

184 FERC ¶ 61,083  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;  
James P. Danly, Allison Clements,  
and Mark C. Christie.

ITC Midwest, LLC

Docket No. ER23-2033-000

ORDER ON TRANSMISSION RATE INCENTIVE

(Issued August 8, 2023)

1. On May 30, 2023, ITC Midwest, LLC (ITC Midwest) submitted a request under section 205 of the Federal Power Act (FPA),<sup>1</sup> Order No. 679,<sup>2</sup> and the Commission's November 15, 2012 policy statement on transmission incentives<sup>3</sup> for incentive rate treatment of ITC Midwest's investment in the Skunk River-Ipava 345 kV Long Range Transmission Plan project (Project). Specifically, ITC Midwest requests authorization to recover 100% of prudently incurred costs associated with its investment in the Project if the Project is cancelled or abandoned for reasons beyond ITC Midwest's control (Abandoned Plant Incentive). As discussed below, we grant ITC Midwest's request.

**I. Background**

2. ITC Midwest states that it is a wholly owned subsidiary of ITC Holdings Corp., which in turn is majority owned by Fortis Inc. and minority owned by GIC Private Limited. ITC Midwest also states that it is a transmission-owning member of MISO, and an independent transmission company operating primarily in Iowa, with portions of its system in Minnesota, Illinois, and Missouri. ITC Midwest states that it owns more than

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<sup>1</sup> 16 U.S.C. § 824d.

<sup>2</sup> *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).

<sup>3</sup> *Promoting Transmission Inv. through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (Transmission Incentives Policy Statement).

6,600 miles of transmission lines and 208 electric transmission substations in Iowa, Minnesota, Illinois, and Missouri.<sup>4</sup>

3. In support of its application, ITC Midwest states that the Board of Directors of MISO unanimously approved a portfolio of 18 transmission projects as part of the Long-Range Transmission Plan (LRTP) Tranche 1 Portfolio in July 2022 to provide reliable and economic energy delivery to meet future reliability needs in MISO.<sup>5</sup> ITC Midwest explains that the Project is one element of the LRTP Tranche 1 Portfolio's East-Central transmission corridor across the MISO footprint from Iowa to Michigan, which will increase power transfer capability across the MISO region and will resolve thermal and voltage constraints in Iowa, Illinois, Missouri, Indiana, and Michigan.<sup>6</sup> In being selected for the LRTP Tranche 1 Portfolio, ITC Midwest asserts that MISO has determined that the Project will help alleviate congestion, reduce costs by allowing more low-cost resources to be integrated and avoiding future reliability upgrades, enhance grid reliability, and reduce carbon emissions.<sup>7</sup> Further, ITC Midwest states that MISO found that the Project, in conjunction with the other projects in the LRTP Tranche 1 Portfolio's East-Central transmission corridor, would address 77 unique thermal violations.<sup>8</sup>

4. ITC Midwest states that the Project will consist of approximately 125 miles of new 345 kV line, depending on the final approved route, to be constructed between Skunk River Substation located in Henry County, Iowa, and Ipava Substation located in Fulton County, Illinois. ITC Midwest explains that it will own and construct the Iowa portion of the 345 kV line, while the Illinois portion will be owned and constructed by a third party, which will be selected through the MISO Competitive Developer Selection Process (Selected Developer).<sup>9</sup> ITC Midwest states that the Project will cross the Mississippi River and that ITC Midwest's segment will connect with the Selected Developer's Illinois segment. ITC Midwest further explains that it will work with the Selected Developer to determine cost and construction responsibility for the Mississippi

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<sup>4</sup> Transmittal at 2-3.

<sup>5</sup> *Id.* at 1 (citing Ex. 1, attach. A. *MTEP21 Report Addendum: MISO Long Range Transmission Planning Tranche 1 Executive Summary*, at 1 (Apr. 13, 2022) (2021 MTEP Report), <https://cdn.misoenergy.org/MTEP21%20Addendum-LRTP%20Tranche%201%20Report%20with%20Executive%20Summary625790.pdf>).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 5 (citing 2021 MTEP Report at 3).

<sup>8</sup> *Id.* (citing 2021 MTEP Report at 40).

<sup>9</sup> *Id.* at 1-3.

River crossing.<sup>10</sup> The 2021 MISO Transmission Expansion Plan (MTEP) Report Addendum: LRTP Tranche 1 states that the entire Project has an expected in-service date of the end of 2029 and will have an estimated cost of \$594 million.<sup>11</sup>

5. ITC Midwest requests an effective date of July 30, 2023.<sup>12</sup> ITC Midwest asserts the importance of timely action to ensure that 100% of prudent construction costs incurred after its requested effective date are eligible for recovery if the Project is abandoned for reasons outside of ITC Midwest's control.<sup>13</sup>

## **II. Notice of Filing and Responsive Pleadings**

6. Notice of ITC Midwest's filing was published in the *Federal Register*, 88 Fed. Reg. 37,238 (June 7, 2023), with interventions and protests due on or before June 20, 2023. Alliant Energy Corporate Services, Inc., Association of Businesses Advocating Tariff Equity, LS Power Midcontinent, LLC, and NextEra Energy Transmission Midwest, LLC filed timely motions to intervene. Timely motions to intervene and a joint protest were filed by the Industrial Energy Consumers of America, Coalition of MISO Transmission Customers, Resale Power Group of Iowa, and Wisconsin Industrial Energy Group (collectively, Consumer Alliance).

