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

APPENDIX TO THE 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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No. 2021AP1325

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
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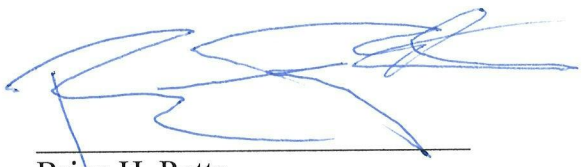
CERTIFICATE OF COMPLIANCE WITH § 809.19(2)

I hereby certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13)(f). The electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated: February 10, 2021



Brian H. Potts

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CO-R-App. No.

BY THE COURT:

DATE SIGNED: November 8, 2021

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

County of Dane et al,

Plaintiff,

v. 19CV3418

Public Service Commission of WI et al,

Defendant.

DECISION AND ORDER

This case holds a unique and complex procedural posture. What began as an arguably run-of-the-mill review of a PSC decision to issue a CPCN became extraordinary when Petitioners established an initial right to pursue discovery regarding whether PSC Commissioner Huebsch acted in a way that created an unconstitutional risk of the appearance of bias. After this potential procedural defect came to light, I separated review of the merits of the PSC decision and temporarily stayed that issue to first address the alleged procedural irregularities. After discovery on the procedural irregularities nearly concluded and a hearing was scheduled to take evidence on this issue a few weeks later, the Wisconsin Supreme Court accepted former Commissioner Huebsch's request for interlocutory review of a variety of my decisions. That interlocutory appeal remains pending.

The Supreme Court's taking review indisputably halts this Court from taking further action on review of procedural irregularities before the PSC. However, initially after the Supreme Court granted interlocutory review, the parties unanimously requested/agreed I should resume review of the merits of the PSC decision. Thus, I scheduled oral arguments on the merits. At a further hearing, Petitioners indicated their intent to argue on the merits review that the existence of possible procedural

irregularity affects the standard of review I apply to the PSC's decision on the merits.

In briefing relating to a motion seeking relief pending appeal, the PSC raised for the first time the question whether I hold competency to conduct further proceedings of substance now that the Supreme Court has the record in this case. I requested, received and reviewed further briefing on that issue.

I. THE COURT LACKS COMPETENCY TO PROCEED ON THE MERITS WHILE THE SUPREME COURT HOLDS THE RECORD.

After review of the briefs, I agree with the PSC and the Co-Owners that I lack competency to conduct the merits review or engage in further proceedings of substance until the Supreme Court returns the record to this Court. The Wisconsin Supreme Court explained:

> Once a Notice of Appeal has been filed with the circuit court and the record has been transmitted to the court of appeals, a circuit court's authority is limited. Wis. Stat. § 808.075(3) (a circuit court "retains the power to act on all issues until the record has been transmitted to the court of appeals"). "An appeal from a judgment or order strips the trial court of jurisdiction with respect to the subject matter of the judgment or order, except in certain unsubstantial and trivial matters," unless explicit contrary authority is noted in the statutes. *See In re Estate of Mayer,* 29 Wis. 2d 497, 505, 139 N.W.2d 111 (1966).

Madison Teachers, Inc. v. Walker, 2013 WI 91, ¶18, 351 Wis. 2d 237, 839 N.W.2d 388. Nobody asserts that Wis. Stat. §808.075 specifically authorizes me to continue review of the merits of the PSC decision. It does not. The statute and the Supreme Court's instructions are clear. 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.* The merits review of the PSC decision is not unsubstantial or trivial. Thus, I cannot act further on it.

Petitioners cite a variety of cases that predate the enactment of Wis. Stat. §808.075 to argue that I can continue to act on topics not directly connected to the issue on appeal. It seems to me that §808.075 and *Madison Teachers, Inc.* make clear that those prior decisions are overruled or no longer apply. Section 808.075 is unambiguous. It prohibits my acting on anything but what that statute specifically authorizes, which does not include the merits review. Wis. Stat. §808.075(3). I must apply an unambiguous statute as written. *Owens-Illinois, Inc. v. Town of Bradley*, 132 Wis. 2d 310, 315, 392 N.W.2d 104 (Ct. App. 1986) ("When statutory language is unambiguous, we interpret the statute according to the plain meaning of the language.")

Petitioners argue that *Madison Teachers*, by referencing the Supreme Court's single cite to *In re Estate of Mayer* therein, confirms that the Supreme Court apparently recognized the principles from *In re Estate of Mayer* that a lower court can still conduct proceedings on issues not related to the issue on appeal continue to be controlling law post-808.075. *See* Dkt. 1145 at 7-8. Petitioners further rely on case law predating §808.075. I do not read this lone citation to *In re Estate of Mayer* as conveying the meaning Petitioners take from it. Unless the Supreme Court clarifies that I can continue to act on separate issues from the one currently on appeal even without a specific statute saying I may do so, I read §808.075 and *Madison Teachers, Inc.* as closing that door.

Even if I agreed with Petitioners, though, their argument still fails 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 decision. Thus, the merits review is connected to the bias issue before the Supreme Court and, thus, I am directly stripped of authority to act on the merits review.

I disregard Petitioners' argument that I should consider policy purposes when interpreting §808.075. "We first examine the plain language of the statute to determine if it clearly and unambiguously sets forth the legislative intent. If it does, we go no further in interpreting the statute." *Return of Prop. in State v. Perez*, 2001 WI 79, ¶14, 244 Wis. 2d 582, 628 N.W.2d 820 (Cleaned up). Because I find §808.075 unambiguous, I do not delve further into exploring policy reasons to interpret the unambiguous statute differently.

I also disagree with Petitioners' argument that my agreeing with the PSC and Co-Owners here will open the door for "non-parties to undermine and effectively freeze litigation on the merits of important issues of statewide importance by appealing interlocutory discovery orders that are unrelated to the merits of the case." Dkt. 1145 at 9. Interlocutory appeals are uncommon. As Justice Grassl Bradley put it, "This case is highly unusual, and worthy of this court's attention." Dkt. 1141 at 4. Unless the Court of Appeals or Supreme Court starts granting requests for interlocutory review frequently, this decision opens no floodgate for abuses.

Therefore, I hereby cancel the oral arguments scheduled for November 19, 2021. I will conduct no further proceedings until the Supreme Court concludes its review unless they are proceedings authorized by law for my consideration while appeal is pending. The law gives me no other choice here, even if strong policy reasons favor holding the merits review now.

II. I DENY CO-OWNERS' MOTION FOR STAY OF MY DECISION GRANTING RELIEF PENDING APPEAL.

I also received and considered briefing on Co-Owners' Motion to stay my Order granting relief pending appeal. I deny that Motion, though I do appreciate the additional briefing. A stay pending appeal is appropriate if the moving party:

> (1) makes a strong showing that 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.

State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

As the Co-Owners point out, the first factor is different from the review I applied on the initial request for relief pending appeal filed by the Petitioners. Co-Owners explain:

> Despite having just evaluated several similar factors when ruling on DALC and WWF's motion for a temporary injunction, this Court cannot simply conclude that "there would not be any likelihood of success on appeal because it . . . already decided" that DALC and WWF's request for an injunction met similar standards. *Waity v. LeMahieu*, No. 2021AP802, at 7-8 (July 15, 2021). In *Waity*, the circuit court simply referenced its previous analysis in granting an injunction, and found that it did not constitute an adequate legal analysis for denying the movant's motion for a stay pending appeal. *Id.* at 9 (if that were the standard, "very few stays pending appeal would ever be entered, because almost no circuit court judge would admit on the record that he/she could have reached a wrong interpretation of the law.")

Dkt. 1137 at 4.

At oral argument and in my ruling, I may have improperly applied this factor by not viewing the likelihood of success from the perspective of an appellate court reviewing these filings. I correct that error now. I accept for purposes of this review that the Supreme Court is likely to disagree with some aspect of my prior decisions on the bias issue, meaning that the Co-Owners have a strong showing of a likelihood of success on appeal. However, I cannot find that the bias review will likely be stopped entirely.

Regardless, though this factor now favors Co-Owners-movants, the remaining factors still all strongly support and, on balance, require that I deny that request. As I explained in my oral ruling, incorporated herein, I disagree that the Co-Owners will suffer irreparable injury. The bond protects the Co-Owners from financial injury.

The only legitimate injury the Co-Owners might suffer is financial, which is by law not an irreparable injury. I reject the argument that the uncertainty whether Petitioners will ever afford the bond is a harm as not well explained or supported by law and as simply absurd. Co-Owners could avoid that uncertainty by voluntarily ceasing construction pending judicial review and thus eliminate their alleged harm.

However, Petitioners and the public stand to suffer significant harm if I stay my injunction granting relief pending appeal. The harm they will suffer is irreparable. Allowing construction to proceed while judicial review regarding the potentially unconstitutional bias of one of the PSC commissioners remains under review will almost certainly confuse the public, undercut faith and trust in the judicial system and the Chapter 227 review structure, and will irreparably harm the landowners affected if the line is built only to have the PSC decision remanded after the conclusion of judicial review.

I also reject the Co-Owner's arguments that the line is almost certain to be approved no matter what happens on the bias review. Even if that is true, process still matters. That the result may be the same after the statutory process is properly completed does not justify excusing a defective process. Statutes and the Constitution matter. The requirement for an impartial decision maker is paramount. Co-Owners' argument would effectively render judicial review of PSC decisions a nullity. I refuse to do so.

Therefore I deny the request to stay my October 18, 2021 decision enshrined in the October 26, 2021 Order.

cc: Parties

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 RESPONDENT AMERICAN TRANSMISSION COMPANY LLC, ATC MANAGEMENT INC., DAIRYLAND POWER COOPERATIVE, AND ITC MIDWEST LLC'S REPLY BRIEF REGARDING THE CIRCUIT COURT'S JURISDICTION TO ADDRESS THE MERITS OF THE COMMISSION'S FINAL DECISION

The Co-Owners hereby reply to the Petitioners' initial brief regarding this Court's current jurisdiction to act on the merits of the Public Service Commission of Wisconsin's (Commission) final decision approving a Certificate of Public Convenience and Necessity (CPCN) for the Cardinal-Hickory Creek Project (Project).

