

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

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

5-BS-228

**JEWELL JINKINS INTERVENORS
RESPONSE TO APPLICANTS' MOTION FOR INTERLOCUTORY REVIEW**

The PSC encourages public participation in its proceedings because public input is essential to reach the most fair and reasonable decision possible.¹

Applicants Wisconsin Public Service Corporation and Madison Gas and Electric Company have jointly filed a Motion for Interlocutory Review seeking reversal of the Order of the Administrative Law Judge, asking the Commission to deny the Jewell Jinkins Intervenors request for Intervention, seeking to prevent the Intervenors from participating as a party in the above-captioned docket. Applicants also seek to reverse the Order granting Kites' party status. The fervor with which Applicants' resist participation of Jewell Jinkins Intervenors, with this Motion, the Motion for Protective Order, and their previous Objection to Intervention, flies in the face of the Commission's commitment to public participation and the opportunity of those affected to intervene. To reverse the Order granting Intervention status would deny Intervenors party status and would eliminate landowners' participation in this docket as a party. That is contrary to Commission policy and practice.

¹ See <https://psc.wi.gov/Pages/ForConsumers/PublicParticipation.aspx> .

The Applicants' Motion should be denied without further delay and Jewell Jinkins Intervenors then proceed with all the rights, responsibilities and obligations of full party status.

I. JEWELL JINKINS INTERVENORS MUST PARTICIPATE IN ALL THE INTERRELATED DOCKETS TO FULLY ADDRESS THEIR CONCERNS.

The reasons for Jewell Jinkins Intervenors intervention in these three of the five interrelated dockets are broad and were simply explained in the Intervention Request – and without participation as a party in all three of these dockets, Jewell Jinkins Intervenors will not have an adequate opportunity to address their concerns before the Commission.² It became apparent that these dockets were all connected, that they would proceed simultaneously, and that the Intervenors needed to participate in all of them in order to be represented in the big picture of this project. This 5-BS-228 docket is one in which the Applicants plan to acquire an interest in the Badger Hollow solar project. Applicant Invenergy appears to be merely a pass-through, an Applicant in name only, to immediately provide a permitted project to MGE and WPSC.

These three dockets,³ if all permitted and approved by the Commission, would result in a utility or two owning 50% of the Badger Hollow project. Because the solar project was applied for by an independent power producer, it is claimed that the IPP is exempt from demonstrating need in the CPCN proceedings (9697-CE-100 and 9697-CE-101). These two Invenergy CPCN applications were made with the utilities MGE and WPSC visibly waiting in the wings with their toe on the stage, ready to jump in as project owners immediately after the projects were permitted. With these two applications and the buy/sell acquisition docket, they are acting in concert in overtly connected actions, actions which should not be separated from the utilities

² Jewell Jinkins Intervenors have requested and been granted party status in three of the interrelated solar dockets, 9697-CE-100, 9697-CE-101, and the above-captioned 5-BS-228. Jewell Jinkins Intervenors have not intervened in the Two Creeks solar dockets, 9696-CE-100 and 9696-CE-101.

³ Again, note that Jewell Jinkins have purposefully not requested intervention in the Two Creeks dockets precisely because their interest is too remote.

through this bait and switch. Invenergy, the CPCN applicant, and MGE and WPSC, through these interrelated dockets, are avoiding need consideration and review. Through this Motion for Interlocutory Review, the CPCN applicant and MGE and WPSC could also avoid public consideration of these interrelated dockets by pushing public Intervenors out. Jewell Jinkins Intervenors object.

II. COMMISSION POLICY AND PRACTICE FAVOR INTERVENTION.

Applicants make some strong claims in their Motion, as if the future of utility regulation depends on prohibiting intervenors from participating, that this grant of party status would “open the floodgates to all manner of tenuous intervention theories in future proceedings.” Motion for Interlocutory Review, p. 1. Applicants state that if the Order “is upheld, it will invite an intervention free-for-all before this agency.” *Id.*, at 3. Look no further than the related Cardinal-Hickory Creek 5-CE-146 to see open floodgates and free-for-all of 76 Intervention requests. Then look at the simple proposal of how those many Interventions are to be handled, and be quickly disabused of any notion of unmanageability of multiple requests for Intervention.⁴ Intervenors may make “all manner of tenuous interventions theories,” which are then evaluated and accepted or rejected. That is the job of the Administrative Law Judge. The dire specter of the open floodgates free-for-all is a fabrication of the Applicants. Further, the two Interventions, TWO, complained of, Jewell Jinkins Intervenors and Kites, do not seem administratively unmanageable, and Applicants have provided no evidence that they are. The Order would not have approved Intervenor requests if that were the case. Intervention requests are granted on a case by case basis. The Order on Request to Intervene – Third is well grounded.

