

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

Industrial Energy Consumers of America,)	
Coalition of MISO Transmission Customers,)	
Wisconsin Industrial Energy Group, Resale)	Docket No. EL22-78-000
Power Group of Iowa, Association of Businesses)	
Advocating Tariff Equity, and Michigan)	
Chemistry Council,)	
Complainants,)	
)	
v.)	
)	
Midcontinent Independent System Operator, Inc.)	
Respondent.)	
)	

**COMMENTS OF LSP TRANSMISSION HOLDINGS II, LLC AND LS POWER
MIDCONTINENT, LLC IN SUPPORT OF COMPLAINT**

On July 22, 2022, the Industrial Energy Consumers of America; the Coalition of MISO Transmission Customers; the Wisconsin Industrial Energy Group; the Resale Power Group of Iowa; Association of Businesses Advocating Tariff Equity; and Michigan Chemistry Council (collectively, “Complainants”) filed a complaint against the Midcontinent Independent System Operator, Inc. (“MISO”) challenging provisions of Attachment FF of its Open Access Transmission, Energy and Operating Reserve Markets Tariff (“Tariff”) that inhibit opportunities for competitive solicitations.¹ The Complaint is timely as MISO is conducting a Long Range Transmission Planning initiative that, to date, has identified the need for over \$10 billion in new transmission facilities, approved as Multi-Value Projects, in the “Midwest” area of MISO. This is the first of four expected “tranches” of projects and the costs of the projects will be allocated

¹ Complaint of Industrial Consumers of America, et al., Docket No. EL22-78-000 (filed July 22, 2022) (“Complaint”).

across multiple zones within the MISO region. LS Power believes in the value of a clean energy transition and recognizes the importance of building new transmission to facilitate the transition, but the Federal Energy Regulatory Commission (“the Commission” or “FERC”) cannot ignore its statutory responsibility to ensure just and reasonable rates, which requires competition.

Under the MISO Tariff, many of the transmission projects that are part of the first tranche of projects, and by extension the investment in these projects, will not be subject to cost-saving competition primarily due to state right of first refusal laws. These state right of first refusal laws were passed at the behest of incumbent transmission owners as a specific response to the requirement to eliminate right of first refusal provisions in Order No. 1000. LS Power supports the Complaint.

LS Power agrees with Complainants that the Commission unquestionably has the ability to require MISO to conduct competitive solicitations for regionally beneficial Order No. 1000 projects in states with right of first refusal laws. The Federal Power Act directs the Commission to ensure that all rates charged for the transmission or sale of electric energy in interstate commerce are just and reasonable and not unduly discriminatory or preferential.² In Order No. 1000 the Commission found that rights of first refusal are barriers to entry that inhibit the participation of nonincumbent developers in the regional planning process, thereby undermining a region’s ability to select the more efficient or cost-effective solution.³ Regional transmission planning is within the Commission’s exclusive jurisdiction, and through Order No. 1000,⁴ the

² 16 U.S.C. § 824d (2018).

³ *See* Order No. 1000 at PP 255-565.

⁴ *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 at PP 225, 323 (2011) (“Order No. 1000”), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132 (“Order No. 1000-A”), *order on reh’g and 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).

Commission established that competition is necessary to establish just and reasonable rates for selected regional transmission facilities. State law cannot thwart the Commission’s regulation of matters over which the Commission has exclusive jurisdiction.

At a minimum, the Commission must grant the relief requested in the Complaint. The introduction of competition does not diminish a state’s jurisdiction over siting or retail rates, nor does it lead to transmission being built by “unqualified” nonincumbent developers. Developers must go through the relevant state siting process as well as the region’s qualification and evaluation process. Order No. 1000 required regions to establish a qualification process to ensure that only qualified developers are selected to build new transmission facilities⁵ and an evaluation process that ensures that selected transmission projects are the more efficient or cost-effective solutions.⁶

Indeed, LS Power urges the Commission to go even further and specifically preempt state right of first refusal laws. LS Power is not proposing that FERC preempt all state laws, just state right of first refusal laws that intrude on FERC’s exclusive jurisdiction over interstate transmission rates (and, as the 5th Circuit recently found in *NextEra Energy Capital Holdings, Incorporated; et. al., v. Chairman Peter Lake, Public Utility Commission of Texas, et. al.*, Case No. 20-50160, issued August 30, 2022 (“*NextEra*”), violate the dormant commerce clause to the United States Constitution.) Specifically, the Commission should use its authority to preempt state right of first refusal laws that target and ultimately nullify the FERC-ordered regional planning process that identifies and selects the more efficient or cost-effective regional transmission projects, such as the specific list of state right of first refusal laws outlined herein.

⁵ Order No. 1000, 136 FERC ¶ 61,051 at PP 225, 323.

⁶ See Order No. 1000 at P 328; Order No. 1000-A at P 452.

LS Power was on the ground in many of the right of first refusal discussions that took place before state legislatures and commissions, defending the competitive reforms in Order No. 1000 and opposing state right of first refusal bills.⁷ Because of that involvement, LS Power has accumulated extensive legislative history for each of the state right of first refusal laws that have been passed, including state legislative transcripts (both state floor legislative debates and state committee hearings) and materials showing legislative intent dating back over a decade in some cases. The legislative history of these laws, both in aggregate and on a state-by-state basis, demonstrates that they were a direct response to the Commission’s elimination of rights of first refusal with the intent to override the competition reforms adopted in Order No. 1000. Testimony and other materials also show how incumbent transmission owners sold a false narrative to their state legislatures – that state right of first refusal laws were needed in order for a state to preserve its jurisdiction over transmission siting and rates and to protect the reliability of the transmission system.

The Commission has the authority to preempt state right of first refusal laws that conflict with a Commission regulation issued pursuant to its delegated authority under the Federal Power Act to establish just and reasonable interstate transmission rates, *i.e.*, the FERC-ordered regional

⁷ When given the opportunity, LS Power has provided testimony opposing state right of first refusal laws. *See, e.g.*, Exhibit 2: Minnesota Legislative History at 9-11, 12, 13 (“Ex. 2”) (Unofficial Transcript of the hearing of the Minnesota Senate Energy, Utilities and Telecommunication Committee on Senate File 1815 held Mar. 20, 2012 at 00:19:28, 00:30:34, 00:33:00); Exhibit 7: Michigan Legislative History at 71-72 (“Ex. 7”) (Letter from Paul Thessen, President of LS Power Grid to the Honorable Dan Lauwers, Michigan State Senator, Chairman of the Energy and Technology Committee (Feb. 26, 2021); Exhibit 8: Texas Legislative History at 6-7 (“Ex. 8”) (Unofficial Transcript of Audio-Recorded of the Texas House of State Affairs Hearing on House Bill 3995 held on Apr. 1, 2019 at 21:24-25:1).

transmission planning process and the rates that result from that process.⁸ As the Supreme Court has said:

[W]e have emphasized that in a situation where state law is claimed to be pre-empted by federal regulation . . .the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area.⁹

Consistent with this authority, the Commission and other federal regulatory authorities have acted to preempt state laws.¹⁰

⁸ *United Distribution Co. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), citing therein *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982).

⁹ *City of New York v. FCC*, 486 U.S. 57, 64, 108 S. Ct. 1637, 1642 (1988), quoting *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986); see also, *National Fuel Gas Supply Corporation v. Public Service Commission of the New York*, 894 F.2d 571 (2nd Cir 1990)(finding New York state process for reviewing FERC approved interstate pipeline projects preempted.).

¹⁰ *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (upholding Commission preempting state regulation of buy-sells in Order No. 636 because of the effect that buy-sells have on interstate transportation—namely, that “buy/sells” facilitate circumvention of the FERC regulated interstate transportation capacity release program); see *California Power Exchange Corporation, et al., v California Independent System Operator Corporation and California Electricity Oversight Board*, 85 FERC ¶ 61,263 (1998)(Commission preempted the operation of the California Oversight Board when Commission determined that the continuing functions of the Oversight Board established by the [California] Restructuring Legislation conflict with its statutory duties under the FPA because “the FPA prevails under the Supremacy Clause” and “the preemption may result from federal agency action taken within the scope of its congressionally delegated authority,” citing therein *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986)); see also *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, 34 FCC Rcd. 5702 (2019)(preempting San Francisco law requiring sharing of in-use wiring on three independent grounds: (1) it impedes federal policy of promoting facilities-based competition as a means of encouraging deployment, investment, and innovation in broadband and other communications infrastructure and services; (2) in-use wire sharing infringes on the Commission’s regulation of cable inside wiring; and (3) an in-use wire sharing requirement intrudes on the Commission’s authority over cable signal quality and technical standards and is inconsistent with the Commission’s prior decision not to mandate wire sharing.)

The Commission should use its authority to preempt state right of first refusal laws that target and ultimately nullify the FERC-ordered regional planning process that identifies and selects the more efficient or cost-effective regional transmission projects, such as the specific state right of first refusal laws described herein. Order No. 1000 required that regions use a competitive process to select among developers competing for the opportunity to advance a regional project, *i.e.* a Multi-Value Project or Market Efficiency Project in MISO. State right of first refusal laws directly target that process by prohibiting any transmission project selected in an Order No. 1000 competitive solicitation from being advanced in the state. Such targeting nullifies the FERC set rate and therefore should be preempted.

Moreover, in preempting state right of first refusal laws, LS Power asks that the Commission take into consideration the recent decision in *NextEra*.¹¹ As the *NextEra* court said, the dormant Commerce Clause, “prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.” *Slip op.* at 14. State right of first refusal laws are designed to protect incumbent utilities from competition, the result of which is higher overall interstate transmission rates and higher costs paid by consumers in non-right of first refusal states. Because competition lowers costs, the absence of competition results in higher overall costs. But these higher costs are not paid by only the consumers in the right of first refusal states. While that in and of itself would be unjust and unreasonable, these higher costs may also be paid by consumers in non-right of first refusal states. In short, consumers in

¹¹ LS Power is asking the Commission to address the dormant Commerce Clause arguments similar to how the Commission handles antitrust issues. The Commission does not enforce the antitrust laws but takes antitrust principles into effect in setting just and reasonable rates. Similarly, LS Power is not asking that the Commission to declare state right of first refusal laws unconstitutional. Rather in determining whether such laws should be preempted, LS Power is only asking that the Commission take into account the unjust and unreasonable rates that result from state right of first refusal laws – laws which LS Power believes violate the dormant Commerce Clause.

the non-right of first refusal states pay higher costs because states with right of first refusal laws are protecting their local utilities from competition, a decision for which those consumers in non-right of first refusal states had no say.¹² To prevent the unjust and unreasonable interstate transmission rates that necessarily arise from right of first refusal laws, the Commission should preempt state right of first refusal laws that take direct aim at the federal transmission planning process, such as the specific list of state right of first refusal laws outlined herein.

I. THE LEGISLATIVE HISTORY OF STATE RIGHT OF FIRST REFUSAL BILLS DEMONSTRATES THAT THEY WERE PASSED SPECIFICALLY TO UNDERMINE THE COMMISSION’S REGULATIONS

The following section discusses the individual state legislative history of the right of first refusal laws passed in states that are part of the MISO region, including Indiana, Iowa, Michigan, Minnesota, Montana, Missouri, North Dakota, South Dakota, and Texas.¹³ The thousands of pages of transcripts from state legislative histories compiled over the past decade are attached to these Comments. These legislative histories show that each law was a targeted reaction to Order No. 1000’s finding that rights of first refusal are unjust and unreasonable practices affecting rates and intended to override the Commission’s decision to eliminate them. The legislative history further demonstrates that many incumbent transmission owners falsely claimed that right of first refusal laws are necessary to preserve the state’s jurisdiction over siting and rates and protect the

¹² *United Haulers Association, Inc., et. al. v. Oneida-Herkimer Solid Waste Management Authority, et. al.*, 127 S. Ct. 1786 (2007) (Supreme Court “dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other states, because when “the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”)

¹³ The hundreds of pages of legislative history, including unofficial transcripts of audio-recordings from state legislative hearings, compiled over the past decade are also attached. For ease of reference, LS Power has grouped the materials into state-by-state exhibits.

reliability of the transmission system, arguments that the Commission addressed in Order No. 1000. The Commission cannot ignore the legislative history of these laws and must take action.

