

**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' MOTION FOR PROTECTIVE ORDER**

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Pursuant to Wis. Stat. § 804.01(3) and Wis. Admin. Code §§ PSC 2.23 and 2.24, the Applicants, Wisconsin Public Service Corporation (“WPSC”) and Madison Gas and Electric Company (“MGE”), seek a protective order (1) preventing Intervenor Richard and Patricia Jinkins, Alan and Marcia Jewell, and Wade Wendhausen (the “Jewell/Jinkins Intervenor”) and Brenda and Casey Kite (the “Kite Intervenor”) (together, the “Landowners”) from seeking discovery in this docket until the full Commission has had an opportunity to consider the Applicants’ pending interlocutory appeal of the ALJ’s decision to allow the Landowners to intervene in this docket; and (2) preventing disclosure to the Landowners of confidential financial, trade secret and Critical Energy/Electricity Infrastructure Information (“CEII”) that is only tangentially related to the reasons for their intervention.

**Background**

The Landowners are not customers of either public utility participating in this docket. They intervened because they live close to the site of the proposed Badger Hollow Solar Farm (“Badger Hollow”) and are concerned about its impacts on their homes and property values. Their intervention request was granted on December 4, 2018. (PSC REF # 354427). On December 10, the Applicants filed an interlocutory appeal from the Administrative Law Judge’s decision granting the Landowners’ request to intervene in this docket. (PSC REF # 354992). In

that filing, the Applicants argued that the Landowners lack standing to intervene. The Commission must issue an order on the interlocutory appeal within 10 days, or the appeal is deemed denied. Wis. Admin. Code § PSC 2.27(3).

Just after being granted intervention in this docket, the Landowners served discovery on the Applicants seeking all confidential information that has been filed to date.<sup>1</sup> The Landowners have specifically requested Appendices A and B to the Application, which contain highly confidential analyses of each utility's future load and capacity projections that the Applicants have kept secret *even from each other*. (PSC REF # 343702, 343711). The Landowners also seek Appendix C, which contains detailed financial analysis of the Applicants' proposed acquisition of a portion of Badger Hollow and the Two Creeks Solar Farm. This analysis necessarily depends on forward-looking, competitively-sensitive, trade secret information of both utilities, *as well as* confidential and proprietary information belonging to the developers of the solar projects. (See PSC REF # 343614, Confidentiality Request.) Finally, the Jewell/Jinkins Intervenors' request specifically seeks CEII. Applicants are required to take stringent precautions against disclosure of CEII, which is defined as "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure (physical or virtual) that: (1) relates details about the production, generation, transmission, or distribution of energy; (2) could be useful to a person planning an attack on critical infrastructure; (3) is exempt from mandatory disclosure under the Freedom of Information Act; and (4) gives strategic information beyond the location of the critical infrastructure." 18 CFR § 388.113(c)(2). Because of its sensitivity, persons seeking CEII information must follow special procedures and be verified by Federal Energy

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<sup>1</sup> The Jewell/Jinkins Intervenors' December 6, 2018 discovery requests are attached as Exhibit A and the Kite Intervenors December 9 discovery is attached as Exhibit B. While the practical effect of their requests are the same, the Jewell/Jinkins Intervenors sought specific categories of confidential information in addition to their blanket request for all confidential filings; the Kite Intervenors simply requested "all documents in this docket filed as 'confidential.'"

Regulatory Commission staff not to pose a security risk. 18 CFR § 388.113(g)(5). To the Applicants' knowledge, the Jewell/Jinkins Intervenors' attorney does not have this certification.<sup>2</sup>