The Petitioners' arguments concerning this Court's jurisdiction are flat wrong. The Petitioners provide a curious and faulty legal framework in attempting to stretch this Court's jurisdiction to their will. But this Court does not have to, nor should it, engage in such legal gymnastics to understand the extent of its jurisdiction while the Supreme Court considers Mr. Huebsch's appeal. Despite acknowledging that Wis. Stat. § 808.075 was created to "clarify the circumstances in which lower courts may act regarding matters on appeal," the Petitioners notably

omit the actual language of the statute itself throughout their entire initial brief. (*See generally* Pet. Br.)

The statute governing this Court's jurisdiction, however, is unambiguous. Because the Dane County Clerk of Court has transmitted the record in this action to the Supreme Court, this Court "*may act only as provided* in [Wis. Stat. §§ 808.075(1) and (4)]." Wis. Stat. § 808.075 (emphasis added). Considering the merits of the Petitioners' various challenges to the Commission's Final Decision is not one of the limited, enumerated actions set forth in the statute that this Court may take, and therefore this Court lacks jurisdiction to issue a decision on the merits until after the Supreme Court resolves Mr. Huebsh's currently pending appeal.

I. The Petitioner's legal framework is misguided.

The Wisconsin Supreme Court has repeatedly held that statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. Instead of starting with the statutory language–or even referring to it at all–the Petitioners dive into an analysis of legislative history that is not only unnecessary and inadvisable, but also inaccurate. *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶ 7, 260 Wis. 2d 633, 638, 660 N.W.2d 656, 659 ("where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history").

Starting with the language of the statute—as the Court should—there is nothing that could even plausibly give rise to competing interpretations. Indeed, the Petitioners have not even attempted to argue that the applicable statutory language is ambiguous. The statute provides an exhaustive list of the "only" permitted actions a circuit court can take pending appeal. Wis. Stat. § 808.075 ("the circuit court may act only as provided in subs. (1) and (4)"). The statute's meaning

is plain, there is no ambiguity to clarify, and there is therefore no need for this Court to even address the Petitioners' misguided citations to legislative history and case holdings that predate the statute.

In fact, if the Petitioners feel so strongly that this Court should hear the merits issues while the appeal is pending, the statutes give them a way to do so. "[A]ny party may petition the appellate court for remand to the circuit court for action upon specific issues" and "the appellate court may remand the record to the circuit court for additional proceedings while the appeal is pending." Wis. Stat. §§ 808.075(5) and (6). The Petitioners have made no such request here.

II. The prior legislative history and case holdings do not support the Petitioners' arguments either.

The Petitioners' arguments are wedded to a principle that predates the passage of Wis. Stat. § 808.075, and they misinterpret the Supreme Court's decision in *Madison Teachers, Inc. v. Walker* to argue that principle remains authoritative. (Pet. Br. at 6-8) But the idea that the circuit court has authority beyond the plain language of Wis. Stat. § 808.075 is absurd.

Indeed, none of the authority the Petitioners cite actually helps their position. For example, in *Hengel v. Hengel*, 120 Wis. 2d 522, 355 N.W.2d 846 (Ct. App. 1984), the Court of Appeals held that the circuit court had no specific statutory authority to order a husband to pay his wife's attorneys' fees while the circuit court's judgment regarding their antenuptial agreement was being reviewed on appeal. *Id*. at 524–27. The Petitioners note that Wis. Stat. § 808.075 was enacted to ameliorate this strict rule in *Hengel* and argue that the statute therefore "expand[s] and clarif[ies] the circumstances in which lower courts may act regarding matters on appeal." But this is circular logic: of course, when given the Court of Appeals' finding in *Hengel* that no specific statutory provision authorized the circuit court's order, any subsequent statutory provisions granting such authority would necessarily be an expansion of the circuit court's jurisdiction.

The Petitioners next recontextualize the Supreme Court's language in *Madison Teachers, Inc.* by selectively quoting the Supreme Court's opinion. (Pet. Br. at 6) The full quote is as follows: "'[a]n appeal from a judgment or order strips the trial court of jurisdiction with respect to the subject matter of the judgment or order, except in certain unsubstantial and trivial matters,' *unless explicit contrary authority is noted in the statutes*." *Madison Teachers., Inc.*, 2013 WI 91, ¶ 18 (emphasis added). As discussed earlier, the statutes do specifically limit how and when a circuit court may act while a case is on appeal.

Regardless, even if this Court finds that it "may continue to act on matters that are unrelated to the subject matter of the judgment or order on appeal", the "bias" and "merits" issues are not unrelated. In fact, the Petitioners have asserted that they intend to argue that a higher standard of scrutiny should be applied to the merits claims given the pending bias claims. It is likely for this reason that the Supreme Court brought up the entire record in this case and not just certain portions related to the "bias" issues. Moreover, while the Petitioners assert that the issues on appeal would not impact the "merits" issues, Justice Karovsky recognized that the "expansive review" may impact "not just [Huebsch's] subpoena but also earlier discovery rulings to which he was not a party." (Dkt. 1038)

III. The Petitioners' policy arguments are also misleading.

Lastly, contrary to the Petitioners' arguments, following the plain language of the statute would not provide an avenue "for non-parties to undermine and effectively freeze litigation on the merits of important issues." (Pet. Br. at 9) The Petitioners' hyperbolic claim is not supported by the language of the statute or general appellate procedure.

For one thing, only final judgments or orders are appealable as of right. *See* Wis. Stat. § 808.03(1). Interlocutory appeals are only permitted with leave of the Court of Appeals, provided certain criteria are met. *Id.* § 808.03(2).

For another, it is not the existence of the appeal itself that triggers a change in this Court's jurisdiction, but the transmittal of the record to the appellate court. Wis. Stat. § 808.075(3); *see also Lyubchenko Laiter v. Lyubchenko*, 2020 WI App 1, ¶ 3 n. 1, 389 Wis. 2d 623, 937 N.W.2d 293. As a result, the appellate court must determine that the appeal meets the statutorily established criteria for granting review before the appeal could divest jurisdiction from the circuit court. *See* Wis. Stat. §§ 808.03(2) and 809.629(1r). Therefore, in following the statute, there is no risk of "allow[ing] non-parties to indefinitely lock-up litigation in the circuit courts by filing interlocutory appeals of unrelated discovery orders and other matters" as the Petitioners' doomsday prognostication would suggest. Plus, as noted above, there *is a process in the statute*s for the Petitioners to obtain the relief they seek: by asking the appellate court to allow merits proceedings to continue in this Court.

CONCLUSION

Under Wis. Stat. § 808.075, this Court lacks jurisdiction to issue a decision on the merits, and it should therefore postpone oral arguments until after the Supreme Court has issued a decision on Mr. Huebsch's appeal.

Dated: November 3, 2021

Respectfully submitted,

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Attorneys for Intervenor-Respondent Dairyland Power Cooperative

In the

United States Court of Appeals

For the Seventh Circuit

No. 20-1350

DRIFTLESS AREA LAND CONSERVANCY and
WISCONSIN WILDLIFE FEDERATION,

Plaintiffs-Appellees,

v.

MICHAEL HUEBSCH, et al.,

Defendants-Appellees.

APPEAL OF: AMERICAN TRANSMISSION COMPANY LLC, et al.,

Intervenors-Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 19-cv-1007-wmc — **William M. Conley**, *Judge*.

SUBMITTED JULY 2, 2020 — DECIDED AUGUST 11, 2020

Before SYKES, *Chief Judge*, and FLAUM and ROVNER, *Circuit Judges*.

SYKES, *Chief Judge*. The Wisconsin Public Service Commission issued a permit authorizing the construction of a $500 million electricity transmission line in southwestern

Wisconsin. Two environmental groups sued the Commission to invalidate the permit. The permit holders moved to intervene to protect their interest in the permit; without it the power line cannot be built. The district court denied the motion, and the permit holders appealed.

Briefing was completed at the end of June, and we set the case for oral argument on September 22, 2020. The permit holders moved for expedited review without oral argument; they want an earlier ruling because the case continues without them in the district court. The environmental groups responded in opposition, and the matter is ready for decision.

We grant the motion. The briefs and record adequately address the single issue raised on appeal, and oral argument would not significantly assist the court. *See* FED. R. APP. P. 34(a)(2)(C). The case is submitted on the briefs, and we now reverse the district court. The permit holders are entitled to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure. In many respects this is a paradigmatic case for intervention as of right.

I. Background

The plaintiffs are two Wisconsin environmental groups, Driftless Area Land Conservancy and Wisconsin Wildlife Federation. The defendants are the Wisconsin Public Service Commission of Wisconsin and its three commissioners (collectively, "the Commission"). The Commission regulates public utilities in the state. Two of the proposed intervenors—American Transmission Company LLC and ITC Midwest LLC—are Wisconsin electric-power utilities. The

third, Dairyland Power Cooperative, is a cooperative association that furnishes electricity to its members.

In April 2018 the two utilities and the cooperative filed an application with the Commission for permission to construct a high-voltage transmission line running from Madison through the southwestern part of the state and ending in Dubuque County, Iowa. A project of this type is subject to heavy regulatory oversight and requires a special permit from the Commission known as a "certificate of public convenience and necessity." WIS. STAT. § 196.491(3). The two utilities each own 45.5% of the project; the cooperative owns the remaining 9%. (We refer to the utilities and the cooperative collectively as "the transmission companies.") The estimated cost of the project is $500 million.

The permitting process requires a "class 1" contested case hearing. *Id.* § 227.01(3)(a). An exhaustive administrative proceeding ensued, spanning almost 18 months and drawing more than 50 intervenors. At the end of September 2019, the Commission approved the project and issued a permit authorizing the transmission companies to construct the proposed power line and acquire easements through eminent domain as necessary to complete construction.

In December 2019 Driftless Area Land Conservancy and the Wisconsin Wildlife Federation filed this lawsuit against the Commission seeking to invalidate the permit. Both groups had participated in the permit proceedings as intervenors in opposition, but their views obviously did not carry the day. The complaint raises three constitutional claims under 42 U.S.C. § 1983. The first alleges that the adjudicative process was tainted by the appearance of bias because two of the three commissioners had apparent conflicts of interest,

depriving the plaintiffs and their members of due process. The second and third claims challenge the authorization to use eminent domain as an unlawful taking of private property in violation of the Fifth Amendment's takings clause.

The Commission filed a motion to dismiss in January 2020. A week later the transmission companies moved to intervene, seeking intervention as of right under Rule 24(a)(2), or alternatively, permissive intervention under Rule 24(b). As required by Rule 24(c), they tendered proposed pleadings—answers and a motion to dismiss—with the intervention motion.

