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**Jan 09, 2019**

PSC REF#: 357254

Public Service Commission of Wisconsin  
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**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

**ORDER ON MOTION TO PROTECT**

On December 12, 2018, Wisconsin Public Service Corporation (WPSC) and Madison Gas and Electric Company (MGE) (collectively Joint Applicants) filed a Motion for Protective Order ([PSC REF#: 355152](#))(Motion), to bar discovery sought by the Jewell-Jinkins Intervenors (JJI or Requestor), and the Kite Intervenors (collectively, Requestors). Jewell-Jinkins Intervenors responded.<sup>1</sup> ([PSC REF#: 355434](#))(Response). Joint Applicants replied. ([PSC REF#: 355757](#))(Reply).

Joint Applicants seek protection from this discovery under Wis. Stat. § 804.01(3)(a),<sup>2</sup> on three grounds. First, the Joint Applicants argue the duty to comply with any discovery of Requestors should be stayed pending disposition of the Joint Applicants' Motion for Interlocutory Review of the Administrative Law Judge's decision to grant Requestors intervention. Motion at 4-5. Second, the Joint Applicants argue a party's right to discovery is limited in scope to the claims asserted by that party, and the information demanded falls outside that scope. Motion at 5-7. Third, Joint Applicants argue the documents demanded contain confidential and critical energy infrastructure information (CEII), the need for the information

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<sup>1</sup> Jewell-Jinkins Intervenors also filed a Response to Joint Applicant's Reply. ([PSC REF#: 355811](#)). Commission procedure allows for no such filing. Therefore, this Order relies in no way on the arguments presented in that filing.

<sup>2</sup> Wis. Stat. § 804.01(3)(a) states, "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...."

requested is outweighed by the harm that could be caused by disclosure, and Requestors are not authorized to receive CEII. Motion at 2-3 and 5-7.

### **Stay of Discovery**

On December 28, 2018, the Joint Applicant's Motion for Interlocutory Review was denied by operation of law. This made moot the Motion with respect to the request for a stay.<sup>3</sup> The Motion is also moot with respect to the Kite Intervenors.<sup>4</sup> However, this Order, denies the Motion with respect to JJI, under Wis. Admin 2.02(1), for the following reasons. Also, for reasons explained below, the relief in this Order applies equally to JJI and Kite.

### **Claims-Based Limit to Discovery.**

No legal basis exists for Joint Applicants' contention that a party's right to discovery is limited in scope to the claims asserted by that party. In Commission proceedings, applicants and intervenors are both parties with equal discovery rights under in Wis. Stat. Ch. 804. Wis. Admin. Code §§ PSC 2.20(1) and PSC 2.24. Wisconsin Stat. Ch. 804, provides that claims made by a particular requestor pose no limit to its discovery rights. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense...." Wis. Stat. § 804.01(2)(a) (emphasis added). Joint Applicants' arguments to the contrary ignore the plain language of Wis. Stat. § 804.01(2)(a). The scope of a civil case is set by the claims and defenses

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<sup>3</sup> Because of the overlapping timing triggered by the two Joint Applicant Motions, the request for a stay was always, at best, superfluous.

<sup>4</sup> Joint Applicants argue that Kite Intervenors' failure to respond deems the Motion granted by operation of Sec. C.7. of the Guidelines for Contested Case Proceedings § C.7. Reply at 1. ([PSC REF#: 355757](#)). Prehearing Conference Memorandum, Guidelines at 10. ("Any request to which a response is authorized, but not received, shall take effect immediately after the response deadline..."). ([PSC REF#: 354877](#)). However, the granting of a motion for protective order by default produces a meaningless result because it causes no protective order to automatically issue. A more accurate framing of this situation is that by failing respond, the Kite Intervenors have been deemed to have withdrawn its request. Therefore, no protective order need issue with respect to that request.

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of all parties to that case, and any party may engage in discovery within that scope, regardless of the particular claim it makes.

In construction authorization proceedings before the Commission, parties do not file “claims,” per se. An application filed with the Commission sets forth the grounds to open a docket. Wis. Admin. § PSC 2.07(1). A request for intervention sets forth the grounds for a person’s intervention in a docket. Wis. Admin. § PSC 2.21(1). While these filings may inform the Commission with respect to the nature of the docket, the scope of a proceeding is officially set in the issues list. The issues list is developed by mutual agreement of the parties and Commission staff, or by order of the Administrative Law Judge. Nothing limits party discovery to a subset of the approved issues. Therefore, in harmony with Wis. Stat. § 804.01(2)(a), any party may conduct discovery within the scope of the entire issues list.