A. States That Have Passed Right Of First Refusal Laws In The MISO Region

1. South Dakota

The South Dakota legislature passed a right of first refusal bill in 2011, SB 132, after the Commission issued the Notice of Proposed Rulemaking in the Order No. 1000 rulemaking proceeding. During a hearing on the bill in the South Dakota Senate, the bill's primary sponsor, South Dakota Senator Tim Rave, explained that

So, um, starting in the year, about 2000, the feds tried to incite [incent] transmission, uh, these regional organizations have come together and, uh, they spend a lot of time on cost allocation. They spend a lot of time bending these processes. They spend a lot of time on transmission because essentially, it's bigger than a state can manage.

So, in our particular case, uh, MISO, along with a couple of the other RTOs, extended, right of first refusal to the -- to the income [incumbent] utilities. What that means essentially is, that if an outsider comes in to your service area and wants to connect to your facility, and that's important, then the first right goes to that income utility to look at the project and decide whether or not it's got merit to their customers and merit within the project.

Um, MISO extended that right, because as you'll understand, uh, transmission, because it's so expensive [is expensive] and is difficult and is detailed. So, all of the MISO shareholders, all of the stakeholders, all of the member states, all of the public utility commissions are affected.

They participate in this very transparent, very laborious prospect project to come to some closure about what to do with transmission. So it's, for that reason that we came the bill, because it's the engineers brought the bill to us because the idea of -- of taking ROFR away and disrupting transmission, um, it just sends them running, screaming from the room.¹⁴

¹⁴ Exhibit 1: South Dakota Legislative History at 3 ("Ex. 1") (Unofficial Transcript of Audio-Recorded during the February 8, 2011 hearing of the South Dakota Senate Commerce and Energy

Thus, Senator Rave believed that the bill was necessary due to “[r]ecent action by the Federal Energy Regulatory Commission, or FERC,” that “threatens to eliminate this first right,”¹⁵ and that the bill was meant to “preserve that first right in South Dakota.”¹⁶ He added that:

The customers and shareholders of the transmission owning utility companies in South Dakota would be adversely affected by FERCs elimination of this first right.

FERCs action could require the public utilities and their customers to bear the transmission development costs of out-of-state transmission developers. The developers do not have the obligation, like our public utilities, to serve the public reliably and economically.¹⁷

The sponsor of the bill in the South Dakota House, South Dakota Representative Mark Willadsen, made similar comments:

Recent action by the Federal Energy Regulatory Commission, or FERC, F-E-R-C, threatens to eliminate this first right. Now, Senate Bill 132 would preserve that first right here in South Dakota.

Now the customers and shareholders of the transmission, owning utility companies in South Dakota, would be adversely affected by FERC’s elimination of this first right. FERC’s action could require these public utilities and their customers to bear the transmission line development costs of out-of-state transmission line developers.

The developers, however, don’t have the obligation, like our local public utilities, to serve the public reliably and economically. Now, our public utilities’ original decisions to join MISO [MISO] were premised on the first right to construct and operate these transmission lines and their customers and their shareholders’ share in the benefits of this right.

Committee on SB 132 at 6:3-7:7 (“Unofficial South Dakota Senate Hearing Transcript”). Hearing audio available at, <https://sdpb.sd.gov/sdpbpodcast/2011/sco18.mp3#t=963>).

¹⁵ Ex. 1 at 2 (Unofficial South Dakota Senate Hearing Transcript at 2:21-23).

¹⁶ Ex. 1 at 2 (Unofficial South Dakota Senate Hearing Transcript at 2:23-24).

¹⁷ Ex. 1 at 2 (Unofficial South Dakota Senate Hearing Transcript at 2:24-3:8).

Passing Senate Bill 132 will ensure the first right continues to exist in South Dakota.¹⁸

Two lobbyists for investor-owned utilities in South Dakota testified in support of the bill. During the South Dakota Senate Hearing, lobbyist Steve Willard made a connection between the “need” for the bill and the Commission’s then-NOPR proposal to eliminate rights of first refusal.

What we're trying to do in a nutshell is extend that contractual right, that we have at this time, and extending it into state statute. And we're doing that in anticipation of the federal action. Now, maybe the fact that we've done that sends a message to the feds and, uh, they say, no, no, we just, we won't try to take ROFR away.

Um, North Dakota’s doing the same thing. I saw Jeff Simon came down this morning from MDU in North Dakota, came out of committee, and essentially tried to do the same thing. So maybe if enough staying -- states gang up and send a message to FERC, they’ll say no, no, we understand, we’ll leave it alone.

I can't speak to that, but if they take it away, then our attorneys and our engineers are convinced that if they take it away, that, uh, we will essentially have manifested that right in state statute. A right that we already have today by contract.¹⁹

He also discussed how the bill’s language “emulated” MISO’s Tariff regional planning language:

So, the action really is in section three. Now, the first sentence reads a little bit like a policy statement, and that essentially extends our right to construct owner maintain to facilities owned by the incumbent electric transmission owner. And, um, that seems a little obvious, but I can tell you exactly where that came from. Um, my soul [sole] language, one of the appendixes within MISO, essentially that’s a portion of the language that FERC has signed off on. So we tried as best we could to emulate the federal language because it's got federal approval. And so we extended that sentence into the statute.²⁰

¹⁸ Ex. 1 at 36 (Unofficial Transcript of Audio-Recorded during hearing of the South Dakota House Committee on Senate Bill 132 before the House South Dakota Legislative Session on Senate Bill 132 held Mar. 2, 2011 at 2:22-3:8 (“South Dakota House Hearing Transcript”). Hearing audio available at, <https://sdpb.sd.gov/sdpbpodcast/2011/hco31.mp3#t=1436>.)

¹⁹ Ex. 1 at 4 (Unofficial South Dakota Senate Hearing Transcript 12:18-13:11).

²⁰ Ex. 1 at 3 (Unofficial South Dakota Senate Hearing Transcript at 9:15-21).

He made a similar point before the South Dakota House Committee:

So it's a regional footprint. MITSO [sic] is a federally registered planning authority, but at the same time, Black Hills Corp doesn't participate. They're kind of an outpost. They're out there by themselves. So if Black Hills wanted to do something similar to this, then, and they want to get cost recovery for transmission, then they're going to make application directly to FERC. So we were generic enough that we weren't specific to MITSO. We wanted to make sure that we did it for all of the federally registered authorities.²¹

* * *

So the challenge for us was to take a contractual right that we have today, those members of MITSOs that we currently have, and translate that into statute. And that's exactly what the bill does. It takes that contractual right that we enjoy at this time, and the reason that matters is because MITSO has come to a planning process. They call it multi-value projects, multi-value planning. We've got projects lined up for construction that are transmission related. In that MITSO footprint, three of them are in South Dakota and MITSO's literally got its arms around this construction process.²²

The other lobbyist for investor-owned utilities, Brett Keneke, asserted that FERC seemed to invite states to pass right of first refusal laws:

the FERC notice [of proposed rulemaking] seemed to imply that they would defer to state policy if we were willing to set that policy. And I firmly believe anytime Washington is willing to let us do something, we ought to take advantage of it, and this is our opportunity.²³

Willard also made claims similar to those that the Commission rejected in Order No. 1000, including that a right of first refusal is necessary because incumbent utilities have

²¹ Ex. 1 at 37 (Unofficial South Dakota House Hearing Transcript at 7:17-8:2).

²² Ex. 1 at 38 (Unofficial South Dakota House Hearing Transcript at 10:3-15).

²³ Ex. 1 at 5 (Unofficial South Dakota Senate Hearing Transcript at 17:6-11).

an obligation to serve here in South Dakota. They also have got a public utilities commission downstairs with a very capable staff and, uh, committed commissioners that have jurisdiction over the actions of the incumbent utilities.

So we've got jurisdiction, we've got accountability out here. We also have a vested interest in providing that service, because we're the ones that are providing customers a[t] retail. So we're the ones that aren't going away.²⁴

He also asserted that competition could be disruptive and slow the construction of new transmission facilities.²⁵

2. Minnesota

In early 2012, as MISO was preparing its Order No. 1000 compliance filing, a bill was introduced before the Minnesota legislature that would grant a right of first refusal to incumbent utilities in Minnesota. The Minnesota Senator who introduced the bill, Minnesota Senator David Brown, directly acknowledged that the bill was a response to Order No. 1000's requirement to eliminate a right of first refusal:

[O]rder 1000 specifically stated that, if states choose to do so, they could enact their own ROFR laws, which many states already have done. There is a bigger issue here, and it's the *issue of federalism versus states' rights*. Absent ROFR legislation, the *federal government will determine what lines get built, who will build them and to a certain extent where they will be located*. State ROFR laws protect our sovereignty in determining those decisions through our state PUC. Our regulated system has served Minnesota well, and our system is reliable and our rates are fairly competitive.²⁶

He also urged the committee to not add a sunset provision:

²⁴ Ex. 1 at 4 (Unofficial South Dakota Senate Hearing Transcript at 13:15-23).

²⁵ Ex. 1 at 5 (Unofficial South Dakota Senate Hearing Transcript at 14:14-18).

²⁶ Ex. 2 at 4 (Unofficial Transcript of the hearing of the Minnesota Senate Energy, Utilities and Telecommunication Committee on Senate File 1815 held Mar. 20, 2012 at 0:00:28 [emphasis added] ("Unofficial Minnesota Senate Hearing")).

that idea [a sunset provision] makes sense but we can do that anytime as a committee in the future. We can go back and look at it – we don't have to write it in to this legislation so I would not favor of that just for the reason that we can do it in the future. Any time we see that it may make sense for Minnesota at that time but you bring up a good point. FERC process is unknown, it's not – there is nothing concrete here. If we choose not to pass this legislation, we are moving into the world of the unknown versus we have a very known process right now, members. And I think it's best to stick with that process because FERC's process is unknown.²⁷

A representative for Xcel Energy, Rick Evans, similarly framed the purpose of the right of first refusal bill:

Under current federal regulation, as Senator Brown pointed out, the utilities have enjoyed the right of first refusal—meaning that if a transmission line is proposed by a non-regulated utility or by a regulated utility, that the two utilities that are connected at either end of that line have the right to come in and say we want to build that line. That right goes away in July under the order 1000 that Senator Brown referred to.²⁸

* * *

Second, without the right of first refusal, critical decisions on transmission, as Senator Brown said, *will shift from state regulation to federal regulation*. Opponents of this bill like to argue that this will increase competition, but that is absolutely not true. The only thing that will happen is that somehow the selection process for who is going to build the lines *will shift to a federal regulator instead of a state regulator*. This is not a situation where consumers are going to get to sit down and decide, based on quality and price, which product they choose – that's competition. We don't work in that system, as you all know. We work in a regulated system. All this bill will accomplish, or all that will be accomplished if this bill fails, *is that we will move that system from our state PUC regulated process to some kind of a federally regulated process*. And I say some kind of federally regulated process because, in point of fact, FERC hasn't even decided how that process will work. The right of first refusal goes away – that part of state regulation is lost as of July and, at this point, FERC is

²⁷ Ex. 2 at 18 (Unofficial Minnesota Senate Hearing at 00:49:21).

²⁸ Ex. 2 at 5 (Unofficial Minnesota Senate Hearing at 00:02:12).

still trying to figure out how the process will work. When people say, well, it will be a competitive system, there is no way they can know that because the system hasn't been designed, and it will not be competitive, it will just be a federal regulatory system.

* * *

If utilities are not allowed to build the critical infrastructure that they need to serve their customers, how can we be held responsible for the quality of the service that we are providing to our customers? When power is lost in a community due to a downed transmission line that is owned by a non-regulated utility regulated by FERC, *who in Washington, DC are you going to call* to talk about when the power is going to be restored in the State of Minnesota? You could call Xcel Energy, but if we don't own the line and we don't maintain it and we didn't build it and we don't operate it, what kind of responsibility are we going to take for the fact that power is out?²⁹

A representative for Missouri River Energy Services ("MRES"), Joe Sullivan, attempted to justify the view that incumbents have lower rates compared to nonincumbent developers who will use FERC rates:

So MRES really fundamentally sees that this issue boils down to the following: do we want to encourage third party transmission owners to buy and build transmission service in Minnesota solely for the purpose of passing the FERC, the higher FERC transmission tariff rate, onto Minnesota ratepayers. I mean, this is transmission service. It's important that we know that this is transmission service that is going to be built already by Minnesota utilities. So we feel that we are really looking at a situation where we are going to pay more for the exact same thing, and that's what it boils down to for us and this is why we support the alternative, which is enacting Senate File 1815, and continue the thoughtful and deliberative process that is Minnesota's transmission planning service.