The district judge rejected intervention as of right, concluding that the transmission companies and the Commission have the same goal—dismissal of the lawsuit—and the Commission adequately represents that shared objective. The judge also declined to authorize permissive intervention, saying that adding the transmission companies as parties would "almost certainly and needlessly complicate and delay this case." The judge denied the motion without prejudice and invited the transmission companies to renew their request if "a concrete, substantive conflict or actual divergence of interests should emerge" later in the litigation. Alternatively, he invited a "standby" application to intervene—essentially a placeholder motion that could be activated if circumstances changed. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 101 F.3d 503, 509 (7th Cir. 1996).

Not content to rely on governmental regulators to protect their $500 million private investment, the transmission companies appealed.

II. Discussion

A. Appellate Jurisdiction

We begin by addressing a skirmish over appellate jurisdiction.[1] It will not take long. It is well established that "from the perspective of a disappointed prospective intervenor, the denial of a motion to intervene is the end of the case, so an order denying intervention is a final, appealable decision under 28 U.S.C. § 1291." *CE Design, Ltd. v. Cy's Crab House N., Inc.*, 731 F.3d 725, 730 (7th Cir. 2013). Notwithstanding this rule, the plaintiffs moved to dismiss for lack of appellate jurisdiction, arguing that the judge's order is not final because he left open the possibility of a new intervention motion if things change later in the litigation.

The possibility of a new motion if circumstances change does not block an immediate appeal. The contingency that the judge has in mind might never arise, leaving the transmission companies on the sidelines of the litigation without appellate review of their intervention claim. Nor does the incantation of the words "without prejudice" automatically defeat finality; what matters is that the judge addressed the substantive merits of the intervention motion and conclusively denied it, freezing the transmission companies out of the case. *See United States v. City of Milwaukee*, 144 F.3d 524, 531 n.14 (7th Cir. 1998). Finally, the judge's invitation to file a

[1] There is also a minor debate about standing. We do not understand why. The transmission companies hold valuable rights under a government-issued permit authorizing them to build a major power line that will yield a return on their investment for many years to come. The permit—and thus the entire power-line project—is at risk of nullification in this litigation. A favorable decision will prevent that injury. No more is needed for Article III standing.

"standby" motion does not prevent finality. The availability of that optional procedure—an innovation mentioned in *SWANCC* but not specified in any procedural rule—does not foreclose an appeal. Nothing we said in *SWANCC* eliminates a disappointed intervenor's right to immediately appeal an order denying intervention.

The plaintiffs rely on *City of Milwaukee*, but that case actually supports rather than defeats appellate jurisdiction. There the district court denied an intervention motion based on a purely technical error: the intervenor failed to include a proposed pleading with his intervention motion as required by Rule 24(c). *Id*. at 527. The judge denied the motion without prejudice to give the intervenor an opportunity to refile it with the required pleading; the judge did not address the merits of the intervention question. *Id*. at 528–29. We dismissed the appeal, explaining that "a decision denying intervention *on strictly procedural grounds* is not a final judgment when the district court expressly contemplates that the putative intervenor subsequently will file a procedurally correct motion." *Id*. at 530.

This case is not remotely analogous. As we specifically observed in *City of Milwaukee*,

> the circumstances would be different if a district court denied a motion to intervene on the ground that the putative intervenor's interests were adequately protected by the existing parties but entered the denial "without prejudice" in recognition of the fact that the circumstances of the case may change such that intervention at a later date would be appropriate.

Id. at 531 n.14. That describes this case.

The judge's order is final and appealable under § 1291. *CE Design*, 731 F.3d at 730. Appellate jurisdiction is secure.

B. Intervention as of Right

With the jurisdictional hurdle cleared, we move to the intervention question. The rule governing intervention as of right provides:

> (a) Intervention of Right. On timely motion, the court *must permit anyone to intervene who*:
>
> …
>
> (2) claims an interest relating to the property or transaction that is the subject of the action[] and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a)(2) (emphasis added).

The rule is straightforward: the court *must* permit intervention if (1) the motion is timely; (2) the moving party has an interest relating to the property or transaction at issue in the litigation; and (3) that interest may, as a practical matter, be impaired or impeded by disposition of the case. A proposed intervenor who satisfies these three elements is *entitled* to intervene *unless* existing parties adequately represent his interests.

Everyone agrees that the three basic criteria for intervention are satisfied: the intervention motion was timely; the transmission companies hold a valuable property interest in

the permit that is under attack in this litigation; and their interest will be *extinguished* (not just "impaired" or "impeded") if the plaintiffs prevail. The only disputed question is whether the existing defendants—the Commission and its members—adequately represent their interests. The district court answered "yes" and denied intervention as of right. We review that determination de novo. *Wis. Educ. Ass'n Council v. Walker* (*WEAC*), 705 F.3d 640, 658 (7th Cir. 2013).

"The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties." 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1909 (3d ed. 2007). Our recent decision in *Planned Parenthood of Wisconsin, Inc. v. Kaul* describes our circuit's three-tiered methodology for evaluating adequacy of representation under Rule 24(a)(2). 942 F.3d 793, 799 (7th Cir. 2019). "The default rule," we explained, "is a liberal one." *Id*. It derives from the Supreme Court's decision in *Trbovich v. United Mine Workers of America*, which explained that "the requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." 404 U.S. 528, 538 n.10 (1972).

However, if the interest of the absentee is identical to that of an existing party, or if a governmental party is charged by law with representing the absentee's interest, then the standard for measuring adequacy of representation changes. In both situations—where the absentee and an existing party have identical interests, or the existing party is a governmental agency or official with a legal duty to represent the absentee's interest—a rebuttable presumption of adequate

representation arises, and the prospective intervenor must carry a heightened burden to establish inadequacy of representation. The degree of this heightened burden varies.

In *Planned Parenthood* we explained the presumption in this way:

> Where the prospective intervenor and the named party have the same goal, … there is a rebuttable presumption of adequate representation that requires a showing of some conflict to warrant intervention. This presumption of adequacy becomes even stronger when the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors; in such a situation the representative party is presumed to be an adequate representative unless there is a showing of gross negligence or bad faith.

942 F.3d at 799 (quotation marks and citation omitted).

In the district court, the plaintiffs advocated for the highest standard, which applies when a governmental party is legally required to represent the absentee's interests. This standard sets a nearly insurmountable bar: the absentee must show that the existing representation is grossly negligent or in bad faith. The judge declined to go that far; he was not convinced that the Commission is charged by law with protecting the transmission companies' interests. Still, he applied the presumption of adequacy in its weaker form. He first concluded that the transmission companies and the Commission share the same goal: dismissal of the plaintiffs' suit. Extrapolating from that conclusion, the judge applied

the presumption of adequacy and required the transmission companies to satisfy the intermediate burden to overcome it. That is, he required them to show an actual, concrete conflict with the Commission's representation and determined that they had not done so.

The transmission companies challenge the judge's use of the intermediate standard. They argue instead for the lenient default standard, which involves no thumb on the scale and requires only a minimal showing that the existing party's representation "may be" inadequate. Alternatively, they argue that the judge misapplied the intermediate standard. The plaintiffs, for their part, no longer advocate for the gross-negligence/bad-faith standard. They adopt a more moderate stance and simply defend the judge's application of the intermediate standard.

Under a correct reading of Rule 24(a)(2) as glossed by our three-tiered approach, the transmission companies are entitled to intervene. The rule calls for a contextual, case-specific analysis, and resolving questions about the adequacy of existing representation requires a discerning comparison of interests. That did not occur here.

To trigger the presumption of adequacy under the intermediate standard, it's not enough that a defense-side intervenor "shares the same goal" as the defendant in the brute sense that they both want the case dismissed. The judge seemed to think it was, but that mode of analysis operates at too high a level of generality. Needless to say, a prospective intervenor must intervene on one side of the "v." or the other and will have the same general goal as the party on that side. If that's all it takes to defeat intervention, then intervention as of right will almost always fail. The judge's

analysis essentially boils down to this: The Commission wants the case dismissed. The transmission companies do too. Therefore, they share the same goal, and the presumption of adequate representation applies. If that's truly how the presumption works, then the default standard will rarely apply.

That's not how the presumption works. Rule 24(a)(2) requires a more discriminating comparison of the absentee's interests and the interests of existing parties. When that kind of contextual analysis is done here, it quickly becomes clear that the transmission companies are entitled to participate as parties to this litigation to protect their private investment in this massive energy project. Their interests are independent of and different from the Commission's in several important respects. To name a few: They own, finance, and will operate the transmission line in question, and have obligations to their investors in connection with its construction and operation. They have substantial sunk and anticipated future investments in the power line, and a valid expectation of a return on their investment pursuant to the ratemaking regulatory regime administered by the Federal Energy Regulatory Commission. *See* 16 U.S.C. §§ 824(d), 824d(a), 824e(a). As public utilities, they have a legal obligation to maintain the power grid and provide adequate and reliable electricity services to the public. *See* WIS. STAT. § 196.03. (The cooperative's obligation to furnish electricity flows to its members, not the general public.) And they hold the right to use eminent domain as needed to construct the power line.

The Commission's interests and objectives overlap in certain respects but are importantly different. The Commission is a regulatory body, and its obligations are to the general

public, not to the transmission companies or their investors. The Commission can be expected to defend the procedural regularity of its proceedings, which is the focus of the due-process challenge raised in count one. The other two counts, however, attack the use of eminent domain, and that authority belongs to the transmission companies.

More broadly, the Commission *regulates* the transmission companies, it does not *advocate for* them or represent their interests. The transmission companies cannot be forced to rely entirely on *their regulators* to protect their investment in this enormous project, which they stand to lose if the plaintiffs are successful. For these reasons, their intervention request is not controlled by the line of cases involving intervention motions by individual members of the public, citizen groups, or other units of government that hold identical or closely aligned interests and objectives as existing governmental parties. *See, e.g.*, *Planned Parenthood*, 942 F.3d at 810 (Sykes, J., concurring); *WEAC*, 705 F.3d at 658–59; *SWANCC*, 101 F.3d at 508.

