

**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

05-CE-146

JEWELL JINKINS INTERVENORS INITIAL COMMENTS

NOTICE TO RESCIND AND REOPEN

Jewell Jinkins Intervenors (hereinafter “JJJ”), a party in the above-captioned docket, submits this Initial Comment to the Public Service Commission as requested in its July 1, 2021 Notice of Intent and Request for Comments, specifically “regarding the Commission’s intent to rescind the Final Decision and/or take other action authorized by Wis. Stat. Ch. 196.”

JJI is grateful that the Commission did not act in haste, and proffered this Comment period for Intervenors and interested members of the public to weigh in.

Jewell Jinkins Intervenors requests that the Commission NOT rescind the CPCN Final Decision, and that it should instead deny the utilities’ request. This docket and the utilities’ request is not in a vacuum – it is inextricably intertwined with the ongoing judicial review of the Commission’s Final Order in the Cardinal-Hickory Creek docket. The Commission should not interfere with judicial review lawfully underway at this time. If the utilities’ request is not denied outright, the Commission should put the request of the Applicants on hold. Further,

because the Commission may well be a tainted body, not an impartial decisionmaker, with that determination pending as an initial part of judicial review, it is not appropriate for that tainted body to rescind the order and make any decisions on “next steps.” If there are to be “next steps,” those steps will be directed by the Court.

The Commission has launched a rush to act, in concert with the utilities, which is an error in this first of a kind request. The Commission must leave this matter to the court as it determines, first, whether Commissioner Huebsch should have recused himself and whether the Commission and whether this process is inherently tainted, and then to the substance of the Final Order. The Commission should not upset the status quo as the court considers whether the CPCN Final Decision was a lawful one.

AN ORDER, FACTS AND FILINGS, AND COMMISSION’S NOTICE TO RESCIND

- The Public Service Commission’s Final Order in the Cardinal-Hickory Creek docket, 05-CE-146, is before the Dane County Circuit Court, Court File 2019CV003418.
- On May 25, 2021, after briefing of the parties, the Judge of Circuit Court discussed the initial determination to be made, that of bias, the potential for a ruling of structural error, and raised the possibility or probability of judicial vacation of the PSC’s Final Order:

I agree that the alleged biases of Comm. Huebsch, if proven, constitute a structural error that will require I vacate the PSC decision and remand to the PSC for further proceedings compliant with due process.

Order, p. 3.

Petitioners’ argument that one tainted member taints an entire proceeding is persuasive.

Order, p. 5.

Each of the circuit courts of appeals decisions Judge Adelman refers to involved review of a commission or agency decision, not a judicial decision. As Judge Adelman noted, five of the six circuits to address this issue held that one biased member tainted the entire decision.

Order, p. 7.

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...

Therefore, if Comm. Huebsch was improperly biased or his participation creates a improper appearance of bias, I must vacate the PSC decision and remand to the PSC for further proceedings. At that point, I need not review the merits of the PSC decision and no further proceedings are required on judicial review.

Order, p. 9.

See Order, May 25, 2021, Court File 2019CV3418, Dane County Circuit Court (attached as Exhibit A).

- On June 28, 2021, at 10:00 a.m., citing Wis. Stat. §ATC and ITC asked the Commission to rescind the Cardinal-Hickory Creek (C-HC) Final Order “on its own motion” and reopen the docket “to consider next steps.” PSC REF #414396.
- On June 28, 2021, at 10:08 a.m., 8 minutes after the ATC/ITC request, Dairyland filed a “me too” supporting that ATC/ITC request.
- On that same date, June 28, 2021, ATC, ITC, and DPC jointly filed a Notice of Motion and Motion for Status Conference and Temporary Stay, which was electronically served to parties to the Circuit Court proceeding at 12:10 p.m. This filing was not filed in the Commissions 05-CE-146 docket. Attached Exhibit B, Notice of Motion and Motion of ATC/ITC/DPC for Limited Stay and Status Conference, 6/28/2021, Court File 2019CV003418.
- Incorrectly presuming primacy of the Commission, apparently attempting to derail the jurisdiction of the Court, the ATC/ITC/DPC joint Motion argued that:

... several important developments have transpired in the last week that necessitate a status conference and temporary stay while the Public Service Commission of Wisconsin (“PSCW” or “Commission”) determines whether, and to what extent, to act on the Co-Owners' request to rescind the Final Decision granting the Certificate of Public Convenience and Necessity (“CPCN”) for the Cardinal-Hickory Creek 345-kilovolt Transmission Line Project (“Project”) and reopen Commission Docket No. 05-CE-146 (“the Proceeding”) to consider next steps.

Id., p. 2.

- The utilities' argument notes:

First, the Co-Owners’ request that the Commission rescind, reopen, and reconsider the CPCN at issue in this case may moot this proceeding. If the Commission rescinds the CPCN, then there will be no final agency action for this Court to review...

Id., p. 3.

- On that same date, the Public Service Commission “filed a letter joining that request” of the utilities when it filed a “Request for Status Conference and Stay” with the Circuit Court. This letter was served only on parties to the Circuit Court proceeding, and was not filed in the PSC’s 05-CE-146 docket.
- The PSC’s June 28, 2021 letter to the Court, electronically served at 4:15 p.m., states:

Judge Frost:

Respondent Public Service Commission of Wisconsin (the “Commission”) writes to advise the Court that it joins the Motion of Intervenor-Respondents American Transmission Company LLC and ATC Management Inc., ITC Midwest LLC, and Dairyland Power Cooperative for Status Conference and Limited Stay. The Commission is evaluating the various filings from today, both before the Commission and before the Court, and agrees that a status conference in 10 to 14 days (or thereafter at the Court’s earliest convenience) is advisable, and that further proceedings in this matter should be temporarily stayed.

Exhibit C, PSC Request for Status Conference and Stay, 6-28-2021.

- The Commission’s Legal Counsel provided a Memorandum to the Commission on July 29, 2021 (disclosed in the Commission’s Agenda, Item 41 but not filed until July 1, 2021 at 3:25 p.m., PSC REF #414998). The recent Circuit Court filings, the June 28, 2021 ATC/ITC/DPC Notice of Motion and Motion for Limited Stay and Status Conference was not named as a “Key Document,” nor was the Commission’s own June 28, 2021 Letter joining with the utility Respondents:

Key Background Documents

[Final Decision Signed and Served 09-26-19 - PSC REF#: 376391](#)

[ATC and ITC Request to Reopen Record - PSC REF#: 414396](#)

[Dairyland Power Cooperative's Request to Reopen Docket - PSC REF#: 414398](#)

Memorandum, 6-29-2021, PSC REF#414998. This Memorandum was not made public until July 1, 2021, after the Commission’s meeting, and after the existence of the Memorandum was noted by JJI with the request that it be made public. PSC REF #414823.

- The Commission’s Legal Council’s Memorandum did not address the fact of the utilities’ request that the Commission take up rescission “on its own motion” and instead framed it as “ATC and ITC requested that the Commission rescind the Final Decision...” PSC REF #414998, but *c.f.* PSC REF #414396.

