

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Industrial Energy Consumers of America, et al.	)	
Complainants,	)	
	)	
v.	)	Docket No. EL22-78-000
	)	
Midcontinent Independent System Operator, Inc.	)	
Respondent.	)	
	)	

**STATUS UPDATE AND SUPPLEMENTAL COMMENTS  
OF THE CONSUMER ALLIANCE**

On July 22, 2022, multiple entities representing parties that pay ever increasing transmission costs (“the Consumer Alliance”)<sup>1</sup> filed a complaint<sup>2</sup> demonstrating that state level transmission development incumbent preference or right-of-first-refusal (“ROFR”) laws interfere with the Commission’s exclusive jurisdiction of the Federal Energy Regulatory Commission (“FERC” or “Commission”) to set just and reasonable rates for transmission in interstate commerce (“Complaint”). Despite the significant rate impact on consumers, the Commission has not ruled on the Complaint. Recent state court filings by the Midcontinent Independent System Operator, Inc. (“MISO”) and MISO incumbent transmission owners demonstrate that the accommodation of state and local laws in MISO’s Open Access Transmission Tariff (“Tariff”) directly harm consumers<sup>3</sup> and MISO now concurs that such state preference/ROFR laws

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<sup>1</sup> The Consumer Alliance is comprised of the Industrial Energy Consumers of America (“IECA”), the Coalition of MISO Transmission Customers (“CMTC”), the Wisconsin Industrial Energy Group (“WIEG”), Resale Power Group of Iowa (“RPGI”), the Association of Businesses Advocating Tariff Equity (“ABATE”), and the Michigan Chemistry Council (“MCC”).

<sup>2</sup> Complaint of Industrial Consumers of America, *et al.*, Docket No. EL22-78-000 (filed July 22, 2022) (“Complaint”).

<sup>3</sup> MISO excluded \$5.5 billion in projects in its Tranche 1 Long Range Transmission Plan (“LRTP”) from competition and handed those projects to incumbents. Complaint at 5 (explaining that consumers throughout

interfere with FERC-jurisdictional transmission planning and are preempted by the Commission’s exclusive jurisdiction under the Federal Power Act.<sup>4</sup>

**I. THE STATE ROFR LAW LITIGATION IN IOWA CONFIRMS THE UNJUSTNESS AND UNREASONABLENESS OF MISO’S TARIFF**

As the Complaint demonstrated, because the Commission has not asserted its exclusive jurisdiction over transmission rates to ensure that the more efficient or cost-effective transmission developer is selected for projects where costs are allocated broadly throughout the region, incumbent transmission owners have used their state lobbying muscle to have preference/ROFR laws passed in multiple MISO states.<sup>5</sup> Those laws effectively prohibit the price-lowering consumer benefits of transmission competition because Section VIII.A.1 in Attachment FF of MISO’s Tariff requires MISO to circumvent competition when a “duly promulgated”<sup>6</sup> state law would allow an incumbent transmission owner to claim the project.<sup>7</sup> Further, the Commission’s failure to act on the Complaint and to fully exercise its jurisdiction has necessitated state and federal judicial proceedings challenging those preference/ROFR laws. MISO has now sought to insert itself into one of those actions – state court litigation in Iowa over whether the Iowa ROFR law was appropriate under the Iowa state constitution. In inserting

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MISO’s northern and central regions will pay higher costs – as much as \$1 billion – for those regional transmission projects in the absence of transmission competition). Although MISO asserted that some of the projects from the default competition requirement would have been excluded from competition by other exclusions, MISO Answer at 10, MISO did not dispute that it did not make those determinations but excluded the projects based on preference laws.

<sup>4</sup> See “Motion for Leave to File *Amicus Curiae* Brief” and “*Amicus Curiae* Brief of the Midcontinent Independent System, Operator, Inc.” Case No. CVCV068040 (filed Feb. 6, 2024). MISO’s motion and amicus brief (“MISO Amicus Brief”) are included as **Exhibit A**.

<sup>5</sup> Complaint at 8.

<sup>6</sup> Section VIII.A.1. in the Tariff only grants MISO authority to comply with any *Applicable Laws and Regulations*, which are defined in Module A as “[a]ll **duly promulgated** applicable federal, state, and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders...” MISO Tariff, Module A (definition of *Applicable Laws and Regulations*) (emphasis added).