Instead, this case falls within a line of cases involving permit holders that have successfully invoked Rule 24(a)(2) to intervene in litigation challenging their permits. *See, e.g.*, *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517–18 (7th Cir. 2004); *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 568–69 (5th Cir. 2016); *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996–97 (10th Cir. 2009); *Sierra Club v. EPA*, 995 F.2d 1478, 1486 (9th Cir. 1993). The plaintiffs cite no appellate case, and we know of none, that affirmed a denial of intervention in similar circumstances.

Because the transmission companies' interests and objectives are materially different than the Commission's, the

presumption of adequate representation does not apply. Under the lenient default standard, they need only show that the Commission's representation "may be" inadequate, "and the burden of making that showing should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10. They have satisfied this burden.

As we've noted, the Commission can be expected to mount a vigorous defense against the plaintiffs' attack on the integrity of the permitting process and the impartiality of the commissioners. But the power-line project itself, and the permit necessary to construct it, belong to the transmission companies, as does the authority to use eminent domain, which is the subject of counts two and three. The Commission may be content to move slowly in this litigation; but the transmission companies want to move quickly, begin using eminent domain as soon as possible, and otherwise keep the construction project on schedule. Different defenses have been raised. In their proposed motion to dismiss submitted with the intervention motion, the transmission companies argue that even if two commissioners had conflicts, the permit was lawfully issued on the vote of the remaining commissioner or would have issued as a matter of law regardless. The Commission raised neither of these arguments in its motion to dismiss. These are not mere "quibbles with … litigation strategy." *WEAC*, 705 F.3d at 659. Rather, they reflect very real differences in the interests at stake.

Accordingly, the transmission companies cannot be kept out of this case. The basic prerequisites for intervention under Rule 24(a)(2) are unquestionably satisfied, and the transmission companies have carried their burden to show that the Commission's representation may be inadequate to

protect their interests. We therefore reverse the district court's order and remand with instructions to permit the transmission companies to intervene.

REVERSED AND REMANDED
WITH INSTRUCTIONS.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

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ORDER

December 17, 2020

Before

DIANE S. SYKES, *Chief Judge*
JOEL M. FLAUM, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 20-3325	DRIFTLESS AREA LAND CONSERVANCY and WISCONSIN WILDLIFE FEDERATION, Plaintiffs - Appellees v. MICHAEL HUEBSCH and REBECCA VALCQ, Defendants - Appellants
Originating Case Information:	
District Court No: 3:19-cv-01007-wmc Western District of Wisconsin District Judge William M. Conley	

The following are before the court:

1. **DEFENDANTS-APPELLANTS' MOTION TO STAY THE DISTRICT COURT PROCEEDINGS**, filed on December 4, 2020, by counsel for the appellants.

2. **PLAINTIFFS-APPELLEES' RESPONSE TO DEFENDANTS-APPELLANTS' MOTION TO STAY DISTRICT COURT PROCEEDINGS**, filed December 11, 2020, by counsel for the appellees.

3. **DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF THEIR MOTION TO STAY THE DISTRICT COURT PROCEEDINGS**, filed on December 16, 2020, by counsel for the appellants.

IT IS ORDERED that the motion for stay is **GRANTED**. Because appellants have identified a colorable claim of immunity, district court proceedings shall be stayed pending resolution of this appeal. *See Allman v. Smith*, 764 F.3d 682, 684 (7th Cir. 2014); *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989).

form name: **c7_Order_3J**(form ID: **177**)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION, and DEFENDERS OF WILDLIFE

Plaintiffs,

v.

RURAL UTITLITIES SERVICE, CHRISTOPHER MCLEAN, Acting Administrator, Rural Utilities Service, UNITED STATES FISH AND WILDLIFE SERVICE, CHARLES WOOLEY, Midwest Regional Director, and SABRINA CHANDLER, Manager, Upper Mississippi River National Wildlife and Fish Refuge, UNITED STATES ARMY CORPS OF ENGINEERS, LIEUTENANT GENERAL SCOTT A. SPELLMON, Chief of Engineers and Commanding General, U.S. Army Corps of Engineers, COLONEL STEVEN SATTINGER, Commander And District Engineer, Rock Island District, U.S. Army Corps of Engineers, and COLONEL KARL JANSEN, Commander and District Engineer, St. Paul District, U.S. Army Corps of Engineers,

Defendants,

and

AMERICAN TRANSMISSION COMPANY, LLC, DAIRYLAND POWER COOPERATIVE, & ITC MIDWEST LLC,

Intervenor-Defendants.

OPINION AND ORDER

21-cv-096-wmc & 21-cv-306,

Plaintiffs National Wildlife Refuge Association, Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and Defenders of Wildlife seek a preliminary injunction prohibiting Intervenor-Defendants American Transmission Company, LLC ("ATC"), Dairyland Power Cooperative ("Dairyland") and ITC Midwest LLC ("ITC") from

beginning construction on the ninety-mile stretch of their proposed, preferred route for the Cardinal-Hickory Creek ("CHC") Transmission Line Project running from far Southwest Wisconsin near Cassville and the Mississippi River to Middleton in the center of Southern Wisconsin through what is known as the Driftless Area.[1] Given the balance of harms implicated by the parties and the plaintiffs' likelihood of success on the merits, a narrowly tailored motion for preliminary injunction will be granted with respect to land on or near federal jurisdictional waters until issuance of this court's decision on the parties' cross-motions for summary judgment, which will be fully briefed within a day of the issuance of this order.

BACKGROUND[2]

A. Project Permits

Since 2012, ATC, ITC, and Dairyland ("co-owners") have been working on approvals for and construction of the CHC project. (Def.'s Resp. to Pl.'s PFOF (dkt. #119) ¶ 3-5.) This project involves a 345-kilovolt, 101-mile transmission line that will carry electricity from Iowa to Wisconsin. (*Id*. at ¶ 1.) Among other things, defendants have proposed that the CHC Transmission Line cross a section of the Upper Mississippi River National Wildlife and Fish Refuge ("Refuge"). (*Id*.) Dairyland has also indicated its intent

[1] The Driftless area is a region in Iowa, Wisconsin, and Minnesota. This region was not flattened by glaciers like many other areas of the Upper Midwest, leading to a unique geographic region with hills, bluffs, and valleys. Many species of plant and animal call this region home, such as the Timber Rattlesnake, the Northern Monkshood, and the Brook Trout. Defining the Driftless, October 28, 2021, https://driftlesswisconsin.com/defining-the-driftless/

[2] As cited below, the following facts are largely undisputed and taken from the parties' responses to each side's proposed findings of fact ("Resp. to PFF") or the administrative record, except where otherwise noted.

to pursue financial assistance from the Rural Utilities Service ("RUS") in the future. (*Id*. at ¶ 5). To that end, the RUS prepared an environmental impact statement ("EIS") regarding the project under the National Environmental Policy Act ("NEPA"), on which both the United States Fish and Wildlife Service ("Service") and the the U.S. Army Corps of Engineers ("Corps") expressly relied. (*Id*. at ¶ 6.) The Service determined that the project is compatible with the purposes of the Refuge, resulting in its issuance of a "right-of-way" permit for the line's construction through the Refuge. (*Id*. at ¶ 128.) Finally, the Corps is responsible for regulating the project to the extent that it impacts jurisdictional waters of the United States. (*Id*. at ¶ 192.) Since the proposed line covers territory under the district authority of two of the Corps branches, both the Rock Valley and St. Paul district branches have permitted sections of the proposed CHC transmission line. (*Id*. at ¶ 196-198.)

Specifically, the Corps-Rock Valley district issued Nationwide Permit 12 ("NWP 12"), under which intervenor-defendants had already started to clear cut the relatively smaller portion (approximately 15 miles) of the proposed CHC line running through Northeastern Iowa without objection by plaintiffs. (*Id*. at ¶ 197-198.) Because the Corps-St. Paul branch revoked NWP 12 within its district, no work had begun in the Upper Mississippi Refuge and the remainder of the proposed line through Wisconsin, although the St. Paul district did issue a more narrow Utility Regional General Permit ("URGP") some time ago (USACE000680).[3]

[3] Whether nationwide or regional, when a general permit is created, the issuing agency does an environmental review, but little, additional review is needed for each *specific* project subsequently. authorized, except for "Pre-Construction Notices" for certain larger projects having more than "minimal effects" on the environment. . (*Id*. at 193-196.)

B. Defendants' and Intervenor-Defendants' New Approach for Obtaining a CHC Line Permit Within the Refuge

On July 29, 2021, intervenor-defendants also requested a "land exchange" with the Service in lieu of obtaining renewed right-of-way permits through the Refuge. (Def.'s Resp. to Pl.'s PFOF (dkt. #119) ¶ 137.) Under this requested land exchange, the proposed co-owners, ITC, ATC and Dairyland, would transfer to the Service another parcel adjacent to the Refuge of around 30 acres. In exchange, the Service would grant the co-owners 19 acres of land within the refuge. (dkt. #53-2.) The Service is considering this proposal and expects its review to take up to nine months. (Def.'s Mot. (dkt #50) 10.)

In the meantime, the Service has withdrawn the CHC Project's application for Compatibility Determination and Right of Way Permits through the Refuge, ostensibly because the Service "did not review the correct easement documents when evaluating the existing use." (dkt. #69.) Additionally, the Corps modified and reissued several, other nationwide permits under the Clean Water Act on January 13, 2021, which it noted rendered the NWP 12 permit invalid. (*Id.*)

C. Plaintiffs' Claims

In this lawsuit, plaintiffs have asserted three, basic challenges to the federal approvals of the proposed preferred route of the CHC Transmission Line. First, plaintiffs' claim that the EIS prepared for the CHC project does not comply with the National Environmental Policy Act ("NEPA"). (Def.'s Mot. (dkt #50) 2.) Second, they claim that the right-of-way permit and compatibility determination by the Service violated the National Wildlife Refuge System Improvement Act, as the project is not compatible with the purposes of the Refuge. (*Id.*) Third, they claim that the Corps violated NEPA, the

Endangered Species Act, and the Clean Water Act by issuing general permits for the proposed project. (*Id.*)

On September 24, 2021, intervenor-defendants notified plaintiffs and this court of their intention to start construction in Wisconsin by clear cutting the proposed route within 30 days, a minimum notice period agreed upon by the parties early in this lawsuit. (dkt. #96.) In response, plaintiffs moved for a preliminary injunction, arguing that (1) clearcutting and subsequent construction of the powerline itself would permanently harm the environment and (2) a temporary pause of clearcutting and construction while the court decides the merits of this case at summary judgment is warranted. (Pl.'s Mot. (dkt. #98).) Subsequently, in response to inquiry by this court, intervenor-defendants agreed to hold off all activities within federal jurisdictional waters until November 29, 2021. (Dkt. #152.)