* * *

²⁹ Ex. 2 at 6 (Unofficial Minnesota Senate Hearing at 0:02:12 [emphasis added]). Xcel and other incumbent transmission owners in Minnesota also raised concerns about the elimination of rights of first refusal before the Minnesota Public Utilities Commission in September 2011. *See, e.g.*, Ex. 2 at 23-41 (Alliant Energy, *et al.*, Summary of Order No. 1000: Transmission Planning and Cost Allocation, Presentation Before the Minnesota Public Utilities Commission (Sept. 9, 2011)).

If we fail to enact ROFR this year, we are going to move the jurisdiction away from our boards, away from the PUC towards, as Mr. Evans said, the FERC in Washington, DC.³⁰

Xcel's representative agreed, arguing that:

So the actual cost passed through our customers would be considerably less, as long as the FERC rate of return is higher than the rate of return authorized by the Public Utilities Commission. Now, there is no guarantee that it's always going to stay that way, but the fact of the matter is that the Public Utilities Commission would regulate our rates – that's not going to change whether there is a ROFR or not a ROFR. The only question is whether the cost of the transmission is going to be paid to the outside company that is not rate regulated or whether the cost of the transmission is going to be brought into the rate case in that entire, in the whole discussion that is involved in a rate case. I just, I do want to just respond to one other question that counsel asked and that is about what this means for the future – what this bill is intended to do is preserve the status quo. It's intended to preserve the system that has existed in the state for the last seven years and more.

* * *

To not pass this bill is to cast us into the uncertainty of whatever FERC decides somewhere down the road. Will they decide it by July when the right of first refusal goes away? There is no way of knowing. So what we are looking for is the kind of certainty and the kind of regulatory scheme that has worked in Minnesota well for the past several years and not trading it off for well, maybe there will be competition somewhere down the road if FERC ever figures out how they are going to do this.

* * *

Now, I don't want to sound too parochial here, this is an inter-related grid, this is a regional grid, this is a national grid – those kind of inter-connections are very important. This FERC process is very important. *But to preserve the regulatory scheme that has worked so well in Minnesota, we need to preserve the ROFR, and that's what will allow us to go forward*, as we see if the federal, regional, regulatory scheme ever actually happens to work out to be anything.³¹

³⁰ Ex. 2 at 6-7 (Unofficial Minnesota Senate Hearing at 0:08:24 [emphasis added]).

³¹ Ex. 2 at 16-17 (Unofficial Minnesota Senate Hearing at 00:42:12 [emphasis added]).

3. North Dakota

North Dakota passed a right of first refusal law in 2011. At the January 31, 2011 meeting of the North Dakota Senate Standing Committee, Senators discussed the draft right of first refusal bill and took testimony. During the opening exchange, Chairman Klein asked, “Things were going well until the Federal Energy Regulatory said we are going to change the rules?”³² Andrea Stomberg, Vice-President Electric Supply, Montana-Dakota Utilities Co. answered, “This came about when the FERC came in and said that the smaller utilities had to join the larger ones that have regional planning organizations because they don’t build transmissions that go out of state. They joined the ISO and believed they would have the right, if the new line being built would affect their customers, in terms of cost, they would get the first right to say they want to build the line.”³³ In her written testimony, Ms. Stomberg explained how the bill would work in relation to MISO’s planning process:

As part of the FERC approved contractual agreements between the utilities and the Midwest ISO, the incumbent utilities are guaranteed the first right to construct transmission lines that interconnect with our existing transmission lines. These new lines are approved through the Midwest ISO regional planning process as needed lines.

In a notice of proposed rulemaking issued last June, the FERC proposed to eliminate this contractual language, saying that the opportunity to build transmission should be available through a competitive process to anybody who is able and interested. This new competitive process creates a new right of first refusal to the entity who first proposes a particular transmission line. The outcome of throwing open interconnecting transmission construction to all comers could be a network of transmission lines; interconnected with existing lines serving North Dakota customers, built by entities who may not be under state PSC

³² Exhibit 3: North Dakota Legislative History at 7 (“Ex. 3”) (Minutes of Hearing of the North Dakota Senate Standing Committee on SB 2322 held on Jan. 31, 2011 at 1 (“North Dakota Senate Hearing”)).

³³ Ex. 3 (North Dakota Senate Hearing at 1).

jurisdiction, but who will be able pass their cost to build and maintain the lines onto the customers of the incumbent utility through the Midwest ISO transmission charges.

This FERC proposal also vacates a fundamental premise under which Montana-Dakota, Otter Tail and Xcel joined the Midwest ISO, and which gave us confidence that we would continue to have some control over transmission interconnecting to our lines the costs of which we would expect to see included in Midwest ISO charges to us.

In its proposed rulemaking, FERC acknowledged that the states have a strong interest in regulating transmission and costs within their borders. Clearly stated in the FERC proposal is language that indicates FERC will recognize state law if that law favors the incumbent utility's first right to build. It is that state law we wish to solidify by proposing the language in Senate Bill 2322.

SB 2322 provides that a transmission provider, which could be another utility as well as an independent transmission builder, could not begin construction of a high voltage transmission line which interconnects with lines owned or operated by an electric public utility such as Montana-Dakota, Otter Tail or Xcel, without obtaining a certificate of public convenience and necessity from the PSC. This is no different than the requirement that applies to the existing utilities. The bill further provides that the PSC may not issue this certificate to a transmission provider if the interconnecting public utility is willing and able to construct and operate a similar transmission line. The language provides that any transmission project that is approved by the Midwest ISO, for instance to convey renewable or other energy to out of state markets, and which an incumbent does not wish to, or is unable to, construct, is available for another entity who would successfully advance a certificate of public convenience and necessity to the Commission.³⁴

John Olson, a representative for Otter Tail Power Company, also tied to the bill to the elimination of the right of first refusal:

Public utilities like Otter Tail Power Company have an obligation to serve the public. In light of this obligation, and because of their

³⁴ Ex. 3 at 34-35 (Testimony of Andrea Stomberg, Vice-President Electric Supply, Montana-Dakota Utilities Co. before the Senate Industry, Business and Labor Committee Hearing on Senate Bill 2322 (Jan. 31, 2011)).

good faith relinquishment of operational control of their transmission systems, public utilities should have the right of first refusal to construct and operate transmission projects approved for construction by MISO and interconnecting with their transmission systems. FERC's proposal to rescind the right is, in a word, troubling. Senate Bill 2322 would ensure this right within the State of North Dakota, preserving the right of first refusal as a matter of state law - - regardless of what FERC does in its final rule. Final passage will ensure public utilities providing retail electric service to North Dakota customers will continue to have the first opportunity to construct and operate transmission in the efficient manner our customers have come to expect. If public utilities choose not to exercise this right or are financially unable to do so, the opportunity to construct and operate transmission will reside with others.³⁵

On March 9, 2011, the North Dakota House Standing Committee took up the bill and discussed why FERC required the elimination of rights of first refusal. Representative Amerman asked, “Why is FERC repealing this rule?” John Olson, representative for Otter Tail Power Company, answered, “They are repealing the rule to spread across the right beyond public utilities to any transmission builder that would want to build that transmission line.”³⁶ He went on to assert that FERC gave states the option to reinstate a right of first refusal in their state: “They are *doing so with the understanding that if the state decides that its public utilities are in such a situation that they would required that right to be preserved for the benefit of their consumers*. I think they recognize that element as well.”³⁷

In 2015, the North Dakota legislature took up a second right of first refusal bill to expand it to cooperatives and municipal power agencies. An exchange between North Dakota State Senators and witness Dale Niezwagg, Senior Legislative Representative for Basin Electric Power

³⁵ Ex. 3 at 37 (Testimony of John Olson, Otter Tail Power Co. before the North Dakota Senate Industry, Business and Labor Committee on Senate Bill 2322 at 2 (Jan. 31, 2011)).

³⁶ Ex. 3 at 23 (Minutes of hearing of the North Dakota House Standing Committee on SB 2322 held on Mar. 9, 2011 at 3 (“North Dakota House Hearing”)).

³⁷ Ex. 3 (North Dakota House Hearing at 3 [emphasis added]).

Cooperative, again drives home the point that the North Dakota right of first refusal laws are intended to thwart the Commission's determination that competitive transmission process are necessary to establish just and reasonable rates for regional transmission facilities:

Senator Sinner: Without this law they may just hire someone to go in and put the line in?

Dale Niezwaag: If this bill is not in place they will do the same planning process and then they would solicit solutions from anybody who wants it. We will have different companies owning different parts of our transmission grid. (8:35-8:50)

Chairman Klein: Are we being proactive here, is this an issue you have been faced with?

Dale Niezwaag: The problem comes in when you join the RTO. When you join the RTO you become part of this multistate process and all of a sudden instead of controlling your part of the world you have half of the United States involved in your world. (9:38-10:15)

Senator Murphy: Basically when you joined the RTO, you are afraid of getting voted off the island right? You are giving up some freedoms and you are trying to insure [sic] that you have some parochial rights in North Dakota.

Dale Niezwaag: Yes.³⁸

4. Indiana

Indiana passed a right of first refusal law in 2013. It was introduced on January 7, 2013 and signed into law on May 7, 2013, a short five-month period.³⁹ Representative Pierce opposed the bill, in part, because of how quickly it moved through the legislature. He noted that it was sold as a "grand compromise" but that not everyone was invited to participate in the discussions

³⁸ Ex. 3 at 79 (Minutes of hearing of the North Dakota Senate Standing Committee on HB 1382 held on Mar. 11, 2015 at 2.)

³⁹ Exhibit 4: Indiana Legislative History at 13-14 ("Ex. 4") (Action List: Senate Bill 0094 (right of first refusal bill in Indiana)).

leading to the compromise.⁴⁰ As he put it, it appears that “interested parties who are the incumbents, pretty much got together and decided, ‘This is what we want to do.’”⁴¹ He noted “actually have some testimony or regulatory flexibility committee actually study what’s going on, make sure the parties that were excluded from the backroom deal, get an opportunity to come in and say their piece, then we can evaluate it.”⁴² He urged the committee to reject the bill and take more time because “there’s a lot more here that [sic] meets the eye” and that “[t]here’s no immediate crisis.”⁴³

Representative Pierce’s references to the “discussions” refer to meetings organized by the Indiana Utility Regulatory Commission, at the behest of the Indiana Energy Association, to discuss Order No. 1000, the MISO and PJM Interconnection, L.L.C. (“PJM”) stakeholder processes to develop compliance filings, and the then draft right of first refusal legislation. Incumbent transmission owners and other established stakeholders participated, but new entrants like LS Power were not informed of the meetings. These meetings laid the legislative foundation for the Indiana bill that was introduced and passed in the spring of 2013.⁴⁴ The meeting

⁴⁰ Ex. 4 at 3 (Unofficial Transcript of Audio-Recorded Indiana House Legislative Session on Senate Bill 94 at 7:19-8:4 (Apr. 10, 2013) (“Unofficial Indiana House Hearing Transcript”).

⁴¹ Ex. 4 at 3 (Unofficial Indiana House Hearing Transcript at 8:11-14).

⁴² Ex. 4 (Unofficial Indiana House Hearing Transcript at 9:1-5).

⁴³ Ex. 4 (Unofficial Indiana House Hearing Transcript at 8:20-24).

⁴⁴ In a letter to the Assistant General Counsel of the Indiana Utility Regulatory Commission, the Indiana Energy Association noted that it worked with its members to develop legislation that would “provide[] a right of first refusal (‘ROFR’) to incumbent transmission providers to construct new local reliability electric transmission facilities which are (a) connected to the incumbent’s transmission facilities or (b) upgrades to its own transmission system.” Ex. 4 at 42 (Letter from Edwin J. Simcox, Interim President, Indiana Energy Association to Beth Roads, Assistant General Counsel – Indiana Utility Regulatory Commission dated Aug. 30, 2012 at 2).

materials and comments from the 2012 meetings are included with the other Indiana legislative materials.⁴⁵

The meeting materials clearly show that the bill was structured to respond to the elimination of the right of first refusal in Order No. 1000⁴⁶ and revised as the Commission provided additional guidance in Order No. 1000-A. For instance, Order No. 1000-A affirmed Order No. 1000's requirement to eliminate rights of first refusal for reliability projects⁴⁷ and provided key clarification on the definitions of "local" and "regional" transmission projects.⁴⁸ The summary and comments submitted in response the August 2012 meeting show how participants were considering the Commission's determinations in Order No. 1000-A and the development of MISO and PJM compliance filings as the participants drafted their proposed legislation.⁴⁹

Turning back to the legislative hearing on the right of first refusal bill, it is clear that the bill was a response to Order No. 1000. Representative Frizzell spoke in support of the bill:

⁴⁵ Ex. 4 at 15-54. Although LS Power was not invited to participate, copies of the materials were later provided to LS Power by the Indiana Utility Regulatory Commission staff.

