

No. 2021AP1321-LV

In the Supreme Court of Wisconsin

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

v.

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

**RESPONSE OF INTERVENOR-RESPONDENTS AMERICAN
TRANSMISSION COMPANY LLC, ATC MANAGEMENT INC.,
DAIRYLAND POWER COOPERATIVE, AND ITC MIDWEST LLC TO
PETITION FOR BIFURCATION AND REMAND**

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Cooperative, and ITC Midwest LLC*

No. 2021AP1325

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American Transmission Company LLC and ATC Management Inc. (“ATC”), Dairyland Power Cooperative (“Dairyland”), and ITC Midwest LLC (“ITC Midwest”) (collectively, the “Co-Owners”) respectfully request that the Court deny Petitioner-Respondents Dane County, Iowa County, Town of Wyoming, Village of Montfort, Driftless Area Land Conservancy, and Wisconsin Wildlife Federation’s (“Petitioners”) petition to bifurcate and remand unspecified “underlying state law issues” raised by their Chapter 227 appeal (the “Petition”).

The Petitioners ask this Court to allow the circuit court to hold oral arguments and issue a decision on various “merits issues” raised in their petition for judicial review while this Court simultaneously decides this appeal. As purported justification for their request, the Petitioners’ Petition mostly focuses on a recently issued, non-final federal district court order (Pet. Ex. A), which will be appealed to the Seventh Circuit and involves different claims and parties than those involved in the state Chapter 227 judicial review proceedings. Noticeably absent from the Petition is any description of what these “merits issues” are or any discussion of the practical implications of what the Petitioners are requesting that this Court do.

In fact - over three months ago - in October 2021, the Petitioners asked the circuit court to move forward on these “merits issues” while this appeal was pending, and the circuit court rightly decided not to do so because, among other reasons, the “merits issues” were too intertwined with the issues before this Court. (CO-R-App. 1–5) Namely, and as discussed in more detail herein, the Petitioners have argued below that what happens in this Court could impact the standard of

review governing the remaining “merits issues” pending before the circuit court. (CO-R-App. 3) As such, according to the Petitioners’ own arguments to the circuit court mere months ago, this Court’s decision on Huebsch’s appeal could impact the circuit court’s review of the “merits issues.” It therefore makes no practical sense for the circuit court to move forward on those “merits issues” until this Court issues its decision in this appeal.

It is also noteworthy that the circuit court decided not to proceed with review of the merits issues on November 8, 2021. (CO-R-App. 1–5) Yet the Petitioners waited for *three months*, and just a few weeks before oral arguments in this proceeding, to file their Petition asking this Court to bifurcate. Substantively or legally, nothing has changed since November 8 related to this bifurcation issue; so why did the Petitioners wait so long to bring this issue before the Court?

To be clear, the Co-Owners would like all of the legal claims raised in these Chapter 227 proceedings to be resolved in a timely fashion, especially now that they have been pending for over *two years*—largely due to the Petitioners’ dilatory conduct in pressing their bias claims against Commissioner Huebsch. (Co-Owners’ Resp. Br. at 39) The Co-Owners firmly believe that the Petitioners’ claims are meritless, and that the Commission’s Final Decision approving a Certificate of Public Convenience and Necessity (“CPCN”) for the Cardinal – Hickory Creek Project (“Project”) will ultimately be upheld. The reality is that the high-voltage transmission link between the Madison, Wisconsin area and Iowa has been discussed and studied for over a decade. (R. 1033 at 15) The Project was identified

over a decade ago as a key piece of infrastructure that can move low-cost wind power from areas west of Wisconsin—which have some of the best wind resources in the entire country—to customers in Wisconsin. (*Id.* at 15–16) The Project has received approvals from multiple agencies at the state and federal level.