7. On June 30, 2023, ITC Midwest filed a motion for leave to answer and answer to Consumer Alliance's protest. On July 17, 2023, Consumer Alliance filed a motion for leave to answer and answer.

## **III. Discussion**

### **A. Procedural Matters**

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2022), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2022), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept ITC Midwest's and Consumer Alliance's

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<sup>10</sup> *Id.* at 1-2.

<sup>11</sup> *Id.*; 2021 MTEP Report at 2.

<sup>12</sup> Transmittal at 2.

<sup>13</sup> *Id.* at 8.

answers because they have provided information that assisted us in our decision-making process.

**B. Substantive Matters**

**1. Section 219 Requirements**

10. In the Energy Policy Act of 2005, Congress added section 219 to the FPA, directing the Commission to establish, by rule, incentive-based rate treatments to promote capital investment in electric transmission infrastructure.<sup>14</sup> The Commission subsequently issued Order No. 679, establishing the processes by which a public utility may seek transmission rate incentives pursuant to section 219. Additionally, in November 2012, the Commission issued a Policy Statement providing guidance regarding its evaluation of applications for transmission rate incentives under section 219 and Order No. 679.<sup>15</sup>

11. Pursuant to Order No. 679, an applicant may seek to obtain incentive rate treatment for a transmission infrastructure investment that satisfies the requirements of section 219, i.e., the applicant must show that “the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion.”<sup>16</sup> Order No. 679 established a process for an applicant to demonstrate that it meets this standard, including a rebuttable presumption that the standard is met if: (1) the transmission project results from a fair and open regional planning process that considers and evaluates projects for reliability or congestion and is found to be acceptable to the Commission; or (2) a project has received construction approval from an appropriate state commission or state siting authority.<sup>17</sup>

12. In addition to satisfying the section 219 requirement of ensuring reliability or reducing the cost of delivered power by reducing congestion, Order No. 679 requires an applicant to demonstrate that there is a nexus between the incentive sought and the investment being made. In Order No. 679-A, the Commission clarified that the nexus test is met when an applicant demonstrates that the total package of incentives requested is “tailored to address the demonstrable risks or challenges faced by the applicant.”<sup>18</sup>

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<sup>14</sup> Pub. L. No. 109-58, § 1241, 119 Stat. 594 (2005).

<sup>15</sup> Transmission Incentives Policy Statement, 141 FERC ¶ 61,129.

<sup>16</sup> Order No. 679, 116 FERC ¶ 61,057 at P 76.

<sup>17</sup> *Id.* P 58.

<sup>18</sup> Order No. 679-A, 117 FERC ¶ 61,345 at P 27.

Applicants must provide sufficient support to allow the Commission to evaluate each element of the package and the interrelationship of all elements of the package.<sup>19</sup> The Commission noted that this nexus test is fact-specific and requires the Commission to review each application on a case-by-case basis.<sup>20</sup>

13. In the Transmission Incentives Policy Statement, the Commission reaffirmed that the abandoned plant incentive is among the financial and regulatory risk-reducing transmission incentives available pursuant to Order No. 679.<sup>21</sup>

## 2. Rebuttable Presumption

14. ITC Midwest asserts that the Project satisfies the rebuttable presumption standard of Order No. 679 because it was selected as a MISO LRTP Tranche 1 Portfolio project.<sup>22</sup> ITC Midwest explains that the Project is a component of one of 18 LRTP projects approved by the MISO Board of Directors in July 2022, as part of the 2021 MTEP.<sup>23</sup> ITC Midwest asserts that MISO's MTEP is a process that satisfies the rebuttable presumption requirement that a project is selected through a fair and open regional planning process and notes that MISO selected the Project through the Commission-authorized MTEP process.<sup>24</sup>

15. ITC Midwest further asserts that the Project provides reliability, economic, and policy benefits.<sup>25</sup> According to ITC Midwest, MISO stated that the Project, in conjunction with the other projects in the LRTP Tranche 1 Portfolio's East-Central transmission corridor, would resolve 77 unique thermal violations in Iowa, Illinois, Missouri, Indiana, and Michigan, including establishing an East-Central transmission corridor to provide increased power transfer capability and to improve voltage profiles

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<sup>19</sup> Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 10 (quoting Order No. 679-A, 117 FERC ¶ 61,345 at P 27).

<sup>20</sup> Order No. 679, 116 FERC ¶ 61,057 at P 43.

<sup>21</sup> Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at PP 11, 14.

<sup>22</sup> Transmittal at 4.

<sup>23</sup> *Id.* at 1 (citing 2021 MTEP Report at 1).

<sup>24</sup> ITC Midwest Answer at 11.

