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 Cardinal-Hickory Creek Project	Docket No. 5-CE-146

REPLY COMMENT OF CLEAN ENERGY ORGANIZATIONS ON NOTICE OF INTENT TO RESCIND

INTRODUCTION

The Clean Energy Organizations (Clean Grid Alliance, Fresh Energy, and Minnesota Center for Environmental Advocacy, collectively "CEOs") continue to support the request of American Transmission Company, ITC Midwest, and Dairyland Power Cooperative (collectively "Applicants") and the intent of the Public Service Commission ("PSC" or "Commission") to rescind the final decision granting a Certificate of Public Convenience and Necessity ("CPCN") for the Cardinal-Hickory Creek transmission line project ("Project").

The only item currently before the PSC is a request by the Applicants to rescind the permit *they* applied for. The basis for the Applicants' request is not due to any proof of bias, but rather an abundance of caution to ensure "transparency, fairness, and integrity" of the process to approve Cardinal-Hickory Creek. Opponents to this project ask this Commission to either delay for lengthy litigation, or to throw away years of work by all parties involved by retrying this case. But the easiest and most efficient path forward is for the Commission to rescind the CPCN and vote anew

today given that this is the exact same remedy opponents will receive after months of litigation if their bias claims are found to be true. The Commission has clear jurisdiction and authority to proceed as the Applicants have requested under Wis. Stat. § 196.39, and no commenter has provided evidence or law to the contrary. Thus, CEOs request the Commission ensure the transparency, fairness, and integrity of the process is preserved by rescinding the existing CPCN and voting anew. CEOs further request the Commission do so without re-opening the record given that the factual record has no bearing on the issue before the Commission—ensuring the vote on the CPCN is free from any possibility of bias.

I. WHETHER BIAS IS PROVEN OR THE COMMISSION ACTS NOW, THE REMEDY WILL BE THE SAME—A REMAND TO THE COMMISSION FOR DETERMINATION OF NEXT STEPS

Comments by opponents to the Cardinal-Hickory Creek Project have attempted to expand the issue that is currently before the Commission. But the matter before the Commission is narrow—a voluntary request by the Applicants to rescind the current CPCN and proceed to a new vote to eradicate any possible concern about bias. The only basis for this request is newly discovered evidence that former Commissioner Huebsch texted with individuals that worked at ATC and ITC using the Signal app. The content of those communications is unknown and may never be known. There is no evidence those communications were ex parte communications about Cardinal-Hickory Creek.[1] In fact, testimony from former Commissioner Huebsch indicates the contrary—he merely used this app to facilitate group chats with long-time friends, the content of

[1] Not all communications are ex parte communications. Ex parte communications are only those made to a Commissioner that are relative to the merits of a case, or are a threat or offer of reward. Wis. Stat. § 227.50(1).

which was sports, health, and family.[2] Further, the former Commissioner testified that he has never had an ex-parte communication with anyone.[3]

The Applicants are asking to resolve any potential bias issue now without further delay by *voluntarily* seeking a rescission of the permit former Commissioner Huebsch voted on. This allows all parties involved to avoid a lengthy inquiry into former Commissioner Huebsch, who is no longer on the Commission, and to proceed to the remedy that would be granted if bias was found—a remand to the existing Commission. *See* CEOs Initial Comment on Rescission at 2 fn. 2 (explaining the only remedy available to the Circuit Court if bias is found is remand under Wis. Stat. § 227.57(4)).

While commenters opposed to the transmission line attempt to disqualify the acting commissioners by arguing Commissioners Valcq and Nowak are "tainted" by the allegations against former Commissioner Huebsch, these arguments are unproven and do not prevent these Commissioners from re-voting on the CPCN. DALC/WWF Comments on Applicants' Request to Rescind the CPCN and Reopen the Record at 2 (July 12, 2021). Commenters cite to a preliminary order by Circuit Court Judge Frost, but in this order Judge Frost explicitly states, "[i]t is important to remember that I make this decision *preemptively*. I do not yet know whether Petitioners will prove that Commissioner Huebsch should have recused himself." Decision and Order at 1, *County of Dane, et al., v. Public Service Commission of Wisconsin, et al.* (19-CV-3418) (May 25, 2021) (emphasis added). Thus, there is currently no decision by any court that Commissioner Huebsch was biased or that his bias affected the decision-making of his fellow Commissioners. More

[2] Chris Hubbuch, *Utilities Call For Quick Re-Vote On Permit; Opponents Say Court Should Decide Power Line's Fate,* Wis. State Journal, July 15, 2021, available at https://madison.com/wsj/news/local/govt-and-politics/utilities-call-for-quick-re-vote-on-permit-opponents-say-courts-should-decide-power-lines/article_59046e40-ebe1-590c-bc63-abdc13ad46a5.html?utm_source=E%20nmggnergy+News+Network+daily+email+digests&utm_campaign=a56ec204a8-EMAIL_CAMPAIGN_2020_05_11_11_36_COPY_01&utm_medium=email&utm_term=0_724b1f01f5-a56ec204a8-89234839.

