

I. INTRODUCTION

No compelling reason existed for the Commission’s prompt consideration of ITC Midwest’s request for an Abandoned Plant Incentive for the portion of the Project to be located in Iowa (“Iowa Project”) and certainly no exigency obliged the Commission to act when and as it did. The Commission nevertheless considered the request and issued the August 8 Order and in doing so, tied a knot that could take years to undo.

The Commission first erred by treating this case as a standard Abandoned Plant Incentive request under Order No. 679 when it is anything but typical.³ Ordinarily, in a state with a Right of First Refusal (“ROFR”) statute, an incumbent transmission provider’s right to own, develop, and construct a new transmission line has been settled before it seeks incentives. Here, however, ITC Midwest’s right to own, develop, and construct the Iowa Project is far from settled and likely does not exist.

Attachment FF of the Open Access Transmission, Energy and Operating Reserves Tariff (“Tariff”) for the Midcontinent Independent System Operator, Inc. (“MISO”) requires a transmission provider’s right to own, develop, and construct new transmission facilities to be determined by “Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner.”⁴ The effectiveness of Iowa’s Right of First Refusal Statute (“ROFR Statute”),⁵ which serves as the basis for ITC Midwest’s claimed development rights to the Iowa Project has been enjoined by the Iowa Supreme Court in an opinion that referred to it as “quintessentially crony

³ 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).

⁴ Tariff, Attachment FF, §VIII.A.1, available at <https://www.misoenergy.org/legal/tariff/> (last viewed September 7, 2023).

⁵ See Iowa Code § 478.16(2).

capitalism,” “rent-seeking,” “protectionist,” and “anticompetitive.”⁶ Whether the ROFR Statute will survive pending litigation challenging the constitutionality of its enactment is unknown, but its survival prospects do not appear good. Under these circumstances, the Commission erred in even considering ITC Midwest’s application at this time.

That the August 8 Order was issued into this uncertain legal context appears to have been more the product of rote processing than careful analysis. Ignoring how the pending Iowa proceedings changed the character of the issues to be decided led the Commission to miss both the case’s import and implications – a marked departure from reasoned decision-making that plainly shows how far the Commission has drifted from a methodical case-by-case evaluation of Order No. 679 incentive applications.

But even if the August 8 Order had appropriately identified and carefully considered the full range of issues to be decided, it nevertheless did so arbitrarily and capriciously. The uncertain status of ITC Midwest’s legal authority to develop the Project affects both the timing and substance of its application. By moving forward at a time when ITC Midwest’s right to develop the Iowa Project was clouded, the Commission may have intervened in the state proceedings – inadvertently or otherwise – in a way that materially increases the risk of the Abandoned Plant Incentive being relied upon by ITC Midwest to buttress its legal position. It is easily foreseeable that ITC Midwest may invoke the August 8 Order to assert an entitlement to recover its post-August 8, 2023 development and construction costs if the Iowa Project ultimately is awarded to a Qualified Transmission Developer⁷ pursuant to MISO’s Competitive Developer Selection Process. In short, the August 8 Order requires customers to insure ITC Midwest against an unfavorable litigation

⁶ *LS Power Midcontinent, LLC v. State*, 988 N.W. 2d 316, 338 (2023).

⁷ A “Qualified Transmission Developer” is an entity that meets the qualifications set forth in Attachment FF, VIII-B.

outcome. And it does so by flouting long-established principles of federal-state comity and deference.

Moreover, the August 8 Order is not supported by substantial evidence. Its generalities are not based upon a detailed analysis of the facts related to the Iowa Project's specific risks. The facts that allegedly demonstrated ITC Midwest's careful tailoring of the Abandoned Plant Incentive to the risks and challenges the Iowa Project faces could apply to virtually any new transmission project. Adherence to Order No. 679 and the Federal Power Act's just and reasonable rate standard requires a level of proof that simply does not exist in this case; the application must therefore be denied.

At this point, it is difficult to see how the August 8 Order can stand without contravening the Commission's primary mission of protecting customers from excessive rates and charges.⁸ Setting just and reasonable rates requires striking a balance of customer and utility interests.⁹ In this case, achieving a balanced result requires doing no harm: granting rehearing and dismissing this case without prejudice to ITC Midwest refiling its request, if necessary, when the ROFR Statute litigation is resolved. The potential harm to customers of refusing to grant rehearing and dismissing this proceeding far outweighs any potential adverse effects of denying ITC's Midwest's application request at this time. Delaying the Project is not a certainty and ITC Midwest has not provided the Commission or customers with any information about Project delay other than to note a MISO-projected Project in-service date of December 31, 2029. A hearing on the summary

⁸ *Municipal Light Boards of Reading and Wakefield, Mass. v. Federal Power Commission*, 450 F.2d 1341, 1348 (D.C. Cir. 1971); *Xcel Energy Servs. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016) (primary purpose of the Federal Power Act is "the protection of consumers from excess rates and charges").

⁹ *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("[T]he fixing of 'just and reasonable rates' involves the balancing of the investor and the consumer interests.").

judgment motion filed by parties challenging the ROFR Statute's validity has been scheduled for September 29, 2023.¹⁰ While the outcome of that hearing may well produce appeals through the Iowa judicial system, that process should not unduly delay the Project. The Commission should appreciate that affirming the August 8 Order on rehearing virtually ensures that a judicial review/remand process will ensue, a consideration that more than counterbalances any claimed delay in the state review process. If the Commission's objective is to reach a definitive result that allows the Project to move forward as soon as possible, then the Consumer Alliance strongly urges the Commission to grant rehearing and dismiss this case without prejudice.

II. BACKGROUND

Pursuant to Rules 203(a) and 713(c), the Consumer Alliance hereby incorporates by reference the Background section of its Protest filed in this proceeding on June 20, 2023.¹¹

III. SPECIFICATION OF ERRORS

The Consumer Alliance respectfully specify the following errors:

1. The August 8 Order does not reflect reasoned decision-making because it considered the case to be a typical abandoned plant incentive case and therefore failed to consider all important aspects of the matters at issue and engage the implications of accepting ITC Midwest's proposal. *ITC Midwest, LLC*, 184 FERC ¶ 61,083 (2023); 16 U.S.C. § 824d; *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); *LS Power Midcontinent, LLC v. State*, 988 N.W. 2d 316 (2023); *Vistra Corp. v. FERC*, _ F.4th _, Case No. 21-1214 (D.C. Cir. Aug. 15, 2023); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520 (D.C. Cir. 2010); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202 (D.C. Cir. 2018); *West Deptford Energy, LLC*, 766 F.3d 10 (D.C. Cir. 2014); *ExxonMobil Oil v. FERC*, 487 F.3d 945 (D.C. Cir. 2007); *New York v. FERC*, 535 U.S. 1, 36 (2002); *Transmission Access Policy Group v. FERC*, 225 F.3d

¹⁰ See "Order Setting Briefing Schedule," *Sw. Transmission LLC et al. v. Leslie Hickey et al.*, Docket CVCV060840 in the Iowa District Court for Polk County (issued July 14, 2023).

