

Nos. 2021AP1321-LV, 2021AP1325, 2021AP1495-W

In the Supreme Court of Wisconsin

COUNTY OF DANE, COUNTY OF IOWA, TOWN OF WYOMING,
AND CITY OF MONTFORT,
PETITIONERS-RESPONDENTS,

FILED

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v.

**CLERK OF SUPREME COURT
OF WISCONSIN**

PUBLIC SERVICE COMMISSION OF WISCONSIN,
RESPONDENT-RESPONDENT,

DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION,
CHRIS KLOPP, LEROY BELKEN, GLORIA BELKEN, S.O.U.L. OF WISCONSIN,
CLEAN ENERGY ORGANIZATIONS, DAIRYLAND POWER COOPERATION, I.T.C.
MIDWEST, LLC, AMERICAN TRANSMISSION COMPANY, MIDCONTINENT
INDEPENDENT SYSTEM OPERATIONS, INC., AND WEC ENERGY GROUP
INTERVENORS-RESPONDENTS

MICHAEL HUEBSCH,
OTHER PARTY-PETITIONER-PETITIONER

On Appeal from the Dane County Circuit Court,
the Honorable Jacob Frost, Presiding
Case No. 2019CV003418

**AMERICAN TRANSMISSION COMPANY LLC, ATC MANAGEMENT
INC., DAIRYLAND POWER COOPERATIVE, AND ITC MIDWEST
LLC'S MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR
STAY OF INJUNCTION PENDING APPEAL**

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INTRODUCTION

This Court previously observed that the proceedings giving rise to this appeal are unusual. (*See* Appeal No. 2021AP001325, Sept. 21, 2021 Order, at 4 (R.G. Bradley, J., concurring)) This emergency motion brings to the Court's attention another new and highly unusual decision by the Dane County Circuit Court, which the Co-Owners respectfully ask this Court to remedy as quickly as possible.¹

As background, on September 21, this Court granted former Commissioner Michael Huebsch's petition for review and related motion to stay and set a briefing schedule that will conclude at the end of November 2021. (*Id.*) The principal issues to be considered in Huebsch's appeal relate to whether the former Commissioner's alleged "appearance of bias" was sufficient to warrant additional discovery and a hearing under Wis. Stat. § 227.57, and more generally, whether the Driftless Area Land Conservancy and Wisconsin Wildlife Federation's ("DALC/WWF") allegations of bias and *ex parte* communications against Huebsch provide a legally sufficient basis to challenge the Public Service Commission of Wisconsin's ("PSC" or "Commission") comprehensive and unanimous, bi-partisan decision to approve and issue a Certificate of Public Convenience and Necessity ("CPCN") for the much-needed Cardinal-Hickory Creek 345 kV Transmission Line Project ("the Project").

¹ The Co-Owners are Intervenor-Respondents American Transmission Company LLC and ATC Management Inc. ("ATC"), Dairyland Power Cooperative, and ITC Midwest LLC.

Moreover, on October 21, 2021, Judge Sykes issued an opinion on behalf of a unanimous panel of the Seventh Circuit Court of Appeals, ordering a stay of all parallel federal litigation related to DALC/WWF's allegations of bias and *ex parte* communications against former Commissioner Huebsch in deference to Wisconsin's state courts. *See Driftless Area Land Conservancy v. Valcq*, No. 20-3325, 2021 WL 4901865, at *2 (7th Cir. Oct. 21, 2021). Recognizing that this case "implicates serious state interests regarding the operation of Wisconsin administrative law and judicial review of state-agency proceedings," the Seventh Circuit found it "appropriate to abstain from exercising federal jurisdiction to give the state courts an opportunity to decide the recusal issue." *Id.* at *2; *see also id.* (further noting that "materially identical due-process recusal claims [were raised] in both state and federal court" and that "[l]itigating the same conflict-of-interest questions in both court systems is duplicative and wasteful").

Notwithstanding this Court and the Seventh Circuit's prior decisions, on October 26, the Dane County Circuit Court—at the request of DALC/WWF, and over the objections of the Co-Owners, the Commission, and other aligned parties—issued an order granting a temporary injunction halting construction of the Project in Wisconsin. (*See* P-App. 102–122; Co-Owners' Stay Motion Appx. 1–2) (hereinafter, "Injunction Order") The circuit court did so by finding that DALC/WWF is likely to succeed on the merits of the *exact same* bias claims pending before this Court.

In granting Mr. Huebsch's petition for review, this Court necessarily determined that Mr. Huebsch is likely to prevail on the merits of DALC/WWF's bias claims, thereby establishing the law of the case²; yet in issuing the Injunction Order, the circuit court found the exact opposite: that DALC/WWF is likely to succeed on the merits of those very same claims. This was an error. And it was a critical error, at that. At all stages of this litigation, federal and state, DALC/WWF have taken every step possible to delay judicial resolution of its claims and stall construction of the Project.³ Here, DALC/WWF strategically and intentionally filed its "emergency" motion for a temporary injunction little more than *two weeks* before construction was slated to start on the Project in Wisconsin,⁴ even though they knew *more than three years ago* that construction would be starting this month.

To be clear, the Injunction Order conditions effectiveness of the temporary injunction on DALC/WWF posting a bond of \$32 million, which they have not yet posted, and thus construction has not yet halted. But that could change at any moment. Every day the circuit court's unlawful Injunction Order remains in place

² For this Court to have granted review and to have issued the stay, it had to find that Huebsch made "a strong showing that [he] is likely to succeed on the merits of the ... appeal." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

³ For instance, DALC/WWF did not file a motion with the Commission requesting that former Commissioner Huebsch and Chairperson Valcq recuse themselves from the administrative proceedings underlying this litigation until *after* those two commissioners indicated their intent to approve the Project. (See P-App. 1071-72 (noting that DALC/WWF's recusal motion "was filed 31 days after the Commission made its preliminary determinations that were adverse to DALC/WWF's position" and that "DALC/WWF's delay in bringing [the recusal motion] can be perceived as intentional, keeping these allegations in reserve to spring upon the Commission if it decided the matter adversely to DALC/WWF's interests.")).

⁴ Project construction in Iowa has been ongoing for more than six months.

contributes to considerable, compounding uncertainty for the Co-Owners as they plan and implement construction activities for this Project—a difficult orchestration of persons and activities under even the best of circumstances.

Given the proceedings already pending before this Court, the fact that the Injunction Order directly conflicts with this Court’s decision to grant former Commissioner Huebsch’s petition for review, and the imminent harm the Injunction Order imposes on the Co-Owners, their construction schedule for the Project, and the general public, the Co-Owners are filing this motion with this Court to redress the errors in the Injunction Order as rapidly as possible.