The fact that one federal district court has issued a non-final order related to some limited federal approvals does not make it “very likely that Petitioners will prevail on ... their state law claims in circuit court” as Petitioners suggest. (Petition at 15) Obviously, the claims the Petitioners raised in their Chapter 227 appeal under the Wisconsin Environmental Policy Act (“WEPA”) were not before the federal district court, and those claims concern a completely different environmental impact statement than the one that was at issue in this case. Moreover, energy infrastructure projects, especially those as large in scope as this Project, take years to develop and often require permits or authorizations from multiple agencies at the federal and state levels. The fact that one federal judge issued a deeply flawed order that will likely be overturned on appeal does not mean that the Project cannot be constructed or that the Petitioners will prevail on substantively different claims raised in a completely different state court proceeding.

Indeed, the Co-Owners intend to appeal the federal district court’s order (and whatever judgment the district court ultimately issues) to the Seventh Circuit Court of Appeals, and there is a high likelihood that the Seventh Circuit will overturn the district court’s order. The Seventh Circuit has already reversed this exact federal district court three times in parallel, Project-related proceedings. *See Drifless Area*

Land Conservancy v. Valcq, 16 F.4th 508 (7th Cir. 2021) (CO-App. 37) (reversing and remanding district court order denying Commission's motion to dismiss); *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742 (7th Cir. 2020) (CO-R-App. 12–25) (reversing and remanding district court order denying Co-Owners' motion to intervene); *Driftless Area Land Conservancy v. Huebsch*, Appeal No. 20-3325 (7th Cir. Dec. 17, 2020) (unpublished opinion) (CO-R-App. 26–27) (overturning the district court's decision to allow discovery to proceed even though the Commission had raised the defense of sovereign immunity). Given the multitude of flaws in the district court's most recent order, the Seventh Circuit is likely to reverse the district court again.¹

PROCEDURAL BACKGROUND

I. THE PETITION FOR JUDICIAL REVIEW AND THE CIRCUIT COURT'S COMPETENCY

In September 2019, after a lengthy administrative contested case proceeding, the Public Service Commission of Wisconsin ("Commission") issued a CPCN for the Project, finding that it would provide economic benefits for Wisconsin that exceed its costs, improve the reliability of the transmission system, and "represents an important step in moving towards a future with increased renewable generation." (See P-App. 1002–1012) The Petitioners filed challenges to the CPCN Order in state court that were consolidated in the above captioned Dane County Circuit Court

¹ The Petitioners make numerous factually inaccurate assertions and claims in their Petition. Since most of those claims and assertions are not relevant to the merits of the Petition or any of the issues currently before this Court, the Co-Owners do not intend to respond to all of them herein.

proceeding. (P-App. 834–867; *see also* Dkt. 95) Despite these challenges, the CPCN Order remains in full force and effect today.

The Petitioners' challenges of the CPCN Order were made pursuant to Chapter 227 of the Wisconsin Statutes and included allegations of judicial bias limited to Commissioner Huebsch's involvement with the Organization of MISO States ("OMS") and Chairperson Valcq's previous employment history. *See* (P-App. 334). Typically, petitions for review of administrative decisions are limited to the record before the agency, *see* Wis. Stat. §§ 227.55, 227.57(1), with additional discovery only being allowed in cases of "alleged irregularities in procedure before the agency." Even though the Commission certified the administrative record for the contested case proceeding six months earlier, the Petitioners waited until after the parties had fully briefed the challenges to the CPCN Order, and ten days before the scheduled oral argument on the merits of the ch. 227 proceeding, to file a Motion to Accept Non-Record Evidence. (*See* Dkt. 236)

After briefing, the circuit court ultimately granted the Petitioners' motion and allowed discovery to proceed on the bias claims related to Commissioner Huebsch. (*See* Dkt. 248; *see also* P-App. 501–503) The Court issued a written decision ruling that if the Petitioners could prove "[Huebsch] was partial or that his involvement creates an improper *appearance of partiality*, [Huebsch's] actions denied [Petitioners] and the public due process." (P-App. 27)

The Petitioners' wide-ranging discovery to parties and non-parties alike, specifically the issuance of deposition and document subpoenas to Huebsch (*see* P-