- At the July 1, 2021 meeting, Commissioner Nowak delivered an impassioned soliloquy noting that “we don’t talk to each other,” imploring the public to understand, that she takes her oath very seriously. The Circuit Court Order notes her similar theme from a public meeting, using very similar words and phrases:

As the PSC noted, Comm. Nowak began her comments stating, “[w] have been waiting to talk to each other for quite a while about this proceeding, so it is good that the day is finally here.” Dkt. 290 at 5. Commissioner also explained at a different public meeting:

If you all understood how seriously we take our jobs and how seriously we adhere to the law – and its frustrating that we can’t talk to each other before a meeting, and we don’t – but don’t go out and say we’re violating the law, or attack the integrity of this body or these commissioners without any evidence.

Dkt. 290 at 6 (emphasis added).

JJI Exhibit A, Order, 5/25/2021, p. 8.

- Applicants’ June 28, 2021 Request to Reopen docket No. 05-CE-146 was based upon Discovery in the Circuit Court case, which paints a different picture:

Last week, ATC and ITC discovered information that indicates 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.

PSC REF #414396, p. 1. In this request, made a month after the Circuit Judge’s Order and despite an explanation of the applicability of the “tainted body” structural error review, the Applicant requests “next steps” of the Commission:

As such, ATC and ITC request that the Commission rescind the Final Decision granting the CPCN and reopen this docket to consider next steps, without the participation of former Commissioner Huebsch.

Id., p. 2.

- At the July 1, 2021 Commission meeting, the Commission ordered that a Notice of Intent be issued, filed that same day, stating in writing an intent to rescind:

THIS NOTICE is in response to the request of American Transmission Company LLC and ATC Management Inc. and ITC Midwest LLC, and supported by Dairyland Power Cooperative (collectively, applicants), to rescind the Final Decision granting a Certificate of Public Convenience and Necessity issued in this docket, and to reopen the docket to consider next steps.

The Commission provides notice, and opportunity to be heard pursuant to Wis. Stat. § 196.39, regarding the Commission's intent to rescind the Final Decision and/or take other action authorized by Wis. Stat. ch. 196.

The Commission reopens this docket for the limited purpose at this time of soliciting comments as provided in this Notice.

The Commission seeks comments on the proposed rescission of the Final Decision and/or other procedural next steps in response to the applicants' request.

Notice of Intent and Request for Comments, p. 1, PSC REF #415003.

I. THE COMMISSION MUST NOT INTERFERE WITH JUDICIAL REVIEW WHERE ITS BIAS AND APPEARANCE OF BIAS IS AT ISSUE.

Where the issue before the court at this stage of judicial review of the Commission's Final Order is whether there was bias or an appearance of bias, whether bias is structural error, whether the Commission is a tainted panel, and where the legitimacy and integrity of the Commission and its decisions is at issue, the Commission must refrain from interfering with judicial review. See Exhibit A, Circuit Court Order, May 25, 2021; see e.g., *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 498 N.W. 2d 842 (1993).

Although the Circuit Court has thus far focused specifically on ex parte contact, but bias and appearance of bias can take many other forms and the inquiry is much broader. *Id.*, p. 4, citing *Berkshire Emps. Ass'n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F. 2d 235, 238-39 (3rd Cir. 1941) (Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of on upon the others can be quantitatively measured).

Focusing on bias and the need for an impartial decision maker, the Circuit Court stresses the due process need for an impartial Commission, and that one biased decider renders the body and the proceeding tainted. *Id.*, p. 2-9.

The Public Service Commission, presently and historically, is anything but impartial. As with former Commissioner Lauren Azar, Commissioner Valcq was a long time utility regulatory attorney, working for the utilities, and a firm representing the utilities, that now come before the Commission.¹ Commissioner Nowak doth protesteth too much, methinks, in repeatedly stating how seriously she takes her oath, that Commissioners do not talk privately, when she “implores the public to understand.” Id., p. 3. There is always a Commissioner representative to MISO², a transmission planning, marketing, and promotional organization that frequently intervenes in Commission dockets. MISO was an intervenor and very active participant in the Cardinal-Hickory Creek docket. PSC REF #353201³. There is also always a Commissioner representative in Organization of MISO States, another transmission lobbying and promotional organization.⁴

At the time of the Cardinal-Hickory Creek Commission decision on the Final Order, Commissioner Huebsch’s involvement in both of these transmission promotional organizations was front and center:

In her opening remarks at the Commission meeting where the Final Order was discussed, Comm. Valcq stated:

As Commissioner Huebsch is our delegated Commissioner for MISO and OMS [i]t makes sense for him to lead the discussion since the project before us is due to MISO’s MVP process. Thank you Commissioner Huebsch for leading the discussion today and for your efforts with OMS and MISO.

Exhibit A, Circuit Court Order, p. 8. The Judge of Circuit Court considered Huebsch’s OMS and

¹ Despite industry ties, Wisconsin's top utility regulator vows independence, public involvement, Wisconsin State Journal, online at: https://madison.com/wsj/news/local/govt-and-politics/despite-industry-ties-wisconsins-top-utility-regulator-vows-independence-public-involvement/article_497257a6-2243-5a07-bfb6-3a2c951ea7a8.html

² MISO Mission: <https://www.misoenergy.org/about/>

³ Per MISO’s intervention: MISO’s planning process includes the development of MISO’s Transmission Expansion Plan, which analyzes and approves transmission projects such as the one proposed in this proceeding by the Applicants. Accordingly, MISO will be affected by any order issued by the Commission in the above-captioned proceeding. PSC REF #353201, p. 2.

⁴ About OMS: <https://www.misostates.org/index.php/about/>

MISO “specific knowledge and experience” as information the Commission wanted to hear. *Id.* However, there is another perspective on participation in these organizations.

Participation in transmission promotional organizations such as MISO and OMS should trigger a need for recusal when a transmission CPCN is before the Commission. In any consideration of the integrity of the Commission, of bias, and of the appearance of bias, a Commissioner’s participation in these organizations should be a red flag of bias, not an invitation to lead the discussion of a transmission application, particularly where MISO is an intervenor!

Another factor in consideration of bias is transparency, which in this case is lacking. The Commission did not disclose, and did not enter into the record, the filings of the applicants or the Commission’s filings before the Circuit Court, pleadings and letters that were filed in the immediate timeframe of the filings requesting the Commission’s Final Order be rescinded. The Memorandum of the Commission’s Chief Legal Counsel mentioned and discussed in one paragraph of three sentences the Circuit Court filings, but the filings were not attached. PSC REF #414998. As above, in this Memorandum’s listing of “Key Background Documents,” the Circuit Court filings are not listed and linked. *Id.* This Memorandum of June 29, 2021 was not filed electronically, and parties and the public had no idea what it contained. Those intervening parties in the Cardinal-Hickory Creek docket not in the Circuit Court proceeding would have no idea of these material filings. The public and parties not in the Circuit Court proceedings would have no idea that the Commission had filed a letter June 28, 2021, stating:

Respondent Public Service Commission of Wisconsin (the “Commission”) writes to advise the Court that it joins the Motion of Intervenor-Respondents American Transmission Company LLC and ATC Management Inc., ITC Midwest LLC, and Dairyland Power Cooperative for Status Conference and Limited Stay. The Commission is evaluating the various filings from today, both before the Commission and before the Court, and agrees that a status conference in 10 to 14 days (or thereafter at the Court’s earliest convenience) is advisable, and that further proceedings in this matter should be temporarily stayed.

