

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

NOV 02 2021

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

**APPENDIX FOR 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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Cooperative, and ITC Midwest LLC*

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10-26-2021
CIRCUIT COURT
DANE COUNTY, WI
2019CV003418

STATE OF WISCONSIN
DANE COUNTY BRANCH 9
CIRCUIT COURT

DATE SIGNED: October 25, 2021

Electronically signed by Jacob B. Frost
Circuit Court Judge

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

ORDER GRANTING EMERGENCY MOTION FOR TEMPORARY INJUNCTION

For the reasons stated at the October 18, 2021 motion hearing, IT IS HEREBY ORDERED that Petitioners Driftless Area Land Conservancy and Wisconsin Wildlife Federation's October 8, 2021 Emergency Motion for Temporary Injunction, which was supported by Petitioners Dane

County, Iowa County, Village of Montfort, Town of Wyoming, and Intervenor-Petitioners Chris Klopp and S.O.U.L. of Wisconsin, is GRANTED. Petitioners have met the standards for a temporary injunction by demonstrating a reasonable likelihood of success on the merits of their bias claims, showing irreparable injury, that there is no adequate remedy at law, and that the public interest weighs in Petitioners' favor. The bond amount required by Wis. Stat. § 196.43 is set at \$32,000,000 and requires two sureties. Intervenor-Respondents American Transmission Company, LLC, ITC Midwest, LLC, and Dairyland Power Cooperative shall be enjoined from commencing construction of the Cardinal-Hickory Creek Transmission Line upon Petitioners providing the required undertakings in the amount above.

IT IS SO ORDERED

FILED
10-15-2021
CIRCUIT COURT
DANE COUNTY, WI
2019CV003418

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

COUNTY OF DANE et al.,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN et al.,

Respondents.

Case No. 2019 CV 3418

**INTERVENOR RESPONDENTS AMERICAN TRANSMISSION COMPANY LLC,
ATC MANAGEMENT INC., DAIRYLAND POWER COOPERATIVE, AND ITC
MIDWEST LLC’S RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR
TEMPORARY INJUNCTION**

Intervenor-Respondents American Transmission Company LLC and ATC Management Inc. (collectively, “ATC”), Dairyland Power Cooperative (“Dairyland”), and ITC Midwest LLC (“ITC Midwest”) (collectively, the “Co-Owners”) respectfully request that this Court deny the Driftless Area Land Conservancy and Wisconsin Wildlife Federation’s (collectively, “Petitioners”) Emergency Motion for Temporary Injunction (*see* Dkt. 1083 (“Motion”)).

I. Introduction

The Cardinal-Hickory Creek 345-kilovolt Transmission Line Project (“Project”) is the most important piece of infrastructure that is needed to transition Wisconsin to a carbon-free, renewable-based future. (*See, e.g.*, R. 1033, at 5-15; R. 1052, at 2-9, 20-22; R. 1123, at 9-10, 17-27; R. 1127, at 3-6)¹ The Project has been studied and vetted by multiple entities at the state and

¹ *See also* Oct. 14, 2021 Affidavit of Thomas Dagenais on behalf of ATC (“Dagenais Aff.”), ¶¶ 9-16; Oct. 13, 2021 Affidavit of Heather Allen (“Allen Aff.”) on behalf of RENEW Wisconsin, ¶¶ 9-12; Oct. 15, 2021 Affidavit of Thomas Hanrahan on behalf of WPPI Energy (“Hanrahan Aff.”), ¶¶ 5-6; Oct. 15, 2021

federal level for more than a decade. (*See* R. 1033, at 15-19; R. 1039, at 15-22) Now is the time to build it. The Court should not entertain the Petitioners' belated request to enjoin construction of such a critical endeavor, on the eve of construction, two years after the Public Service Commission of Wisconsin ("Commission") granted the Co-Owners a Certificate of Public Convenience and Necessity ("CPCN") to build it, and after the Co-Owners have already invested approximately \$159 million. (*See* Oct. 14, 2021 Affidavit of Sarah Justus on behalf of ATC ("Justus Aff."), ¶ 13; Oct. 15, 2021 Affidavit of Shawn Mathis on behalf of ITC ("Mathis Aff."), ¶ 9)

The Midcontinent Independent System Operator, Inc. ("MISO") approved the Project as part of its Multi-Value Project ("MVP") portfolio in 2011 because of the significant economic, reliability, and public policy benefits that it would provide to the state and the region. (*See* R. 1039, at 20-22) The Project will increase the transfer capability of the transmission system between Iowa and Wisconsin by approximately 1,300 megawatts ("MW"), allowing the import of low-cost, renewable power into the state. (*See* R. 1033, at 11-13, 18, 49; Hanrahan Aff., ¶ 5; Allen Aff., ¶¶ 9, 12) 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. (Dagenais Aff., ¶¶ 11-13; *see also generally* Smith/Krueger Aff.) 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. (R. 1033, at 48-50; R. 1123, at 21-28 ("If Wisconsin wishes to make cost-effective contributions to a general objective

Affidavit of Scott Smith and Daniel Krueger on behalf of Wisconsin Public Service Corporation, Wisconsin Electric Power Company, and Madison Gas and Electric Company ("Smith/Krueger Aff."), ¶¶ 5-9, 45-50).

of reducing greenhouse gas emissions, approval of the Project could be a reasonable investment based on the global climate benefits criterion alone.”))

Both the Commission and the Iowa Utilities Board independently evaluated and approved the Project as being in the public interest after lengthy contested case proceedings. (*See* R. 19); *In Re ITC Midwest LLC and Dairyland Power Cooperative*, 2020 WL 2949408 (I.U.B. May 26, 2020). Multiple federal agencies have also completed a thorough environmental review of the Project, resulting in a complete federal environmental impact statement under the National Environmental Policy Act (“NEPA”), and have issued, or are in the process of issuing, authorizations for the Project’s crossing of the Mississippi River. That review, of course, comes in addition to the more than 600-page environmental impact statement that the Commission and the Wisconsin Department of Natural Resources (“WDNR”) issued for the Project under the Wisconsin Environmental Policy Act (“WEPA”) in the proceedings under review here. (*See* R. 1193)

The Petitioners were first put on notice that the Co-Owners planned to start construction this month three years ago, when the Co-Owners initially filed their CPCN application in 2018. (*See* R. 356 (PSC REF#: 352698), at 28 (noting an October 2021 construction start date for the transmission line)) In other words, the “emergency” they claim is at hand is entirely of their own making. They have taken every step possible to delay these proceedings at all levels—filing a recusal motion with the Commission *after* it orally approved the Project, (R. 266); using the COVID-19 pandemic as a pretext to seek an unsuccessful injunction, (*see* Dkt. 133, 172, 314); seeking to admit extra-record evidence months *after* merits briefing was completed and shortly before oral argument was scheduled, (Dkt. 236); and now requesting an “emergency” injunction weeks before a construction start date of which they have long been aware.

In fact, the same day the Petitioners filed their motion for an injunction in this Court, they sought *identical relief* in proceedings before the federal district court for the Western District of Wisconsin regarding the federal approvals for the Project—a move they had been foreshadowing *for months*.² Weeks ago, on *August 26*, Petitioners also asked the Seventh Circuit to lift a stay that it issued *last December*, in an apparent attempt to seek a preliminary injunctive relief related to several federal due process claims pending against former Commissioner Huebsch and Chairperson Valcq.³ The simple fact is the Petitioners are not interested in prosecuting any of these cases in a timely manner. They are interested in generating headlines and gumming the Project up in as many cases and as many courts as possible, with the hope that their dilatory litigation tactics will force their opponents to throw up their hands and walk away.

The reality is that there is no reasonable basis to enjoin Project construction, especially given that the Project is scheduled to be placed in-service by the end of 2023. Enjoining Project construction would impose at least *tens of millions* of dollars in extra costs that will be borne by ratepayers, including Wisconsin families and businesses. The Co-Owners would need to reschedule construction plans that have been in place for years, de-mobilize workers who are prepared to implement those plans, and re-mobilize them at some as-yet undetermined date (i.e., according to the Petitioners, whenever this Court and the Supreme Court of Wisconsin resolves this case). 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.

² See *Nat'l Wildlife Refuge Ass'n et al. v. Rural Utilities Service*, No. 21-cv-00096, 21-cv-00306 (W.D. Wis.) (Dkt. 97-98 (seeking motion for preliminary injunction)).

³ See *Driftless Area Land Conservancy et al. v. Huebsch et al.*, Appeal No. 20-3325 (7th Cir.) (Dkt. 60-1).

(Justus Aff., ¶¶ 15-21; Mathis Aff., ¶¶ 12-13, 17-21) Disrupting this sequence causes ripple effects to the overall construction schedule that cannot easily be “made-up” without increased costs and delays. (Justus Aff., ¶¶ 23-27; Mathis Aff., ¶¶ 21-24)

These significant impacts are exactly why the Wisconsin Legislature directed that a CPCN, like the Co-Owners’ CPCN for the Project, shall continue in full force and effect during the pendency of all judicial review proceedings. *See* Wis. Stat. §§ 196.43, 227.54. In other words, after the Commission has found that the Project is in the public interest and will provide renewable energy and reliability benefits for Wisconsin consumers, construction should proceed during *all* judicial review proceedings. *Id.* The Legislature has prescribed detailed requirements that a party *must meet* to enjoin a CPCN. *See* Wis. Stat. § 196.43. The Petitioners tried and failed to satisfy those requirements once before, (*see* Dkt. 172, 314), and they have failed again. The Co-Owners respectfully request that the Court deny the Motion.

II. The Petitioners’ “emergency” motion is untimely, which eviscerates any plausible claim that they will suffer irreparable harm if construction proceeds.

Petitioners’ assertion that they “find themselves in this emergency situation through no fault of their own,” (Motion, at 4), is not credible. They have no justification moving for an injunction at the eleventh hour. Parties seeking the extraordinary equitable relief that the Petitioners seek here are expected to do so expeditiously and without delay. *See, e.g., Int’l Union v. Local Union No. 589*, 693 F.2d 666, 674 (7th Cir. 1982) (“Equity aids only the vigilant, and injunctive relief will be denied to those who slumber upon their rights.”). Despite Petitioners’ characterization that the start of transmission line construction in Wisconsin is an “exigent circumstance,” (Motion, at 2), the Co-Owners publicly disclosed the October 2021 construction three years ago, in November 2018. (*See* R. 356 (PSC REF#: 352698), at 28)) Petitioners could have sought to protect their rights—and if successful, avoid the massive expense and disruption

associated with a last-minute injunction request—at *any* time after the Commission approved the CPCN on September 26, 2019. But Petitioners did nothing. Instead, despite having already sought (and lost) one injunction based on the COVID-19 pandemic, Petitioners made the strategic choice to delay seeking the injunctive relief they are now belatedly requesting.

In April 2020, at the outset of this proceeding, Petitioners asked this Court to enjoin the Co-Owners from conducting any pre-construction activities that involved entry onto private property. (*See* Dkt. No. 133) This Court denied their request, finding that the Petitioners had the burden to show they were entitled to an injunction and that they had not satisfied the requirements under Wis. Stat. § 196.43 for such relief:

The problem with this is that temporary injunctions, as requested here, are very rare. They are disfavored, and they are only granted when there is a clear need for it. And I'll get to the case law here. They are not to be issued lightly. They are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm, not just the fear of irreparable harm The burden is on the petitioners for the injunction to satisfy the predicates for the injunction even setting aside the bond issue, I don't believe that the standards for granting a temporary injunction have been established here.

(*See* Dkt. No. 314, at 50-51) The Petitioners did not appeal the Court's decision and made no mention of the possibility that they might later seek broader injunctive relief.

Now, eighteen months later, Petitioners seek broad injunctive relief on an emergency basis, without offering any plausible reason for their delay. Petitioners assert that they were hoping to obtain a favorable ruling prior to the start of construction, but that their wait-and-see strategy was stymied as “[t]he Transmission Owners have nearly run out the clock.” (Motion, at 5) But the consequences of which Plaintiffs complain are the result of their own intentional strategic decisions. Hoping for complex litigation to end in a certain way, and by a certain date, while sitting idly by is not a circumstance that puts the “fundamental principle of due process . . . at grievous

risk,” as Petitioners insist. (Motion, at 2) To the contrary, courts consistently recognize that this type of inaction is grounds alone for *denying* equitable relief.⁴ (*See also* Section III(C), *infra*) At a minimum, Petitioners’ delay significantly undermines any contention that the harm they claim will, in fact, be irreparable or that such harm warrants this Court’s urgent intervention.⁵

III. The Petitioners have again failed to meet the requirements for an injunction under Wis. Stat. § 196.43.

The Wisconsin Legislature has determined that once the Commission grants a CPCN, construction may commence and continue during the pendency of all appeals, and an injunction stopping construction can only be issued if certain specific requirements are met. *See* Wis. Stats. §§ 196.43, 227.54.⁶ As this Court previously recognized, the burden is on the Petitioners to show

⁴ *Int’l Union*, 693 F.2d at 674; *see also, e.g., Ideal Industries, Inc. v. Gardner Bender, Inc.*, 612 F.2d 1018, 1025 (7th Cir. 1979); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011) (“[T]he likelihood of irreparable harm takes into account how urgent the need for equitable relief really is.”); *Ixmation, Inc. v. Switch Bulb Co., Inc.*, No. 14-CV-6993, 2014 WL 5420273, at *7 (N.D. Ill. Oct. 23, 2014) (“unexcused delay on the part of parties seeking extraordinary injunctive relief is ground for denial of a motion because such delay implies a lack of urgency and irreparable harm.”) (internal quotation marks omitted).

⁵ *See Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) (“Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff’s claim that he or she will face irreparable harm if a preliminary injunction is not entered”); *Essentia Health v. Gundersen Lutheran Health Sys., Inc.*, No. 17-CV-100-WMC, 2017 WL 1318112, at *8 (W.D. Wis. Apr. 7, 2017) (“[T]he court . . . can consider plaintiff’s delay in determining whether it has shown a sufficient risk of irreparable harm to warrant injunctive relief.”); *see also Quince Orchard Valley Citizens Ass’n, Inc. v. Hodel*, 872 F.2d 75, 79–80 (4th Cir. 1989) (denying injunction sought on the eve of construction, nine months after the Record of Decision and EIS issued, because “[e]quity demands that those who would challenge the legal sufficiency of administrative decisions concerning time sensitive public construction projects do so with haste and dispatch”).

⁶ As they did with respect to their first injunction request, Petitioners again rely in the first instance on the inapplicable injunction statute laid out in the Wisconsin rules of civil procedure. (*See, e.g.,* Motion at 3 (“Wis. Stat. § 813.02 provides circuit courts with discretion to enter temporary injunctions to preserve the status quo . . .”); *id.* at 6 (“[T]he authority for the issuance of a temporary injunction is statutory”—quoting from and citing § 813.02)). Petitioners do so notwithstanding the fact that this Court has already correctly determined that “[t]he actual requirements for an injunction [here] are governed by 196.43.” (Dkt. 314, at 49); *see also, e.g., Wagner v. State Medical Examining Board*, 181 Wis. 2d 633, 641 (1994) (“ch. 227 ‘contemplates the limited use of those civil procedure statutes which do not conflict with ch. 227.’”) (quoting *State v. Walworth County Circuit Court*, 167 Wis. 2d 719, 724 (1992)); *id.* at 639 (“[W]hen a conflict occurs between the rules of civil procedure and ch. 227, the dictates of ch. 227 must prevail.”) (citing *Walworth County*, 167 Wis. 2d at 727). To the extent Wis. Stat. § 813.02 permits injunctions under

that a preliminary injunction is warranted: a temporary injunction is a rare, disfavored remedy for which there must be a clear showing of need. (*See* Dkt. No. 314, at 50-51); *see also Kocken v. Wis. Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 24, 301 Wis. 2d 266, 732 N.W.2d 828 (2007) (“Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial.”)

Specifically, “[n]o injunction may be issued in any proceeding for review under ch. 227” unless Petitioners satisfy several threshold requirements, including:

- (1) posting a bond to cover the significant costs of any unnecessary delays related to an injunction, should Petitioners ultimately lose on their claims, *see* Wis. Stat. § 196.43(2);
- (2) demonstrating that they are “likely to succeed on the merits,” *id.* § 196.43(3);
- (3) demonstrating that they “will suffer irreparable harm” without the injunction, *id.* § 196.43(3); and
- (4) showing that the injunction “is in the public interest,” *id.* § 196.43(3).

These statutory requirements reflect the state’s interest in allowing important public infrastructure projects to proceed pending judicial review, except in extraordinary circumstances. Petitioners are required to meet *all* of these prerequisites to justify an injunction halting construction. They have satisfied none.

