

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Joint Application of American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative, for Authority to Construct and Operate a New 345 kV Transmission Line from the Existing Hickory Creek Substation in Dubuque County, Iowa, to the Existing Cardinal Substation in Dane County, Wisconsin, to be Known as the Cardinal-Hickory Creek Project

Docket No. 5-CE-146

**THE APPLICANTS' REPLY COMMENTS ON THE PROPOSED RESCISSION OF
THE FINAL DECISION AND NEXT STEPS**

In their initial comments on the Public Service Commission of Wisconsin's (Commission) Notice of Intent to Rescind (PSC REF#: 415003 (Notice)), the Applicants proposed that the Commission rescind the CPCN on its own motion; decline to re-open the evidentiary record; and re-consider and re-vote on the CPCN based on the existing evidentiary record.

The Applicants have reviewed the other parties' comments and public comments on the Notice. None of those comments provides a credible alternative to the Applicants' proposed process. The Commission has authority to rescind the CPCN and reopen this proceeding, Chair Valcq and Commissioner Nowak can and should re-vote on the CPCN, and no commenter has identified any reason that the Commission must or should reopen the underlying evidentiary record. The Applicants' proposed process stands on sound legal footing, is fair, and reflects the most efficient means of ensuring that the Project—which is critical to ensuring Wisconsin can

transition to a cleaner, more reliable, and more affordable energy future—can meet its scheduled in-service date of December 2023.¹

I. THE COMMISSION HAS THE AUTHORITY TO RESCIND THE CPCN, NOTWITHSTANDING THE PENDENCY OF THE JUDICIAL REVIEW PROCEEDINGS IN THE DANE COUNTY CIRCUIT COURT.

Various intervenors suggest that the Commission lacks jurisdiction to rescind the CPCN. (*See, e.g.* Klopp Initial Comments, at 3 (PSC REF#: 415672); DALC/WWF Initial Comments, at 2 n.1 (PSC REF#: 415816); SOUL Initial Comments, at 8 (PSC REF#: 415792); JJI Initial Comments, at 6 (PSC REF#: 415694)) But the intervenors fail to cite any legal authority in support of their argument, and the plain language of the governing statute confirms that the Commission does have jurisdiction to rescind the CPCN.

The Legislature has granted the Commission discretion to rescind, reopen, and/or alter any of its prior orders:

The commission *at any time*, upon notice to the public utility and after opportunity to be heard, may rescind, alter or amend any order fixing rates, tolls, charges or schedules, or any other order made by the commission, and may reopen any case following the issuance of an order in the case, for any reason.

See Wis. Stat. § 196.39(1) (emphasis added). This statutory grant of authority is broad and unqualified: the Commission can rescind, alter, or amend *any* of its orders “at any time” and “for any reason,” so long as the public utility (in this case the Applicants) is provided notice and an opportunity to be heard. Wisconsin courts have also acknowledged the Commission’s broad authority under this specific statutory provision. *See, e.g., Bohn v. Pub. Serv. Comm'n of Wisconsin*, 222 Wis. 2d 220, 587 N.W.2d 215 (Ct. App. 1998) (“[It] allows the Commission to take two actions at any time, on its own motion or upon motion of an interested party . . . (1)

¹ Numerous parties included comments attempting to relitigate issue and evidence presented in the proceeding. (*See, e.g.,* SOUL Comments, at 3-5) The Applicants are not responding to these arguments because they are outside of the scope of the Notice and because they were the subject of briefings in the judicial review proceedings.

rescind, alter or amend any order fixing rates, tolls, charges or schedules, or any other order made by the Commission, and (2) reopen any case following the issuance of an order in the case”).

There is no basis in the statutory text to conclude that, because of the pending judicial review proceedings, the Commission lacks jurisdiction to rescind the CPCN and re-vote on the Project. Such a finding would cut against the unambiguous statutory language. *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238 (“If the language is plain, [the court’s] inquiry ends”). Had the Legislature intended for this qualification to apply, it could have stated so; because it did not, such language cannot be read into the statute.

In fact, DALC and WWF previously argued that the Commission has authority to take the *very same action* the Commission is contemplating now. In their federal lawsuit challenging the Project, DALC and WWF argued that “[t]he Commissioners could rescind the CPCN and the eminent domain authority it grants”² Chapter 227 judicial review proceedings were pending in the Dane County Circuit Court at the time DALC and WWF made this argument. As such, by DALC and WWF’s own admission, if the Commission had authority to rescind or alter the final decision then, the Commission retains that same authority now.