App. 613–17), eventually gave rise to Commissioner Huebsch’s Petition for Expedited Review. (P-App. 1–2) This Court granted the Petition for Expedited Review and also stayed enforcement of “any [] discovery or trial-related demands to Michael Huebsch.” (P-App. 1–2) In granting the stay, this Court found that the Petition for Expedited Review met the criteria set forth in Wis. Stat. § 809.62(1r) and that addressing the appeal will “help develop, clarify or harmonize the law.” (P-App. 3)

After this Court granted review of Huebsch’s appeal, the PSCW raised the question of whether the circuit court had competency to conduct further proceedings of substance, since the record of the case had been transmitted to this Court. After holding briefing on the issue, the circuit court agreed with the PSCW and the Co-Owners that it lacked “competency to conduct the merits review or engage in further proceedings of substance until the Supreme Court returns the record to this Court.” (CO-R-App. 2) The circuit court found that the language of Wis. Stat. § 808.075 is unambiguous: “once the record left the Dane County Circuit Court and arrived in the Supreme Court’s capable hands, Branch 9 lost competency to act ‘except in certain unsubstantial and trivial matters.’” (*Id.*) In addition to being unconvinced by the Petitioners’ interpretation of Wis. Stat. § 808.075, the circuit court found that “because Petitioners made clear they believe and intend to argue that the mere allegation of procedural defects affects the standard of review I apply on my review of the merits of the PSC decisions... the merits review is connected to the bias issue before the Supreme Court.” (*Id.* at 3) Thus, the circuit court concluded that it was

directly stripped of authority to act on the merits review and that, in any event, it would not make sense to move forward because this Court's ultimate decision in this appeal could impact the circuit court's review of the remaining "merits issues."

(Id.)

II. THE FEDERAL PROCEEDINGS AND THE WESTERN DISTRICT DECISION

Because the Project is expected to cross the Mississippi River near Cassville, Wisconsin and be routed through the Upper Mississippi River National Wildlife and Fish Refuge ("Refuge") on the Iowa side of the river, in close proximity to two existing high-voltage transmission lines (owned by ITC Midwest and Dairyland), the Project also requires certain very limited approvals or environmental reviews from three federal agencies: the U.S. Fish and Wildlife Service ("FWS"), the U.S. Army Corps of Engineers ("Corps"), and the Rural Utilities Service ("RUS").² To cross the Refuge through a new or expanded right-of-way, the Co-Owners had to apply for a right-of-way (or "ROW") permit from FWS.

Additionally, the Co-Owners applied to the Corps for permits authorizing construction work that would result in *de minimis* permanent and temporary impacts to wetlands subject to federal jurisdiction under the Clean Water Act, 33 U.S.C. § 1251 et seq. ("CWA"). Specifically, in December 2019, the Corps' St. Paul District issued verification letters to ATC and ITC Midwest, verifying that activities

² RUS environmental review of the Project is only required because Dairyland currently intends to seek financing from RUS to fund its share of the Project. If Dairyland does not ultimately seek financing from RUS, no environmental review from RUS be necessary.

impacting jurisdictional waters along the Project route in Wisconsin were eligible for coverage under the Corps St. Paul District's Utility Regional General Permit ("URGP"). Those verifications authorized the permanent fill of approximately 0.02 acres of jurisdictional wetlands (associated with the placement of approximately ten transmission structures in such wetlands) and temporary fill of less than 14 acres of jurisdictional wetlands (associated with the use of temporary matting to protect such wetlands from construction activities) in Wisconsin.

In support of these requests for authorization, the Co-owners spent eight years performing environmental studies and technical feasibility analyses that informed a multi-volume federal Environmental Impact Statement (EIS), Biological Opinion, Compatibility Determination and Clean Water Act permit verifications prepared by the federal agencies. The regional planning for the transmission line began in 2008, and the federal permitting process spanned nine years from the time the Co-owners first began meeting with FWS.

