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

Docket 5-BS-228

APPLICANTS' MOTION FOR INTERLOCUTORY REVIEW

Pursuant to Wis. Admin. Code § PSC 2.27, the Applicants, Wisconsin Public Service Corporation ("WPSC") and Madison Gas and Electric Company ("MGE"), request interlocutory review of the Administrative Law Judge's December 4, 2018 Order permitting Richard and Patricia Jinkins, Alan and Marcia Jewell, Wade Wendhausen, and Brenda and Casey Kite (together, the "Landowners") to intervene out of time in this matter (PSC REF# 354427).

The Landowners are not customers of either public utility participating in this docket and have demonstrated no interest in this proceeding sufficient to confer standing. The ALJ's Order to the contrary is premised on an unprecedented and overly expansive view of standing that would permit anyone who purchases electricity anywhere within the MISO footprint to intervene in this Commission's Wisconsin-centric proceedings. The Commission's view of standing has never been so broad, and permitting the Order to stand could open the floodgates to all manner of tenuous intervention theories in future proceedings. If standing doctrine is to retain any teeth within this agency, the Commission must reverse and rule that none of the Landowners have a substantial interest in whether WPSC or MGE acquire ownership interests in a utility-scale solar generation project proposed by an independent power producer.

Brief Background

This proceeding concerns Applicants' proposal to acquire ownership interests in the solar generation facilities proposed to be constructed by Badger Hollow Solar Farm, LLC ("Badger Hollow") in Docket 9697-CE-100 and by Two Creeks Solar, LLC in Docket 9696-CE-100. All of 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.

This proceeding, however, will not take up those issues; instead, it is limited to whether WPSC and MGE will be permitted to *acquire ownership interests* in the Badger Hollow and Two Creeks facilities. The Landowners have no conceivable interest in that question, so Applicants opposed their intervention on basic standing grounds (*see* PSC REF# 353470). In their opposition, Applicants explained that this docket is about how they will provide electric service *to their customers*. (*Id.* at 2-3). The Landowners are not customers of either Applicant, so cannot claim an interest in Applicants' costs or quality of service. (*Id.*)

The ALJ's order granting intervention disregarded this straightforward standing analysis in favor of a strained and circuitous approach. First, citing Wis. Stat. § 196.49(3)(b), the ALJ reasoned that because a project cannot be approved unless it is in the "public interest," and because "public" includes all electric customers within the State, the Landowners are part of the group "whose interest the Commission must consider" in this proceeding, and thus have standing to intervene as of right. (Order at 2). Second, the ALJ accepted the Landowners' argument that as customers of Wisconsin Power & Light ("WPL"), their rates could be affected if (as proposed) the Applicants ultimately transfer their interests in the generation tie facility to ATC. (*Id.*; *cf.* PSC REF# 353659 at 2). Third, the ALJ theorized that because Badger Hollow (if built) will be

dispatched into the MISO market, its construction and operation, "in some way, will impact the interests of *all electric consumers in the state*." (*Id.* at 3, emphasis added). By extension, Applicants' *acquisition* of the facilities "may compound (or lessen) these impacts," justifying Landowners' intervention. *Id.*

Argument

In determining whether a person has a right to intervene, the Commission applies a familiar two-part test: (1) whether the petitioner demonstrated that it has or will suffer an injury in fact; and (2) whether that injury is to an interest the law seeks to regulate or protect. *See* Order Denying Intervention, *Consolidated Water Co. and Wis. Pub. Serv. Corp.*, Docket 5-DR-105 (PSC REF# 48623) at 3 (Oct. 5, 2005). Whether the Landowners satisfy that test with respect to the Badger Hollow CPCN proceeding is not at issue. But by no stretch of the imagination do they meet that standard *in this proceeding*. The ALJ's contrary logic does not hold up—and if it is upheld, it will invite an intervention free-for-all before this agency.

I. Just because a proceeding is concerned with the "public interest" does not mean every member of the public is entitled to intervene.

The ALJ's first basis for permitting intervention is that the Landowners are members of "the public," "whose interest the Commission must consider" in this proceeding. (Order at 2). There are at least two problems with this logic.

First, the case cited by the ALJ, *Wisconsin Power & Light Co. v. PSC*, 148 Wis. 2d 881, 437 N.W.2d 888 (Ct. App. 1989), did not concern intervenor standing, but rather statutory interpretation. As the ALJ noted, that case did hold that the word "public" in the CPCN statute extends to all consumers of electricity in Wisconsin, *id.* at 892-93, but the court did *not* hold that all such consumers therefore have automatic standing to intervene in any CPCN proceeding. As such, the Order's logic is missing a link: it identifies no authority tying "the public interest" that

must be considered under the CPCN statute to party *standing* under Wis. Stat. § 227.44(2m) and Wis. Admin. Code § 2.21(1). In short, the two are completely different things.