<sup>25</sup> Transmittal, Ex. 1 (Prepared Direct Testimony of Jeffrey W. Eddy), at 7 (Eddy Test.).

across the MISO control area.<sup>26</sup> ITC Midwest argues that the Project, therefore, is entitled to the rebuttable presumption of Order No. 679.<sup>27</sup>

**a. Commission Determination**

16. The Commission has previously found that projects approved through a regional transmission planning process that evaluated whether the identified transmission projects will enhance reliability and/or reduce congestion are entitled to the rebuttable presumption established under Order No. 679.<sup>28</sup> In this case, the MTEP transmission planning process, through which the Project was approved, evaluated whether proposed transmission projects will enhance reliability and/or reduce congestion, and satisfies the rebuttable presumption standard of Order No. 679. Therefore, we find that the Project is entitled to the rebuttable presumption that it meets this requirement of section 219.

**3. Abandoned Plant Incentive**

**a. ITC Midwest's Request**

17. ITC Midwest asserts that the need for the Abandoned Plant Incentive for the Project is supported because the Project faces significant regulatory, environmental, financial, and construction risks that could result in ITC Midwest's development of the Project being abandoned for reasons beyond ITC Midwest's control. ITC Midwest states that development of the Project has not yet reached the stage where ITC Midwest has begun applying for local, state, and federal permits required for development, but that it will be required to seek these authorizations and approvals and ensure that development and construction of the Project is conducted in compliance with underlying rules and regulations. ITC Midwest explains that, similar to any transmission developer, ITC Midwest has limited insight into environmental factors that will shape the path of the Project and could prevent construction and operation. In addition, ITC Midwest asserts that large scale energy infrastructure projects, such as the Project, are increasingly facing

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<sup>26</sup> Eddy Test. Ex. 1 at 7.

<sup>27</sup> Transmittal at 4-5.

<sup>28</sup> See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,301, at P 14 (2017); *TransCanyon DCR, LLC*, 152 FERC ¶ 61,017, at P 17 (2015) (*TransCanyon*); *Pac. Gas & Elec. Co.*, 148 FERC ¶ 61,195, at P 14 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,246, at P 15 (2015); *S. Ind. Gas & Elec. Co.*, 125 FERC ¶ 61,124, at P 28 (2008).

challenges in administrative and judicial forums by project opponents that increase the risk that a needed permit will be denied.<sup>29</sup>

18. More specifically, ITC Midwest states that the Project faces potentially significant financial risks and challenges associated with the regulatory and environmental risks, which could negatively impact financial stability and result in high capital costs. ITC Midwest argues that the Commission has recognized that transmission development poses inherent financial risks including cash flow risks associated with long lead time facilities being placed into rate base.<sup>30</sup>

19. Finally, ITC Midwest asserts that it faces risks and challenges in connection with constructing the Project because costs for construction materials, specialized skilled labor, and specialized equipment continue to remain high and fluctuate significantly due to supply chain and labor shortages that resulted from the COVID-19 pandemic. ITC Midwest further explains that these costs and uncertainty are exacerbated at a macro level by geopolitical unrest, extreme weather events of increased frequency and intensity, and intense competition for scarce resources.<sup>31</sup>

20. ITC Midwest states that, in accordance with Order No. 679 and Commission precedent, if abandonment is required, ITC Midwest will make an appropriate filing under section 205 demonstrating the prudence of the costs for which recovery is sought before collecting any abandonment costs. Therefore, ITC Midwest commits to maintaining a zero balance in its Attachment O template for the placeholder associated with the recovery of abandoned plant costs for the Project until the Commission approves such rates in a future section 205 filing.<sup>32</sup>

**b. Consumer Alliance Protest**

21. Consumer Alliance argues that ITC Midwest's development of the Project is premature and should be rejected due to questionable legality of the assignment of the

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<sup>29</sup> Transmittal at 6.

<sup>30</sup> *Id.* (citing Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 12).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 8 (citing *ALLETE, Inc.*, 153 FERC ¶ 61,296, at PP 33-34 (2015) (*ALLETE*); *Midcontinent Indep. Sys. Operator, Inc.*, 160 FERC ¶ 61,101 (2017)).

Iowa portion of the Project to ITC Midwest.<sup>33</sup> According to Consumer Alliance, ongoing legal challenges to Iowa's right of first refusal (ROFR) statute's state constitutionality were filed against the state of Iowa and the Iowa Utilities Board and, if such legal challenges prevail, then MISO's assignment of the Iowa portion of the Project could be legally invalid.<sup>34</sup> Consumer Alliance asserts that, to avoid violating its Tariff, MISO would be required to expeditiously initiate its Competitive Transmission Process for the Project. Consumer Alliance states that it understands that the ROFR statute litigation is likely to conclude within the next several months. Because the Project does not have an in-service date until December 31, 2029, and because a significant portion of the Project's Iowa route is located in already-existing easements, Consumer Alliance argues that settling the issue of development authority will not materially delay construction. Moreover, Consumer Alliance asserts that the consumer benefits to be derived from the entire Project being subject to MISO's Competitive Developer Selection Process should outweigh any concern about modest delays.<sup>35</sup>

22. Consumer Alliance argues that MISO assigned ITC Midwest the Project pursuant to a state law that is not currently in effect and that is surrounded by legal uncertainty that directly impairs ITC Midwest's eligibility to develop the Iowa portion of the Project.<sup>36</sup> Consumer Alliance further argues that ITC Midwest has not demonstrated that its ability to proceed is free and clear of any legal impediments arising from the pending ROFR litigation.<sup>37</sup> It is Consumer Alliance's opinion that the prudence of incurred costs by ITC Midwest for its investment in the Project can be questioned due to ITC Midwest's development authority being under a legal cloud.<sup>38</sup> Consumer Alliance asserts that, if ITC Midwest chooses to move forward with the Project, it should do so at its own risk and that consumers should not subsidize ITC Midwest for costs it incurs related to its investment in the Project while the question of ITC Midwest's development authority is being determined by the Iowa courts.<sup>39</sup>

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<sup>33</sup> Consumer Alliance Protest at 11.

