

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ITC Midwest, LLC

)
)
)

Docket No. ER23-2033-000

MOTION FOR LEAVE TO ANSWER AND ANSWER
OF
THE INDUSTRIAL ENERGY CONSUMERS OF AMERICA, THE COALITION OF
MISO TRANSMISSION CUSTOMERS, THE RESALE POWER GROUP OF IOWA,
AND THE WISCONSIN INDUSTRIAL ENERGY GROUP

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure¹ of the Federal Energy Regulatory Commission’s (“Commission”), the Industrial Energy Consumers of America (“IECA”), the Coalition of MISO Transmission Customers (“CMTC”), the Resale Power Group of Iowa (“RPGI”), and the Wisconsin Industrial Energy Group (“WIEG”),² (collectively, “Consumer Alliance”) hereby answer the Motion for Leave to Answer and Answer filed by ITC Midwest, LLC (“ITC Midwest” or “ITCM”) on June 30, 2023 (“ITCM’s Answer”) to the Consumer Alliance’s protest (“Protest”) to ITCM’s application requesting authorization to recover 100% of prudently incurred costs associated with Iowa portion of the Skunk River-Ipava 345 kV project (“Project”) if the Project is cancelled or abandoned for reasons beyond ITC Midwest’s control (“Abandonment Incentive”).³

¹ 18 C.F.R. §§ 385.212-385.213.

² IECA submitted a timely intervention in the above-referenced docket on June 16, 2023. CMTC submitted a timely intervention on June 16, 2023. RPGI submitted a timely intervention in the above-referenced docket on June 20, 2023. WIEG submitted a timely intervention in the above-referenced docket on June 16, 2023.

³ ITC Midwest, LLC, Docket No. ER23-2033-000 (filed May 30, 2023) (hereinafter “ITCM Request”).

ITCM's Answer fails to cure the deficiencies underlying its Section 205 application and fails to demonstrate authorization of the Abandonment Incentive is just and reasonable. The Commission may proceed to reject ITCM's application as premature because (1) the legal authority of ITCM to develop and own the Project is uncertain, and currently enjoined as likely unconstitutionally approved;⁴ and (2) ITCM has admitted that the scope of the Project is unclear because ITMC *may* or *may not* be selected to develop the Mississippi River Crossing portion of the Project.⁵ Because the Project does not have an in-service date until December 31, 2029,⁶ the Commission should not authorize the Abandonment Incentive at this time, given that ITCM could return to the Commission when and if ITCM has clear legal authority to develop the Project, has greater clarity regarding the scope of the Project, and is able to present an application that meets the Order No. 679⁷ nexus test (*i.e.*, demonstrates that any requested incentive is narrowly tailored to address project risks and challenges).

I. MOTION FOR LEAVE TO ANSWER

In the event the Commission considers ITCM's unauthorized Answer, the Consumer Alliance respectfully moves for leave to answer ITCM's Answer. Although the Commission's procedural rules generally do not allow for answers to answers,⁸ the Commission may permit answers for good cause. The Commission will accept answers that contribute to a more accurate and complete record, help the Commission better understand the issues, clarify misstatements, respond to new issues raised, or provide useful and relevant information that will assist the

⁴ *LS Power Midcontinent, LLC, et al v. State of Iowa, et al*, 988 N.W.2d 316, 331-340 (Iowa 2023).

⁵ See ITCM's Answer at 15-16.

⁶ See "Long Range Transmission Planning – Reliability Imperative," MISO, available at [Long Range Transmission Planning \(misoenergy.org\)](https://www.misoenergy.org/Long-Range-Transmission-Planning) (last accessed July 17, 2023). MISO includes on its website at that link a schedule for the LRTP Tranche 1 projects.

⁷ See *Promoting Transmission Inv. through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 at P 26 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

⁸ 18 C.F.R. §§ 385.213(a)(2) & 385.713(d)(1).