A. The bond requirement has not been met.

At least two sureties must enter into an undertaking on behalf of the Petitioners before an injunction can issue. Wis. Stat. § 196.43(2). This Court could not have been clearer in emphasizing the need to comply with this requirement when denying Petitioners’ first request for an injunction.

less stringent standards than § 196.43, it is clearly in conflict with the Legislature’s instructions regarding injunctions in Chapter 227 cases involving Commission orders and is inapplicable here.

(Dkt. 314, at 50 (“The burden is on the petitioners for the injunction to satisfy the predicates for the injunction; as I say, one of which is the bond, and that has not been addressed sufficiently to satisfy 196.43.”)) In a recent Chapter 227 judicial review proceeding concerning the Badger Coulee Project—another MVP transmission line—the Court of Appeals overturned a circuit court’s order issuing an injunction, finding that “it did not comply with [the] statutory requirements” of Wis. Stat. § 196.43, including the requirement for a bond. *See Town of Holland v. Pub. Serv. Comm’n of Wis.*, 2018 WI App 38, ¶ 48, 382 Wis. 2d 799, 824.

Petitioners concede that they have not met this requirement. (Motion, at 13-17) But rather than attempt to show what a reasonable bond amount might be (as was their burden), Petitioners seek to avoid complying with the statute altogether. They insist that “[n]o injunction bond is necessary under Wis. Stat. § 196.43 because no parties will suffer substantial pecuniary damages from an injunction of short duration.”⁷ (Motion, at 2, 15-16) This is false.

As explained below, the Co-Owners have provided substantial evidence showing that an injunction would cause them to incur significant pecuniary harm. This evidence is unrebutted. The Court should reject Petitioners’ speculative and incorrect theories suggesting no harm will occur; such general claims are insufficient to meet Petitioners’ burden.

⁷ They also assert that bond requirements in the statute at issue here—Wis. Stat. § 196.43(2)—are “very similar to” the bond requirements set forth in Fed. R. Civ. P. 65(c). (Motion, at 14, n.14) The Petitioners are again misrepresenting the law to fit their own distorted view of the facts. The federal rule requires movants to “give[] security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained,” Fed. R. Civ. P. 65(c), whereas the state rule requires that “at least 2 sureties enter into an undertaking on behalf of the petitioner,” with the “sum of the undertaking [to] be enough to effect payment of *any damage* which the opposite party *may sustain* by the delay or prevention of the order of the commission from becoming effective” Wis. Stat. § 196.43(2).

1. An injunction will likely cause the Co-Owners and electric ratepayers to suffer significant financial harm.

Despite Petitioners' attempt to downplay the Co-Owners' potential damages, the reality is that an injunction would increase Project costs, harming the public and the Co-Owners alike. If the delay associated with the injunction is less than six months, the Project would likely still be able to achieve its targeted in-service date of December 2023. (Justus Aff., ¶¶ 23-28; Mathis Aff., ¶ 20) But delaying the commencement of construction and having to make up for lost time later will increase Project costs in several ways. Those costs will be borne in part by Wisconsin transmission customers, who will pass them onto Wisconsin retail electric customers in the form of increased electric bills.

First, an injunction halting construction of the Project could impose significant costs associated with mobilizing and re-mobilizing workers and coordinating outages on the existing system. Through the end of August 2021, the utilities have invested approximately \$159 million into the Project. (Justus Aff., ¶ 13; Mathis Aff., ¶ 9) The utilities have entered into contracts with suppliers for key equipment and hired workers to commence construction on the Project according to its scheduled start date. (Justus Aff., ¶¶ 15-16; Mathis Aff., ¶ 10) If an injunction issues, the utilities will not be able to proceed with construction and will need to de-mobilize these workers, only to repay for a second round of mobilization and de-mobilization costs at a later date. (Justus Aff., ¶ 24; Mathis Aff., ¶ 17-21) The utilities also need to coordinate outages on approximately 80 miles of existing transmission and distribution lines that will be removed, relocated, re-built, and/or double-circuited with the Project. (Justus Aff., ¶¶ 18-19, 26) Several of those lines represent the backbone of the existing transmission system in Wisconsin, meaning that there are constraints on when and for how long they can be taken out-of-service. (*Id.*) Depending on the length and timing of an injunction, conditions on the system could preclude the utilities from taking these

lines out-of-service in accordance with the current schedule, causing further delay and cost increases. (Justus Aff., ¶¶ 26-27)

Second, even a stay of a “short duration” would create a chain of delays that could lead to increased labor and material costs. (See, e.g., Justus Aff., ¶ 17-27; Mathis Aff., ¶¶ 17-24) Constructing a large transmission line is a costly, time-consuming, and logistically complex endeavor. (Justus Aff., ¶ 15) Significant lead time is required to procure the labor and materials required for the Project, work must occur in a defined sequence, and environmental and permitting considerations limit the time-of-year at which such work can occur. (Justus Aff., ¶¶ 17-21; Mathis Aff., ¶¶ 12-13) Thus, even if the injunction is lifted after six months, the result could be a delay of construction for an entire year due to seasonal construction restrictions. (Mathis Aff., ¶ 19)

Due to these seasonal restrictions, the utilities intend to commence with vegetation clearing along the Project route in the next several weeks and to complete that work before seasonal tree-clearing restrictions kick-in in April 2022. (Justus Aff., ¶¶ 22-23; Mathis Aff., ¶¶ 17-18) If that work is halted now, it could delay the utilities’ ability to proceed with subsequent phases of work (e.g., foundation installation, structure setting, and wire-pulling). (Justus Aff., ¶ 23; Mathis Aff., ¶ 18) If Project construction was delayed for six months, to keep on-schedule and place the Project in-service by December 2023, the utilities would need to add additional construction crews, increase work hours (with crews working in multiple shifts), pay a premium for out-of-state laborers, and work on multiple Project segments at once. (Justus Aff., ¶ 25; Mathis Aff., ¶ 21) Construction delays could also increase costs for storing steel that is set to be delivered under existing contracts, and there is always the risk that other macroeconomic factors (e.g., inflation, labor shortages, etc.) materially increase construction costs. (Justus Aff., ¶ 25; Mathis Aff., ¶ 22)

Thus, it is clear than even a “short” delay from an injunction could cause significant damage, which the Petitioners completely disregard. The utilities conservatively estimate that an injunction creating a six-month construction delay would increase costs by approximately \$30 million, (Justus Aff., ¶ 27; Mathis Aff., ¶ 24), which would likely be passed on to ratepayers. A longer delay would be even more problematic, result in materially higher construction costs and a risk that the Project would not go into service by December 2023, (Justus Aff., ¶ 28; Mathis Aff., ¶ 25), which would delay the realization of the overall economic, reliability and public policy benefits.

Third, because of the unique rate treatment that the Federal Energy Regulatory Commission (“FERC”) has approved for ATC’s capital projects, ATC would suffer significant lost profits due to an injunction. (*See generally* Oct. 15, 2021 Affidavit of Michael Degenhardt on behalf of ATC (“Degenhardt Aff.”)) Utilities typically add a new capital investment to rate base—and thus, earn a profit on that investment—on the day the investment becomes used and useful in providing utility service. (*Id.* ¶¶ 5-9) However, FERC has approved alternative rate treatment for ATC, whereby ATC adds ongoing capital investments (referred to as Construction Work in Progress, or “CWIP”) to rate base as those investments are incurred. (*Id.* ¶ 9) ATC has been applying this accounting treatment to its investment in the Project. (*Id.* ¶ 10)

If an injunction issues, there are two categories of lost profits that ATC will suffer. First, ATC will need to remove the capital it has *already spent* on the Project from rate base and will not be permitted to track or recover the interest lost on that capital while the injunction is in effect. (*Id.* ¶ 11) Rather, while the injunction is in place, ATC will simply fail to earn on the money it has spent to date and will essentially have to bear the financing costs of its prior investment in the Project. (*Id.*) Second, ATC will continue to incur costs while the injunction remains in effect, but

will not be able to add them to rate base to earn a return or interest on those costs. (*Id.* ¶ 12) Taken together, these two categories of losses would amount to approximately \$2 million if an injunction lasted six months and approximately \$6 million if an injunction lasted a year. (*Id.* ¶ 13); see *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 457 (7th Cir. 2010) (“Every day that a sum of money is wrongfully withheld, its rightful owner loses the time value of the money,” and there is “no procedural vehicle to enable [non-moving party] to recover the loss of the time value of its money” in such circumstances).

In sum, Petitioners’ assertion that a “short pause in the construction schedule will not substantially harm any of the parties” is flat wrong. (Motion, at 15) The utilities are at risk of bearing cost increases of approximately \$30 million, which will likely be passed onto ratepayers, and ATC is at risk of losing out on \$2 million to \$6 million in lost profits, warranting a bond amount of at least \$36 million. At the very least, these significant costs weigh against the Court granting Petitioners’ request for injunctive relief. See *Colo. River Indian Tribes v. Dep’t of Interior*, No. CV14-02504, 2015 WL 12661945, at *32 (C.D. Cal. Jun. 11, 2015) (denying preliminary injunction against construction of utility scale solar project, in part because developer would incur approximately \$1.5 million in labor demobilization costs under existing engineering, procurement, and construction (“EPC”) agreement); *Sierra Club v. U.S. Army Corps of Engineers*, No. 2:20-CV-00396-LEW, 2020 WL 7389744, at *23 (D. Me. Dec. 16, 2020), *aff’d* 997 F.3d 395 (utility’s commitment of “considerable human and economic resources” to construct high-voltage transmission line connecting hydropower generation resource to the New England electric grid undermined plaintiffs’ motion for preliminary injunction); *Reed v. Antwerp*, No. 4:09CV3096, 2009 WL 2824771, at *8 (D. Neb. Aug. 28, 2009) (denying motion for preliminary injunctive

relief to halt construction on segment of new transmission line, in part due to the “considerable investment” public power district had already committed to the project).

2. Petitioners’ theories regarding the lack of harm from a delay are incorrect.

Petitioners argue that *no* pecuniary harm will result from an injunction for three primary reasons, none of which have any merit or are sufficient to sustain their burden.

First, Petitioners make much of the fact that the Co-Owners asked the Commission to rescind and re-vote on the CPCN for the Project, (Motion, at 15), implying that no harm will result from an injunction if the Co-owners’ themselves asked their regulator to rescind their permit. Petitioners fail to mention that the Co-Owners’ motion to the Commission included a request to “reconsider the existing evidentiary record and re-vote [on the CPCN] as expeditiously as possible” so that the Project could meet its scheduled December 2023 in-service date. (*See* Dkt. 729, at 2-4) Contrary to Petitioners’ baseless suggestion, the Co-Owners made their request to resolve this case *more quickly* and to ensure the Project could meet its scheduled in-service date—not because they were willing to delay the Project altogether.

Second, Petitioners suggest that the Co-Owners are “more than adequately protected” from damages caused by an injunction “through FERC’s ‘incentive-based rate treatment.’” (Motion, at 15) Petitioners vastly overstate the “protection” afforded by the rate treatment that the Co-Owners *may* ultimately receive if the Project is *cancelled*. First, the FERC orders at issue are only applicable if the Project is “abandoned or cancelled”—they do not guarantee recovery of cost increases due to a *temporary* injunction, which is what Petitioners’ request here. *See, e.g., In Re American Transmission Co. LLC*, 166 FERC ¶ 61025, 2019 WL 256477 (2019). Second, these orders are not, as Petitioners suggest, a guarantee of recovery. FERC explicitly stated that it would “not determine the justness and reasonableness of ATC’s recovery of costs for abandoned electric

transmission facilities, if any, until ATC seeks such recovery in a future section 205 filing that a public utility is required to make if it seeks abandoned plant recovery.” *Id.* at 61123.

Even assuming, *arguendo*, the Project is cancelled and the Co-Owners are able to recover the costs invested to date, consider the hubris of the Petitioners’ position: they are essentially claiming that their parochial interests should be placed above those of the general public. The public at large stands to pay for not only the prudently incurred costs to the tune of roughly \$159 million, but also to lose out on realizing the benefits of the Project as a whole. The Project’s *quantified* net benefits to Wisconsin are estimated at \$23 million to \$350 million, (R. 1033, at 45), and have likely only increased with the substantial increases in renewable generators that are contingent on the Project. (R. 1127, at 32 (noting that Project benefits increase as additional renewable generation is added to the grid); Dagenais Decl., ¶¶ 10-12 (noting the increase in generators conditional on the Project since the CPCN issued in 2019)) And of course, this says nothing of the Project’s climate-related benefits, which were not accounted for in the Co-Owners’ economic analysis. (*See* R. 1123, at 21-24)

Third, Petitioners suggest that regardless of any harm caused by an injunction, the Court need not consider it for purposes of an injunction because of its smaller proportion to the larger overall cost of the Project, because costs might also arise from other speculative delays, and because these other speculative delays somehow make any damage resulting from the *certain* delay of an injunction “extraordinary speculative and likely lost in the wash of other factors that could slow down this project.” (Motion, at 17; *see also id.* at 16 (“The limited duration of the requested temporary injunction in comparison to the lifetime of this project also weighs against the need for an injunction bond.”); *id.* at 16-17 (“Construction projects of this size and scale are subject to any number of risks ... Any one of these factors may result in a further delay”). Petitioners’

misunderstand *their* burden to establish entitlement to an injunction, however, and cannot use general claims of speculative damage as a basis to avoid compliance with the *mandatory* bond requirement in Wis. Stat. § 196.43.⁸ Section 196.43(2) includes no qualifiers or exceptions to the bond requirement where the potential damages are not “significant” in comparison to other costs or risks, but rather requires coverage for “*any damage* which the opposite party *may sustain* by the delay.” In any event, and as explained above, the Co-Owners’ damages are *far* from zero and are likely, if not certain, to be incurred as a result of an injunction delaying construction of the Project. (See *supra*, Section III(A)(1))

At bottom, Petitioners’ arguments that no bond is required have no support in fact or law. When the Petitioners last moved for an injunction, this Court rejected Petitioners’ insufficient “speculation as to what is or is not a reasonable bond amount.” (Dkt. 314, at 51) Absent a bond, Petitioners’ failure to make any reasonable showing of what the amount of a bond should be, and to offer the required undertakings of at least two sureties pursuant to Wis. Stat. § 196.43(2), is grounds alone to deny the Motion. This failure is particularly acute here, given the Court’s previous emphasis on the importance of satisfying the bond requirement. Moreover, given the Co-Owners’ attached affirmative evidence of damage, Petitioners’ speculative theories simply cannot support their claim that “no parties will suffer substantial pecuniary damages” from the requested delay. (Motion, at 2)

The Legislature’s instructions regarding a bond under the applicable injunction statute were clear: “at least 2 sureties [must] enter into an undertaking,” and “the court *shall direct* that the sum

⁸ To this end, Petitioners’ cited cases regarding the need to establish damages with “reasonable certainty” relate to entirely separate, affirmative claims for relief such as breach of contract. See Br. at 17 (citing *Naden v. Johnson*, 61 Wis. 2d 375, 387, 212 N.W.2d 585, 591 (1973); *Sporleder v. Gonis*, 68 Wis. 2d 554, 559–60, 229 N.W.2d 602, 605 (1975)). These cases nothing to do with injunctions or the bond requirement Petitioners must comply with here pursuant to Wis. Stat. § 196.43(2).

of the undertaking be enough to effect payment of any damage which the opposite party *may sustain* by the delay.” Wis. Stat. § 196.43(2). Petitioners have not satisfied these requirements, and the Court should not accept their renewed invitation to disregard them.⁹

B. Petitioners have not demonstrated a likelihood of success on the merits.

Petitioners’ Motion must also fail unless the Court finds that they are “likely to succeed on the merits.” Wis. Stat. § 196.43(3). The bar is even higher where, as here, the result of the injunction would have a similar effect to the relief obtained by a final decree, as such injunctions should “not be granted unless the complainant’s right to relief is clear.” *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 172, 127 N.W.2d 29, 34 (1964). Petitioners cannot genuinely contend they have established such a “clear” right to relief for any of their claims here.

Moreover, the standard of review to be applied to the Commission’s decision is a deferential one. The Court’s review is limited to whether the Commission’s decision to grant a CPCN for the Project is supported by a rational basis and is not arbitrary and capricious. Wis. Stat. § 227.57. The Wisconsin courts have long acknowledged the Commission’s expertise in administering Wis. Stat. § 196.491 to determine what proposed projects are appropriate and in the public interest. *Wisconsin Power & Light Co. v. Pub. Serv. Comm’n of Wisconsin*, 148 Wis. 2d 881, 888, 437 N.W.2d 888, 891 (Ct. App. 1989); *see also Clean Wisconsin v. Pub. Serv. Comm’n of Wis.*, 2005 WI 93, ¶¶ 136-140, 282 Wis. 2d 250, 700 N.W.2d 768 (recognizing the Commission’s expertise in reviewing proposed construction projects under Wis. Stat. § 196.491).