Exhibit C, PSC Letter to Circuit Court, June 28, 2021.

At the time of the meeting of July 1, 2021, were the Commissioners aware of the Circuit Court filings of June 28? At the time of the meeting of July 1, 2021, were the Commissioners aware of the Circuit Court's May 25, 2021 Order and the court's discussion of bias and appearance of bias, of structural error, tainted panel, and the need for an impartial decider? If so, why were these matters not incorporated into the discussion? If not, why not? The absence of these documents and absence of any discussion of the Commission's positions is an indicator of bias, an appearance of bias at the least.

The Commission's discussion and presumption of rescission on the facts and issues made public, including the presumption of issuance of a Notice of Intent, was stunning! What parties benefit from rescission and rendering moot the judicial review of the Commission's Final Order? As ATC, ITC, and DPC note in their Circuit Court filing:

First, the Co-Owners' request that the Commission rescind, reopen, and reconsider the CPCN at issue in this case may moot this proceeding. If the Commission rescinds the CPCN, then there will be no final agency action for this Court to review...

Exhibit A, ATC ITC DPC Motion for Stay, p. 3.

ATC, ITC, DPC, and the Commission are the benefactors. What parties benefit from judicial review rendered moot? ATC, ITC, DPC, and the Commission. What parties have acted jointly to raise rescission at the same time in filings at the Circuit Court and the Commission? ATC, ITC, DPC, and the Commission. Any claim that this is not a coordinated effort at the Circuit Court and at the Commission is not credible.

This presumption by the Commission of rescission is a blatant and unacceptable demonstration of regulatory capture, bias, self-interest, and is an action against the public interest. For a Commission under scrutiny, with the potential designation as a "tainted panel"

hanging overhead, this joint effort to rescind the Final Order to end Circuit Court review, and the Commission's issuance of a Notice of Intent to Rescind, is ill-advised. Intervenors, the public, and the public interest would be irreparably harmed, and the Commission would be digging its legal hole even deeper.

The Commission must not interfere, and must let the judicial review process move forward, particularly now that Discovery is proceeding and even more evidence could well be revealed. The Commission should not exercise its powers to hide evidence and the truth.

II. THE COMMISSION MUST NOT DISRUPT THE STATUS QUO

Judicial review is ongoing regarding the Commission's Final Order, as written, with new, important information revealed in Discovery, and additional Discovery pending. See Exhibit A, Order, p. 9-11. Given the import of the Discovery thus far, as the judge noted, "[i]t is entirely possible that documents will be critical to show a procedural irregularity occurred." *Id.*, p 10.

As above, the utilities openly state that if the Commission would rescind the Order, there is no Final Order to review:

First, the Co-Owners' request that the Commission rescind, reopen, and reconsider the CPCN at issue in this case may moot this proceeding. If the Commission rescinds the CPCN, then there will be no final agency action for this Court to review...

Id., p. 3; citing *Lake Beulah Mgmt. Dist. V. State Dep't of Nat. Res.*, 2010 W Ap 85, ¶ 10, 327 Wis. 2d 222, 230, 787 N.W. 2d 926, 931, *aff'd in part, rev'd in part*, 2011 WI 54, ¶ 10, 335 Wis. 2d 47, 799 N.W.2d 73 (dismissing as moot appeal from administrative decision where contested permit had expired and DNR had issued another permit); *PRN Assocs. LLC v. State, Dep't of Admin.*, 2009 WI 53, ¶¶ 28-29, 317 Wis. 2d 656, 671, 766 N.W.2d 559, 567 (noting the "general rule is that the court will not determine abstract principles of law" and that an "issue is moot when the court concludes that its resolution cannot have any practical effect on the existing

controversy”) (citation omitted).

As ATC, ITC, and DPC argue:

Again, if the Commission rescinds the CPCN, then there necessarily is no final order for this Court to review under Chapter 227.

Id., p. 4. In short, if moot, the Circuit Case is over, it ends.

The Commission, in its July 1, 2021 public discussion, did not bring up this crucial point, and not acknowledging or admitting this probable legal outcome of rescission is avoidance of the very purpose and result of the utilities request, a request joined by the Commission – render the Circuit Court review moot.

If the Commission rescinds the Final Order, if the Circuit Court case is rendered moot, and an unknown “start over” process goes forward before the Commission, the review of this specific Final Order would be avoided. Of course the Commission would like this result. The Respondent utilities and the Commission would benefit – it is in their interest to avoid this Discovery process – and would be essentially an admission of the claims of the Plaintiffs. Any other interpretation strains credulity.

It is against the public interest, and the interests of the Plaintiffs, to rescind the case and for Discovery regarding bias, the first part of this judicial review, and for the Circuit Court action to come to a screeching halt.

III. IMPROPER WEIGHT WAS GIVEN TO ONE CIRCUIT COURT PLAINTIFF

At the very beginning of the discussion, Commissioner Nowak stated that:

It is noteworthy that the primary plaintiff agrees to rescission.

Commission meeting, July 1, 2021, at ~5 minutes into Item 41⁵. Commissioner Valcq did

⁵ DALC’s statement is conflicted, by noting the attempt to shut down the process, but then agreeing that the Final Order should be rescinded!

agree with this statement.

This comment demonstrates that one plaintiff has greater weight than others, and gives additional credibility to claims of impermissible bias. Despite the extremely foreshortened time between the June 28, 2021 request for rescission and the July 1, 2021 meeting, multiple parties weighed in, all intervenors with full-party status. One of those parties filing comments on June 29, 2010, was Jewell Jinkins Intervenors, strongly objecting to rescission. Not one other party, of the many intervenors in this docket, was mentioned by Commissioners. The Commission's declaration of noteworthiness also is a statement that those who intervened in the Commission docket, are in fact not equal, that some are more equal than others, and that the funded intervenor/plaintiff is the one to which these Commissioners are paying attention. This is clear appearance of bias, and likely actual bias, on the part of the Commissioners.

All intervenors are deemed parties, we have a "seat at the table," we participate to the fullest extent possible with limited resources, expending significant effort and time to show up and be heard. The Commission must not make any decision predicated on a single party's statement of "agreement" with applicants, particularly an inconsistent statement when reading the filing as a whole, and even more so in considering a statement by a well-funded Plaintiff/Intervenor with a relative and grossly unequal wealth of resources with which to leverage its challenges. Ostensibly, a Commission proceeding is not a "pay to play" endeavor.

Thus, it is not surprising that ATC, ITC, and Dairyland are now trying to shut down the court-administered discovery process and return to the PSC on the eve of depositions and a trial. They apparently do not want the Circuit Court or the Wisconsin public to discover any other embarrassing facts about the utilities' practices to embed and ingratiate themselves with Wisconsin regulators in a web of ex parte relationships and communications.

