

PUBLIC SERVICE COMMISSION OF WISCONSIN**Memorandum**

May 17, 2019

FOR COMMISSION AGENDA

TO: The Commission

FROM: Mark Ruskiewicz, Assistant General Counsel
Office of General Counsel

RE: Application for a Certificate of Public Convenience and Necessity of Badger Hollow Solar Farm, LLC to Construct a Solar Electric Generation Facility, to be Located in Iowa County, Wisconsin 9697-CE-100

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 application of Badger Hollow Solar Farm, LLC (Badger Hollow) for a Certificate of Public Convenience and Necessity (CPCN) to construct a solar photovoltaic electric generation facility with a generating capacity of up to 408 megawatts (MW) direct current (DC) and up to 300 MW alternating current (AC). ([PSC REF#: 364425.](#))

On May 8, 2019, Jewell Jinkins Intervenors (JJI)¹ filed a petition for rehearing pursuant to Wis. Stat. § 227.49. ([PSC REF#: 366330.](#)) Badger Hollow filed an opposition to the petition on May 13, 2019. ([PSC REF#: 366761.](#))

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

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).

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. Public 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 the Commission committed an error of law in its application of Wis. Stat. § 196.491(3)(d)8, relating to the consideration of the use of brownfields “to the extent

five individuals, in their individual capacity, were granted party status in docket 9697-CE-100. ([PSC REF#: 352599.](#))

practicable.” ([PSC REF#: 366330](#) at 2-5.) JJI cites the Commission’s Final Decision, the Environmental Assessment and Badger Hollow’s Application and claims that this evidence is insufficient and repeats its arguments set forth in the Decision Matrix. JJI claims that brownfields were not used to the extent practicable.

Badger Hollow responds, noting JJI’s failure to present evidence challenging the substantial record evidence of Badger Hollow’s evaluation as to the use of brownfield sites and stating that “[n]o facts support the Jewell Jinkins Intervenors’ fantastical claim that a 300 MW solar project such as the Badger Hollow Project could practicably be developed by spreading it out across all of southwestern Wisconsin.” ([PSC REF#: 366761](#) at 6.) Badger Hollow notes that “[t]he law does not impose on an applicant for a CPCN the burden of negating every use of a brownfield site that another party can dream up” and, that as a merchant, consideration as to costs associated with using or not using brownfields sites is irrelevant. *Id.*

JJI asserts that the Commission’s decision to proceed with the review of Badger Hollow’s CPCN application “without a solar rulemaking and a framework in place results in a decision that is arbitrary and capricious and an error of law.” ([PSC REF#: 366330](#) at 7.) Badger Hollow counters that the CPCN law (Wis. Stat. § 196.491), which applies to a wide array generation resources and fuel types many of which with the exception of Wind do not have specific siting rules, “provides a robust framework for the consideration of utility-scale energy projects” ([PSC REF#: 366761](#) at 14.) As Badger Hollow notes, the Commission previously reviewed and rejected in docket 1-AC-254² JJI’s contentions that a solar siting rulemaking was necessary. *Id.* at 15.

² *Petition for Administrative Rules for Siting of Solar Generation Facilities*, Order ([PSC REF#: 359090](#))(Wis. PSC Feb. 6, 2019).

JJI argues that the project will interfere with orderly land use and development, contending that the project is “not compatible with agriculture, it is not compatible with community plans, values, and it will significantly impair viewsheds and aesthetics.” ([PSC REF#: 366330](#) at 7.) JJI quotes excerpts from the Environmental Assessment (EA) and does not present any additional evidence. *Id.* at 8. Commission staff notes that these selective citations are often taken out of context by JJI and ignore the ultimate findings and conclusions of the Final EA. Badger Hollow responds that Commission applied with the correct legal standard which requires that the interference be unreasonable and supported its decision with substantial evidence. ([PSC REF#: 366761](#) at 7.) Badger Hollow counters with extensive citations to the record, noting that “the Jewell Jinkins Intervenors assert opinions as if they were fact that ignore the full record that was developed in this proceeding” and that “[n]one of these statements are new, and all have been addressed by Badger Hollow, by Commission staff, and/or in the Final Decision.” *Id.* at 7-8.

JJI argues that “[t]he Commission’s Decision does not address impacts demonstrated in the Environmental Assessment and the concerns of the Jewell Jinkins Intervenors, including the character of this agricultural community, the change in its visual nature and aesthetics if the project were to be built.” ([PSC REF#: 366330](#) at 9.) Badger Hollow states that the Commission’s decision did consider the public interest and whether the project would have an “undue adverse impact” on environmental values as required by Wis. Stat. § 196.491(3)(d)3 and 4. ([PSC REF#: 366761](#) at 10.) Badger Hollow offers citations to the Final Decision, evidentiary record and briefs where these issues were considered. *Id.* at 10-11. Badger Hollow concludes that JJI’s “copy and paste arguments do not identify any material errors of law or material errors of fact in the Final Decision.” *Id.* at 11.

JJI contends that an Environmental Impact Statement (EIS) was required because it believes there will be significant impacts and “irreversible environmental effects.” ([PSC REF#: 366330](#) at 16-17.) Wisconsin law requires the preparation of an EIS only if there exists a “major action significantly affecting the quality of the human environment.” Wis. Stat. § 1.11(2)(c). In other instances, other types of environmental review, such as an EA, may be appropriate based upon the type of the project. Wis. Admin. Code § PSC 4.10. JJI concedes that the Badger Hollow project is a Type III project that does not, by code, require the preparation of an EA or EIS. ([PSC REF#: 366330](#) at 6.) Though not required for this project, the Commission completed an EA which concluded that: “This assessment finds that approval and construction of this project is unlikely to have a significant impact on the human environment as defined by Wis. Stat. § 1.11.”

Badger Hollow responds that the Commission’s determination that no EIS was required and the findings of the Final EA are supported by extensive facts in the record that it cites. ([PSC REF#: 366761](#) at 12-13.) While JJI appear to disagree with the findings of the EA, Badger Hollow argues that JJI “do not cite any law or regulation showing that the Commission misinterpreted or misapplied that term or supporting their position that the impacts they describe are ‘significant’ and ‘should trigger’ an EIS.” *Id.* at 13. Badger Hollow contends that it addressed each and every one of JJI’s assertions about potential environmental impacts in the record, including JJI’s “irreversibility” concern. *Id.*

In summary, JJI argues that rehearing is required by the Final Decision “is fatally flawed by the Commission’s procedural errors and errors of fact and law” and “relied on false statements regarding brownfields, ignored important evidence of substantial and material impacts, and misinterpreted and did not properly address Wisconsin’s statutory criteria.” ([PSC](#)

[REF#: 366330](#) at 18-19.) On the other hand, Badger Hollow argues that JJI has not identified any material error of law or material error of fact, as required by Wis. Stat. § 227.49(3). ([PSC REF#: 366761](#) at 16.) Badger Hollow states that JJI “merely restate the same unsupported and speculative ‘facts,’ rehash the same unfounded misinterpretations of law, and reargue the same matters they put forth in their testimony and post-hearing briefs, that the Commission already fully addressed in this proceeding.” *Id.* at 2.

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.

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Key Background Documents

[Final Decision Signed ad Served 04-18-19 - PSC REF#: 364425](#)

[Jewell Jinkins Intervenors - Petition for Rehearing - Corrected footers - PSC REF#: 366330](#)

[Response of Badger Hollow Solar Farm, LLC to Jewell Jinkins Intervenors' Petition for Rehearing - PSC REF#: 366761](#)