<sup>34</sup> *Id.* at 9-11.

<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 12-13.

<sup>39</sup> *Id.* at 13.

23. Moreover, Consumer Alliance argues that, even if ITC Midwest had clear legal authority to proceed with developing the Project, ITC Midwest's request is premature because the scope of the work to be constructed by ITC Midwest has not been finalized.<sup>40</sup> Consumer Alliance contends that ITC Midwest does not at this time have any certainty regarding the degree to which it will be responsible for constructing the Mississippi River crossing, as responsibility for constructing the Mississippi River crossing portion will be determined after the completion of the Competitive Developer Selection Process for the Illinois portion of the Project.<sup>41</sup> Consumer Alliance argues that the Commission should reject ITC Midwest's request because ITC Midwest's request would sign consumers up for the role of insurers of last resort without full appreciation of the liability they are assuming.<sup>42</sup>

24. Consumer Alliance further argues that the Commission should reject ITC Midwest's request on the merits because ITC Midwest has not met its burden to demonstrate that its request for the Abandoned Plant Incentive is warranted and will produce just and reasonable rates.<sup>43</sup> Consumer Alliance explains that ITC Midwest has not tailored its request to the Project's demonstrable risks and challenges because ITC Midwest has not presented detailed factual information to support its assertion that the risks and challenges ITC Midwest faces in developing the Project are appropriately tailored to the Abandoned Plant Incentive.<sup>44</sup> According to Consumer Alliance, ITC Midwest claims that it identifies three broadly stated risks providing a sufficient detailed factual foundation for the Abandoned Plant Incentive, but ITC Midwest does not supply support for any of these stated risks.<sup>45</sup>

25. Consumer Alliance contends that ITC Midwest does not explain in any detail how the need to secure local, state, and federal permits increase the Project's regulatory and environmental risks and challenges. According to Consumer Alliance, the Project is not a greenfield transmission line, as portions of the new facilities will be built within existing easements, which obviates the risk of securing new easements and lowers the

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 14.

<sup>44</sup> *Id.* at 15-16.

<sup>45</sup> *Id.* at 16.

risk of permit denial.<sup>46</sup> Consumer Alliance asserts that ITC Midwest has not explained how its particular location or configuration for the Project, a large scale infrastructure project, increases permitting risks beyond that presented by a routine project or how the cancellation risk is so exceptional that it requires ratepayers to provide a safety net for its investors.<sup>47</sup>

26. Consumer Alliance argues that, while ITC Midwest claims to face potentially significant financial risks and challenges, such as cash flow risks associated with long lead time facilities being placed into rate base, ITC Midwest does not seek a construction work in progress incentive, but instead seeks only the Abandoned Plant Incentive to facilitate financing by pre-authorizing the recovery of prudently incurred development costs if the Project is cancelled. Consumer Alliance contends that ITC Midwest fails to provide a nexus between the requested Abandoned Plant Incentive and the Project's risks and challenges.<sup>48</sup> In addition, Consumer Alliance argues that, while ITC Midwest claims that regulatory and environmental risks can negatively affect financial stability and result in higher capital costs for the Project, ratepayers deserve more than assertions and generalizations if they are to insure ITC Midwest's development costs associated with the Project.<sup>49</sup>

27. Consumer Alliance also argues that ITC Midwest cites vague generalities to support its assertion that the Project is presented with construction-related risks and challenges that could result in cancellation. According to Consumer Alliance, the construction-related risks and challenges that ITC Midwest claims to be presented with are operating norms rather than exceptional or specific to the Project. Consumer Alliance contends that ITC Midwest fails to explain why it deserves the 100% Abandoned Plant Incentive if the Project is cancelled in lieu of the Commission's 50% cost recovery when large, critical infrastructure projects in other sectors of the economy do not have any such assurance. Consumer Alliance further contends that, if the Project were subject to MISO's Competitive Transmission Process, the Selected Developer would likely commit to higher levels of cost containment and a cost cap, all of which contrast ITC Midwest's proposal to construct the Project.<sup>50</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 16-17.

<sup>48</sup> *Id.* at 17.

<sup>49</sup> *Id.* at 17-18.

<sup>50</sup> *Id.* at 18-19.