Under the circumstances, the PSC should immediately rescind the CPCN for the Cardinal-Hickory Creek transmission line.

DALC/WWF Request to Reopen the Record, PSC REF #414829. This position of DALC/WWF is inconsistent.

It is noteworthy that the Commissioners did not address the questions raised by DALC/WWF in that same pleading:

Who else was Comm. Huebsch talking to? Who else were ATC's, ITC's, Dairyland's and MISO's senior officials and other representatives communicating with among the Commissioners? How long has this been going on? What other cases and issues are affected? These are questions that the courts and, potentially, Wisconsin's Attorney General, should investigate and answer.

DALC/WWF Request to Reopen the Record, p. 3. PSC REF #414829. The Commission should be cautious in giving weight to a party "agreeing" with the utilities when that "agreement" is countered by questions raised in that party's pleading, where the Commission does not address the questions raised, and the "agreement" seems against interest of that party asking those questions.

If the Commission rescinds the Final Order, the Circuit Court proceeding is moot, Discovery ends, and the answers to DALC's questions will not come out. On the other hand, if the status quo is not upset, the Circuit Court proceeding moves on, and we may get the answers that we're seeking. The Commission and ATC, ITC, and DPC may not like that exposure, but it's a situation of their own making, and they must be held accountable. Moving onward with judicial review is the only way that accountability happens.

IV. NEXT STEPS FOR THE COMMISSION

The Commission at this time should reject the request of the utilities, and should take no action. Judicial review is in progress, and the Commission must let that review run its course.

If the Commission should decide to rescind the Cardinal-Hickory Creek application, the next steps should include, and not be limited to:

- Applicants submission of a new application, starting the CPCN proceeding anew, in a new docket, and marching through the entire process.
- Intervenors in this new docket should receive reasonable Intervenor

Compensation necessary to participate meaningfully this second time.

- If reopened, all issues are on the table, and all statutory must be met – applicants have the burden of production and proof. Need remains an issue – a frequent check of the MISO LMP shows that need should not be assumed.⁶

Jewell Jinkins Intervenors, a party in this docket, is grateful for the Commission’s solicitation of comments and the opportunity to weigh in. Rescission of the Cardinal-Hickory Creek Final Order, by a likely “tainted” decider, making judicial review moot, would subject the Commission to an even higher level of scrutiny and legal challenge than is currently underway.

Dated this 11th day of July, 2021



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⁶ See MISO LMP: <https://api.misoenergy.org/MISORTWD/lmpcontourmap.html>

BY THE COURT:

DATE SIGNED: May 25, 2021

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN

**CIRCUIT COURT
BRANCH 9**

DANE COUNTY

COUNTY OF DANE et al,

Plaintiff,

v.

2019CV3418

PUBLIC SERVICE COMMISSION
OF WISCONSIN et al,

Defendant.

DECISION AND ORDER

At the oral argument on January 21, 2021, I held that Petitioners presented enough information to allow discovery regarding whether Commissioner Huebsch acted impartially or whether facts show that his involvement in the decision at issue creates an appearance of partiality. If Petitioners prove he was partial or that his involvement creates an improper appearance of partiality, Comm. Huebsch’s actions denied Petitioners and the public due process.

I requested further briefing on the sole issue whether a finding that Comm. Huebsch should have recused himself taints the entire proceeding and requires that I vacate the PSC’s decision regardless of the fact that the other two impartial commissioners voted to approve the CPCN. Though no case law addresses this exact question in the context of the Wisconsin PSC, I agree with Petitioners. The right to an impartial decision maker is fundamental to due process. Violation of that right would taint the entire proceeding and require I vacate the PSC decision and remand for further proceedings conducted in accordance with due process.

It is important to remember that I make this decision preemptively. I do not yet know whether Petitioners will prove that Comm. Huebsch should have recused himself. If Petitioners cannot do so, my task returns to reviewing the PSC record

and applying the relevant law on judicial review of agency decisions. I am deciding this issue at the outset because had I ruled otherwise, if Comm. Huebsch alleged improper participation did not require that I vacate the PSC decision, then allowing discovery and reviewing this issue at all would have been an exercise in futility. Based on my decision on this preliminary issue, though, discovery shall proceed. After I explain why I reached this decision, I end by setting initial guidance on and deadlines for discovery.

DUE PROCESS REQUIRED THE PSC COMMISSIONERS TO ACT IMPARTIALLY. IF COMMISSIONER HUEBSCH VIOLATED THAT DUTY, HE DEPRIVED PETITIONERS OF THEIR DUE PROCESS RIGHTS AND THAT STRUCTURAL ERROR TAINTS THE ENTIRE PROCEEDING.

I. Due Process Requires an Impartial Decision Maker and Violation of this Right is a Structural Error Not Subject to Harmless Error Review.

The importance of a fair and impartial decision maker must not be understated. Petitioners fairly summarized the many comments courts made to this effect:

The Wisconsin Supreme Court has characterized the need to safeguard public confidence in judicial integrity as a “vital state interest.” *State v. Herrmann*, 2015 WI 84, ¶39, 364 Wis. 2d 336, 353, 867 N.W.2d 772, 781 (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 1666 (2015)). Impartial justice is so important that even the appearance of bias is constitutionally unacceptable if it poses a serious risk of actual bias. *Id.*, ¶46; *Guthrie v. Wisconsin Employment Relations Comm’n*, 107 Wis. 2d 306, 314, 320 N.W.2d 213, 218 (Ct. App. 1982) (“Guthrie I”), *aff’d*, 111 Wis. 2d 447, 331 N.W.2d 331 (1983) (“Guthrie II”); *State v. Gudgeon*, 2006 WI App 143, ¶21, ¶24, 720 N.W.2d 114, 121. Judges “must be perceived as beyond price.” *Herrmann*, 2015 WI 84, ¶40. “Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.” *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016); see *Tetra Tech EC, Inc. v. Wisconsin Dep’t of Revenue*, 2018 WI 75, ¶64, 382 Wis. 2d 496, 552, 914 N.W.2d 21, 49 (explaining that “a minimal rudiment of due process is a fair and impartial decisionmaker”).

Dkt. 249 at 2-3.

Petitioners also appropriately summarize that violation of the right to an impartial decision maker is a structural error that undermines the entire proceeding:

“Most constitutional errors can be harmless.” *Neder v. United States*, 527 U.S. 1, 8 (1999). However, there is a “limited class of fundamental constitutional errors that ‘defy analysis by ‘harmless error’ standards.’” *Id.*

at 7 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)). These latter and more serious constitutional errors are known as “structural errors” because “the error so permeates the proceeding that it is incapable of producing a constitutionally-sound result.” *In re S.M.H.*, 2019 WI 14, ¶16, 385 Wis. 2d 418, 430.... “Errors of this type are so intrinsically harmful as to require automatic reversal ... without regard to their effect on the outcome.” *Neder*, 527 U.S. at 7.

The Wisconsin Supreme Court has adopted the United States Supreme Court’s structural error rubric and applies it to cases involving judicial bias. See *In re S.M.H.*, 2019 WI 14, ¶14, 385 Wis. 2d 418, 427 (describing the history and rationale for the structural error doctrine); *In re Paternity of B.J.M.*, 2020 WI 56, ¶16 (applying structural error doctrine in a judicial bias case)....