⁹ To be sure, Petitioners offer no authority to support such a position. They cite primarily to *Nauman v. Cent. Shorewood Bldg. Corp.*, a decision issued in 1943 regarding a general injunction in which the condition of a bond itself is discretionary, to suggest the Court exercises unfettered discretion to require a bond under Wis. Stat. § 196.43(2). (*See* Motion, at 13 (citing 243 Wis. 362, 365, 10 N.W.2d 151, 152 (1943))). Such a position cannot be squared with the Legislature’s directives in Section 196.43, nor the facts and affirmative evidence of potential harm discussed above.

Attempting to bolster their claims, Petitioners contend that “circumstances that have unfolded since Petitioners filed their merits briefs last year have only strengthened their likelihood of success on the merits.” (Motion, at 11) In support of this argument Petitioners largely rely on their bias claim against former commissioner Huebsch (*Id.* at 11-12) But these circumstances do not “strengthen” Petitioners’ chances of success such that they are entitled to the extraordinary, last-minute equitable relief sought in their Motion.

Nearly six months of discovery has taken place in these proceedings, covering the time period from the date the Co-Owners filed their CPCN application with the Commission to the present. Tens of thousands of pages of records and communications have been produced, numerous depositions have been taken, and yet, after all this discovery, no evidence has come to light that any of the communications that occurred between Mr. Huebsch and anyone else concerned the Project itself. None. And as this Court itself has recognized, the fact that the Wisconsin Supreme Court has agreed to review whether Petitioners’ have asserted a *prima facie* showing of procedural irregularities is further evidence that the Petitioners are not likely to succeed on the merits.

Petitioners also assert that they are likely to prevail on the merits because the Co-Owners’ economic analysis failed to account for the “surge in solar that was being approved and built in Wisconsin during the application process.” (Motion, at 12) Again, this is simply wrong. The Co-Owners analyzed the Project’s economic benefits in eight different plausible future scenarios, which reflected different assumptions about the future of the electric grid, including (for example) buildout of different generation resources (e.g., solar power). (*See* Dkt. 202, at 37-46) Commission staff also analyzed the Project in *another* eight different future scenarios. (*See* R. 715) As one staff witness opined, “[s]ince the future is inherently unknowable, the best one can do is cover a range of reasonable possibilities while modeling complex projects such as this one. I am confident that,

between the applicants' revision 3 models and those I performed myself, *a robust record has been developed covering such a range.*" (See Confidential R. 19, at 40) (emphasis added)) In other words, the whole point of analyzing the Project in multiple different futures was to ensure that the analysis captured various potential but uncertain changes in the bulk electric transmission system.

Moreover, this modeling *did* account for the very "surge in solar" that Petitioners claim warrants reversal of the CPCN: the development of utility-scale solar generation in Wisconsin. The Co-Owners' modeling *did not*, as Petitioners assert, "include[] only 30 MW of new solar generation" in Wisconsin. (Motion, at 6) As one of the Petitioners' *own witnesses* admitted, the modeling reflected the addition of (depending on the future studied) *thousands of megawatts* of new solar generation in Wisconsin between 2021 and 2031. (See Confidential R. 17, at 27-29) As Commission staff acknowledged, in futures with more renewable resources and less fossil fuel generation, the Projects' benefits to Wisconsin increase. (Confidential R. 19, at 26)

The absurdity of the Petitioners' position is further illustrated by the fact that the very solar projects they contend are adequate alternatives to the Project are, in fact, *dependent on the Project being built.* (See Dagenais Aff., ¶¶ 13-14; Smith/Krueger Aff., ¶¶ 5-8) If the Project is delayed, these Wisconsin-based renewables may be subject to quarterly operating studies from MISO, which could ultimately *limit* their output to the grid, resulting in millions of dollars of lost capacity and energy value for the project's owners, who provide retail electric service to almost two million Wisconsinites. (See Dagenais Aff., ¶¶ 13-14; Smith/Kreuger Aff., ¶¶ 1, 3, 32, 43) So contrary to Petitioners' baseless assertions, the "reality on the ground today" (Motion, at 13) reinforces rather than diminishes the need for the Project and the Commission's decision to approve it.¹⁰

¹⁰ Petitioners also reference the testimony of Citizens Utility Board ("CUB") witness Mary Neal for the proposition that the Co-Owners "greatly overstated" the Project's wind-related benefits and that the Project "could actually increase coal-generated electricity" (Motion, at 12, n.12) What Petitioners fail to mention is that *five different witnesses* thoroughly rebutted and undermined Ms. Neal's analysis on both issues,

There is also no indication that the Petitioners will prevail on their other claims to overturn the CPCN. The Commission had before it an enormous record when it vetted and approved the Project, including more than 2,000 pages of pre-filed written testimony from more than 70 fact and expert witnesses, an approximately 600-page final environmental impact statement, hundreds of electronically submitted public comments, and over 2,000 pages of transcripts from the five days of technical hearing and three days of public hearing sessions. (Dkt. 202, at 1) The substantial evidence the Commission considered was overwhelming that the Project is needed and meets all the statutory criteria for a CPCN to be granted.

The Commission's decision is subject to the standard of review set forth in Wis. Stat. § 227.57 and Petitioners face a significant uphill battle to disrupt it on appeal. (*See* Dkt. 202, at 16-21) That battle should be fought in connection with the parties' full merits briefing—not in connection with unsupported hyperbole in a belated request for an injunction. To the extent some limited construction occurs in the meantime, Petitioners have only themselves to blame for their delay in bringing the Motion until the literal last minute. (*See* Section II, *supra*)

C. Petitioners have not demonstrated irreparable harm.

Petitioners must demonstrate not just the mere possibility of irreparable harm, but rather, a *likelihood* of irreparable and immediate harm before an injunction can issue. *See* Wis. Stat. § 196.43(3); *see also, e.g., Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008); *Caribbean Marine Servs. Co. Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Petitioners' Motion fails to demonstrate this required showing. In fact, the Petitioners' have put forth *no* affidavits or other evidence of irreparable harm. Nothing.

rendering her testimony wholly incredible. (*See* R. 1127, at 67-71; R. 1123, at 8-21; R. 1130, at 11; R. 1139, at 9-12; R. 1160, at 8-9; R. 1169, at 2-5)

As noted above, the fundamental premise of Petitioners' claims of "imminent" harm is severely undercut by their nearly two-year delay in bringing the present Motion. (*See* Section II, *supra*); *see also, e.g., Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011) ("[T]he likelihood of irreparable harm takes into account how urgent the need for equitable relief really is."); *Exmation, Inc. v. Switch Bulb Co., Inc.*, No. 14-CV-6993, 2014 WL 5420273, at *7 (N.D. Ill. Oct. 23, 2014) ("[U]nexcused delay on the part of parties seeking extraordinary injunctive relief is grounds for denial of a motion because such delay implies a lack of urgency and irreparable harm.") (internal quotation marks omitted). Courts routinely infer that there is a lack of such threatened harm in cases where movants' delays are far less egregious than that presented here. *See, e.g., Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983) (preliminary injunction denied where plaintiff waited two months); *Stokeley-Van Camp Inc. v. Coca-Cola Co.*, No. 86 C 6159, 1987 WL 6300, at *3 (N.D. Ill. Jan 30, 1987) (preliminary injunction denied where plaintiff delayed three months); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987-88 (D.C. Cir. 1975) (decision to deny plaintiffs' motion for preliminary injunction was bolstered by the plaintiffs' "inexcusable" 44-day delay in bringing suit).

Moreover, Petitioners incorrectly assume that the existence of *any* alteration of the environment in the Driftless Area constitutes a *per se* finding of irreparable harm for purposes of an injunction. (*See, e.g.,* Motion at 7 ("There can be little reasonable dispute that these damages constitute 'irreparable harm' for the purposes of a temporary injunction. ... [they] are consequential and irreversible.)) Not so. The mere potential for environmental harm or injury does not equate to a *per se* showing of irreparable harm. *See, e.g., 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). And the mere presence of the Project does not necessarily

result in adverse environmental impacts to the Driftless Area, which is marked by active agricultural and other human uses, including utility infrastructure. (R. 1126, at 17) In fact, the potential impacts of the Project are substantially smaller than other similar projects, in part because of the significant avoidance and minimization measures the Co-Owners have conducted or are committed to conducting. (*Id.* at 18)

Indeed, Petitioners' wholly fail to acknowledge significant mitigating facts undercutting their claims of harm. To be sure, the construction of the Project will have some impacts. But the Project route follows existing road and transmission line right-of-way (ROW) for over 90 percent of its length, and there is no evidence that Project construction is going to cause significant environmental damage.¹¹ (*Id.*; R. 356, at Appx. B, Tbl. 7) The Commission and the WDNR have required detailed construction mitigation measures, which the Co-Owners must follow during construction to ensure that the Project's impacts are as minimal as possible. (R. 19, at 90-96) (requiring Co-Owners to hire an independent environmental monitor that reports to the Commission, to implement construction and mitigation plans ("CMPs") for each segment of the Project, to implement a Project-specific Avian Protection Plan, and to implement a variety of best management practices, among other things). Indeed, the WDNR has already review and approved the construction management plans outlining how the Co-Owners will comply with these incredibly detailed construction mitigation measures for the segments the Co-Owners plan to construct within the next month.¹²

¹¹ In areas where the Project will be double-circuited with existing transmission lines, the Commission has ordered that the width of the existing and new ROW not exceed 150 feet, unless the Co-Owners apply for and receive a minor routing adjustment. (R. 19, at 90) In areas where the Project will be built adjacent to existing transmission line corridors, the Co-Owners must minimize the need to acquire additional ROW to the greatest extent practicable. (*Id.*)

¹² See *PSCW Electronic Records Filing System*, <https://apps.psc.wi.gov/Home.aspx> (Docket No. 05-CE-146), PSC REF#: 420163, 420164, 420165, 420166, 420254, 420255, 420256, 420257, 420485.

Finally, Petitioners' claim of environmental harm is undercut by the fact that the Legislature has already established a process to compensate communities in which the Project will be located for Project-related impacts. The Co-Owners are required by statute to pay a one-time environmental impact fee (equal to five percent of the cost of the Project) and an annual impact fee (equal to 0.3 percent of the cost of the Project) to the Department of Administration ("DOA"). *See* Wis. Stat. §§ 16.969, 196.491(3g)(a); Wis. Admin. Code ch. Adm. 46. The DOA, in turn, distributes these fees to each town, village, and city through which the line is routed. *See* Wis. Admin. Code § Adm. 46.06. The municipalities are to use these fees "for park, conservancy, wetland or other similar environmental programs, unless the commission approves a different use under this subsection." Wis. Stat. § 16.969(4). In this case, the Co-Owners will be paying a one-time environmental impact fee of approximately \$14 million, with annual impact fees of approximately \$850,000 to more than two dozen municipalities in the affected area.¹³

In sum, Petitioners' claims of irreparable harm are wholly undermined by their failure to seek equitable relief in a timely manner, as well as the record evidence in this case.

D. Petitioners have not demonstrated that an injunction would be in the public interest.

Finally, before granting a temporary injunction, the Court must find that such relief is in the public interest. Wis. Stat. § 196.43(3). The record before the Court shows the exact opposite: given the significant economic, reliability, and environmental benefits the Project will generate for Wisconsin and the region, enjoining construction of the Project would undermine the public interest.

¹³ *See Letter from Tom Malanowski, ATC Regulatory Relations Manager, to Steffany Powell Coker, Secretary to the Commission, Re: Impact Fee Distribution for the Cardinal Hickory Creek Project* (Oct. 23, 2019), available at <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=378029>.

Although the United States has seen an increase in the amount of electric energy generated from renewable resources over the last decade, transmission constraints continue to inhibit delivery of that energy to population centers. (R. 1123, at 24 to 28) Many of the nation's best renewable resources are located in rural areas (e.g., the deserts of the Southwest or plains of the Midwest) where there are few people and, consequently, relatively little electric infrastructure. Additional transmission capacity is needed to transport renewable energy to market and realize the full potential of the nation's renewable resources. (*Id.*; R. 1139, at 14-17)

The Cardinal-Hickory Creek Project was designed to do just that. Like the 16 other transmission projects that MISO approved as part of the MVP portfolio in 2011, the objective of the Cardinal-Hickory Creek Project is relatively straightforward: to improve the reliability and efficiency of the high-voltage transmission system by relieving transmission congestion and increasing access to low-cost, renewable energy being developed within the MISO footprint. (R. 1127, at 3-6) In fact, the amount of renewable capacity placed in-service or currently under construction is more than *four times* what MISO predicted when it initially approved the MVP portfolio in 2011. (Dagenais Aff., ¶¶ 6-9) The fact that renewable development in the upper Midwest has outpaced MISO's initial projections by a factor of four demonstrates that the Project is needed now more than ever. (*Id.*) The Project will provide a major 345-kV backbone in an area that currently lacks any such infrastructure and facilitate the transfer of this low-cost renewable energy to population centers. It will also support the burgeoning development of local solar generation in Iowa and Wisconsin. In so doing, the Project will generate significant economic, reliability, and environmental benefits for the upper Midwest.

By contrast, if the Court grants the Petitioners' "emergency" request for an injunction, the public good will suffer. As noted above, the Co-Owners' analysis indicates that the Project will

generate approximately \$23 million to \$350 million in net benefits for the state of Wisconsin during its assumed 40-year life. (R. 1033, at 45) It achieves these benefits primarily by reducing congestion on the transmission system, allowing low-cost renewable power to displace power from more expensive, higher emitting energy resources. (*See, e.g.*, R. 1127, at 19-20; R. 1049, at 2-11), If the Petitioners' requested injunction delays the Project's in-service date, it would diminish and likewise delay the state of Wisconsin from realizing these important economic benefits. From a reliability perspective, MISO has repeatedly identified the Project as needed to maintain voltage stability, prevent voltage collapse on the regional grid, and relieve other reliability constraints and overloads on the transmission system. (R. 1039, at 27-29; R. 1110, at 3-6; R. 1127, at 58-61, 78-79; R. 1132, at 4-5) As additional renewable generation comes online, any delay in the Project's in-service date will render the overall system less secure, with transmission facilities loaded above safe operating levels or below adequate voltage levels. (R. 1039, at 46-50)

Finally, the Project is critical to supporting the interconnection of thousands of megawatts of renewable generation being developed both within and to the west of Wisconsin and to facilitating Wisconsin's transition to a more affordable, more sustainable energy future. (R. 1127, at 28-29; R. 1039, at 32; R. 1144, at 11-12; Allen Aff., ¶¶ 9-12; Dagenais Aff., ¶¶ 9-16) By relieving congestion on the existing transmission system, the Project will play a key role in ensuring the reliable and safe delivery of cost-effective renewable generation to Wisconsin ratepayers. (Hanrahan Aff., ¶¶ 4-6) As such, the Project will help Wisconsin utilities transition away from traditional, fossil fuel-fired generation and, in so doing, reduce regional greenhouse gas emissions. (R. 1123, at 9-24; Allen Aff., ¶ 12; Smithi/Krueger Aff., ¶¶ 44-48)

By contrast, delaying construction of the Project will hinder this transition and, by extension, undermine the public interest. At this time, approximately 7,500 MW of renewable

generation—enough to power millions of homes per year—have signed generator interconnection agreements (“GIAs”) making those resources conditional on the construction of the Project. (Dagenais Aff., ¶ 10-11) Approximately 750 MW of that total consists of renewable generators located in Wisconsin that are or will be owned by Wisconsin utilities providing electric service to over two million Wisconsin residents. (Dagenais Decl., ¶¶ 13-14; Smith/Krueger Aff., ¶¶ 1, 3, 7-8) Until the Project is placed in-service, these generators could be subject to quarterly operating studies, which could limit their ability to inject their full output onto the grid. (R. 1144, at 17-21; Dagenais Aff., ¶¶ 13-14; Allen Aff., ¶¶ 10-11)

The impacts of this kind of curtailment are real and significant. MISO estimates that, for every megawatt of wind output that is limited due to these quarterly studies, system production costs increase by approximately \$100,000 per year. (R. 1144, at 20-21) This has a direct result on greenhouse gas emissions from the regional generating fleet. (*See* R. 1123, at 18-21) For every gigawatt (1,000 MWs) of wind capacity that is delayed for a 12-month period, carbon dioxide emissions would increase by somewhere between 1.5 to 3.9 million tons. (*Id.* at 20) From this perspective, timely completion of the Project is critical to mitigating transmission congestion, ensuring that Wisconsin utilities can procure cost-effective renewable resources to serve their customers, and ensuring the state can achieve its 100 percent carbon-free goal by 2050. (Allen Aff., ¶¶ 9, 12; Hanrahan Aff., ¶¶ 4-6)

If the Project is delayed as a result of an injunction, the impact of this potential curtailment would not just affect out-of-state wind generators, but also wind and solar projects being developed right here in Wisconsin. (Dagenais Aff., ¶¶ 13-15) Four proposed wind projects, totaling almost 900 MW of capacity, plan to interconnect to the transmission system through that portion of the Project located between the Hill Valley and Cardinal Substations. (*Id.* ¶¶ 15-16) If the project is

not built, these generators would have to identify an alternative point-of-interconnection, pay for additional transmission upgrades, or (if they are unable to do so) cancel development altogether.