[3] *Id.*

importantly, the remedy that Judge Frost has stated he will grant even if he believes Commissioner Huebsch was biased and tainted his colleagues is a "remand to the PSC for further proceedings." *Id*. at 3. Judge Frost is well aware that the remand would be to the current Commission consisting of two commissioners that served with former Commissioner Huebsch and one commissioner that must recuse himself. Yet, Judge Frost's stated remedy is to return this matter to the Commission. *See Id*.

Thus, there is no reason for the Commission to delay action on Applicants' request for rescission and a new vote. Even if this case proceeds through the Circuit Court, the allegations of bias against former Commissioner Huebsch are found to be true, and the Court determines Commissioner Huebsch tainted his colleagues, the resulting next steps will be exactly what the Applicants are asking for now—a return of the issue to the PSC for appropriate next steps as determined by the existing Commission.

Additionally, there is clear Wisconsin case law showing that when the decision-making body is a panel similar to the PSC (as opposed to an appellate judiciary panel), remand to that body is the proper remedy. *See, e.g.*, *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 31, 498 N.W.2d 842, 849 (1993) (remanding back to the zoning board for new hearing without the biased decision-maker); *Keen v. Dane County Board of Supervisors*, 2004 WI App 26, ¶ 17, 269 Wis. 2d 488, 498, 676 N.W.2d 154, 160 (identifying remedy as remand to the county board for rehearing without that decision-maker). Thus, regardless of whether Commissioner Huebsch is found to have been biased by the Circuit Court, or whether the Commission proceeds on Applicants' request for rescission now, the result will be exactly the same—the matter will be before the Commission and the Commission will have discretion to determine the next steps needed. CEOs therefore support

the option that saves all the parties the time and expense of further litigation, and proceeds to that remedy now.

II. ALLEGATIONS OF BIAS HAVE BECOME OVERBLOWN AND IN SOME CASES NONSENSICAL AND CONTRARY TO LAW

It is worth noting that while an abundance of comments were submitted during this comment period, the vast majority of them are either wholly irrelevant to the issue before the Commission, or have cloaked their desire to thwart the Project in allegations of bias. For example, approximately one-third of the comments provided no substantive argument on the issue before the Commission and instead simply stated their opposition to the Project.[4] Further, many comments were from parties who have opposed the project throughout these multi-year proceedings but have never alleged bias—until last week. For example, Jewell Jinkins asserts that at the Commission's most recent meeting, the Commission's acknowledgement of DALC/WWF's position (one of the main opponents to the Project) and not others was "clear appearance of bias, and likely actual bias on the part of the Commissioners." Jewell Jinkins Intervenors Initial Comments Notice to Rescind and Reopen at 12 (July 12, 2021). Thus, commenters argue that the Commission is biased both when it agrees with the Applicants, and *the Applicants' opponents*. With these types of arguments, one must ask, is there any party the Commission can agree with without being accused of bias? This example illustrates just how overblown the accusations of bias have become.

Moreover, Jewell Jinkins and many other commenters talk about the "appearance of bias" as if this were the legal standard by which all of the Commission's actions have to be considered. This is a misrepresentation of the law, and it is worth clarifying that the legal standard for determining bias is actually quite different. First, decisions by decision-makers like the

[4] Hubbuch, *supra* note 2.

Commission begin with a *legal presumption* that the decision-maker acted fairly, impartially, and without bias. *In re Paternity of B.J.M*, 2020 WI 56, ¶ 21, 392 Wis. 2d 49, 944 N.W.2d 542. This means that *mere allegations or concerns of bias are not enough*. The individual alleging bias must actually produce evidence sufficient to overcome this presumption and demonstrate that there was actual or objective bias by a preponderance of the evidence. *Id*.

Second, there are two types of bias: actual bias or objective bias. Objective bias is the kind of bias commenters are referring to when they talk about "an appearance of bias." In an objective bias claim, the law is not simply whether there is *any* appearance of bias, but whether there is "a serious risk of *actual bias* based on objective and reasonable perceptions." *Caperton v. Massey Coal Co., Inc.,* 556 U.S. 868, 884 (2009) (emphasis added). The question is whether, given the circumstances, an average decision-maker in the position is likely to be neutral, or whether there is an unconstitutional potential for bias. *Id.* at 881. In applying this standard, the Wisconsin Supreme Court has said,

> We ask whether there is "a serious risk of actual bias—based on objective and reasonable perceptions." "Due process requires an objective inquiry" into "whether the circumstances would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."