¹¹ 18 C.F.R. §§385.203(a) and 385.713(c) (2023).

- 667 (D.C. Cir. 2000); *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987); *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889 (D.C. Cir. 1998); *Laclede Gas Co. v. FERC*, 997 F.2d 936 (D.C. Cir. 1993)); *North Carolina Util. Comm'n v. FERC*, 42 F.3d 659 (D.C. Cir. 1994); *Security Sav. Bank of Valley Junction v. Connell*, 200 N.W. 8 (Iowa 1924); *Peters v. Broward*, 222 U. S. 483 (1912); *Municipal Light Boards of Reading and Wakefield, Mass. v. Federal Power Commission*, 450 F.2d 1341 (D.C. Cir. 1971); *Xcel Energy Servs. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).
- a. The August 8 Order erroneously considered ITC Midwest's request to initiate a standard Order No. 679 proceeding and processed it accordingly.
 - b. The August 8 Order does not reduce ITC Midwest's risk of non-recovery and exposes its customers to the risk of paying unjust and unreasonable rates if the Iowa courts ultimately hold the ROFR Statute to be unconstitutional.
 - c. The August 8 Order forces customers to assume an unjust and unreasonable level of risk even if the Iowa courts ultimately find the ROFR Statute to be constitutional.
2. The August 8 Order's authorization of a transmission rate incentive when the effectiveness of the legal authority assigning the Project has been enjoined is arbitrary and capricious and not reflective of reasoned decision-making. *ITC Midwest, LLC*, 184 FERC ¶ 61,083 (2023); 16 U.S.C. § 824d, 16 U.S.C. § 8251(b); *LS Power Midcontinent, LLC v. State*, 988 N.W. 2d 316 (2023); *Vistra Corp. v. FERC*, _ F.4th _, Case No. 21-1214 (D.C. Cir. Aug. 15, 2023); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520 (D.C. Cir. 2010); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202 (D.C. Cir. 2018); *West Deptford Energy, LLC*, 766 F.3d 10 (D.C. Cir. 2014); *ExxonMobil Oil v. FERC*, 487 F.3d 945 (D.C. Cir. 2007); *New York v. FERC*, 535 U.S. 1, 36 (2002); *Transmission Access Policy Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000); *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987); *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889 (D.C. Cir. 1998); *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050 (2017); *Del. Div. of Pub. Advocate v. FERC*, 3 F.4th 461 (D.C. Cir. 2021); *NextEra Energy Transmission Southwest, LLC*, 180 FERC ¶ 61,032 (2022); *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 (2009); *Security Sav. Bank of Valley Junction v. Connell*, 200 N.W. 8 (Iowa 1924); *Peters v. Broward*, 222 U. S. 483 (1912).
 3. The August 8 Order fails to grant comity and respect to the State of Iowa and its judicial processes. *LS Power Midcontinent, LLC v. State*, 988 N.W. 2d 316 (2023); U.S. Constitution, Article IV, § 2, Clause 2; *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); *Younger v. Harris*, 401 U.S. 37 (1971); *Fair Assessment in Real Est. Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981); *El Paso Elec. Co. v. FERC*, 832 F.3d 495 (5th Cir. 2016); *La. PSC v. FERC*, 771 F.3d 903 (5th Cir. 2014); *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *Fla. Gas Transmission Co. v. FERC*, 876 F.2d 42 (5th Cir.

1989); *Security Sav. Bank of Valley Junction v. Connell*, 200 N.W. 8 (Iowa 1924); *Peters v. Broward*, 222 U. S. 483 (1912).

4. The August 8 Order's authorization of the Abandoned Plant Incentive is not supported by substantial evidence in the record. *ITC Midwest, LLC*, 184 FERC ¶ 61,083 (2023); 16 U.S.C. § 824d; 16 U.S.C. § 8251(b); *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); *Vistra Corp. v. FERC*, _ F.4th _, Case No. 21-1214 (D.C. Cir. Aug. 15, 2023); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520 (D.C. Cir. 2010); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202 (D.C. Cir. 2018); *West Deptford Energy, LLC*, 766 F.3d 10 (D.C. Cir. 2014); *ExxonMobil Oil v. FERC*, 487 F.3d 945 (D.C. Cir. 2007); *New York v. FERC*, 535 U.S. 1, 36 (2002); *Transmission Access Policy Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000); *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987); *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889 (D.C. Cir. 1998); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014); *La. PSC v. FERC*, 522 F.3d 378 (D.C. Cir. 2008); *Laclede Gas Co. v. FERC*, 997 F.2d 936 (D.C. Cir. 1993); *North Carolina Util. Comm'n v. FERC*, 42 F.3d 659 (D.C. Cir. 1994); *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015); 18 C.F.R. § 385.211; *Total Gas & Power N. Am., Inc.*, 176 FERC ¶ 61,026 (2021); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *LaChance v. Erickson*, 522 U.S. 262 (1998); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Baltimore Gas & Electric Co.*, 120 FERC ¶ 61,084 (2007); *City of Augusta, Kentucky et al.*, 72 FERC P 61,114 (1995).
 - a. The August 8 Order impermissibly reduced ITC Midwest's section 205 burden to a generic check-the-box exercise and rendered Order No. 679's nexus test a nullity.
 - b. The August 8 Order failed to engage the Consumer Alliance's specific arguments undercutting ITC Midwest's need for the Abandoned Plant Incentive.
 - i. ITC Midwest's application is premature and does not articulate risks with specificity because the scope of work for the Project has not been finalized.
 - ii. The August 8 Order does not demonstrate that the Abandoned Plant Incentive meets Order No. 679's nexus test.

IV. ARGUMENT

A Commission order will be reversed on review if it is arbitrary or capricious, reflects an abuse of discretion, is not otherwise in accordance with law, or is not supported by substantial evidence.¹² In order to satisfy its obligation to engage in reasoned decision-making, the Commission must examine the relevant data and articulate a rational connection between the facts found and the choices made.¹³ The Commission must reach its conclusion through decision-making that is “reasoned, principled, and based upon the record.”¹⁴ Under the Federal Power Act (“FPA”), FERC’s factual findings are determinative so long as they are supported by substantial evidence.¹⁵ The “substantial evidence” standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.”¹⁶ Substantial evidence is “relevant evidence” that “a reasonable mind might accept as adequate to support a conclusion.”¹⁷ Additionally, to avoid an arbitrary and capricious decision or one that does not reflect reasoned decision-making, the Commission must consider all important aspects of the problem at issue.¹⁸

¹² *Vistra Corp. v. FERC*, _ F.4th _, 2023 WL 5209555, Case No. 21-1214 at 18 (D.C. Cir. Aug. 15, 2023); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010).