<sup>7</sup> See Complaint at 25-27, 64-82

itself into the state proceeding over state constitutional issues, MISO now argues that the state actions around ROFR laws interfere with the MISO transmission planning process and are both field and conflict preempted.<sup>8</sup>

As the Commission was informed through supplemental information filed in this docket, on December 12, 2023 the Supreme Court of Iowa called the Iowa ROFR law<sup>9</sup> “crony capitalism,”<sup>10</sup> found that its passage likely violated the Iowa constitution, and determined that the plaintiffs challenging the law had a likelihood of success on the merits to demonstrate the law’s illegality so that a temporary injunction restraining enforcement of the law was appropriate.<sup>11</sup> The Iowa Supreme Court remanded the matter to the Iowa District Court for additional proceedings. On December 4, 2023, the Iowa District Court issued an Order finding the ROFR law’s passage violated the Iowa Constitution and, as a result: (1) permanently enjoined operation or enforcement of Iowa Code § 478.16 and Iowa Administrative Rule 199-11.14; (2) permanently enjoined the Iowa Utilities Board from taking any additional action or relying on prior actions related to the Iowa-based projects in Tranche 1 of MISO’s long-range transmission plan (“Iowa Projects”)<sup>12</sup> claimed pursuant to the Iowa ROFR law and (3) permanently enjoined incumbent utilities MidAmerican Energy Company (“MidAmerican”) and ITC Midwest LLC (“ITC Midwest”), intervenors in the case who had claimed the right to

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<sup>8</sup> See MISO Amicus Brief at 9-14.

<sup>9</sup> Iowa Code § 478.16.

<sup>10</sup> See Supplemental Information Submitted By LSP Transmission Holdings II, LLC And LS Power Midcontinent, LLC, filed December 12, 2023 in Docket No. EL22-78 (hereinafter “LS Power December 2023 Update”) (quoting *LS Power Midcontinent, LLC, et al v. State of Iowa, et al.*, 988 N.W.2d 316, 338 (Iowa 2023)).

<sup>11</sup> *Id.*

<sup>12</sup>The Iowa Projects are LRTP-7, LRTP-8, LRTP-9, LRTP-12, and LRTP-13. See MISO MTEP21 at p. 3, available at [MTEP21 Addendum-LRTP Tranche 1 Report with Executive Summary625790.pdf \(misoenergy.org\)](#) (last accessed Feb. 8, 2024).

projects under the law, from taking any additional action, or relying on prior actions, related to the Iowa Projects they were assigned pursuant to the ROFR law.<sup>13</sup>

Not surprisingly, MidAmerican and ITC Midwest sought reconsideration of the District Court injunction. While those entities, as part of the MISO Transmission Owners, opposed the Consumer Alliance’s assertion in the Complaint that preference/ROFR laws interfere with the Commission’s exclusive transmission jurisdiction,<sup>14</sup> when faced with losing their ill-gotten gains from MISO’s application of Iowa’s unconstitutional ROFR law, ITC Midwest has changed its tune and now argues: “The planning of the transmission system, **including determining the ownership of regional transmission facilities planned by MISO and other RTOs, is wholly within FERC’s jurisdiction under the Federal Power Act**, and is administered under MISO’s Tariff.”<sup>15</sup> ITC Midwest also noted that the Commission’s exclusive jurisdiction extends to “electric transmission planning in particular” and only provides a limited role to states.<sup>16</sup> Notwithstanding its contrary positions in this case, before the Iowa District Court ITC Midwest asserted that “MISO assigned ownership of the Iowa [Projects] pursuant to federal law, an assignment this Court appears to acknowledge it cannot alter.”<sup>17</sup>

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<sup>13</sup> LS Power December 2023 Update at 2 (citing *LS Power Midcontinent, LLC, et al v. State of Iowa*, et al, Ruling On Motions For Summary Judgment, Case No. CVCV060840, District Court for Polk County, issued Dec. 4, 2023) attached to the LS Power December 2023 Update.

<sup>14</sup> Protest of the MISO Transmission Owners, at p. 13, Docket EL22-78 (filed Sep. 1, 2022). The MISO Transmission Owners emphasized that both incumbent and non-incumbent “developers must still comply with state law. *Id.* at p. 14 (citing *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 76).

<sup>15</sup> ITC Midwest Brief In Support Of Motion To Reconsider And Enlarge Under Rule 1.904(2), filed December 19, 2023 in Case No. CVCV060840 Iowa District Court for Polk County, at 7 (emphasis added), a copy of which is Attached as **Exhibit B** (“ITC December 2023 Reconsideration Petition”).

<sup>16</sup> *Id.* at p. 24.

<sup>17</sup> *Id.* at 2 (footnotes omitted). ITC’s argument confirms what the Commission originally found, allowing a MISO tariff provision to recognize state law to effect project assignment creates a federally enforced right of first refusal, in direct violation of Order No. 1000. *Midwest Independent Transmission System Operator and the MISO Transmission Owners*, 142 FERC ¶ 61,215 (2013) at P 205 (“We find that, as discussed further below, MISO’s proposed new provision at section VIII.A of Attachment FF—State or Local Rights of First Refusal must be removed from its Tariff. MISO is correct that Order No. 1000 does not require removal from Commission-jurisdictional tariffs or agreements references to state or local laws or regulations with respect to construction of