The controlling United States Supreme Court and Wisconsin Supreme Court cases make clear that judicial bias, like other structural errors, is “intrinsically harmful” and is “not amenable to harmless error review.” *Neder*, 527 U.S. at 7-8; *Williams v. Pennsylvania*, 136 S. Ct. at 1909; *In re Paternity of B.J.M.*, 2020 WI 56, ¶35 (quoting *Williams*); see also *State v. Gudgeon*, 2006 WI App 143, ¶9 (judicial bias is “per se prejudicial”); *Franklin v. McCaughtry*, 398 F.3d 955, 961 (7th Cir. 2005) (“where there is a structural error, such as judicial bias, harmless error analysis is irrelevant”); *Gacho v. Wills*, 986 F.3d 1067, 1075 (7th Cir. 2021) (“Judicial-bias claims are not subject to harmless-error review.”).

Dkt. 308 at 6-7.

I agree that the alleged biases of Comm. Huebsch, if proven, constitute a structural error that will require I vacate the PSC decision and remand to the PSC for further proceedings compliant with due process. Respondents’ argument that PSC commissioners are not judges and therefore the case law discussing judicial bias does not apply are unpersuasive and miss the point. Case law makes clear that due process rights exist in hearings at which a government agency renders decisions affecting individual property rights. Cases discussing due process in the context of judges are numerous, as courts routinely render such decisions, but the due process rights and requirements are not unique to judges or courts. The Third Circuit Court of Appeals summarized why long ago:

Nevertheless, if the administration of public affairs by administrative tribunals work of our government it is essential that it proceed, on what may be termed its judicial side, without too violent a departure from what many generations of English speaking people have come to regard as essential to fair play. One of these essentials is the resolution of contested questions by an impartial and disinterested tribunal. These adjectives are not absolute but relative as every thoughtful person knows. Decisions affecting human beings, made by human beings, necessarily are colored by the sum total of

the thoughts and emotions of those responsible for the decision. The judicial process, or any other human process, cannot operate in a vacuum. The most we can hope for is that persons charged with the responsibility for decisions affecting other people's lives and property will be as objective as humanly possible. Certain rules, of more or less definiteness, have been worked out through judicial decision by judges to regulate their own conduct. The rules disqualifying a judge for bias are illustrations. Other rules have been provided by legislatures to secure fairness in the trier of the facts. Thus prospective jurors may be examined for views which indicate predilections for either party to the controversy. These rules are analogous but not necessarily conclusive here.

....

We conclude that in this case the facts, if proved, show a case which goes beyond the line of fair dealing with a particular litigant. If the circumstances alleged are proved Berkshire did not have a hearing before an impartial tribunal, but one in which one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side. This is obviously not like a case where ill-advised extra-judicial statements have been made by a judge, or where a litigant seeks to subject an administrative body to interrogatories to discover the inner workings of the administrator's mind. It goes further and, in our judgment, it goes beyond that which is permissible from the standpoint of either litigants or public.

The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.

Berkshire Emps. Ass'n of Berkshire Knitting Mills v. N.L.R.B., 121 F.2d 235, 238–39 (3d Cir. 1941). Here the PSC's decision to grant a CPCN directly affects property rights of landowners whose lands the line will cross, as condemnation proceedings may be had forcibly to acquire the necessary lands. That alone surely triggers the right to due process. The PSC must provide due process in its proceedings on a CPCN.

I also find the case law Petitioners rely on, including the decisions involving judicial conduct, more compelling than the law Respondents cite. The public policy reasons requiring both actual impartiality and the appearance of impartiality apply equally to the PSC. At each hearing I have held, and the PSC commissioners at the public meeting each noted the extensive public participation in this PSC proceeding and the judicial review. I received meaningful briefing from private citizens operating pro se. This high level of public participation surely reflects that the PSC's decisions affect us all. Indeed, the PSC's decisions affect the entire state. They directly impact access to reliable electricity, affect property rights, affect the environment, and have direct physical effects on communities and

properties, as things like power plants and power lines are highly visible and alter the natural landscape. With such a meaningful impact on this State, the need for public trust in a fair and impartial process before the PSC cannot be understated. The requirement for impartial decision makers applies at least as strongly here as it does before a circuit court or court of appeals. The need to protect public confidence that the PSC acts impartially is equally a vital state interest.

II. A Structural Error Taints the Entire PSC Proceeding and Requires Remand.

Petitioners' argument that one tainted member taints an entire proceeding is persuasive. Indeed, arguably this is the controlling law in Wisconsin and in the majority of courts to have addressed the issue. The Wisconsin Supreme Court seemed to resolve this issue in *Marris v. City of Cedarburg*. 176 Wis. 2d 14, 498 N.W.2d 842 (1993). There plaintiff challenged a local zoning board decision because one member of the Board held an improper bias against plaintiff. The Supreme Court held that the right to a fair and impartial decision maker applied to a local zoning board:

The parties agree that Marris was entitled to a fair and impartial hearing under these common law concepts of due process and fair play, which include the right to have matters decided by an impartial board.⁶ The parties further agree that due process and fair play can be violated "when there is bias or unfairness in fact[, or when] ... the risk of bias is impermissibly high."⁷ The parties disagree whether Marris received a fair and impartial hearing.

In determining whether Marris was afforded due process and fair play, we recognize that zoning decisions implicate important private and public interests; they significantly affect individual property ownership rights as well as community interests in the use and enjoyment of land. Furthermore, zoning decisions are especially vulnerable to problems of bias and conflicts of interest because of the localized nature of the decisions, the fact that members of zoning boards are drawn from the immediate geographical area, and the adjudicative, legislative and political nature of the zoning process.⁸ Since biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding and rational decision-making as well as to ensure public confidence in the decision-making process.⁹

Id. at 24–26.

The same concerns and considerations apply equally, if not more, to the importance of fair and impartial PSC commissioners whose decisions also "implicate important private and public interests; they significantly affect individual property ownership rights as well as community interests in the use and enjoyment of land." *Id.*

Footnote 6 of the Supreme Court's decision makes clear that due process applies to the PSC's decision here. The Court said:

Although the parties characterize the Board's hearing as adjudicative, we need not label these proceedings quasi-legislative or quasi-judicial to determine whether the decision-maker must be impartial. We need look only to the characteristics of the proceedings to determine whether the decision-maker must be impartial. In this case the Board must make factual determinations about an individual property owner and then apply those facts to the ordinance. We conclude that common law notions of fairness require an impartial decision-maker under these circumstances.

Id. at 25.

So, too, the PSC made factual determinations about the specific proposed project and applied those facts to the law. See *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 2005 WI 93, ¶146, 282 Wis. 2d 250, 700 N.W.2d 768 (Noting the PSC must make findings of fact and conclusions of law.) Due process requirements apply to PSC proceedings.