The plain language of Wis. Stat. § 196.39(1) unambiguously grants the Commission the authority to rescind and re-vote on the CPCN. The intervenors’ arguments to the contrary lack merit.

² *Driftless Area Land Conservancy v. Huebsch*, Appeal No. 20-3325, 2021 WL 372412, Response Brief of Plaintiffs-Appellees Driftless Area Land Conservancy and Wisconsin Wildlife Federation, at 28 (7th Cir.) (Dkt. 39)

II. IF THE COMMISSION DECIDES TO RESCIND THE CPCN AND REOPEN THIS CASE, CHAIRPERSON VALCQ AND COMMISSIONER NOWAK MAY PARTICIPATE IN ADJUDICATING THE MERITS.

DALC and WWF argue at length that the Dane County Circuit Court’s order authorizing discovery in the pending judicial review proceedings³ somehow precludes Chairperson Valcq and Commissioner Nowak from further participation in this proceeding. (DALC/WWF Initial Comments, at 3-5) They assert that former Commissioner Huebsch’s participation in the prior proceeding “tainted” Chairperson Valcq and Commissioner Nowak, and that those commissioners are now forever “disqualified from further participation on the requested CPCN, or any re-opened request for a CPCN, for the proposed Cardinal-Hickory Creek transmission line.” (*Id.* at 2) DALC and WWF are misrepresenting the Circuit Court’s holding: the very authority the Circuit Court relied upon in its order directly contradicts DALC and WWF’s stated position.

The Circuit Court *did not* hold that Chairperson Valcq and Commissioner Nowak are precluded from re-voting on the CPCN, as DALC and WWF allege. The Circuit Court instead held that, if former Commissioner Huebsch was indeed biased, that bias tainted the Commission’s *original* decision approving the Project, even though former Commissioner Huebsch’s vote was not dispositive.⁴ The Circuit Court did not hold that this “tainting” would carry over to any decision the Commission might issue on remand. That issue was never briefed in the Circuit Court, and the intervenors have provided no legal support for their position that Commissioners Valcq and Nowak must recuse themselves going forward.

In fact, the very decision that the Circuit Court cited in its order, *Marris v. City of Cedarburg*, confirms that Chairperson Valcq and Commissioner Nowak can re-vote on the CPCN

³ See *County of Dane v. Pub. Serv. Comm’n of Wis.*, No. 2019-cv-3418, *Decision and Order* (Dkt. 322) (Wis. Circuit Court Dane Cnty., May 25, 2021) [hereinafter, “May 25 Decision and Order”].

⁴ *Id.* at 9.

without former Commissioner Huebsch. 176 Wis. 2d 14, 39, 498 N.W.2d 842 (1993). As the Circuit Court itself explained, in *Marris*, “[t]he Supreme Court vacated the board’s decision and *sent the matter back to the board* for a new hearing *with [only] the [biased] chairperson removed.*”⁵ Based on this precedent, the Circuit Court concluded that “if Comm. Huebsch was improperly biased or his participation creates an improper appearance of bias, I must vacate the PSC decision and remand to the PSC for further proceedings.”⁶

DALC and WWF also repeat their allegations of bias against Chairperson Valcq and now also assert that Commissioner Nowak may be biased. (DALC and WWF Initial Comments, at 2-3 n.1) But they cite no evidence in support of these claims. In fact, the federal court has already dismissed their claims of bias against Commissioner Nowak and the Circuit Court has similarly dismissed their claims of bias against Chair Valcq.⁷ Despite having received nearly 14,000 pages of documents, emails and text messages from the Commission, the Applicants, and other third parties to date, DALC and WWF can still not substantiate their claims against either Commissioner.

Finally, while DALC and WWF suggest that the Commission could delegate this case to a “special master” or “retired judge,” they again provide no legal support for this assertion. Indeed, the statute that allows delegation, Wis. Stat. § 15.02(4), only allows an agency head to delegate *within* the agency.

⁵ *Id.* at 6.

⁶ *Id.* at 9.

