

PUBLIC SERVICE COMMISSION OF WISCONSIN

Memorandum

May 16, 2019

FOR COMMISSION AGENDA

TO: The Commission

FROM: Drew Jelinski, Assistant General Counsel
Office of General Counsel

RE: 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 Petition for Rehearing

Suggested Minute: The Commission (granted rehearing on one or more of the issues presented in the petition for rehearing filed by Jewell Jinkins Intervenors /denied the petition for rehearing/took no action and allowed the petition for rehearing to be deemed denied by operation of law).

Introduction

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

On May 8, 2019, Jewel Jenkins Intervenors (JJI)¹ filed a petition for rehearing pursuant to Wis. Stat. § 227.49. ([PSC REF#: 366212](#).) Applicants filed an opposition to the petition for rehearing on May 15, 2019. ([PSC REF#: 366940](#).)

Legal Standard

The disposition of a petition for rehearing is governed by Wis. Stat. § 227.49, which 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. A petition for rehearing must be filed within 20 days after service of a final order. Wis. Stat. § 227.49(1).

Under Wis. Stat. § 227.49(4), the agency may order a rehearing or enter an order with reference to the petition without a hearing, within 30 days after it is filed. If the agency grants the petition, it shall set the matter for further proceedings as soon as practicable. Wis. Stat. § 227.49(6). If the agency does not order a rehearing or enter such an order within 30 days, the petition is deemed denied by operation of law upon expiration of this 30 day period. Wis. Stat. § 227.49(4).

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 Jenkins, Alan and Marcia Jewell, and Wade Wendhausen. These five individuals, in their individual capacity, were granted party status in docket 5-BS-228. ([PSC REF#: 354427](#).)

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. *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.

Analysis

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.

Applicants respond that JJI’s conflict of interest allegations are speculative, unsupported, untimely and procedurally deficient. ([PSC REF#: 366940](#) at 2-3.) Applicants observe that “JJI’s recusal demand comes nearly a year after the Application was filed, six months after JJI intervened, and five months after Chairperson Valcq was appointed to the Commission.” *Id.* at 2. Applicants argue that “JJI’s tardy and opportunistic demand violates the rule against strategic recusal, which bars litigants from waiting to see how a ruling shakes out before seeking recusal.” *Id.* citing *Pure Milk Prods. Corp. v. Nat’l Farmers Org.*, 64 Wis. 2d 241, 249, 219 N.W.2d 564, 569 (1974); *In re United Shoe Mach. Corp.*, 276 F.2d 77, 79 (1st Cir. 1960). Next, Applicants

respond that JJI's claims of Chairperson's Valcq's alleged financial interest are unsubstantiated as "[t]here is no evidence, in the record or elsewhere, that Valcq (a) has any financial interest in the outcome of this proceeding, (b) has any present financial interest in the law firm of Quarles & Brady LLP, or (c) ever had an equity interest in Quarles." *Id.* at 3. Lastly, applicants state that JJI's assumption that Chairperson Valcq's recusal would have created a different result is incorrect, because Commissioner Huebsch's vote in favor constituted a majority. *Id.*, citing Wis. Stat. § 15.06(6), 63 A.L.R.3d 1072; *Robert's Rules of Order: Newly Revised* (11th ed. 2011) at 400:8-12; *see also*, No. OAG 97-79, 1979 WL 42069 (Wis. A.G. Nov. 1, 1979).

Addressing for the first time a party's allegations of a conflict of interest or request for recusal or disqualification of a decision maker via a party's attempted interruption at an open meeting or a petition for rehearing is inconsistent with how the Commission has previously addressed such allegations. *See* Wis. Stat. § 19.81; *Wisconsin Open Meetings Law Compliance Guide*, Wisconsin Department of Justice (March 2018), at 20; Wis. Admin. Code § PSC 2.23; *Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas, and Steam Rates*, docket 5-UR-107.² The factual allegations, as to the presence of a conflict or the Commission's diligence in addressing any potential conflict, are inconsistent with the Commission's own records. *See* Appendix A, Recusal Policy for Rebecca Cameron Valcq's Appointment to the Public Service Commission.

JJI also asserts alleged procedural improprieties and contends that there were errors of fact and law, relating to the consideration of the requirements of Wis. Stat. § 196.49, Wis. Stat. § 1.11 and Wis. Admin. Code § 4.30, and argues that the decision is not supported by substantial

² Motion for Disqualification of Commissioner Ellen Nowak of the Alliance for Solar Choice ([PSC REF#: 225417](#)); Order ([PSC REF#: 226347](#)).

evidence. In support of its contentions relating to the misapplication of Wis. Stat. § 196.49, JJI adopts the technical economic arguments that the Citizens Utility Board raised in the proceedings and restates the arguments that JJI made previously. ([PSC REF#: 366212](#) at 9-16.)

As to JJI's procedural grievances which it characterizes as errors of fact, applicants note that the procedural aspects described in the Commission's Final Decision were not material facts on which its decision rested and that there is no citation to authority to support a claim that the Commission's failure to provide a detailed recitation of the procedural history somehow invalidates its decision. ([PSC REF#: 366940](#) at 4.) Further, applicants argue that JJI has waived any argument about potential procedural deficiencies when, in January, JJI expressly waived the opportunity request an extension of the schedule, stating:

For the record, Jewell Jinkins 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.

