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Supreme Court of Wisconsin

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November 8, 2021

To:

Hon. Jacob B. Frost
Circuit Court Judge
Room 5109, Branch 9
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Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
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Madison, WI 53703

*Address list continued on page 4.

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

No. 2021AP1321-LV	<u>County of Dane v. PSC of Wisconsin</u> , (L.C. #2019CV3418)
2021AP1325	<u>County of Dane v. PSC of Wisconsin</u> (L.C. #2019CV3418)

On September 21, 2021, this court granted the petition for review filed by other party-appellant-petitioner, Michael Huebsch, and it also granted a motion seeking a stay of enforcement of an August 24, 2021 subpoena and any other discovery or trial-related demands directed to Huebsch.

Intervenors-respondents, American Transmission Company LLC, ATC Management Inc., Dairyland Power Cooperative, and ITC Midwest LLC (the "Co-Owners") have filed an emergency motion seeking a stay of an October 26, 2021 order of the Dane County Circuit Court enjoining physical construction of the Cardinal-Hickory Creek 345-kV Transmission Line Project, along with a memorandum in support of the emergency motion for stay and an appendix. (The circuit court issued an oral ruling enjoining construction of the Transmission Line Project on October 18, 2021. The Co-Owners state that they moved for a stay of the circuit court's order pending appeal, but to date the circuit court has not ruled on that motion.) The Co-Owners acknowledge that the circuit court's temporary injunction has not yet gone into effect and state that the injunction will go into effect once intervenor-respondents Driftless Area Land Conservancy and Wisconsin Wildlife Federation obtain an undertaking in the amount of \$32 million from two sureties. The Co-Owners state, "Given the proceedings already pending before this Court, the fact that the Injunction Order directly conflicts with this Court's decision to grant former Commissioner Huebsch's petition for review, and the imminent harm the Injunction Order imposes on the Co-Owners, their construction schedule for the Project, and the general public, the Co-Owners are

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filing this motion with this Court to redress the errors in the Injunction Order as rapidly as possible.” The Co-Owners ask this court to “enter an order staying enforcement of the circuit court’s October 26, 2021 Injunction Order pending this Court’s resolution of Mr. Huebsch’s petition for review and any subsequent appeals that the Co-Owners may take of the October 26, 2021 Injunction Order, either to the Court of Appeals or to this court.”

IT IS ORDERED that the emergency motion is denied, ex parte.

PATIENCE DRAKE ROGGENSACK, J. (*concurring*). The issues raised in Huebsch’s petition for review arise out of subpoenas issued to compel Huebsch’s testimony in order to evaluate claims of bias lodged against him when he was serving as a member of the Public Service Commission. Although the Co-Owners’ motion arises out of the same circuit court case as did Huebsch’s petition for review, the Co-Owners raise unique issues and, more importantly, Huebsch has not joined in the Co-Owners’ motion. If the Co-Owners desire appellate review and a stay of the circuit court’s October 26, 2021 order, they may ask for leave to appeal the order in the court of appeals. See Wis. Stat. § 808.03(2). Indeed, the Co-Owners recognize this fact since they state that they “also plan to submit to the Court of Appeals a petition for leave to appeal the Injunction Order, a petition for supervisory writ of the Injunction Order, and a request for a stay and/or temporary relief from the Injunction Order pending appeal. The Co-Owners plan to submit these filings no later than the week of November 8.” Co-Owners’ memorandum in support of emergency motion for stay of injunction pending appeal at 15, n. 14. The normal rules of appellate procedure should be followed. Accordingly, I respectfully concur.

I am authorized to state that CHIEF JUSTICE ANNETTE KINGSLAND ZIEGLER joins this concurrence.

REBECCA GRASSL BRADLEY, J. (*dissenting*). The majority's decision to take a pass on deciding the Co-Owners' Emergency Motion for Stay of Injunction Pending Appeal leaves the parties with a circuit court ruling in tension with this court's September 21, 2021 stay order, an impending appeal of that ruling—to be filed with the court of appeals—and a pending appeal before this court on prior rulings of the circuit court. Considering we have already taken jurisdiction over interrelated issues, the most prudent procedural option would be for this court to resolve the Emergency Motion. The majority's decision to simultaneously subject the parties to the jurisdiction of three courts may precipitate a fog of confusion and irresolution reminiscent of the court of chancery in Bleak House.¹

Departures from the ordinary course of appellate review are generally reserved for exceptional cases like this one. Nothing in the rules of appellate procedure precludes this court from exercising jurisdiction over a challenge to the circuit court's latest order. As I explained in

¹ Charles Dickens, Bleak House (1852–53).

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my concurrence to this court's stay order, it is well within our statutory and constitutional authority to do so.² Given the highly unusual nature of this case, we should exercise that authority.

The circuit court's order halted construction of a high-voltage transmission line with an estimated cost of \$474 to \$560 million. The Co-Owners assert a consequent increase in construction costs of \$32 million, which "would be passed onto retail electric ratepayers—that is, the families and businesses that pay for electricity from their local utilities."³ Given the high-stakes nature of the case, its potential impact on the people of Wisconsin, and this court's existing involvement, we should order responses to the Emergency Motion and resolve it. The majority's contrary course raises the risk of rulings from the lower courts in conflict with this court's controlling decisions as we proceed to resolve interrelated issues presented to us by another party's petition for review. I respectfully dissent from the majority's ex parte denial of the Co-Owners' Emergency Motion.

Sheila T. Reiff
Clerk of Supreme Court

² See Cnty. of Dane v. PSC of Wis., Nos. 2021AP1312-LV, 2021AP1325 & 2021AP1495-W, unpublished order, at 3–5 (Wis. Sept. 21, 2021) (Rebecca Grassl Bradley, J., concurring with the order granting the petition for review and granting a stay pending appeal).

³ Co-Owners' Mem. Supp. Emergency Mot. Stay Inj. Pending Appeal at 25.

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