As explained below, the Co-Owners respectfully request that this Court enter an order staying enforcement of the circuit court’s October 26, 2021 Injunction Order pending this Court’s resolution of Mr. Huebsch’s petition for review and any subsequent appeals that the Co-Owners may take of the October 26, 2021 Injunction Order, either to the Court of Appeals or to this Court.

STATEMENT OF FACTS

I. The Commission conducted a thorough review of the Project and voted on a unanimous, bipartisan basis to issue a CPCN and approve its construction in September 2019.

The underlying facts regarding the Project have largely been set forth in previous briefings addressing Huebsch’s petition for review. (*See, e.g.*, Oct. 28, 2021 Opening Br. of Petitioner Michael Huebsch (“Pet. Op. Br.”), at 16–31) Thus,

the Co-Owners repeat only those facts most pertinent to the relief they are seeking with this motion.⁵

The Commission granted the Co-Owners approval to construct the Wisconsin portion of the 102-mile Project in September 2019. (*See* P-App. 991 *et seq.*) (Commission's final decision approving a CPCN for the Project) Over the last decade, multiple entities at the state and federal level—including the Midcontinent Independent System Operator, Inc. ("MISO"), the regional grid operator—have identified the Project as a critical 345-kV transmission connection between Iowa and Wisconsin. (*See, e.g.*, P-App. 1001–05) In approving the Project, the Commission found that it will enhance transmission system reliability and generate between \$23 and \$350 million in *net* economic benefits for Wisconsin ratepayers. (*Id.* at 1009) In other words, over its expected 40-year life, the Project will generate such significant economic benefits to the state of Wisconsin that it will pay for itself, and then some. The Project will also result in a capital investment in Wisconsin of more than \$429 million, thereby creating jobs and boosting local economies. (*Id.* at 1069)

⁵ The Co-Owners' citations to "P-App. __" are to the October 28, 2021 Appendix to the Opening Brief of Petitioner Michael Huebsch, which this Memorandum cites to the extent possible. Documents filed with the circuit court that were not included in Petitioner Huebsch's Appendix and that were not included with the circuit court record transferred to this Court on October 18, 2021 are being included in an appendix to this motion and are designated as "Co-Owners' Stay Motion Appx. __." Documents included in the circuit court record transferred to this Court on October 18, 2021 are referenced by the document number on the index that the Clerk of the Dane County Circuit Court provided to this Court and are cited as "Dkt. __." Finally, the underlying administrative record for the CPCN proceedings before the Commission is included in the return of record the Commission filed with the Court. (*See* Dkt. 113) Any references to documents from the administrative record are cited as "R. __."

Before the Commission granted its approval, an administrative law judge presided over a contested case hearing and developed the record relied upon by the Commission to render its decision. DALC/WWF participated as full parties in the proceeding, which included extensive pre-hearing discovery, motion practice, the submission of over 2,000 pages of written testimony, a five-day, in-person technical hearing, and public hearings. (*See e.g., id.* at 870–72)

The Commission convened to consider whether to approve the Project for the first time in a public meeting on August 20, 2019. (*Id.* at 872) During that public meeting, the Commission orally approved the Project. *A month later*, DALC/WWF filed a motion (the “Recusal Motion”) demanding that Chairperson Valcq and former commissioner Huebsch recuse themselves due to allegations of bias and *ex parte* communications. (*Id.* at 1070) On September 26, 2019, the Commission denied the Recusal Motion and issued its final written decision granting a CPCN for the Project. (P-App. 872, 1070–76)

II. DALC/WWF sought judicial review of the Commission’s decision under Wis. Stat. ch. 227 and belatedly sought to introduce non-record evidence related to its bias claims against former Commissioner Huebsch, which led to this Court’s decision to grant review of Huebsch’s appeal.

DALC/WWF appealed the Commission’s final decision issuing a CPCN for the Project under Wis. Stat. ch. 227, reiterating the bias and *ex parte* allegations in their Recusal Motion and raising several other merits-based challenges. The Dane County Circuit Court consolidated DALC/WWF’s petitions for judicial review (which were filed in Iowa and Columbia counties) with petitions filed by other

Petitioner-Respondents, including Dane County, Iowa County, the Town of Wyoming, and the Village of Montfort, pursuant to Wis. Stat. § 227.53(1)(a)3. (*See* Dkt. 95) The parties completed merits briefing on the various petitions for judicial review in the summer of 2020 and oral arguments were scheduled for October 29, 2020. (*See* Dkt. 232) After the parties had fully briefed the challenges to the Commission's decision, however, DALC/WWF filed a motion to accept non-record evidence related to its bias claims against former Commissioner Huebsch. (P-App. 618) The circuit court then postponed oral argument to consider the motion.

Although chapter 227 generally limits a circuit court's review to the record before the Commission, *see* Wis. Stat. §§ 227.55, 227.57(1), the circuit court subsequently granted DALC/WWF permission to conduct extensive additional discovery related to their bias allegations. (*See, e.g.*, P-App. 501–04) This included wide-ranging, personal discovery against Huebsch unrelated to his evaluation of the Project or the Commission proceeding (or even his time on the Commission).⁶

As noted in previous briefing, the circuit court's discovery rulings were premised on its "preemptive" holding that "if Petitioners prove Huebsch acted impartially or whether facts show that his involvement in the decision at issue creates an *appearance of partiality*," that "would taint the entire proceeding and require I vacate the PSC decision." (P-App. 27 (emphasis added))

⁶ The circuit court permitted DALC/WWF to seek discovery from April 2018 through the present day, notwithstanding Mr. Huebsch's resignation from the Commission in January 2020. (P-App. 604, ¶ 1)

After Huebsch sought emergency relief from the Court of Appeals, DALC/WWF withdrew their deposition subpoena to Huebsch to strategically moot his appeal, only to serve another subpoena seeking trial testimony days after the Court of Appeals dismissed the action as moot. (P-App. 602) On August 27, 2021, Huebsch filed his petition for review with this Court seeking emergency relief. Specifically, Huebsch sought review of numerous issues, including the following:

- Whether conduct by an adjudicator that creates a mere “appearance of bias” violates the Due Process Clause?
- Whether an adjudicator’s personal connections to individuals linked to parties appearing before the adjudicator, whether those individuals are close friends or mere professional acquaintances, give rise to a “serious risk of actual bias” under the Due Process Clause, notwithstanding the presumptions of regularity, integrity, honesty, and impartiality that attach to the adjudicator’s decisions?
- Whether the practice of applying for employment, after leaving public office, with an entity that had previously appeared before the adjudicator creates a “serious risk” that the adjudicator, when the entity appeared before him, had been actually biased?