28. Consumer Alliance asserts that ITC Midwest's request falls short of establishing a nexus between the risks the Project faces and the Abandoned Plant Incentive being sought, and that ITC Midwest has demonstrated a fundamental disregard for what it is asking consumers to undertake. Consumer Alliance argues that ITC Midwest claims that ITC Midwest's request is similar to recent Commission approved abandoned plant incentive requests, notwithstanding that ITC Midwest's only support for its position is that its request is consistent with abandoned plant incentives that the Commission approved for other projects in the 2021 MTEP. Consumer Alliance further argues that ITC Midwest fails to recognize the specific risks other projects faced in recent Commission approved abandoned plant incentive requests and the comparative advantages ITC Midwest enjoys.<sup>51</sup>

29. Additionally, Consumer Alliance argues that ITC Midwest has failed to demonstrate that the resulting rates from the Abandoned Plant Incentive will be just and reasonable. According to Consumer Alliance, ITC Midwest overlooks the other incentives that it receives, such as its return on equity of 10.02%, 25 basis point Transco adder, and 50 basis point Regional Transmission Organization adder, and fails to address the specific rate impacts to the Attachment O-ITC Midwest formula rate.<sup>52</sup> Consumer Alliance also argues that, while ITC Midwest's request addresses the current regulatory framework that provides transmission owners with a presumption that abandoned plant costs are prudent or recoverable, any prudently incurred plant costs that consumers are required to pay for that do not benefit or serve them should be recovered with a return based upon a lower cost of capital. Consumer Alliance contends that abandoned plant cost recovery should only be narrowly permitted on a case-by-case basis without any presumption that abandoned plant costs are prudently incurred and that ITC Midwest has failed to demonstrate that its request for the Abandoned Plant Incentive is narrowly tailored to meet the Project's risks and challenges.<sup>53</sup>

**c. ITC Midwest Answer**

30. ITC Midwest states that none of the issues that Consumer Alliance raises is relevant to the factors that are considered by the Commission when deciding to authorize an abandoned plant incentive. Additionally, ITC Midwest claims that Consumer Alliance improperly attempts to inject state legal proceedings into this proceeding and suggests

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<sup>51</sup> *Id.* at 19-20.

<sup>52</sup> *Id.* at 21.

<sup>53</sup> *Id.* at 21-23.

that incentive applications should be held in abeyance if they are subject to ongoing litigation, despite citing no Commission precedent that would support this proposition.<sup>54</sup>

31. ITC Midwest further argues that Consumer Alliance's assertion that ongoing state court litigation requires the application to be rejected outright is unsupported for several reasons. ITC Midwest avers that Consumer Alliance's argument relies on the assertion that the Iowa ROFR statute is void *ab initio*, despite the Iowa Supreme Court specifically declining to make such a ruling.<sup>55</sup> Additionally, ITC Midwest points out that the Iowa Utilities Board recently authorized it to begin holding public outreach meetings to discuss the Project with local communities, which ITC Midwest argues evidences a need for it to begin the development process now in order to construct the Project on time. Additionally, ITC Midwest counters Consumer Alliance's contention that final resolution of the state court litigation is likely to conclude in the next couple of months. ITC Midwest argues that requiring an applicant requesting the abandoned plant incentive to demonstrate that it is "free and clear of any legal impediments" imposes a requirement that has never been adopted by the Commission.<sup>56</sup>

32. ITC Midwest contends that Consumer Alliance's argument that ITC Midwest should not be eligible for incentive rate treatment, because the MTEP process is not sufficiently open and transparent as MISO allowed ITC Midwest to develop the Project based solely on its incumbent status, is an impermissible collateral attack to MISO's filed rate that must be rejected. ITC Midwest argues that Consumer Alliance has already filed a pending complaint against MISO that if granted would require MISO to use competitive solicitations for all MTEP Multi Value Projects.<sup>57</sup>

33. ITC Midwest argues that its application is similar to other applications submitted by other developers that have been recently granted the abandoned plant incentive by the Commission.<sup>58</sup> ITC Midwest further points out that the abandoned plant incentive only grants the developer the opportunity to collect up to 100% of prudently made investments. ITC Midwest argues that Consumer Alliance correctly recognizes that ITC

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<sup>54</sup> ITC Midwest Answer at 2-3.

<sup>55</sup> *Id.* at 3, 9 (citing *LS Power Midcontinent, LLC v. State*, Appellant's Response to Petitions for Rehearing at 10-11, 21-22, Case No. 21-0696 (April 19, 2023); *LS Power Midcontinent, LLC v. State*, 988 N.W.2d 316 (Iowa 2023), *reh'g denied* (Apr. 26, 2023) (*LS Power*)).

<sup>56</sup> *Id.* at 9-10 (quoting Consumer Alliance Protest at 10).

<sup>57</sup> *Id.* at 14-15.

<sup>58</sup> *Id.* at 3.