⁷ *County of Dane et al. v. Pub. Serv. Comm’n of Wis.*, No. 2019-cv-3418, *Jan. 21, 2021 Oral Argument*, Oral Arg. Tr. at 12 (Wis. Cir. Ct. Dane Cnty., Jan. 21, 2021); *Driftless Area Land Conservancy v. Huebsch*, No. 19-cv-1007, *Opinion and Order* (Dkt. 159), at 26 (W.D. Wis. Nov. 11, 2020).

For these reasons and those articulated in the Applicants' initial comments, Chairperson Valcq and Commissioner Nowak need not recuse themselves from further participation in this proceeding.

III. IF IT RESCINDS THE CPCN AND REOPENS THE PROCEEDING, THE COMMISSION DOES NOT NEED TO RECEIVE NEW EVIDENCE.

Despite contending that the record should be re-opened to new information, no intervenor has identified any new evidence or changed circumstances that they believe the Commission should consider. For example, Dane County asserts that, among other things, the Commission should “permit the parties to provide updated modeling and data to the Commission.” (Dane County Initial Comments, at 2) Dane County does not explain *why* the Commission should be required to reopen the record. Dane County also does not explain what it believes has changed since the final decision issued that would require updated modeling or how any new modeling would be materially different than the extensive modeling already conducted for the Project. In fact, the Commission already received and considered arguments concerning the adequacy of the Applicants' modeling, (*see, e.g.*, Direct-DALC/WWF-Desu-c), and rejected those arguments, (*see* Final Decision, at 22, 26). The intervenors' unsupported assertions and vague speculation do not warrant disregarding the vast record already assembled.

Intervenors SOUL and Klopp rely on Wis. Stat. § 227.49(6)⁸ for the proposition that the “only rehearing design that is unquestionably fair to all parties is to follow the exact same process used in the original hearing.” (Soul Initial Comments, at 8; Klopp Initial Comments, at 5) However, the provision to which these intervenors are referring—Wis. Stat. § 227.49—is not applicable here and pertains only to petitions for rehearing filed or granted “within 20 days after

⁸ “Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct.” Wis. Stat. § 227.49.

service of [an] order.” This 20-day deadline expired a long time ago, and, in any event, Wis. Stat. § 227.49 does not apply since the Commission can rescind the CPCN and re-vote on the Project *on its own motion*, pursuant to Wis. Stat. § 196.39(1).⁹

As explained in the Applicants’ initial comments, the Commission has typically only reopened the record to the extent necessary to address specific issues identified by the courts on remand. In this case, even if the Dane County Circuit Court determined after an evidentiary hearing that former Commissioner Huebsch was biased and remanded the action to the Commission, the Commission would not need to reopen the record to remedy the error, since Commissioner Huebsch took no part in shaping the evidentiary record in the CPCN proceeding. (Applicants’ Initial Comments, at 4-7 (PSC REF#: 415806))

The existing evidentiary record is more than sufficient to support approval of the Project if the Commission decides to rescind the CPCN and reconsider the Project. (Applicants’ Initial Comments, at 7) No commenter has identified any deficiency in the factual record before the Commission, and the Project was justified based on an evaluation of a range of potential futures.¹⁰

As summarized in the Applicants’ post-hearing brief:

The Applicants conducted . . . simulations in eight different plausible scenarios, which were based on futures that MISO developed These futures contain different assumptions about key variables that affect the delivered price of electricity, such as demand and energy growth; fuel prices; demand side management

⁹ Even if Wis. Stat. § 227.49 applied, it does not bind the Commission to any particular method of rehearing.

¹⁰ While no party raised any specific concerns beyond bias in initial comments to the Commission, in a recent filing with the Circuit Court, DALC, WWF, Iowa County, Dane County, and Town of Wyoming asserted that new solar generation sited in Wisconsin needs to be evaluated. (*See County of Dane et al. v. Pub. Serv. Comm’n of Wis.*, No. 19-cv-3418, *Response to Intervenor’s Motion for Limited Stay and Status Conference*, at 3 (Wis. Cir. Ct. Dane Cnty. Jul. 14, 2021)) But if every new development in the topology of the transmission system needed to be specifically accounted for in a CPCN proceeding, the record could never be closed. This assertion also proves too much: every time a court remanded an order or decision back to the Commission, the Commission would need to reopen the record merely because of the passage of time—which is contrary to the cases cited herein and those cited in the Applicants’ initial comments. This is the precise reason the Applicants evaluated the Project under a range of potential futures: to show that the Project is needed regardless of the specific projects and energy demands that arise in the future. Further, the intervenors could have raised these arguments in their initial comments to the Commission and chose not to do so.