D. Jurisdictional Limits

Given that NWP 12 through Wisconsin and the Service's previous grant of a right of way through the Refuge are no longer valid, intervenor-defendants are unable to begin construction in the Refuge, including clearcutting. Additionally, Dairyland has not yet asked for funding from RUS, making that EIS relevant only to the extent it impacts the validity of other, current permits issued or actions taken by the Corps and the Service. Because the Wisconsin section is currently the subject of clearcutting and possible construction is authorized under the URGP alone, that is the only place where irreparable harm is likely to occur for the purposes of the preliminary injunction. As such, at most, the court can enjoin construction activities requiring permitting under that URGP. Any

other construction activity is unavailable due to lapsed permits, is outside the jurisdiction of this court, or is not the subject of challenge in this lawsuit.

OPINION

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008). A party seeking preliminary injunctive relief must demonstrate as a threshold matter that it: (1) has a reasonable likelihood of success on the merits; (2) lacks an adequate remedy at law; and (3) will suffer irreparable harm if relief is not granted. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). If these elements are met, the court must then balance, on a sliding scale, the irreparable harm to the moving party with the harm an injunction would cause to the opposing party. *HH-Indianapolis, LLC v. Consol. City of Indianapolis & Cty. of Marion*, Indiana, 889 F.3d 432 (7th Cir. 2018). In particular, when assessing whether a claim challenging the issuance of a government permit has a likelihood of success on the merits, the court must follow the Administrative Procedure Act ("APA"), only asking "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 952–53 (7th Cir. 2003) (citation omitted).

As with their briefing on cross-motions for summary judgment to date, the parties' equally lengthy submissions on plaintiffs' motion for preliminary injunction are like large ships passing in the night, largely failing to engage on the crucial legal issues, and for the most part, not even agreeing on what those issues are. Fortunately, by distillation of the material facts and legal issues during last week's nearly three hours of oral argument with

counsel, both the basic facts set forth above and key legal issues addressed below have emerged. Accordingly, that argument frames this opinion on plaintiffs' recently-filed motion.[4] In particular, the court's analysis begins by addressing those legal claims on which plaintiff is most likely to prevail, then moves on to the other factors that must be considered before issuance of a preliminary injunction.

I. Likelihood of Success on the Merits

A. Utility Regional General Permit

Given that the URGP is the only permit whose validity is currently contested in this case *and* on which intervenor-defendants could proceed with construction in Wisconsin, at least as to federally protected jurisdictional waters, plaintiffs must show that they have some likelihood of success on the merits of their claim that the URGP is invalid. General approval documents for the URGP state that the Corps-St. Paul branch will analyze the cumulative impact of all projects authorized under that permit to make sure that it does not exceed minimal impacts. Specifically, the approval documents contemplate that "[i]n reviewing the [pre-construction notice] for the proposed activity . . . [t]he Corps will also consider the cumulative adverse environmental effects caused by activities authorized by

[4] Like most matters in this case, the parties disagree about who is responsible for the sudden motion and need for a decision on an only recently filed motion for preliminary injunction in a case that has been pending for the better part of a year: intervenor-defendants for providing only 30-days notice of its intent to adhere to its long set schedule to begin work in Wisconsin, despite having no currently valid permit to do so within the Refuge itself; or plaintiffs for not realizing that the intervenor-defendants would proceed as originally planned with just the minimum notice agreed upon, even if it inevitably meant the court having to make a preliminary assessment of the merits just before turning to the parties' cross-motions on summary judgment. In the end, wherever the blame is most appropriately placed, this court's obligation to assessing the substance of plaintiffs' motion does not change.

the RGP and whether those cumulative adverse environmental effects are no more than minimal." (USACE 009060.) However, at least on the basis of the record cited by both sides to date, there is *no* evidence of even cursory analysis of the cumulative impact of the CHC Transmission Line in the Corps-St. Paul's project specific verifications under the RGP. (USACE 000679; USACE000686.)

Certainly, as both defendants and intervening-defendants take pains to point out repeatedly in their briefing and at oral argument, general permits need not engage in the same strenuous review necessary for an individual permit; indeed, the central tenet of general permits is that projects proceeding under them will not cause more than minimal harm, either individually or cumulatively. (USACE009046.) Even assuming that the Corps' limited review of the specific proposal for the CHC Line were adequate, without *any* apparent analysis of the projects proceeding under the general RGP, the Corps appears to have no basis on which it could have found harms are no more than minimal.

At this point, it remains to be seen whether there are in fact sufficient projects to raise such concerns, but the URGP is authorized for a period of five years and can be applied to any number of projects during that time, so it is only reasonable that the Corps comport with the text of its permit and take at least some look at the cumulative impacts over time with each subsequent project approved under that URGP.[5]

Moreover, there are also questions about the extent to which the CHC project itself

[5] The URGP defines a single and complete project as "that portion of the overall linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the US (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of this general permit authorization." (USACE 009058.)

qualifies for the URGP at all, which is limited to projects that do not "cause the loss of greater than 0.5 acre of waters of the US." USACE009046. In its project-specific verification, for example, the Corps-St. Paul branch acknowledges around 2.64 acres of permanent loss of wooded wetlands, but provides little explanation as to why that loss does not preclude the CHC project's operating under the URGP. USACE 000680 ("Indirect effects also include a permanent conversion of 1.50 acre of wooded wetland that will be cleared and maintained for the utility corridor."); USACE000686 ("Indirect effects also include a permanent conversion of 1.14 acre of wooded wetland that will be cleared and maintained for the utility corridor."),)[6]

The Corps' short memorandum on the specific project verification also states that,

> While the overall 5.81 acres of temporary impacts from timber matting include 1.14 acre of wooded wetland conversion, the matting is considered a best management practice to protect and minimize ground disturbance during construction. Because all wooded wetland conversion areas are a result of the matting, the Corps will not require compensatory mitigation."

(USACE000688.) However, operations under a general permit does not provide for a "best practices" exemption for mitigation. "The measurements of loss and temporary impact to waters of the US are for determining whether a project may qualify for the RGP, and are not reduced by compensatory mitigation." (USACE009048.) Even if this loss is divided between separate areas of the transmission line under the Corp's definition of "project,"

[6] ATC and ITC, two of the intervenor-defendants, applied separately for use of the URGP on their respective portions of the line. Because of this, there are two project verifications authorizing use of the URGP for the proposed CHC transmission line. (USACE000680; USACE000687.) Even taken separately, however, as noted above, these verifications still acknowledge 1.5 and 1.14 acres of permanent conversion of wooded wetlands, respectively. (*Id.*)

there is still no indication that the Corps considered this in either URGP project verification. (USACE000680; USACE000687.) Indeed, that this court, even with the benefit of the full administrative record, is struggling to understand how the Corps-St. Paul's project verification worked[7] further supports a finding that plaintiffs have established at least some likelihood of success on the merits as to the intervening-defendants right to proceed with clear cutting, much less building the CHC Line on permanent wetlands under the URGP alone.

B. Environmental Impact Statement

1. Corp's Reliance on the EIS

Defendants first argue that the EIS prepared for this project is wholly irrelevant to the court's analysis of plaintiffs' likelihood of success on the merits, as it was only created and relied upon for possible funding by one of the intervening-defendants' construction costs by the RUS. More specifically, since Dairyland has not even asked RUS for funding yet, defendants maintain any potential problems with the EIS are beyond this court's review. Defendants further maintain that because the Corps' verification of the project under the URGP permit occurred a few weeks before issuance of the final findings, it has no bearing on the Corps' issuance of that permit.

Even if either of these arguments were credited, the previous analysis under the URGP would still show some likelihood of success on the merits supporting an injunction and would at least be relevant to consideration of possible harms were this project to be

[7] On this second point about 3 acres, the Corps may be taking advantage of 33 USCA 1344(f)(1)(e), but if that is what they are relying on for the "best practices" point, there appears to be *no* mention of this in the administrative record.

allowed to proceed fully in Wisconsin. However, the court also does not credit either of defendants' arguments. Indeed, defendants' suggestion that the EIS is irrelevant to the URGP because the RUS financing has yet to be approved is just silly on its face. And while defendants' argument that the EIS should be ignored because the project-specific verification for the URGP was given before its final publication has some superficial appeal, it requires acceptance of a fiction that simply does not make sense and is contradicted by the record.

Certainly, the final EIS *was* published after the URGP verification, but the URGP verification and publication of the formal EIS occurred within *one* month of each other, making it unlikely that one occurred independently of each other at least factually, if not legally. (USACE000680; USACE000687; USACE00001.) Even more striking is the fact that Corps-St. Paul branch, which issued the URGP, had been a part of planning and development meetings for and preparation of the EIS nearly three *years* before the URGP project verification, dating back to at least to May of 2016. (USACE14753.) In that time, the Corps-St. Paul branch office was included in numerous meetings and calls about the NEPA analysis of the project, intervenor-defendants' plans for the line, *and* the drafting of the EIS. (USACE001238; USACE003685.)

Even more persuasive, the Corps' project verifications themselves cite heavily to actions RUS took under the EIS. (USACE000680 ("Other federal agencies involved include SERVICE, USEPA, and Corps Rock Island District. The Rural Utilities Service, USDA, is the lead federal agency and they published the Notice of Availability in the Federal Register for the Final EIS on October 23, 2019"); USACE000681 ("The action area was defined by the lead federal agency, the USDA Rural Utility Service (RUS), as the

entire project area"); USACE000682 ("RUS submitted a biological assessment (BA) to the Service on November 2, 2018 for all species identified throughout the entire Cardinal Hickory Creek project area . . . RUS made a 'no effect determination' for the whooping crane . . . The Corps has reviewed the documentation provided by the agency and determined it is sufficient to confirm Section 7 ESA compliance for this permit authorization."); USACE000683 ("RUS used the NEPA process, which covers the entire Cardinal Hickory Creek project area from Dubuque County, Iowa to Dane County, Wisconsin, to satisfy the public involvement process for Section 106 of the NHPA . . . the identification and evaluation process would be provided for in a Programmatic Agreement (PA) . . . RUS developed a PA that was fully executed on October 21, 2019 . . . The Corps has reviewed the PA provided by RUS and determined it is sufficient to confirm Section 106 compliance for this permit authorization.").) Accordingly, the court will not just ignore: nearly 3 years of collaboration, frequent citations to RUS findings made during the EIS process; and a temporal gap of less than a month before final publication of the EIS and issuance of the URGP verification. Thus, to the extent the EIS undergirded the Corps' project-specific decision, any material errors in approval of that statement may impact the validity of the URGP, as well as the Corps' specific project approval.