Midwest “moves forward at its own risk” as future cost recovery associated with abandonment would be subject to a section 205 filing that demonstrates the prudence of the investments and which would be subject to challenge by interested parties at that point in time. ITC Midwest argues that rejecting its application at this stage would fundamentally alter longstanding Commission policy and precedent, which carefully balances the needs of developers to mitigate risks early in the development process while preserving the ability of customers to later challenge the prudence of costs if a project is abandoned.<sup>59</sup>

34. ITC Midwest argues that its application is supported by testimony that demonstrates that the Abandoned Plant Incentive request is narrowly tailored to mitigate specific risks associated with the development of the Project, including regulatory approvals from various state and federal agencies and local approvals such as zoning modifications or exemptions for substation construction, county road permits and drainage district approvals, in addition to legal challenges to such approvals.<sup>60</sup> Furthermore, ITC Midwest argues that, contrary to Consumer Alliance’s arguments, the Project is not a routine investment made in the ordinary course of expanding the system to provide safe and reliable transmission service, but instead is a project selected as part of the “largest and most complex transmission study effort in MISO’s history.”<sup>61</sup>

35. ITC Midwest argues that, despite Consumer Alliance’s contention otherwise, ITC Midwest has narrowly tailored the request, and the supporting testimony filed with its application presents the same significant operational, legal, regulatory, and environmental risks faced by other high voltage long-range transmission projects that the Commission has routinely authorized for abandoned plant incentive rate treatment.<sup>62</sup>

36. ITC Midwest further argues that Consumer Alliance ignores the fact that ITC Midwest will be required to file for recovery of any Abandoned Plant Incentive pursuant to section 205 when arguing that the Abandoned Plant Incentive is not narrowly tailored because it does not reflect the fact that the Project may use existing easements and rights of way. ITC Midwest contends that Consumer Alliance’s argument that, because ITC Midwest enjoys Commission-approved formula rates, it is distinguishable from other MISO LRTP projects that have been granted similar incentives is an impermissible collateral attack. Further, ITC Midwest avers that the Commission’s transmission

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<sup>59</sup> *Id.* at 3-4, 10.

<sup>60</sup> *Id.* at 7, 12.

<sup>61</sup> *Id.* at 12 (quoting 2021 MTEP Report at 1).

<sup>62</sup> *Id.*

incentive policies and precedent do not make a distinction based on whether an applicant or its affiliates have accepted Commission formula rates.<sup>63</sup>

37. ITC Midwest further argues that the Commission should not penalize it for deciding to engage in prudent planning and development practices by later consulting with the Selected Developer to determine which entity is best positioned to construct the segment of the Project for the Mississippi River crossing. ITC Midwest commits that, if it is later determined that the Selected Developer should be responsible for the Mississippi River crossing, and the Project is ultimately abandoned for reasons outside of its control, ITC Midwest would not seek to recover any costs associated with the Mississippi River segment. ITC Midwest also argues that it would benefit customers for the Iowa and Illinois developers to fully consider the permitting risks and other regulatory approvals needed for the crossing before deciding on responsibility. ITC Midwest asserts that requiring it to wait for the outcome of the competitive solicitation process before it can seek the Abandoned Plant Incentive as Consumer Alliance argues, would “unnecessarily prejudice ITC Midwest and make it hostage to the delays inherent in the competitive solicitation process.”<sup>64</sup>

**d. Consumer Alliance Answer**

38. Consumer Alliance argues that ITC Midwest’s right to construct and own the Project is derived solely from Iowa’s ROFR statute, which the Iowa Supreme Court has enjoined, recognizing that the public interest of consumers is harmed due to the competition avoidance purpose of the Iowa ROFR statute.<sup>65</sup> Consumer Alliance asserts that ITC Midwest’s request for the Abandoned Plant Incentive seeks to ensure that consumers bear the risk of its actions in advancing the Project notwithstanding the ongoing Iowa ROFR statute litigation. Consumer Alliance maintains that ITC Midwest has failed to demonstrate that the authorization of the Abandoned Plant Incentive is needed or appropriate prior to the end of that litigation and that the Commission should therefore defer to Iowa’s judicial process.<sup>66</sup> Consumer Alliance notes that ITC Midwest

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<sup>63</sup> *Id.* at 13.

<sup>64</sup> *Id.* at 15.

<sup>65</sup> Consumer Alliance Answer at 3.

<sup>66</sup> *Id.* at 3-4.

could come back to the Commission and seek the incentive if and when it has clear legal authority to own and develop the Project.<sup>67</sup>

39. Consumer Alliance argues that, contrary to ITC Midwest's claims, the underlying Iowa ROFR statute litigation does not entail expected landowner resistance, environmental, or permitting risks or matters entirely "beyond the control of the utility."<sup>68</sup> Consumer Alliance contends that, rather, the underlying Iowa ROFR statute litigation can be traced to efforts by ITC Midwest to promote the Iowa ROFR statute to receive a preferential treatment for the Project arising out of MISO's LRTP to avoid the application of Order No. 1000's transmission competition policies.<sup>69</sup> According to Consumer Alliance, neither Commission policy nor precedent indicates an intent under Order No. 679 or section 219 to relieve transmission developers from litigation risks they helped create or exacerbate, or to impose the costs of voluntary assumption of such risks on consumers. Consumer Alliance asserts that, if ITC Midwest wishes to proceed with the development of the Project, it should do so at its own risk and not be authorized by the Commission to pass any abandonment costs on to consumers.<sup>70</sup>

40. Consumer Alliance contends that ITC Midwest does not demonstrate any authority under Order No. 679 or any Commission precedent to prematurely request the Abandoned Plant Incentive for a substantial scope of work for the Project that has yet to be clearly defined or assigned. Consumer Alliance argues that ITC Midwest's request does not delineate any specific facts, challenges, and risks or a detailed explanation regarding the Mississippi River crossing portion of the Project. Consumer Alliance's asserts that the Commission does not have enough information on which to review ITC Midwest's request to determine if ITC Midwest's request complies with Order No. 679's

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<sup>67</sup> *Id.* at 9.