¹³ *Sacramento*, 616 F.3d at 528; *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹⁴ *New Eng. Power Generators Ass’n v. FERC*, 881 F.3d 202, 210-11 (D.C. Cir. 2018); *West Deptford Energy, LLC*, 766 F.3d 10, 20 (D.C. Cir. 2014); *ExxonMobil Oil v. FERC*, 487 F.3d 945, 953 (D.C. Cir. 2007); see *New York v. FERC*, 535 U.S. 1, 36 (2002); see also *Transmission Access Policy Group v. FERC*, 225 F.3d 667, 705, 716 (D.C. Cir. 2000) (citing *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1021 (D.C. Cir. 1987)); *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889, 893 (D.C. Cir. 1998).

¹⁵ Section 313(b) of the FPA, 16 U.S.C. § 8251(b).

¹⁶ See *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 97 (3d Cir. 2014) (quoting *La. PSC v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008)).

¹⁷ *N.J. Bd. of Pub. Utils.*, 744 F.3d at 9 (quoting *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011)).

¹⁸ See e.g. *Motor Vehicle Mfrs.*, 463 U.S. at 43 (“an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) (“In previous cases, we have rejected agency orders when the Commission neglected to deal with an important part of the problem. . .”) (citing *Laclede Gas Co. v. FERC*, 997 F.2d 936, 945-48 (D.C. Cir. 1993)); *North*

It is “well established that the Commission must ‘respond meaningfully to the arguments raised before it.’”¹⁹

While the Commission’s determinations regarding rates, tariffs, and related practices involving technical issues are entitled to great deference, deference is not owed unless FERC “relied on its factual or technical expertise.”²⁰ Nor will deference be owed if FERC “has not substantiated the application of its policy, either through the development of specific facts or by making a reasoned explanation.”²¹ When the Commission fails to rely on its technical expertise or fails to substantiate the application of its policy, an appellate court will conclude that FERC’s actions are arbitrary and capricious.²²

A. The August 8 Order Does Not Reflect Reasoned Decision-Making Because It Considered the Case to be a Typical Abandoned Plant Incentive Case and Therefore Failed to Consider All Important Aspects of the Matters at Issue and Engage the Implications of Accepting ITC Midwest’s Proposal. (ERROR #1)

To avoid an arbitrary and capricious decision or one that does not reflect reasoned decision-making, the Commission must consider all important aspects of the problem at issue.²³ The August 8 Order not only fails meet this standard, it fails to engage the implications of granting the Abandoned Plant Incentive in any meaningful way whatsoever, thereby leading it to a decision

Carolina Util. Comm'n v. FERC, 42 F.3d 659, 666 (D.C. Cir. 1994) (given the complexity of the issue, FERC must more fully explain its decision).

¹⁹ *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015).

²⁰ *El Paso Elec. Co. v. FERC*, 832 F.3d 495, 503 (5th Cir. 2016) (citing *La. PSC v. FERC*, 771 F.3d 903, 909 (5th Cir. 2014) and *South Carolina*, 762. F3d at 54-55).

²¹ *El Paso Elec.*, 832 F.3d at 503 (quoting *Fla. Gas Transmission Co. v. FERC*, 876 F.2d 42, 45 (5th Cir. 1989)).

²² *Id.* (citing *Fla. Gas Transmission*, 876 F.2d at 45); see also *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 16 (D.C. Cir. 2005).

²³ See e.g. *Motor Vehicle Mfs*, 463 U.S. at 43; *NorAm Gas Transmission*, 148 F.3d at 1165 (“In previous cases, we have rejected agency orders when the Commission neglected to deal with an important part of the problem...”) (citing *Laclede Gas*, 997 F.2d at 945-48); *North Carolina*, 42 F.3d at 666 (given the complexity of the issue, FERC must more fully explain its decision).

that is logically untenable – the exact opposite of reasoned decision-making. Meeting its responsibility under the FPA to set just and reasonable rates requires the Commission to grant rehearing and dismiss ITC Midwest’s application until the Iowa courts clarify whether the ROFR Statute is valid.

1. ***The August 8 Order Erroneously Considered ITC Midwest’s Request to Initiate a Standard Order No. 679 Proceeding and Processed It Accordingly.***

The August 8 Order claims that “ITC Midwest’s request for the Abandoned Plant Incentive is not a determination that any costs that ITC Midwest actually incurs during the abeyance period or afterwards are prudent.”²⁴ The August 8 Order further claims that the prudence of any costs incurred will be addressed “if and when ITC Midwest makes a filing under section 205 seeking recovery of such costs. . . .”²⁵ In making these claims, the order demonstrates precisely how far the Commission’s consideration of Abandoned Plant Incentives has devolved from a careful case-by-case analysis of facts into the rote application of Order No. 679’s standards. Even though the August 8 Order asserts that it is evaluating ITC Midwest’s request on own merits, it completely misses, and therefore, fails to consider, the logically untenable, unjust, and unreasonable place in which it leaves customers and potentially, ITC Midwest.

Unlike standard cases in which an incumbent public utility seeks an Abandoned Plant Incentive, this case arises before ITC Midwest’s right to develop the Iowa Project has been secured.²⁶ As previously noted, that right rests solely on the now-stayed ROFR Statute, the constitutionality of which has been challenged in Iowa’s courts. The Iowa Supreme Court held

²⁴ August 8 Order at P 45.

²⁵ *Id.*

²⁶ In a Competitive Developer Selection Process, a prospective developer may seek a declaratory order for Order No. 679 incentives to develop the economic components of a proposal “with the degree of precision and confidence required to effectively compete” if it is awarded the project. *Transource Kansas, LLC*, 151 FERC ¶61,010 at P 6 (2015); *Transource Wisconsin, LLC*, 149 FERC ¶61,180 at P 6 (2014).

the likelihood of the success of these challenges to be so high that it enjoined the ROFR Statute's effectiveness during the litigation. Because Iowa law deems an unconstitutional statute to have been void *ab initio*,²⁷ ITC Midwest's right to develop the Iowa Project is at best unsettled and most likely void. (In fact, in this case, a prospective judicial determination of the Iowa Project's unconstitutionality requires far less speculation than generalized allegations of a state or local official's denial of a required permit or project-blocking opposition to a new transmission line constructed in existing rights-of-way.)

Even so, the August 8 Order processes ITC Midwest's application exactly as if those rights were settled, stating that the "presence of regulatory or litigation uncertainty does not preclude the Commission from evaluating or granting a request for transmission incentives under Order No. 679 and Commission precedent."²⁸ The difficulty with this approach is that the issue ignored by the August 8 Order fundamentally skews application of Order No. 679's analytical framework. In short, there is too much foot being crammed into too little shoe: the framework simply does not fit the circumstances. This "mis-fit" is so profound and thoroughgoing that it results in unjust and unreasonable rates *no matter how the pending state ROFR Statute litigation is resolved.*

2. *The August 8 Order Does Not Reduce ITC Midwest's Risk of Non-Recovery and Exposes Customers to the Risk of Paying Unjust and Unreasonable Rates if the Iowa Courts Ultimately Hold the ROFR Statute to be Unconstitutional.*

If the Iowa courts find the ROFR Statute to be unconstitutional under Iowa law, the Iowa Project would qualify as a Competitive Transmission Project under Tariff Attachment FF and MISO would award it based upon its evaluation of proposals submitted by Qualified Transmission

²⁷ See Consumer Alliance Protest at n. 37 (citing Summary Judgment Motion Brief at 28 (citing *Security Sav. Bank of Valley Junction v. Connell*, 200 N.W. 8, 10 (Iowa 1924) ((citing *Peters v. Broward*, 222 U. S. 483, 495 (1912); *Norton v. Shelby Cty.*, 118 U. S. 425, 442 (1886))).

