

SERVICE DATE
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PSC REF#: 368006

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 May 8, 2019, Jewell Jinkins Intervenors (JJJ)¹ filed a petition for rehearing pursuant to Wis. Stat. § 227.49. ([PSC REF#: 366212.](#)) The petition asserts that Chairperson Valcq's participation was an error of law due to an alleged conflict of interest, contends that there were procedural improprieties that were errors of fact and law, and argues that the Commission erred in its application of Wis. Stat. § 196.49. The petition also requests a stay of the Commission's Final Decision and that the matter be remanded to the Administrative Law Judge for rehearing for additional fact finding, and for oral argument on the petition. *Id.* at 1, 17. On May 15, 2019, applicants filed a reply to the petition for rehearing as permitted by Wis. Stat. § 227.49(4). ([PSC REF#: 366940.](#))

JJI has failed to show that the Commission committed a material error of fact or law, and has failed to present any evidence strong enough to warrant modification or reversal of the Final Decision. JJI's argument alleging a purported conflict of interest presented by Chairperson Valcq's participation is neither an error of law nor does it constitute the "discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence." Wis. Stat. § 227.49(3)(c). JJI has presented no

¹ JJI is a non-profit corporation formed on November 20, 2018 consisting of five members. The individual officers or members of JJI consist of Richard and Patricia Jinkins, Alan and Marcia Jewell, and Wade Wendhausen. These five individuals, in their individual capacity, were granted party status in this docket. JJI is not and was never a party to the proceeding.

Docket 5-BS-228

credible evidence – let alone new evidence. JJI simply makes statements, not supported by documents or other evidence, that are in conflict with the facts set forth in the Commission’s own records, the records for this proceeding, and the law. In addition to being unsubstantiated and based purely on speculation without regard to the actual facts, JJI’s allegations are untimely and procedural deficient. The balance of JJI’s arguments in the petition merely re-litigate issues that have already been addressed by the record evidence and the Final Decision.

Therefore, the petition is DENIED.

Background

On April 18, 2019, the Commission issued a Final Decision approving the joint application filed by Madison Gas and Electric Company (MGE) and Wisconsin Public Service Corporation (WPSC) (collectively, applicants) for approval to acquire ownership interests in solar electric generating facilities. ([PSC REF#: 364436.](#)) Specifically, the Commission authorized the applicants to acquire ownership of a total of 300 megawatts (MW) (200 MW by WPSC and 100 MW by MGE) of solar photovoltaic generating capacity and an associated generation tie line to be developed by Two Creeks Solar, LLC, (Two Creeks), an affiliate of NextEra Energy, Inc., and Badger Hollow Solar Farm LLC, (Badger Hollow) an affiliate of Invenergy, LLC, (collectively, Solar Facilities) at a cost of approximately \$389.7 million, excluding allowance for funds used during construction (AFUDC). The Two Creeks solar generation facility and its associated generation tie line was authorized by the Commission in docket 9696-CE-100 and 9696-CE-101. ([PSC REF#: 364423](#), [PSC REF#: 364424.](#)) The Badger Hollow solar generation facility and its associated generation tie line was authorized by the

Docket 5-BS-228

Commission in docket 9697-CE-100 and 9697-CE-101. ([PSC REF#: 364425](#), [PSC REF#: 364426](#).)

Opinion

Wisconsin Stat. § 227.49 provides that rehearing may only be granted on the basis of: (1) some material error of law; (2) some material error of fact; or (3) the discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence. Wis. Stat. § 227.49(3)(a) – (c).

The purpose of the rehearing statute is to enable the administrative agency to correct any errors in the proceedings before the case goes any further in the adjudicative process. *See Wisconsin Dept. of Revenue v. Hogan*, 198 Wis. 2d 792, 809, 543 N.W.2d 825 (1995), *Vill. of Cobb v. Pub. Serv. Comm’n*, 12 Wis. 2d 441, 458, 107 N.W.2d 595 (1961). “A petition for rehearing pursuant to [Wis. Stat. § 227.49] is addressed to the agency’s discretion.” *Schwartz v. Wisconsin Dept. of Revenue*, 2002 WI App 255, ¶ 40, 258 Wis. 2d 112, 653 N.W.2d 150.