(*See* Pet. Op. Br., at 15)

On September 21, 2021, this Court granted Huebsch’s petition for review and stayed related aspects of the circuit court proceedings. (*See* Sept. 21, 2021 Order, Appeal No. 2021AP001325) The Dane County Clerk of Court transmitted the record in this action to this Court on October 18, 2021. (Dkt. 1094–1096) Pursuant to a follow-up October 5 order from this Court, Huebsch’s opening brief was filed on October 28, with responses and replies due within 20 and 10 days, respectively. (*See* Appeal No. 2021AP001325, Oct. 5, 2021 Order)

III. Following this Court's decision to take up Huebsch's petition for review, the Dane County Circuit Court issued a preliminary injunction on the grounds that DALC/WWF is likely to succeed on the merits of the bias claims that this Court is reviewing.

Notwithstanding this Court's September 21 Order granting Huebsch's petition for review, DALC/WWF have continued to press both their merits and bias allegations in the circuit court. On October 8, they moved to temporarily enjoin all Project construction "until the latest of two things occurs": (1) the circuit court's ruling on the merits in this Chapter 227 appeal, and (2) this Court's resolution Huebsch's appeal in this case. (P-App. 581-82) DALC/WWF argued, among other things, that "a strong probability of success on their bias claim" supported an injunction. (*Id.* at 592) DALC/WWF couched their motion as an "emergency," even though they have known for the better part of three years that Project construction was slated to start in Wisconsin in October 2021. (*See* R. 356, PSC REF#: 352698, at 28) (the Co-Owners' September 2018 CPCN application for the Project, noting a "start [of] transmission line construction" in Wisconsin of October 2021) After receiving briefing, the Dane County Circuit Court held a hearing on October 18. (*See* P-App. 38)

At the outset of that hearing, the circuit court expressed uncertainty as to its authority to conduct proceedings in light of this Court's review of Mr. Huebsch's pending appeal. (*Id.* at 43-51) The circuit court asked for briefing as to whether it had competency to hold an upcoming oral argument on the merits of the various challenges to the Commission's decision authorizing a CPCN for the Project. (*Id.* at

139–40)⁷ However, the circuit court concluded that it could proceed to consider DALC/WWF’s injunction request. (*Id.* at 51:8-15) After hearing from the parties, the circuit court orally granted the requested injunction, conditioned on DALC/WWF submitting undertakings to cover the bond required by Wis. Stat. § 196.43(2).⁸ (*Id.* at 102:9-22:25)

In its oral ruling, the circuit court stated unequivocally that it was *not* finding that DALC/WWF was likely to succeed on the merits of the various challenges to the CPCN that *were not* related to its bias claims.⁹ Instead, the court based its injunction solely on its view that “there was a reasonable likelihood of the petitioners succeeding in finding that there was a due process violation . . . because of an improper appearance of bias.” (P-App. 111:2–7; *see also id.* at 113:16–18 (“[M]y decision today is—is looking more at the bias problem, the one that’s up on appeal, than the merits issue”)) While the court observed that it “ha[d] made a variety of other decisions that explained why [it] believed that [DALC and WWF were reasonably likely to succeed on their bias claims],” it declined to specifically

⁷ Opening briefs addressing the circuit court’s authority to conduct merits-related proceedings were submitted on October 29. Response briefs are due November 3. (*Id.*)

⁸ Pursuant to affidavits that the Co-Owners submitted in opposition to the preliminary injunction motion, the circuit court set the bond at \$32 million. (*See* Co-Owners’ Stay Motion Appx. 33-76 (Affidavits); P-App. 23 (Injunction Order), 118–22 (Hearing Transcript)) DALC/WWF have yet to submit undertakings to cover this bond but could do so at any time.

⁹ *See* P-App. 113:6–12 (“What I will not do is, based on what I’ve seen so far and the extensive review I had last year and refreshing myself this year on the merits review, I’m not making a finding of a reasonable probability of success on the merits review. It’s too close of a call for me to say that it’s so clear that I should grant a temporary injunction.”)

identify those bases being used to support the injunction.¹⁰ And while the circuit court acknowledged that this Court's grant of review "tends to suggest that [it] may be making some decisions that are different than [the circuit court] did," and that it "makes sense" that this Court believes "the trial court did something wrong," it chose not to consider that implication absent further guidance from this Court. (*Id.* at 111:16-13:6) Indeed, the circuit court all but invited this Court's review of its rationale. (*See id.* at 112:4-9 ("What do they think I did wrong? ... I'm not going to guess ... *If you ask them to review my decision today, they can have a better idea, I suppose, of what they think the likelihood of success in front of them is.*") (emphasis added))

The circuit court's views of the bias claims were critical to its analysis.¹¹ Indeed, the circuit court made that point expressly: "[M]y holding is that, because of the likelihood of success on the bias issue, all of the factors are met to grant a temporary injunction." (*Id.* at 117:23-25) (emphasis added). On October 26, the

¹⁰ *See id.* at 111:9-15 ("I'm not going to recite all of them here. I'll just incorporate them all because they're all part of my record, and they're ever present in my mind when I'm deciding things in this case; so those all, in my opinion, suggested there was a strong showing that there's a likelihood to succeed, and I would like to believe that would continue on appeal.")

¹¹ For instance, as to preservation of the status quo—which the court deemed to be the unaltered state of the environment—it opined that "if [it] decide[s] there was a bias problem and send[s] [the case] back to the PSC," it was not clear that any "alteration[s] to land" could be undone. *Id.* at 77:4-78:5. As to "the public interest issue and the irreparable harm" factors, which "match each other and go together," the court found "[t]hat doesn't look like it was due process" because bias "[is] an irreparable harm" and against the public interest, which "has to be in due process and in fair proceedings." *Id.* at 78:6-18.

circuit court issued a written order incorporating its oral ruling, which granted the temporary injunction upon satisfaction of the required bond.¹² (*See* Dkt. 1138)

At the October 18, 2018 hearing, the Co-Owners orally moved for a stay of the circuit court's order pending appeal, pursuant to Wis. Stat. § 808.07(2)(a)1. *See* Wis. Stat. § 809.12; (P-App. 131:9–133:19) The Co-Owners subsequently submitted briefing on this motion, which DALC/WWF opposed. As of the date of this motion, the circuit court has yet to rule on the Co-Owners' motion for stay pending appeal.¹³ But given the pressing construction schedule for the Project, the Co-Owners are expeditiously filing this motion directly with this Court.¹⁴

STANDARDS OF REVIEW

This Court has already exercised jurisdiction over the parties and issues implicated by this motion through its September 21, 2021 Order granting Huebsch's petition for review. In connection with the proceedings before it, the Court may stay the circuit court's injunction order, and ordinarily applies the well-known

¹² This order specifically stated that the court's basis for granting the injunction was that DALC/WWF demonstrated "a reasonable likelihood of success on the merits of their bias claims..." (Dkt. 1138)

¹³ By a letter dated October 28, 2021, the Co-Owners informed the circuit court that they would be filing the instant motion by close of business on November 1 and requested that the circuit court issue a ruling on their motion for a stay pending appeal before that time.