Second, and more fundamentally, it cannot be that every electric customer in Wisconsin has standing to participate in every Commission proceeding concerned with "the public interest" merely because they are members of "the public." If that were so, then no request to intervene filed by a Wisconsin citizen could ever be denied. Instead, the entire purpose of the standing doctrine is to identify individuals with a specific, cognizable interest *over and above* the interests of the general public; it is only that heightened interest which gives rise to the right to intervene. *See Wisconsin's Environmental Decade, Inc.* v. *Wis. Dep't of Natural Resources*, 115 Wis. 2d 381, 406-07, 340 N.W.2d 722 (1983) (to have standing under Chapter 227, "petitioners must have an injury different in kind or degree from injury to the general public"). That is precisely why Wis. Stat. § 227.44(2m) and Wis. Admin. Code § 2.21(1) require a "substantial interest" before a person may intervene as of right.

The ALJ has recognized this distinction in previous orders. *See, e.g.*, Order Identifying Parties, *Application of ATC*, Dkt. 137-CE-166 (PSC REF# 213833) (Aug. 14, 2014) (where landowner requesters "expressed general skepticism and concern about the project" and "wished to highlight particular hardships the proposal may cause to themselves and their property," their proposed participation "track[ed] that of a member of the general public, not that of a party"). But here, for some reason, the ALJ disregarded this distinction and the plain language of Wis. Stat. § 227.44(2m) and Wis. Admin. Code § 2.21(1) to conclude that merely being electric customers somewhere in Wisconsin gives the Landowners a right to intervene. This was error with obvious implications for future intervention requests, and the Commission should reverse.

II. The Landowners' sole theory of standing is unduly conjectural and remote.

Other than concerns that will be addressed in the CPCN dockets, as opposed to this one, the only theory of standing articulated by the Landowners themselves is that as WPL customers, their rates could somehow be affected if the Applicants later transfer their interests in the Badger Hollow generation tie facility to ATC. (PSC REF# 353659 at 2). The ALJ accepted this rationale as a basis for conferring standing. (Order at 2). This, too, was incorrect.

To have standing, the petitioner must identify an "injury in fact," which "must not be hypothetical or conjectural." Order Denying Intervention, *Consolidated Water Co.*, *supra*, at 3. Here, even taking Landowners' alleged concern at face value, their alleged injury is so small as to be hypothetical or conjectural. Although it is true that ATC would incorporate the value of the Badger Hollow generation tie facility into ATC's rate base and recover a return on and of the investment, the impact on a single Wisconsin residential electric customer would be almost too small to measure. ATC's rates are spread over electric customers in parts of four states: Wisconsin, Minnesota, Michigan and Illinois. For each $1 million invested in the generation tie line, the Applicants estimate that a WPL residential customer's electric rate would increase on average by $0.0000025/kWh, for a total bill increase of approximately $0.02 *per year*.

This does not rise to the level of "substantial injury" required to confer standing as of right. Not only is the customer impact so small as to be purely theoretical, but a general interest in lower electric rates does not give rise to standing in the first place. *See, e.g.*, *Public Service Co. of New Hampshire v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998) ("a putative intervenor must show at a bare minimum that it has a significantly protectable interest that is direct, not contingent," and a generalized interest in "lower electric rates . . . falls well outside the pale": "After all, every electricity consumer in New Hampshire and every person who does business

with any electricity consumer yearns for lower electric rates.") (internal citations and quotation marks omitted). Moreover, if endorsed, this basic theory of standing would grant all electric customers throughout ATC's service territory the right to intervene in any Commission proceeding involving transmission facilities anywhere in the State.

III. The MISO-based theory of standing is even more attenuated, with potentially ridiculous consequences.

The Order's third theory of standing is that because Badger Hollow (if built) will be dispatched into the MISO market, its construction and operation, "in some way, will impact the interests of all electric consumers in the state"—and so, by extension, will this proceeding relating to acquisition of ownership interests in the facilities. (Order at 3).

Even setting aside the logical leap from the CPCN dockets to this one, this MISO-based theory of standing is the most attenuated of all. The premise is that anyone purchasing electricity from a utility in the MISO market has an interest sufficient to confer standing in Commission proceedings. If that is the case, why stop at electric customers in Wisconsin? The MISO footprint extends all the way through the middle of the country and beyond, stretching from Louisiana and Mississippi in the south to Manitoba in the north. Badger Hollow's construction and operation, "in some way, will impact the interests of all electric consumers" in those places, too. If that is enough to confer standing, Commission beware.