JJI’s Alleged Conflict of Interest Claims

JJI asserts that Chairperson Valcq’s participation in the Commission’s Final Decision was an error of law due to an alleged conflict of interest, resulting in the purported invalidity of the Commission’s Final Decision. JJI states, without any record evidence, that Chairperson Valcq “received shareholder payments” or “renumeration as a shareholder,” including “a share of revenue generated from matters before the Commission, including but not limited this docket, where Quarles represented the joint applicants.” ([PSC REF#: 366212](#) at 3-5.) JJI contends that “[h]ad Chair Valcq recused herself as she should have, there would have been no quorum and no decision would have been made” and that “[h]er failure to recuse, in this situation, was a material

and prejudicial error.” *Id.* at 2. JJI is wrong both on the facts and the law, and its attempt to raise its concerns through either JJI’s representative’s outburst at the Commission’s open meeting of April 11, 2019 or in its petition for rehearing, are both procedurally deficient and untimely. These defects alone warrant denial. In addition, JJI’s allegations are unsubstantiated and do not meet the criteria warranting review.

JJI’s attempt to raise the issue during the open meeting discussion was procedurally improper as it did not comply with either the open meetings law, Wis. Admin. Code § PSC 2.23, or Commission practice. Wisconsin’s open meetings law grants citizens the right to attend and observe open session meetings of governmental bodies, but does not require that a governmental body allow members of the public to speak or actively participate in the body’s meeting. Wis. Stat. § 19.81(2); *Wisconsin Open Meetings Law Compliance Guide*, Wisconsin Department of Justice (March 2018), at 20, *citing* Lundquist Correspondence (Oct. 25, 2005). The Commission does not allow such participation and JJI’s representative was immediately informed at the open meeting that her interjection was improper. Further, raising such an issue verbally fails to comply with Wis. Admin. Code § PSC 2.23 which requires a party to file a written motion making the specific request for relief. JJI’s failure to file a specific motion, and instead including its assertions in its petition for rehearing, is also not consistent with past Commission practice. In instances where a Commissioner’s ability to participate in a contested case is called into question, the party has filed a specific motion for disqualification.²

² *See, e.g.*, Motion of SOUL for Recusal of the Three Commissioners and for Appointment of an Independent Panel as the Final Decision-Maker, *Joint Application of Minnesota Power Company and Wisconsin Public Service Corporation for Authority to Construct and Place in Service Electric Transmission Lines and Other Electric Facilities for the Arrowhead-Weston Project Located in St. Louis County in Minnesota, and Chippewa, Clark, Douglas, Lincoln, Marathon, Oneida, Price, Rusk, Sawyer, Taylor and Washburn Counties in Wisconsin*, docket 5-CE-113; Motion for Disqualification of Commissioner Ellen Nowak of the Alliance for Solar Choice, *Application of*

Finally as matter of procedure, attempting to raise these concerns in writing now, 20 days after the Commission's Final Decision in a petition for rehearing, is untimely³ and improper. The Wisconsin Supreme Court held in *Guthrie v. WERC*, 111 Wis. 2d 447, 453, 331 N.W.2d 331 (1983) "that it is contrary to general principles of court administration to permit a party to proceed in the face of full knowledge of a cause for objection and then to allow an initial objection only when the proceeding has produced an untoward result."⁴ These procedural defects alone warrant dismissal of the petition.

In addition, JJI cites no evidence to support the assertions and assumptions that Chairperson Valcq received shareholder payments at any time, received a share of revenue generated from matters before the Commission, or received any other remuneration as a shareholder. Even a cursory review of the law or even the most basic due diligence to ascertain the facts by JJI would have confirmed that its assumptions were false. Instead, JJI belatedly and wrongfully accuses a sitting public official of violating the law; specifically, the Code of Ethics for Public Officials, Wis. Stat. ch. 19, subch. III.⁵

While JJI obtained a copy of, and quotes excerpts from, the Commission's recusal policy for Chairperson Valcq ([PSC REF#: 366212](#) at 3), it failed to comprehend its scope or meaning.

Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas, and Steam Rates, 5-UR-107.

³ See Wis. Stat. § 227.46(6).

⁴ See also *Storms v. Action Wisconsin Inc.*, 2008 WI 110, ¶¶ 29-30, 314 Wis. 2d 510, 754 N.W.2d 480 ("While we are appreciative of the fact that requesting the disqualification of a judge by law is a very serious matter, in fairness to the parties and the court, if a party has information while a case is pending that goes to the issue of a judge's or justice's participation in the matter, that party has an obligation to promptly bring the matter to the individual judge's or justice's attention before a decision has been rendered.")