¹⁴ Given that Huebsch's petition for review is already before this Court, the Co-Owners believe it is most appropriate for this Court to grant the Co-Owners the relief they are requesting herein. However, the Co-Owners also plan to submit to the Court of Appeals a petition for leave to appeal the Injunction Order, a petition for supervisory writ of the Injunction Order, and a request for a stay and/or temporary relief from the Injunction Order pending appeal. The Co-Owners plan to submit these filings no later than the week of November 8. When the Co-Owners file these appeals, and in addition to the other bases for its jurisdiction discussed herein, the Court can also of course take jurisdiction of those appeals on its own motion at any time pursuant to Wis. Stat. § (Rule) 809.61.

Gudenschwager test to determine whether to do so. *Gudenschwager*, 191 Wis. 2d at 440. More specifically, a stay pending appeal is appropriate where the moving party:

- 1) makes a strong showing that is likely to succeed on the merits;
- 2) shows that, unless a stay is granted, it will suffer irreparable injury;
- 3) shows that no substantial harm will come to other interested parties; and
- 4) shows that a stay will do no harm to the public interest.

Id. These factors are not prerequisites but rather are interrelated considerations that must be balanced together.

The *Gudenschwager* test first looks to whether the moving party has made a “strong showing that it is likely to succeed on the merits” of the appeal. *Id.* Specifically, the question is “whether the movant has shown ‘more than the mere possibility’ of convincing a different court (namely, an appellate court), which, when coupled with irreparable harm, requires that the effect of the circuit court’s judgment or order be temporarily stayed while the appellate court is reviewing the case.” *Id.* at 521. To that end, while the grant of a temporary injunction lies within the discretion of the trial court, appellate courts must overrule such acts unless the trial court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a conclusion that a reasonable judge could reach. *Id.* at 440. Important here is also the “presumption of honesty and integrity” afforded to former Commissioner Huebsch as an agency decisionmaker. *See Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶ 29, 286 Wis. 2d 252, 706 N.W.2d 110.

Separate from the traditional *Gudenschwager* analysis, this Court can also stay the injunction order by virtue of its constitutional “superintending and administrative authority over all [Wisconsin] courts.” Wis. Const., Art. VII, § 3. That authority “is as broad and as flexible as necessary to insure the due administration of justice in the courts of this state.” *Madison Tchrs., Inc. v. Walker*, 2013 WI 91, ¶ 16, 351 Wis. 2d 237, 243 (quoting *In re Kading*, 70 Wis.2d 508, 520, 235 N.W.2d 409 (1975)); see also *Arneson v. Jezwinski*, 206 Wis.2d 217, 225, 556 N.W.2d 721 (1996) (authority “endows this court with a power that is indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice”). It further permits the Court “to protect its appellate jurisdiction,” as well as “to control the course of ordinary litigation in the lower courts of Wisconsin.” *Madison Tchrs.*, 2013 WI 91, ¶ 16 (quoting *Arneson*, 206 Wis.2d at 226).

ARGUMENT

Because the Co-Owners satisfy the *Gudenschwager* test, they are entitled to a stay of enforcement of the Injunction Order pending this Court’s review of former Commissioner Huebsch’s appeal and any subsequent appeals that the Co-Owners may file for appellate review of the Injunction Order. Even if the Co-Owners did not satisfy that test, this Court should stay the Injunction Order anyway pursuant to its superintending authority, given the order’s encroachment on this Court’s jurisdiction to address the issues presented by Huebsch’s petition for review.

This Court has already recognized the unusual nature of this case, its significant implications for the state of Wisconsin, and the scale of the Project potentially threatened. The same concerns are now amplified given that DALC/WWF could post the required bond at any point and immediately halt Project construction activities. This motion presents the very type of circumstance for which this Court should exercise its broad and flexible authority.

- I. **This Court should stay the Injunction Order pending its resolution of former Commissioner Huebsch's petition for review and any subsequent appeals that the Co-Owners file for appellate review of the Injunction Order.**
 - A. **Former Commissioner Huebsch has "more than the mere possibility" of success on the merits of DALC/WWF's bias claims, and the Co-Owners have "more than a mere possibility of success" on vacating the Injunction Order on appeal.**

The circuit court determined an injunction was warranted based exclusively on its view that the bias claims were reasonably likely to succeed on the merits. In doing so, however, the circuit court failed to: (1) examine relevant facts, (2) apply a proper standard of law, and (3) reach a conclusion that a reasonable judge could reach. All of these errors require reversal of its order.

First, despite having received nearly 14,000 pages of documents, emails and text messages from the Commission, the Co-Owners, and other third parties, DALC/WWF still cannot substantiate their bias or *ex parte* claims against

Commissioner Huebsch.¹⁵ Instead of considering these facts or considering the applicable legal standard (which presumes Commissioner Huebsch acted with honesty and integrity), the circuit court weighed heavily the fact that the Co-Owners previously asked the Commission to rescind the CPCN and expeditiously re-vote on the Project, without former Commissioner Huebsch's involvement (who, in any event, retired from the Commission in January 2020). (*See* P-App. 110:16–111:7) However, the Co-Owners' request was not an admission of wrongdoing or that *ex parte* communications occurred. Rather, the request indicates that the Co-Owners were confident in the Project's merits and the benefits it will generate for Wisconsin and the upper Midwest, and that a timely and expeditious re-vote on the Commission's timely reconsideration without former Commissioner Huebsch's involvement would ensure that Project construction could move forward expeditiously without the need for a bias hearing (or any of these appeals). Nonetheless, the circuit court unreasonably drew the conclusion that the Co-Owners' request was significant to DALC/WWF's reasonable likelihood of success, while ignoring DALC/WWF's inability to substantiate their claims or overcome the "presumption of honesty and integrity" afforded to agency decisionmakers. *Marder*, 2005 WI 159, ¶ 29, 286 Wis. 2d 252.

¹⁵ A communication is *ex parte* if it is related to the merits of an ongoing case. *See* Wis. Stat. § 227.50(1)(a). In other words, communications between parties and commissioners are prohibited only to the extent that they directly relate to the merits of a pending case. Importantly, after almost two years and two appeals in state and federal court, there is still no evidence that any party to this proceeding communicated with any commissioner about the Cardinal-Hickory Creek Project or the merits of the CPCN proceeding.