Commission in its decision-making process.⁹ The Consumer Alliance requests that the Commission accept this answer to clarify the record and correct misrepresentations wherein ITCM Midwest took certain content from the Consumer Alliance’s Protest out of context.¹⁰

II. ANSWER

A. The Commission Should Reject ITCM’s Application as Premature Due to Substantial Uncertainty Impacting ITCM’s Authority to Develop the Project and ITCM’s Concession That It Does Not Even Know Its Full Scope of Work for the Project for Which ITCM Seeks the Abandonment Incentive.

ITC Midwest’s right to construct and own the Project derives solely from Iowa’s Right of First Refusal (“ROFR”) statute,¹¹ the effectiveness of which has been enjoined by the Iowa Supreme Court. In granting the injunction, the Iowa Supreme Court specifically recognized the public interest of consumers, including members of the Consumer Alliance, that are harmed by the ROFR statute’s competition avoidance purpose. In finding that the public interest supports enjoining the ROFR statute, the Court specifically relied on the direct impact on consumers from projects proceeding without competition.¹² ITCM’s application seeks to ensure that consumers bear the risk of its actions in advancing the project notwithstanding the ongoing litigation. The Commission should defer to Iowa’s judicial process and the outcome of the Iowa litigation. ITCM has failed to demonstrate that the authorization of the Abandonment Incentive is needed or appropriate prior to the end of that litigation, especially given that the litigation (which

⁹ See *NSTAR Elec. Co. v. ISO New England, Inc.*, 120 FERC ¶ 61,261 at P 32 (2007) (accepting the answer to an answer because the answers assisted the Commission in its decision-making process). See also, *Midwest Indep. Transmission Sys. Operator, Inc.*, 126 FERC ¶ 61,144 at P 8 (2009) and *Me. Pub. Utils. Comm’n v. ISO New England, Inc.*, 126 FERC ¶ 61,090 at P 37 (2009).

¹⁰ See, e.g., ITCM’s Answer at 2.

¹¹ See Iowa Code § 478.16(2).

¹² *LS Power Midcontinent, LLC, et al v. State of Iowa, et al*, 988 N.W.2d 316, 339 (Iowa 2023).

commenced in October 2020) is well underway,¹³ and the in-service date of the Project is not until December 31, 2029.

1. *Consumers Should Not Bear the Costs of ITC Midwest's Voluntary Assumption of Project Risks*

ITCM asserts that the Consumer Alliance has improperly injected state legal proceedings into this docket and that “the Commission’s abandonment incentive policy recognizes that litigation and administrative challenges are risks associated with developing large-scale transmission infrastructure projects.”¹⁴ While ITCM may be correct that FERC’s abandonment incentive policy recognizes financial risks associated with transmission projects, the underlying litigation does not entail expected landowner resistance or environmental or permitting risks or matters entirely “beyond the control of the utility.”¹⁵ Instead, the underlying litigation can be traced to efforts of incumbent utilities, such as ITCM, to promote the Iowa ROFR law¹⁶ to enable ITCM to receive a preferential treatment for projects arising out of MISO’s long-range transmission planning to avoid the application of Order No. 1000’s¹⁷ transmission competition

¹³ The status of the litigation can be checked here: [Court Proceedings | Iowa Utilities Board](#) (last accessed July 17, 2023). Relevant court filings are available here: [Court Filings - LS Power Midcontinent et al v. State of Iowa, Iowa Utilities Board, Geri D. Huser et al | Iowa Utilities Board](#) (last accessed July 17, 2023).

¹⁴ ITCM Answer at 2-3; *see also* ITCM’s Answer at 9-10.

¹⁵ *See* Order No. 679 at PP 165-166; *See* Order No. 679-A at PP 115-116 (referring to the inability to obtain siting authority).

¹⁶ *See* Consumer Alliance Protest, **Exhibit B** (Iowa Supreme Court Decision) at fn. 3 (noting ITC Midwest and registration of support for the Iowa ROFR bill prior to passage).