⁵ See, e.g., Wis. Stat. §§ 19.46(1)(a) (prohibiting a public official from taking official action substantially affecting a matter in which the official has a substantial interest); 19.45(2) and 19.46(1)(b) (preventing official from attempting the use the official's office in a way that procures a substantial benefit); 15.06(3) (precluding a Commissioner from holding any other office or position of project or from pursuing any other business or vocation).

As is plain from the face of the document, the policy was not limited to a narrow interpretation of matters in which she was personally and substantially related, and also encompassed any obligations under Wis. Stat. ch. 19, subch. III, Wis. Stat. §§ 15.06(3)(a), 15.79(2), and SCR 20:1:11. Contrary to JJI's unsubstantiated assertions, the Commission fulfilled its obligations to vet, review and disclose potential conflicts, as evidenced by the recusal policy, by comprehensively reviewing and addressing all ethical and legal requirements applicable to Chairperson Valcq's appointment to the Commission. The Commission finds that JJI's criticisms of the Commission's alleged failed diligence ring hollow when JJI failed to make even a rudimentary investigation into Chairperson Valcq's alleged financial interests, such as obtaining a copy of Chairperson Valcq's Statement of Economic Interest that she was required to file under Wis. Stat. §§ 19.43, 19.44. Had JJI reviewed that filing,⁶ which identifies all financial interests and would have identified any purported shareholder interest in a partnership, JJI would have learned that its assumptions were simply not true.

In addition to being unsupported, speculative, and false, the alleged "facts" are not new. Chairperson Valcq's former association with the law firm Quarles & Brady is not new information. At the time of her appointment five months ago, that information was widely publicized.⁷ JJI offers no explanation why it waited more than five months to attempt to raise this issue. JJI's has failed to present new evidence sufficiently strong to reverse or modify the Commission's Final Decision, and which could not have been previously discovered by due

⁶ Members of the public can request copies of a public official's SEI. See, <https://ethics.wi.gov/Resources/ETH-2RequestsToExamineSEIs.pdf>.

⁷ See, e.g., <https://www.bizjournals.com/milwaukee/news/2018/12/21/EVERS-appoints-more-to-cabinet-including-quarles.html>; <https://www.quarles.com/news/quarles-brady-attorney-appointed-to-wisconsin-governor-elects-public-service-commission/>

diligence. *Vill. of Cassville v. Wisconsin Employment Relations Comm'n*, 199 Wis. 2d 122, 545 N.W.2d 519, 151 L.R.R.M. (BNA) 2217, 1995 WL 753814, at *2 (Ct. App. 1995).

The Commission finds JJI's conflict of interest claims to be untimely and procedurally defective. In addition, it finds that there is no credible evidence⁸ to support JJI's allegations that Chairperson Valcq had a conflict of interest. Therefore, Chairperson Valcq's participation was not an error of law and JJI's belated attempt to present its speculative and unfounded factual assertions do not constitute new evidence sufficiently strong to reverse or modify the Commission's Final Decision.⁹

JJI's Alleged Procedural Irregularities

Following completion of the proceeding, JJI now offers a litany of complaints about applicants' conduct, including its challenge to standing of the JJI members to participate and discovery disputes – both of which were adjudicated in JJI's favor. JJI also complains about the Commission's failure to grant it intervenor compensation and the procedural history recited in the Commission's Final Decision.

Other than vague assertions that applicants' unsuccessful challenges delayed JJI's ability to participate, it is unclear what relevance these grievances have. As to the alleged delay, at no point prior to the Commission's decision did JJI seek an extension of time. On the contrary –

⁸ Credible evidence is that evidence which excludes speculation or conjecture. *See Bumpas v. DILHR*, 95 Wis.2d 334, 290 N.W.2d 504 (1980).

⁹ JJI's speculation that “[h]ad Chair Valcq recused herself as she should have, there would have been no quorum and no decision would have been made” ([PSC REF#: 366212](#) at 2) is not correct as a matter of law. Wisconsin Stat. § 15.06(6) provides “that vacancies shall not prevent a commission from doing business.” The hypothetical recusal or abstention of Chairperson Valcq would have created a vacancy, making the majority of the Commission at the Commission decided this proceeding one (Commissioner Huebsch), whose vote in a favor of the acquisition would have been sufficient. *See* 2 M. Jr. 2d Administrative Law § 80; 63 A.L.R.3d 1072; *State ex rel. Burdick v. Tyrrell*, 158 Wis. 425, 149 N.W. 280 (1914); No. OAG 97-79, 1979 WL 42069 (Wis. A.G. Nov. 1, 1979).

despite the explicit invitation to seek such a request by the ALJ it categorically stated that an extension was not needed.