Second, the circuit court's decision to grant an injunction is in direct conflict with this Court's order granting review of Huebsch's petition and motion to stay. Indeed, the basis for Huebsch's motion to stay before this Court was specifically that Petitioner-Respondents' "due process theory of 'bias'—even if proven—fails as a matter of law" and that, for this reason alone, any subpoena issued to him is unlawful. (*See* Appeal No. 2021AP1325, Aug. 27, 2021 Brief in support of Motion for Stay, at 2) This Court thus presumably determined at least that *Huebsch* is likely to succeed on the merits of the bias claims on appeal when it granted his motion to stay.¹⁶ (*See* Appeal No. 2021AP1325, Sept. 21, 2021 Order, at 2)

The circuit court's order, however, is premised on the exact *opposite* conclusion, and it is thus irreconcilable with this Court's review. In this sense, the Injunction Order is contrary to the law-of-the-case doctrine, under which "a decision on a legal issue by an appellate court . . . must be followed in all subsequent proceedings in the trial court Thus, a circuit court is generally bound to apply any decisions made by the court of appeals or supreme court in a particular case." *State v. Stuart*, 2003 WI 73, ¶ 23, 262 Wis. 2d 620, 644 N.W.2d 82; *see also Alabama Ass'n of Realtors v. United States Dep't of Health and Human Servs.*, No. 20-cv-3377, 2021 WL 3577367, at **4–7 (D.D.C. Aug. 13, 2021) (district court declined to lift stay pending appeal of its vacatur of eviction moratorium on law-of-

¹⁶ This Court's order granting Huebsch's petition and motion to stay presumptively reflects at least a preliminary determination that Huebsch made "a strong showing that [he] is likely to succeed on the merits of [his] . . . appeal." *Gudenschwager*, 191 Wis. 2d at 440.

the-case grounds because the Court of Appeals' decision affirming the stay "concluded that the government was likely to succeed on the merits and the plaintiffs ask this Court to vacate its stay on the opposite ground;" a contrary approach would "produce absurd results whenever a district court and a court of appeals disagree over emergency relief" and "flaunt basic principles of vertical *stare decisis*"). Regardless, and at a minimum, this Court's grant of Huebsch's petition should be sufficient to demonstrate that the Co-Owners have made a "strong showing that they are likely to succeed on the merits" of any appeal of the Injunction Order. *Id.*

Third, even if this Court permits the bias trial to proceed, and the circuit court ultimately determines that Huebsch was biased, the remedy would be a remand to the agency with a rehearing by the Commission—which would likely include the two Commissioners who already approved the Project. This remedy is not only consistent with Wisconsin precedent¹⁷ and precedent from other jurisdictions,¹⁸ but

¹⁷ When Courts have determined that a single decisionmaker was biased, they have routinely remanded the case back to the original deciding body to reconsider the matter without that decisionmaker's participation. *See, e.g., Marris v. City of Cedarburg*, 176 Wis. 2d 14, 39, 498 N.W.2d 842, 852 (1993) (holding that the chairperson of a zoning board had inappropriately prejudged the issue before the board, vacating the board's decision, and remanding the case back to the board for a new hearing without the chairperson); *see also Keen v. Dane County Board of Supervisors*, 2004 WI App 26, ¶ 21, 269 Wis. 2d 488, 499, 676 N.W.2d 154,160 (remanding the case to a county's zoning and natural resources committee without the biased member after finding an impermissibly high risk of bias).

¹⁸ Other jurisdictions have dealt with this issue similarly. *See, e.g., Antoniu v. S.E.C.*, 877 F. 2d 721, 726 (8th Cir. 1989) (nullifying a Securities and Exchange Commission (SEC) proceeding due to the participation of a biased member and remanding the case to the SEC without the participation of the biased commissioner); *see also Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583 (D.C. Cir. 1970) (vacating a Federal Trade Commission order due to the chairman's bias

it is also consistent with the general rule that, when an appellate court reverses and remands the decision of an inferior administrative or judicial tribunal, members of those tribunals are not required to disqualify themselves simply because they participated in the initial decision-making process with a biased decisionmaker.¹⁹ Therefore, even if DALC/WWF sufficiently demonstrated a reasonable probability of success in getting Huebsch's vote thrown out and the order remanded (they have not), they have *not* demonstrated a likelihood of successfully preventing the Project from being constructed altogether.²⁰ This is a critical point. Because the temporary injunction impacts the actual construction of the Project, the circuit court erred in considering only the likelihood of success of the bias claims, while failing to consider the likelihood of DALC/WWF successfully stopping the Project's actual construction.

and remanding the case with instructions that the commissioners reconsider the record and evidence without the chairman's participation).

¹⁹ See *Withrow v. Larkin*, 421 U.S. 35, 49 (1975) (in appeal from administrative proceeding, noting that it is "not the rule of judicial administration that ... a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings."); see also *Liteky v. United States*, 510 U.S. 540, 551 (1994) ("[O]pinions held by judges as a result of what they learned in earlier proceedings" do not equal "bias" or "prejudice."); *Hicks v. City of Watonga*, 942 F.2d 737, 750 (10th Cir. 1991) (addressing issues of immunity with respect to 42 U.S.C. § 1983 and stating that "[i]n cases in which some but not all members of an administrative tribunal were biased, the courts hold that the tribunal may reconvene without the biased members and vote anew"); *Antoniu*, 877 F. 2d at 726 (nullifying commission proceedings due to participation of biased member, and remanding the case to the commission to make a de novo review of the evidence without participation by the biased commissioner).

²⁰ At the July 29, 2021 open meeting discussing the Co-Owners' rescission request, both Commissioner's Nowak and Valcq stated that the project was in the public interest and agreed that the initial proceedings were free from partiality and that DALC and WWF's arguments were frivolous. (See, e.g., Dkt. 771 at 5, 7)

Finally, in issuing the Injunction Order, the circuit court committed legal error by failing to acknowledge or even consider the fact that, like legislative enactments, orders of the Commission—such as the one under review here, authorizing Project construction—are *prima facie* valid and lawful. See Wis. Stat. § 196.40 (“[E]very order or determination [of the Commission] shall be on its face lawful and reasonable unless a court determines otherwise under s. 227.57.”); *Wis. Power & Light Co. v. Pub. Serv. Comm’n of Wis.*, 148 Wis. 2d 881, 888, 437 N.W.2d 888, 891 (1989) (“Public Service Commission orders are ‘prima facie valid, and to be upset [they] must be shown to be otherwise by clear and satisfactory evidence.’”) (alterations in original) (internal citations omitted). In similar circumstances involving challenges to the constitutionality of state statutes, this Court has recognized that this presumption of lawfulness is *in and of itself* sufficient to demonstrate a “likelihood of success on the merits” for purposes of the *Gudenschwager* test. See Co-Owners’ Stay Motion Appx. 83 (citing *Gudenschwager*, 191 Wis. 2d at 441). The circuit court altogether failed to consider this presumption of lawfulness that attaches to orders of the Commission, and indeed, expressly acknowledged that DALC/WWF’s non-bias related challenges to the CPCN were a “close call” and that it was “not making a finding of reasonable probability of success on the merits review.” (P-App. 113) This alone warrants reversal of its Injunction Order and a stay pending this Court’s resolution of Huebsch’s petition for review, as well as any subsequent appeals the Co-Owners may bring to vacate the Injunction Order.