<sup>68</sup> *Id.* at 4 (citing Order No. 679, 116 FERC ¶ 61,057 at PP 165-166).

<sup>69</sup> *Id.* at 4-5 (citing *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051, at PP 332, 335 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g & clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014)).

<sup>70</sup> *Id.* at 5.

requirements that the incentives requested are “tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project.”<sup>71</sup>

41. Moreover, Consumer Alliance argues that ITC Midwest has not met its burden to demonstrate that the requested Abandoned Plant Incentive is tailored to meet the risks and challenges of the Project and will produce just and reasonable rates. Consumer Alliance contends that ITC Midwest only generically refers to MISO’s transmission expansion plan process and generically applicable risks, Commission policy, and other incentive requests to support its request.<sup>72</sup>

42. Consumer Alliance notes that neither Order No. 679 nor section 219 mandates that all eligible projects automatically receive the incentives requested. Consumer Alliance argues that ITC Midwest overlooks the Commission’s emphasis in the Transmission Incentives Policy Statement that the objective of section 219 is to encourage transmission infrastructure investment “while maintaining just and reasonable rates.”<sup>73</sup> Consumer Alliance further argues that the abandoned plant incentive is a “risk mitigation” incentive, and the Commission made it clear in the Transmission Incentives Policy Statement that it “expects applicants to take all reasonable steps to mitigate the risks of a project.”<sup>74</sup> Consumer Alliance asserts that, here, not only has ITC Midwest failed to mitigate the risks it seeks to protect against, it has voluntarily and proactively assumed those risks; therefore, the Commission need only find that ITC Midwest’s request is premature and that ITC Midwest has not “take[n] all reasonable steps to mitigate the risks of a project.”<sup>75</sup>

**e. Commission Determination**

43. We grant ITC Midwest’s request for the Abandoned Plant Incentive. In Order No. 679, the Commission found that this incentive is an effective means of encouraging transmission development by reducing the risk of non-recovery of costs in the event that

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<sup>71</sup> *Id.* at 5-6 (citing Order No. 679-A, 117 FERC ¶ 61,345 at PP 6, 21).

<sup>72</sup> *Id.* at 6-7.

<sup>73</sup> *Id.* at 7 (citing Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 1).

<sup>74</sup> *Id.* at 8 (citing Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 4).

<sup>75</sup> *Id.* at 8-9 (citing Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 4).

a project is abandoned for reasons outside of the applicant's control.<sup>76</sup> We find 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. Thus, we find that ITC Midwest has demonstrated a nexus between its requested incentive and its planned investment, and that ITC Midwest has tailored its incentive rate request to its identification of risks and challenges associated with the Project.

44. Consumer Alliance contends that ITC Midwest's request for the Abandoned Plant Incentive should be denied based on the questionable legality of Iowa's ROFR statute, and that ITC Midwest has not demonstrated that its ability to proceed is free and clear of any legal impediments arising from the pending ROFR litigation. We disagree that ITC Midwest's request should be denied based on the pendency of litigation challenging Iowa's ROFR statute. 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 or Commission precedent.<sup>77</sup>

45. With respect to Consumer Alliance's argument that the Commission "presumes that all expenditures are prudent, so the utility need not justify in its case-in-chief the prudence of all of its costs," and that the Commission should reconsider its procedures and criteria for awarding the abandoned plant incentive, we find that these arguments are premature and outside of the scope of this proceeding.<sup>78</sup> We note, however, that our granting 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.<sup>79</sup> The Commission will address the prudence of any costs incurred if and

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<sup>76</sup> Order No. 679, 116 FERC ¶ 61,057 at PP 163-166; *see also, e.g., ALLETE*, 153 FERC ¶ 61,296 at P 28; *TransCanyon*, 152 FERC ¶ 61,017 at P 41.

<sup>77</sup> *See* Order No. 679, 116 FERC ¶ 61,057 at PP 163-165; *see also NextEra Energy Transmission Southwest, LLC*, 180 FERC ¶ 61,032, at PP 8, 18-19 (2022); *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, at P 49 (2009), *order on reh'g & clarification*, 130 FERC ¶ 61,044, at P 58 (2010).

<sup>78</sup> Consumer Alliance Protest at 22-23 (quoting *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050, at P 100 (2017) (*PATH*)).