The ALJ's Order on Motion to Protect ([PSC REF#: 357254](#)) specifically provided:

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.*

Id. at 9 (emphasis added.) Instead of filing any such motion if delay were a legitimate concern of JJI, JJI instead responded:

Jewell Jenkins Intervenors have been provided the Confidentiality Agreements, they've been executed and returned, I have received voluminous information, and am saving, filing, and reading for the next few days.

For the record, Jewell Jenkins Intervenors will not be requesting an extension of time for Rebuttal in this docket. We have no interest in wasting the time of the tribunal nor in delaying this proceeding. We'll be prepared for Friday's hearing.

That said, we do, of course, reserve our rights as a party to Cross Examination, etc., as provided particularly regarding this recently released information.

([PSC REF#: 357350.](#)) To the extent JJI had legitimate concerns about the time to prepare, it has either waived or is estopped from asserting those claims when it failed to pursue them prior to the conclusion of the proceeding.¹⁰

¹⁰ Waiver is the voluntary and intentional relinquishment or abandonment of a known right. *Milas v. Labor Ass'n of Wisconsin, Inc.*, 214 Wis. 2d 1, 9, 571 N.W2d 656 (1997). Estoppel is action or non-action on the part of one against whom estoppel is asserted, which induces reasonable reliance thereon by the other. *Id.* at 11.

As to JJI's concerns about its failure to obtain, intervenor compensation, there is no legal entitlement to intervenor compensation, where, as here, JJI and its member failed to meet the eligibility requirements set forth in Wis. Stat. § 196.31.¹¹ In fact, JJI's intervenor compensation applications demonstrated the same lack of diligence in preparation as does JJI's petition for rehearing in this docket. Additionally, JJI has failed to identify any prejudice it suffered in its ability to participate absent the award. Finally, it is unclear how the succinct summary of the procedural history in the Commission's Final Decision constitutes a material error of fact or law.

For these reasons, the Commission finds that JJI's belated procedural objections are without merit and do not satisfy the statutory criteria warranting rehearing.

The Commission's Alleged Misapplication of Wis. Stat. § 196.49

The Commission's determination of whether approval of the proposed acquisition is in the public interest is not solely a legal question and making such a determination requires a high degree of discretion and judgment, as it involves intertwined legal, factual, value, and public policy determinations. *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 2005 WI 93, ¶ 41, 282 Wis. 2d 250, 295, 700 N.W.2d 768. When making such determinations, the Commission's findings will be granted due weight and will be upheld, when supported by substantial evidence. Wis. Stat. § 227.57(6); *Clean Wisconsin*, 2005 WI 93, at ¶ 46; *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 78-79, 382 Wis.2d 496, 914 N.W.2d 21.

“Substantial evidence does not denote a preponderance of evidence; rather, the court determines, after considering all of the evidence in the record, whether ‘reasonable minds could arrive at the conclusion reached by the trier of fact.’” *Town of Holland v. Pub. Serv. Comm'n of*

¹¹ See *Application of Jewell Jinkins Intervenors Inc. to Participate in docket 5-BS-228*.

Docket 5-BS-228

Wis, 2018 WI App 38, ¶ 22, 382 Wis. 2d 799, 812, 913 N.W.2d 914 (*Town of Holland*) (internal citations omitted.)

A record may contain “substantial evidence” to support a number of reasonable findings. However, the “weight and credibility of the evidence are for the agency, not the reviewing court, to determine. To that end, the findings of fact ‘may be set aside only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence.’” *Town of Holland*, 2018 WI App 38, ¶ 22 (internal citations omitted.)

Pursuant to this legal framework, the Commission reviews the remaining allegations of JJI relating to the merits of the Commission’s decision to approve the acquisition. Where a decision is supported by substantial evidence, there is no error of fact or law. JJI asserts that the Commission misapplied Wis. Stat. § 196.49(4) which provides that the Commission may not issue a certification for the construction of electric generating equipment and associated facilities unless the Commission determines that brownfields are used to the extent practicable. JJI also asserts that the Commission JJI’s misapplied the criteria set forth in Wis. Stat. § 196.49(3).