(Id. ¶ 16)

These adverse impacts are not just limited to renewable generators interconnecting to the Project itself, but throughout southwest Wisconsin. For example, ALLETE Clean Energy, Inc. (“ACE”) is developing the 92 MW Red Barn wind project in Grant County, Wisconsin. (Oct. 15, 2021 Affidavit of Wells McGiffert (“McGiffert Aff.”), ¶ 6) Red Barn will generate enough low-cost, sustainable energy to power approximately 40,000 homes, but is conditional upon the construction of Cardinal-Hickory Creek. (*Id.* ¶¶ 7-8) A delay in Cardinal-Hickory Creek’s in-service date would impose significant additional risks upon this wind project. (*Id.* ¶¶ 8-9)

Similarly, three of Wisconsin’s largest electric utilities own the Badger Hollow solar project, a 300 MW solar project located in Grant County, Wisconsin that is conditioned on Cardinal-Hickory Creek. (Smith/Kreuger Aff., ¶¶ 7-8, 26) Those utilities invested approximately \$390 million in Badger Hollow under the assumption that the Cardinal-Hickory Creek would go into service by December 2023. (*Id.* ¶¶ 6, 9, 19) However, for at least three reasons, even a slight delay in Cardinal-Hickory Creek’s in-service date would likely impair the economics of that investment, harming those utilities, their customers, and the state as a whole. (*Id.* ¶ 20)

First, a delay in Cardinal-Hickory Creeks’ in-service date could jeopardize the utilities’ ability to use the capacity from Badger Hollow to meet their resource adequacy obligations. (*Id.* ¶ 21) If the Cardinal-Hickory Creek Project is delayed by even two months, the utilities would be unable to rely on Badger Hollow’s capacity to meet their 2024 capacity obligations, resulting in losses of \$15 to \$20 million in 2024 alone. (*Id.* ¶ 32)

Second, a delay in Cardinal-Hickory Creek's in-service date could inhibit the utilities' ability to offer energy from Badger Hollow into the market. (*Id.* ¶ 35) Given the lack of robust transmission infrastructure in southwest Wisconsin, existing transmission constraints could impair—if not fully prevent—Badger Hollow's output from reaching the market. (*Id.* ¶ 38) This would result in lost revenues that would otherwise be used to offset the utilities' cost-of-service, potentially increasing rates for customers. (*Id.* ¶ 39) It would also increase the price for energy that the utilities would need to serve their customers. (*Id.* ¶¶ 40-42) The combined effect of these losses would exceed \$1 million in just four months. (*Id.* ¶ 43)

Third, delaying the Project's in-service date could impede the utilities' efforts to support state and national climate change goals announced by Governor Evers and President Biden. (*Id.* ¶ 44) As described earlier, many utilities have engaged in long-term planning to transition from fossil fuel-based generation to cleaner, lower-cost, renewable sources of energy. But if transmission constraints in southwest Wisconsin mean they cannot rely on units like Badger Hollow to meet customer needs, they would need to consider delaying retirements of older, fossil fuel-fired units to maintain reliability. (*Id.* ¶ 48)

Red Barn and Badger Hollow are just a couple examples of how an injunction delaying the construction of or in-service date for Cardinal-Hickory Creek could adversely impact Wisconsin ratepayers, the development of renewable energy within and to the west of Wisconsin, and broader efforts to reduce carbon emissions and combat climate change. Given the amount of renewable energy conditioned on the Project, there are almost certainly dozens of other developers and utilities facing similar issues throughout the upper Midwest. One is left to wonder why the Petitioners—who profess to be conservation groups acting in the public interest—would support an outcome that would so clearly undermine the public interest.

The bottom line is that the Project is critical to transitioning Wisconsin to a cleaner, more sustainable, and more reliable energy future. An injunction halting its construction is therefore not in the public interest. The Court should deny the Motion.

IV. CONCLUSION

Petitioners inexcusably delayed bringing this Motion for years, all while substantial work and effort was undertaken to begin construction on schedule in October 2021. Petitioners are not likely to prevail on the merits of any of their claims; they waited years to file the instant Motion; they have declined to offer to put up a bond; they have failed to demonstrate irreparable harm; and they have not shown that delaying construction is in the public interest. For these reasons and those expressed above, the Co-Owners respectfully request that the Court deny the Motion.

Dated: October 15, 2021

Respectfully submitted,

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FILED
10-15-2021
CIRCUIT COURT
DANE COUNTY, WI
2019CV003418

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

AFFIDAVIT OF SHAWN MATHIS

I, Shawn Mathis, being first duly sworn, on oath, depose and say:

1. I have personal knowledge of the facts stated herein and, if called upon to do so, could and would testify competently thereto. I state that the following is true and correct to the best of my knowledge and belief.

2. I am employed by ITC Holdings Corp. as Senior Project Manager. I am the project manager primarily responsible for managing cost and schedule for the portion of the Cardinal-Hickory Creek transmission line (“Project”) in Iowa and Wisconsin to be owned co-owned by ITC Midwest LLC (“ITC Midwest”) and Dairyland Power Cooperative (“DPC”).

I. ITC MIDWEST & PROJECT BACKGROUND.

3. ITC Midwest operates nearly 6,700 circuit miles of transmission lines in Iowa, Minnesota, Illinois and Missouri. The company is headquartered in Cedar Rapids, Iowa, and maintains operating locations in Dubuque, Iowa City, and Perry, Iowa; and Albert Lea and Lakefield, Minnesota.

4. ITC Midwest is committed to improving reliability of the electric transmission system and to serve the growing needs of customers in the region. To this end, ITC Midwest has facilitated the interconnection of approximately 4,410 megawatts of new generating capacity to the grid—including approximately 3,700 megawatts of wind energy production capacity.

5. ITC Midwest will construct, own and operate the portion of the Project from the Hill Valley Substation west to the Hickory Creek substation in Iowa and share ownership with DPC. The route for this portion of the Project follows existing transmission and road rights-of-way for approximately 99 percent of its length.

6. On May 27, 2020, the Iowa Utilities Board granted ITC Midwest and DPC a franchise to construct, operate and maintain the Project in Dubuque and Clayton Counties in Iowa. This franchise affirms that the Project in Iowa represents a “reasonable relationship to an overall

plan of transmitting electricity in the public interest.” Iowa Utilities Board, Docket No. E-22386 (May 27, 2020).

7. On September 26, 2019, ITC Midwest, DPC, and American Transmission Company, LLC (“ATC”) were granted a certificate of public convenience and necessity to construct the Project from the Public Service Commission of Wisconsin.

8. ITC Midwest is responsible for all construction of the portion of the Project it will own with DPC. This includes all construction in Iowa and the portion of the Project in Wisconsin west of the Hill Valley Substation. In Iowa, this consists of what ITC Midwest has identified as Iowa Segment One and Iowa Segment Two; likewise, Wisconsin includes Wisconsin Segment One (W-1) and Wisconsin Segment Two (W-2).

9. Collectively, ITC Midwest, DPC, ATC have invested approximately \$159 million in the Project through August 31, 2021. Through that date, ITC Midwest alone has invested more than \$86 million. The total capital cost of the Project is anticipated to be approximately \$492 million.

II. PRE-CONSTRUCTION ACTIVITIES

10. In Iowa and Wisconsin, ITC Midwest completed a number of preconstruction activities, including soil borings, design, vegetation pre-planning and bidding, temporary bridge pre-planning and bidding, construction bid package preparation, threatened and endangered (“T&E”) species surveys, avian surveys, stormwater permit application, incidental take authorization from Wisconsin Department of Natural Resources (“WDNR”) for T&E species, and cultural resource surveys for the entire right-of-way and all off-right-of-way access routes.

11. ITC Midwest has also acquired all easements for the Iowa portion of the Project. For the Wisconsin portion of the Project, land acquisition is almost complete, and ITC Midwest has obtained the land rights necessary to conduct the planned work for Wisconsin this fall (2021).

III. PERMITTING CONDITIONS AFFECTING CONSTRUCTION SCHEDULE.

12. Some of the permits/approvals issued for the Project contain conditions which require certain construction activities in certain areas to occur within a specified season or timeframe; if construction does not occur within the specified season or timeframe, ITC Midwest would have to wait to undertake the activities until the following year. For example, no tree-clearing is allowed on the portion of the Project ITC Midwest is constructing from June 1-August 15 because of rare bats; similarly, the Wisconsin Oak Wilt restriction on cutting oak trees is from April 1-July 15.

13. Seasonal restrictions such as these typically are imposed to avoid or minimize environmental impacts, particularly with respect to T&E species. As such, although variances or permit modifications are available with respect to some (but not all) seasonal restrictions, they are subject to additional surveys and agency discretion, and there is no guarantee that a resource agency like WDNR or USFWS would agree to modify the seasonal restrictions.

IV. PROJECT CONSTRUCTION.

14. ITC Midwest has already commenced construction of the Project. Specifically, ITC Midwest began Project-related tree-clearing in Iowa in January 2021, and construction of the Project in Iowa commenced in mid-April 2021 with Iowa Segment One. Iowa Segment One begins at the Hickory Creek Substation in Dubuque County, Iowa, and terminates at the first pole east of Turkey River Substation in Iowa.

15. Thus far, ITC Midwest has completed pouring 46 foundations, installing 26 poles, and stringing more than two miles of wire. This fall, ITC Midwest anticipates installing 19 additional poles. ITC Midwest anticipates that there are approximately three months of work remaining on the construction of Iowa Segment One, which will be followed by restoration of the right-of-way.

16. On or after October 25, 2021, ITC Midwest plans to begin construction activities in Wisconsin on Wisconsin Segment W-1. Planned activities include the installation of mats followed by vegetation removal. The mats must be installed before the ground freezes (likely in late November), and the matting contractor will need approximately one month to install the mats to stay ahead of the vegetation contractors. This will allow the vegetation contractors to begin work such that they can be completed before seasonal tree-clearing restrictions begin on April 1, 2022.

V. IMPACTS OF DELAY.

17. If ITC Midwest's work on the Project is halted due to a preliminary injunction, the delay would lead to significant harms for ITC Midwest and the public interest. In this declaration, I focus on harm to ITC Midwest. Harm to the public interest is described by ATC witness Mr. Dagenais and other witnesses.

18. For example, any delay in laying mats on Wisconsin Segment W-1 will, in turn, delay vegetation removal. If vegetation removal is not completed before seasonal tree-clearing restrictions begin on April 1, 2022, other construction activities will also be delayed because ITC Midwest will not be able to access structure locations, dig foundations, set structures, string wire, and the like. This will lead to construction inefficiencies, potential remobilization charges, and a real potential for workforce shortages.

19. Overall, because of seasonal construction requirements, an injunction would have implications beyond day-for-day delays; halting construction for several months could have the effect of delaying construction for an entire year.

20. Based on my analysis of the interconnected and dependent construction activities, any delay in construction that lasts more than six months would jeopardize the December 2023 in-service date for the Project.

21. Trying to mitigate schedule delays would increase overall construction costs for the Project. This also assumes ITC Midwest is able to secure additional crews. If work is stalled due to inability to access locations then the work would have to be “made-up” by simultaneously constructing on Wisconsin Segments W-1 and W-2, resulting in substantial cost increases by doubling crew sizes to construct both segments at once, which would include increasing work hours, working in multiple shifts, overtime and paying a labor premium for out of state workers.

22. Delays would bring added costs due to inflation and payment for storing the steel for the transmission structures to be used in Wisconsin that is contractually set to be delivered in February 2022. There would also be additional costs associated with allowance for funds used during construction (“AFUDC”), which represents the cost of financing regulated construction projects. Further, any delay increases the risk for cost increases related to the Project.

23. Based on my experience generally and this Project specifically, and taking the above factors into account, I anticipate that a six-month delay, for example, would increase the costs of construction labor by at least 30 percent for ITC Midwest’s portion of the Project in Wisconsin alone. Conservatively, this would equate to an approximate increase of at least \$5.5 million. Similarly, accelerating matting crews in Wisconsin to make up for a lost construction season is estimated to increase those costs by an additional 20 percent, or roughly \$1 million. Likewise, if tree-clearing were delayed for a construction season, activities in the following season would also need to be accelerated, resulting in an approximate 20 percent increase in the cost of the accelerated work.

24. In total, I estimate that a six-month delay would add approximately \$7 million to the overall Project costs for ITC Midwest alone. There are likely additional costs and inefficiencies associated with a six-month delay – such as the inability to obtain crews and other inefficiencies

– that are unknown at this time, so I would characterize this increase as a conservative estimate based on what we know today

25. A longer delay would result in materially higher Project construction costs and risk that the Project would not be in-service by December 2023.

Dated October 15, 2021

By: Shawn Mathis 

Shawn Mathis

Subscribed and sworn before me
This 15th day of October, 2021
Notary Public – State of Minnesota
County of Anoka

Breann Lee Jurek 

Notary Public
My Commission expires January 31, 2022

Online Notary Public. This notarial act involved the use of
online audio/video communication technology.

Notary Seal

FILED
10-15-2021
CIRCUIT COURT
DANE COUNTY, WI
2019CV003418

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

COUNTY OF DANE et al.,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN et al.,

Respondents.

Case No. 2019 CV 3418

**AFFIDAVIT OF SARAH JUSTUS IN SUPORT OF OPPOSITION TO
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**

I, Sarah Justus, declare as follows:

1. I have personal knowledge of the facts and information stated herein and, if called as a witness, I could and would testify competently thereto.

2. I am employed by ATC Management, Inc., the corporate manager of American Transmission Company LLC (collectively, "ATC"). My job title is Director of Construction and my business address is W234 N2000 Ridgeview Parkway Court Waukesha, WI 53188.

3. I have been employed by ATC in various roles for approximately 17 years. Prior to joining ATC, my educational and professional experience was in the public policy field. I hold a Bachelor's Degree in Public Administration and Policy Analysis from the University of Wisconsin – Stevens Point and a Master's Degree in public policy from the University of Wisconsin – Madison.

4. My responsibilities at ATC include overseeing the execution of the ATC's capital program, including Engineering and Project Management.

5. With respect to the Cardinal-Hickory Creek 345-kilovolt (“kV”) Transmission Line Project (“Project”), I am responsible for overseeing the engineering and project management functions, budget and expenditures, internal controls, and overall project execution.

6. ATC was founded in 2001 as the first multi-state, transmission-only utility in the United States. ATC provides electric transmission service over approximately 10,000 miles of high-voltage transmission lines and 582 substations, in an area from the Upper Peninsula of Michigan, throughout eastern Wisconsin, and into portions of Illinois.

7. ATC, ITC Midwest LLC (“ITC”), and Dairyland Power Cooperative (“Dairyland”) (collectively, “the Co-owners”) will construct and own the Project, which is a new, approximately 102-mile long transmission line that will run from Dubuque County, Iowa across the Mississippi River to a new, intermediate Hill Valley Substation to be located near Montfort, Wisconsin, to the Cardinal Substation in Middleton, Wisconsin.

8. ATC will own 45.5 percent of the Project, ITC will own 45.5 percent of the Project, and Dairyland will own the remaining nine (9) percent. ATC’s ownership interest in the Project is in the Hill Valley Substation, the Cardinal Substation, and the 345-kV transmission line and associated facilities between the Hill Valley and Cardinal Substations.

9. The approximately 34-mile segment of the Project from the Mississippi River to the Hill Valley Substation shares approximately 99 percent of its length and 34 percent of its area (211 acres) with existing transmission rights-of-way (“ROW”). The approximately 53-mile segment of the Project from the Hill Valley Substation to the Cardinal Substation shares approximately 93 percent of its length and 47 percent of its area (452 acres) with existing transmission line, road, or railroad ROW.

10. On September 26, 2019, the Public Service Commission of Wisconsin (“Commission”) granted the Co-owners a Certificate of Public Convenience and Necessity (“CPCN”) to construct the Project.

11. ATC is the construction manager for the eastern portion of the Project from the Hill Valley Substation to the Cardinal Substation in Dane County, Wisconsin. ATC will share ownership of this portion of the transmission line with Dairyland. ATC is responsible for acquiring land rights, including transmission line easements, and constructing the portion of the Project that it will own.