The Applicants sought and were granted confidential treatment for each of the above items. For example, in support of WPSC's request to redact load and capacity information from Appendix A to the Application, Ted Eidukas declared under penalty of perjury that the information: (1) contains trade secrets as defined in Wis. Stat. § 134.90; (2) would aid a competitor of WPSC under Wis. Stat. § 196.14; and (3) may otherwise be exempt from disclosure under Wisconsin's Public Records Law, Wis. Stat. §§ 19.31 to 19.39. (*See* PSC REF # 343711, Confidentiality Request). Appendix B similarly contains MGE's trade secrets, and is information that "is economically valuable because it is not generally known or readily ascertainable and its disclosure would aid utility competitors and suppliers." (*See* PSC REF # 343702, Confidentiality Request). Based on the Applicants' affidavits, Commission Staff concluded that each of these appendices contained trade secrets and competitively sensitive information that should not be disclosed to the public, and approved partial redaction of Appendices A and B and redaction of Appendix C in its entirety. (*See* PSC REF # 343711, 343702, 343614, Confidentiality Determinations).

### **Legal Standard**

Protective orders are proper when a discovery request will subject a party to "annoyance, embarrassment, oppression, or undue burden or expense[.]" Wis. Stat. § 804.01(3)(a); *see also State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 150 N.W.2d 387 (1987). A protective order may order the discovery not be had, that certain matters not be inquired into, and that trade secrets or other confidential commercial information not be disclosed. Wis. Stat. §§ 804.01(3)(a)

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<sup>2</sup> The Jewell/Jinkins Intervenors' Request No. 5 is also unduly burdensome because it asks Applicants to create "narrative summaries" of PROMOD data that do not exist, and would need to be specially drafted for the Jewell/Jinkins Intervenors.

1, 4, 7. When determining whether to issue a protective order, the Commission must weigh the burden and expense of providing the discovery against the value of the information sought. *See Vincent & Vincent, Inc. v. Spacek*, 102 Wis.2d 266, 272, 306 N.W.2d 85 (Ct. App. 1981).

### **Argument**

#### **A. A protective order should be granted to maintain the *status quo* pending the Commission's decision on the Applicants' interlocutory appeal.**

The Applicants' first request for relief is modest: a brief stay of the Landowners' pending discovery to give the Commission time to decide whether they were properly granted party status. If the Commission reverses the ALJ's order, the Landowners will no longer be parties to this case and will have no basis for seeking discovery of any sort, let alone of confidential, trade secret and CEII information.

As the Applicants explained in their interlocutory appeal, the ALJ's decision to allow the Landowners to intervene was premised on an unprecedented and overly expansive view of standing that, taken to its logical conclusion, would permit anyone who purchases electricity anywhere within the MISO footprint to intervene in this Commission's Wisconsin-centric proceedings. Allowing the Landowners to gain access to the Applicants' trade secret and CEII information as a result of their tenuous theory of intervention will exacerbate the harm caused by their intervention in this docket.

Wisconsin law supports the Applicants' requested relief. Recent revisions to Wisconsin's discovery rules mandate that all discovery stop while a motion to dismiss for failing to state a claim on which relief may be granted is pending, "unless the court finds good cause upon the motion of any party that particularized discovery is necessary." *See* Wis. Stat. § 802.06(1)(b). The Applicants' request for interlocutory review presents an analogous situation. Until the

Commission determines whether the Landowners have standing to participate in this case, they should not be allowed to freely seek discovery.

**B. A Protective Order should be granted regardless of the disposition of the interlocutory appeal to prevent disclosure of confidential information, trade secret information and CEII that has little bearing on the Landowners' claims in this docket.**

The Landowners' intervention request reveals that their concern with Badger Hollow is principally rooted in its close proximity to their homes:

- “The Kite’s [sic] own and reside in the residence located at 2680 County Road G, Cobb, Wisconsin 53526 (“Residence”). . . . the Kite’s [sic] entire Residences is located within and adjacent to the proposed Badger Hollow Solar Farm . . . . The Kite’s [sic] are concerned about the extreme close proximity of the . . . Project to their Residence, the health and safety impacts of the . . . Project on their family and livestock, the facility’s negative impact on the Kite’s [sic] property values, and the potential growth of the . . . Project within the . . . Project boundaries.” (PSC REF # 353052, at 2).
- “The Kite’s [sic] stand more to lose from this project than any customer of the Applicants. Neither of the Applicants’ customers will be surrounded by hundreds of thousands of solar panels as the Applicants are not purchasing a project in their own territories. The Applicants’ customers get to reap the benefits of the project to the detriment of the Kite’s [sic]. As a result, this is not a ‘theoretical interest’ as suggested by the Applicants, it is very real.” (PSC REF # 353659, at 2).
- “Jewells and Jinkins will be affected by the ‘buy/sell’ agreement’s impacts due to the Badger Hollow project’s proximity and physical intrusion into their established community.” (PSC REF # 353022, at 3).