⁴⁶ In its comments, Hoosier Energy stated that:

1) Legislation should establish an Indiana ROFR for all projects – reliability, economic and multi-value. . . .

b) Most parties agree that a state ROFR should be established for reliability projects. However, because of the scale and dollar magnitude of most economic and multi-value projects, it is particularly important for the IURC to have the capability to protect customer interests with respect to economic and multi-value projects.

Id. at 38-39.

⁴⁷ Order No. 1000-A at P 428.

⁴⁸ *Id.* at PP 423-24.

⁴⁹ See Ex. 4 at 27 (Summary of Meeting on August 13, 2012 at 7); see also *id.* Ex. 4 at 32-35 (Wabash Valley Power Association redline of draft legislation and comments show that it was primarily focused on ensuring incumbent transmission owners maintain a right of first refusal for reliability projects in Indiana).

And, uh, if a company [nonincumbent developer] comes in and wants to connect with them [incumbent utility] or cross any other property, those type of things, uh, they can refuse and say, “We want -- as an incumbent company, we want to provide those services to do the construction, those type of things.”

Uh, this summer, uh, the federal, uh, Energy Regulatory Commission, FERC, had two orders, order 1,000 and 1,000 A. And basically, what it said was, how we have the state's -- the ability to get rid of Right of First Refusal, in other words, to promote competition by encouraging more companies to promote innovation and inefficiency. In other words, some of these new companies that provide, uh, transmission lines and -- and companies as well.

Now because of that, Indiana wanted to, uh -- to guide their own destiny in this. And this summer we had a lot of stakeholders very much involved and interested in this issue. Um, we had a lot of the incum- -- the invested-owned companies, REMCs and also municipal, uh, utilities to discuss this.

And they came up with a balance to say that two thirds of the, uh, bigger jobs, will be total competition when you lift, uh, uh, ROFR up and you lift that up, there's going to be competitions. But the smaller ones, the smaller, uh, uh, jobs, which are for a reli- -- reliability and something that the REMCs wanted, say that they would still be under Right of First Refusal.⁵⁰

Representatives Battles argued that “The Right of First Refusal is actually a protection on Indiana jobs.”⁵¹ He also asserted that a right of first refusal in favor of an incumbent transmission owners ensures, to the extent there is competition through some sort of bidding process, that the incumbent transmission owner is the one deciding who builds a project, and after the project is built, that it owns the transmission line.⁵²

5. Montana

⁵⁰ Ex. 4 at 2 (Unofficial Indiana House Hearing Transcript at 3:8-4:5).

⁵¹ Ex. 4 at 4 (Unofficial Indiana House Hearing Transcript at 10:3-4).

⁵² Ex. 4 at 4 (Unofficial Indiana House Hearing Transcript at 10:17-11:8).

In 2017, the Montana legislature, at the behest of group of cooperatives, took up a right of first refusal bill. This bill clearly targeted the Commission-regulated planning process and competition reforms as it only applied to the small portion of Montana located in an RTO/ISO.⁵³ The bill’s sponsor, Representative Hertz, claimed that FERC is deferential to state laws, and “has made it very clear that it will defer to state policy on this right; and they will not preempt state law that allows this right.”⁵⁴

Representative Hertz asserted that a right of first refusal is needed to protect reliability:

Right of first refusal does one thing only. It gives an incumbent utility in Montana the right of first refusal to build and own transmission lines -- uh, new transmission lines in their area.

Without first refusal, new lines needed for load growth could be bid out to entities, uh, to own and operate and receive a rate of return. These entities may not have the same long term ownership interests as an incumbent utility.

Right of first refusal has nothing to do with market access. It only ensures that an incumbent utility with an established present -- presence in the area will have a right to build and own new transmission lines approved by an organized market for cost sharing across those areas.

The incumbent utility is the one whose customers, or member consumers in the case of a cooperative, are affected by the long term reliability of those electric lines in those areas and whose ownership is unlikely to be sold or traded off to out of state interests, whose focus may be on a maximum rate of return, rather than reliability or stability.⁵⁵

A representative for Montana Electric Cooperatives Association also asserted that the bill was needed for reliability: “the singular purpose of right of first refusal in this case is to just help

⁵³ Exhibit 5: Montana Legislative History at 2 (“Ex. 5”) (Unofficial Transcript of Audio-Recorded Montana House Energy, Technology, and Federal Relations Committee on HB 297 at 4:24-5:8 (Jan. 25, 2017) (“Unofficial Montana House Hearing Transcript”).

⁵⁴ Ex. 5 at 4 (Unofficial Montana House Hearing Transcript at 12:5-8).

⁵⁵ Ex. 5 at 3 (Unofficial Montana House Hearing Transcript at 6:7-16).

ensure that there is a local grid reliability. That’s the singular purpose of the bill. Through – and ensure that that local grid reliability occurs through a strong local presence.”⁵⁶

In a common theme, two Montana state representatives questioned whether a developer would be qualified and committed to serve customers in Montana.

Representative Knudsen: [Y]our reasoning for bringing this bill - - correct me if I’m wrong. I’m just trying to clarify my own head.

Um, it’s basically just insuring that in a boom and bust place like the Bakken⁵⁷ you don’t get a, um, you know, out of state or, you know, out of country or whatever company coming in and building some big transmission line to feed everybody there and then once it kind of busts out they just are gone again and the consumers aren’t actually taken care of after that.

Representative Hertz: Mr. Chair. Representative Knudsen. That’s certainly own [sic] concern that, uh, is the impetus for this bill. Um, yeah. It’s about long term reliability and stability. Um, and not having a patchwork of owners.⁵⁸

6. Iowa

Prior to when Order No. 1000 was issued and for several years after, any developer could apply to the Iowa Utilities Board for approval to own and construct a transmission line in the state. In 2018 incumbent utilities were successful in bringing a bill to the Iowa legislature that would grant to incumbent utilities a first opportunity to build a new transmission project. The provision passed the Iowa Senate but failed in the Iowa House. The bill was up again for discussion in 2020. It was passed in the dead of night, with little discussion.

⁵⁶ Ex. 5 at 3 (Unofficial Montana House Hearing Transcript at 8:19-24).

⁵⁷ “Bakkens” refers to the Bakken Shale area located in Montana and North Dakota and been a significant source of new oil production in the United States for over a decade. Production fluctuates based on oil prices and demand, creating the boom-and-bust cycle that Representative Knudsen referenced in his comments.

⁵⁸ Ex. 5 at 5-6 (Unofficial Montana House Hearing Transcript at 19:24-20:14).

The bill’s history is illustrative of the lack of thoughtful discussion about the impact of state right of first refusal laws. On June 14, 2020, on the final day of the 2020 Iowa legislative session, the legislature was focused on passing a budget bill. The history is described in detail in LS Power’s Brief to the Iowa State District Court:

It is the final day of the 2020 Iowa legislative session, June 14, 2020, in the Iowa Senate. The legislature has been back in service for 10 days, as part of its extraordinary session due to the COVID-19 virus, and the budget bill is the main priority to complete before session closes the following day. Ex. 1, Zumbach Decl. ¶ 22; Ex. 21, Bolton Decl. ¶ 21; see also Ex. 2, at 7 (Senator Bolkcom speaking, noting the budget was one of the only things the legislature had to do during its 10-day window). After opening the session at 1:29 a.m., at 1:31 a.m., Senator Whitver moves to call up H.F. 2643, the budget bill, which the Iowa House passed earlier in the evening that same day. S. Journal, 88th G.A., Reg. Sess. 840 (June 14, 2020); see also Ex. 2, at 2. Immediately thereafter, at 1:32 a.m., Senator Breitbach, gives opening remarks and proposes S-5163, an over fifty-page omnibus amendment that “strik[es] everything after the enacting clause” and inserts new language. S-5163, 88th G.A., Reg. Sess., at 1 (Iowa 2020) (attached as Ex. 3); see also Ex. 2, at 2. Several of the proposed insertions in S-5163 properly relate to appropriations. See, e.g., Ex. 3, at 4 (adding Division II, which proposed to reduce the general assembly budget); Ex. 3, at 5 (adding Division III, Section 5, appropriating funds to the Secretary of State); Ex. 3, at 7 (adding Division V, related to judicial appropriations); and Ex. 3, at 14 (adding Division VI, Section 17, appropriating money for reducing addiction initiatives). However, several others are policy initiatives, with no appropriation attached.⁵⁹

* * *

Senator Breitbach, when introducing amendment S-5163, gave only a brief statement in his opening remarks related to Division XXXIII: “It also includes a right of first refusal for utilities extensions. I can go into that for anybody that wants to know more about that.” Ex. 2, at 3 (Senator Breitbach speaking, at 1:33 a.m.). At 2:28 a.m., S-5163 was again taken up. Ex. 2, at 6. Senator Bolkcom commented, “**It would have been nice to have**

⁵⁹ Brief in Support of Motion for Temporary Injunction at 1-2, *LS Power Midcontinent, LLC v. The State of Iowa*, Case No. CVCV060840 (Nov. 13, 2020) [emphasis added].

had this amendment during the – during the daytime and had more opportunity to actually understand what we are voting on, but we are not going to get that opportunity here in the middle of the night....” Ex. 2, at 7 (Senator Bolkcom speaking, at 2:29 a.m.). Senator Ragan echoed, **“Wow, this is not what I would call transparency, 2:30 in the morning,** Well, I’m not [used to doing all-nighters], and I don’t think most of Iowans are. **I don’t see dumping this bill, with very little time to actually even look at it, as the way to do things.”** Ex. 2, at 10 (Senator Regan speaking, at 2:30 a.m.). On Division XXXIII specifically, senators expressed surprise and confusion. Senator Bisignano stated, “I’ve never heard of anything like this in any moving legislation that was drafted and in committee, and do you have a bill history on the bill this would have addressed?” Ex. 2, at 23-24 (Senator Bisignano, at 4:13 a.m.). Senator Boulton similarly noted that, “I don’t think many of at least my colleagues on this side of the aisle saw [Division XXXIII] coming.” Ex. 2, at 18 (Senator Boulton speaking, at 2:43 a.m.). He further inquired:

Was there a – And maybe I missed this.
Was there a bill with a subcommittee process?
Because it feels like we’re – we’re –we’re kind of
technical in our discussion here, and I – I want to
make sure that members of the public and – and –
and interested players in this system were able to
get a question and answer like this and have a
discussion so that we all understood the risks and
advantages of doing something like this as a public
policy change.

Ex. 2, at 21 (Senator Boulton speaking, at 2:46 a.m.)⁶⁰

* * *

Despite this legislative history, on the Senate floor on June 14, 2020, at approximately 4:15 in the morning, Senator Breitbart, the amendment’s sponsor, misspoke to his colleagues about Division XXXIII’s history. Senator Breitbart claimed to colleagues Division XXXIII had been “worked on ... over in the House” in 2020 and “went through the full committee process, passed out of the House, came over to the Senate and then we did not move it,” because it did not make it through the funnel. Ex. 2, at 28 (Senator Breitbart speaking, at 4:17 a.m.). Senator Bisignano questioned this statement, as he thought (accurately) the bill never made it through subcommittee, but Senator Brietbach

⁶⁰ *Id.* at 4.

again pushed back, saying, “I’m not sure if it was voted on the floor, but it went through the committee process, ... I believe it made it all the way through the floor.” Ex. 2, at 29-30 (Senator Breitbach speaking, at 4Des:19 a.m.). Senator Breitbach continued (inaccurately) to say the bill never made it through the funnel, continued (inaccurately) to state that the bill failed due to the shortened session and continued (inaccurately) to say that Division XXXIII could have been put through “the regular way.” Ex. 2, at 30. Senator Breitbach continued with a threat: “Now, if you want to stay, if you want your caucus to stay for three months yet, we could do that.” *Id.* Obviously frustrated by the process, Senator Bisignano stated:

I mean, this is setting statute in business in the middle of the night that was never lobbied by any utility to have a chance to support or oppose it.