Although the Co-Owners initially proposed (and received approval) for the Project to cross the Refuge through a compatibility determination and ROW authorization, they are now in the process of negotiating a land exchange with FWS. Specifically, in December 2019 and September 2020, FWS issued a compatibility determination and ROW permit for the Project to cross the Refuge. In March 2021, the Co-Owners applied for an amended ROW permit that would (among other things) modify the Project route to accommodate concerns that a Native American Tribe raised about the Project's impacts on a burial mound outside the Refuge. In

July 2021, the Co-Owners also applied to FWS for a land exchange, which would make the award of a ROW unnecessary. Under the current proposal, the Co-Owners would convey to FWS their existing transmission ROW within the Refuge and a 35-acre parcel outside the Refuge, in exchange for FWS conveying land within the Refuge for the Project. FWS agreed that the land exchange is a potentially favorable alternative to the ROW permit and is currently processing the Co-Owners' request, which was scheduled to be completed in the next several months. In the meantime, FWS revoked the compatibility determination and ROW permit that it previously issued for the Project in 2019 and 2020.

In 2021, a group of organizations, including Petitioners, filed suit in the federal district court for the western district of Wisconsin, seeking judicial review under the Administrative Procedure Act, 5 U.S.C. § 551 et seq. ("APA"), of the foregoing federal actions related to the Project. Generally speaking, the plaintiffs alleged that FWS's decision to issue a compatibility determination and ROW permit for the Project's crossing of the Refuge was unlawful under the Refuge Act; that the URGP and verification letters the Corps issued for the Project were unlawful under the CWA and other environmental statutes; and that a final EIS that the Rural Utilities Service ("RUS") prepared for the Project failed to comply with NEPA. (*See* CO-R-App. 29) The plaintiffs to that action, the Co-Owners, and the federal defendants filed cross motions for summary judgment in the fall of 2021.

In early November 2021, the district court found "that plaintiffs have established at least some likelihood of success on the merits as to [the Co-Owners']

right to proceed with . . . building the Project on permanent wetlands under the URGP” and preliminarily enjoined the Co-Owners from “any activities requiring permission under [the URGP] until the issuance of an opinion and order on summary judgment.” (CO-R-App. 31, 37) This narrow preliminary injunction only impacted the Co-Owners’ ability to construct the Project along a very small portion of the line—i.e., work that would result in permanent fill of 0.02 acres and temporary fill of less than 14 acres in federal jurisdictional wetlands in Wisconsin.

Then, on January 14, 2022, the district court issued its opinion and order on the parties’ cross-motions for summary judgment. (Pet. Ex. A) The district court reversed its prior ruling on the plaintiffs’ claims against the Corps, finding that the Corps lawfully issued the URGP and verifications for Project work affecting federal jurisdictional waters. (*Id.* at 41–44)

The Court also addressed the claims against FWS. Because the FWS revoked the compatibility determination and ROW permit that it previously issued and has not yet acted on the request for a land exchange, the district court should not have even addressed the plaintiffs’ claims against FWS concerning the Project’s crossing of the Refuge. Nonetheless, the Court ignored these jurisdictional limitations, and held that the Project is incompatible with the Refuge’s purposes and that FWS’ decision to issue the (now revoked) compatibility determination and ROW permit for the Project was arbitrary and capricious. (*Id.* at 32) The Court further held that FWS could not permit the Project to cross the Refuge through the proposed land exchange, even though FWS has not taken any final action on the Co-Owners’

application for a land exchange. (*Id.* at 35) As to the plaintiffs' claims against RUS, the Court held that the "purpose and need" statement in the EIS that RUS (as lead agency) prepared for the Project was unduly narrow and did not comply with NEPA. (*Id.* at 41)

Importantly, at this time, the federal district court's order does not preclude or otherwise affect the Co-Owners' ability to continue Project construction outside the Refuge. Indeed, the district court invited further briefing on what (if any) remedy is appropriate, given its rulings. (*Id.* at 44) The parties submitted briefing on a proposed remedy on January 31, 2022 and are awaiting issuance of a final judgment from the district court. The Co-Owners have also moved the district court to stay whatever final judgment it issues pending an appeal to the Seventh Circuit.