JJI advances the same arguments on this subject as it did in the initial proceedings and offers no new evidence or information. In fact, much of its arguments are simply an explicit restatements of the arguments advanced by another party, Citizens Utility Board – “Jewel Jinkins Intervenors adopt the technical economic arguments of Citizens Utility Board if fully related here.” ([PSC REF#: 366212](#) at 9.) The purpose of a petition rehearing is not to re-litigate issues already decided. A material error of law “is not demonstrated by the disappointment of the losing party” *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). “Merely

Docket 5-BS-228

recycling and reformulating existing information into a new format does not generate new evidence.” *In re Commitment of Williams*, 2001 WI App 155, ¶ 16, 246 Wis. 2d 722, 631 N.W.2d 623. The Commission expresses its frustration with such attempts to reargue positions already addressed, and questions whether the ultimate motive for filing petitions for rehearing containing such a rehash is simply a delay tactic. Unfortunately, unlike the courts, the Commission does not have as many tools for addressing such tactics and the filing of frivolous motions.

While already addressed in the Commission’s Final Decision ([PSC REF#: 364436](#) at 20), the Commission reiterates that, to the extent the brownfield provision even applies to this acquisition, it has been satisfied. The evidence plainly established the largest brownfield in southwestern Wisconsin is 369 acres, a fraction of the size needed for the project. That evidence consists not only of the Environmental Assessment entered into the record for this proceeding, but all of the record evidence from the proceedings in dockets 9697-CE-100 and 9697-CE-101. *Id.* at 6, fn. 5. JJI seems to misapprehend the concept of burden of proof. ([PSC REF#: 366212](#) at 16.) The record regarding brownfields establishes that approximately 3,500 acres of nearly contiguous developable land in close proximity to existing transmission facilities is needed in order to construct the project. Despite JJI’s repeated insistence that Badger Hollow needed to utilize distributed generation or site a portion of the approximately 3,500 acres needed for the project on a brownfields site, there is nothing in the record to support a finding that such alternatives are even possible, let alone practicable. As opposed to being practicable, JJI’s assertions are based solely on speculation and without any factual support from the record. JJI suggested use of distributed generation throughout its filings, however, presented no evidence to

Docket 5-BS-228

support that this, coupled with brownfield siting, was a feasible alternative that should have been further analyzed. Distributed generation was not part of the proposed generation project, and JJI's vague hints at its viability anywhere near the scale of the project is, at best, speculative and made without any factual support. To the extent it was a viable option, it was incumbent upon JJI to present countervailing evidence (not mere assertions) that there is a more practicable alternative.

JJI's other arguments regarding the Commission's purported misapplication of the criteria set forth in Wis. Stat. § 196.49(3) are merely explicit restatements of the arguments advanced by another party, Citizens Utility Board – "Jewel Jenkins Intervenors adopt the technical economic arguments of Citizens Utility Board if fully related here." ([PSC REF#: 366212](#) at 9.) Here again, the Commission's Final Decision specifically addressed and rejected the arguments advanced by CUB:

CUB was the only intervenor to provide additional technical assessment of the economics of the proposed acquisitions. CUB generally agreed with Commission staff's assessment of the applicants' economic modeling and analysis. CUB also expressed concern that sensitivities such as capacity accreditation and avoided energy costs could affect the applicants' base case assumptions and could cause net rate increases over the life of the solar facilities. On balance, however, the Commission found the applicants' testimony concerning MISO's solar capacity accreditation methodology, short term capacity auction values for the value of the capacity to be provided by the Solar Facilities and avoided energy costs to be more persuasive.

([PSC REF#: 364436](#) at 15.)

For these reasons, the Commission finds that JJI's arguments relating to the purported misapplication of Wis. Stat. § 196.49 are without merit and do not satisfy the statutory criteria warranting rehearing.

Request for Stay

In addition to its request for rehearing, JJI requests that the Commission's Final Decision approving the acquisition be stayed. Wisconsin Stat. § 227.49(2) specifically provides that the "filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law."

As there is no basis for granting the petition for rehearing, the Commission also finds there is no basis for granting a stay. That request is denied.

ORDER

1. JJI has failed to show that the Commission committed a material error of fact or law, and has failed to present any evidence, strong enough to warrant modification or reversal of the Final Decision.
2. JJI's petition for rehearing is denied.
3. JJI's request for a stay is denied.
4. This Order shall take effect one day after the date of service.

Dated at Madison, Wisconsin, the 29th day of May, 2019.

By the Commission:



Steffany Powell Coker
Secretary to the Commission

SP: DL:01686242