**BEFORE THE**
**PUBLIC SERVICE COMMISSION OF WISCONSIN**

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Joint Application of Madison Gas and Electric Company and Wisconsin Public Service Corporation for Approval to Acquire Ownership Interests in Solar Electric Generating Facilities

Docket 5-BS-228

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## APPLICANTS' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

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Applicants, Wisconsin Public Service Corporation ("WPSC") and Madison Gas and Electric Company ("MGE"), filed a motion on December 12, 2018 seeking a protective order preventing Intervenors Richard and Patricia Jinkins, Alan and Marcia Jewell, and Wade Wendhausen (the "Jewell/Jinkins Intervenors") and Brenda and Casey Kite (the "Kite Intervenors") from seeking discovery of confidential information in this docket.

The Kite Intervenors did not respond to the Applicants' motion by the deadline in section C.4 of the Guidelines for Contested Cases (the "Guidelines"). Thus, the Applicants' motion with respect to the Kite Intervenors is deemed granted pursuant to section 7 of the Guidelines.

The Jewell/Jinkins Intervenors did file a response to the Applicants' motion. (PSC REF # 355434). The Jewell/Jinkins Intervenors conceded that a protective order ***is appropriate*** while the Applicants' motion for interlocutory review concerning their intervention in the case is pending. (*Id.* at 6-7) ("Applicants do make a legitimate request for a pause while the Motion for Interlocutory Review is pending . . ."). Thus, a protective order should be granted for this period.

The Jewell/Jinkins Intervenors resist entry of a protective order if their party status is upheld by the Commission. In support of their position, they rely principally on two arguments. First, they argue that because this docket is interrelated with the Badger Hollow Solar Farm ("Badger Hollow") CPCN dockets, they must be allowed to fully participate. Second, they focus

on the designation of certain materials as Critical Electricity/Energy Infrastructure Information ("CEII"), arguing that the designation is improper and that in any event their counsel is certified to view such information. As explained below, the Jewell/Jinkins Intervenors' first argument is beside the point because Badger Hollow will be built whether or not the Applicants invest in it. Their second argument is in error and may in any event be moot because they have made clear that they are not seeking discovery of the PROMOD modeling data containing CEII. Finally, the Jewell/Jinkins Intervenors' threats to seek an extension of the schedule in this docket should be disregarded. The Jewell/Jinkins Intervenors waited for many months to intervene in this docket, and agreed that their participation would not lead to delay. They should not be allowed to avoid the consequences of their own delay and should be held to their commitments on schedule.

## Argument

Before turning to the substance of the Jewell/Jinkins Intervenors' arguments, it is important to note that they completely ignore important aspects of the Applicants' motion, including:

- The Applicants' explanations for why the information they seek is competitively sensitive and trade secret, both of which are legitimate grounds for resisting discovery under Wisconsin law. Wis. Stat. § 804.01(3)(a)7.
- The fact that they lack any compelling economic interest in receiving the information; the Jewell/Jinkins Intervenors are not the Applicants' customers and Badger Hollow will be constructed whether or not the Applicants acquire ownership in it. The letter that the Applicants filed on December 18, 2018 makes the Jewell/Jinkins Intervenors' interest in this docket even more tenuous. It is now clear that ATC will not be adding the generator tie lines for Badger Hollow to its

rate base, which means that ***none*** of those costs will be allocated to customers of Wisconsin Power & Light, including the Jewell/Jinkins Intervenors. (PSC REF # 355729).

- The fact that CUB is an active participant in the docket, and has far more experience advocating on behalf of residential customers than do the Jewell/Jinkins Intervenors. (Applicants' Motion at 7-8). While the Jewell/Jinkins Intervenors stress their unique perspective as neighbors of the project, they fail to explain how they bring anything to the table with respect to the economic issues that will be decided in this docket, which is where CUB has particular expertise.

### A. The mere fact that this docket is in some way related to the Badger Hollow CPCN does not give the Jewell/Jinkins Intervenors free reign for discovery.