In *Marris*, evidence showed that the chairperson of the zoning board prejudged the issue before the board. His failure to recuse after doing so violated plaintiff's right to common law due process. The Supreme Court vacated the board's decision and sent the matter back to the board for a new hearing with the chairperson removed. In other words, the chairperson's involvement tainted the entire proceeding and panel. *Marris* did not discuss whether that chairperson was the deciding vote, implying, as I read it, that it was irrelevant if he was, as his participation tainted the decision regardless.

Even if I am reading too much into *Marris*, my decision also rests on the holdings from the vast majority of federal courts to address this issue. A decision from Judge Adelman in the Eastern District of Wisconsin further confirms that a member of a panel being partial requires the panel's decision be vacated regardless whether the impermissible vote was the deciding vote. Judge Adelman explained:

A multi-member panel's decision must be vacated if the deciding vote is cast by a member who is disqualified due to a lack of impartiality. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) (8–0). The vote in the present case was very close—9 to 7—but Richmond's vote was not the deciding vote. *Aetna* expressly did not discuss what remedy due process requires when a disqualified person participates but does not cast the decisive vote. *Id.* at 827 n. 4, 106 S.Ct. 1580.

Three of the eight justices in *Aetna* wrote or joined concurrences stating that any decision issued by a multi-member panel must be vacated if a biased

member participated in the decision. *Id.* at 831, 106 S.Ct. 1580 (Brennan, J., concurring) (“while the influence of any single participant in this [deliberative] process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition”); *id.* at 833, 106 S.Ct. 1580 (Blackman, J., concurring, joined by Marshall, J.) (because “the collegial decisionmaking process that is the hallmark of multimember courts ... occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case”).

In addition, five of the six circuits to address this question have held that the panel decision must be vacated. “Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.” *Berkshire Employees Ass'n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 239 (3rd Cir.1941). See also *Cinderella Career & Finishing Schs., Inc. v. Fed. Trade Comm'n*, 425 F.2d 583, 592 (D.C.Cir.1970) (vacating and remanding agency decision “despite the fact that former Chairman Dixon's vote was not necessary for a majority”); *Am. Cyanamid Co. v. Fed. Trade Comm'n*, 363 F.2d 757, 767–98 (6th Cir.1966) (agency decision must be vacated and remanded for de novo review; result “is not altered by the fact that [the biased panel member's] vote was not necessary for a majority”); *Antoniu v. Sec. Exch. Comm'n*, 877 F.2d 721, 726 (8th Cir.1989) (vacating commission decision and remanding for de novo reconsideration, even though biased commissioner belatedly recused himself and did not vote on final decision); *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir.1995) (vacating unanimous decision because of bias of one panel member; “plaintiff need not demonstrate that the biased member's vote was decisive or that his views influenced those of other members. Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings.”).

Based upon the reasoning of these decisions, and on the record presently before me, the decision of the Coaches' Council could not be sustained.⁵

Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1116–17 (E.D. Wis. 2001). Each of the circuit courts of appeals decisions Judge Adelman refers to involved review of a commission or agency decision, not a judicial decision. As Judge Adelman noted, five of the six circuits to address this issue held that one biased member tainted the entire decision.

I agree. If Commissioner Huebsch should have recused himself, his failure to do so taints the entire proceeding and I must vacate the PSC decision and remand for proceedings before the PSC that are compliant with the parties' due process rights. Respondents' argument that I should find differently here because of the nature of the PSC's process does not persuade me. That the commissioners do

not speak to each other privately about the CPCN and that each came to the first public meeting with an idea how he or she intended to decide the application does not change my calculus. Though each of course comes to the public meetings with his or her initial thoughts and preliminary decision on an application, surely any of the commissioners can change her or his mind because of the public discussion with the other commissioners. If this were not true, why have the public discussion at all?

The commissioners confirmed they see value in the public meeting. Respondents quote various comments of the commissioners at the public hearing indicating excitement at finally being able to hear from each other and discuss the matter before them. Those comments confirm that these public discussions impact the process and, potentially, the ultimate decision. As the PSC noted, Comm. Nowak 'began her comments stating "[w]e have been waiting to talk to each other for quite a while about this proceeding, so it is good that the day is finally here.'" Dkt. 290 at 5. Commissioner Nowak also explained at a different public meeting:

If you all understood how seriously we take our jobs and how seriously we adhere to the law—and it's frustrating that we can't talk to each other before a meeting, and we don't—but don't go out and say we're violating the law, or attack the integrity of this body or these commissioners without any evidence.

Dkt. 290 at 6 (emphasis added). If hearing from her fellow commissioners had no impact on her, why does Comm. Nowak find it frustrating to have to wait to discuss the application?

Further, in her opening remarks, Comm. Valcq stated:

As Commissioner Huebsch is our delegated Commissioner for MISO and OMS [I]t makes sense for him to lead the discussion since the project before us is due to MISO's MVP process. Thank you Commissioner Huebsch for leading the discussion today and for your efforts with OMS and MISO.

Dkt. 309 at 3. Commissioner Valcq referred to the meeting as a discussion, not a consecutive reading of pre-made decisions. Surely her colleagues' voices could impact her. That she chose Comm. Huebsch to lead the discussion due to his role with OMS and MISO also confirms this was a discussion and the other two commissioners apparently wanted to specifically hear from and have Comm. Huebsch lead the meeting based on his specific knowledge and experience.

At the very least, these comments imply or create the appearance that Comm. Huebsch's comments and insights carried some importance to the other two commissioners. Appearances matter. Any neutral observer who heard these comments from Comms. Valcq and Nowak surely believed that the commissioners wanted to hear from Comm. Huebsch to consider his comments when reaching

their decisions. We know that many active public participants in the PSC proceedings heard these comments first hand. They surely considered these comments why Comm. Huebsch led the discussion as showing the other commissioners' interest to hear from him. Because of this, 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.

People often dislike decisions, whether made by judges, local tribunals make 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.

As a final note, I struggle that the PSC and other Respondents effectively insist and ask me to declare that the PSC's public meetings are meaningless. Do you truly want me to declare that no commissioner is ever open to a true discussion, that no commissioner ever considers his or her fellow commissioner's comments with an open mind? If I so held, shouldn't that defect demand that I vacate and remand the proceedings for the failure of the commissioners to meaningfully participate in these public meetings?

Therefore, 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. At that point I need not review the merits of the PSC decision and no further proceedings are required on judicial review.

DISCOVERY

I did not find the briefing on discovery particularly helpful. Petitioners effectively ask me to resolve a variety of potential discovery disputes preemptively in their favor. I will not. Respondents focus more on arguing why no discovery is necessary, rehashing arguments I already rejected, than on presenting a discovery plan. Respondents' staged discovery approach, though, offers some value.

I first address whether I can allow requests for production of documents. Wisconsin Statute §227.57(1) specifically allows depositions and written interrogatories as provided in Chapter 804. Chapter 804 envisions depositions accompanied by demands for documents. Having document production occur by a witness bringing numerous documents to a deposition and then having everyone sit around while counsel review those documents ensures wasted time. Having

the documents ahead of time allows for preparation and a more focused, efficient deposition. Further, the documents at times remove the need for the deposition. Forcing counsel to notice up a deposition and wait for the day of the deposition to then learn they no longer want the deposition serves only to waste time and create unnecessary expense. This is surely not what §227.57(1) intends. I also read *Marder v. Bd. of Regents of Univ. of Wisconsin Sys.* as recognizing that I have broad discretion under Wis. Stat. §227.57(1) to allow discovery and entertain flexible approaches to resolve allegations of procedural irregularities. 2004 WI App 177, ¶39, 276 Wis. 2d 186, 687 N.W.2d 832, aff'd, 2005 WI 159, 286 Wis. 2d 252, 706 N.W.2d 110.