ARGUMENT

I. REMANDING THE MERITS ISSUES NOW WOULD BE INEFFICIENT AND WOULD NOT PROMOTE JUSTICE.

Wisconsin Statute § 808.075(5) provides that "any party may petition the appellate court for remand to the circuit court for action upon specific issues." Yet, the Petitioners' Petition does not specify which specific "merits issues" they would like this Court to bifurcate. For this reason alone, this Court should deny the Petition.

Looking at just one of the Petitioners' initial merits briefs filed by DALC/WWF, the brief includes the following four general categories of claims:

1. The "Commission failed to comply with the plain language of Wisconsin's CPCN statute (Wis. Stat. § 196.491)" in various ways;

2. “The Final Decision Unlawfully Shifts the Burden of Proof, Mislabels ‘Conclusions Of Law’ as ‘Findings of Fact,’ and Excuses The Applicants’ Failure to Prove their Case by a Preponderance of the Evidence”;
3. The “PSC Violated the Wisconsin Environmental Policy Act (WEPA) and its Required Procedures”; and
4. The “PSC’s Entanglements With Parties to This Case Created a Risk of Unfairness, Bias, and Lack of Impartiality that is Impermissibly High.”

(Dkt. 185 at ii-iii) Presumably when the Petitioners discuss the “merits issues,” they are referring to their claims in numbers 1 through 3. But again, this is not clear from their Petition. And other petitioners below have made additional claims, which are not covered by DALC/WWF’s list in their brief so it is unclear which if any of these other claims the Petitioners assert should also move forward while this appeal is pending.

Even if it is presumed that the Petitioners’ request was aimed at all of the claims not involving bias, the bias issues are intertwined with each of the other claims, and it would simply not be efficient to move forward with these other claims while this appeal is pending. The circuit court recognized this in its order finding that it lacked competency to hear the merits issues. In so doing, the circuit court correctly pointed out that the Petitioners have “made clear that they believe and intend to argue that the mere allegation of procedural defects [at issue in the Supreme Court] affects the standard of review I apply on my review of the merits of the PSC Decision.” (CO-R-App. 3) In other words, the Petitioners have argued

that this Court's decision in this appeal could impact the standard of review that the circuit court should apply to the remaining "merits issues."³ The Petitioners neither address nor even acknowledge the circuit court's concern in their Petition. In fact, the Petitioners' Petition never even addresses whether the bias and merits issues are connected.

Because the Petitioners have and presumably will continue to argue that this Court's decision could impact the circuit court's review of the "merits issues," it makes no sense to bifurcate the case. If this Court grants the Petitioners' request, the circuit court holds oral argument, and the circuit court decides the "merits issues" prior to this Court rendering a final decision, there is a risk that the circuit court might have to redo both the oral argument and re-issue its final decision based on what this Court decides. This would further delay and complicate the already "unique and complex procedural posture" of this matter. (CO-R-App. 1)

With similar disregard for the facts, the Petitioners rail against the Co-Owner's for "recklessly orchestrating a trainwreck," (Petition at 15), but fail to acknowledge their own role in delaying their challenge to the PSCW's CPCN Order. This is not the first, last-minute motion that the Petitioners have filed right before an oral argument was scheduled in this case. DALC/WWF waited until after the parties had fully briefed the challenges to the CPCN Order, and ten days before the

³ The Petitioners claim that the Co-Owners have "conceded that the statutes provide this Court with discretion to allow the circuit court to act on the merits issues while Mr. Huebsch's interlocutory appeal is pending." (Petition at 11). But the only thing that the Co-Owners "conceded" in the cited reply brief is that petitioning the appellate court is the proper procedure for such a request, not that this Petition should be granted. (CO-R-App. 8)

scheduled oral argument on the merits of the ch. 227 proceeding, to file a Motion to Accept Non-Record Evidence, which is what eventually led to this appeal. (See Dkt. 236) Additionally, despite having notice that the Co-Owners planned to start construction in October 2021 over three years ago, the Petitioners waited until the eleventh hour to move for an injunction to halt construction of the Project. (See Dkt. 1082; *see also* Dkt. 1101) The simple reality is that, starting with the filing of their recusal motion⁴ in the CPCN proceeding in front of the Commission, the Petitioners have failed to press their claims in a timely and good faith manner.