additions; generation retirements and expansions; transmission topology; and carbon reductions. Each future provides a different, plausible picture of what the bulk electric system across MISO might look like under a variety of future conditions. The purpose of modeling the Project and each alternative in these different futures is rooted in a concept known as “strategic flexibility.” The premise is that, because no one can predict the future with absolute certainty, investments should be tested under a variety of scenarios and assumptions. If an alternative performs well in most futures, it is more likely to be a robust project that can perform well under a variety of future conditions and is more likely to deliver net benefits to customers. . . .

(Applicants Initial Br., at 11-12) (PSC REF#: 372104)

This robust modeling considered numerous potential future build outs of the regional transmission system and generation development. And it clearly demonstrated that the Project is critical to the interconnection of several gigawatts of renewable energy, both within and to the west of Wisconsin; enables the delivery of low-cost, renewable power from those generating resources to Wisconsin consumers; and reduces regional greenhouse gas emissions.

In sum, given that no party has identified or otherwise put forth any particular reason to reopen the evidentiary record, the Commission should decline to do so.

IV. RESCINDING THE CPCN WOULD NOT VIOLATE INTERVENORS’ RIGHTS AND WOULD SAVE THE COMMISSION, THE CIRCUIT COURT, AND THE PARTIES’ TIME AND RESOURCES.

For the better part of two years, various intervenors have fought vigorously to convince the Dane County Circuit Court to reverse, set aside, or vacate the CPCN. (*See generally, e.g.*, DALC/WWF Initial Br. No. 19-CV-3418 (Wis. Cir. Ct. Dane Cnty. May 1, 2020) (Dkt. 185); Dane County Initial Br. No. 19-CV-3418 (Wis. Cir. Ct. Dane Cnty. May 1, 2020) (Dkt. 181)) Such an action would have resulted in remand to the Commission. The Applicants are now requesting that the Commission do just that: rescind the existing CPCN and re-vote on the Project. In other words, the same intervenors who fought for this very outcome are now urging the Commission to “respect

the current jurisdiction of the Dane County Circuit Court” and decline to rescind the CPCN. (DALC/WWF Initial Comments, at 2 n.1) They argue that rescinding the CPCN would “interfere in the due process rights of parties in the appeal process” (SOUL Initial Comments, at 8) and that they are “opposed to any actions that would interfere with the Courts review of the CHC Decision.” (Klopp Initial Comments, at 9-10) These arguments, however, misunderstand the role of the courts and judicial review.

For one thing, none of the intervenors have cited any legal authority explaining how or why rescinding the CPCN would interfere with their “due process rights.” As noted above, the Commission has broad discretion to rescind its prior orders at any time and for any reason. The Legislature could have restricted the Commission’s authority to act on prior orders while judicial review proceedings are pending; but it did not do so. Given this broad grant of authority from the Legislature, the intervenors have no credible argument that rescinding the CPCN would violate their due process rights. Moreover, to state a cognizable due process violation, a party must show a deprivation of a constitutionally protected property interest without due process of law. *See Stipetich v. Grosshans*, 2000 WI App 100, ¶ 24, 235 Wis. 2d 69, 612 N.W.2d 346; *State v. Ozuna*, 2017 WI 64, ¶ 22, 376 Wis. 2d 1, 898 N.W.2d 20. No intervenor has explained how rescinding the very CPCN that it spent years opposing would deprive them of a constitutionally protected property interest.

In addition, at this stage, proceeding with judicial review would be a waste of resources for everyone involved—the Circuit Court, the Commission, and the parties. If the judicial review proceedings continue, the Circuit Court holds an evidentiary hearing in September (as currently planned), and the Circuit Court subsequently decides that former Commissioner Huebsch should have recused himself, the Circuit Court would remand the CPCN to the Commission for a new

vote and the judicial review proceeding would be over. *See* Wis. Stat. § 227(4); *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W. 2d 842 (1993); *Keen v. Dane Cty. Bd. of Supervisors*, 2004 WI App 26, ¶ 21, 269 Wis. 2d 488, 676 N.W.2d 154. If the Commission decides to rescind the CPCN now, it achieves the same result. The case will return to the Commission for review. The Circuit Court will have no final order to review and the issue of former Commissioner Huebsch’s recusal will be moot. In other words, if the Commission rescinds the CPCN, the parties avoid spending another 10 weeks on discovery, motion practice, and hearing preparation to potentially arrive at the exact same outcome: namely, a renewed vote on the Project before the Commission without former Commissioner Huebsch.