The Applicants do not dispute that the Badger Hollow CPCN dockets and this Buy/Sell docket are related in some ways: obviously they both deal with the same solar project and the dockets are proceeding on similar schedules. But this does not mean that the Jewell/Jinkins Intervenors' interests are at issue in ***this*** docket**.**

The CPCN dockets deal with siting and environmental issues that inherently concern neighbors like the Jewell/Jinkins Intervenors. They have been granted intervention in those dockets. (*See* PSC REF # 352599). Thus, the Jewell/Jinkins Intervenors will have the opportunity to contest the siting and construction of that proposed facility, which they oppose due to its proximity to their homes. ***This*** proceeding is fundamentally different because it is limited to Applicants' proposal to acquire ownership interests in Badger Hollow and the Two Creeks Solar Farm.[1] It has absolutely nothing to do with the issues animating the Jewell/Jinkins Intervenors'

[1] The Jewell/Jinkins Intervenors claim that the Applicants are attempting to "circumvent[] project need review." (Jewell/Jinkins Intervenors Br. at 2). To the contrary, the principal point of the Buy/Sell docket is to determine, based on their need, whether the Applicants should be allowed to add Badger Hollow and the Two Creeks Solar

legitimate interests in Badger Hollow—its impact on their homes and property values. (*See* Applicants' Motion at 5-6).

Indeed, as customers of neither Applicant, the Jewell/Jinkins Intervenors have no interest in whether the Applicants acquire ownership in the Badger Hollow project. Invenergy has made clear that Badger Hollow will be built ***whether or not the Applicants buy a portion of it***. (PSC REF # 343803 at 4) ("In the event that the regulatory approvals are not obtained by WPS and MGE from the Commission or the transactions under the [Asset Purchase Agreement] are not consummated, then Badger Hollow, provided it receives a CPCN from the Commission, will, directly or indirectly through its affiliates, construct and operate the Project by selling the power using long term power purchase agreements."). Thus, what happens in this docket will have no bearing on whether or not the Jewell/Jinkins Intervenors will experience the harms they claim will befall them if Badger Hollow is constructed. Put another way, in the unlikely event the Jewell/Jinkins Intervenors were able to establish in this docket that Applicants do not need the energy and capacity output of Badger Hollow, it would make not one bit of difference in whether the project is built near their land and homes.

To the extent it sheds light on the Applicants' need to acquire a portion of Badger Hollow, the competitively-sensitive, trade secret and CEII information that the Jewell/Jinkins Intervenors seek in this case will not make any difference with respect to the concerns that underlie their intervention. On the other hand, its release has the potential to significantly harm the Applicants, as explained in their motion. (Applicants' Motion at 2-3). Thus, under well-established Wisconsin law, the Applicants are entitled to a protective order. *See Vincent & Vincent, Inc. v. Spacek*, 102 Wis.2d 266, 272, 306 N.W.2d 85 (Ct. App. 1981).

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Farm to their generation portfolios. The mere fact that the Jewell/Jinkins Intervenors have nothing to contribute on that question does not mean that the Applicants are "circumventing" the issue.

### B. The Jewell/Jinkins Intervenors' arguments on CEII are unconvincing and do not require disclosure of the information they seek.

Completely ignoring the Applicants' arguments that the information they seek is competitively sensitive and/or contains trade secrets, the Jewell/Jinkins Intervenors spend several pages attacking the Applicants' designation of five documents as CEII and arguing that their counsel should be given access to these documents. It may be possible to avoid this entire issue based on a clarification offered in the Jewell/Jinkins Intervenors' brief. Specifically, it is now clear that the Jewell/Jinkins Intervenors are not seeking CEII if it is contained in PROMOD modeling. (Jewell/Jinkins Intervenors Br. at n. 2). All five of the confidential data request responses that contain CEII consist of PROMOD modeling (*see* PSC REF # 345803, 346523, 349288, 344781 and 349934) and therefore appear to fall outside the scope of the Jewell/Jinkins Intervenors' discovery (although they would still fall within the Kite Intervenors' more generic request for all confidential information).