It’s brand-new. The first time I saw it is an hour ago, maybe an hour and a half now, but I’m just **uncomfortable with policy legislation coming through a budget bill in the middle of the night that no one’s heard of, that I know of, and my utility is saying**, “What is this?” So I just wanted to know if there was a bill history that I could say I missed it and it was my bad, I didn’t catch it, or my utility didn’t, but I don’t think it was out there, and I don’t think it was public until it was stuck in this appropriation bill.

Isn’t that the way it went down?

Ex. 2, at 30-31 (Senator Bisignano speaking, at 4:20 a.m.). The legislators’ hands were tied. Senator Breitbach never corrected his inaccurate statements to his fellow senators on the record, and, the next time amendment S-5163 was called up, Senator Breitbach did not state anything about Division XXXIII, instead giving final remarks and stating, “I simply move the bill.” Ex. 2, at 32-34 (Senator Breitbach speaking, at 5:43 a.m.). Amendment S-5163 passed on a voice vote with Division XXXIII included at 5:44 a.m. S. Journal, 88th G.A., Reg. Sess. 842 (June 14, 2020). H.F. 2643, as amended, passed four minutes later, at 5:47 a.m. on a vote of 30 to 17. *Id.* at 842- 43.

Later that morning, H.F. 2643, as amended by S-5163, came before the House. H. Journal, 88th G.A., Reg. Sess. 769 (June 14, 2020). In opening remarks, Division XXXIII was briefly

referenced: “The amendment provides language that gives the utility companies and electric cooperatives currently serving Iowans with a first right of refusal to put up electric transmission lines.” Ex. 7, at 2 (Rep. Mohr speaking, at 11:29 a.m.). There was no further debate or discussion of Division XXXIII. *Id.* The House concurred in the Senate amendment, and H.F. 2643, as amended, passed shortly thereafter in the House on a vote of 51 to 41. H. Journal, 88th G.A., Reg. Sess. 773, 775 (June 14, 2020); *see also* Ex. 7, at 63 (The Speaker speaking, at 1:08 p.m.). In short, Division XXXIII’s terms, which had been rejected in the prior session and the current session, was reintroduced, discussed and passed between 1:30 a.m. and 1:08 p.m., a total of less than 12 hours, on the last day of the legislative session as part of an omnibus appropriations bill.⁶¹

Iowa State Senators Bisignano and Boulton and Iowa State Representative Zumbach later provided sworn statements confirming the events detailed above, including that the bill did not go through normal procedures.⁶² They confirmed that they were surprised by the introduction of the bill.⁶³ Senator Bisignano confirmed that the bill “took me and other senators by surprise. I had no indication a right of first refusal for incumbent electric transmission lines would be introduced, taken up, or voted on this session. I had not had the opportunity to review and debate any of the language . . . prior to its introduction in the early morning hours of June 14, 2020.”⁶⁴ He also noted that the public was deprived of the opportunity to comment or engage on the legislation. Representative Zumbach also noted that the title of the bill “gave no fair notice

⁶¹ *Id.* at 6-7.

⁶² Exhibit 6: Iowa Legislative History at 92 (“Ex. 6”) (Declaration of Tony Bisignano at Paragraph 4, dated Dec. 10, 2020 (“Bisignano Declaration”)); Ex. 6 at 87 (Declaration of Nate Boulton Paragraph 5, dated Nov. 12, 2020 (“Boulton Declaration”)); Ex. 6 at 82 (Declaration of Louis J. Zumbach at Paragraphs 5 (“Zumbach Declaration”)).

⁶³ Ex. 6 at 92 (Bisignano Declaration at Paragraph 7); Ex. 6 at 87 (Boulton Declaration at Paragraph 8); Ex. 6 at 82 (Zumbach Declaration at Paragraphs 9).

⁶⁴ Ex. 6 at 92 (Bisignano Declaration at Paragraph 7).

to me that a right of first refusal for incumbent electric transmission owners was contained within the bill.”⁶⁵

Senator Boulton also testified that Senator Breitback gave misleading information about the bill, such as stating that the bill “allowed an open bidding process, and an incumbent utility had the option to match the price of the lowest bidder.”⁶⁶ Both Senator Bisignano closed his testimony by expressing his belief that the legislation would not have passed as a stand-alone bill had it gone through the normal process.⁶⁷

Following passage of the bill, ITC pressed Iowa Governor Kim Reynolds to sign the bill into law. Its letter to the Governor included several misleading statements:

Allowing the Midcontinent Independent System Operator (MISO), an out-of-state entity, to competitively bid overlay transmission projects and simply accept the lowest bid *shifts the decision-making authority away from the Iowa Utilities Board. It also prioritizes project cost over landowner impacts, not to mention design quality and system resiliency.*⁶⁸

The assertion that the Iowa Utilities Board would cede jurisdiction to MISO and that MISO’s evaluation process puts cost over design quality and system resiliency are demonstrably false. MISO has a highly detailed and robust evaluation process that considers cost on equal footing with design quality and system resiliency. Furthermore, MISO selects the project before conducting a competitive solicitation process and conduct a thorough examination of each bidder’s proposal so that there are no “design quality and system resiliency” issues.

⁶⁵ Ex. 6 at 83 (Zumbach Declaration at Paragraph 10).

⁶⁶ Ex. 6 at 88 (Boulton Declaration at Paragraph 11); *see also* Ex. 6 at 93 (Bisignano Declaration at Paragraph 11).

⁶⁷ Ex. 6 at 95 (Bisignano Declaration at Paragraph 20); *see also* Ex. 6 at 90 (Boulton Declaration at Paragraph 23).

⁶⁸ Ex. 6 at 97 (Letter from ITC to Governor Kim Reynolds, June 16, 2020 [emphasis added]).

LS Power has challenged the statute in Iowa state courts. Incumbent transmission owners in the state have filed pleadings defending the passage of the bill.⁶⁹

7. Michigan

In February 2021 and September 2021, the Michigan Senate Energy and Technology Committee held hearings on the bill that became Michigan’s now-effective right of first refusal law. Representatives for ITC clearly framed the issue as a jurisdictional one, urging the Michigan legislature to protect states’ rights. For instance, Simon Whitelock, representative for ITC, asserted that:

Now, this is really a states rights issue and this legislation will maintain the status quo with respect to that and it will allow Michigan to determine who should build and invest in its transmission infrastructure, not the federal government or an RTO such as MISO.⁷⁰

* * *

Some may say that this problem should be left up to FERC to solve, not the states. Well, with all due respect to FERC, they've recognized for years that there's a problem with Order 1000 but they have yet to come up with a solution. And unfortunately, we don't have the luxury of time to wait for a viable outcome.⁷¹

* * *

Under this order [Order 1000], states are permitted to enact legislation allowing them to codify pre-Order 1000 standards.⁷²

* * *

⁶⁹ See, e.g., MidAmerican Energy Company’s Resistance to Request for Temporary Injunction, *LSP Midcontinent, LLC v. The State of Iowa*, Case No. CVCV060840 (Iowa D.Ct. Jan. 14, 2021); ITC Midwest LLC’s Resistance to Plaintiff’s Request for Temporary Injunction, *LSP Midcontinent, LLC v. The State of Iowa*, Case No. CVCV060840 (Iowa D.Ct. Jan. 14, 2021).

⁷⁰ Ex. 7 at 4 (Unofficial Transcript of Audio-Recorded during of the Michigan Senate Energy and Technology Committee Hearing on Senate Bill 103 at 13:15-20 (Feb. 16, 2021) (“Unofficial Michigan Senate February Hearing Transcript”).

⁷¹ Ex. 7 at 5 (Unofficial Michigan Senate February Hearing Transcript at 15:5-10).

⁷² Ex. 7 at 2 (Unofficial Michigan Senate February Hearing Transcript at 4:13-15).

First, Order 1000 allows for states to pass legislation opting them out of the solicitation process.⁷³

Similar arguments were made during the September 21, 2021 hearing held by the same committee. Senator Schmidt, the sponsor of the bill, stated that “Order 1000 sought to drive transmission development and investment across the country. Unfortunately, as seen across the country and as mentioned by several FERC chairmen and the FERC commissioners over the year, the order 1000 RTO competitive solicitation process, say that three times fast, has failed to produce the intended results.”⁷⁴

ITC’s President and CEO, Linda Aspey, echoed made similar arguments during the September 21, 2021 hearing.

As Senator Schmidt alluded to in his comments, Senate bill 103 seeks to address an issue that's been plaguing the industry for over a decade, FERC order 1,000 and specifically order 1000 RTO Competitive Solicitation Process which has proven to be a major impediment to transmission planning and the development needed to upgrade our grid to meet our current and future needs.

Although order 1000 is a federal policy, I want to be clear that the state does in fact have the ability to resolve this issue and remove the risk, the uncertainty, and the delays that order 1000 has presented. After several years of examining how to spur investment in regional transmission infrastructure to facilitate the transition to more renewable energy, in 2011, FERC issued order 1000 which aimed to make reforms in transmission planning and cost allocation policies.⁷⁵

* * *

By exempting Michigan from the order 1000 RTO competitive solicitation process, Senate Bill 103 will allow for an environment where Michigan chooses who builds and where transmission

⁷³ Ex. 7 at 4 (Unofficial Michigan Senate February Hearing Transcript at 11:24-12:1).

⁷⁴ Ex. 7 at 35 (Unofficial Transcript of Audio-Recorded during hearing of the Michigan Senate Energy and Technology Committee at 4:12-19 (Sept. 21, 2021) (“Unofficial Michigan Senate September Hearing Transcript”).

⁷⁵ Ex. 7 at 36 (Unofficial Michigan Senate September Hearing Transcript at 6:6-23).

owners can partner, collaborate, plan, and invest in Michigan's electric transmission system without delays.⁷⁶

* * *

Absent approval of Senate Bill 103 and the assurance that our grid will be appropriately -- appropriately planned by those who have the responsibility to do so, we will undoubtedly realize an environment that promotes band-aid solutions over holistic solutions, duplication of efforts, time delays, and unnecessary operational complexity.

All of these will result in an inefficient, ineffective, and higher risk outcomes for customers. To be candid with you, Michigan and the entire MISO region are at a crossroads as it relates to its energy future. The energy landscape is changing at an incredibly rapid pace. A pace where transmission investments are already extraordinarily challenged to keep up.⁷⁷

* * *

And lastly, uh, another question that we have frequently received is, some have argued that since this is a federal issue, that this should be addressed by the federal energy regulatory commission. In a perfect world, I would absolutely agree. The order 1000 RTO Competitive Solicitation Process has failed plain and simple.

And even FERC has acknowledged that the order 1000 process has created barriers to investment and transmission. I have -- indicate that order 1000 has failed, including the FERC Chairman just last week, who indicated he would be open to eliminating those provision altogether.⁷⁸

* * *

I strongly believe that Michigan must act now like many other states already have, to secure the ability for transmission owners in this state to proactively and collaboratively plan the trans- -- transmission grid of the future given the significant transformation occurring in our sector, along with the impending impact of the electrification of our economy.

⁷⁶ Ex. 7 at 37 (Unofficial Michigan Senate September Hearing Transcript at 10:8-13).

⁷⁷ Ex. 7 at 37 (Unofficial Michigan Senate September Hearing Transcript at 10:16-11:6).

⁷⁸ Ex. 7 at 38 (Unofficial Michigan Senate September Hearing Transcript at 15:13-25).