B.J.M., 2020 WI 56, ¶ 24 (quoting *Caperton*, 556 U.S. 868, 884-85 (2009) (omissions in original)). Put another way, a court must assess whether "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *B.J.M.*, 2020 WI 56, ¶ 22 (quoting *Caperton*, 556 U.S. 868, 883-84 (2009)). Both the United States Supreme Court and the Wisconsin Supreme Court have recognized that only the most extreme cases rise to the level of "a serious risk of actual bias." *See Caperton*, 556 U.S. at 887 ("Our decision today addresses an *extraordinary* situation where the Constitution requires recusal.")

(emphasis added); *B.J.M.*, 2020 WI 56, ¶ 24 ("We acknowledge it is the exceptional case with extreme facts which rises to the level of a serious risk of actual bias."). Thus, it is not nearly enough to simply allege an *appearance of bias*. Disqualifying a decision-maker requires a much higher legal standard— "a serious risk of actual bias" coupled with actual evidence.

While comments like that of Jewell Jinkins would normally not even warrant a response, CEOs highlight this to show how the allegations of bias put forth by one joint party to this case have now been adopted as a talking point by opponents to the project at large.[5] This rush to judgement, impugning the credibility of the Commission without hard evidence, is a dangerous path to follow. It is easy for mere allegations and conjecture to take on a life of their own simply through repetition in the public dialogue. But the goal of every party to this case should be for the results to be based on the law and the facts—not sound bites.

III. THE COMMISSION HAS AUTHORITY TO PROCEED AND BROAD DISCRETION AS TO PROCEDURAL NEXT STEPS

The Commission has the legal authority to grant Applicants' request for rescission now, and to decide the procedural next steps. Some commenters assert the Commission must wait until the Circuit Court proceeding has concluded. Others assert that if the rescission is granted, the Commission must effectively start the process over and build an entirely new record. Neither of these assertions is correct. As CEOs explained in their Initial Comments, Wis. Stat. § 196.39 gives the Commission authority to rescind one if its orders "at any time." And the Commission has authority to reopen any case following the issuance of an order in the case for any reason. *Id*. Clearly then, the Commission has authority to take up Applicants' request at this time.

[5] *See PSC Updates,* Driftless Defenders (July 18, 2021, 11:39 AM) https://driftlessdefenders.com/updates/ (identifying talking points for commenters for the July 12, 2021 comment period including "[s]ay that you join the comments being submitted by DALC and WWF" and providing template for longer comment "using DALC/WWF suggestions.").

Commenters go on to cite to Wis. Stat. § 227.49(6) to support their request for a full reopening of the record. But this provision is about petitions for *rehearing*, not the process after rescission. Even so, this provision *still* gives the Commission discretion to determine the process. *See* Wis. Stat. § 227.49(6) ("Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing *except as the agency may otherwise direct*.") (emphasis added). Thus, commenters that urge the Commission to reopen the record and start the contested case process all over again can cite to no authority supporting or requiring this action.

Moreover, the request to "start over" reveals the true intent behind many of the comments received during the comment period. These commenters specifically highlight their request that the Commission reopen the record to approve the BWARA alternative. But taking this action has nothing to do with the issue of alleged bias. Instead, this reveals the actual intent behind the comments is for the Commission to re-open this proceeding so opponents have a second bite at the apple to argue against a project they simply do not like. But, because the request before the Commission does not raise questions of fact, nor challenge the facts admitted into the record, there is no need to take additional testimony or re-open the record for a re-trial. CEOs thus recommend the Commission simply re-vote now, on the existing record. This record was thoroughly developed through a comprehensive process that appropriately rejected the BWARA option as an insufficient alternative, and approved this much-needed transmission line.

CONCLUSION

The scope of the issue before the PSC today is narrow—should the Commission rescind the CPCN based on the Applicants' request? The most efficient option for all involved is for the Commission to do so now, given that this would be the same remedy the Court could grant if bias was found. The Commission should proceed to a new vote on the CPCN application based on the

current record in order to address the concern that is before the Commission: that the transparency, fairness and integrity of the process in this matter be retained and concerns of alleged bias affecting the Commission's vote be resolved. Commenters have provided no legal requirement prohibiting the Commission from acting in this manner, and it is the most logical and efficient path forward to address the Applicants' request.

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Respectfully submitted,

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