It is entirely possible that documents will be critical to show a procedural irregularity occurred. The thought that interrogatories can secure responses identifying the existence and importance of critical documents and that depositions can obtain testimony discussing those documents, but a party could never actually secure the document itself is plainly contrary to the statute's intent. Section §227.57(1) conveys the Legislative intent to allow the Court to authorize discovery, if needed, to resolve claimed procedural irregularities. I conclude that Wis. Stat. §227.57(1) grants this Court broad enough authority to allow requests to produce documents. I exercise my discretion to authorize such requests here.

Therefore, I set the following schedule for discovery.

June 4, 2021 – the parties shall issue any initial written discovery requests to other parties. This can include interrogatories and requests for production of documents. Written responses and any responsive documents not objected to shall be provided within no more than 30 days after service of the discovery requests.

June, July and August 2021 – The parties shall conduct depositions in accordance with Ch. 804.

Discovery shall close **August 31, 2021**.

If a party requires adjustments to this schedule, attempt to secure the agreement of the other parties first. If you cannot, file a written request explaining exactly what adjustment is needed and why. The parties must comply with statute and local rule regarding discovery disputes before filing a motion to compel. Any motion to compel must be accompanied by the relevant discovery requests, the allegedly insufficient responses or objections and a description of the efforts made to resolve the dispute without court assistance.

I will set some initial bounds for discovery. For now, discovery shall be limited to the time period of the date the petition for a CPCN was filed to the present. I already ruled that questions and documents surrounding Comm. Huebsch's post-decision communications with people affiliated with Dairyland and surrounding his application for employment by Dairyland are relevant, as they could create the

appearance of bias. Respondents' argument that a quid pro quo is required ignores that a due process violation can occur by the appearance of impropriety as well as actual bias. Post-decision communications and information are potentially relevant. I am highly skeptical how the details of Comm. Huebsch's current business are relevant, but will not rule on that issue yet. I will not address any other issues raised in the briefs, as I deem them all premature.

I currently have calendar space on September 10, 29 and 30, 2021. **By no later than June 2, 2021**, each party shall file a written statement identifying which of those 3 days he/she/it is available for an evidentiary hearing on the alleged impropriety in the process before the PSC. Also put in that written statement the number of days you believe are needed for the hearing. I will then set trial using those potential dates.

So ordered.

cc: Parties

STATE OF WISCONSIN
DANE COUNTY BRANCH 9
CIRCUIT COURT

For official use

County of Dane,
Driftless Area Land Conservancy,
Wisconsin Wildlife Federation,
Iowa County,
Town of Wyoming,
Village of Montfort,

Petitioners,

Chris Klopp,
Gloria and LeRoy Belkin,
S.O.U.L of Wisconsin,

Intervenor-Petitioners,

v.

Public Service Commission of Wisconsin,

Respondent,

American Transmission Company, LLC,
ITC Midwest, LLC,
Dairyland Power Cooperative,
Midcontinent Independent System Operator, Inc.,
Clean Grid Alliance,
Fresh Energy,
Minnesota Center for Environmental Advocacy,
Intervenor-Respondents.

Case No. 19-CV-3418

**NOTICE OF MOTION OF INTERVENOR-RESPONDENTS AMERICAN
TRANSMISSION COMPANY LLC AND ATC MANAGEMENT INC., ITC MIDWEST
LLC, AND DAIRYLAND POWER COOPERATIVE FOR STATUS CONFERENCE AND
LIMITED STAY**

TO: ALL PARTIES (via electronic filing)

PLEASE TAKE NOTICE that at a date and time to be determined by the Court, in the Dane County Circuit Court, 215 South Hamilton Street, Madison, WI 53703, Branch 9, the Honorable Jacob Frost presiding, Intervenor-Respondents American Transmission Company LLC and ATC Management Inc. (“ATC”), Dairyland Power Cooperative (“Dairyland”), and ITC Midwest LLC (“ITC”) (collectively, “the Co-Owners”) will move this Court for a status conference and temporary stay of all deadlines in the case until the requested status conference can be held. The basis for this motion is set forth more fully in the accompanying motion being filed concurrently herewith.

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Dated: June 28, 2021

Respectfully submitted,

PERKINS COIE, LLP

Electronically signed by Brian H. Potts

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**WHEELER, VAN SICKLE & ANDERSON,
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Attorneys for ITC Midwest LLC

STATE OF WISCONSIN
DANE COUNTY BRANCH 9
CIRCUIT COURT

For official use

County of Dane,
Driftless Area Land Conservancy,
Wisconsin Wildlife Federation,
Iowa County,
Town of Wyoming,
Village of Montfort,

Petitioners,

Chris Klopp,
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v.

Public Service Commission of Wisconsin,

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Dairyland Power Cooperative,
Midcontinent Independent System Operator, Inc.,
Clean Grid Alliance,
Fresh Energy,
Minnesota Center for Environmental Advocacy,
Intervenor-Respondents.

Case No. 19-CV-3418

**MOTION OF INTERVENOR-RESPONDENTS AMERICAN TRANSMISSION
COMPANY LLC AND ATC MANAGEMENT INC., ITC MIDWEST LLC, AND
DAIRYLAND POWER COOPERATIVE FOR LIMITED STAY AND STATUS
CONFERENCE**

Intervenor-Respondents American Transmission Company LLC and ATC Management Inc. (“ATC”), Dairyland Power Cooperative (“Dairyland”), and ITC Midwest LLC (“ITC”) (collectively, “the Co-Owners”) hereby move for a status conference in 10 to 14 days (or otherwise at the Court’s earliest convenience) in the above-captioned case. The Co-Owners also move for a temporary stay of all deadlines in the case until the requested status conference can be held. As explained below, several important developments have transpired in the last week that necessitate a status conference and temporary stay while the Public Service Commission of Wisconsin (“PSCW” or “Commission”) determines whether, and to what extent, to act on the Co-Owners’ request to rescind the Final Decision granting the Certificate of Public Convenience and Necessity (“CPCN”) for the Cardinal-Hickory Creek 345-kilovolt Transmission Line Project (“Project”) and reopen Commission Docket No. 05-CE-146 (“the Proceeding”) to consider next steps.¹

I. Background

This case concerns the Commission’s September 26, 2019 Final Decision approving a CPCN for the Project. Pursuant to Wis. Stat. § 227.52, the Petitioners seek review of that decision by this Court. Petitioners claim, among other things, that former PSCW Commissioner Michael Huebsch should have recused himself from participating in the CPCN proceedings because he allegedly engaged in *ex parte* communications regarding the CPCN application for the Project.²

Last week, ATC and ITC discovered information indicating that former Commissioner Huebsch engaged in regular communications with an ATC employee, a former independent contractor for ITC, and other individuals over several years, including during the Proceeding, using

¹ Undersigned counsel for ATC contacted counsel for petitioners Driftless Area Land Conservancy and Wisconsin Wildlife Federation (“DALC/WWF”) to inform them that the Co-Owners would be submitting this motion to the Court. DALC/WWF indicated that they have not yet formed on a position on this motion.