¹⁷ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000 at PP 332, 335, 136 FERC ¶ 61,051 (2011) (“Order No. 1000”), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132 (“Order No. 1000A”), *order on reh’g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012) (“Order No. 1000-B”), *aff’d sub nom. S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). Order No. 1000 focused on encouraging regional transmission infrastructure investment and ensuring just and reasonable rates. The Commission was very clear that it could not ensure just and reasonable rates for those projects without transmission competition. Order No. 1000 at P 286 (quoting *Otter Tail Power Co. v. United States*, 410 U.S. 366 at 374 (1973)). MISO’s list of Qualified Transmission Developers currently stands at 49 companies, including ITC Midwest LLC. *See* <https://cdn.misoenergy.org/MISO%20Qualified%20Transmission%20Developers%20List82330.pdf> (last accessed July 17, 2023). Yet ITCM asks that the Commission ignore its rates when analyzing incentive treatment for a Project for which it acknowledges it was only able to claim through use of a currently ineffective and challenged ROFR law. As the Iowa Supreme Court held, the challenged law has a direct impact on FERC

policies and the Competitive Transmission Process in Attachment FF of MISO’s Tariff.¹⁸ The Iowa Supreme Court concluded that the Iowa ROFR statute likely violates the Iowa Constitution.¹⁹ While the abandonment incentive may recognize regulatory and financial risks associated with developing large-scale transmission infrastructure projects, neither Commission policy nor precedent evinces an intent under Order No. 679 or Section 219 of the Federal Power Act (“FPA”)²⁰ to relieve transmission developers from litigation risks they helped create or exacerbate, let alone burden consumers with the costs of the voluntary assumption of such risks by transmission developers. From the inception of the constitutional challenges to the Iowa ROFR law, ITCM has been an active intervenor/opponent in the litigation. Accordingly, if ITCM wishes to nevertheless proceed with development of the Project it claimed under the challenged and enjoined ROFR law, ITC Midwest should do so at its own risk and not be authorized an opportunity to pass any abandonment costs on to consumers.

2. *ITC Midwest Concedes That It Does Not Even Know Its Full Scope of Work for the Project for Which It Seeks the Abandonment Incentive*

Without citing to any legal authority, ITC Midwest contends that there “there is no basis to deny ITC Midwest’s recovery of the Abandonment Incentive until MISO selects a developer for the Mississippi River Crossing portion of the Project.”²¹ Additionally, without citing to any legal authority or justifying the need for authorization of the Abandonment Incentive at this time,

jurisdictional rates: “Common sense tells us that competitive bidding will lower the cost of upgrading Iowa’s electric grid and that eliminating competition will enable the incumbent to command higher prices for both construction and maintenance.” *LS Power Midcontinent, LLC, et al v. State of Iowa, et al*, 988 N.W.2d 316, 338 (Iowa 2023).

¹⁸ See Consumer Alliance Protest, **Exhibit B** (Iowa Supreme Court Decision) at 15.

¹⁹ *LS Power Midcontinent, LLC, et al v. State of Iowa, et al*, 988 N.W.2d 316, 334-338 (Iowa 2023) (explaining that plaintiff LS Power had shown a likelihood of success on the merits of its claims that the ROFR law’s enactment violated Article III, Section 29 of the Iowa Constitution).

²⁰ 16 U.S.C. § 824s.

²¹ ITCM’s Answer at 14 (omitting bold captioned font and certain capitalization).

ITCM asserts that “[t]he Commission need not deny or delay authorization of the Abandonment Incentive.”²² Furthermore, ITCM materially clarifies its initial Section 205 application by requesting the Abandonment Incentive for the Mississippi River Crossing portion of the Project that ITC *may or may not* develop.²³ ITCM does not demonstrate any authority under Order No. 679 and any FERC precedent to prematurely request an Abandonment Incentive for a substantial scope of work for the Project that has yet to be clearly defined or assigned to the applicant. Importantly, ITCM’s initial Section 205 application does not delineate any specific facts, challenges, and risks regarding the Mississippi River Crossing portion of the Project, let alone any detailed explanation of that portion of the Project. As a result, the Commission does not have enough information by which to review and adjudicate ITCM’s application to determine if the application complies with Order No. 679’s requirement that the incentives requested are “tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project.”²⁴

B. ITCM Fails to Comply with Order No. 679’s Nexus Test Requiring an Applicant to Demonstrate That the Requested Incentive is Tailored to Address Specific Project Risks and Challenges.