Applicants interpret the notion of standing, for purposes of intervention, as one of limitation. Applicants interpret “interest” and “injury” narrowly, and challenge the Order’s

⁴ See ERF # [354955](#), Intervention Requester Letter.

broader interpretation:

This argument also reduces the test for injury in fact to a simple conditional statement: if an alleged injury is theoretical, then it cannot be injury in fact. However, this argument obfuscates the complexity of this test. “Injury alleged, which is remote in time or which will only occur as an end result of a sequence of events set in motion by the agency action challenged, can be a sufficiently direct result of the agency's decision to serve as a basis for standing.” *Wisconsin's Environmental Decade, Inc. v. Public Service Commission of Wisconsin et al.*, 69 Wis. 2d 1, 14, 230 N.W.2d 243 (1975). “However, the sequence of events cannot be so conjectural or hypothetical, ... as to strain the imagination.” *Fox v. Wisconsin Dept. of Health and Social Services*, 112 Wis.2d 514, 334 N.W.2d 532 (1983) (internal citation omitted).

Order on Request to Intervene, p. 3. As noted in the Order, “whether the acquisition poses injury to Requestors is up for debate.” *Id.*

Applicants in these dockets are, intentionally or not, avoiding project need review, which is contrary to the purpose of Wisconsin’s regulatory scheme and the Commission’s jurisdiction. Deflecting or undermining regulatory review through circumvention is another injury, affecting all in Wisconsin.

As CUB notes in testimony in the solar siting CPCN docket:

Had the two utilities themselves applied for the CPCN, questions such as engineering, economics, need, and alternatives could have been considered alongside the questions of siting, allowing the Commission to appropriately evaluate all of the issues and statutory requirements in a holistic way. Moreover, given the timing of this CPCN proceeding (as well as the proceeding dealing with the Two Creeks solar farm), which is being handled in nearly lock-step with the Acquisition Docket, it is unclear whether questions of engineering (which may bear upon some of the concerns of landowners in the project area, such as safety) will be presented before the Commission in such a way that the Commission has the statutory authority to take any actions it might otherwise have deemed appropriate.

Direct-CUB-Singletary-10, p. 11, l. 8-17.⁵ There are “concerns that continued use of the site-and-acquire model being employed with Badger Hollow may undermine a comprehensive or holistic application of the CPCN statutes by the Commission.” With reason, Jewell Jinkins

⁵ ERF # [355364](#), Direct Testimony of Singletary, p. 11, PSC Docket 9697-CE-100.

Intervenors share these concerns,⁶ and they share the related concerns regarding ability to address need in this docket were voiced by Jewell Jinkins Intervenors at the Prehearing Conference, and again in its response to Applicants' Objection to Intervention Out-of-Time. See 05-BS-228 Tr. 1-39, p. 5, l. 24 – p.6, l.19. Need is the most fundamental issue to address, because a determination of need determines whether a project will be built.⁷ Discussion of alternatives is also a fundamental issue, because a large first-impression project has precedential and physical impacts on future direction of energy policy and land-use.

The Commission, in its administrative role, exercises its discretion permissively, as codified, on a case-by-case basis, and encourages public participation. The Commission's administrative procedure directive is clear in favoring intervention:

(2m) Any person whose substantial interest may be affected by the decision following the hearing **shall**, upon the person's request, be admitted as a party.

Wis. Stat. §227.44(2m) (emphasis added); see also Wis. Code PSC 2.21(1).

Permissive intervention is... well... permissive, as noted in Code and in the Order:

(2) PERMISSIVE INTERVENTION. A person not satisfying the criteria of sub. (1) may nevertheless intervene in a proceeding or docket **if the person's participation likely will promote the proper disposition of the issues** to be determined in the proceeding or docket **and if the person's participation will not impede the timely completion of the proceeding or docket.**

Wis. Code PSC 2.21(2)(emphasis added); see also Order on Request to Intervene, p. 3. The importance of intervention, and state support of public participation, is also found in Wisconsin's system of Intervenor Compensation, designed to help Intervenors present their case by providing resources to Intervenors. Wis. Code. PSC Ch. 3. Wisconsin's policy on Intervention is both

⁶ Inverenergy used this same pass-through model in Minnesota, to acquire wind project and transmission permits, which is to be immediately sold to Xcel Energy. See Freeborn Wind, MN PUC Docket IP-6946/17-410 and IP-6946/17-322. CUB's concerns are based in fact.

⁷ Denial of intervention, limiting Jewell Jinkins Intervenors to participation in only two of the three interrelated dockets, unable to address need, would in itself be an injury in fact.

permissive and supportive.

III. APPLICANTS MOTION SHOULD BE DENIED.

The Applicants' seek to limit Jewell Jinkins Intervenors participation in the third of the three interrelated dockets. However, Applicants' have produced no evidence that Jewell Jinkins Intervenors participation will not promote the proper disposition of the issues, nor have Applicants' provided any evidence that Jewell Jinkins participation would impede the timely completion of the proceeding or docket.

Instead, Applicants' Objection and Motions are an abuse of process that has sucked Intervenors into a cycle of responding which takes time away from effective participation in the docket, delays Discovery, and which does "impede the timely completion of the proceeding or docket." Applicants' should be held accountable for their delays.

For the above reasons, Jewell Jinkins Intervenors respectfully request that the Applicants' Motion for Interlocutory Review and reversal of the Order on Intervention Requests – Third be promptly denied, and that Jewell Jinkins Intervenors be allowed to proceed with all rights and responsibilities of a full party.

Dated this 15th day of December, 2018.



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