For its part, MISO told the Commission in its answer to the Complaint, that when faced with a party assigned a project it could not build as a result of a preference law, MISO’s Tariff required implementation of its Variance Analysis.<sup>18</sup> MISO also asserted that the “fact that the States’ exercise of this authority may have some effects on FERC-jurisdictional tariffs does not call for preemption . . . .”<sup>19</sup> Instead of initiating the Variance Analysis it relied on in opposing the relief sought by the Complaint, MISO on February 6, 2024, injected itself into the Iowa litigation – over three years after the litigation commenced. MISO now asserts exactly what the Complaint argues: that FERC has exclusive regulatory authority over transmission and that “[t]his comprehensive authority over the transmission of electric energy in interstate commerce extends to matters of transmission planning and related transmission planning activities by jurisdictional public utilities, such as MISO.”<sup>20</sup> MISO concludes that Congress “clearly intended that the transmission of electric energy in interstate commerce be subject to exclusive federal regulation and assigned to FERC the exclusive authority to ensure that RTOs’ transmission planning processes remain just and reasonable.”<sup>21</sup> MISO argues that any interference with its planning is both “field”<sup>22</sup> and “conflict”<sup>23</sup> preempted.

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transmission facilities, including but not limited to authority over siting or permitting of transmission facilities. However, MISO’s proposal goes beyond mere reference to state or local laws or regulations; it references state and local laws and then uses that reference to create a federal right of first refusal. Order No. 1000 does not permit a public utility transmission provider to add a federal right of first refusal for a new facility based on state law.”)

<sup>18</sup> Motion To Dismiss and Answer Of The Midcontinent Independent System Operator, Inc., at p. 36, Docket No. EL22-78 (filed Sep. 1, 2022).

<sup>19</sup> *Id.* at 4.

<sup>20</sup> MISO Amicus Brief at 10 (citing *S. Carolina Pub. Serv. Auth. v. FERC*, 762 F3d 41, 56 (D.C. Cir. 2014) (transmission planning processes are practices under the Federal Power Act that directly affect rates)).

<sup>21</sup> MISO Amicus Brief at 10.

<sup>22</sup> MISO Amicus Brief at 9-12.

<sup>23</sup> MISO Amicus Brief at 12-14.

MISO’s general recitation of the regulatory framework is consistent with and supports the Consumer Alliance’s complaint asking “the Commission to ‘act comprehensively and effectively’ in an area in which it has exclusive jurisdiction (the setting of rates for interstate electric transmission service and all practice affecting those rates) to make certain that its policy requiring competition for new transmission project development can be implemented as the Commission intended.”<sup>24</sup> In summary, while the MISO Transmission Owners and MISO have opposed the relief sought in the Complaint, the Iowa court filings of MISO and ITC Midwest present a framework for a federal energy regulatory regime wherein the Commission – through the exercise of its exclusive jurisdiction over transmission planning and transmission rate-setting for MISO/FERC-jurisdictional transmission facilities – may determine that the ROFR law exception in Tariff Attachment FF is unjust and reasonable and therefore order its removal because such state preference/ROFR laws interfere with the Commission’s exclusive jurisdiction.

**II. REMOVING THE ROFR LAW EXCEPTION FROM MISO’S TARIFF IS NECESSARY TO ENSURE JUST AND REASONABLE RATES AND TO ENSURE TIMELY TRANSMISSION DEVELOPMENT.**

The facts and litigation in the State of Iowa provide a concrete example of why MISO’s Tariff is unjust and unreasonable, further substantiating the allegations in the Complaint. Pursuant to Tariff Attachment FF, the Competitive Developer Selection Process is the default rule unless one of three exceptions applies, including the ROFR law exception.<sup>25</sup> In July 2022, MISO bypassed the Competitive Transmission Process in its Tariff based on a law that was

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<sup>24</sup> Consumer Alliance Complaint, at p. 5, EL22-78 (filed July 22, 2022); *see id.* at p. 6-10, 38-52

<sup>25</sup> MISO Tariff, Attachment FF, Section VIII.A.

suspect from the beginning<sup>26</sup> and was in litigation,<sup>27</sup> to allow incumbent transmission owners to claim \$1-2 billion in the Iowa Projects under the Iowa ROFR law. The ROFR law exception in MISO's Tariff – as played out in the State of Iowa – has hampered MISO's ability to select the more efficient or cost-effective developer in a timely manner or to effectively facilitate transmission development subject to the Commission's exclusive jurisdiction. And now MISO asserts that its determination to skip competition cannot be undone by a state court ruling that the law was unconstitutional from the inception. Accordingly, the Consumer Alliance respectfully requests that the Commission, pursuant to its obligation to ensure just and reasonable rates, expeditiously grant the Complaint and issue any other appropriate relief to ensure continued timely and competitive transmission planning in the MISO region.

Respectfully submitted,

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<sup>26</sup> *LS Power Midcontinent, LLC, et al v. State of Iowa, et al.*, 988 N.W.2d 316, 325-326 (2023).

<sup>27</sup> *LS Power Midcontinent, LLC, et al v. State of Iowa, et al.*, 988 N.W.2d 316, 328 (2023).

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Date: February 9, 2024



**CERTIFICATE OF SERVICE**

I hereby certify that I have this 9th day of February 2024 served or caused to serve the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

By: /s/ Kenneth R. Stark

Kenneth R. Stark  
McNees Wallace & Nurick LLC