12. ITC Midwest is serving as the construction manager for the western portion of the Project, spanning from the Hickory Creek Substation in Dubuque County, Iowa to the Hill Valley Substation near Montfort, Wisconsin. ITC Midwest and Dairyland will jointly own this portion of the Project and ITC Midwest is responsible for Project construction and easement acquisition in these areas.

13. As of the end of August 2021, the Co-owners have collectively spent approximately \$159 million on the Project.

14. I understand that the Plaintiffs in this matter have filed a motion for a preliminary injunction, requesting that the Court enjoin construction of the Project before construction of the Project begins in Wisconsin.

15. Building a large energy infrastructure such as the Project, which is regulated by multiple agencies at the state and federal level, is a costly, time-consuming, and logistically complex endeavor. Significant lead-time is required to conduct pre-construction field work, to arrange for outages of the existing transmission or distribution lines that will be relocated and or re-built as part of the Project, and to procure the equipment and labor needed for

construction. These challenges are amplified by the ongoing COVID-19 pandemic, which has created significant disruptions in regional and global supply chains and labor markets.

16. In Wisconsin, ATC has conducted a variety of activities to prepare for the construction of the Project, including pre-construction field-surveys, such as land surveys of property boundaries, topographic features, and above-ground structures; staking of proposed transmission structure locations; geotechnical investigations and soil sampling; wetland delineations; and surveys for cultural resources and rare or special status species. ATC has also entered into contracts with suppliers for key equipment, such as steel poles, conductors, and insulators, and has contracts for labor needed to start construction on the Project this fall.

17. ATC's construction of the Project in Wisconsin is scheduled to start on November 1, 2021, and the Project is currently scheduled to be placed in-service by December 2023. Generally speaking, construction will proceed according to the following sequence at any given location:

- a. Installation of erosion control measures and best management practices ("BMPs") prior to ground disturbance at that portion of the Project on which construction is commencing. This would include installation of timber, composite, or hybrid timber matting as a protective measure to minimize ground impacts from construction. Since the line will be constructed in segments, mats may be moved and used in other segments as construction progresses;
- b. Vegetation clearing within the transmission ROW at or slightly above the ground surface;
- c. In areas of steep topography, grading for access routes or work platforms to

facilitate construction access;

- d. In addition to storing materials and equipment at central laydown yards, temporary staging areas will be established for temporary storage of structures and hardware along the ROW before they are installed;
- e. Excavation and installation of foundations for the transmission structures;
- f. Setting of transmission structures within the foundations and, once enough structures have been set consecutively in a row to support a wire pull, the conductor and static wires will be pulled onto the structure and clipped in place;
- g. Where the Project will be replacing or overbuilt on existing transmission or distribution structures, the existing structures and wire will be removed and replaced;
- h. After construction is completed, site cleanup and restoration will occur and any necessary seedbed preparation and seeding will be performed along with other BMPs to ensure restoration of vegetation along the ROW;

18. The construction sequence for the Project is complicated by the fact that approximately 64 miles of existing transmission lines and approximately 14 miles of existing distribution lines along the Project route will need to be taken out-of-service, removed and relocated, rebuilt, and/or double-circuited with (i.e., strung on the same structures as) the Project.

19. Several of these transmission lines are currently the backbone of the transmission system in southwest Wisconsin, which make them difficult to take out-of-service for construction activities while maintaining reliability. Conditions on the system may create outage constraints that limit ATC's ability to take these lines out of-service-during certain

times of the year as part of the construction process.

20. The construction sequence for the Project is also complicated by the fact that regulations and approvals restrict the time at which or duration for which certain construction activities can occur. For example, to prevent the spread of oak wilt, there are limitations on harvesting oak trees between April 1 and July 15. Tree-clearing is prohibited between June 1 and July 31 to protect the federally endangered northern long-eared bat.

21. Similarly, permits or approvals issued for the Project may limit or restrict construction work in certain areas from being conducted in certain seasons, primarily to protect species that are protected under state and federal law. For example, in areas of suitable habitat for a certain state listed species, WDNR recommends limiting work from July to September, and the CPCN the Commission issued requires ATC to comply with WDNR's recommendations where feasible.

22. ATC intends to commence vegetation clearing along the Project route between November 2021 and March 2022, with initial foundation installation for transmission structures scheduled to commence in approximately February 2022. This work will begin on the eastern end of the Project at the Cardinal Substation in Dane County on November 1, 2021 and move west over the following weeks and months. ATC's objective is to have this work completed prior to April 1, 2022, when seasonal tree-clearing restrictions will apply.

23. Although the length of the temporary injunction that the Plaintiffs are proposing is unclear, any injunction that halts construction of the Project will adversely impact ATC's ability to maintain the current construction schedule described above. For example, if ATC is unable to commence with installation of matting and vegetation clearing on November 1, this could delay its ability to proceed with subsequent phases of work (foundation installation,

structure setting, etc.). In addition, if activities currently planned in the fall were moved to the Spring, weather conditions increase the likelihood that additional matting will be required to protect the ground in the construction area, which will significantly increase costs.

24. If an injunction issues, ATC could need to de-mobilize construction crews that have already mobilized to start construction this fall, and then re-mobilize those crews if and when the injunction is lifted and construction can re-start.

25. Moreover, to maintain the Project's currently scheduled December 2023 in-service date, ATC would need to add additional construction crews, increase work hours, and modify carefully sequenced construction work on multiple segments of the Project once the injunction is lifted, which will adversely impact the efficiency of the construction work. Depending on labor market conditions, ATC may need to pay a premium for the additional labor need to timely complete Project construction. There is also the added risk that, while the injunction is in effect, inflation, labor shortages, or other macroeconomic factors could materially increase construction costs.

26. An injunction could also disrupt the Project construction schedule by disrupting ATC's ability to coordinate outages on existing transmission or distribution lines that ATC plans to take out-of-service, remove, and relocate, rebuild, and/or double-circuit with the Project. Depending on the length and timing of the injunction, conditions on the system may preclude ATC from taking these existing lines out-of-service in accordance with the current construction schedule, which would cause further delays.

27. Taking into account all of these factors, ATC estimates that an injunction lasting approximately six months (from November 1, 2021 to May 1, 2022) would increase the cost of constructing its portion of the Project by approximately \$23 million. The increase

reflects costs due to idling crew costs during the injunction; extra construction, environmental staff, and matting costs when construction resumes, so that construction can occur in more locations simultaneously; lengthening laydown yard leases; extra leases for equipment storage; and costs to re-coordinate outages on existing transmission or distribution lines that will be removed and relocated, rebuilt, and/or doubled circuited as part of construction.

28. If an injunction were to last longer than six months, there is a much higher probability that the in-service date for the Project would be delayed beyond December 2023. This would result in adverse economic impacts to ATC’s transmission customers and Wisconsin electric ratepayers, the reliability of the electric grid, and the thousands of megawatts of renewable generation in the upper Midwest that is conditioned on the Project, as described in the declarations that other witnesses have submitted in response to the Plaintiffs’ request for an injunction.

Dated this 14 th day of October, 2021.

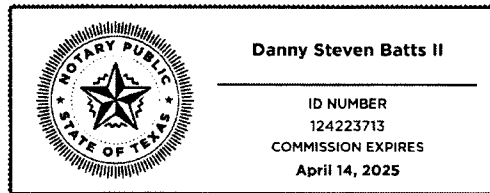
Sarah Justus

Sarah Justus

Subscribed and sworn to before me
On this 14 th day of October, 2021.

Danny Steven Batts II

Danny Steven Batts II, Notary Public
State of ~~Wisconsin~~ Texas *DSB II*
County of Guadalupe
My Commission expires: 04/14/2025



(JURAT) State of Texas; County of Guadalupe; ss.
Danny Steven Batts II, Notary Public, State of Texas
Commission ID: 124223713 Commission Exp.: 04/14/2025
Notarized online using audio-video communication

filed written direct testimony that I filed in support of this Project in the proceedings before the Commission. (*See* R. 1033, at 1-4).

5. My pre-filed written and live testimony provides background on the planning analysis that the Co-owners conducted in support of the Project and a description of the Project's benefits. I submit this affidavit to update some of the information in my pre-filed written testimony that is relevant to the Court's consideration of the Driftless Area Land Conservancy and Wisconsin Wildlife Federation's ("Petitioners") emergency motion for a temporary injunction in this case, (*see* Dkt. 1082-1083), and the harm to the public interest that would result if the Court issued such an injunction.

6. Table 1 in my rebuttal testimony, (*see* R. 1127, at 13), includes a table comparing the amount of renewable energy capacity that the Midcontinent Independent System Operator, Inc. ("MISO") assumed would be added in the upper Midwest by 2021 when it approved the Multi-Value Project ("MVP") portfolio in 2011 to the amount of renewable capacity that has actually been installed since 2011.

7. That information was true and correct at the time it was prepared and submitted to the Commission in 2019, but in the intervening two years, additional renewable energy capacity has been installed in the upper Midwest, as shown in the updated table below.

Table 1: Comparison of Upper Midwest Renewable Capacity Assumed in MISO in 2011 MVP Analysis Versus Actual Capacity Installed/Proposed Within MISO

State	Renewables Capacity (MW)			
	Renewable additions assumed by 2021 (from 2011 MVP analysis)	Renewables actually placed in-service since 1/1/2011	Renewables currently under construction	Active renewable requests in the MISO Queue
IA	1,223	7,117	550	9,266
MN	250	2,403	195	8,513
ND	422	1,099	-	3,430
SD	892	950	300	1,925
WI	491	351	1,593	13,256
Total	3,278	11,919	2,638	36,390

1. As shown in the MISO Queue on 9/30/2021 (https://www.misoenergy.org/planning/generator-interconnection/GI_Queue/gi-interactive-queue/).
2. Active Requests have Status = Active or Done and Post GIA Status = Not Started.
3. The capacity of a generator is typically measured in megawatts (“MW”), which is equal to 1,000 kilowatts (“kW”). Renewable resources such as wind and solar produce energy intermittently, with output varying based on weather conditions. Therefore, one megawatt of generating capacity from a renewable generator does not mean that generator is capable of producing that amount of energy at all times. Rather, to determine the generator’s overall energy output, one must consider how often the generator runs over a given period of time—a metric referred to as “capacity factor.” Based on data from the U.S. Department of Energy, wind generators located in the states identified in Table 1 have average capacity factors of 27 percent (in Wisconsin) to 42 percent (in North Dakota) over the course of a year. The U.S. Energy Information Administration reported that, in 2020, the average annual electric consumption for an American residential utility customer was 10,715 kilowatt-hours (“kWh”). Therefore, assuming a 35 percent capacity factor, one (1) MW of wind capacity produces enough energy to power approximately 286 homes annually.

8. As I explained in the proceedings before the Commission, one of the primary reasons MISO included the Project in the MVP portfolio was to enable the cost-effective import of low-cost, sustainable renewable energy from areas west of Wisconsin into the state, ultimately reducing energy costs and greenhouse gas emissions.

9. The updated data in Table 1 shows that, in the upper Midwest, the amount of renewable capacity placed in-service or currently under construction is more than *four times* what MISO initially assumed when it first approved the MVP portfolio in 2011. This additional renewable development is unsurprising, given that the upper Midwest has some of the best, low-cost wind resources in the entire country. The fact that renewable development in the upper Midwest has outpaced MISO’s initial projections by *a factor of four* demonstrates that the Project

is needed now more than ever.

10. Appendix D-4 to the Co-owners CPCN Application, (R. 469, at 24-27), includes a list of existing or proposed generating units (most of which are renewable) whose interconnection is conditioned on the construction of the Project. The information in that appendix was true and correct as of the time it was submitted to the Commission in June 2019. However, in the intervening two years, additional renewable projects, both within and to the west of Wisconsin, have been conditioned on the construction of the Project, as shown in the table below.

Table 2: Generators Explicitly Conditioned on Construction of the Cardinal-Hickory Creek Project

Interconnection Study Phase	Renewables		All Fuel Types	
	# Requests	MW	# Requests	MW
With Signed GIA	42	7,566	45	7,909
In Phase 3	29	4,114	31	4,125
In Phase 2	37	5,770	38	5,865
Total	108	17,450	114	17,898

1. Renewables include Fuel Type = Wind, Solar, Battery Storage, Hybrid, and Hydro

11. As shown in Table 2, approximately 7,500 MW of renewable generation have completed the interconnection process and have signed generator interconnection agreements (“GIAs”) that condition the output from those generators on the construction of the Project. This represents an approximately 50 percent (or more than 2,000 MW) increase over the last two years. (*Compare* Table 2, above, to Table D-4-1 in Appendix D-4 of the CPCN Application).

12. Another approximately 9,800 MW of renewable generators are in advanced stages of the interconnection process and are conditioned on the construction of the Project. This represents a more than 200 percent (or more than 6,500 MW) increase over the last two years. (*Compare* Table 2, above, to Table D-4-2 in Appendix D-4 of the CPCN Application)

13. Thirteen of these conditional renewable projects, totaling approximately 1,489 MW

of generating capacity, are wind or solar resources located in Wisconsin.¹ My understanding is that five of these projects (totaling approximately 748 MW of renewable generating capacity) are or will be owned by, or are providing power under contract to, utilities providing wholesale and/or retail electric service in Wisconsin:

- a. Wisconsin Power and Light Company owns the 200 MW Grant County solar project and the 50 MW Bear Creek solar project (located in Richland County, Wisconsin), both of which are conditional on the Project.²
- b. Wisconsin Public Service Corporation (“WPSC”), Wisconsin Electric Power Company (“WEPCO”), and Madison Gas and Electric Company (“MGE”) own the 300 MW Badger Hollow solar project (located in Iowa County, Wisconsin), which is conditional on the Project.³
- c. WPSC and MGE have sought approval from the Commission to purchase the 100 MW Red Barn wind project (located in Grant County, Wisconsin), which is conditional on the Project.
- d. Dairyland Power Cooperative has a power purchase agreement in place to purchase the entire output of the 98 MW Quilt Block Wind Farm (located in Lafayette County, Wisconsin), which is conditional on the Project.

14. Until the Project is placed into service, the renewable generators that are conditioned on the Project could have their output curtailed by MISO. The longer the Project is not placed in-

¹ Of that 1,489 MW, six projects (totaling 748 MW) have signed GIAs, with another seven projects (totaling 741 MW) in Phase 2 or 3 of the DPP study process.

² Wisconsin Power and Light Company provides retail electric service to approximately 480,000 electric customers in central and southwestern Wisconsin.

³ Wisconsin Electric Power Company provides retail electric service to approximately 1.1 million customers in eastern Wisconsin (including the Milwaukee metropolitan area) and the upper Peninsula of Michigan. Wisconsin Public Service Corporation provides retail electric service to approximately 450,000 customers in northeast and central Wisconsin. Madison Gas and Electric Company provides retail electric service to approximately 157,000 customers in Dane County, Wisconsin.

service, the longer these units are at risk of being subject to quarterly operating limit studies from MISO, which could limit them from providing their full output to the transmission grid. This means that there would be less zero-emission renewable energy available for the consuming public in Wisconsin.

15. There are also five proposed renewable generators in southwest Wisconsin that will interconnect directly to that portion of the Project running between the proposed Hill Valley substation (the Project's midpoint substation located near Montfort, Wisconsin) and the Cardinal substation (in Middleton, Wisconsin), as shown in Table 3: **Proposed Generators Interconnecting Directly.**

Table 3: Proposed Generators Interconnecting Directly to Cardinal-Hickory Creek Project in SW Wisconsin

MISO Queue #	Proposed In-Service Date	DPP Study Phase	Size (MW)	Fuel Type
J1483	10/30/2023	Phase 2	99	Wind
J1773	04/15/2024	Phase 2	300	Wind
J1781	04/15/2024	Phase 2	300	Wind
J1928	10/01/2025	Not started	100	Battery
J1931	10/01/2025	Not started	190	Wind

16. If the Project is not built, these generators would have to identify an alternative point-of-interconnection to the transmission system and would likely need to pay for additional transmission system upgrades needed to facilitate their interconnection onto the grid. If they are unable to identify an alternative point-of-interconnection or fund the upgrades that would be necessary for their interconnection, these projects could be cancelled altogether, further depriving the consuming public in Wisconsin of low cost, zero-emission renewable energy.

Dated this 14 th day of October, 2021.

Thomas J Dagenais
Tom Dagenais Thomas J Dagenais

Subscribed and sworn to before me
On this ___ th day of October, 2021.