²⁸ August 8 Order at P 44.

Developers. Without a doubt, ITC Midwest would file a Section 205 proceeding based on the August 8 Order, seeking recovery of its development and construction costs it incurred after August 8, 2023. In a typical Abandoned Plant Incentive cost recovery case, ITC Midwest would bear the burden of proving that (1) the Iowa Project was abandoned for reasons beyond its reasonable control; and (2) its expenses were prudent when they were incurred.²⁹ With regard to the Iowa Project, however, no abandonment would have occurred; the Project would have been awarded to a Competitive Transmission Developer and would be moving forward.³⁰ But assuming ITC Midwest cleared the first hurdle, the second could prove to be insurmountable because the Commission could reasonably find that any post-August 8 development and construction expenses were imprudent *per se*, given ITC Midwest would have incurred them after the Iowa Supreme Court enjoined the ROFR Statute's effectiveness, which would expose ITC Midwest to the very risk of non-recovery of costs that the Abandoned Plant Incentive was intended to mitigate.³¹ In other words, the August 8 Order would have accomplished nothing.

Alternatively, if the Commission determined that ITC Midwest incurred post-August 8 Iowa Project costs prudently, customers would be required to pay rates to permit recovery of those costs – a result that puts customers in the untenable position of paying rates based on Abandoned Plant costs while also paying rates based on the actual development and construction costs for the

²⁹ See Order No. 679 at P 166.

³⁰ Of course, the Competitive Developer Selection Process could result in ITC Midwest being awarded the Iowa Project; however, that outcome neither cures the harm to customer interests caused by the August 8 Order nor sanctions the prudence of ITC Midwest incurring development costs when its right to develop was subject to serious legal challenge.

³¹ Order No. 679 at P 163; August 8 Order at P 43 (The purpose of the Abandoned Plant Incentive is “to encourage transmission development by reducing the risk of non-recovery of costs.”)

same project.³² This partially duplicative cost recovery would diminish, if not erase, the overall value of the competitive process by raising the overall cost of the Iowa Project. Consumers would have stepped fully into the role as ultimate insurers of ITC Midwest’s cash flow – a role they should not be required to fulfill under the Federal Power Act’s consumer protection purpose, but one that is entirely possible under the August 8 Order.

3. *The August 8 Order Forces Customers to Assume an Unjust and Unreasonable Level of Risk Even if the Iowa Courts Ultimately Find the ROFR Statute to be Constitutional.*

Even a determination by the Iowa courts that the ROFR Statute is constitutional would not cure the August 8 Order’s fundamental error of granting the requested Abandoned Plant Incentive when the basis of ITC Midwest’s legal right to develop was enjoined and the Iowa Supreme Court had referred to the ROFR Statute as “quintessentially crony capitalism,” “rent-seeking,” “protectionist,” and “anticompetitive.”³³ In effect, the August 8 Order gave ITC Midwest the green light to incur costs without providing any cost-limiting parameters or conditions aside from “prudently incurred” – a very broad standard against which the prudence of a utility’s expenditures is determined *post hac* by comparison to expenditures made by other reasonable utility managers under similar conditions.³⁴ In other words, the August 8 Order determined that expending funds on the Iowa Project’s development and construction prior to securing the final, non-appealable right to do so is prudent *per se*. Apparently, the Consumer Alliance does not have the option of

³² Order No. 679 emphasized the importance of avoiding double recovery from consumers. *See* Order No. 679 at P 166 (“The Commission will evaluate the public utility’s cost recovery to ensure no double recovery of costs”); *see also United Airlines, Inc. v. FERC*, 827 F.3d 122, 134 (D.C. Cir. 2016) (vacating FERC’s order because FERC failed to demonstrate there was no double-recovery of certain taxes).

³³ *LS Power Midcontinent, LLC v. State*, 988 N.W. 2d 316, 338 (2023).

³⁴ *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050, at P 100 (2017) (*PATH*)).

arguing that *none* of those costs were prudently incurred because no reasonable manager would take the risk of expending substantial funds without those rights in hand.

In a recent concurrence in a typical Abandoned Plant Incentive proceeding, Commissioner Christie expressed his concern about the Abandoned Plant Incentive being *de facto* insurance provided by customers at no cost to a transmission provider to assure the recovery of the provider's costs if the transmission project is abandoned for reasons beyond the provider's control.³⁵ The August 8 Order takes that *de facto* insurance to an entirely new level, further compounding the invalidity of the August 8 Order's approach. Not only are customers insuring ITC Midwest against the nonrecovery of costs for a project abandoned for reasons beyond the utility's control, they are also insuring ITC Midwest against the adverse financial consequences of losing the ROFR Statute litigation – a pernicious type of insurance that gives free rein to ITC Midwest to begin incurring expenses long before it may be prudent to do so. At a time when substantial reinforcement and expansion of the electric transmission grid is a public imperative and electric rates continue to exponentially increase year-after-year, it is inconceivable that customers should be required to pay higher rates to insure a utility's shareholders against unfavorable litigation outcomes, yet that is exactly what the August 8 Order provides.³⁶

4. *The Commission Should Dismiss This Proceeding.*

The August 8 Order reaches an arbitrary and capricious result that is not the product of reasoned decision-making. It does not recognize that the context of this case differs from the standard Abandoned Plant Incentive case, consider (let alone address) the threshold issue

³⁵ See *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC 61,039 (2023) (Christie concurrence, P 3)

³⁶ Importantly, it is not just ITCM's customers, but customers throughout MISO North/Central that are harmed by the August 8 Order because all customers will pay Multi-Value Project ("MVP") charges associated with the Project under MISO Tariff Attachment MM.

presented, or engage the implications of granting ITC Midwest's requested incentive under these circumstances in any meaningful way. In fact, the August 8 Order ties a knot that will likely require years of litigation and judicial review to unsnarl and potentially delay completion of the Project.

By processing ITC Midwest's case as a standard Order No. 679 proceeding, the August 8 Order sends the Commission down an unproductive, legally tenuous course. At this point, the Commission must do no harm, that is, leave the parties in a position that does not inflict present or future harm on customer rates or prejudice ITC Midwest's option of seeking a future Abandoned Plant Incentive for the Iowa Project when that incentive can provide the risk-lowering benefit Order No. 679 intended. For this reason, the Consumer Alliance requests the Commission to grant rehearing and dismiss the proceeding without prejudice until such time as the state ROFR Statute litigation is resolved.

