BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Joint Application of American Transmission Company, 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	))))))))))	5-CE-146

COMMENTS OF IOWA COUNTY, THE VILLAGE OF MONTFORT AND THE TOWN OF WYOMING IN RESPONSE TO THE JULY 1, 2021 NOTICE OF INTENT AND REQUEST FOR COMMENTS

After review of Parties comments and the history of this matter, Iowa County, the Town of Wyoming, and the Village of Montfort suggest these steps to the Commission.

1. Terminate this process now, as proposed by intervener Klopp and at least implied by others.

2. Admit error in the case before the Circuit Court as proposed by DALC/WWF, stipulating to the CPCN being vacated and the associated Order Reversed.

3. Recuse Commissioners Valc and Nowak from any proceedings on a subsequent application the Applicants might file to revive the Project.

4. Accede to the Circuit Court's management of discovery because of the over-riding public interest.

5. Initiate an investigation to determine what Applicants have spent, and if Applicants' actions are demonstrated to have been material to creating bias or the appearance of bias, make orders ensuring that Applicants, not the public, bear appropriate costs.

The Applicants' request to the PSC to rescind the CPCN was filed contemporaneously to the Applicants' motion to stay proceedings in Circuit Court. The contradiction between the Applicants' plan to have CPCN issued to them and their request that it be rescinded – temporarily – reveals that the Applicants are using the Commission process for an ulterior purpose. The ulterior purpose is to engineer a way for Applicants to escape the administrative review and its associated discovery. An ulterior purpose is the first element of abuse of process. Use of a legal process to "obtain a collateral advantage, not properly involved in the proceeding itself" is the second element. *Schmidt v. Klumpyan*, 264, Wis.2d 414, 421 (Wis. App. 2003). The Applicants' request to rescind the CPCN is aimed solely at securing such a collateral advantage. It aims to secure the CPCN without being hampered with accountability that litigation opponents are positioned to secure in a different proceeding. The Commissioners should not have entangled the agency with this kind of effort.

The Commissioners have already sullied themselves by engaging with the Applicants' request in a way that advances the Applicants' illegitimate objectives. The Commission should stop now and not make it worse.

Leaving aside the issue of jurisdiction, which has been well-addressed by others, when Applicants sent their "request," to the Commission there existed no pending motion on which the Commission could act. The law governing reopening and rehearing precluded Applicants from bringing such a motion. While a Party may seek to reopen a PSC contested case (Wis. Stat. § 196.39(2)) a Party's rights to seek

reopening are limited by Wis. Stat. § 227.49, which requires a Party to make its request within 20 days of the Order for which reopening is sought. Wis. Admin. Code § PSC 2.28 states the same time limit. The time limits run from the date of the CPCN Decision and expired long ago.

The Applicants did not limit themselves to notifying the Commission of what they indicate they just discovered. They requested specific action. The Utilities' request was therefore, by definition, a motion. See: *Motion*, Black's Law Dictionary, 10th Ed., 2014. It should have been treated as a motion. Since it was untimely, the Commission should have ignored it.

The Applicants likely knew they could not make a motion, so they asked the Commission to make it for them. This is a problem: the Applicants asked the Commissioners to *act as the Applicants' proxy by adopting the Applicants' motion as the Commission's own motion*. Applicants asked the Commission to step-in for them in a disputatious administrative process and do for the Applicants what the Applicants could not do for themselves. The request should have set off alarm bells for the Commission. The Commission should not have entangled itself by acting as the Applicants' proxy.

The facts undergirding the Applicants motion are striking. The encrypted communications were so problematic that the Applicants are putatively prepared to eschew the CPCN because of them. Applicants concede, in other words, that the very existence of those communications creates an appearance of impropriety that poisoned the process through which it was approved.

The Commission's response is equally striking: these facts elicited *no concern* from the Commission. The PSC has neither directed production of the associated records nor initiated an investigation (*See*: Wis. Stat. §§ 196.02(6), (7)). It has not proposed rules addressing the use of encrypted tools to communicate with representatives of Parties. It has neither announced nor adopted any policy or agreement that Commissioners would avoid such tools in their communications with representatives or agents of Parties to contested cases. And the Commission's 0pen meeting displayed no concern with the substance of the disclosures. If the Commission wonders how members of the public and non-utility Parties can develop suspicions of the Commission, it may want to consider how it's combined decisions to i) act on behalf of Companies who are not positioned to act for themselves, facilitating their illegitimate purpose, while ii) simultaneously ignoring egregious facts, appear to outsiders.

Instead of addressing the underlying substance, the Commission's response was i) to immediately calendar the issue; ii) presume the existence of a motion the Commission had made on its own – effectively making the Commission the Applicants' proxy; and iii) agree to issue a "notice of intent to rescind" the CPCN as proposed by Commissioner Valc,[1] with Commissioner Novak concurring while noting her associated interest in speeding things up and limiting any additions to the record upon reopening.

[1] "My inclination is to issue a notice of intent to rescind the final decision and request comments." "We would reopen this docket and issue a notice of intent to rescind and to reopen the docket for the sole purpose of collecting the comments." (Open Meeting of July 1, 2021, Commissioner Valc).

Apparently aware of just how bad this looks, the Commission agent, probably an attorney, who crafted the notice to which these comments respond, truncated the title to "NOTICE OF INTENT," omitting the words "to rescind" that had been used by both Commissioners in the open meeting of July 1, 2021.

So: we have a motion created by the Commission acting as a proxy for the Applicants. And we have the Commissioners agreeing to notify parties of the Commissioners' intent to grant the motion, and then we have the Commission inviting comment on what the Commission has signaled that it already intends to do, and comment on what the Commission should do after it does what it intends.

The Commission, by acting expeditiously as the Applicants' proxy has disqualified itself anew through showing bias or the appearance of bias. If the Commission proceeds at all it will be proceeding under a cloud that it has just made darker.

Thus, our suggestions.

Respectfully submitted July 19, 2021.

s/ *Electronically signed by Frank Jablonski*
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