2. Narrow Purpose

Plaintiffs' main argument as to the EIS's defect goes to its purpose and need statement, which defines the scope of alternative analysis. (Pl.'s Mot. (dkt. #70) 34.) Specifically, plaintiffs object to EIS's adoption of the intervenor-defendants' proposed statement as to the purpose of the project: "increase[ing] transfer capability between Iowa

and Wisconsin enabling additional generation." FEIS Vol. I, 1.4.1. This purpose arguably allows little else but a large, wired transmission line between the two states. For instance, as even defendants concede, alternatives such as reliance on solar energy, battery storage, upgrading existing transmission lines, or changing the grid management system could reduce the *need* for increased transfer capability, but would not *increase* transfer capability between the two states. (Pl.'s Mot. (dkt. #70) 39.)

The Seventh Circuit has observed that "[o]ne obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997). In *Simmons*, an EIS was prepared for a plan to supply two districts with water by creating a lake. *Id*. at 667. However, the Seventh Circuit found error in defining the purpose of the project as "supplying two users (Marion and the Water District) from a single source," because it effectively ruled out the consideration of any alternative that did not provide water from a single source, greatly reducing the scope of the EIS. *Id*. Similarly, plaintiffs argue here that RUS's adoption of a purpose narrowed to increasing transfer capacity unnecessarily constrained consideration of viable alternatives in the EIS. (Pl.'s Mot. (dkt. #70) 34.)

In response, defendants contend that "an EIS does not run afoul of [purpose] guidelines simply because its definition of a project's purpose precludes a particular interest group's preferred alternative." (Def.'s Mot. (dkt. #92) 56.) However, the stated purpose accepted in the EIS did not simply leave out plaintiffs' *preferred* option; it wholly adopted a purpose proposed by intervenor-defendants, which left little room for anything but the large CHC transmission line that intervenor-defendants had been planning all along.

"If NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives." *Simmons*, 120 F.3d at 670. Perhaps defendants can ultimately demonstrate the adopted purpose is not *too* narrow, but in emphasizing the limiting options that the EIS allows by adoption of a very narrow purpose, plaintiffs have at least demonstrated *some* likelihood of success on the merits of their argument that the EIS failed to weigh fully reasonable alternatives to the proposed powerline project, and thereby failing the purpose of NEPA.

3. Cumulative Impacts Analysis

The EIS also defines the area in which it considers cumulative impacts for different categories is required to be considered, including cumulative impacts on vegetation. As for wetlands in particular, the EIS states that:

> The spatial boundary is the Savanna and Coulee Sections of the Driftless Area Ecoregion bounded to the north by where the Turkey and Wisconsin Rivers join the Mississippi River. **Rationale:** The direct and indirect impacts to vegetation would occur within and immediately adjacent to the proposed C-HC Project ROW. These moderate (short- and long-term) impacts could contribute to adverse cumulative vegetation and wetland impacts within these ecoregions.

FEIS Vol. III, Table 4.2-1. The same boundary and definition were used for the wildlife impacts section. *Id*. Even construed generously, therefore, the definition limits the vegetation and wildlife cumulative impacts analysis to the area south of where the Wisconsin River meets the Mississippi River.

Unfortunately, plaintiffs assert, and defendants do not dispute that, a fair portion of the proposed CHC route is north of that area. (Def.'s Resp. to Pl.'s PFOF (dkt. #119) ¶ 102-103.) While defendants argue that the agencies creating the EIS have discretion in

drawing such boundaries as long as a rationale is given, the stated rationale contradicts the chosen boundary. (Def.'s Opp. (dkt. #115) 20-21.) In particular, the given rationale is that "direct and indirect impacts to vegetation would occur within and immediately adjacent to the proposed [CHC] Project ROW," but the adopted boundary cuts out a swath of the CHC line's right of way. (FEIS Vol. III, Table 4.2-1.) Moreover, there is also no indication that vegetation or wildlife would *not* be impacted in the right of way north of the chosen boundary.

Regardless, "NEPA requires that an agency explain in the EIS how it chose the geographic area in which it conducted the cumulative impacts analysis and . . . demonstrate that in making such choice it considered the relevant factors." *Habitat Educ. Ctr., Inc. v. Bosworth*, 363 F. Supp. 2d 1090, 1097 (E.D. Wis. 2005). Because the EIS fails to do so, plaintiffs' claim that the EIS violates NEPA also has some likelihood of success on the merits.

II. Likelihood of Irreparable Harm

The court next looks at whether the activities proposed, if not enjoined, will likely cause irreparable harm. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 376 (2008). Plaintiffs have offered statements from several of their members that outline how the construction could impact their ability to live, work, and play in the Driftless Area. For instance, Dena Kurt "is concerned that clearing and maintenance of the ROW will lead to increased run-off of soil, nutrients, and pollutants into the Mississippi River, which resulting sedimentation and algal blooms that would harm the aquatic ecosystem and her enjoyment of the Mississippi River and its species." (Pl.'s PFOF (dkt. #119) ¶ 15.)

Additionally, Brian Durtschi, who owns property that will be crossed by the transmission line, is concerned that, "[g]round-clearing and ground-moving activities will likely cause significant erosion and sedimentation of the creek and its wetlands, especially due to the steep topography found on the property." (Id. at ¶ 23.)

While defendants assure the court that best construction practices and mitigation will be used, that does not change the fact that some harm will come to the environment. (Id. at ¶ 24.) Specifically, even the first stage of construction will involve ground clearing, which in and of itself causes harms that are acknowledged in the Environmental Impact Statement, which the Corps signed. (USACE000001.) Even before actual construction starts, "[c]learing of vegetation as well as grading would disturb topsoil, which would result in newly exposed, disturbed soils that could be subject to accelerated soil erosion by wind and water." (FEIS Vol. II, Pg. 145.) Additionally, "disturbance of vegetative cover could facilitate the introduction, spread and proliferation of invasive species, which in turn could alter plant community composition . . . several species of invasive plants were documented in the C-HC Project." (*Id*. at 170-171.) And regarding animal species which live in the right of way, "[l]ong-term moderate impacts associated with clearing the ROW would include habitat loss, fragmentation, and degradation along with changes to species movement." (*Id*. at 201.)

All of the above represent real and irreparable impacts that will occur from clearing alone; actual groundbreaking will lead to even more severe consequences. Given that the Corps signed the Record of Decision, which adopts the findings of the Environmental Impact Statement (USACE000001), defendants must acknowledge that soil, habitats, and vegetation would all be truly and concretely impacted by the intervenor-defendants

beginning work.

III. Adequate Legal Remedy

Finally, the court looks to whether there exists an adequate legal remedy that would rectify such harms should they occur, such as "money damages and/or an injunction ordered at final judgment." *Abbott Lab'ys v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992). According to the Seventh Circuit, "[a] harm is 'irreparable' if it 'cannot be prevented or fully rectified by the final judgment after trial.'" *Girl Scouts*, 549 F.3d at 1089 (citing Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380 (7th Cir. 1984).)

Here, the potential harm relates to the destruction of ecosystems, wetlands, and habitats, and simply awarding damages cannot repair fragile ecosystems that are harmed. *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545, (1987) ("[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.") Accordingly, an injunction on the final merits is not likely to be sufficient to repair this kind of environmental damage once it occurs, as money cannot reverse soil erosion or reintegrate fragmented habitats. *Id*. Indeed, "[i]f [environmental] injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.* 480 U.S. 545. Courts have even found irreparable harm in less concrete situations; for instance, "courts have recognized that NEPA plaintiffs are likely to suffer irreparable harm when an agency is allowed to commit itself to a project before it has fully complied with NEPA," even if no actual construction would take place. *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F. Supp. 2d 656 (E.D. Wis. 2013).

All of this suggests a strong presumption in favor of an injunction where environmental harm is likely. As before, defendants signed off on the Environmental Impact Statement, which explicitly outlines the environmental harms that will occur from clearing activities. (USACE000001.) Given the presumption in favor of injunctions and the fact that defendants' own documents show a likelihood of environmental harm, this prong of the test is also satisfied.

IV. Balancing Test

While there are several compelling interests at play in this case, the court agrees with plaintiffs that the balance of equities favors a preliminary injunction as well for at least two reasons: (1) plaintiffs will be prejudiced without an injunction; (2) intervenor-defendants have voluntarily put the court in the position of having to decide this motion prematurely by not simply delaying plans to disturb federal jurisdictional waters a few months until the court can consider and decide the parties almost fully briefed, cross-motions on summary judgment; and (3) intervenor-defendants demonstrated only minimal damages, if any, from the imposition of a short, preliminary injunction to disturbing jurisdictional waters.

First, plaintiffs have suggested that defendants may use this construction to tilt the scales at summary judgment. (Pl.'s Mot. (dkt. #70) 68.) Intervenor-defendants have been building the Iowa side of the transmission line since April of 2021, and allowing additional construction on the Wisconsin side would no doubt help the transmission companies build momentum, if not create an air of inevitability to completion of the line, even through the Upper Mississippi River National Fish and Wildlife Refuge. (Def.'s Mot. (dkt #50) 10.)

Indeed, the Upper Mississippi River Refuge sits in the middle of the Iowa and Wisconsin branches that the intervenor-defendants are proceeding to clear cut and eventually construct towers and power lines despite a lack of permit for this crucial, environmentally sensitive section. (Def.'s Resp. to Pl.'s PFOF (dkt. #119) ¶ 1.) Moreover, plaintiffs' claims challenging construction within the Refuge remain, by far, their strongest in terms of likelihood of prevailing.

Thus, by permitting construction up to the edge of the Refuge on the Wisconsin side, just as they have already been doing on the Iowa side, the Refuge would represent only a relatively small strip of land, albeit likely the most environmentally sensitive, to complete the line. Psychologically, if not legally, this would likely make it much harder for state or federal regulatory authorities *or* the courts to deny a right of way through the Refuge.