B. Both the Co-Owners and Wisconsin retail electric ratepayers will suffer significant, irreparable harm absent a stay of the Injunction Order.

The circuit court all but agreed that the Co-Owners demonstrated the irreparable injury they will suffer should the temporary injunction take effect, as evidenced by its decision to require DALC/WWF to post a \$32 million bond as a condition of the injunction becoming effective. (*See* Statement of Facts, Section III, *supra*; *see also* Co-Owners' Stay Motion Appx. App. 12–19) While there is a possibility that the bond will not be posted and thus those harms will not come to pass, the uncertain prospect of an injunction at any time nonetheless hangs over the Project like a dark cloud. In fact, because there is no time limit on the order tied to when the bond must be posted, the Co-Owners will be constantly faced with the possibility that construction could be abruptly stopped at any point. This sort of cloud alone causes irreparable harm to the Co-Owners (and the public). As the Co-Owners explained to the circuit court:

Construction work on large infrastructure projects like transmission lines cannot start and stop with the flip of a switch. These are costly, time-consuming, and logistically complex endeavors, more akin to a carefully synchronized orchestra of various skilled laborers' conducting work in a defined sequence so that all pieces of construction are completed at a defined time. Disrupting this sequence causes ripple effects to the overall construction schedule that cannot easily be "made-up" without increased costs and delays.

(Co-Owners' Stay Motion Appx. App. 6–7)

In their briefing in opposition to DALC/WWF's injunction motion, the Co-Owners provided a detailed explanation, supported by affidavits from multiple

witnesses, of how a preliminary injunction lasting just six months could increase construction costs by approximately \$30 million. (Co-Owners' Stay Motion Appx. 14) Those costs would be passed onto retail electric ratepayers—that is, the families and businesses that pay for electricity from their local utilities. (*Id.*) ATC would also lose out on an approximately \$2 million in financing costs that it has and will continue to incur for capital it has invested into the labor and materials needed to construct the Project. (*Id.* at 14-15) Importantly, actual damages could well exceed those amounts, leaving the Co-Owners and Wisconsin retail electric ratepayers on the hook for any increased construction costs resulting from the unlawful Injunction Order.

Finally, while the Co-Owners acknowledged that they could likely still place the Project in-service by its currently scheduled in-service date (December 2023) if the injunction lasted only six months, this is by no means guaranteed: seasonal restrictions on when certain construction work can be conducted and the need to carefully coordinate Project construction with outages on existing transmission and distribution lines could cause greater than a “day-for-day delay” based on the amount of time the injunction is in effect. (*Id.* at 37) Moreover, this case has already been pending before the circuit court for almost *two years*. The likelihood that this Court rules on Huebsch's petition for review, the circuit court rules on DALC/WWF's other challenges to the CPCN for the Project, and all appeals related to those decisions are exhausted in the next six months is at best unknown, meaning that an injunction could very well delay the Project's December 2023 in-service

date. This would not only result in additional construction costs being shifted to ratepayers, but would also delay the State of Wisconsin from realizing the Project's significant benefits, including reduced energy costs, increased system reliability, and the availability of more low-cost energy from renewable generators both within and to the west of Wisconsin. (*See id.* at 25–31)

C. In contrast, a stay will cause not cause substantial harm to DALC/WWF.

As this Court has recognized, “injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial.” *Kocken v. Wis. Council 40, AFSCME, AFL-CIO*, 2007 WI 72 ¶ 24, 301 Wis. 2d 266, 732 N.W.2d 828 (2007) (internal quotation marks and citations omitted). The party seeking the injunction has the burden of showing irreparable harm unless an injunction issues. *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee County*, 2016 WI App 56 ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154 (2016); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 158 (2010) (“It is not enough for a court considering whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test . . .”). DALC/WWF failed to make such a showing in its motion to the circuit court. Indeed, its strategic decision to *wait* to seek preliminary injunctive relief until the eve of construction— notwithstanding the fact that it has known for *at least three years* that construction would be starting on the transmission line in October 2021—cuts against its conclusory allegations of harm. This not only shows that the circuit court abused its

discretion in issuing the Injunction Order, but that the Co-Owners are entitled to a stay of that order pending this Court's resolution of Huebsch's appeal and any subsequent appeals that the Co-Owners take of the Injunction Order itself.

In briefing to the circuit court, DALC/WWF asserted abstract claims of "harm[] and irreparable adverse impacts on Southwest Wisconsin's environmental, economic, aesthetic, and cultural values." (See P-App. 587) Aside from these conclusory allegations, however, they submitted no affidavits explaining how or why construction of the Project would result in *immediate* or *irreparable* harm to them or their members. Their vague and abstract statements of harm were insufficient then, and are insufficient now, to demonstrate a *likelihood* of irreparable and immediate harm. See also *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008) (plaintiff must show "that irreparable injury is *likely* in the absence of an injunction"); *Earth Island Inst. v. Carlton*, 626 F.3d 462, 474 (9th Cir. 2010) (declining to adopt a rule that "*any* potential environmental injury *automatically* merits an injunction") (emphasis in original) (internal quotation marks and citations omitted); *Caribbean Marine Servs. Co. Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."). Indeed, during the October 18 hearing, Attorney Amelia Vohs from the Minnesota Center for

Environmental Advocacy²¹ recognized as much, acknowledging that DALC/WWF's allegations were far from the type of particularized harms necessary to support the requested injunction. (*See* P-App. 68:5–72:18)

DALC/WWF's lack of demonstrable harm is even more evident in connection with the "harms analysis" for purposes of a stay pending appeal. As part of this analysis, the Court must weigh the irreparable harm that the stay movant (here, the Co-Owners) would face absent stay and in the event the injunction is successfully vacated on appeal with the harm that the prevailing party in circuit court (here, DALC/WWF) would incur if the injunction is affirmed on appeal. (*See* Co-Owners' Stay Motion Appx. 82–83) As noted, the Co-Owners submitted detailed evidence of the harms that both they and the general public would incur if the Injunction Order issued. On the other hand, DALC/WWF failed to put forth *any* affidavits or other concrete evidence of harm, leaving the Court with only its generalized allegations. The dearth of record evidence to support these conclusory allegations demonstrates that the circuit court abused its discretion in issuing the Injunction Order and that DALC/WWF will not suffer substantial harm if this Court stays the Injunction Order now.