To the extent the Jewell/Jinkins Intervenors nevertheless seek these five documents, their arguments in support of disclosure are unconvincing. First, the relevant information was designated by FERC as CEII. In particular, the PROMOD models incorporate at least two types of data that are CEII: Multiregional Modeling Working Group data ("MMWG") and FERC Form 715 contingency event data.[2] By classifying this data as CEII, FERC has indicated that this data "could be useful to a person planning an attack on critical infrastructure." 18 CFR § 388.113(c)(2). This designation has nothing to do with impugning the Jewell/Jinkins Intervenors' attorney's motives, as their brief suggests. (*See* Jewell/Jinkins Intervenors Br. at 5). Rather, it is a

[2] *See* https://rfirst.org/ProgramAreas/RAPA/ERAG/MMWG/ERAG%20%20MMWG%20Library/ERAG%20Base%20Case%20Release%20Procedure.pdf#search=ceii (last visited Dec. 18, 2018) ("The Eastern Interconnection Reliability Assessment Group (ERAG) . . . MMWG . . . Power Flow Models contain data that the . . . FERC . . . has deemed . . . CEII. Release of CEII data is restricted for the benefit of public safety . . .."); https://www.ferc.gov/docs-filing/forms/form-715/overview.asp (last visited Dec. 18, 2018) ("The Commission considers the information collected in FERC-715 as . . . CEII . . . and will treat it as such.").

recognition that certain information must be kept under tight wraps, which is the aim of the Applicants' request for a protective order preventing its disclosure.

Second, the Jewell/Jinkins Intervenors' attorney cites a prior instance in which she has apparently received authorization from FERC to receive CEII. However, this certification is valid only for the calendar year in which it is issued. 18 CFR § 388.113(g)(5)(v) ("Once a CEII requester has been verified by Commission staff as a legitimate requester who does not pose a security risk, his or her verification will be valid for the remainder of that calendar year.") Because the letter that she attached to the Jewell/Jinkins Intervenors' brief is dated April 18, 2017, the Applicants cannot verify that she is ***currently*** authorized to receive such data. Moreover, the email that she attached to the Jewell/Jinkins Intervenors' brief does not definitively answer questions about disclosure of CEII; rather it allows the authors of CEII to determine whether it should be released. Here, the authors of the protected data have not authorized its release.

### C. The Jewell/Jinkins Intervenors failed to timely intervene in this case, and should not be rewarded with an extended schedule.

The Jewell/Jinkins Intervenors warn that "continued delay may well result in an Intervenor Motion and request for extension of time due to that Applicant delay." (Jewell/Jinkins Intervenor Br. at 6). However, what the Jewell/Jinkins Intervenors call "Applicant delay," the Applicants consider to be an exercise of their rights to seek a protective order under the Guidelines and Wisconsin discovery law. Any schedule problems the Jewell/Jinkins Intervenors are experiencing are completely of their own making, since they failed to timely intervene in this case. Had they intervened timely and served discovery shortly thereafter, both this dispute and the standing dispute that is the subject of Applicants' request for interlocutory relief would have

resolved months or weeks earlier. The Jewell/Jinkins Intervenors should not be rewarded for their dilatory approach to this case.

Finally, Wis. Admin. Code ch. PSC 2.21(4)(b) states, "Except as otherwise ordered, a grant of an untimely request to intervene shall not be a basis for delaying or deferring any procedural schedule established prior to the grant of the request." The schedule for this docket was established on November 13 at the pre-hearing conference and the Jewell/Jinkins Intervenors were not granted intervenor status until December 4. Further, in their November 12, 2018 request to intervene, the Jewell/Jinkins Intervenors "commit[ted] to respect . . . the Commission's schedule and all deadlines," and vowed not to "impede or delay the timely completion of this proceeding or docket." (PSC REF # 353022 at 5). The Jewell/Jinkins Intervenors should be held to these commitments and to the requirements of the Administrative Code; to the extent they request an extension of the schedule, that request should be denied.

Respectfully submitted this 19th day of December, 2018.


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