([PSC REF#: 357350](#).) As to JJI's other arguments, applicants contend that the arguments were either already raised by JJI or waived.

Commission Alternatives

Alternative One: Grant the petition for rehearing and [order a rehearing or enter an Order with reference to the petition without a hearing].

Alternative Two: Deny the petition.

Alternative Three: Take no action on the petition with the 30-day period (by June 8, 2019) and allow the petition to be deemed to have been denied by operation of law.

CES:spc:DL: 01685672

Key Background Documents

[Order and Final Decision Signed and Served 04-18-19 - PSC REF#: 364436](#)

[Jewell Jinkins Intervenors - Petition for Rehearing - PSC REF#: 366212](#)

[Response Opposing Petition for Rehearing - PSC REF#: 366940](#)

**RECUSAL POLICY FOR
REBECCA CAMERON VALCQ'S APPOINTMENT TO THE PUBLIC SERVICE
COMMISSION**

This document serves as the recusal policy for Rebecca Cameron Valcq. Effective January 7, 2019, Ms. Valcq began serving as a Commissioner for the Public Service Commission of Wisconsin (Commission). As a Commissioner, Ms. Valcq is a state public official within the meaning of Wis. Stat. § 19.42(13) and must also comply with the ethical obligations set forth in Wis. Stat. ch. 19, subch. III, and Wis. Stat. §§ 15.06(3)(a) and 15.79(2). Ms. Valcq is also an attorney licensed to practice in the State of Wisconsin and is obligated to comply with the Rules of Professional Conduct for Lawyers, SCR 20:1.11. Pursuant to SCR 20:1.11(d), Ms. Valcq may not participate in a matter in which she “participated personally and substantially while in private practice or nongovernmental employment”

Prior to her appointment and from September, 2017 until January 4, 2019, Ms. Valcq was employed by the law firm Quarles & Brady. While at the law firm, Ms. Valcq represented WEC Energy Group, Wisconsin Public Service Corporation, and WEPCO (collectively WEC Entities) on discrete matters before the Commission and remain open dockets and are identified below. The vast majority of her representation of the WEC Entities involved matters not jurisdictional to the Commission.

Prior to her employment at Quarles & Brady and from 2000 through 2014, Ms. Valcq was employed as in-house legal counsel for Wisconsin Electric Power Company (WEPCO). She worked on several matters on behalf of WEPCO before the Commission which remain open dockets before the Commission and are identified below.

To avoid either the actual or appearance of a conflict of interest and to comply with Wis. Stat. §§ 19.45, 19.46, 15.06(3)(a), and SCR 20:1.11, Ms. Valcq and the Commission have agreed to the following recusal policy.

1. Ms. Valcq will not participate in the following matters at the Commission where, while at either Quarles & Brady or WEPCO, she personally and substantially participated in that matter:
 - a. 6630-ER-103, *Wisconsin Electric Power Company 2019 Fuel Cost Plan*;
 - b. 6690-ER-103, *Wisconsin Public Service Corporation 2019 Fuel Cost Plan*;
 - c. 6630-FR-2017, *Application of Wisconsin Electric Power Company for Reconciliation of Actual Fuel Costs to the Authorized 2017 Fuel Cost Plan*;

- d. 6630-FR-104, *Application of Wisconsin Electric Power Company for Authorization to Implement New Electric Rates According to its 2014 Fuel Cost Plan;*
- e. 6630-FR-103, *Application of Wisconsin Electric Power Company for Authorization to Implement New Electric Rates According to its 2012 Fuel Cost Plan;*
- f. 6630-FR-102, *Fuels Rules Proceeding to Adjust Wisconsin Electric Power Company's Electric Rates Originally Set in Docket 5-UR-104;*
- g. 6630-FR-102, *Fuels Rules Proceeding to Adjust Wisconsin Electric Power Company's Electric Rates Originally Set in Docket 5-UR-103;*
- h. 5-UR-103, *Joint Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies for Wisconsin Electric Power Company to Increase Its Electric, Natural Gas and Steam Rates and For Wisconsin Gas LLC to Increase its Natural Gas Rates;*
- i. 5-UR-104, *Joint Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies for Wisconsin Electric Power Company to Increase Its Electric, Natural Gas and Steam Rates and For Wisconsin Gas LLC to Increase its Natural Gas Rates;*
- j. 5-UR-105, *Joint Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas and Steam Rates;*
- k. 5-UR-106, *Joint Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas and Steam Rates;*
- l. 5-UR-107, *Joint Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas and Steam Rates;*
- m. 5-AE-146, *Application of Wisconsin Electric Power Company and American Transmission Company for Approval of an Operation and Maintenance Agreement for Transmission Facilities;*
- n. 5-AE-153, *Application of American Transmission Company LLC, Wisconsin Power and Light Company, Wisconsin Electric Power Company, Madison Gas and Electric Company, Wisconsin Public Service Corporation, and*