<sup>79</sup> *PATH*, 158 FERC ¶ 61,050 at P 100 ("The Commission permits challenges to the prudence of individual expenditures when the Commission's filing requirements, policy, or precedent require otherwise, the Commission itself determines that the company must establish the prudence of an expenditure, or a party creates serious doubt as to the prudence of an expenditure.").

when ITC Midwest makes a filing under section 205 seeking recovery of such costs, and Consumer Alliance (and any other interested person) is free to challenge the prudence of such costs at that time.<sup>80</sup>

46. We disagree with Consumer Alliance's contention that ITC Midwest's request fails to recognize the specific risks other projects faced in recent Commission-approved abandoned plant incentive requests. The Commission stated in Order No. 679 that it will evaluate each request for incentives pursuant to that final rule on the merits of the individual application, on a case-by-case basis.<sup>81</sup> In addition, we disagree with Consumer Alliance's argument that ITC Midwest has not explained how the Project's risks and challenges differ from those of a routine project. In the Transmission Incentives Policy Statement, the Commission explained that it would no longer apply the Order No. 679 nexus analysis based on whether a proposed project is routine or non-routine.<sup>82</sup> Furthermore, we find that Consumer Alliance's argument that, if the Project were subject to MISO's Competitive Transmission Process, the Selected Developer would likely commit to higher levels of cost containment and a cost cap is outside of the scope of this proceeding.<sup>83</sup>

47. Regarding Consumer Alliance's argument that ITC Midwest has not taken all reasonable steps to mitigate risks, the Commission explained in the Transmission Incentives Policy Statement that it "expects an applicant that requests an *incentive ROE* based on a project's risks and challenges to demonstrate that it is taking appropriate steps and using appropriate mechanisms to minimize its risks during project development."<sup>84</sup> Further, the Commission specifically pointed to the risk-reducing incentives, such as the abandoned plant incentive, as one such appropriate step that could be used by an applicant to mitigate risks.<sup>85</sup>

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<sup>80</sup> We also note ITC Midwest's commitment not to seek recovery for any costs associated with the Mississippi River crossing if the Selected Developer – and not ITC Midwest – is determined to be responsible for that portion of the Project.

<sup>81</sup> See Order No. 679, 116 FERC ¶ 61,057 at P 43.

<sup>82</sup> Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 10.

<sup>83</sup> Consumer Alliance Protest at 18-19.

<sup>84</sup> Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 24 (emphasis added).

<sup>85</sup> *Id.* PP 4, 24.

48. The Abandoned Plant Incentive for the Project will be available to ITC Midwest for 100% of prudently-incurred costs expended on and after the date of this order, if the Project were to be abandoned for reasons beyond ITC Midwest's control.<sup>86</sup> As discussed above, we will not determine the prudence of any costs incurred prior to the abandonment, if any, until ITC Midwest seeks such recovery in a future section 205 filing.<sup>87</sup>

The Commission orders:

ITC Midwest's request for the Abandoned Plant Incentive for the Project is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Christie is dissenting with a separate statement attached.

( S E A L )

Debbie-Anne A. Reese,  
Deputy Secretary.

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<sup>86</sup> Order No. 679, 116 FERC ¶ 61,057 at P 163; *see San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, at 137-38 (D.C. Cir. 2019) (*SDG&E*); *see also, e.g., NextEra Energy Transmission Midwest, LLC*, 166 FERC ¶ 61,169, at P 21 (2019); *GridLiance W. Transco LLC*, 164 FERC ¶ 61,049, at P 20 (2018); *Pac. Gas & Elec. Co.*, 163 FERC ¶ 61,187 at P 14; *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,039, at P 28 (2023).

<sup>87</sup> Order No. 679, 116 FERC ¶ 61,057 at PP 165-166. In the event that ITC Midwest seeks abandoned plant recovery for the time period prior to the effective date of this order, ITC Midwest would be eligible to seek recovery of 50% of its prudently-incurred costs, consistent with prior precedent. *See, e.g., San Diego Gas & Elec. Co.*, 154 FERC ¶ 61,158, *order on reh'g*, 157 FERC ¶ 61,056 (2016), *aff'd*, *SDG&E*, 913 F.3d 127.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

ITC Midwest, LLC

Docket No. ER23-2033-000

(Issued August 8, 2023)

CHRISTIE, Commissioner, *dissenting*:

1. I dissent because I see no compelling reason to grant ITC Midwest the Abandoned Plant Incentive right now. There currently is pending in the Iowa state courts a challenge to Iowa's Right of First Refusal (ROFR) law – the same law under which MISO assigned the Project to ITC Midwest.<sup>1</sup> Should the Iowa ROFR law ultimately be struck down by the Iowa courts, presumably the bidding for the Project would have to be rerun by MISO on a competitive basis and only then would the award of the Project be certain. In the alternative, should the Iowa ROFR law be upheld, the Commission could grant the incentive at that time.<sup>2</sup>

For these reasons, I respectfully dissent.

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Mark C. Christie  
Commissioner

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<sup>1</sup> Indeed, the Iowa Supreme Court has enjoined enforcement of the Iowa ROFR law pending the resolution of the state court litigation, concluding that the plaintiff challenging the Iowa ROFR law “has shown a likelihood of success on the merits of its claim that the ROFR’s enactment violates . . . the Iowa Constitution.” Consumer Alliance Protest, Ex. B at 35; *see also id.* at 4, 30.

<sup>2</sup> While the Commission should always seek to act expeditiously, I note too that there is no statutory deadline to act on ITC Midwest’s filing by a particular date. Moreover, while the majority suggests that nothing “preclude[s]” the Commission from granting the incentive and issuing this order, nothing requires it either. *ITC Midwest, LLC*, 184 FERC ¶ 61,083, at P 44 (2023).

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