Furthermore, I would like to point out that FERC contemplated the ability for states to opt out of this competitive solicitation construct so that states would retain the right to determine who builds and who invests in electrical transmission infrastructure. We cannot sit by and hope that FERC solves the problem facing Michigan and that's why I'm here today asking for your help and support.⁷⁹

Representatives for ITC also made several misleading statements about the bill, Order No. 1000, and the competitive process held to-date during the February Hearing. For instance, they asserted that the bill was not anti-competitive, even though it would prevent nonincumbents from competing, under the theory that nonincumbents could simply buy transmission facilities in Michigan if they want to compete:

First, um, opponents may say that this legislation is anti-competitive and would not allow for outside entities or nonincumbents to participate in the transmission planning and construction process. Simply put, that's false. There's nothing in the legislation that would prevent an out-of-state or nonincumbent entity from buying transmission assets and developing projects from those assets like we've done, ITC. That's how we got our start. Or by partnering with a -- uh, an in-state transmission owner to develop projects.⁸⁰

Mr. Whitelock also insisted that “FERC itself has even concluded that Order 1000 has failed but hasn’t done anything about it and doesn’t appear to be fixing it any time soon.”⁸¹

ITC’s Vice President of Planning for ITC made several misleading statements about the effectiveness of competitive processes held to date in MISO:

A -- a couple examples are two of the projects, two of the three projects that were competitively sol -- solicited at MISO. The first project, the Duff Coleman Project, added 385 days to the process. The second project, the Hartburg-Sabine Project, added 381 days to the process. And a little additional context, for the evaluation, for MISO's evaluation of these two projects, the cost was approximately \$2.5 million to review and award these

⁷⁹ Ex. 7 at 38 (Unofficial Michigan Senate September Hearing Transcript at 16:5-20).

⁸⁰ Ex. 7 at 4 (Unofficial Michigan Committee February Hearing Transcript at 13:4-14).

⁸¹ Ex. 7 at 3 (Unofficial Michigan Committee February Hearing Transcript at 8:25-9:3).

contracts, uh, and those costs were passed directly to customers. Additionally, associated with these delays, ITC conducted an internal analysis of the economic impact to the customers for delay -- delaying the Duff-Coleman Project. In order to conduct a c- -- competitive solicitation, the estimated one-year delay cost customers approximately \$160 million in foregone economic benefits. So we have delays associated with the Order 1000 process.⁸²

ITC representatives made similar comments during the September 21, 2021 hearing. Ms.

Aspey asserted a litany of complaints about competition:

First, let me say, that the competitive bidding provisions of order 1000 are anything but free market competition. Order 1000 is a failed attempt at regulated competition. ... Nothing in FERC order -- FERC's order 1000 allows free market competition to -- competition to take place and as instead attempts to allure -- attempts to lure ratepayers into the notion that because it is called competition, that somehow it must mean that it's good, or that it's better.⁸³

* * *

Of the few order 1000 competitively bid projects across the country, many have resulted in developers, omitting or capping the cost of maintenance, the maintenance of the assets in order to win the bid. Electric utility infrastructure requires ongoing preventative invest- -- preventative investment in the operations and maintenance of those assets. Our assets are long lived, exposed to the elements and require significant ongoing proactive investment to ensure reliability. Winning a competitive bid with a plan to forgo maintenance of the assets is like trying to win a horse race by starving your horse to avoid the expense of food and care. The order 1000 RTO Competitive Solicitation Process has failed ratepayers by causing costly delays for projects, substandard designs, and forcing ratepayers to pick up the cost to administer these competitive processes.⁸⁴

* * *

⁸² Ex. 7 at 3-4 (Unofficial Michigan Committee February Hearing Transcript at 9:14-10:7).

⁸³ Ex. 7 at 37 (Unofficial Michigan Senate September Hearing Transcript at 12:22-13:8).

⁸⁴ Ex. 7 at 36 (Unofficial Michigan Senate September Hearing Transcript at 8:11-9:4).

And what we -- what we recognized was that developers were, um, submitting bids, uh, that, for example, were substandard designs.

They were not designs that, you know, the line, for example, the transmission wire, the line has to be rated and sized for the weather conditions, um, in that particular area. It has to withstand certain, um, amount of, you know, ice loadings or wind. Um, and what we saw was that other bidders were not, um, bidding with the appropriate level of, um, um, you know, design that would withstand the weather. The -- the way these competitive solicitation processes work, they have a, you know, they have a review committee, um, where, you know, multiple developers submit different types of projects, uh, apples and oranges, um, many of which are substandard designs. The people that are reviewing the projects their -- their job is not to opine on the appropriate design standard of a -- of a transmission line. And so ultimately at the end of the day, um, you know, these projects are assessed, uh, based on sort of, you know, I would say, um, you know, factors around sort of, are -- are they a credit worthy party? Um, you know, what was the cost of their bid?

Um, and it doesn't necessarily look at the long-term impact of the type of investment or solution that they're proposing. The RTO has no ability, um, to mandate, uh, the design standard, um, on a transmission facility; that is not their responsibility. That's not their role. They don't set standards; they don't review standards.⁸⁵

* * *

Yeah. I think that is part of the challenge as, you know, as sort of transmission developers have emerged to try to take advantage of this space. You know, they d- -- many of them don't own transmission assets, have never operated electrical transmission systems.

You know, I suppose at the end of the day, they're, you know, they fall under FERC's jurisdiction in terms of their high voltage electric transmission assets. Um, but quite frankly, FERC -- FERC's not set up to review design standards, um, um, either. Um, you know, obviously for us, you know, we're -- we're an established, uh, business here.⁸⁶

⁸⁵ Ex. 7 at 39 (Unofficial Michigan Senate September Hearing at 20:3-21:9).

⁸⁶ Ex. 7 at 40 (Unofficial Michigan Senate September Hearing at 23:22-24:9).

These statements are false. ITC ignores that competition among *developers* for the right to construct, own, and operate transmission facilities, results in a competition of ideas, with each developer putting forward its best solution, its best, most innovative design, and lowest cost with consumers protection built in. In addition, MISO’s qualification and evaluation processes ensures that developers are qualified and project designs meet applicable reliability standards. MISO’s selection reports show that the selected designs were more robust than the minimum design standards. ITC also downplays the chilling effect that the bill has had on competition. Because of the law, projects located in that state are not eligible for competition and requiring pay to play is rarely sound policy.

8. Texas

The Texas legislature passed a right of first refusal bill in 2019 after MISO completed a competitive process for a Market Efficiency Project partially located in Texas that resulted in the selection of a nonincumbent transmission developer (Hartburg-Sabine Junction 500-kV project). However, incumbent transmission owners’ efforts to prevent transmission competition in the areas outside of the Electric Reliability Council of Texas Prior began earlier. In February 2017, when it appeared that the Southwest Power Pool (“SPP”) would hold a competitive process for a transmission project partially located in Texas, Southwestern Public Service Company filed suit against SPP in Texas state court seeking a declaratory judgment that Texas law prohibits SPP from designating a nonincumbent developer to construct transmission facilities in Texas.⁸⁷ In the Petition, Southwestern Public Service Company laid out the impetus for the filing – the

⁸⁷ *Southwestern Pub. Serv. Company’s Original Petition for Declaratory Judgment and Temporary and Permanent Injunctive Relief*, Case No. 106111-B (Jan. 18, 2017).

Commission’s elimination of rights of first refusal and SPP’s determination that Texas did not have a right of first refusal law.⁸⁸

A month later, Southwestern Public Service Company and SPP agreed to put the lawsuit on hold and seek an answer from the Public Utility Commission of Texas (“Texas PUC”). Parties in that proceeding raised many familiar arguments against competition, including that it would result in FERC expanding its jurisdiction in Texas, to the detriment of Texas ratepayers⁸⁹ and that competitive processes slow down construction.⁹⁰ On October 26, 2017, the Texas PUC determined that Texas did not have a right of first refusal.⁹¹

Having lost before the Texas PUC and with the competitive solicitation for the MISO Hartburg-Sabine Project (partially located in Texas) culminating in the selection of a nonincumbent developer, incumbent transmission owners took their case to the Texas state legislature, urging the legislature to pass a right of first refusal bill to “Protect the Integrity of Texas Transmission Development” and “Preserve the Legislature’s and the PUC’s comprehensive jurisdiction over utility rates and service to Texas customers.”⁹²

The sponsor of the Texas right of first refusal bill, Representative Phelan, described the bill as “ensur[ing] that the Public Utility Commission of Texas, and not the federal government,

⁸⁸ *Id.* at 5-10.

⁸⁹ *See, e.g.*, TIEC, Initial Brief at 1-2, filed in Texas PUC Docket No. 46901 (June 21, 2017).

⁹⁰ *Id.* at 1.

⁹¹ *Joint Petition of Southwestern Pub. Serv. Co. and Southwest Power Pool, Inc. for Declaratory Order*, Declaratory Order, Texas PUC Docket No. 46901 (2017).

⁹² Ex. 8 at 75 (Advertisement Sponsored By American Electric Power; Texas Association of Business; Texas Association of Manufacturers, Entergy Texas, Inc., Lower Colorado River Authority, Oncor, El Paso Electric, CenterPoint Energy, Texas-New Mexico Power, and Xcel Energy (stating “Protect the Integrity of Texas Transmission Development” benefit of bills include, “Preserve the Legislature’s and the PUC’s comprehensive jurisdiction over utility rates and service to Texas customers.” “Falsely cloaked as ‘competition,’ this change would eliminate the PUC’s jurisdiction over rates and services in important areas of the state.”))

will continue to have jurisdiction over Texas transmission operations and rates.”⁹³ During a hearing in the Texas House, Representative Phelan asserted that the bill:

creates operational continuity and makes clear who has the responsibility to reliably serve customers. It also keeps transmission rates outside of ERCOT under the PUC jurisdiction. The legislature addressed that question in 2009 creating a narrow exception for certain transmission-owned only utilities but with customer protections.

And in the non-ERCOT areas, the fully integrated utilities maintained the exclusive right and obligation to provide transmission service. That 2 -- 2017 decision, risk taking jurisdiction, over rates and operation for non-ERCOT transmission facilities out of the hands of Texas PUC and giving it to the federal regulator, FERC.⁹⁴

Texas Senator Hancock, who sponsored the bill in the Texas Senate, shared a similar rationale for the right of first refusal law: “It codifies the state’s current practice to determine who should own and build transmission infrastructure in Tex- -- Texas. It ensures that Public Utility Commission retains regulatory authority over utilities in Texas.”⁹⁵

The lack of faith in FERC was on full display in an exchange between a representative of the Lower Colorado River Authority, a supporter of the bill, and Representative Phelan, in which they discussed how the Texas PUC focuses solely on issues in Texas, while FERC does not.

MR. ONEY:· Um, it's not surprising to me that FERC [talking over each other] –

REP. PHELAN:· Their priorities are somewhere else.

MR. ONEY:· Their priorities are somewhere else.

⁹³ Ex. 8 at 3 (Unofficial Transcript of Audio-Recorded of the Texas House of State Affairs Hearing on House Bill 3995 held on Apr. 1, 2019 at 9:15-18 (“Unofficial Texas House Hearing Transcript”).

⁹⁴ Ex. 8 at 2 (Unofficial Texas House Hearing Transcript at 3:6-19).

⁹⁵ Ex. 8 at 51 (Unofficial Transcript of Audio-Recorded of the Texas Senate Committee on Business and Commerce Hearing on Senate Bill 1938 held on Apr. 2, 2019 at 2:19-23, Apr. 2, 2019 (“Unofficial Texas Senate Hearing Transcript”).

REP. PHELAN:· And that's my concern with -- with this, not fixing this issue. Their concerns will be somewhere else. Whereas with the PUC, I can -- I can get their attention. But I can't get FERC's attention.

MR. ONEY:· The PUC's solely focused on what we do here in Texas. Uh, and reliability and -- and reasonable cost were what they do. Uh, that's what they're charged to oversee. And they do it very well.

REP. PHELAN:· So that would be a good -- that'd be a good area - - a good, uh, guess, governmental body to oversee our rates and, you know, the consumer protections would be the PUC, not FERC?

MR. ONEY:· Agreed, Mr. Chairman. Yes, sir.

REP. PHELAN:· That's -- that's -- this going to be recurring theme than not. So won't be the last time you hear that.⁹⁶

Another common theme was that transmission rates would be higher if a nonincumbent developer were permitted to build in Texas because its rates would be regulated by FERC, not the Texas PUC. For instance, a representative for Entergy Texas, Inc., Xcel Energy, and El Paso Electric Company, Lino Mendiola, asserted that transmission rates under FERC's jurisdiction are higher because FERC allows higher returns on equity:

MR. MENDIOLA:· So the long history is that, uh -- is -- historically, FERC has allowed for higher returns on equity than the Texas PUC. I think the Texas PUC has been generally more conservative with respect to allowing, uh, returns on equity, uh, compared to what FERC can, uh -- has -- has historically allowed. And again, if, um -- if the Texas PUC loses jurisdiction over the return on equity that's applicable to transmission rates, then there's a significant chance that those rates would be higher because they're FERC regulated as opposed to, uh, the Texas PUC regulated. Yes, sir.