Upper Peninsula Power Company for Approval of a Project Services Agreement and Common Facilities Agreement and Termination of a Transitional Services Agreement;

- o. 5-AE-184, Application of American Transmission Company LLC and Wisconsin Electric Power Company, d/b/a We Energies, for Approval of an Affiliated Interest Agreement Relating to Freeman and North Lake Substation Balancing Authority Metering Facilities Installation;*
- p. 5-AE-202, Application of American Transmission Company LLC and Wisconsin Electric Power Company for Approval of an Affiliated Interest Agreement Regarding the Pleasant Prairie Switchyard Reconfiguration Project Common Facilities Expansion Agreement;*
- q. 5-EI-141, Investigation on the Commission's Own Motion to Review the 18 Percent Planning Reserve Margin Requirement;*
- r. 5-GF-144, Request by Wisconsin Electric Power Company and Wisconsin Gas Company for Authorization to Implement a Low Income Pilot Program and to Utilize Escrow Accounting for Residential Customer Class Amounts Over Those Currently Allowed in Rates (Modification to the Low Income Pilot Program);*
- s. 5-GM-101, Joint Application of Wisconsin Electric Power Company and Wisconsin Gas, LLC, both d/b/a We Energies, to Merge Wisconsin Gas, LLC into Wisconsin Electric Power Company;*
- t. 6630-AE-118, Application of Wisconsin Electric Power Company for Blue Sky Request for Approval of Assignment and Assumption of Contracts;*
- u. 6630-BS-100, Application of Wisconsin Electric Power Company to Transfer an Undivided Ownership Interest in its Presque Isle Power Plant, located in the City of Marquette, Marquette County, Michigan, to Wolverine Power Supply Cooperative, Inc.*
- v. 6630-CE-294, Application of Wisconsin Electric Power Company for a Certificate of Public Convenience and Necessity to Construct a Wind Electric Generation Facility and Associated Electric Facilities, to be located in Fond du Lac County;*
- w. 6630-CE-302, Application of Wisconsin Electric Power Company for a Certificate of Public Convenience and Necessity to Construct a Wind Electric*

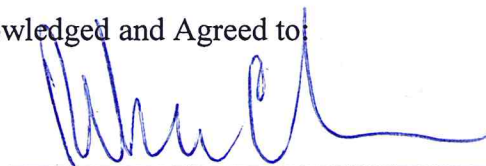
Generation Facility and Associated Electric Facilities, to be located in Towns of Randolph and Scott, Columbia County, Wisconsin;

- x. *6630-CE-309, Wisconsin Electric Power Company Notification of Intent to Install Emission Control Equipment at its Presque Isle Power Plant Units 5 through 9, Including Low NOx Burners (Units 5 and 6), Spray Dryer Absorbers (Units 5, 6 and 7), Dry Sorbent Injection (Units 8 and 9), Boosted Over Fire Air (Units 5-9), Power Activated Carbon Facilities and Associated Equipment for Control of Sulfur Dioxide, Nitrogen Oxide, Mercury and Air Toxic Emissions Located in the City of Marquette, Marquette County, Michigan;*
- y. *6630-CU-101, Application of Wisconsin Electric Power Company for Authority to Convert the Valley Power Plant from a Coal-Fired Cogeneration Facility to a Natural Gas Fired Cogeneration Facility;*
- z. *6630-DR-105, Application of Wisconsin Electric Power Company for a Declaratory Ruling Regarding Its Plan to Increase the Supply of Renewable Energy in Wisconsin;*
- aa. *6630-EI-113, In the Matter of the Application for All Approvals Necessary for the Transfer of Ownership and Operational Control of the Point Beach Nuclear Plant from Wisconsin Electric Power Company (d/b/a We Energies) to FPL Energy Point Beach, LLC, a subsidiary of FPL Group Capital, Inc.; and*
- bb. *6630-RM-100, Application of Wisconsin Electric Power Company and Randolph Wind, LLC, for All Requisite Approvals in Connection with the Merger of Randolph Wind, LLC, into Wisconsin Electric Power Company.*

- 2. For a period of twelve months following Ms. Valcq's appointment, Ms. Valcq will recuse herself from any new matter filed with the Commission in which Ms. Valcq was personally and substantially involved. Those matters, if any, will be identified by way of addendum to this recusal policy.

Acknowledged and Agreed to:

BY:



Rebecca Cameron Valcq, Commissioner
Public Service Commission of Wisconsin

DL: 01670281

ADDENDUM A
TO
RECUSAL POLICY FOR
REBECCA CAMERON VALCQ'S APPOINTMENT TO THE PUBLIC SERVICE
COMMISSION

In accordance with Item 2 of the Recusal Policy for Ms. Valcq, the following docket(s) have been added and shall be handled in accordance with the policy.

Added January 16, 2019

- 6630-FR-2018, *Application of Wisconsin Electric Power Company for Reconciliation of Actual Costs to the Authorized 2018 Fuel Cost Plan.*
- 6690-FR-2018, *Application of Wisconsin Public Service Corporation for Reconciliation of Actual Costs to the Authorized 2018 Fuel Cost Plan*

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