If the Court has any doubts as to the utter lack of substantial harm DALC/WWF would incur in the event of a stay, those doubts should be dispelled

²¹ A 501(c)3 nonprofit advocacy organization, with an in-house team that includes some of Minnesota's foremost environmental law and policy professionals, as well as policy analysts, subject-matter experts and communications professionals. *See* <https://www.mncenter.org/mission-impact>.

entirely by DALC/WWF's deliberate and strategic decision to *wait* to seek injunctive relief until the eve of construction. As noted earlier, DALC/WWF has been aware that the Co-Owners would be starting construction in October 2021 since the Co-Owners filed their application for a CPCN for the Project with the Commission *three years ago*, in 2018. (*See* R. 356, PSC REF#: 352698, at 28) (the Co-Owners' September 2018 CPCN application for the Project, noting a "start [of] transmission line construction" in Wisconsin of October 2021) Indeed, DALC/WWF has referenced this construction start date in multiple filings before this Court and the federal district court for the Western District of Wisconsin in a related challenge it has raised to certain federal permits for the Project. (*See, e.g.*, Dkt. 373, at 2) (in July 9, 2021 briefing in opposition to motion to quash a third-party subpoena, noting the October 2021 start date for construction on the Project) Courts have routinely recognized that the type of inaction and delay DALC/WWF engaged in here is grounds alone for denying equitable relief. (*See* Co-Owners' Stay Motion Appx.7-9, 22-23 (citing cases)) DALC/WWF's dilatory conduct in moving for a preliminary injunction is itself sufficient to warrant the granting of a stay and, indeed, vacatur of the circuit court's Injunction Order entirely.

D. A stay of the Injunction Order pending appeal is clearly in the public interest.

The final factor assesses whether the stay will be in the public interest. Importantly, the Wisconsin Legislature has determined that once the Commission grants approval for new large energy infrastructure like this one, construction may

commence and continue during the pendency of all appeals, and an injunction stopping construction can only be issued if numerous detailed requirements are met. *See* Wis. Stats. §§ 196.43, 227.54. Likely because of this policy, the Co-Owners are not aware of the Court of Appeals or this Court *ever* upholding an injunction issued by a circuit court that halted construction of a Commission-approved large energy infrastructure project. *Cf. Town of Holland v. Pub. Serv. Comm'n of Wis.*, 2018 WI App 38, ¶ 48, 382 Wis. 2d 799, 824 (overturning such an injunction for failure to follow the bond requirements).

The record developed before the Commission here and presented to the circuit court demonstrated the significant economic, reliability, and environmental benefits that the Project will generate for Wisconsin and the region. (*See, e.g.*, P-App. 1009–1022, 1025–1027) The Project will reduce energy costs for families and business throughout the state, improve the reliability of the transmission system so that it is more resilient to extreme weather events and potential outages, and will support the interconnection of thousands of megawatts of renewable energy projects being developed both in and to the west of Wisconsin by both independent developers and Wisconsin utilities. (*See, e.g.*, 1033, at 45; R. 1039, at 27–29; R. 1049, at 2–11; R. 1110, at 3–6; R. 1127, at 19–20, 58–61, 78–79; R. 1132, at 4–5)

In this sense, the Project is critical to transitioning Wisconsin to a more affordable, more reliable, and more sustainable energy future. Delaying construction of the Project will have substantial adverse impacts on that transition

and, by extension, the public interest. (*See* Co-Owners' Stay Motion Appx. 27–31)

As the Co-Owners emphasized to the circuit court below:

The Project is critical to supporting the full interconnection of more than 7,500 MW of renewable generation in the upper Midwest, including approximately 750 MW of renewable generation in Wisconsin. The Project will reduce energy costs for Wisconsin customers, improve the reliability and flexibility of the transmission system, and provide a critical link in that system to support the country's transition away from fossil fuels and aid in the battle against climate change.

(Co-Owners' Stay Motion Appx. 4)

Allowing the Injunction Order to stand and potentially delay the Project's in-service date will impose substantial harm on the development and import of this low-cost renewable energy into Wisconsin. That harm will not just be borne by independent developers of those renewable projects, but also several of the largest investor-owned utilities in this state—and consequently, their ratepayers. For example, three of Wisconsin's largest investor-owned utilities—who serve almost two million Wisconsin retail electric ratepayers throughout the state—have invested approximately \$390 million in the 300-megawatt Badger Hollow solar project (located in Grant County) under the assumption that Cardinal-Hickory Creek would be placed in-service by December 2023. (*See* Co-Owners' Stay Motion Appx. 29, 69–70) Even a slight delay in Cardinal-Hickory Creek's in-service date would impair the economics of the Badger Hollow solar project, potentially imposing millions of dollars in costs on those utilities and their ratepayers and complicating

their long-term plans for how they will procure energy to serve their customers. (*See id.* at 70)

This is just one example of the significant harm that the Injunction Order will impose on the public interest. The Co-Owners' response in opposition to DALC/WWF's motion for a preliminary injunction included a wealth of additional evidence—from both the underlying administrative record and in the form of contemporaneous affidavits—showing that an injunction is clearly contrary to the public interest. (*See id.* at 25–31) Thus, a stay (and ultimately, a vacatur) of the Injunction Order pending this Court's decision on Huebsch's petition for review, as well as any subsequent appeals the Co-Owners file related to that order, is in the public interest.

E. On balance, a stay of the injunction order is warranted here.

As noted, the *Gudenschwager* factors “are not prerequisites but rather are interrelated considerations that must be balanced together.” *Gudenschwager*, 191 Wis. 2d at 440. On balance, the circuit court's Injunction Order should be stayed pending appeal. Given this Court's decision to grant review of the bias claims underlying the circuit court's Injunction Order, the immediate and particularized harm that would accrue to both the Co-Owners and the general public if that order is allowed to stand, DALC/WWF's complete failure to put forth any concrete evidence of irreparable harm that would accrue absent an injunction, and DALC/WWF's deliberate and strategic delay in bringing its motion for equitable relief, the Co-Owners respectfully submit that this Court has every reason to stay

enforcement of the circuit court's Injunction Order pending its review of Huebsch's appeal and any subsequent appeals that the Co-Owners take related to the Injunction Order.