REP. PHELAN:· Um, so in addition to losing control of -- of the rate process, if I go under FERC, we could potentially be looking at, uh -- at higher rates based on historical rate cases, FERC --

⁹⁶ Ex. 8 at 3 (Unofficial Texas House Hearing at 7:10-9:1).

MR. MENDIOLA: Uh, yes.⁹⁷

This ignores the fact that any interregional competitively bid project would fall under the FERC-approved rate in the SPP or MISO Tariff, even if the project is built by an incumbent transmission owner under a right of first refusal.

B. Nebraska Is A Non-MISO Example Of A State That Passed A Right Of First Refusal After The Commission Eliminated Rights Of First Refusal

Nebraska passed a right of first refusal law in 2013. The legislative history links the law's passage to Order No. 1000's elimination of the right of first refusal. In fact, the law grants an incumbent transmission owner 90 days to decide whether to accept responsibility for a regional project,⁹⁸ the same time-limited right of first refusal that the Commission rejected in Order No. 1000-A.⁹⁹ In addition to this similarity, the legislative history links the purpose of the bill to Order No. 1000. The Committee Statement states that:

LB 388 would preserve state authority over transmission lines in light of Federal Energy Regulatory Commission (FERC) Order 1000, which would change the way Regional Transmission Organizations (RTOs) select electric transmission project builders. Under the order, RTOs are required to open access to building transmission to any qualifying entity, rather than simply deferring to incumbent utilities. FERC has, however, recognized that if a state law provides for a right of first refusal for incumbent utilities, the RTO must adhere to the state law. All transmission in the state is publicly-owned and operated. The public power industry believes that the first right to expand RTO-ordered transmission in Nebraska should be held by known entities with a track record in Nebraska and which are subject to known regulatory processes.¹⁰⁰

⁹⁷ Ex. 8 at 4 (Unofficial Texas House Hearing at 12:8-25).

⁹⁸ R.R.S. Neb. § 70-1028.

⁹⁹ Order No. 1000-A at P 428 (affirming its decision to require the elimination of rights of first refusal, including a 90-day right of first refusal).

¹⁰⁰ Exhibit 9: Nebraska Legislative History at 1 ("Ex. 9") (Committee Statement – Legislative Natural Resources Committee on LB388 (Feb. 1, 2013)).

Nebraska State Senator Carlson’s statements made a similar connection between Order No. 1000 and the right of first refusal bill:

LB388 would preserve state authority over the construction of electric transmission lines in Nebraska. This bill is in response to the Federal Energy Regulatory Commission, or FERC, Order 1000, which changes the way that regional transmission organizations, or RTOs, select electric transmission project builders. . . . Under the FERC Order 1000, RTOs are required to open access to building transmission not any qualifying entity rather than simply deferring to incumbent utilities. In other words, the order requires that mandated new transmission facilities can be bid on by any entity wanting to own and operate the new facility. FERC has, however, recognized that if a state law provides for a right of first refusal for incumbent utilities, the RTO must adhere to that state law.¹⁰¹

It is clear from discussion at a hearing before the Nebraska Natural Resources Committee that the law was specifically aimed at SPP’s competitive transmission process. For instance, a representative for Lincoln Electric System stated that: “First of all let’s be clear, this bill was only designed to address the right of first refusal for RTO-ordered transmission projects. Okay? So basically in the SPP. We really weren’t intending to impact anything beyond that.”¹⁰²

C. States Where Right Of First Refusal Laws Were Introduced But Failed To Pass

Bills granting a state right of first refusal have been introduced in Wisconsin, New Mexico, Kansas, and Colorado but have failed to advance out of the legislature. The legislative history of these laws, however, shows the same intent to thwart Order No. 1000’s elimination of rights of first refusal and the role of incumbent transmission owners in advocating for these laws.

¹⁰¹ Ex. 9 at 37 (Transcript Prepared by the Clerk of the Legislature, Transcriber’s Office, of First Round Floor Debate in the Nebraska Senate Natural Resources Committee on LB388 held on Apr. 3, 2013 at 52).

¹⁰² Ex. 9 at 20 (Transcript Prepared by the Clerk of the Legislature, Transcriber’s Office, of Nebraska Natural Resources Committee hearing on LB388 held on Feb. 1, 2013 at 18).

1. Wisconsin

A right of first refusal law was introduced in Wisconsin in 2021 and testimony was submitted in early 2022. Ultimately the bill failed to advance out of the legislature but statements from the bill’s sponsors and testimony submitted by incumbent transmission owners clearly identifies that the purpose of the bill is to inhibit FERC’s jurisdiction over the regional transmission planning process. From its inception, the goal of the Wisconsin right of first refusal bill was to preempt FERC’s regulations:

The goal of the language is to ensure *WI will continue to control* the expansion and operation of transmission lines. We want the facilities to continue operating under the current state approval requirements but *prevent a federal selection process* for the expansion of the lines. *More of a federal pre-emption bill.*¹⁰³

Written statements made by the Wisconsin sponsors confirm the goal was for Wisconsin law to override any determinations in the FERC-jurisdictional MISO planning process. From a written statement by State Representative Tyler Vorpapel, State Representative:

To put this bill in simple terms, this legislation would maintain the state’s right to control the expansion and operation of the transmission grid.

When I was approached about offering this bill it was right up the alley of the committee I chaired for 4 years in the Assembly. While the Assembly Committee on Federalism and Interstate Relations may no longer exist, I still believe it is important that we *continue to push for states’ rights and not allow the federal government or other states to drive our narrative.*¹⁰⁴

* * *

¹⁰³ Exhibit 10: Wisconsin Legislative History at 5 (“Ex. 10”) (Email from Czaja, Ashley, Staff for Majority Leader Devin LeMahieu, Nov. 9, 2021 1:45 PM, to Shea, Elisabeth in the Wisconsin Legislative Reference Bureau [emphasis added]).

¹⁰⁴ Ex. 10 at 68 (Testimony of Wisconsin State Representative Tyler Vorpapel on Assembly Bill 892, Committee on Energy and Utilities, Feb. 3, 2022 at 1 [emphasis added] (“Vorpapel Testimony”)).

I encourage you to listen to all the testimony and be reminded that when it comes down to it, this bill is about state's rights. By passing this bill, Wisconsin would join Michigan, Iowa, Minnesota, South Dakota, North Dakota, Indiana, and Texas in making sure we put our state's needs ahead of the Federal Governments when determining our energy Transmission priorities. We'd like to keep Wisconsin in control of their transmission lines rather than allow the federal government, or states without Wisconsin's best interest, to take over. Thank you for taking the time to listen to my testimony on this bill.¹⁰⁵

From a written statement of State Senator Julian Bradley:

Allowing MISO, a regional entity formed and approved by the federal government, to dictate who builds crucial infrastructure while our neighboring states take steps to control their own fates would be a troubling abdication of responsibility by Wisconsin policymakers.¹⁰⁶

Incumbent transmission owners pushed a similar narrative. In his written testimony, Bill Marsan, Executive Vice President and General Counsel at American Transmission Company ("ATC") stated that:

This legislation is necessary to maintain the state's right to control the expansion and operation of the transmission grid.

The majority of states in the Upper Midwest have already passed similar legislation. There are several reasons why.

- These states recognize that without this legislation, states are beholden to a mandated, federal process that takes too long, does not deliver promised cost savings, and obstructs the state's ability to oversee that the transmission system remains safe, reliable and meets customers' changing needs:

- There is near universal recognition that the mandated, federal process for building transmission has been a failure. This process puts out-of-state entities in charge of determining who will build and own certain transmission projects within a state:

¹⁰⁵ Ex. 10 at 68 (Vorpapel Testimony at 1).

¹⁰⁶ Ex. 10 at 69 (Testimony of Wisconsin State Senator Julian Bradley, Committee on Energy and Utilities, Feb. 3, 2022 at 1).

- The mandated, federal process does not actually prioritize cost-effectiveness of transmission solutions. Indeed, cost-effectiveness considerations are reflected in only 2 of 23 factors considered; and,

- The mandated, federal process has failed to achieve its ultimate policy objective, which was to build more transmission.¹⁰⁷

* * *

Without this legislation, Wisconsin risks:

- A federally-mandated selection process for who gets to build transmission in Wisconsin, which would lead to inevitable delay in addressing customer needs and result in litigation (this delay typically adds a year to transmission being built);

- A loss of control over who builds transmission in the state - possibly for every project;

- A fragmented transmission system built to varying standards; and,

- A process with no credible support for the belief that costs will be reduced, nor that the system will be operated and maintained safer and more reliably.¹⁰⁸

ATC submitted an additional written statement:

American Transmission Company (ATC) supports Senate Bill 838/Assembly Bill 892, as it ensures Wisconsin will preserve the state’s right to control the expansion and operation of the grid to meet the needs of the state’s customers and avoid uncertainty and delay created by the federal process to select entities to own and operate transmission infrastructure.¹⁰⁹

* * *

ATC is supporting Senate Bill 838/Assembly Bill 892 because it prevents a federal process established by the Federal Energy

¹⁰⁷ Ex. 10 at 71 (Written Testimony of Bill Marsan, Executive Vice President and General Counsel at American Transmission Company in Support of Senate Bill 838/Assembly Bill 892 (“Marsan Testimony”).

¹⁰⁸ Ex. 10 at 72 (Marsan Testimony at 2 (unnumbered)).

¹⁰⁹ Ex. 10 at 73 (American Transmission Co. Written Testimony at 1 (Jan. 26, 2022) (“ATC January Testimony”) [citations omitted]).

Regulatory Commission (FERC) from undermining Wisconsin's creation of ATC and the value it provides customers.¹¹⁰

Dairyland Power Cooperative's written testimony submitted on February 2, 2022 stated that:

SB 838/AB 892 will allow for local control, retaining a Wisconsin presence in building out and, more importantly, reliably operating the Wisconsin grid. Currently, our neighboring states—Minnesota, Iowa, Michigan, and the Dakotas— have moved to this model emphasizing a state's right rather than a federal selection to build out the transmission infrastructure.¹¹¹

Written testimony of Tony Clark, Sr. submitted on behalf of ATC argued that:

First, state leaders have recognized that they have an interest in preserving some measure of state authority over the planning and execution of the wires portion of the electric business. Under the Federal Power Act, state and local governments' authority is much clearer when a utility actually serves customers in that state. This ensures a greater measure of local control and accountability. The utilities that serve retail customers tend to not plan and propose transmission projects if their own states are inalterably opposed to them. Because they serve customers in that state, and because the state has retail jurisdiction over them, they have an interest in not finding themselves getting crosswise with state officials and regulators. This aligns utility planning with the public interest. Pure merchant developers have no such nexus with the state. Their interest is getting selected by regional and interregional planners that are overseen by the Federal government - which may or may not reflect the preferences of Wisconsin. And coming out of the recent infrastructure package passed in Congress, there is even more reason to be concerned, because Congress - unfortunately in my view - greatly expanded the federal government's ability to site electric transmission projects against the wishes of a state.¹¹²

¹¹⁰ Ex. 10 at 73 (ATC January Testimony at 1).

¹¹¹ Ex. 10 at 81 (Letter from Ben Porath, Chief Operating Officer for Dairyland Power Cooperative to Representative Mike Kuglitsch, at 2 (Feb. 2, 2022)).

¹¹² Ex. 10 at 83-84 (Written Testimony of Tony Clark, Sr. Advisor Wilkinson Barker Knauer, LLP on Assembly Bill 892 before the Committee on Energy and Utilities at 1-2 (unnumbered) (Feb. 3, 2022) ("Clark Testimony")).

* * *

If approved, this legislation will confirm that new transmission projects in Wisconsin will be constructed as part of the traditional regulatory structure. It simply codifies the practice that has served Wisconsin well. This helps ensure that Wisconsin's interests are placed first. The decisions that companies like ATC, Xcel and the retail customer serving utilities make are done with accountability - because they are made with the oversight of regulators who work to see that Wisconsin's public interest is met.¹¹³

Finally, Ellen Nowak, a Commissioner of the Wisconsin Public Service Commission submitted written testimony on February 3, 2022 urging the legislature to pass the right of first refusal bill to ensure that the Wisconsin Public Service Commission's determinations trump any federal process:

I understand the impact unreasonably high rates or an unreliable grid has on Wisconsin's customers. But this legislation isn't about rates, it is about reliability and construction costs which make up around 10% of a customer's bill. Any suggestion that turning over the decision as to who builds critical infrastructure in Wisconsin to out of state bureaucrats or the federal government will save money is false.