This pattern of gamesmanship demonstrates that the Court should not give serious consideration to their Petition. They are not interested in prosecuting or resolving their claims in a timely manner. They are interested in generating headlines and gumming up the Project 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.

This will not happen. The record before the PSCW regarding the value of this Project speaks for itself: the CPCN proceeding gave all parties a fair and impartial opportunity to make their cases, Commission staff was thorough in

⁴ A month after the Commission unanimously orally approved of the Project, DALC/WWF filed a recusal motion requesting that (1) Chairperson Valcq and Commissioner Huebsch recuse themselves from deliberating the merits of the case, and that (2) the Commission refrain from approving the Project. (P-App. 1070–1076) Although they cited no substantiating evidence (because, as they admitted later during depositions, they had none), DALC/WWF alleged that former Commissioner Huebsch was biased due to *ex parte* communications with parties to the CPCN proceeding while serving as the Commission's representative to the Organization of MISO States and on the MISO Advisory Committee.

preparing and assembling the record and the state EIS, and, in the end, the record overwhelmingly supported the Commission's approval of the Project. The record established that the Project is perhaps the most critical piece of energy infrastructure being constructed or even contemplated in Wisconsin that is necessary to facilitate Wisconsin's transition to a more affordable, more reliable, and more sustainable energy future. The Co-Owners are happy to defend the Project's merits before the circuit court when it is appropriate to do so. But now is not that time.

II. THE CO-OWNERS ARE MITIGATING THE RISK TO WISCONSIN RATEPAYERS BY STARTING CONSTRUCTION

The Petitioners also claim that the Co-owners "are playing a risky game with other peoples' money" by proceeding with the construction as scheduled. (Petition, at 14) In coming to this conclusion, however, the Petitioners incorrectly presume that the recent federal district court's order means that the project "*cannot be completed along its current route*" and makes it "very likely that Petitioners will also prevail on at least two of their state law claims in circuit court." (Petition, at 12 and 15) These assertions are simply false. In addition, moving forward with construction while legal challenges to the Project are pending is common-place and reduces costs associated with starting and stopping construction of a large infrastructure project.

a. The federal district court's order is unlikely to impact the Project.

Notwithstanding the Petitioners' assertions to the contrary, the federal district court ruling does not "create serious doubt about the future of the CHC

transmission line.” (Petition, at 11) At this time, the federal court’s order has no impact on the vast majority of the Project being constructed. In fact, of the 101-mile-long line, less than 1.5 miles of the Project will run through the Refuge. The remainder of the Project will be predominantly built on private land, primarily on existing utility or transportation rights-of-way. Moreover, the Co-Owners have existing easement rights within the Refuge on which they could build the Project, without obtaining a new or expanded right-of-way. The notion that the district court’s order “creates serious doubt” about the future of the Project is simply wrong.

In any event, the federal district court will not have the last word on this subject. Its order will be appealed to—and in all likelihood, overturned by—the Seventh Circuit. Indeed, the Seventh Circuit has reversed the same federal district court *three times* in Project-related cases. Given the significant flaws in the district court’s reasoning and legal analysis, there is a very high likelihood that its newest order will also be overturned on appeal to the Seventh Circuit.⁵