ITCM contends that the Consumer Alliance’s protest is a “collateral attack on the Commission’s existing abandonment incentive policy”²⁵ and therefore takes the position that ITCM is entitled to receive the requested Abandonment Incentive as a matter of law and policy.

²² ITCM’s Answer at 14.

²³ On June 2, 2023, LS Power filed a motion for summary judgment on their Iowa Constitution article III, section 29 claims and requested permanent injunctive relief. That motion for summary judgment is pending with the Iowa District Court.

²⁴ Order No. 679-A at PP 6, 21.

²⁵ See ITCM’s Answer at 2

ITCM misconstrues the Order No. 679²⁶ framework and precedent, which the Consumer Alliance applied in their Protest.²⁷ The Consumer Alliance demonstrated that, in the context of applying the Order No. 679 framework, ITC Midwest had not met its burden to demonstrate that the requested Abandonment Incentive is tailored to meet the risks and challenges of the Project and will produce just and reasonable rates.²⁸ Importantly, neither Order No. 679 nor FPA Section 219²⁹ mandate that all eligible projects automatically receive the incentives requested by an applicant. ITCM has not demonstrated any specific and unique Project challenges that warrant the authorization for the Abandonment Incentive.³⁰ Instead, ITCM again generically refers to MISO's transmission expansion plan process and generically applicable risks, Commission policy, and other incentive requests.³¹

ITCM generally invokes the Commission's Incentive Policy Statement,³² but overlooks the Commission's emphasis in the Incentives Policy Statement that the objective of Section 219 of the FPA is to "encourage transmission infrastructure investment while maintaining just and reasonable rates."³³ In fact, the Commission "implemented section 219 by issuing Order No. 679, which established by rule incentive-based rate treatments for investment in electric transmission infrastructure *for the purpose of benefiting consumers* by ensuring reliability and

²⁶ See *Promoting Transmission Inv. through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

²⁷ See Consumer Alliance Protest at 14-23.

²⁸ Consumer Alliance Protest at 14-23.

²⁹ 16 U.S.C. § 824s.

³⁰ An applicant must provide detailed factual information for the special risks and challenges that justify granting incentives for the Project. See *Baltimore Gas & Electric Co.*, 120 FERC 61,084 at PP 52-53 (2007).

³¹ See ITCM's Answer at 11.

³² See ITCM's Answer at 7; see generally *Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129 (Policy Statement issued Nov. 15, 2012) (hereinafter "2012 Policy Statement").

³³ 2012 Policy Statement at P 1.

reducing the cost of delivered power by reducing transmission congestion.”³⁴ Thus, it is just and reasonable rates and consumer interests that are at the heart of the Commission’s incentives policy, and those interests support denial of ITCM’s request for the Abandonment Incentive.

Furthermore, the Abandonment Incentive is a “risk mitigation” incentive. The Commission made it clear in the Incentives Policy Statement that it “expects applicants to take all reasonable steps to mitigate the risks of a project . . .”³⁵ Here, not only has ITCM failed to mitigate the risks it seeks to protect against, ITCM has voluntarily and proactively assumed those risks. As ITCM acknowledges, despite ongoing litigation challenging the constitutionality of the Iowa ROFR law, ITCM sent a Notice to the Iowa Utility Board in November 2022 claiming a right under the challenged law to the Project for which it now seeks protection.³⁶ ITCM relies on the fact that at the time of the Notice claiming the project “the Iowa Supreme Court had not yet enjoined enforcement of the ROFR law . . .”³⁷ But ITCM had no obligation to voluntarily seek the Project in the midst of ongoing litigation, whether the Iowa Supreme Court had enjoined the ROFR law or not at that time. ITCM sought the Project presumably because it was in the economic interest of ITCM to do so notwithstanding the ongoing risk that its claim of entitlement to the Project would be invalidated. Thereafter, ITCM continued, and continues, to press forward with the Project, even after the stay issued by the Supreme Court in March 2023. Now, ITCM seeks FERC investment protection notwithstanding the state court injunction.