B. The August 8 Order's Authorization of a Transmission Rate Incentive When the Effectiveness of the Legal Authority Assigning the Project Has Been Enjoined is Arbitrary and Capricious and Not Reflective of Reasoned Decision-making. (ERROR #2)

The August 8 Order errs by failing to engage and meaningfully address the Consumer Alliance's arguments regarding the considerable doubts surrounding ITC Midwest's right to develop and construct the Iowa Project.³⁷ In place of careful legal analysis of the facts and the applicable law followed by a thorough explanation of its decision, the August 8 Order states simply that the Commission "disagree[s] that ITC Midwest's request should be denied based on the pendency of litigation challenging Iowa's ROFR statute" and that the "presence of regulatory or litigation uncertainty does not preclude the Commission from evaluating or granting a request for

³⁷ *TransCanada*, 811 F.3d at 12; *see also Vistra Corp. v. FERC*, __ F.4th __, Case No. 21-1214 at 18.

transmission incentives under Order No. 679 or Commission precedent.”³⁸ The August 8 Order’s “response to [the Consumer Alliance’s] contrary evidence can be described as little more than a hand wave.”³⁹

The cases cited by the August 8 Order to justify this cursory review do not support granting the Abandoned Plant Incentive. In *NextEra*, the Commission granted the Abandoned Plant Incentive to a competitive transmission developer in a non-contested proceeding.⁴⁰ The Commission found that the project at issue in that proceeding “faces significant regulatory and siting risks that are beyond [NextEra’s] control and could lead to abandonment of the Project.”⁴¹ The Commission’s order, however, says nothing about litigation challenging NextEra’s right to own, develop, and construct the project and, in fact, no such litigation existed at the time of NextEra’s application. Instead, NextEra, a non-incumbent competitive transmission developer, supported its application for an Abandoned Plant Incentive by citing “the risk that incumbent utilities in Oklahoma will lobby their state legislature to pass state laws creating a right of first refusal or impose other limitations on the ability of non-incumbent utilities to obtain necessary permits or otherwise to develop or own transmission assets in the state.”⁴² The Commission considered the possibility of the incumbent providers’ ability to block NextEra’s project to be a significant regulatory risk and therefore granted the requested incentive.

³⁸ August 8 Order at P 44. By essentially holding that the existence of any type of litigation or regulatory uncertainty need not impede the authorization of a rate incentive, the August 8 Order’s rationale contains no limiting principle and no clear standard.

³⁹ *See Del. Div. of Pub. Advocate v. FERC*, 3 F.4th 461, 469 (D.C. Cir. 2021) (remanding FERC’s arbitrary and capricious rate determination for failure to consider an important aspect of the problem and the contrary evidence).

⁴⁰ *NextEra Energy Transmission Southwest, LLC*, 180 FERC ¶ 61,032 at P 19 (2022).

⁴¹ *NextEra*, 180 FERC ¶ 61,032 at P 18.

⁴² *See id.* at P 8.

This case arises in a much different context and offers a prime example why the Commission was right to grant the Abandoned Plant Incentive in *NextEra* but erred in granting it in this proceeding. In this case, ITC Midwest along with other incumbent transmission providers lobbied the Iowa General Assembly *hard* to pass the ROFR Statute and after twice being unsuccessful through the ordinary legislative processes, were only able to secure its enactment as part of a must-pass general appropriations bill after midnight during the dying hours of the 2020 legislative session – a process the Iowa Supreme Court characterized as “logrolling” wherein the bill, which did not have the votes to pass as standalone legislation, was rolled into a much larger bill to fund state government and passed, likely in violation of the Iowa constitution.⁴³ Unsurprisingly, litigation challenging the ROFR Statute ensued and led to the Iowa Supreme Court enjoining the statute’s effectiveness pending the outcome of those challenges.

Consequently, the critical difference between this case and *NextEra* is the same as that between what has already happened and what may occur in the future. The ROFR Statute challenges have been active since October 14, 2020 – well in advance of MISO’s finalization of the Tranche 1 portfolio, including the Iowa Project, in July 2022. As a result, ITC Midwest’s right to own, develop, and construct the Iowa Project has *always* been in doubt; a precondition of its eligibility for the Abandoned Plant Incentive has not been satisfied. In *NextEra*, the competitive transmission developer’s right to own, develop, and construct was not subject to an actual challenge, let alone a court opinion finding a likelihood of the challenge’s success. Indeed, the Commission had already granted Order No. 679 incentives for the project and the cited case simply

⁴³ *LS Power*, 998 N.W. 2d, at 337-338.

added the Abandoned Plant Incentive to the list.⁴⁴ That is certainly not the case here, where ITC Midwest’s right to own, develop, and construct has never been free from legal challenge.

The same distinction applies to *Pioneer Transmission*, a case in which the Commission found that a new 240-mile transmission line project faced significant risks and challenges due to the need to obtain rights-of-way by negotiating with individual landowners.⁴⁵ The transmission provider’s right to own, develop, and operate the project was not subject to challenge. The only issue was whether the transmission provider had satisfied Order No. 679’s nexus test.

As pointed out by Commissioner Christie in his dissent in the August 8 Order, ITC Midwest has not demonstrated any “compelling reason to grant ITC Midwest the Abandoned Plant Incentive right now”⁴⁶ because the Iowa Supreme Court has already found that the plaintiffs in the Iowa ROFR law litigation have “shown a likelihood of success on the merits of its claim that the ROFR’s enactment violates . . . the Iowa Constitution.”⁴⁷ The August 8 Order is arbitrary and capricious because it is based on nothing more than the Commission’s assumption that ITC Midwest will own, develop, and construct the Iowa Project – an assumption that the Iowa Supreme Court has already deemed unlikely. The Commission must act only on what is, not what might be. The Consumer Alliance strongly urges the Commission to grant rehearing and dismiss this case until such time as the issue ITC Midwest’s right to own, develop, and construct the Iowa Project has been settled.

⁴⁴ See *NextEra*, 180 FERC ¶ 61,032 at P 2.

⁴⁵ *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, at P 49 (2009).

⁴⁶ August 8 Order, Christie Dissent at P 1.

⁴⁷ August 8 Order, Christie Dissent at fn. 1 (citing Consumer Alliance Protest, Exhibit B at 35); see also Consumer Alliance Protest, Exhibit B at 4, 30).

C. The August 8 Order Fails to Grant Comity and Respect to the State of Iowa and Its Judicial Processes. (ERROR #3)

Prior to ITC Midwest’s application seeking the Abandoned Plant Incentive, the Iowa Supreme Court issued a very clear ruling, holding that “the plaintiffs have shown a likelihood of success on the merits” of their constitutional claims challenging the validity of the ROFR [S]tatute.”⁴⁸ As previously noted, the ROFR Statute is the sole basis for ITC Midwest’s claim to the Iowa Project and so any state proceeding that would invalidate that statute can be expected to impact the need for the Commission’s action on ITC Midwest’s application. The August 8 Order, however, considers the Iowa Supreme Court’s likelihood of the ROFR Statute’s potential invalidity to be irrelevant for the purposes of this proceeding and granting ITC Midwest the Abandoned Plant Incentive as if the Court had never issued its opinion.