⁵ Likewise, the Petitioners’ assertion that the Project “will need an entirely different route, which requires a new CPCN” is, again, simply false. The Refuge is federally managed land located in Iowa and over which the PSCW obviously has no jurisdiction. It was for that exact reason that, when issuing the CPCN for the Project, the Commission authorized the Project’s crossing of the Mississippi River at two different locations, depending on the route the federal government authorized through the Refuge. (CPCN, at 44–45) Moreover, even if the Project could not cross the Refuge (either through a new right-of-way or on the Co-Owners’ existing easement), the Co-Owners would not need a new CPCN, as Petitioners suggest. The Co-Owners could petition for a minor route adjustment to, or reopen the record for, the existing CPCN. (CPCN, at 55–56); Wis. Stat. § 196.39.

b. The Project is in the best interests of Wisconsin ratepayers and any delays will cause the Co-Owners and electric ratepayers to suffer significant financial harm.

Although the Petitioners color the Co-Owners start of construction as a “decision to aggressively press forward,” it is a decision that is in the best interest of electric ratepayers. (Petition at 11) As the Co-Owners have already noted in their response brief filed in this Court, the Wisconsin Legislature has made it clear that large energy infrastructure projects, like the Project here, can proceed with construction during the pendency of Chapter 227 reviews, and the Legislature has set a higher bar for courts to enjoin construction of such projects. *See Wis. Stat. § 196.43*. Indeed, it is common practice in Wisconsin for large energy projects to be constructed while Chapter 227 appeals are pending.

The Project is also part of MISO’s Multi-Value Project (MVP) portfolio approved in 2011. When MISO—the fifteen-state not-for-profit regional grid operator—approved of the MVP portfolio it directed “transmission owners to use due diligence to construct the facilities.” (*See R. 1039, at 7*) The Co-Owners are proceeding with construction activities in full compliance with all permits, certificates and court orders, and these activities are continuing to help protect the interests of ratepayers.

Moreover, the evidence in the record before the circuit court demonstrates that delaying Project construction would not be in Wisconsin ratepayers’ best interests. The Co-Owners have already provided the circuit court with unrebutted detailed evidence explaining how and why even a short construction delay would

necessarily increase the costs of the Project. (*See* Co-App. 84, 92) Constructing a large transmission line is a costly, time-consuming, and logistically complex endeavor. (Co-App. 89) A delay in construction would disrupt carefully crafted construction schedules and result in increased costs in several ways, harming the public and the Co-Owners alike.

Even a short delay would require demobilizing workers and equipment scheduled to begin construction and remobilizing them at a yet-to-be determined date, forcing utilities to pay for a second round of mobilization and demobilization costs. (Co-App. 83–84, 93) It would also require the rescheduling of power outages on existing transmission and distribution lines. (Co-App. 91–93) Additionally, a short delay could create a ripple effect of increased labor and material costs because the construction schedule is planned around seasonable construction restrictions. (Dkt. 1101, at 11–12; *see, e.g.*, Co-App. 83–84, 87, 91–93) Thus, even a six-month delay could set back construction an entire year. The utilities conservatively estimated, and the circuit court agreed (*see* CO-R-App. 49), that a six-month injunction would increase the costs of construction by \$30 million. (CO-App. 83)


The bottom line is that the PSCW found that the Project is critical to transitioning Wisconsin to a cleaner, more sustainable, and more reliable energy future and that it would generate significant economic and environmental benefits for the State. (*See* P-App. 1002–1012) Despite the Petitioners' challenges, that CPCN remains in full force and effect today, and the Co-Owners' actions in initiating construction are in line with the best interests of Wisconsin's ratepayers.

CONCLUSION

As the Petitioners fail to specify which of their claims they would like the Court to bifurcate and their claims are entangled with the bias claims on appeal with this Court, the Petitioners' Petition to bifurcate should be denied.

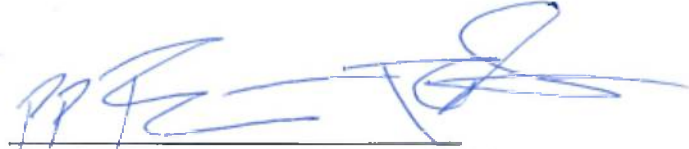
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