Second, this proposed preliminary injunction is a problem of intervenor-defendants' own making. Early in the lawsuit, intervenor-defendants vowed to give plaintiffs at least a 30-day notice before beginning construction. (Def.'s Mot. (dkt #50) 9.) To their credit, this minimal notice was given, but by sticking to the very minimum notice necessary, defendants and intervenor-defendants surely were aware of what little time both plaintiffs and the court would have to take up this motion. (Dkt. #96.) Even more concerning is the fact that the proposed construction start date fell only 1 week before cross briefing on the parties' cross-motions for summary judgment would be completed. Intervenor-defendants have offered little, in any, reason why they cannot wait 60 days to receive a final judgment on the merits, given that they decided to withhold notifying the court of their commitment to stick to original construction plans until the last possible moment.

This, combined with plaintiffs' likelihood of irreparable harm and success on the merits, warrants the issuance of a preliminary injunction against any steps toward construction at least on federal jurisdictional waters, including clearance activities.

Finally, while intervenor-defendants have represented that they will suffer monetary damages due to an injunction, these limited damages are unlikely to outweigh the permanent damage threatened. Notably, intervenor-defendants have voluntarily decided to refrain from any work in jurisdictional waters until November 29, 2021 as "a showing of cooperation and good faith." (Status Rep. (dkt. #152) 1.) Intervenor-defendants represent that even this limited voluntary cessation will cost $140,000 in extra construction costs. (*Id.* at 5.) Moreover, if construction were halted along the entire Wisconsin right of way, rather than just jurisdictional waters, intervenor-defendants purportedly expect that a 30-day injunction would cause $3.1 million in damages, and a 60-day injunction would cause $12.72 million in damages. (Justus Dec. (dkt. # 157) 6-7.)

While actual damages would likely be much less -- given that this court has no jurisdiction to enjoin construction outside of land on or near jurisdictional waters -- briefing on the parties cross-motions for summary judgment will be completed within one day of this opinion's issuance, and the court does not anticipate taking more than 30 to 60 days to issue a final judgment on the administrative record already before it.[8] With these facts, the damages that intervenor-defendants will incur are not so extreme that it outweighs

[8] Since intervenor-defendants have yet to provide any calculation of this far narrower injunction for this short period of time, the court will not require plaintiffs to post any monetary bond at this time without prejudice to intervenor-defendants supplementing the record as to that much smaller sum and renewing their request for a monetary bond.

their likelihood of success on the merits and irreparable harm, which plaintiffs have raised. Thus, the balance of equities here weighs in favor of the plaintiffs.

ORDER

IT IS ORDERED that intervenor-defendants American Transmission Company, LLC, Dairyland Power Cooperative and ITC Midwest LLC are enjoined from any activities requiring permission under the Utility Regional General Permit until the issuance of an opinion and order on summary judgment. This includes any work impacting jurisdictional waters of the United States as defined under 33 C.F.R. § 328.3. Activities that fall under 33 C.F.R § 323.2(d)(2) are not restricted under the URGP and may proceed.

Entered this 1st day of November, 2021.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

BY THE COURT:

DATE SIGNED: December 21, 2021

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

County of Dane *et al*,

Plaintiff,

v. case number 19CV3418

Public Service Commission of Wisconsin *et al*,

Defendant.

DECISION AND ORDER ON MOTION FOR RECONSIDERATION

The procedural history of this case is lengthy and convoluted. I do not repeat it here, but incorporate my prior recitations and the Court record as reflecting it. Relevant here, on October 18, 2021, I granted Petitioners DALC and WWF's[1] Emergency Motion for Temporary Injunction and ordered that, upon DALC securing two sureties and a $32 million bond, ATC, ITC and DPC[2] are enjoined from constructing the Cardinal-Hickory Creek Transmission Line. DALC insists that I reconsider that decision, arguing that I erred in interpreting the statute regarding the bond requirement and, alternatively, asserting that if the statute requires the bond amount I imposed, the statute is unconstitutional as applied. I reject both arguments and deny the Motion.

To succeed on a motion for reconsideration, DALC must meet the following high standard:

> [It] "must present either newly discovered evidence or establish a manifest error of law or fact." *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397,

[1] For ease of reference, I refer to DALC and WWF jointly as DALC throughout the decision.
[2] For ease of reference, I refer to ATC, ITC and DPC jointly as ATC throughout the decision.

> 416, 685 N.W.2d 853, 862. "A 'manifest error' is not demonstrated by the disappointment of the losing party." *Id.* Instead, it requires a showing of "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.* (citations omitted). Mere repetition of the same arguments raised during prior hearings and earlier briefs does not warrant "making any additional findings of fact or setting forth additional reasoning." *See Schapiro v. Pokos*, 2011 WI App 97, ¶ 18, 334 Wis. 2d 694, 706, 802 N.W.2d 204, 210.

Dkt. 1167 at 3.

I. DALC DOES NOT IDENTIFY ANY NEWLY DISCOVERED EVIDENCE OR MANIFEST ERROR OF LAW OR FACT.

DALC does not identify any error of law warranting reconsideration. Rather, in arguing I erred in setting the bond amount, DALC merely repeats the arguments I previously rejected. That is insufficient on reconsideration. I do not address again those rehashed arguments, but rely on my prior decision rejecting them.

DALC also argues that newly discovered evidence requires reconsideration. Namely, Western District of Wisconsin's Judge Conley issued a temporary injunction preventing construction of a small sliver of the Line. I do not consider this injunction as newly discovered evidence warranting reconsideration. For one reason, DALC provides no law to support the argument that different facts arising AFTER I issued the temporary injunction can form a basis to reconsider. Newly discovered evidence seems to require it existed but was undiscovered as of my decision. This new injunction is newly existing evidence, not something I could have but did not consider when rendering my decision. A decision is not subject to reconsideration based on the inevitability that the world continues spinning after I render it and the facts on a latter date differ from those existing when I held trial. The bond amount I set reflected a picture in time – the damages as proven at the hearing on the temporary injunction. That new events occurred subsequent to my decision and would now potentially dictate a different amount for the undertaking if the hearing was today does not render my decision from October incorrect.

If I modified the bond every time any aspect of the facts underlying it change, I would likely need to clear calendar space every other week to adjust the amount. Every time material prices fluctuate or labor costs shift the bond amount would need updating and could go higher or lower. I am sure DALC does not want me to find that ATC can seek a higher bond if it learns of increases in the losses. If I allow modifications down when DALC believes the possible damages fall, I must also entertain modifications up when damages soar. I reject this argument and refuse to turn the temporary injunction into a constantly moving target. No case law and nothing in the statutes suggest that the undertaking set as a condition of a temporary injunction must be revisited at all, much less every time the circumstances on which I relied when setting that amount change.

DALC's argument is better suited for any future claim ATC makes for damages if the injunction takes effect but then is found unwarranted. Then DALC can argue that the federal injunction barring construction on a relatively small stretch of the Line rendered some or all of ATC's damages unreasonable or perhaps no longer caused at all by the temporary injunction I issued. We are not yet there.

Further, my decision as to granting the injunction and setting the bond amount did not rely on whether or what the federal courts may do. Judge Conley could remove his injunction as suddenly as he granted it. My injunction exists independently of his. The possible damages I awarded still exist as a possibility. The amount remains correct. Perhaps if Judge Conley issued a final order and injunction the amount would then more permanently change and warrant reevaluation.

II. I REJECT DALC'S ARGUMENTS THAT THE BOND RENDERS THE STATUTE UNCONSTITUTIONAL AS APPLIED TO DALC.

DALC next argues that by requiring a bond in the high amount I found Wis. Stat. §196.43 demands, that statute is unconstitutional as applied. I reject DALC's argument as unsupported and often undeveloped. It falls far short of overcoming the mountainous threshold required for this Court to declare the statute unconstitutional.

ATC correctly detailed the standard I apply when reviewing whether a statute is constitutional as follows:

> Statutes are presumptively constitutional: the Court must "indulge[] every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, [the Court] must resolve that doubt in favor of constitutionality." *Aicher ex rel. LaBarge v. Wis. Patients Compensation Fund*, 2000 WI 98, ¶¶18, 237 Wis. 2d 99, 613 N.W.2d 849. "To overcome this strong presumption, the party challenging a statute's constitutionality must demonstrate that the statute is unconstitutional beyond a reasonable doubt. It is not sufficient for the challenging party merely to establish doubt about a statute's constitutionality, and it is not enough to establish that a statute is probably unconstitutional." *Id.* ¶ 19. This is because courts are not in the position "to make the economic, social, and political decisions that fall within the province of the legislature." *Id.* ¶ 20. Rather, the job of the judiciary is only to determine "if the legislation clearly and beyond doubt" offends the state or federal constitutional provisions. *Id.*

Dkt. 1167 at 4.

DALC's argument fails for numerous reasons. First, DALC waived the constitutional challenge by not raising it timely. DALC moved for a temporary injunction on October 8, 2021. Though briefing occurred very rapidly, ATC filed its

brief and supporting documents indicating the amount it argued the undertaking needed to be set at on October 15, 2021. In their reply filed October 17, 2021, and in their opening brief filed October 8, DALC never raised or briefed the constitutional challenge though it surely knew ATC would seek a bond amount in the millions. Further, at oral argument, DALC only raised the constitutional challenge after I entered my decision disagreeing with DALC and setting bond at $32 million. DALC never raised this challenge before my decision, despite knowing this possible amount ahead of time. A party cannot wait for a decision and then raise for the first time on reconsideration, or even at oral argument but after the decision is rendered, a new argument against that decision.

Despite the waiver, I deem it appropriate to address the constitutionality argument for a few reasons. The briefing was very rapid and timelines short ahead of oral argument. Constitutional challenges to a statute also require notice to persons in State government, which DALC provided after oral argument. Lastly, the issue is now fully briefed. As considering this challenge to a state statute and deciding it on the merits serves the public interest, I still consider the argument.

Second, I reject DALC's constitutional challenge to Wis. Stat. §196.43 as unsupported by law. DALC never properly defines the issue or sets forth the standards. Namely, DALC should have, but did not, define what due process or equal protection require or how to evaluate those rights in the context of a bond. I consider the argument undeveloped in that regard.