Under the United States Constitution’s comity clause, courts/tribunals in one jurisdiction must respect the laws and judicial decisions of other jurisdictions out of deference and mutual respect.⁴⁹ The comity doctrine “serves to ensure that ‘the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.’”⁵⁰ The August 8 Order fails to demonstrate that any federal interest in authorizing an Abandoned Plant Incentive at this early time in the Iowa Project outweighs Iowa’s interest in protecting its legislative and judicial

⁴⁸ *LS Power*, 998 N.W. 2d, at 322.

⁴⁹ See U.S. Constitution, Article IV, § 2, Clause 2.

⁵⁰ *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). The comity doctrine “reflects ‘a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.’” *Levin*, 560 U.S. at 421 (quoting *Fair Assessment in Real Est. Ass’n, Inc. v. McNary*, 454 U.S. 100, 112 (1981)).

processes.⁵¹ Accordingly, the August 8 Order erred by prematurely authorizing the Abandoned Plant Incentive to ITC Midwest instead of deferring to Iowa judicial process.

This is not a case in which the Commission's technical expertise requires deference by the appellate courts. While the Commission's determinations regarding rates, tariffs, and related practices involving technical issues are entitled to great deference, deference is not owed unless the Commission "relied on its factual or technical expertise."⁵² In determining that the ROFR Statute litigation is irrelevant to ITC Midwest's requested Abandoned Plant Incentive, the August 8 Order did not rely on any peculiar technical expertise within its jurisdiction. Indeed, it did not even explain why it considered the ROFR Statute litigation to be irrelevant. Moreover, the Commission did not explain why it was forced to act on ITC Midwest' application when it did. The Iowa Supreme Court's opinion was entitled to respect and the August 8 Order failed to accord the Court that respect – an inopportune development, given that transmission grid expansion, reinforcement, and security require close federal/state cooperation.

The Consumer Alliance urges the Commission to rehear the August 8 Order and respect the Iowa courts by dismissing this proceeding without prejudice pending a final, non-appealable determination of the ROFR Statute's constitutionality by the Iowa courts.

⁵¹ The Consumer Alliance recognizes the Commission's federal interest in ensuring transmission development and buildout. However, the August 8 Order may have the unintended consequence of complicating the buildout of the Project, given the Commission incented a utility to spend money on a project where the ownership rights are likely to be invalidated. To avoid any ROFR law issues adversely impacting transmission buildout in the MISO region, the Commission could simply direct MISO to initiate the Competitive Transmission Projects for all Tranche 1 projects in Iowa and proceed to grant the Consumer Alliance's complaint in Docket EL22-78 requesting MISO to utilize competitive solicitations for all long-range transmission projects in the MISO region.

⁵² *El Paso*, 832 F.3d at 503 (citing *La. PSC*, 771 F.3d at 909 and *South Carolina*, 762 F.3d at 54-55).

D. The August 8 Order’s Authorization of the Abandoned Plant Incentive Is Not Supported by Substantial Evidence in the Record. (ERROR #4)

1. *The August 8 Order Impermissibly Reduced ITC Midwest’s Section 205 Burden to a Generic Check-the-Box Exercise and Rendered Order No. 679’s Nexus Test a Nullity.*

Under Section 205 of the Federal Power Act, “the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility.”⁵³ Rule 211 of the Commission’s Rules of Practice and Procedure grant a person the right to “file a protest to object to any application...or rate filing.”⁵⁴ However, that right to protest an application seeking an Abandoned Plant Incentive for a MISO Tranche 1 project is illusory⁵⁵ because the August 8 Order impermissibly reduces the statutory burden of a filing party to demonstrate that its proposal is just and reasonable.⁵⁶ In contrast to Order No. 679’s requirement for an applicant to demonstrate the specific need for a rate incentive on a case-by-case basis and meet the “nexus test,” the August 8 Order reduces the Order No. 679’s evidentiary requirements to a box-checking exercise that only

⁵³ Section 205, 16 U.S.C. § 824d(e). Section 205 provides that all rates and charges, together with “all rules and regulations affecting or pertaining to such rates or charges,” must be “just and reasonable” and not unduly discriminatory. 16 U.S.C. § 824d(a)(b).

⁵⁴ 18 C.F.R. § 385.211(a)(1).

⁵⁵ Due process requires 1) notice and 2) an opportunity to be heard. Importantly, the opportunity to be heard requires a fair and meaningful opportunity to be heard. Here, a meaningful opportunity to be heard would include a reasoned analysis and engagement of the Consumer Alliance’s arguments, which the August 8 Order did not provide. The Commission recognizes and applies constitutional due process principles. *See Total Gas & Power N. Am., Inc.*, (2021) (citing 5th Amendment of the U.S. Constitution; *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60, (1999); *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (“[t]he core of [due process] is the right to notice and a meaningful opportunity to be heard.”)).

⁵⁶ The bare-bones reduction of the burden to a box-checking exercise essentially results in transferring a heavy burden to a protesting party to demonstrate that the requested incentive should not be authorized. *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC 61,039 (2023) (Christie concurrence, P 2) (expressing concern that the Commission’s determination of whether substantial risks and challenges exist when granting the Abandoned Plant Incentive and other incentives has become nothing more than a check-the-box exercise). The entire process – from the Section 205 incentive application to the protest to the FERC order – becomes perfunctory because the outcome appears preordained. If the Commission is willing to grant an incentive for a project under these specific circumstances – when it is more likely than not that the project owner will not have legal title to the project – the Consumer Alliance is hard pressed to envision any scenario wherein the Commission would actually reject a rate incentive application.

requires an application to contain (1) a few references to a long-range transmission project and the planning process undertaken by the respective grid operator; and (2) a recitation of non-specific, generic risks and challenges that any transmission project may face.

ITC Midwest did not sustain its evidentiary burden to demonstrate that the Abandoned Plant Incentive is narrowly tailored to addressing the specific risks and challenges presented by the Project under Order No. 679's "nexus test."⁵⁷ The Commission's acceptance of ITC Midwest's generic statements of risk pursuant to Order No. 679 policy⁵⁸ does not help ITC Midwest to meet its burden. Generic statements do not constitute evidence in the context of a concrete application for a case-specific approval. If the Commission desires to discard the nexus test and Order No. 679's case-by-case basis adjudication framework (and shift an even greater burden to protesters challenging an incentive request), the Commission must, when changing course from a prior position, provide "a reasoned explanation...for disregarding facts and circumstances that underlay or were engendered by [its] prior policy."⁵⁹ The Commission has not done so. Rehearing is warranted.

⁵⁷ 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).