What this bill does is protect Wisconsin's ability to have a say in who owns and maintains critical infrastructure in our state. Wisconsin residents and businesses have a reliable transmission grid due, in large part, to the system we have in place now. Forfeiting Wisconsin's ability to determine who can build here and replacing our process with a slow, cumbersome bureaucratic process run by the federal government or an arm of the federal government is not in the best interest of Wisconsin. Who owns the transmission and builds it here matters. It matters for economic reasons, health reasons and safety reasons. Wisconsin, not out of state bureaucrats or the federal government, should make those decisions because we know what is best for our state.

Preserving a state's ability to make decisions about transmission development is not a partisan issue. The National Association of Utility Regulators, the entity that represents all state utility

¹¹³ Ex. 10 at 84 (Clark Testimony at 2 (unnumbered)).

commissioners - a diverse group - was united in its opposition to the portion of the federal infrastructure bill that allows the FERC and Department of Energy to pre-empt state siting jurisdiction and grants eminent domain powers as they relate the siting certain electric transmission projects. The real question is: Does the federal government, via FERC by itself or through the rules it imposes on its regional transmission organizations including MISO, know what is best for the citizens of Wisconsin? If not, then we should jealously protect the right of Wisconsin to decide what is best for Wisconsin.¹¹⁴

2. New Mexico

A right of first refusal bill has been considered three times by the New Mexico legislature and failed to pass three times. The bills have been supported by incumbent transmission owners, such as Xcel Energy. Mr. Brandt, a representative from Xcel Energy, argued that a right of first refusal “is important to the state to maintain its reliability to its customers and to keep costs down.”¹¹⁵ In a 2014 handout to the Radioactive and Hazardous Materials Committee, Xcel Energy claimed that FERC eliminated the right of first refusal in Order No. 1000 but also “made it clear . . . that it will defer to state policy on right of first refusal . . .”¹¹⁶ The handout claimed that the benefits of the right of first refusal bill included, “First, . . . avoid[ing] serious disruption to the current New Mexico state regulatory oversight structure. . .; Second, . . . maintain[ing] New Mexico’s control over the quality of transmission service to New Mexico customers . . .; Third, the cost for transmission lines will be lower if a New Mexico utility builds the transmission lines.”¹¹⁷ Minutes from a meeting of the Radioactive and Hazardous Materials

¹¹⁴ Ex. 10 at 94 (Testimony of Ellen Nowak, Commissioner, Public Service Commission of Wisconsin at 2 (Feb. 3, 2022)).

¹¹⁵ Exhibit 11: New Mexico Legislative History at 5 (“Ex. 11”) (Minutes of the Fourth Meeting of the New Mexico Radioactive and Hazardous Materials Committee held on Oct. 22, 2012 at 5).

¹¹⁶ Ex. 11 at 45 (Xcel Energy Handout at 1 (Oct. 22, 2012)).

¹¹⁷ Ex. 11 at 46-47 (Xcel Energy Handout at 2-3).

Committee held on October 22, 2012 summarized Steve Fogel’s, representative for Xcel Energy, comments:

Mr. Fogel then spoke about the ROFR proposal. He said that historically, a utility could build transmission lines in its operating area, but last year, the federal government issued an order that takes away the utility's right to build transmission lines in its area unless the state has established policy. The proposal asks that the State of New Mexico give the local utility the right to have the first opportunity to build transmission lines in its area, he explained. In elucidating benefits to the state for doing so, Mr. Fogel noted the following: the state's regulatory oversight structure is maintained; the quality of transmission service to New Mexico customers is maintained; and it is less expensive for New Mexico customers if a New Mexico utility builds the lines. He said that the bill proposal would add a new section to the Public Utility Act that makes state policy clear in terms of a local utility having the first right to construct, own and maintain transmission facilities.¹¹⁸

Representatives for Xcel Energy returned in 2014 to support another attempt at right of first refusal bill and made similar statements to those in 2013. At a September 2014 meeting of the Radioactive and Hazardous Materials Committee, Xcel Energy representatives gave a presentation entitled, “Preserving New Mexico’s Oversight of Transmission Facilities: Proposed 2015 Electric Transmission Right of First Refusal (ROFR) Bill.” The presentation claims that a benefit of the right of first refusal bill will ensure that the New Mexico Public Regulation Commission “maintains state oversight of: Cost of transmission service, Reliability performance, Line need, cost and routing.”¹¹⁹ As the minutes made clear,

Mr. Ripperger then spoke about the ROFR legislation, which essentially gives the public utility the first right of construction, as in the past. Currently, some large lines are subject to a bid process, and oversight of the new lines is the responsibility of a federal

¹¹⁸ Ex. 11 at 5 (Minutes of the Fourth Meeting of the New Mexico Radioactive and Hazardous Materials Committee held on Oct. 22, 2012 at 5).

¹¹⁹ Xcel Energy, “Preserving New Mexico’s Oversight of Transmission Facilities: Proposed 2015 Electric Transmission Right of First Refusal (ROFR)” (Sept. 17, 2014).

agency, not the Public Regulation Commission (PRC). He said that this legislation continues New Mexico's oversight of transmission in the state. Among the benefits are that the PRC maintains oversight of the cost of transmission, of its reliability and of the need for, and cost and routing of, new lines built. Also, this would promote job growth at local utilities, he said.¹²⁰

* * *

In giving a history of the ROFR policies, Mr. Grant said that public utilities with an obligation to serve had the ROFR on transmission facilities in their area and that even under a competitive process, if there are needs in an area that no one else can build on, it is Xcel's obligation to be the builder of last resort. In 2011, FERC Order 1000 removed the ROFR for public utilities while deferring to state policy, he added. In 2015, the SPP will enter its first set of competitive projects by soliciting proposals. In reviewing FERC Order 1000, Mr. Grant said that a May 2012 rule was passed to expand the electric transmission grid and that the SPP already had its regional transmission process in place. The three areas of focus for FERC Order 1000 included encouraging regional and interregional planning and cost allocation and replacing the federal ROFR by a bid process, he said. Mr. Grant stated that if Xcel built a transmission development company, it would be regulated federally, that what is needed is to form an unregulated company and that it is in the best interest of the state to maintain control. He added that the ROFR bill would apply to SPS, which would be responsible for building.

Mr. Ripperger then stated that the PRC oversight of rates keeps customer costs down and that the SPS profit margin is at 9.96%. He said that the FERC sets higher margins than are typically allowed by state commissions, which vary from 10% to 12.3%. He added that the ROFR bill maintains the PRC's oversight of the cost of transmission service and that the PRC is the customer's advocate for affordable and reliable service. Also, SPS has a lot of experience designing and owning lines, and, regardless of who builds the lines, the PRC is responsible for reliability of the system. The PRC also has oversight of the construction of new lines in the state; it validates need, cost and routing of lines before approval; and this ROFR legislation maintains such oversight by

¹²⁰ Ex. 11 at 12 (Minutes of the Third Meeting of the New Mexico Radioactive and Hazardous Materials Committee held on Sept. 17, 2014 at 12-13 (“Third Meeting Minutes”)).

the PRC. In addition, Mr. Ripperger spoke about the jobs that SPS adds as the system grows, with SPS adding 46 positions over the past four and one-half years, which adds to the economic development of the state.¹²¹

* * *

Mr. Ripperger . . . explained that the ROFR legislation is needed now to ensure that the PRC maintains control over the development of new transmission. He said that the SPP will request bids for transmission lines in 2015 and that SPS is well-positioned to compete as one of the lowest cost bidders. He added that although Xcel agrees with the FERC, it is important to expand the transmission system and this should not come at the cost of the PRC losing its control.¹²²

3. Kansas

A right of first refusal bill was introduced in Kansas in 2016 that specifically targeted transmission projects located in Kansas that are approved by SPP.¹²³ The Kansas Energy and Environment Committee held a hearing on the bill on February 12, 2016. The bill’s advocates included incumbent utilities, Westar Energy and Sunflower Electric Power Corp. Their written testimony included the common arguments made by incumbent transmission owners. For instance, Sunflower Electric Power Corp. urged the Kansas legislature to pass the bill “in order to maintain affordable electric rates, ensure reliability of service, and limit the impact on ratepayers that widespread transmission buildout might involve.”¹²⁴ It also listed potential ways that Order No. 1000

¹²¹ Ex. 11 at 39-40 (Third Meeting Minutes at 12-13).

¹²² Ex. 11 at 40 (Third Meeting Minutes at 13).

¹²³ The proposed bill stated that “An incumbent electric transmission owner has the right to construct, own and maintain a new local electric transmission line that: (1) Has been approved for construction by the southwest power pool in any southwest power pool plan; and (2) connects to existing electric transmission lines owned by the incumbent.”

¹²⁴ Exhibit 12: Kansas Legislative History at 9 (“Ex. 12”) (Testimony Submitted by Stuart Lowry, President and CEO of Sunflower Electric Power Corp. before the Kansas House Energy and Environment Committee in Support of HB 2623 at 2, Feb. 12, 2016 (“Lowry Testimony”)).

can unnecessarily increase costs for Kansas ratepayers.

- Order 1000 incepts proposal of, and advocacy for, transmission projects whether truly needed or not. . . .
- Order 1000 creates the potential that transmission projects will be pursued despite the ability to utilize lower cost, non-transmission solutions to electrical needs. . . .
- The Order 1000 competitive process can also incent transmission being built at the lowest initial cost (in order to win a competitive bid), rather than the lowest overall cost for the expected useful life of the line. . . .
- The Order 1000 process does not clearly allow the withdrawal of a project due to changes in loads or system conditions. . . .
- The Highway/Byway funding methodology used by SPP allows out-of-state entities to propose and build transmission projects that Kansas ratepayers have to pay for. . . .
- The implementation of Order 1000 results in the duplication of the cost of planning and designing a transmission line that will be competitively bid. . . .
- Order 1000 can fragment ownership of facilities and negatively impact reliability, safety, and coordination. . . .

¹²⁵

Westar Energy suggested that projects proposed by nonincumbent developers would be less reliable than those constructed by incumbents transmission owners:

Without a ROFR, might the construction standards for future transmission tend toward the minimum requirements in a rush to be the low bidder, thus impacting future reliability for Kansas customers? HB2623 fixes the unintended consequences of FERC Order 1000, and allows Kansas companies to be responsible for Kansas transmission. It is about allowing Kansas companies to continue doing what they do best – knowing the weather conditions of the state, building to that standard, and keeping the lights on for our Kansas customers. As importantly, it allows Kansas companies to retain the right to build these projects themselves, or choose who builds for them based on the values that have served Kansas for so long.¹²⁶

¹²⁵ Ex. 12 at 11-12 (Lowry Testimony at 4-5).

¹²⁶ Ex. 12 at 24 (Testimony of Westar Energy in Support of HB2623 before the House Energy and Environment Committee (Feb. 12, 2016)).

III. CONCLUSION

In 2013, Commissioner Norris released a statement on the Commission’s orders on MISO and PJM’s initial Order No. 1000 compliance filings.¹²⁷ He expressed concern with “efforts to extend state laws and regulations into the federal planning process itself in a manner that limits the projects that may be considered for the inclusion in the regional plan.”¹²⁸ His reasoning was that “[a]llowing these measures to effectively disqualify an otherwise more efficient and cost-effective project from consideration essentially creates a new federal ROFR. This restricts competition and prevents state policymakers and their consumers from seeing the benefits competition can bring in meeting transmission needs by blocking potentially beneficial projects from ever seeing the light of day.”¹²⁹ Time has proven Commissioner Norris correct.

LS Power supports the Complaint and urges the Commission to extend the relief requested in the Complaint, including preempting any state right of first refusal law that specifically targets the Commission-jurisdictional federal regional planning process.¹³⁰

¹²⁷ Commissioner Norris, Statement on Docket Nos. ER13-198-000, ER13-75, and ER13-187 (Mar. 21, 2013) (Attached as Exhibit 13).

¹²⁸ *Id.* at 1-2.

¹²⁹ *Id.* at 2.

¹³⁰ *See NextEra Energy Capital Holdings, Incorporated; et. al., v. Chairman Peter Lake, Public Utility Commission of Texas, et. al.*, Case No. 20-50160, issued August 30, 2022.

Date: September 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Date at Austin, Texas this 1st of September 2022.

By: /s/ Christina R. Switzer

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