At issue in the instant proceeding is Joint Applicants’ need to purchase certain proposed electric facilities, and that such purchase is in the public interest. Prehearing Conference Memorandum, Docket 5-BS-228 § II. ([PSC REF#: 354877](#)). JJI, in a letter dated December 6, 2018, requested that Joint Applicants produce: 1) a non-disclosure agreement for the production of confidential information, 2) the confidential versions of three specific appendices to the application filed in this proceeding, and 3) all other confidential information filed in this proceeding, including CEII except for that information as it related to PROMOD or other modeling information. Motion, Exhibit A ([PSC REF#: 355152](#))(Request). No dispute exists that the Request demands information relevant to the approved issues. Therefore, when viewed as a discovery request, the Request is valid.<sup>5</sup>

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<sup>5</sup> Joint Applicants’ contention that the information sought in the Request falls outside the scope of JJI’s real interests, also relies on mere speculation and mischaracterization of JJI’s interests. Raising such matters here,

Joint Applicants error goes even further than its misreading of Wis. Stat. § 804.01(2)(a). Joint Applicants erroneously characterize the Request as discovery under Wis. Stat. Ch. 804, when its proper treatment is a demand for service of documents under Wis. Admin. Code § PSC 2.06(3)(a)1. “In a proceeding, parties shall serve upon all other parties, a copy of any paper filed with the commission.” Wis. Admin. Code § PSC 2.06(3)(a)1.

No dispute exists that the documents requested are already filed with the Commission. Therefore, rather than discovery under Wis. Stat. Ch. 804, the Request is a demand to be served documents already filed, under Wis. Admin. Code § PSC 2.06(3)(a)1. Furthermore, because the documents requested are already filed and specifically identified in the Request, no need exists to ‘discover’ the documents. Fulfilling the Request could not be any easier. Therefore, Joint Applicants assertion that the Request creates of any ‘burdens’ worthy of protection are disingenuous.

Service under Wis. Admin. Code § PSC 2.06(3)(a)1, is an essential element to Commission practice because due process and the creation of a complete and accurate record require all parties have access to the same information for the preparation of written testimony and full participation at the party hearing session. See Wis. Stat. §§ 227.45(2) and 227.45(6). Because Joint Applicants filed the documents at issue with the Commission, they must serve them on JJI. This right is, of course, subject to any necessary protective measures, as discussed below.

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amounts to re-litigation of JJI’s Request to Intervene. Order on Requests to Intervene-Third, *interlocutory review denied*. ([PSC REF#: 354427](#)). And, no need exits to swim again in the currents that creates.

### **Confidential Information**

As the last ground for protective order, Joint Applicants assert that the documents requested contain confidential, trade secret and CEII.<sup>6</sup> CEII is information that relates to details about the production, generation, transportation, transmission, or distribution of energy and could be useful to a person in planning an attack on critical infrastructure. 18 CFR 388.113 (c)(2). Joint Applicants contend that to gain access to CEII in this proceeding, Requestors must have a current FERC CEII verification under 18 CFR § 388.113(g)(5). Motion at 2.

Joint Applicants provide no authority to support contention that 18 CFR § 388, applies to this proceeding. Independent research reveals none. While federal law prohibits Commission release of CEII on the basis of a public records request,<sup>7</sup> it also recognizes the Commission's independent need for, and handling of ,CEII in its proceedings.<sup>8</sup> Therefore, FERC procedures for submitting, designating, handling, sharing, and disseminating of information under 18 CFR 388.113, pertains to FERC, not to the Commission.

Assuming, for argument's sake that the FERC rule governs the dissemination of CEII in Commission proceedings, Joint Applicants erroneously invoke the verification process under 18 CFR § 388.113(g)(5). This section applies to requests for CEII by those who are **not** "parties in

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<sup>6</sup> Joint Applicants provide no basis for withholding any confidential information not designated by them as CEII other than the basis already fully addressed above; that the information does not relate to Requestors interests in the proceeding.

<sup>7</sup> "[CEII s]hall not be made available by any Federal, State, political subdivision or tribal authority pursuant to any Federal, State, political subdivision or tribal law requiring public disclosure of information or records." 16 U.S.C.A. § 824o-1(d)(1)(B).

<sup>8</sup> 16 U.S.C.A. § 824o-1(d)(4):

In exercising their respective authorities under this subsection, the Commission and the Secretary shall take into consideration the role of State commissions in reviewing the prudence and cost of investments, determining the rates and terms of conditions for electric services, and ensuring the safety and reliability of the bulk-power system and distribution facilities within their respective jurisdictions.

a proceeding.” 18 CFR § 388.113(f)(4),<sup>9</sup> governs the sharing of CEII between parties. Under this section, the filer of CEII must share with the requesting party CEII upon receipt of an executed non-disclosure agreement provided by the filer. As explained below, this process is substantively the same as the Commission’s process for the service of confidential information between parties to a proceeding. No further bar to sharing CEII need be erected simply at Joint Applicants’ insistence. Therefore, by using the Commission’s confidentiality procedures in the dissemination of CEII, the Commission, in comity with FERC regulation, reasonably exercises its independent authority to use CEII.

The Guidelines for Contested Case Proceedings, ordered in this proceeding, explain this process in detail:

Any party, or its representative, may review a record submitted in the course of this proceeding and protected under Wis. Admin. Code § 2.12, and participate in any in camera proceedings in this docket, subject to any protective measures necessary to protect the trade secrets of parties and any information entitled to confidentiality protection. Such measures may be provided by agreement between the parties and without approval of the Administrative Law Judge or, if agreement cannot be reached, by order of the Administrative Law Judge.

