

**BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN**

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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

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**REPLY COMMENTS OF THE CITIZENS UTILITY BOARD**

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**I. INTRODUCTION**

On June 28, 2021, American Transmission Company LLC (ATC) and ITC Midwest LLC (ITC), made a filing (Request) with the Public Service Commission (Commission) requesting that the Commission “act on its own motion to rescind the Final Decision granting the Certificate of Public Convenience and Necessity (“CPCN”) issued for the Cardinal-Hickory Creek 345-kilovolt Transmission Line Project (“Project”) and reopen the above-captioned docket to consider next steps.” (Request p.1) Dairyland Power Cooperative also separately filed its support for the Request. On July 1, 2021, the Commission issued a Notice of Intent and Request for Comments (NOI) following its open meeting discussion of ATC and ITC’s Request during the Commission open meeting held earlier that same day. The NOI “seeks comments on the proposed rescission of the Final Decision and/or other procedural next steps in response to the applicants’ request.” The Citizens Utility Board (CUB) provides the following comments in response to the comments filed to date and the Commission’s NOI.

**II. COMMENTS**

As an initial matter, CUB would note that the Request made by ATC and ITC (herein collectively as “Applicants”) is unprecedented as far as CUB is aware. Moreover, the Applicants’ Request for rescission and reopening of the record is not based on a need to supplement the record, address changes in the record evidence, or otherwise address any facts upon which the Commission based its Final Decision of September 26, 2019. Were this the case CUB surmises that most if not all parties would support such a request, given the history of this Docket. However, the Request is driven by ATC and ITC’s discovery that “former Commissioner Michael Huebsch engaged in regular communications with an ATC employee, a former independent contractor for ITC, and other individuals over several years and while the CPCN application was pending” (Request p.1) via the Signal messaging platform. In simple terms, the Request is based upon an appearance of bias on the part of former Commissioner Huebsch, with the Applicants seeking through their Request to “[preserve] the transparency, fairness, and integrity of all regulatory and judicial proceedings.” (Request p.2) The Applicants further assert that “rescinding the CPCN and then re-voting without former Commissioner Huebsch’s participation will remove all questions of potential bias in the proceeding. (Applicants Initial Comments p.) Thus, the Applicants represent that the Request is aimed at protecting the public interest by preserving the public trust in the decision-making process of the Commission as it relates to undue bias, or in more lay terms, corruption.

If the Applicants’ Request is truly aimed at this goal, CUB supports this intent. However, as discussed below, as a specific remedy against bias, whether actual or perceived, CUB finds the Applicants’ specific proposal lacking.

First, it does not appear to CUB that the Commission has jurisdiction to take the actions requested by the Applicants. This case has proceeded on to appeals litigation before the Dane

County Circuit Court, which has jurisdiction over one of the pending appeals, and before the U.S. District Court for the Western District of Wisconsin and the U.S. Court of Appeals for the Seventh Circuit, which have jurisdiction over other pending appeals. Among the issues before those courts is the issue of bias on the part of the Commission in its issuance of a CPCN in this docket and whether the parties' right to due process were violated as a consequence. It would appear then to CUB that the appropriate venue to address the issue presented by the Applicants as the basis for its Request for rescission and reopening of the record, the issue being bias on the part of former Commissioner Huebsch, whether actual or perceived, would be before these judicial bodies. Even if the Commission were to continue to maintain that no actual bias occurred in this case, the admission of perceived bias as the Applicants' basis for rescission, would still indicate that any remedies should be pursued via the courts. Indeed, on May 25, 2021, Dane County Circuit Court Judge Jacob Frost issued a Decision and Order in *Dane County et al.*'s appeal of the Commission's Final Decision in this docket, in which he addressed the issue of bias, both in appearance and in practice:

“People often dislike decisions, whether made by judges, local tribunals make (sic) or the PSC. That is the natural and unavoidable consequence of our system, as generally someone ‘loses’. Knowing this, it is essential to our democratic system, to our design of government, that we maintain the process as fair *in appearance* and in practice. At least then the disappointment of the losing party is in having lost, not in being cheated by an unfair process or decision maker. Disappointment is acceptable. Distrust is dangerous.” (emphasis added)

Judge Frost also noted that “The public policy reasons requiring both actual impartiality *and the appearance of impartiality* apply equally to the PSC [as they do to judicial conduct].” (Id. emphasis added) Moreover, “even if no actual harm occurred by virtue of Comm. Huebsch's

alleged bias, meaning that the other commissioners would still have reached the same decision regardless of his comments, there is still a real harm by the proceedings forever appearing tainted due to his involvement. Allowing a decision rendered in violation of the parties' due process rights to stand damages the public's ability to trust the PSC process and the integrity of its decisions." (Id.)

Judge Frost's order illustrates that the issue of bias is central to the legal issues at play in appeals of the Commission's Final Decision in this docket. Citing Judge Frost's order, the Driftless Area Land Conservancy and Wisconsin Wildlife Federation (DALC & WWF) argue that:

"The Commission is legally and constitutionally bound to conduct any future proceedings in accordance with Due Process requirements. Chair Valcq and Commissioner Nowak have been tainted by their participation in the proceeding, and they are disqualified from further participation on the requested CPCN, or any re-opened request for a CPCN, for the proposed Cardinal-Hickory Creek transmission line. If they were instead to do so, that would undermine public confidence in the fairness, impartiality and integrity of the Commission's decision-making process." (DALC & WWF Initial Comments p.2)

Based on the available information, CUB agrees with DALC & WWF's reading of Judge Frost's order. As such, it appears to CUB that the appropriate venue to address these issues has moved from the Commission to the courts.