See Attached

_____, Notary Public
State of _____
County of _____
My Commission expires _____

JURAT

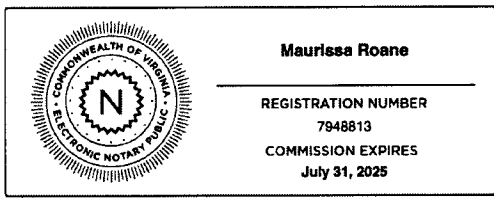
State/Commonwealth of VIRGINIA)
)
 City County of Chesterfield)

On 10/14/2021, before me, Maurissa Roane,
Date Notary Name

the foregoing instrument was subscribed and sworn (or affirmed) before me by:

Thomas J Dagenais
Name of Affiant(s)

- Personally known to me -- OR --
- Proved to me on the basis of the oath of _____ -- OR --
Name of Credible Witness
- Proved to me on the basis of satisfactory evidence: driver_license
Type of ID Presented



WITNESS my hand and official seal.
 Notary Public Signature: Maurissa Roane
 Notary Name: Maurissa Roane
 Notary Commission Number: 7948813
 Notary Commission Expires: 07/31/2025
Notarized online using audio-video communication

DESCRIPTION OF ATTACHED DOCUMENT

Title or Type of Document: Affidavit of Tom Dagenais Support of Opposition to Emergency Motion for Preliminary Injunction
 Document Date: 10/14/2021
 Number of Pages (including notarial certificate): 8

FILED
10-15-2021
CIRCUIT COURT
DANE COUNTY, WI
2019CV003418

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

COUNTY OF DANE et al.,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN et al.,

Respondents.

Case No. 2019 CV 3418

**AFFIDAVIT OF HEATHER ALLEN IN SUPORT OF OPPOSITION TO
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**

I, Heather Allen, declare as follows:

1. I have personal knowledge of the facts and information stated herein and, if called as a witness, I could and would testify competently thereto.

2. I am the Executive Director at RENEW Wisconsin, Inc. ("RENEW"), a 501(c)(3) nonprofit organization organized in 1991 and headquartered in Madison, Wisconsin. RENEW promotes renewable energy in Wisconsin by advocating for policies, programs, and projects that expand the deployment of various forms of renewable energy, including solar, wind, biogas, local hydropower, geothermal energy, as well as, new technologies that support renewable energy deployment including, energy storage and electric vehicles.

3. In my role as Executive Director for RENEW, I am responsible for execution of our mission to accelerate the transformation to renewable energy in Wisconsin.

4. RENEW's membership is composed of individuals and families, businesses, and renewable energy project developers, large and small. Several of RENEW's members own,

operate, and/or are developing large-scale wind and solar projects in Wisconsin and elsewhere in the Midwest.

5. In August 2019, Wisconsin's Governor Evers signed Executive Order #38 relating to clean energy in Wisconsin. Executive Order #38 established a goal of "ensuring all electricity consumed within the state of Wisconsin is 100% carbon-free by 2050." One of the many reasons for Executive Order #38 was "to act to prevent continuing damage to our climate and to invest in solutions that help to mitigate the changes that have already occurred."

6. All major Wisconsin electric providers also have publicly committed to becoming carbon-free, or net-carbon neutral, by 2050.

7. The Wisconsin Renewable Portfolio Standard (RPS), last modified in 2006, set a statewide goal of 10% of Wisconsin's electricity usage to come from renewable resources by 2015, with individual electric provide compliance requirements as well. The 10% statewide goal was met early, and all of Wisconsin's electric providers continue to comply with their RPS requirements. The RPS can be viewed as a "down payment" enabling these electric providers to begin transitioning to 100% carbon-free resources by 2050.

8. RPS compliance has mostly been achieved by the development of transmission-interconnected wind projects, both in Wisconsin and in neighboring states. In order to serve the needs of electricity consumers in Wisconsin, these wind projects required interstate transmission to deliver their output from generator to load.

9. RENEW believes that achievement of Wisconsin's carbon-free goals by 2050 will require Wisconsin electric providers to make substantial and diverse investments in new renewable generation sources across the Midwest. More so than any other statewide organization, RENEW advocates for and advances the development of renewable generation

in Wisconsin. However, to achieve their ambitious carbon-free goals by 2050, Wisconsin providers must make use of all renewable resource options. These options must include investments in renewable projects interconnecting at both the distribution and transmission level in Wisconsin, as well as renewable projects built in neighboring states such as Iowa and Minnesota.

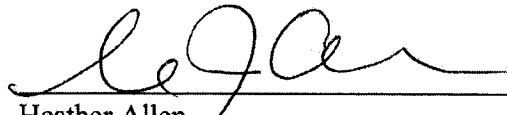
10. The interconnection of many of these renewable projects to the high-voltage transmission system in and to the west of Wisconsin is conditioned on, or economically reliant upon, the Cardinal-Hickory Creek 345-kilovolt transmission line project (“Project”) being constructed and placed in-service by its currently scheduled in-service date of December 2023.

11. If Project construction is delayed, some of RENEW’s members would suffer substantial harm because the projects that they are currently operating or developing may be unable to deliver their full energy output to the grid. Specifically, until the Project is placed in-service, those projects that are conditional on the Project could be subject to quarterly operating studies from the Midcontinent Independent System Operator, Inc. (“MISO”), which could ultimately curtail or limit the amount of energy they can produce and sell onto the grid. Moreover, grid congestion that could be alleviated by the Project may cause renewable projects in the region to receive lower market prices for production, undermining the economic viability of current and future renewable projects.

12. Finally, RENEW believes that the Project is necessary to support a robust transmission network that will facilitate renewable energy solutions for achieving Wisconsin’s 100% carbon-free goal by 2050. If construction of the Project is delayed, Wisconsin’s carbon-free goals will be jeopardized by the removal of vital climate change solutions, such as the Project and the renewable generation projects conditioned on, or economically reliant upon,

the Project. Therefore, RENEW believes it is in the public interest that the Project is constructed and placed in-service by its currently scheduled in-service date of December 2023.

Dated this 13th day of October, 2021.



Heather Allen

Subscribed and sworn to before me
On this 13th day of October, 2021.



DAVID ZOPPO, Notary Public
State of Wisconsin

County of Dane is
My Commission expires PERMANENT



FILED
10-15-2021
CIRCUIT COURT
DANE COUNTY, WI
2019CV003418

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

COUNTY OF DANE et al.,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN et al.,

Respondents.

Case No. 2019 CV 3418

**AFFIDAVIT OF THOMAS HANRAHAN IN SUPPORT OF OPPOSITION
TO EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**

Thomas S. Hanrahan, being first duly sworn on oath, states and affirms as follows:

1. I am General Counsel of WPPI Energy (“WPPI”), a Wisconsin municipal electric company organized pursuant to Section 66.0825 of the Wisconsin Statutes.

2. WPPI is a not-for-profit wholesale electric supplier to 51 community-owned electric utilities, including 41 municipally-owned electric utilities in Wisconsin (“Members”). Each Member owns and operates its own electric distribution system, used to deliver electricity supplied by WPPI to its local customers. WPPI Members’ loads are located primarily in the footprint of the American Transmission Company, LLC (“ATC LLC”) system¹, with additional load in the Xcel Energy and ITC Midwest systems, which are located in western Wisconsin, Minnesota, and Iowa. These systems comprise a portion of the integrated power grid operated by the Midcontinent Independent System Operator (“MISO”).

¹ WPPI is a minority owner of ATC LLC, and has minority ownership interests in portions of two transmission lines located within the State of Wisconsin.

3. As the wholesale provider to its Members, WPPI owns certain generating resources and purchases the electric output of others pursuant to power purchase agreements. A number of these resources are located in adjacent states, including Minnesota, Iowa and Illinois, and all are interconnected to, or have the right to transmit electricity over, the MISO transmission system. WPPI relies on the MISO to deliver the output of its resources to its Members, and ultimately their customers.

4. Increasingly, utilities' generation portfolios are changing. Fleets are shifting from resources located close to customer loads toward resources, particularly renewables, which frequently are located far from load centers. WPPI recognizes the importance of a robust transmission system in economically and reliably delivering generation resources to customer load.

5. WPPI believes timely completion of Cardinal-Hickory Creek 345-kilovolt transmission line project ("Project") will play a key role in ensuring continued reliable and safe delivery of current and future generation resources to Wisconsin utilities and their customers. It will help provide geographical flexibility to utilities in procuring cost-effective future renewable resources. The Project is also expected to aid in mitigation of transmission congestion, which not only can impair the viability of future remotely-sited generation projects, but also impedes the economic delivery of existing remote resources to Wisconsin loads.

6. WPPI supports timely completion of the Project by its currently scheduled in-service date of December 2023, and is concerned that the adverse impacts of an injunction halting construction will negatively impact Wisconsin consumers. WPPI therefore opposes the pending motion for an injunction in this proceeding.

Dated this 15th day of October, 2021.

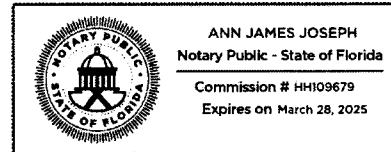
Thomas Hanrahan

Thomas S. Hanrahan

Subscribed and sworn to before me
On this 15th day of October, 2021 by Thomas Hanrahan

Ann James Joseph

Ann James Joseph _____, Notary Public
County of Miami Dade
State of Florida
My Commission expires: 03/28/2025



Type of ID Produced: WI Drivers License

Notarized online using audio-video communication

including in Wisconsin. We also engage in the development of wind energy facilities for sale to others upon completion.

5. I am the Business Development Vice President. I am responsible for leading project development initiatives and supporting project acquisitions, including project valuation, due diligence, contract negotiations, and operations integration.

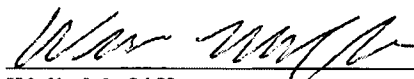
6. ACE is planning to build a utility-scale wind electric generating facility in southwest Wisconsin, which will be known as the Red Barn Wind Farm ("Red Barn"). This project will include 28 turbines in Grant County and will have a nameplate capacity of 92 megawatts.

7. If constructed, Red Barn will generate enough low-cost, sustainable energy to power approximately 40,000 homes in southwest Wisconsin.

8. Red Barn is contingent upon construction of the Cardinal-Hickory Creek transmission line. If Cardinal-Hickory Creek Project is not constructed, ACE may not proceed with developing this project because production from Red Barn will be subject to potential curtailment and potential reduced value of capacity, imposing significant additional risks upon the project.

9. If construction of the Cardinal-Hickory Creek project is delayed for several months or more due to an injunction, the delay would impose significant additional risks upon the Red Barn project.

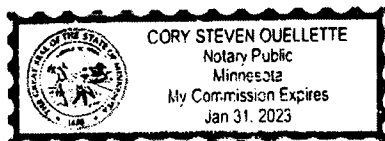
Dated this 16th day of October, 2021.


Wells McGiffert

Subscribed and sworn to before me
On this 15th day of October, 2021.



Cory Steven Ouellette, Notary Public
State of MN
County of St. Louis
My Commission expires 1/31/23



3. WPSC and WEPCO are both Wisconsin public utilities. WPSC provides electric service to 453,000 customers in north central and northeastern Wisconsin. WEPCO provides electric service to 1,149,000 customers in southeastern Wisconsin.
4. We make this affidavit based on personal knowledge and information.
5. As part of their efforts to build a cleaner energy future for Wisconsin, MGE, WPSC, and WEPCO have received approval from the Public Service Commission of Wisconsin (Commission) to build utility-scale renewable energy projects in Wisconsin.
6. These projects were planned and approved, and some are in various stages of construction, based on the assumption that the Cardinal-Hickory Creek (CHC) transmission line would be placed into service no later than December 31, 2023.
7. Between our three utilities alone, there are 392 megawatts (MW) of renewable electric generating capacity that are contingent on the approved CHC transmission line and could see their output constrained if the line is delayed.
8. One specific example of these projects is the Badger Hollow Solar Project, a 300-MW solar energy generating facility located near the villages of Montfort and Cobb in western Iowa County, Wisconsin.
9. This project is one of Wisconsin's first utility-scale solar projects, and when completed will provide the benefits of zero-emission solar electric energy to all 1.8 million electric customers of MGE, WPSC and WEPCO.

10. The Commission approved the construction of the Badger Hollow Solar Project in April of 2019, in Docket 9697-CE-100.
11. The Badger Hollow Solar Project will be completed and placed into service in two phases, each corresponding to 150 MW of the project's total capacity.
12. The first phase of the project (Badger Hollow I) is scheduled to be completed and placed into service by the end of 2021.
13. The second phase of the project (Badger Hollow II) is scheduled to be completed and placed into service by the end of 2023.
14. The Commission separately approved acquisition of the project by MGE, WPSC, and WEPCO in two decisions, corresponding to the two phases of the project.
15. In April of 2019, in Docket 5-BS-228, the Commission authorized MGE to acquire 50 MW of the project's capacity, and authorized WPSC to acquire 100 MW of the project's capacity.
16. Then, in March of 2020, in Docket 5-BS-234, the Commission authorized MGE to acquire an additional 50 MW of the project's capacity, and authorized WEPCO to acquire the remaining 100 MW of the project's capacity.
17. As a result of the acquisitions approved by the Commission, MGE, WPSC, and WEPCO will each own 100 MW of the project's electric generating capacity.
18. Between Badger Hollow I and Badger Hollow II, the three utilities' combined investment in the Badger Hollow Solar Project is approximately **\$390 million**.
19. In committing to this investment in clean, renewable energy for Wisconsin, MGE, WPSC, and WEPCO relied upon ATC's construction schedule, which has been

publicly available for several years, and assumed that the CHC transmission line would be completed and placed into service no later than December 31, 2023.

20. For multiple reasons, even a slight delay in the in-service date of the CHC transmission line likely would impair the economic benefits to customers from our three utilities' \$390 million investment in Badger Hollow.
21. First, any delay in the transmission line's in-service date could jeopardize our ability to use Badger Hollow's capacity (ability to produce energy) to meet the total capacity we are obligated to maintain to serve customers.
22. The Mid-Continent Independent System Operator (MISO) requires public utilities to maintain adequate capacity to serve anticipated customer demand, plus a planning reserve margin.
23. Importantly, only capacity *accredited* by MISO can be used to offset a utility's capacity obligations.
24. Capacity accreditation is determined by MISO and will be reduced (set at less than 100%) to reflect transmission or other limitations identified in system studies.
25. Here, without the CHC transmission line, there is a real potential that Badger Hollow's capacity accreditation would be reduced, particularly after Badger Hollow II is placed into service.
26. This is because the Generator Interconnection Agreements for the Badger Hollow facility, like many other pending renewable energy projects, are expressly contingent upon the CHC line being in service on schedule.

27. Until that occurs, the facility is not guaranteed interconnection to transmission, and the facility may be limited in the amount of capacity it will be able to offer into the market.
28. Focusing on 2024 - when both Badger Hollow II and the CHC transmission line are scheduled to be completed and placed in service - even a modest reduction in Badger Hollow's accredited capacity likely would result in significant losses of accredited capacity value for the utilities and increased future costs for their customers.
29. Specifically, assuming that the Planning Resource Auction for 2024 clears at the Cost of New Entry (CONE), meaning the cost to buy capacity is equal to the cost to build capacity, we estimate that every ten percent reduction in Badger Hollow's total accredited capacity would result in approximately \$1.5-\$2.0 million in lost capacity value for MGE, WPSC, and WEPCO and their customers.
30. Compounding the problem, MISO requires utilities to confirm their generating resources by March 1 of each year to have those resources counted towards their capacity obligations or offered into the annual Planning Resource Auction.
31. The Planning Resource Auction is held only once each year, in April. After all entities submit their demand obligations and all accredited capacity is offered or self-scheduled in the auction, the auction "clears" at a certain price, which is then paid *by* entities that purchase capacity in the auction *to* entities that sell capacity in the auction.

32. As a practical matter, this means that if construction of the CHC transmission line is delayed by **even two months**, this would leave Badger Hollow's owners unable to rely on its capacity in time for the 2024 Planning Resource Auction. Whether in the form of lost capacity auction revenues or an obligation to purchase a corresponding amount of capacity in the auction, we estimate that a 100% capacity accreditation loss for Badger Hollow would result in **lost capacity value of \$15-\$20 million for Planning Year 2024 alone**.
33. The Planning Resource Auction is binding, and all results are binding for the entire Planning Year; there is no opportunity to cure any loss from a reduction in capacity accreditation later in the year.
34. If the transmission line is delayed even longer, this would further compound capacity exposure.
35. Second, any delay in the transmission line's in-service date could jeopardize our ability to offer Badger Hollow's full potential energy output into the relevant market, resulting in significant daily economic losses.
36. Electric utilities like MGE, WPSC, and WEPCO provide electric service to retail customers via a regional wholesale market managed by MISO. The utilities sell their generating units' electrical output into the MISO market, and they purchase from the same market all the energy they need to serve their customers.
37. MISO market transactions clear daily, meaning that every day a unit's full electrical output cannot reach the MISO market represents a corresponding revenue loss for that unit for that day. Meanwhile, the unit's owner remains

responsible for the unit's cost, and must still acquire sufficient energy in the MISO market to serve all of the utility's customers.