² *See, e.g.*, DALC Petition for Judicial Review, ¶ 113 (Iowa County Case No. 2019-CV-144, Dkt. 2); WWF Petition for Judicial Review, ¶ 113 (Columbia County Case No. 2019-CV-334)

the Signal messaging application. Signal is used by companies and individuals because it enables users to send private, encrypted messages, which, depending on the user's settings, can be automatically deleted after a preset time period.³

The Co-Owners recognize that this newly discovered information may have significant implications for the Commission's decision in the Proceeding. As such, earlier today, ATC and ITC requested that the Commission act on its own motion to rescind the Final Decision granting the CPCN at issue in this case, reopen the Proceeding, and take further action on the CPCN without Mr. Huebsch's participation.⁴ (See Exhibit A) Because Mr. Huebsch is no longer a PSCW commissioner, he necessarily would have no role in any further Commission proceedings.

II. The Court should temporarily stay all deadlines in this case and convene a status conference.

The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket. Hefty v. Strickhouser, 2008 WI 96, ¶ 31, 312 Wis. 2d 530, 752 N.W.2d 820 (power to control docket is inherent and is also granted by statute, specifically Wis. Stat. § 802.10(3)(f)). The decision to stay proceedings rests with the sound discretion of the circuit court. *Id.* ATC's and ITC's discovery of Commissioner Huebsch's communications over the Signal app, and the Co-Owners' subsequent request to reopen the Proceeding, raise several issues that warrant a stay and status conference.

First, the Co-Owners' request that the Commission rescind, reopen, and reconsider the CPCN at issue in this case may moot this proceeding. If the Commission rescinds the CPCN, then there will be no final agency action for this Court to review unless and until the Commission takes

³ See, e.g., Signal Support, available at <https://support.signal.org/hc/en-us/articles/360007320391-Is-it-private-Can-I-trust-it->; <https://support.signal.org/hc/en-us/articles/360007320771-Set-and-manage-disappearing-messages>.

⁴ Dairyland's employees and representatives were not involved in the communications. Nevertheless, Dairyland supported the request to the Commission by separate filing and joins in this filing. (See Exhibit B)

further action on the CPCN for the Project (without the participation of former Commissioner Huebsch) and issues a new final decision. See, e.g., Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res., 2010 WI App 85, ¶ 10, 327 Wis. 2d 222, 230, 787 N.W.2d 926, 931, aff'd in part, rev'd in part, 2011 WI 54, ¶ 10, 335 Wis. 2d 47, 799 N.W.2d 73 (dismissing as moot appeal from administrative decision where contested permit had expired and DNR had issued another permit); PRN Assocs. LLC v. State, Dep't of Admin., 2009 WI 53, ¶¶ 28-29, 317 Wis. 2d 656, 671, 766 N.W.2d 559, 567 (noting the “general rule is that the court will not determine abstract principles of law” and that an “issue is moot when the court concludes that its resolution cannot have any practical effect on the existing controversy”) (citation omitted).

Moreover, the Legislature intended judicial review under Wis. Stat. § 227.52 to be limited to final agency orders. See Sierra Club v. Dep't of Nat. Res., 2007 WI App 181, ¶ 13, 736 N.W.2d 918, 923. Courts are guided by “the principle that judicial review should be of the agency action ‘in its entirety,’” and “[t]here is no doubt that it is more efficient for circuit courts and the court of appeals to address all the issues in one petition for judicial review.” Id. at ¶ 24 (citations omitted). Again, if the Commission rescinds the CPCN, then there necessarily is no final order for this Court to review under Chapter 227.

A temporary stay of this case is thus warranted pending further Commission action on the CPCN so that the parties and this Court can determine what, if any, additional action is necessary in this proceeding—a topic that can be explored at the status conference.

Second, even if this case proceeds, additional time is needed to ensure the parties have reasonable assurance that they know and understand all relevant facts and to prepare for upcoming depositions. At this time, the Co-Owners have no evidence that any of the newly discovered Signal communications were related to the Cardinal-Hickory Creek Project or the Proceeding. ATC and

ITC are working expeditiously to retrieve these communications. But from a forensic standpoint, the encrypted nature of the Signal application and its ephemeral messaging capability make recovery of these communications more difficult compared to traditional electronically stored information. In fact, it is unclear at this time whether these communications can be fully recovered at all. A short stay while the Co-Owners investigate these issues will allow for more complete and meaningful discovery responses if this case continues to move forward.⁵ Moreover, the Petitioners have subpoenaed the ATC employee who communicated with former Commissioner Huebsch over the Signal application. That employee was previously represented by undersigned ATC counsel in a related federal proceeding, but counsel was forced to withdraw from that representation upon discovering the existence of the Signal communications. A limited stay will permit that employee to retain counsel and have that counsel appear in this case if he so desires.

Third, a stay will prevent a significant expenditure of the parties' and the Court's resources for tasks that are likely to be unnecessary. In addition to significant discovery pending between the parties, several depositions are currently scheduled for mid- to late-July. Petitioners also have a pending motion for a protective order, (see Dkt. 349), with further briefing required. These and other related tasks should be suspended pending the status conference, because the ongoing discovery may no longer be necessary given the Co-Owners' request that the Commission reopen the Proceeding.

III. Conclusion

For the foregoing reasons, the Co-Owners respectfully request that the Court schedule a status conference in 10 to 14 days (or otherwise at the Court's earliest convenience) and impose a limited stay of all case deadlines until the requested status conference can be held.

⁵ Notwithstanding the request for a limited stay, ATC and ITC intend to provide written responses to Petitioners' discovery requests today, June 28, 2021.

Dated: June 28, 2021

Respectfully submitted,

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June 28, 2021

The Honorable Jacob Frost
Dane County Circuit Court, Branch 9
Dane County Courthouse
Room 6105
215 S. Hamilton St.
Madison, WI 53703

Re: Dane County et al v. Public Service Commission of Wisconsin;
Case No. 19-CV-3418

Judge Frost:

Respondent Public Service Commission of Wisconsin (the "Commission") writes to advise the Court that it joins the Motion of Intervenor-Respondents American Transmission Company LLC and ATC Management Inc., ITC Midwest LLC, and Dairyland Power Cooperative for Status Conference and Limited Stay. The Commission is evaluating the various filings from today, both before the Commission and before the Court, and agrees that a status conference in 10 to 14 days (or thereafter at the Court's earliest convenience) is advisable, and that further proceedings in this matter should be temporarily stayed.

Sincerely,

s/ Christianne A.R. Whiting

Christianne A.R. Whiting
Assistant General Counsel
Public Service Commission of Wisconsin

cc: Counsel of record (via efileing)