This issue of public confidence as it relates to due process is plainly clear to CUB. It is insufficient that public officials merely avoid actual bias or corruption. Decision-makers and public institutions tasked with protecting the public interest and parties' constitutional rights

must also avoid even the appearance of bias in their decisions, lest the integrity of those decisions evaporate.

In consideration of the foregoing and the Comments filed by other parties, CUB believes the appropriate actions for the Commission are as follows:

1. *IF* the Commission continues to assert, as it has done in court, that there was no bias in the Commission's decision in this docket, whether actual or perceived, then it should take no action as there would be no basis for rescission or a reopening of the record.
2. *IF, however*, the Commission were to agree with the Applicants that there is an appearance of bias on the part of former Commissioner Huebsch — thus undermining the public trust and denying parties' their due process rights — the Commission should admit this before the courts and submit itself to any remedies subsequently prescribed.
3. Finally, *IF*, counter to its assertions to date, the Commission finds that there was actual bias in the Commission's decision, then it should also admit this before the courts and accept any remedies subsequently prescribed.

To CUB's knowledge, no party has put forth any evidence or arguments supporting rescission and a reopening of the record in this case other than the appearance of bias produced by the revelations regarding former Commissioner Huebsch's communications with the Applicants and their agents. As such, were the Commission to rescind its Final Decision in this docket and move quickly to render a new judgment based on the existing record with the aforementioned appeals still pending, that action would come across as an attempt to "paper over" the issues still surrounding this case. Instead of serving to, as the Applicants assert, "[preserve] the transparency, fairness, and integrity of all regulatory and judicial proceedings." (Request p.2) such an action would further undermine public trust in the integrity of the

Commission as no other reason has been presented for taking such an action, except for an admission of bias, whether in appearance or in practice.

All of the foregoing ignores consideration of any arguments regarding record evidence in this Docket. As such, should the Commission issue an order rescinding its Final Decision, CUB believes the record should be reopened and a new hearing held to accept new evidence regarding the Project. The reason for this is simple. If the Commission wishes to take some sort of “do-over” steps to restore public trust in the integrity of the Commission’s decision-making, those steps must be meaningful. Questions regarding the evidence in the record existed prior to the Commission’s decision, particularly with respect to the modeling assumptions made by the Applicants in their modeling of Project benefits as they relate to utility scale solar PV deployment in Wisconsin and non-wires alternatives (NTA) such as storage. Despite their assertions (Applicants Initial Comments p.8), the past 22 months have seen the Applicants’ assumptions regarding the future of these technologies to be proven very wrong. Substantially more solar has been approved by the Commission in the intervening period than what was modeled. Utility-scale battery storage systems, which the Applicants represented as uneconomic during the proceeding, have been proposed by three Wisconsin utilities, including one of the Applicants. Specifically, ATC itself has proposed a 2.5 MW/5MWh battery storage as a transmission-only asset project near Waupaca, citing its cost effectiveness as compared with traditional wires solutions.<sup>1</sup>

These forecasting failures are significant as increases in solar deployment were found to decrease the projected benefits of the Project. Additionally, issues regarding the adequacy of the

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<sup>1</sup> See MISO presentation “Review of ATC Proposed 15947 Waupaca Area Storage as a Transmission Only Asset (SATO) Project”, <https://cdn.misoenergy.org/20190823%20WSPM%20Item%2003c%20ATC%20SATO%20project375568.pdf>

Applicants' non-wires alternatives were already at issue in the record. That Wisconsin utilities including the Applicants are moving forward with battery storage further undermines the Applicants' assumptions and modeling regarding the cost-effectiveness of the Project as represented in the record.

If the Commission were to render a new decision in this Docket based solely on a record that is already two years old and was already considered "stale" by parties at the time of the Commission's September 29, 2019 decision, while ignoring facts that the Commission itself is aware of simply by virtue of its own decision over the past 22 months, that action would do little to restore trust in the Commission's decision-making, and would likely cause more harm. Therefore, should the Commission rescind its Final Decision in this docket, CUB believes the Commission must reopen the record fully and schedule an evidentiary hearing to take in new evidence, prior to issuing any new decision.

## **CONCLUSION**

For the foregoing reasons, CUB recommends that the Commission either:

- Deny the Applicants' request for rescission and a reopening of the record, or
- Admit to bias on the part of former Commissioner Huebsch, whether in appearance or in practice, in the relevant judicial appeals proceedings and accept any remedy subsequently prescribed.

Should the Commission decide to grant the Applicants' request for rescission, CUB recommends that the Commission reopen the record fully, and schedule an evidentiary hearing to take in new evidence prior to issuing any new decision.

Dated this day, Monday, July 19, 2021.

Respectfully Submitted,

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By: */s/ Corey S.J. Singletary*  
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