⁵⁸ The August 8 Order did not specifically adjudicate ITC Midwest's request; instead, the August 8 Order focused on Order No. 679's policy determination "that this incentive is an effective means of encouraging transmission development by reducing the risk of non-recovery of costs" due to project abandonment outside the applicant's control. See August 8 Order at P 43.

⁵⁹ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

2. The August 8 Order Failed to Engage the Consumer Alliance’s Specific Arguments Undercutting ITC Midwest’s Need for the Abandoned Plant Incentive.

In order to avoid reversal on appeal, the Commission must support its findings with substantial evidence.⁶⁰ Substantial evidence is “relevant evidence” that “a reasonable mind might accept as adequate to support a conclusion.”⁶¹ To avoid an arbitrary and capricious decision or one that does not reflect reasoned decision-making, “the Commission must ‘respond meaningfully to the arguments raised before it.’”⁶²

The August 8 Order’s authorization of the Abandoned Plant Incentive rests on the Commission’s acceptance of ITC Midwest’s generic assertions about transmission project risks that would be applicable to any large transmission projects. Indeed, the August 8 Order’s review of the alleged risks is summarized in a single paragraph – Paragraph 43 – wherein the Commission finds that “ITC Midwest has demonstrated that the Project faces certain regulatory, environmental, and siting risks that are beyond ITC Midwest’s control and could lead to the Project’s abandonment, and that approval of the Abandoned Plant Incentive will address those risks by protecting ITC Midwest if the Project is cancelled for reasons outside its control.”⁶³ The Commission further generically concluded that ITC had demonstrated a nexus between the requested incentive and planned investment and tailored its incentive rate request to the identified risks and challenges associated with the Project. However, the Commission fails to explain the specific regulatory, environmental, and siting risks faced by the Project; fails to explain the nexus

⁶⁰ Section 313(b) of the FPA, 16 U.S.C. § 8251(b); *Vistra Corp. v. FERC*, _ F.4th _, Case No. 21-1214 at 18 (D.C. Cir. Aug. 15, 2023); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010).

⁶¹ *N.J. Bd. of Pub. Utils.*, 744 F.3d at 97 (quoting *Mars Home for Youth*, 666 F.3d at 853).

⁶² *TransCanada*, 811 F.3d at 12.

⁶³ August 8 Order at P 43.

between the requested incentive and the planned investment; and fails to explain how the incentive request was narrowly tailored to any specific Project risks and challenges.

- (a) ITC Midwest’s application is premature and does not articulate risks with specificity because the scope of work for the Project has not been finalized.

Although the Commission recited the Consumer Alliance’s argument that ITC Midwest’s application is premature because the scope of work for the Project has not been finalized, the August 8 Order failed to engage and respond to that argument.⁶⁴ The Consumer Alliance pointed out that responsibility for constructing the Mississippi River crossing portion of the Project will be determined after completion of the Competitive Developer Selection Process for the portion of the Project located in Illinois.⁶⁵ Given it will be nine months to a year before that segment of the project is awarded, ITC Midwest does not have any certainty regarding the degree to which it will be responsible for the segment of the Project crossing the Mississippi River.⁶⁶ The Consumer Alliance further contended that ITC Midwest did not demonstrate any authority under Order No. 679 and any FERC precedent to prematurely request an Abandoned Plant Incentive for a substantial scope of work for the Project that has yet to be clearly defined or assigned to the applicant.”⁶⁷

- (b) The August 8 Order Does Not Demonstrate That the Abandoned Plant Incentive Meets Order No. 679’s Nexus Test.

In the Commission determination sections of August 8 Order, the Commission does not specifically engage the Consumer Alliance’s arguments regarding ITC Midwest’s failure to meet

⁶⁴ See August 8 Order at P 23.

⁶⁵ See Consumer Alliance Protest at 13 (citing ITCM Request, Transmittal at 1-2, n. 7).

⁶⁶ *Id.* at 13.

⁶⁷ Consumer Alliance July 17, 2023 Answer at 6.

the nexus test. Instead, the August 8 Order just cites to general principles from Order No. 679 and the Transmission Incentives Policy Statement.⁶⁸ The August 8 Order fails to recognize 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.**”⁶⁹ The August 8 Order overlooks the potential rate consequences of authorizing the Abandoned Plant Incentive to ITCM, especially given the pending ROFR Statute litigation.⁷⁰

The August 8 Order’s conclusory determinations, which are not supported by an application of specific facts, risks, and challenges presented in ITCM’s application, imply that any transmission incentive request will be authorized so long as it is generally consistent with Order No. 679 policy. Yet, the Consumer Alliance pointed out that not every new transmission investment qualifies for a transmission rate incentive.⁷¹ In Order No. 679-A, the Commission emphasized that “the most compelling case for incentives are new projects that present special risks or challenges, not routine investments made in the ordinary course of expanding the system to provide safe and reliable transmission service.”⁷² The Commission has specified factors to distinguish between routine projects and projects with “special risks or challenge,” including (i) the project’s scope; (ii) the project’s effect; (iii) and the specific challenges or risks faced by the project.⁷³ An applicant requesting an incentive must provide detailed factual information in support

⁶⁸ See August 8 Order at PP 46-48.

⁶⁹ 2012 Policy Statement at P 1 (emphasis added).

⁷⁰ The August 8 Order brushed aside the Consumer Alliance’s arguments about future rate impacts as premature because the Consumer Alliance could challenge the prudence of ITC Midwest’s cost recovery in a future Section 205 proceeding. See August 8 Order at P 45. The ability to challenge cost recovery in the future does not make the instant requested abandonment incentive just and reasonable. Instead of engaging the hard issues, the August 8 Order prejudged the prudence of costs incurred and punted the issues to a future proceeding.

⁷¹ See Consumer Alliance Protest at 15.

⁷² Consumer Alliance Protest at 15 (citing Order No. 679-A at P 23).

⁷³ *Id.* at 15 (citing *Baltimore Gas & Electric Co.*, 120 FERC 61,084 at P 52 (2007)).

of the factors relied upon.⁷⁴ An applicant asserting that its project faces special risks or challenges should, “first, explain those risks and challenges *in detail* and second, explain how the risks and challenges compare to a project that is more routine in nature.”⁷⁵ ITCM has not provided that detailed explanation and neither has the August 8 Order.

Specifically, the Consumer Alliance argued that ITC Midwest failed to demonstrate sufficient regulatory, environmental, and siting risks and challenges given most of the Iowa portion of the Project is not a greenfield transmission line and that portions of new facilities will be built within existing easements, utilizing the pathway for the existing 161 kV circuit to construct a new circuit/structures that will be operated at 345 kV.⁷⁶ A project that utilizes existing rights-of-way for new facilities construction obviates the risk of securing new easements and lowers the risk of permit denial.⁷⁷ In a recent filing with the Iowa Utilities Board for landowner meetings for another MISO transmission project, ITC Midwest boasted that it “has a proud track record of working with Iowa landowners on hundreds of transmission line projects over the past 15 years, achieving more than 98% voluntary easements.”⁷⁸ ITCM’s application addresses siting, permitting, and environmental issues as if the Iowa portion of the Project consisted of new facilities located on yet-to-be procured rights of way with myriad potential permitting issues – a project much different

⁷⁴ *Baltimore Gas*, 120 FERC 61,084 at P 53.