Moreover, the intervenors’ suggestions that the Commission and/or the Applicants are attempting to evade discovery is false. When they became aware of former Commissioner Huebsch’s use of the Signal application, the Applicants promptly disclosed this information to this Commission and to the Circuit Court and requested that the Commission rescind the CPCN. This fact alone belies any suggestion that the Applicants were trying to “bury the truth.” The fact that the Applicants asked the Commission to rescind a permit for a \$492 million project—after a heavily contested, 18-month long administrative proceeding before the Commission and multiple appeals in state and federal court—demonstrates how seriously the Applicants take this situation. And notwithstanding their request for a stay, the Applicants have continued to respond to discovery in the ongoing judicial review proceedings and have produced all responsive documents in their possession. No further discovery from the intervenors to the Applicants is outstanding.

Finally, and most importantly, rescinding the CPCN and then re-voting without former Commissioner Huebsch’s participation will remove all questions of his potential bias in the proceeding, while also ensuring that the Project can be put into service in a timely manner if it is

reapproved. Like any commissioner, former Commissioner Huebsch had no role in shaping the evidentiary record in this case. He did not file testimony, cross-examine witnesses, or rule on the admissibility of evidence in the existing record. Instead, the Administrative Law Judge determined what was to be included in the evidentiary record, which was then referred to the Commission for its review and a decision after the close of evidence. *See e.g.* Wis. Admin. Code §§ PSC 2.04 & 2.27. Therefore, granting the Applicants’ request to rescind the CPCN would be an efficient and fair means of resolving the claims of bias in these proceedings.

V. THERE IS STILL NO EVIDENCE THAT FORMER COMMISSIONER HUEBSCH ENGAGED IN ANY *EX PARTE* COMMUNICATIONS WITH ANY PARTY TO THIS PROCEEDING.

The intervenors appear to be divided on the question of whether there is sufficient evidence to conclude that there was a due process violation. In fact, Ms. Klopp opined that the Commission “has no actual evidence that supports action at this time.” (Klopp Initial Comments, at 3) Meanwhile, other intervenors assert that the Applicants have “admitted wrongdoing” and that “they and the Commission together have violated the due process rights of the Petitioners and the public.” (DALC/WWF Initial Comments, at 6) They accuse the Applicants of engaging in “misconduct and *ex parte* communications” with former Commissioner Huebsch. (DALC/WWF Initial Cmts. at 9-10) But these allegations are not supported by citations to any evidence.

A communication is *ex parte* if it is related to the merits of an ongoing case. *See* Wis. Stat. § 227.50(1)(a). In other words, communications between parties and commissioners are prohibited only to the extent they directly relate to a pending case. Importantly, after almost two years and two appeals in state and federal court, there is still no evidence that any party to this proceeding communicated with any commissioner about the Cardinal-Hickory Creek Project or the merits of this proceeding.

Notwithstanding the intervenors' claims to the contrary, the Applicants' request for the Commission to rescind the CPCN is not an admission of wrongdoing or of *ex parte* communications. It is simply an acknowledgement that, while there is no evidence of any actual *ex parte* communications occurring, the existence of these Signal communications raise sufficient questions regarding former Commissioner Huebsch that the Applicants believe it is appropriate to return to the Commission for a new decision without his participation. The Applicants and their representatives are aware of Wisconsin's *ex parte* law and take its requirements seriously. Moreover, the Cardinal-Hickory Creek Project can stand on its own two feet. The Applicants have not and will not attempt to improperly influence the decision making of this body because they are confident in the Project's merits and the benefits it will generate for Wisconsin and the upper Midwest as a whole.

CONCLUSION

For the reasons set forth above, the Applicants respectfully request that the Commission rescind the CPCN, not reopen the evidentiary record, and reconsider the case expeditiously, without the participation of former Commissioner Heubsch.

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Respectfully submitted this 19th day of July, 2021.

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