DALC does cite a variety of decisions declaring different bond requirements imposed as a pre-requisite to pursue appeal or a lawsuit as unconstitutional in circumstances where the bond requirement completely forecloses a party from seeking relief. Each of those cases are distinctly different from this situation. Section 196.43 does not affect at all DALC's right to seek judicial review of the PSC's decision regarding the CPCN for the Line. It does not affect DALC's right to appeal my decisions or participate in the proceedings before the Supreme Court on my decisions relating to former Commissioner Huebsch.

What §196.43 does is set a high bond requirement as a prerequisite to obtain a temporary injunction. With or without that temporary injunction, judicial review proceeds and DALC will, I am sure, vigorously engage in all aspects of that review. DALC has and continues to pursue judicial review of aspects of the PSC decision in this Court, in the Western District of Wisconsin, in the Seventh Circuit, in the Wisconsin Court of Appeals, and is participating in Mr. Huebsch's appeal to the Wisconsin Supreme Court. Whether DALC can afford the bond and sureties needed to obtain the temporary injunction does not affect its ability to seek review before each of these courts. The doors to the courthouse remain wide open.

For that reason, and the additional reasons ATC persuasively argues, I find all of the case law DALC relied on distinguishable. Not a single case involved facts remotely similar to those here. The closest DALC came was the *Habitat Education*

Center v. U.S. Forest Service decision, 607 F.3d 453, 459–60 (7th Cir. 2010). However, that decision is not persuasive as it was quite specific to FRCP 65. FRCP 65 is not analogous to §196.43 and that decision therefore provides no insight to my application of state statute. I adopt ATC's summary of the language of the federal rule and §196.43 as follows to show the significant differences between the two:

> In relevant part, Federal Rule of Civil Procedure 65(c) provides:
>
> > The court may issue a preliminary injunction or a temporary restraining order only if the movant gives 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.
>
> In contrast, Wis. Stat. § 196.43(2) provides:
>
> > No injunction may be issued in any proceeding for review under ch. 227, or in any other proceeding or action, suspending or staying any order of the commission or having the effect of delaying or preventing any order of the commission from becoming effective, unless at least 2 sureties enter into an undertaking on behalf of the petitioner or plaintiff. The court or presiding judge of the court shall direct that the sum of the undertaking 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, and to such further effect as the judge or court in its discretion directs. No order or judgment in any proceeding or action may be stayed upon appellate court review unless the petitioner or plaintiff enters into the undertaking under this subsection in addition to any undertaking required under s. 808.07.

Dkt. 1167 at 18-19.

Rule 65 grants the district judge significant discretion when setting security amounts. It allows the court to set the amount at what it deems "proper" to pay the costs and damages the enjoined party sustains. Section 196.43(2), on the other hand, mandates that I "shall" set the sum at an amount high 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." "Shall" is mandatory as I explained in my decision on the injunction. It requires I set the undertaking sufficiently high to cover "any damage" a party "may sustain." This covers all potential damages a party may sustain, not just the amount I deem proper to cover damages actually sustained or even those most likely to be sustained. Section 196.43(2) thus imposes significantly different requirements on this Court when granting a temporary injunction than would FRCP 65.

The only discretion the Legislature granted me is to set the amount of security or other conditions of the bond above this baseline if I desire, as shown by the clause that I can make orders "to such further effect as the judge or court in its discretion directs." "Such further effect" means in addition to the baseline set in the preceding clause of that subsection. As I explained in my prior decision, DALC is wrong in arguing this language in the latter clause somehow gives me discretion to ignore the plain language requiring the bond be set at an amount the covers all damages ATC may sustain. "Further effect" means in addition to, not subtraction from. This significant difference in the federal rule and state statute render *Habitat* unpersuasive.

Likewise, as ATC correctly explains, *Habitat* did not hold that a bond that exceeds what a litigant can afford is automatically inappropriate, as DALC attempts to argue. Rather, the Seventh Circuit held that FRCP 65 has "an exception for a case in which the bond is both higher than necessary and beyond the plaintiff's financial capacity, and thus inflicts irreparable harm without justification." 607 F.3d at 456.

That judicially created exception to FRCP 65 does not apply to §196.43(2) for an obvious reason. The statute dictates the amount of the bond I set. If I follow the baseline amount required by statute – the amount needed to cover any damages ATC may suffer because of the temporary injunction – that amount cannot be "higher than necessary." The Legislature declared this amount as exactly what is necessary to protect an opposing party when a PSC decision is enjoined. Perhaps if I exercised my discretion to set an even higher bond that excess could meet this exception as unnecessarily high. I did not do so, though, and the exception cannot apply.

Though the often high amount the Legislature declared necessary may be out of reach for most litigants, and indeed may harm DALC by rendering a temporary injunction unobtainable for practical purposes, the amount does not "inflict[] irreparable harm without justification." The justification was declared by the Legislature in the language of the statute - to ensure the movant covers all damages that a temporary injunction causes if it later proves unwarranted. DALC disagrees with that justification, but that disagreement need go to the Legislature. I cannot rewrite the statute; I enforce it as written. *Sorenson v. Batchelder,* 2016 WI 34, ¶44, 368 Wis. 2d 140, 885 N.W.2d 362.

All other cases DALC cites deal with other circumstances even more unlike the facts before me than was *Habitat*. I did not find any of them instructive or persuasive under the unique circumstances §196.43(2) creates.

Though DALC did not discuss the foundational requirements for due process and equal protection claims, ATC did, and I will therefore address why DALC's arguments further fail. DALC misunderstands the statute and my decision. Section 196.43(2) only allows a temporary injunction where three requirements are satisfied: a) the Court makes the necessary findings to grant a temporary

injunction, b) the Court provides the required procedural process including notice to all parties that appeared before the PSC and a hearing, and c) the movant pays the undertaking and secures two sureties. DALC has the right to a temporary injunction only upon satisfying all three requirements. As DALC cannot meet the final requirement, it has no right to an injunction. A due process claim requires loss of a protected interest or right without due process of law. DALC's inability to prove deprivation of any such right or property defeats the constitutional claim. *See Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 53, 235 Wis. 2d 610, 612 N.W.2d 59.

As to the equal protection claim, though ATC does address the standard somewhat, I turn to a case discussed by both parties and use the US Supreme Court's explanation of this claim. Namely, when discussing whether an Oregon statute imposing additional undertaking requirements solely on tenants as a prerequisite to the right to appeal, the Supreme Court explained:

> The statute potentially applies to all tenants, rich and poor, commercial and noncommercial; it cannot be faulted for over-exclusiveness or under-exclusiveness. And classifying tenants of real property differently from other tenants for purposes of possessory actions will offend the equal protection safeguard 'only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective,' []. It is readily apparent that prompt as well as peaceful resolution of disputes over the right to possession of real property is the end sought by the Oregon statute. It is also clear that the provisions for early trial and simplification of issues are closely related to that purpose. The equal protection claim with respect to these provisions thus depends on whether the State may validly single out possessory disputes between landlord and tenant for especially prompt judicial settlement. In making such an inquiry a State is 'presumed to have acted within (its) constitutional power despite the fact that, in practice, (its) laws result in some inequality.'

Lindsey v. Normet, 405 U.S. 56, 70–71 (1972) (Cleaned up).

In *Lindsey*, Oregon's law did not pass muster for a variety of reasons not similar to those here. Namely, in addition to imposing a significant bond as a prerequisite for appeal, a requirement that applied only to tenants, the law also set as an automatic penalty the loss of the entire bond if the tenant lost on appeal. The landlord need not prove damages to receive this amount. The Supreme Court rejected Oregon's arguments that these requirements were tied to any relevant State objective, as they served only to punish poorer tenants.

Section 196.43(2) is not comparable to the facts of *Lindsey*. Here, statute dictates that I set the undertaking at an amount sufficient to cover all damages ATC might suffer as a result of the temporary injunction. Thus, the purpose is to ensure that the party being enjoined does not suffer monetary losses as a result of an ultimately unsuccessful injunction. This then ensures those losses are borne by

the unsuccessful movant and not passed on to the public. DALC must admit these losses would otherwise be put on the public, as much of DALC's argument against setting a $32 million bond rested on DALC's insistence ATC would suffer no loss because it would pass the costs on to the rate paying public. The plain language of §196.43 shows the clear purpose to ensure the movant pays damages an ultimately unsuccessful injunction causes so they are not passed on to the public. This clearly and directly serves a legitimate State objective. It does not rest "on grounds wholly irrelevant to the achievement" of that objective. Further confirming that §196.43 is narrowly tailored to serve this public interest of protecting utility rates, the statute only applies to injunctions relating to enjoining PSC decisions. PSC decisions by their nature directly impact the public. The undertaking requirement is directly and closely related to the State's objectives and does not violate equal protection.

As a final point, though the effect of my decision may seem unfair by allowing ATC to continue breaking ground based on a CPCN that this Court already indicated may well be overturned for procedural defects, this is a truly unique circumstance. This proceeding began over two years ago. In normal situations, I would have finished my review long ago and the review would now be before the Court of Appeals or Supreme Court, if not fully concluded. This case was scheduled for oral arguments on review of the merits in 2020. Less than two weeks prior to that argument, DALC moved to introduce new evidence relating to possible procedural irregularities before the PSC. After many rounds of briefing and oral argument, I granted DALC the right to pursue discovery on the potential procedural irregularities. Just before trial on that issue, the source of the alleged procedural irregularities, former Commissioner Huebsch sought and secured Supreme Court review of my decisions. This upended the entire case, leading to my loss of competence to proceed on the merits or procedural irregularities issues.

That we are now over 2 years past filing with no decision on the merits or on the procedural irregularity challenge reflects these truly unique circumstances. Indeed, that the Wisconsin Supreme Court elected to take review of certain non-final decisions as to a non-party witness is, to put it lightly, a procedural unicorn. This is not the run of the mill PSC review. This circumstance may never repeat. That the result seems unreasonable and unfair reflects that unique path. It does not reflect an inherent problem in §196.43. Indeed, the opposite seems true. Section 196.43 existed in its current form since 1997. Despite that, apparently no published appellate case encountered even a remotely similar problem to that presented here. PSC decisions often end in appeal. This absence of even one example of a similar problem to the present speaks volumes.

I deny the Motion for Reconsideration. I cannot issue a temporary injunction but stay the bond requirement, as the bond is a prerequisite to the right to an injunction. Therefore, I also deny DALC's request that I do so.

cc: Parties