38. Here, in the absence of the CHC transmission line, existing transmission constraints in southwestern Wisconsin would at a minimum impair, if not fully prevent, Badger Hollow's output from reaching the market. This would cause two interrelated types of damage.
39. First, and most obviously, there would be lost revenues as a direct result of lost energy sales from Badger Hollow to the MISO market. And to the extent Badger Hollow's future output is constrained by the loss of the CHC transmission line, the price received for electrical production from the project would also be reduced. Lower revenues would ultimately increase our cost of service and the rates we charge our customers.
40. Second, like all the other public utilities participating in the MISO market, MGE, WPSC, and WEPCO have a financial obligation to MISO to take and pay for *all* the energy required to meet their customers' energy needs, regardless of transmission constraints, to the extent the wholesale market is able to physically serve the load.
41. In the absence of supply from Badger Hollow, we would expect energy prices in the MISO market to be higher, increasing the utilities' cost to purchase the same amount of energy needed to serve all of their customers.
42. In other words, constraining Badger Hollow's output would both reduce energy revenues and increase energy costs for MGE, WPSC, and WEPCO's customers.

43. We conservatively estimate that for these three utilities alone, assuming only a 1% reduction in Badger Hollow's output and a \$5/MWh increase in MISO energy prices, the combined effect of these losses in the wholesale energy market would be approximately \$10,000 per day for each day that the CHC transmission line is delayed. These damages would **exceed \$1 million within just four months.**
44. Third, and finally, any delay in the CHC transmission line's in-service date could impede utilities' efforts to support the state and national climate change goals announced by Governor Evers' and President Biden's administrations.
45. As Wisconsin transitions to a cleaner energy future, MGE, WPSC, and WEPCO are each committed to reshaping their current generating fleets to take advantage of utility-scale renewable resources, including wind and solar.
46. Utility-scale solar facilities are one of the cleanest, most affordable ways to meet customers' energy needs because their construction cost is competitive as the result of federal tax incentives and, once constructed, they require no fuel source and cost relatively little to operate.
47. For these reasons, MGE, WPSC, and WEPCO have each engaged in long-term planning to retire older, less efficient fossil fuel units and replace them with clean, renewable energy sources – like Badger Hollow.
48. However, if transmission constraints in southwestern Wisconsin mean the utilities cannot rely on Badger Hollow – and numerous other regional renewable projects like it already in the planning queue – to meet their obligations to

customers, they would need to consider delaying planned retirements of older units, including coal units, in order to maintain the reliability of their systems as they are required to do under Wisconsin law.

49. At a minimum, any such delay would increase costs for MGE, WPSC, and WEPCO, and ultimately the rates they charge their combined 1.8 million customers across Wisconsin. Any such delay would also be expected to increase maintenance expenditures and capital expenses required to further extend the life of units that would otherwise retire.

50. Beyond this, while we have not attempted to quantify the environmental and natural resource costs of delaying Wisconsin's clean energy transition, we are surprised that professed conservation groups would be the ones seeking that delay.

As to paragraphs 1 and 4-50:

Signature: [Handwritten Signature]

Printed Name: Scott R. Smith

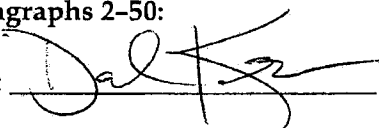
Sworn to and subscribed before me this 15th day of October, 2021.

[Handwritten Signature]
Notary Public

My Commission expires: Permanently

As to paragraphs 2-50:

Signature:



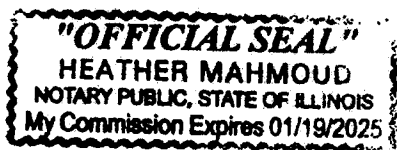
Printed Name: Daniel P. Krueger

Sworn to and subscribed before
me this 15th day of October, 2021.



Notary Public

My Commission expires: 01/19/2025





OFFICE OF THE CLERK

Supreme Court of Wisconsin

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P.O. BOX 1688

MADISON, WI 53701-1688

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Web Site: www.wicourts.gov

June 11, 2019

To:

Hon. Frank D. Remington
Circuit Court Judge, Br. 8
215 S. Hamilton St., Rm. 4103
Madison, WI 53703

Colin Thomas Roth
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
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Timothy E. Hawks/ Barbara Z. Quindel
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Hawks Quindel, S.C.
P.O. Box 442
Milwaukee, WI 53201-0442

Thomas C. Bellavia
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

*Address list continues on Page 13

You are hereby notified that the Court has entered the following order:

No. 2019AP622

SEIU, Local 1 v. Vos L.C.#2019CV302

Pending before this court is a motion by the defendants-appellants, Robin Vos, Roger Roth, Scott Fitzgerald, and Jim Steineke, all in their official capacities as leaders of the Wisconsin Assembly and Wisconsin Senate¹ (the Legislative Defendants), for temporary relief pending appeal in this matter.

In an order entered March 26, 2019, the Dane County Circuit Court granted in part the motion of the plaintiffs-respondents, Service Employees International Union, Local I, et al. (the plaintiffs), for a temporary injunction and enjoined the enforcement of certain provisions in 2017 Wisconsin Act 369 (Act 369), which the Wisconsin Legislature had passed during an

¹ Robin Vos is the Speaker of the Assembly. Roger Roth is the President of the Senate. Scott Fitzgerald is the Majority Leader of the Senate. Jim Steineke is the Majority Leader of the Assembly.

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June 11, 2019

No. 2019AP622

SEIU, Local 1 v. Vos L.C.#2019CV302

"extraordinary session"² in December 2018 and which had subsequently been signed into law by then Governor Scott Walker. Specifically, the circuit court temporarily enjoined the defendants from enforcing the following provisions of Act 369:

- Section 26, which provides that in order for the Attorney General to compromise or discontinue a civil action brought on behalf of the state or a state officer, department, board, or commission, the Attorney General must obtain the consent of a house of the Legislature that has intervened in the action or, if no house of the Legislature has intervened, from the Legislature's Joint Committee on Finance;
- Section 30, which provides that, with respect to civil actions against the state or a state department, officer, employee, or agent in which the plaintiff seeks injunctive relief or a consent decree, in order for the Attorney General to compromise or settle the action, the Attorney General must obtain the consent of a house of the Legislature that has intervened in the action or, if no house of the Legislature has intervened, from the Legislature's Joint Committee on Finance;
- Section 64, which provides that the Legislature's Joint Committee for the Review of Administrative Rules (JCRAR) may suspend an administrative rule multiple times; and
- Sections 31, 33, 38, 65-71, and 104-105, which (1) define a new category of administrative materials as "guidance documents;"³ (2) require existing and new guidance documents to go through a notice and comment period, which must be certified by the secretary or head of the respective administrative department or agency;⁴ (3) require that each guidance document must identify the applicable

² We use the term "extraordinary session" to describe what the Legislature did in December 2018 when it conducted floor debate and votes because that has been the term used by the parties in their filings.

³ Section 31 of Act 369 defines "guidance document" as "any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following:

1. Explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency.
2. Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly situated."

⁴ Any guidance document that an administrative department or agency wishes to adopt after July 1, 2019 (the first day of the seventh month after the effective date of Act 369), must go

Page 3

June 11, 2019

No. 2019AP622

SEIU, Local 1 v. Vos L.C.#2019CV302

provision of federal or state law that supports the statement or interpretation of law in the guidance document; (4) require that each guidance document must not contain any standard, requirement, or threshold that is not explicitly required or permitted by a lawfully promulgated statute or rule; and (5) authorize judicial review proceedings to challenge the validity of guidance documents.⁵

In the same order, the circuit court also denied the Legislative Defendants' motion for a stay of the injunction pending the completion of appellate review. The circuit court's discussion of the motion for a stay was contained in a single footnote, which stated as follows (except for the deletion of a parenthetical aside):

²To obtain a stay pending appeal, the legislative defendants must demonstrate the inverse of all the factors that plaintiffs must demonstrate for injunctive relief. *See State v. Scott*, 2018 WI 74, ¶46, 382 Wis. 2d 476, 914 N.W.2d 141 ("a stay pending appeal is appropriate where the moving party: (1) makes a strong showing it is likely to succeed on the merits of the appeal; (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.").^[6]

through the notice and comment period and must be certified as such before it may be adopted by the department or agency. Act 369, § 38. For all guidance documents that are in existence prior to July 1, 2019, if the guidance document has not gone through the notice and comment period and has not been certified as such prior to July 1, 2019, the guidance document is considered rescinded. Id.

⁵ The circuit court found that the plaintiffs had not met their burden for obtaining a temporary injunction and therefore refused to enjoin the enforcement of a number of provisions in both Act 369 and 2017 Wisconsin Act 370 (Act 370). Those sections, which have remained in effect, include provisions relating to (1) the ability of the houses of the Legislature to intervene in civil actions (Act 369 §§ 3, 5, 28, 29, 97, 98, and 99), (2) the designation of enterprise zones (Act 369 § 87), and (3) requests to the federal government for waivers on pilot programs and demonstration projects and for reallocation of public and local assistance funds (Act 370 §§ 10-11). In addition, the plaintiffs withdrew their motion for a temporary injunction with respect to several other provisions of Act 369: section 35 (prohibiting administrative agencies from seeking deference for their interpretations of law in lawsuits), section 16 (relating to changes in security at the state capitol), and section 72 (requiring notice of the outcome of a challenge to the validity of an administrative rule be given to the Legislative Reference Bureau). These statutory provisions also have remained in effect.

⁶ These factors were adopted by this court in State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (citing Leggett v. Leggett, 134 Wis. 2d 384, 385, 396 N.W.2d 787

Page 4
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SEIU, Local 1 v. Vos L.C.#2019CV302

The court has concluded that plaintiffs are likely to succeed on the merits on some of their claims. And during oral arguments, the legislative defendants could not identify any harm that would result if the court were to decline to issue a stay in this case. Accordingly, to the extent this court balances the interests of the parties for and against the stay, the balance overwhelmingly tips in favor of not granting one. Therefore, the court denies the legislative defendants' motion to stay this ruling pending appeal"

The Legislative Defendants subsequently appealed as of right from the circuit court's order granting the temporary injunction. See Wis. Stat. § 813.025(3). By order dated April 19, 2019, this court assumed jurisdiction over the appeal on its own motion, pursuant to Wis. Const. Art. VII, § 3(3), Wis. Stat. § 808.05(3), and Wis. Stat. § (Rule) 809.61.

While the appeal was pending in the court of appeals, the Legislative Defendants filed a motion for temporary relief (a stay) pending appeal, along with a memorandum in support of the motion. See Wis. Stat. § 808.07(2). In the motion, the Legislative Defendants seek a stay of the entirety of the circuit court's injunction while their appeal is pending.

When this court assumed jurisdiction over this appeal, it acquired jurisdiction over all motions that were pending in the appeal, including the Legislative Defendants' motion for temporary relief pending appeal. The court's April 19, 2019 order, therefore, advised the parties that it would decide that motion based on the documents that had been filed in the court of appeals. On April 30, 2019, however, this court issued an order in League of Women Voters of Wisconsin v. Evers, Case No. 2019AP559, an appeal relating to the constitutionality of the three acts passed during the December 2018 "extraordinary session." In the April 30, 2019 order, this court granted the Wisconsin Legislature's motion for temporary relief pending appeal. Accordingly, by order dated May 7, 2019, this court allowed the parties to file supplemental memoranda concerning the motion for temporary relief pending appeal in this matter, including the effect, if any, of this court's April 30, 2019 order in Case No. 2019AP559 on the motion.

Wisconsin Statute § (Rule) 808.07(2) authorizes both a circuit court and an appellate court to grant a number of forms of temporary relief while an appeal is pending, including (1) staying execution or enforcement of a judgment or order; (2) suspending, modifying, restoring, or granting an injunction; or (3) issuing any other order appropriate to preserve the "existing state of affairs or the effectiveness of the judgment subsequently to be entered."

Where a litigant asks an appellate court to grant it temporary relief pending appeal and the litigant has sought such relief unsuccessfully in the circuit court, the motion addressed to the appellate court is not considered in a vacuum. The appellate court's review is conducted by

(Ct. App. 1986)). Indeed the Scott decision cited Gudenschwager as authority for those factors. We therefore will refer to these factors in this order as the "Gudenschwager factors."

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reviewing initially the circuit court's decision to grant or deny such relief under an erroneous exercise of discretion standard. Gudenschwager, 191 Wis. 2d at 440. "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." Id. at 440 (citing Loy v. Bunderson, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)).

Having reviewed the circuit court's decision on the Legislative Defendant's motion for a stay pending appeal, we conclude that the circuit court erroneously exercised its discretion because it made errors of law. It set forth the proper factors relevant to such motions, but it failed to follow the proper rules for applying them.

The circuit court's legal errors appear to arise, in part, from its erroneous belief that the factors for deciding whether to grant a stay pending appeal are simply the inverse of the factors for granting a temporary injunction. Those analyses, while similar, have important differences with respect both to the likelihood of success and consideration of irreparable injuries, which we will explain below.

In order to obtain a temporary injunction, a moving party, usually the plaintiff, must first demonstrate that it has a reasonable likelihood of success on the merits of its claim. In other words, it must demonstrate that it is reasonably likely to obtain the relief it seeks at the conclusion of the case. See Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) ("A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits."). On the other hand, where a party against whom a temporary injunction has been entered seeks a stay of that injunction pending appeal (in either the circuit court or an appellate court), the appellant must make a "strong showing" that it is likely to succeed on its appeal of the temporary injunction. We have explained, however, that this "strong showing" is met when the circuit court has enjoined a statute based on its conclusion that the statute is unconstitutional. See Gudenschwager, 191 Wis. 2d at 441. The plaintiff's likelihood of success on the ultimate merits of his/her claim is not necessarily the inverse of the appellant's likelihood of success on appeal of a temporary injunction. In other words, the likelihood of success calculus in these two analyses is not a zero sum game. If a plaintiff has a likelihood of success on the merits of its claims, that fact does not necessarily mean that the defendant against whom a temporary injunction has been entered lacks a likelihood of success on an appeal of the temporary injunction. If the opposite were true, then no stay of a temporary injunction pending appeal would ever be entered because a circuit court must always find a reasonable likelihood of ultimate success on the merits by the party seeking an injunction in order to issue the temporary injunction in the first place.

The circuit court in this case, however, erred as a matter of law because it relied on this improper conflation of the two analyses. When it was supposed to be analyzing the Legislative Defendants' likelihood of success on an appeal of its injunction, it did not conduct that analysis but again pointed to the fact that it had already found that the plaintiffs had a likelihood of

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success on the merits of some of their claims. This was the wrong analysis for deciding the motion for a stay and caused it to issue a legally flawed decision, as discussed below.

Moreover, the circuit court also fell victim to the same legal error that occurred in League of Women Voters of Wisconsin. It failed to take into account that its decision to issue a temporary injunction was based on legal determinations regarding novel questions involving the separation of powers doctrine that will be subject to de novo review on appeal. It failed to consider that its conclusions regarding the scope of the separation of powers doctrine will be the first word, not the last word, on those legal questions. It simply reasoned that since it had determined those legal questions in favor of the plaintiffs initially, the Legislative Defendants had to have no likelihood of success on appeal.

Second, the circuit court failed to properly consider irreparable injuries. Instead, it once more pointed to its consideration of harms in deciding the plaintiffs' motion for a temporary injunction. The analysis of harms for a temporary injunction, however, is not the same as that which must occur when deciding a motion for a stay of a temporary injunction, nor is one simply the inverse of the other. Again, if those analyses were simply inverses of each other, then no stay of a temporary injunction would ever be issued. In order to grant a temporary injunction, a circuit court must conclude that the irreparable injuries that result from not granting the temporary injunction tip in favor of the party seeking the injunction. That conclusion must be reached before any stay is ever sought or analyzed. If a circuit court merely conducted the same analysis of harms in deciding the stay, of course it would reach the same conclusion.

There is, however, a critical distinction between the two analyses, one which the circuit court in this case ignored. When deciding a motion for a temporary injunction, a circuit court analyzes whether the party moving for an injunction has shown that it will suffer irreparable harm in the absence of a temporary injunction and that it lacks an adequate remedy at law. Werner, 80 Wis. 2d at 520. The circuit court also compares that showing of irreparable harm with the competing irreparable harm that the party or parties who oppose the injunction and the public will suffer if a temporary injunction is issued. See Pure Milk Products Co-op v. National Farmers Organization, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (in context of reviewing grant of permanent injunction, "competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction"); see also Werner, 80 Wis. 2d at 520 (consideration of irreparable harm and lack of adequate legal remedy is required for both temporary and permanent injunctions).