Indeed, in addition to the balancing factors referenced above, "a stay should be granted when necessary to preserve the status quo." *Banach v. City of Milwaukee*, 31 Wis. 2d 320, 331 (1966). Since November 2018, when the Co-Owners' filed their CPCN application for the Project with the Commission, they set October 2021 as the start date for Project construction in Wisconsin. (See Co-Owners' Stay Motion Appx. 5) The Commission issued a CPCN for the Project approximately one-year later, in September 2019, authorizing construction of the Project on that schedule. (See *id.* at 7-8) Construction on the Project in Iowa has been ongoing for more than six months. *That* is the status quo. The Injunction Order disrupts several years' worth of planning and logistics that the Co-Owners' have conducted to ensure construction can start this year and the Project can be placed in-service by December 2023—not to mention the investment-backed expectations of dozens of renewable generators, both within and to the west of Wisconsin, who are counting on the Project to go into service by this date. Given this reality, the public interest is clearly better served by timely construction of the Project, as opposed to giving in to the parochial and short-sighted whims of challengers advancing abstract notions of environmental harm. Declining to stay the order would permit that disruption to continue and could jeopardize Wisconsin's transition to a more affordable energy future.

II. To the extent the Court harbors any doubt as to whether a stay is appropriate under the traditional *Gudenschwager* analysis, it should nonetheless exercise its superintending authority to avoid inconsistent, piecemeal adjudication of issues it has already agreed to review.

To the extent the Court declines to consider or grant the Co-Owners' motion for stay, it can and should nonetheless exercise its constitutional superintending authority over the circuit court to effectuate the same result. Indeed, the circuit court recognized that it was likely making decisions on bias-related issues that this Court will disagree with, and thus essentially invited this Court's guidance and review of its conclusion. (*See* Statement of Facts, Section III, *supra*) Importantly, it was the same bias-related conclusion that, standing alone, supported the circuit court's determination that each injunction factor was met, rendering its order wholly within the scope of the issues upon which this Court has granted review.

Moreover, while the Co-Owners appreciate that this Court does not take lightly decisions to exercise its superintending authority, this is not a procedurally or substantively typical case. Rather, as the Court previously recognized, "[t]his case is highly unusual, and worthy of [its] attention," with the potential for "significant implications throughout state government," and is one in which "the circuit court could benefit from appellate guidance sooner rather than later." (*See* Sept. 21, 2021 Order, Appeal No. 2021AP001325, at 4 (R.G. Bradley, J., concurring)) The Court also recognized the massive scale of the Project (*see id.*), which as noted, continues to be threatened absent a stay. Importantly, while DALC/WWF urged the circuit court to continue proceedings based on a perceived

“bifurcation” of merits issues from those related to the bias challenges, (*e.g.*, P-App. 49:11-18), the circuit court’s injunction decision makes it clear that such separation is impossible. Indeed, while the Injunction Order was supported solely by the court’s views as to the bias claims against former Commissioner Huebsch, the order effectively granted DALC/WWF the ultimate relief they seek on the merits of their entire challenge to the CPCN (*i.e.*, to cease all construction).²² All aspects of the circuit court proceedings would clearly benefit from this Court’s guidance as to the bias issues, including the propriety of any injunction.

Finally, the Co-Owners recognize that as a typical practice, “[t]o convince this court to exercise this constitutional grant of power, a party must establish that an appeal from a final judgment is inadequate and that grave hardship will follow a refusal to exercise the power.” *State ex rel. Universal Processing Servs. of Wisconsin, LLC v. Cir. Ct. of Milwaukee Cty.*, 2017 WI 26, ¶ 48, 374 Wis. 2d 26, 50. The Co-Owners respectfully submit that these criteria have been met here. The Co-Owners have explained at length in this brief and in their submissions to the circuit court in opposition to the injunction the continuing, irreparable, and significant nature of the harm that will accrue if the injunction stands. While the Co-Owners intend to seek review of the Injunction Order with the Wisconsin Court of

²² Notably, because of this fact, DALC/WWF were required to demonstrate that their right to relief was “clear” to support their requested injunction. *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 172, 127 N.W.2d 29, 34 (1964). Yet the circuit court expressly stated that the merits were *too close* a call to make such a finding, and that it was expressly *not* doing so to support the injunction. (P-App. 113:6–12.)

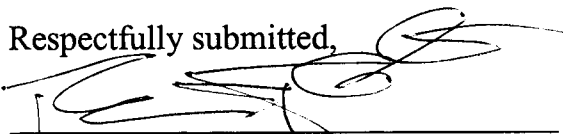
Appeals, (*see supra* n. 14), such an appeal is not an adequate remedy given the time-sensitive nature and complexity of the Project's construction. The clock is already ticking past the intended start date. Securing commitments and planning for a Project of this scale is anything but straightforward and is made even more tenuous given the uncertainty that an injunction could become effective at any time. Because construction of this nature cannot be turned on and off at any time like a switch, but rather must be carefully orchestrated amongst a large number of parties, proceeding in the Court of Appeals—even in an expedited fashion—is not adequate given the circumstances. The Co-Owners thus believe that the Court's exercise of its superintending authority is eminently appropriate here. *Cf. McEwen*, 90 Wis. 2d at 268–70 (exercise of superintending authority warranted where to “tell the parties that they may raise the issue[s] again at a later stage of the proceedings” would only “cause delay, additional expense, and unnecessary multiplicity of appeals.”); *see also Universal Processing*, 374 Wis. 2d at 45 (Wisconsin Supreme Court “can and should” exercise superintending authority to resolve “important issue[s] for Wisconsin courts and the public.”).

CONCLUSION

For the reasons set forth above, the Co-Owners respectfully request that the Court grant their motion to stay enforcement of the Dane County Circuit Court's October 26, 2021 injunction order pending this Court's resolution of Mr. Huebsch's petition for review, as well as any subsequent appeals the Co-Owners may file related to the Injunction Order.

DATED: November 2, 2021

Respectfully submitted,



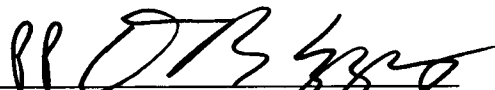
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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2021, I caused true and correct copies of the foregoing memorandum to be delivered to counsel of record, addressed as follows:

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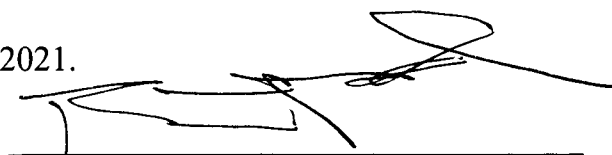
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