While Iowa Courts will ultimately determine the constitutionality of the ROFR law and ITC Midwest’s authority/entitlement to the Project, the Commission only needs to find that 1)

³⁴ 2012 Policy Statement at P 2 (emphasis added); *see id.* at P 31 (explaining that “the Commission will continually assess measures to further transparency in its incentives policy and the impacts of that policy on consumers”).

³⁵ 2012 Policy Statement at P 4.

³⁶ *See* ITCM’s Answer at 9; Consumer Alliance’s Protest, **Exhibit C** (Summary Judgment Motion Brief) at p. 24.

³⁷ *See* ITCM’s Answer at 9.

ITCM's request is premature and ITCM has not "take[n] all reasonable steps to mitigate the risks of a project."³⁸ Order No. 679 does not authorize risk mitigation incentives to provide sophisticated transmission utilities with a hedge against pursuing projects when authority to own and develop those projects has long been contested. Instead, the Commission "expects applicants to take all reasonable steps to mitigate the risks of a project,"³⁹ which in this instance would involve waiting to seek any rate incentives until when and if ITCM obtains clear legal authority under Iowa law to own and develop the Project. Accordingly, the Commission should not authorize the Abandonment Incentive at this time. ITCM could return to the Commission when and if ITCM has clear legal authority to own and develop the Project.

III. CONCLUSION

WHEREFORE, the Consumer Alliance respectfully requests that:

1. The Commission reject ITC Midwest's request because the request is premature given the ongoing Iowa litigation and lack of clear legal authority for ITC Midwest to develop the Iowa portion of the Project and because ITCM's scope of work has not been finalized.
2. In the event that the Commission reaches the merits of ITC Midwest's request, the Commission should deny the request because ITCM has not met its burden to demonstrate that the Abandonment Incentive is tailored to the Project's demonstrable risks and challenges or would otherwise result in just and reasonable rates.
3. The Commission grant all other relief it deems necessary and proper.

³⁸ See 2012 Policy Statement at P 4.

³⁹ See *id.*

Respectfully submitted,

/s/ Kenneth R. Stark

Kenneth R. Stark
McNees Wallace & Nurick LLC
100 Pine Street
Harrisburg, PA 17101
Phone: (717) 237-8000
kstark@mcneeslaw.com

Robert A. Weishaar, Jr.
McNees Wallace & Nurick LLC
1200 G Street, NW, Suite 800
Washington, DC 20005
Phone: (202) 898-0688
bweishaar@mcneeslaw.com

Counsel to the Industrial Energy Consumers of America and Coalition of MISO Transmission Customers and on Behalf of the Consumer Alliance

BETTS & HOLT LLP

/s/ David E. Crawford

James H. Holt
David E. Crawford
1101 Connecticut Avenue, N.W.
Suite 450
Washington, D.C. 20036
Phone: (202) 530-3380
jhh@bettsandholt.com
dcrawford@bettsandholt.com

Counsel for the Resale Power Group of Iowa

/s/ Todd Stuart

Todd Stuart, Executive Director
44 East Mifflin Street, Suite 404
Madison, WI 53703.
tstuart@wieg.org

/s/ Kavita Maini

Kavita Maini, Principal
961 North Lost Woods Road
Oconomowoc, WI 53066
Phone: 262-646-3981
kmaini@wi.rr.com

Wisconsin Industrial Energy Group

Date: July 17, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via first-class mail or electronic transmission, the foregoing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 17th day of July, 2023.

/s/ Kenneth R. Stark
Kenneth R. Stark
McNees Wallace & Nurick LLC
kstark@mcneeslaw.com