⁷⁵ *Id.* (emphasis added).

⁷⁶ See Consumer Alliance Protest at 16 (citing Consumer Alliance Protest, **Exhibit A**, MTEP 21 LRTP Addendum Appendix A.xlsx, Facilities Tab, Rows 95-101).

⁷⁷ See, e.g., *City of Augusta, Kentucky et al.*, 72 FERC P 61,114 at P 61,647-61,648 (1995) (noting that the use existing rights-of-way for a transmission line helps avoid certain environmental, archaeological, and historic site requirements).

⁷⁸ *Morgan Valley – Twinkle (Benton County segment) Public Information Meeting Presentation*, IUB Docket No. E-22544, Slide 45 (filed May 2, 2023) available at [PowerPoint Presentation \(iowa.gov\)](#) (last accessed Sep. 7, 2023).

from the actual Project described in MISO documents.⁷⁹ The August 8 Order did not engage these Consumer Alliance arguments that undermine the need for any incentive.

Further, the Consumer Alliance also pointed out that ITC Midwest failed to connect any specific risks/challenges to the type of incentive requested. ITC Midwest argued that Project development in Iowa faces “potentially significant financial risks and challenges,” including “cash flow risks associated with long lead time facilities . . . being placed into rate base.”⁸⁰ Yet, ITC Midwest does not seek a Construction Work in Progress incentive. Instead, ITC Midwest sought an incentive that does nothing to mitigate cash flow risk but is intended to facilitate financing by pre-authorizing the recovery of prudently incurred development costs if a project is cancelled.⁸¹ The August 8 Order fails to demonstrate that the rationale ITC Midwest provides for its requested incentive is tailored to or correlated with any specific risks identified (*i.e.*, establishing any nexus whatsoever between the requested incentive and Project risks).⁸²

If ITC Midwest seeks to require ratepayers to insure 100% development cost recovery, consumers deserve something more than the Commission’s acceptance of ITC Midwest’s bald assertions and hasty generalizations, especially given that the Project already will benefit from several other previously granted transmission rate incentives.⁸³ Because the authorization of the Abandoned Plant Incentive is not supported by substantial evidence, rehearing is warranted.

⁷⁹ See Consumer Alliance Protest at 16.

⁸⁰ *Id.* at 17 (citing ITCM Transmittal at 6).

⁸¹ *Id.* (citing *Dayton Power & Light Co.*, 182 FERC 61,147 at P 38 (2023)).

⁸² Consumer Alliance Protest at 17.

⁸³ Consumer Alliance Protest at 17-18. The Consumer Alliance explained that ITC Midwest benefits from two adders to its Return on Equity: a 50-basis point Regional Transmission Organization adder and a 25-basis point transco adder. ITC Midwest also benefits from a 60% equity/40% debt capitalization ratio. See *id.*, fn. 61.

IV. ALTERNATIVE REQUEST FOR CLARIFICATION

If the Commission affirms the August 8 Order's acceptance of the Abandoned Plant Incentive on rehearing, it should nevertheless clarify that in any Section 205 proceeding in which ITC Midwest seeks recovery of costs for the Iowa Project that it claims were prudently incurred, the ROFR Statute's unconstitutionality and reassignment of the Project to MISO's Competitive Transmission Process under Attachment FF cannot constitute circumstances "beyond the control of management" under Order No. 679's framework for recovering development and construction costs pursuant to the Abandoned Plant Incentive.⁸⁴

If the August 8 Order is permitted to stand, ITC Midwest has a choice, given the pendency of the ROFR Statute litigation: wait until that litigation is resolved or begin incurring millions of dollars in development costs. Given the current legal posture of that litigation, if ITC Midwest decides to move forward, it should bear the full risk of that decision, that is, it must make its own assessment of the litigation risk *without the possibility of customers mitigating that risk* through the Abandoned Plant Incentive.

After failing twice to secure legislative approval of the ROFR Statute through ordinary legislative processes, ITC Midwest (and other incumbent utilities) chose to push its enactment through constitutionally dubious, extraordinary means. When prospective Qualified Transmission Developers filed a lawsuit against the State of Iowa to challenge the constitutionality of the ROFR Statute, ITC Midwest chose to intervene and defend the ROFR Statute's validity. Even after the Iowa Supreme Court recognized the prospective developers' likelihood of success in that lawsuit, describing the ROFR Statute's passage as "logrolling" and the ROFR Statute itself as

⁸⁴ See Order No. 679 a P 165.

“quintessentially crony capitalism,” “rent-seeking,” “protectionist,” and “anticompetitive,” ITC Midwest chose to continue its staunch defense of its monopoly on new transmission projects under the ROFR Statute *except* that for the first time, ITC Midwest decided to ask this Commission to throw an Abandoned Plant Incentive “safety net” under its development activities just in case its choices do not pan out as it expected.⁸⁵

The Commission does not advance the prudent decision-making by the utilities it regulates when it protects them from the natural consequences of their choices. Captive customers should not be placed in the position of enabling imprudent behavior and thereafter used as the utility’s backstop “insurer of last resort.”⁸⁶ For that reason, the Consumer Alliance respectfully requests that if the Commission affirms its grant of the Abandoned Plant Incentive for the Iowa Project, it also clarify the August 8 Order to make certain that ITC Midwest only relies on that incentive for the purpose Order No. 679 intended it: to prevent nonrecovery of prudently incurred development and construction for a transmission project cancelled for reasons beyond the utility’s reasonable control.

⁸⁵ Under these circumstances, when a public utility elevates project risks by proactively taking measures that trigger and protract extensive litigation, the Commission must find that any project abandonment due to the litigation that was exacerbated by the public utility itself is not “beyond the control of management” under the Order No. 679 framework.

⁸⁶ *Midcontinent Independent System Operator, Inc.*, 182 FERC ¶ 61,039 (Jan. 31, 2023) (Christie, Comm’r, concurring at P 3). Through the Abandoned Plant Incentive, consumers provide *de facto* insurance and receive no benefits for projects that fail to materialize. *See id.* at Christie Concurrence at P 2.

V. CONCLUSION

WHEREFORE, the Consumer Alliance respectfully requests that the Commission grant rehearing of the August 8 Order for the reasons set forth herein and reject ITC Midwest's request for the Abandoned Plant Incentive. In the alternative, the Consumer Alliance respectfully requests that the Commission clarify the August 8 Order as described above.

Respectfully submitted,

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Wisconsin Industrial Energy Group

Dated: September 7, 2023

CERTIFICATE OF SERVICE

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

Dated this 7th day of September 2023.

/s/ Kenneth R. Stark

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