On the other hand, in the context of a subsequent motion to stay an injunction, the court must weigh the irreparable harm that the movant for a stay would face in the absence of a stay during the appeal in the event that the movant is ultimately successful in having the injunction vacated on appeal versus the irreparable harm that the party who prevailed at the circuit court would suffer without the injunction during the appeal in the event the party who prevailed at the circuit court was successful in having the temporary injunction affirmed at the end of the appeal. Gudenschwager, 191 Wis. 2d at 441-44. In other words, the analysis for a stay motion adds to the mix the ability of the respective harms to be undone or unwound by the appellate court at the

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end of the appeal. Therefore, consideration of the likelihood that each side's harms can be mitigated or remedied upon conclusion of the appeal if the result on appeal is in favor of that side is a necessary consideration.

It is the presence of this added element that requires circuit courts to conduct two separate harms analyses—one analysis of the factors for determining whether to grant a temporary injunction in the first instance and, if a temporary injunction is entered and a stay is sought, a second analysis of the factors for determining whether to stay that injunction while it is being reviewed on appeal. The circuit court in this instance, however, never conducted this second analysis and never considered the ability or likelihood that either side's harms could be remedied or mitigated in the event that side prevailed on appeal. It simply relied on the analysis it had used for deciding to grant the temporary injunction. That was an error of law that rendered its ultimate decision an erroneous exercise of discretion.

Having determined that the circuit court's decision was legally erroneous, we turn to the proper application of the Gudenschwager analysis.

When we address the first factor of the likelihood of success on appeal where a statute has been enjoined, our prior decisions require us to take into account the presumption of constitutionality that attaches to regularly enacted statutes.⁷ Unlike the situation in League of Women Voters of Wisconsin, the plaintiffs in this case do not allege that either Act 369 or Act 370 was invalidly enacted into law. Therefore, the presumption of constitutionality clearly should be applied in this case. Further, as both the Governor and the Attorney General concede, the presumption of constitutionality, by itself, is sufficient to satisfy the first Gudenschwager factor of a "strong showing" of a likelihood of success on appeal in the context of a motion for temporary relief pending appeal. See Gudenschwager, 191 Wis. 2d at 441 ("Since regularly enacted statutes are presumed to be constitutional, see Chicago & N.W.R. Co. v. LaFollette, 27 Wis. 2d 505, 520-21, 135 N.W.2d 269 (1965), we conclude that, for purposes of deciding whether or not to grant a stay pending appeal, the State has made a strong showing that it is likely to succeed on the merits of its appeal of Judge Wolfe's finding that chapter 980 is unconstitutional."). Consequently, as we did in Gudenschwager, we conclude that the first factor weighs in favor of granting a stay of an injunction against the enforcement of a statute. Id.

Turning to consideration of irreparable harms, we acknowledge that in most cases there will be some harm to both sides, especially when the stay motion is directed toward an injunction against the enforcement of a statute that is presumed to be constitutional. That does not mean, however, that the totality of the harms on each side of the issue will be of equal severity and magnitude, nor that they will be equal in terms of the ability and likelihood that the harms can be remedied or mitigated by the ultimate decision on appeal.

⁷ The circuit court failed to consider the presumption of constitutionality in its footnote denying the Legislative Defendants' motion for a stay pending appeal. This was yet another error of law that rendered its decision an erroneous exercise of discretion.

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As we stated in our April 30, 2019 order in League of Women Voters of Wisconsin, the Legislature (here represented by the Legislative Defendants) and the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur. Moreover, there are specific irreparable harms that stem from the nature of the acts that would be enjoined under the circuit court's order. Sections 26 and 30 of Act 369 grant to the Legislature the right to consent or not to consent before the Attorney General (1) settles or discontinues a civil action in which the state (or a subdivision or representative thereof) is a plaintiff (plaintiff-side action) or (2) compromises or settles a civil action against the state (or a subdivision or representative thereof) in which an injunction or consent decree is sought (defendant-side action). If the temporary injunction is not stayed while this appeal is pending, the Legislature will be prevented from exercising those rights of review and consent. For example, it will be unable to review instances where the Attorney General confesses the invalidity (constitutional or otherwise) of a statute passed by the Legislature. Moreover, this harm likely will not be able to be remedied or mitigated if the Legislative Defendants prevail in this appeal. A settlement of a plaintiff-side case or the entry of a final injunction or consent decree in a defendant-side case will almost certainly result in the entry of a final judgment or order in that litigation. It will be extremely difficult, if not impossible, to undo those final judgments or orders, especially where the civil action was pending in a federal court.⁸

Moreover, this is not a speculative injury. The Attorney General has admitted that once the circuit courts in League of Women Voters of Wisconsin and this case enjoined the enforcement of sections 26 and 30 of Act 369, the Department of Justice (DOJ) proceeded to settle several cases since it no longer needed to obtain legislative consent. *Aff. of Charlotte Gibson* ¶21. Some, if not all, of these cases appear to have been pending in federal court since they were identified as "multi-state" consumer cases. If the Legislative Defendants ultimately prevail on appeal, this court will not be able to direct the federal courts to vacate or reopen the judgments in those cases. The right of the Legislature to review and consent to those settlements will be gone forever.⁹

⁸ The majority of the civil cases in which the Wisconsin Department of Justice is involved occur in federal court. *Aff. of Charlotte Gibson* ¶5.

⁹ In its footnote, the circuit court stated that during oral argument on the motion for temporary injunction, the Legislative Defendants "could not identify any harm that would result if the court were to decline to issue a stay in this case." As shown in the text above, that is not fully accurate if the circuit court really meant that the Legislative Defendants had identified no harm at all. The Legislative Defendants did identify the harms that would result from the Legislature's inability to enforce the enjoined sections of Act 369. If the circuit court meant that the Legislative Defendants had been unable to identify particular case settlements or particular administrative regulations or particular guidance documents to which the Legislature would object in the absence of a temporary injunction, that is not surprising since neither the Legislative Defendants nor their counsel had access to the relevant information about what case settlements or administrative regulations would occur during the pendency of this appeal. Further, the case

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The same types of irreparable injury will occur with respect to the Legislature's ability to suspend administrative rules and to ensure that administrative guidance documents comport with the statutes that govern the promulgating agency. Because these provisions relate to state agencies, however, we acknowledge that there is a somewhat greater possibility that a final decision on appeal could remedy or mitigate the harm that stems from the injunction.

However, the plaintiffs, the Governor, and the Attorney General identify the general harm that may occur if statutory provisions that are ultimately found to be unconstitutional are enforced while the appeal is pending. The Attorney General also alleges that sections 26 and 30 of Act 369 make it more difficult and time-consuming for the DOJ to settle cases. He particularly focuses on the impact of the legislative consent requirement on settlement negotiations, noting that in some instances opposing parties make settlement offers contingent upon DOJ acceptance within a certain time period and that the Legislature and the DOJ had not agreed upon a procedure for obtaining legislative consent before the injunctions were entered. Indeed, he contends that some settlement opportunities may be missed because the DOJ may not be able to obtain legislative consent within the time set by the opposing party.

Even accepting, *arguendo*, that some settlement opportunities during the pendency of this appeal may be missed because the DOJ may not be able to obtain legislative consent within the time frame specified in a settlement offer, that does not necessarily mean that the state has lost the ability to obtain a similar settlement or final litigated result. An opposing party that wishes to settle may be willing to extend the time period for settlement or to renew its settlement offer (or to make a similar new offer) later in the case that will provide the same or similar benefits to the state. To say that the state will lose out forever on the benefits it could obtain in a particular settlement offer that could not be accepted within the time period specified in the offer is speculative.

Finally, we consider the potential harm to the public. As the Attorney General notes, staying the injunction may delay the settlement or resolution of some plaintiff-side consumer cases where settlement funds are distributed to individual members of the public. It must be remembered, however, that this delay, if it occurs, would be temporary because the stay of the injunction under consideration would apply only while this appeal is pending. On the other hand, however, as noted above, the public as a whole suffers irreparable injury of the first magnitude where a statute enacted by its elected representatives is declared unenforceable and enjoined before any appellate review can occur.

law does not require that level of specificity. For example, in Gudenschwager, this court concluded that the state would be irreparably harmed because Gudenschwager's release would create a risk of him committing new sexual offenses. The court did not require the state to identify what specific crimes Gudenschwager would commit against which individuals on what specific dates. 191 Wis. 2d at 442 ("The harm identified by the State is that there is a substantial likelihood that Gudenschwager will commit further acts of sexual violence if he were to be released under the conditions set by Judge Wolfe.").

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Having considered the nature and magnitude of the irreparable harms and the likelihood that those harms cannot be remedied or mitigated at the conclusion of the appeal, we conclude that a stay of the temporary injunction should be granted in this case, with one exception.

The exception to the stay relates to guidance documents that were in existence as of March 26, 2019, when the circuit court order enjoining section 38 of Act 369 was entered. Under section 38 of Act 369, if an existing guidance document has not been certified as having gone through the new notice and public comment procedure, the guidance document will be considered rescinded as of July 1, 2019. Those guidance documents, which assist members of the public in dealing with their state government, will no longer be available. The agencies subject to this requirement, however, have been under the impression that they would not have to meet the July 1, 2019 deadline because the guidance document provisions in Act 369 have been subject to a circuit court temporary injunction for more than two months (since March 26, 2019). If this court were now to stay that part of the circuit court's injunction, the agencies would have insufficient time to complete the notice and comment procedure for all of their existing guidance documents. The inability of the agencies at this point to complete that process would create harm to the general public because the existing guidance documents on which members of the public rely to interact with state government agencies will no longer be available as of July 1, 2019. That harm to the public affects our decision with respect to guidance documents that were in existence when the circuit court enjoined section 38 of Act 369. We therefore determine that, given the effect of the circuit court's temporary injunction on the notice and comment process for those guidance documents and the impact that the rescission of those documents would have on the public, the better course is to allow the temporary injunction to remain in effect solely with respect to the provision in section 38 of Act 369 that requires the rescission of guidance documents in existence on March 26, 2019 that are not certified as having gone through the notice and public comment process by July 1, 2019. See Wis. Stat. § 227.112(7)(a). Our decision does not affect section 38 in regard to guidance documents that were created after the circuit court injunction was entered.

IT IS ORDERED that the motion of defendants-appellants Robin Vos, Roger Roth, Scott Fitzgerald, and Jim Steineke for temporary relief pending appeal is granted in part as follows. The temporary injunction issued by the Dane County Circuit Court on March 26, 2019, is stayed pending the final resolution of the appeal in this matter, with the sole exception that the temporary injunction is not stayed and therefore remains in effect with respect to the provision in section 38 of Act 369 that requires the rescission of guidance documents that were in existence as of March 26, 2019. See Wis. Stat. § 227.112(7)(a).¹⁰

¹⁰ When an appellate court determines that a circuit court erroneously exercised its discretion in failing to grant a stay pending appeal at the same time that the temporary injunction was issued, it should craft its relief to return the parties to the positions they were in immediately prior to the entry of the circuit court's injunction to the extent practicable. The court notes that the Attorney General has acknowledged that the Department of Justice settled or discontinued some cases without obtaining legislative consent while the injunctions in League of Women

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¶1 REBECCA FRANK DALLET, J. (*Concurring in part, dissenting in part*). I agree with the majority order that the temporary injunction remains in effect with respect to the provision in section 38 of 2017 Wisconsin Act 369 (Act 369) that requires the rescission of guidance documents. I also agree that the temporary injunction be stayed with respect to section 64 of Act 369, which provides that the Legislature's Joint Committee for the Review of Administrative Rules may suspend an administrative rule multiple times. I disagree, however, with the decision to stay the temporary injunction to the extent it enjoins enforcement of sections 26 and 30 of Act 369.¹¹ For that reason, I respectfully dissent.

¶2 The majority order alters the applicable standard of review, erroneous exercise of discretion, with respect to the first Gudenschwager factor, likelihood of success. See State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). The majority order appears to alter substantive law when it asserts that because the decision to issue a temporary injunction "was based on legal determinations regarding novel questions," it would be subject to de novo review on appeal. Under current law however, a de novo review is part and parcel of the erroneous exercise of discretion standard. See LeMere v. LeMere, 2003 WI 67, ¶14, 262 Wis. 2d 426, 663 N.W.2d 789 (setting forth that this court decides de novo "any questions of law which may arise during our review of an exercise of discretion") (quoted source omitted). However, I will not dwell on the first Gudenschwager factor as the Attorney General and the Governor concede that this factor weighs in favor of the Legislative Defendants. Accepting this concession, I focus instead on the other three Gudenschwager factors as applied to sections 26 and 30.¹² As emphasized by this court in Gudenschwager, 191 Wis. 2d at 440, "[t]hese factors are not prerequisites but rather are interrelated considerations that must be balanced together."

¶3 In its written decision, the circuit court observed that during oral argument the Legislative Defendants "could not identify any harm that would result if the court were to decline to issue a stay in this case." In their brief to the circuit court, the Legislative Defendants pointed only generally to chaos resulting from not knowing which cases, if any, the Attorney General would defend. I agree with the Governor that counsel for the Legislative Defendants, the movant, "made virtually no effort to persuade the court that the final three Gudenschwager factors, having to do with irreparable and other harm, were in their favor." In contrast, Service

Voters of Wisconsin and this case were in effect. The court will not attempt to undo those settlements or discontinuances because it does not appear that it would be practicable to do so.

¹¹ Sections 26 and 30 took away the Attorney General's power to settle or discontinue a civil action where the State is a plaintiff and the power to compromise or settle a civil action against the State in which an injunction or consent decree is sought. This power was given to a house of the Legislature, or the Legislature's Joint Committee on Finance.

¹² Pursuant to the other three factors, the moving party must: "(2) show[] that, unless a stay is granted, it will suffer irreparable injury; (3) show[s] that no substantial harm will come to other interested parties; and (4) show[] that a stay will do no harm to the public interest." State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

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Employees International Union, Local I, et al. (the plaintiffs), the Governor, and the Attorney General provided numerous affidavits detailing specific harm resulting from the challenged statutory provisions. The circuit court applied the proper standard and determined that the Legislative Defendants made no showing on three of the four Gudenschwager factors. There is no basis for this court to declare that no reasonable judge could reach the conclusion of the circuit court. See State v. Jeske, 197 Wis.2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995) (concluding that a circuit court's decision should be upheld "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.") This court's inquiry should end there.

¶4 Even when this court considers the briefs that were submitted to this court subsequent to the circuit court's decision, the Legislative Defendants still do not demonstrate proof of harm if the injunction is not stayed that outweighs the harm to the plaintiffs, the Governor, and the Attorney General if the stay is granted. The majority order focuses on abstract harm to the Legislative Defendants and the public when a law enacted by the Legislature and signed by the Governor is enjoined. This abstract harm to the Legislative Defendants is offset by the alleged abstract harm to the Governor and Attorney General of having their executive powers usurped.

¶5 The Attorney General, however, provides specific examples of concrete harm to its office and the public that would result from the litigation procedure controls in sections 26 and 30 going into effect, including harm that occurred before entry of the injunction. A critical part of the Attorney General's responsibility in litigation is a determination of the terms on which to compromise, settle, or dismiss a case. The Attorney General alleges that the litigation control provisions in sections 26 and 30 prevent it from maintaining necessary confidentiality in settlement negotiations and to timely meet deadlines for settlement offers since no process of legislative approval has been established. The Attorney General details specific examples of harm resulting from missed settlement deadlines and breached confidentiality.¹³ The Attorney General further describes how taxpayers would be harmed by continuing to defend the State of Wisconsin in suits that the Department of Justice believes, in its professional judgment, should be terminated.

¶6 The majority order inflates the corresponding abstract harm the Legislative Defendants would suffer from an inability to exercise their newly conferred power to review and consent to settlement negotiations. Any abstract harm conferred upon the Legislative Defendants from the temporary injunction enjoining the enforcement of the litigation control provisions is outweighed by concrete, irreparable harm to the Attorney General and the citizens of the State of Wisconsin, and therefore the temporary injunction should remain in effect as to sections 26 and 30 of Act 369.

¹³ The majority order simply speculates that opposing parties "may be willing to extend the time period for settlement or to renew its settlement offer . . . later in the case." However, individuals entitled to compensation may never attain another settlement and, at a minimum, will have any recovery delayed in the process without the ability to obtain interest.

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¶7 For the reasons stated above, I respectfully concur in part and dissent in part.

¶8 I am authorized to state that Justices SHIRLEY S. ABRAHAMSON and ANN WALSH BRADLEY join this concurrence/dissent.

Sheila T. Reiff
Clerk of Supreme Court

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