- “. . . because the Jewell Jinkins Intervenors are long-time local residents and landowners with generational ties to the community, and as landowners with long-standing agricultural activities, they are concerned about the big picture issues and community impacts associated with the three dockets for this project.”  
*Id.*
- “These projects have extremely close proximity to their land and homes, and will have resultant health and safety impacts on the land, water, livestock and property values.” *Id.*
- “[The Jewell/Jinkins Intervenors] are concerned that the proposed, large scale solar power generation facility would create hardship over the lifetime of the project on the agricultural economies they in the project are depend on [sic] and have very [sic] substantial interest in preserving.” *Id.* at 4.
- “If the project were to go forward without regard to whether project or its output were purchased, which is not credible, if the nature of the community were to be changed so substantially on mere speculation, on a speculative market project, that is a great risk to the community, and one that would indeed be an injury in fact.” (PSC REF # 353525, at 3).

*This* proceeding, however, will not take up those issues; instead, this proceeding is limited to Applicants’ proposal to acquire ownership interests in Badger Hollow and the Two Creeks Solar Farm. The Landowners were granted leave to intervene in the Badger Hollow CPCN docket. (*See* PSC REF # 352599). Thus, the Landowners will have the opportunity to

contest the siting and construction of that proposed facility, which they oppose due to its proximity to their homes.<sup>3</sup>

Against the significant harm that could be caused by disclosure of the Applicants' protected information, the Landowners' need for the information is remote. The Landowners are not customers of the Applicants, and any potential impact on their electric rates from the project via MISO or ATC would be miniscule. (PSC REF # 354992, at 5). With nearly nothing on the scales in favor of permitting the Landowners' discovery, even a minimal risk of disclosure means the Applicants' motion for a protective order should be granted. Wis. Stat. § 804.01(2)(am)2 (precluding discovery when the burden or expense outweighs its likely benefit or is not proportional to the needs of the case).

Moreover, to the extent the Landowners do state an interest -- however remote -- in the rate impacts of the Applicants' acquisition, there is at least one other party participating in this case specifically for the purpose of addressing residential customer costs. CUB's intervention request stated that "CUB's members pay for electricity service from WPSC & MGE, and the utilities' joint application . . . could impact customer rates due to acquisition, O&M and transmission costs." (PSC REF # 334040, p. 2). CUB's request also indicated that it "intends that its advocacy benefit not just its own members but all residential and small business ratepayers of the state." *Id.* Thus, the Landowners' interests are represented by another party that has far more experience and expertise advocating on behalf of Wisconsin residential customers. This, too,

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<sup>3</sup> While the Landowners pay lip service to a desire to examine the Applicants' need for Badger Hollow (*see, e.g.*, PSC REF # 353022, at 4) and the effect of acquiring the project on utility rates, it is clear that the animating force behind their intervention is the project's proximity to their homes. In any event, the Applicants explained in their pending interlocutory appeal why the Landowners' limited alleged economic concerns are insufficient to confer standing and by extension insufficient to give them access to confidential, trade secret and CEII information. (PSC REF # 354992).

weighs against allowing discovery of confidential, trade secret and CEII information by the Landowners.

**Conclusion**

For the reasons stated above, the Applicants seek a protective order: (1) preventing all discovery by the Landowners while the Applicants' request for interlocutory review is pending; and (2) a further protective order preventing discovery by Landowners, at any time, of confidential economic, trade secret and CEII information that has no direct connection to issues of local impact raised by the Landowners in this case.

Respectfully submitted this 12th day of December, 2018.

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