Applicants' position is not that the Commission should "force Requestors to prove injury will occur before they are allowed to participate in the process," as the Order suggests. (Order at 3). But the law does require Landowners to demonstrate a direct causal link between this docket and a concrete injury before they may intervene as of right. And the links proffered by Landowners and the ALJ in this matter—MISO electrons, hypothetical future ATC costs, or belonging to the general public—simply do not meet that bar.

The Order cites *Wisconsin's Environmental Decade, Inc.* v. *Public Service Commission of Wisconsin*, 69 Wis. 2d 1, 230 N.W.2d 243 (1975), for the proposition that alleged injuries "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" may be sufficient to confer standing. (Order at 3). Notably, however, the would-be intervenor in that case (WED) represented customers of the utility applicant and was granted leave to intervene on that basis. *Id.* at 17 ("Our conclusion is that WED's members, *who are customers in the area affected by the PSC's order in this case*, have a sufficient interest . . . in the future adequacy *of their service*, and that WED has standing"); *see also id.* at 19 ("WED has alleged . . . injury to the interests of its members, *who are customers of the Corporation*, to continue to enjoy adequate and sufficient service . . ."). (emphases added). The case provides no support for conferring standing upon *non*-customers, as the ALJ did here.

IV. The Landowners also fail to qualify for permissive intervention.

Because the Order incorrectly concludes that the Landowners satisfy the requirements for intervention as of right, it does not reach the question of whether they would qualify for permissive intervention under Wis. Admin. Code § PSC 2.21(2). The Order's principal harm is in its legal analysis of standing and the implications of that analysis for future cases. However, the Landowners also fail the test for permissive intervention because their participation will not likely "promote the proper disposition of the issues to be determined in the proceeding." *Id.*

Again, the issue to be determined in *this* proceeding is whether Applicants may acquire an ownership interest in the Badger Hollow facilities. Respectfully, Landowners have nothing to contribute to that discussion. It does not involve *their* electric utility (WPL), and the matters that do affect them (the construction and operation of Badger Hollow) will be addressed in the CPCN docket, where they are already participating. Moreover, Badger Hollow has indicated that (if

approved) the project will be built whether Applicants invest in it or not. *See* PSC REF# 343803. Thus what was said of the *CWC* intervenors is true of Landowners here: "Since [their] concerns are not issues *in this case*, the requesters' intervention would not promote the proper disposition of the issues." Order Denying Intervention, *Consol. Water Co.*, *supra*, at 3 (emphasis added).

Beyond this, Wis. Admin. Code § PSC 2.21(2) requires that a permissive intervenor's participation "will not impede the timely completion of the proceeding or docket." The ALJ predicted that admitting Landowners to be proceeding would cause no disproportionate interference (Order at 3-4), but Landowners have already proven this prediction false with a patently overbroad data request seeking access to all of Applicants' confidential data in this docket.[1] For this reason, too, the Commission should reverse.

V. Conclusion

The Landowners' real complaint is "not in my backyard": they oppose the Badger Hollow solar project because it will be built close to their homes, and that is why they have intervened in the relevant CPCN proceeding. But the Order approving their intervention in *this* proceeding fails to identify any concrete injury that the Landowners will suffer due to anything to be decided *here*. Their only theoretical interest here is financial, it is doubtful that a general interest in lower electric rates is sufficient to confer standing in any event, and either way there is no chance that these *non-customers* will be directly or indirectly affected by anything determined in this docket. The Commission should reverse the Order and deny the Landowners' request to intervene.

[1] *See* Landowners' Data Requests to WPSC and MGE, served December 6, 2018, and attached as Exhibit A to Applicants' forthcoming motion for protective order.

Respectfully submitted this 10th day of December, 2018.

QUARLES & BRADY LLP

/s/ Bradley D. Jackson

Bradley D. Jackson
Joseph O. Wilson
33 East Main Street
Madison, WI 53703
(608) 283-2675
bradley.jackson@quarles.com
joe.wilson@quarles.com

Catherine Phillips
Wisconsin Public Service Corporation
231 W. Michigan Street
Milwaukee, WI 53202

Attorneys for Applicant
Wisconsin Public Service Corporation

STAFFORD ROSENBAUM LLP

/s/ Bryan Kleinmaier

Bryan Kleinmaier
222 West Washington Ave., Suite 900
Madison, WI 53703
(608) 259-2600
bkleinmaier@staffordlaw.com

Attorney for Applicant
Madison Gas and Electric Company