Prehearing Conference Memorandum, Docket 5-BS-228, Guidelines for Contested Case Proceedings § B.2.d. ([PSC REF#: 354877](#)).

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<sup>9</sup> 18 CFR s. 388.113(f)(4):

Any person who is a participant in a proceeding or has filed a motion to intervene or notice of intervention in a proceeding may make a written request to the filer for a copy of the complete CEII version of the document without following the procedures outlined in paragraph (g)(5) of this section. The request must include an executed copy of the applicable protective agreement and a statement of the person's right to party or participant status or a copy of the person's motion to intervene or notice of intervention. Any person may file an objection to the proposed form of protective agreement. A filer, or any other person, may file an objection to disclosure, generally or to a particular person or persons who have sought intervention. If no objection to disclosure is filed, the filer must provide a copy of the complete, non-public document to the requesting person within five business days after receipt of the written request that is accompanied by an executed copy of the protective agreement. If an objection to disclosure is filed, the filer shall not provide the non-public document to the person or class of persons identified in the objection until ordered by the Commission or a decisional authority. (emphasis added)

No dispute exists that Joint Applicants filed the documents at issue claiming confidential protection under Wis. Admin. Code § PSC 2.12(3). No dispute exists that the Commission granted confidential handling treatment under that rule. Therefore, Wis. Admin. Code §, PSC 2.12(7)(d),<sup>10</sup> applies to the review of these documents by a party. This means, Requestors' right to receive the documents, under Wis. Admin. Code § PSC 2.06(3)(a)1, is subject to, "any protective measures necessary to protect the trade secrets of parties and any information entitled to confidentiality protection."

This process was reiterated at the Prehearing Conference, where JJI raised the matter of access to CEII. This tribunal explained that the only potential barrier to the complete and immediate production of such confidential information filed by Joint Applicants, is the execution of a non-disclosure agreement. "[A]s long as you have a confidentiality agreement and you meet the standards of that agreement [ ] information can be shared." Docket 5-SB-228, Tr. 1-39 Prehearing Conference at 34: 3-6. ([PSC REF#: 353273](#)).

Joint Applicants acted in every way but the manner directed by the rules, Guidelines and Prehearing Conference instructions. By ignoring these directives and erroneously asserting protection from discovery as a shield against their obligations to serve documents under Wis. Admin. Code § PSC 2.06(3)(a)1, the Motion was without any reasonable basis in law.

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<sup>10</sup> Wis. Admin. Code §, PSC 2.12(7)(d), states:

In a proceeding the commission shall, and during the hearing in a proceeding the administrative law judge shall, permit a party or its representative to review the record and participate in any *in camera* proceedings, and may order any protective measures necessary to protect the trade secrets of parties and any information entitled to confidentiality protection.

*See also* Wis. Stat. § 227.46 (7)(a).

A plain reading of the Request shows that the only potential CEII requested by JJI was that included in any “narrative reports regarding PROMOD or other modeling.” Request at 1. (emphasis in original). The Request was limited to those reports, “shown on ERF,” Request at 1. However, Joint Applicants, read this part of the Request as seeking the creation of such reports, if they did not already exist. Joint Applicants stated in the Motion that it did not possess such reports and, as one basis for the Motion, sought protection from the burden of their creation. Motion at 3 fn. 2.

The Response confirmed the plain language of the Request by stating that JJI did not seek to create new documents, but only to receive documents already filed. Response at 4. How Joint Applicants read the words “shown on ERF,” as asking for the production of documents not on ERF, and for the creation of documents that do not exist, and, why, if any confusion could be justified for such a reading, Joint Applicants did not just simply ask JJI for clarification instead of wasting the time and resources of this tribunal, belies reason.

Joint Applicants are guilty of the same rush to judge the Kite Intervenor request as unauthorized and burdensome. The Kite Intervenors requested “all documents in this docket filed as “confidential...” Motion, Exhibit B (PSC REF#: 355152). Joint Applicants labeled the documents it filed that contain CEII information, specifically as “CEII,” and not simply “confidential.” So with further inquiry, Joint Applicants might have complied with the Kite Request to the mutual satisfaction of both parties without bringing this dispute to adjudication. For this reason, the Motion appears to seek not the legitimate protection of CEII upon good cause, and had the effect of obstructing the Kite Intervenors participation by barring the timely receipt of relevant information. Therefore, even though the Kite Intervenors’ failure to respond



to the Motion deems its request withdrawn, justice requires that Kite Intervenors shall receive the same documents Joint Applicants provide to JJI, according to the process established below.

**Order**

For these reasons explained above:

1. Joint Applicants shall immediately provide the Requestors the non-disclosure agreement it made available to other parties in this proceeding, and shall immediately produce all existing information as requested by JJI, upon receipt of an executed agreement, to the recipient each requestor designates in their respective agreements.
2. Requestors may introduce evidence related to the information received through this Order in its rebuttal filing. If the deadline for rebuttal does not provide enough time, Requestors may move for extension of the schedule established in this proceeding by filing a motion for that purpose by the rebuttal testimony deadline.



Michael E. Newmark  
Administrative Law Judge

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