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CIRCUIT COURT
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2019CV003418**

STATE OF WISCONSIN
DANE COUNTY BRANCH 9
CIRCUIT COURT

County of Dane, Driftless Area Land Conservancy,
Wisconsin Wildlife Federation, Iowa County,
Town of Wyoming, and Village of Montfort,
Petitioners,

For official use

Chris Klopp, Gloria and LeRoy Belken,
S.O.U.L of Wisconsin,
Intervenor-Petitioners,

Case No. 19-CV-3418

v.

Public Service Commission of Wisconsin,
Respondent,

American Transmission Company, LLC, et. al,
Intervenor-Respondents.

**DANE COUNTY, IOWA COUNTY, VILLAGE OF MONTFORT, TOWN OF
WYOMING, DRIFTLESS AREA LAND CONSERVANCY AND WISCONSIN
WILDLIFE FEDERATION’S RESPONSE TO THE INTERVENOR-RESPONDENTS’
MOTION FOR LIMITED STAY AND STATUS CONFERENCE**

INTRODUCTION

Dane County, Iowa County, Village of Montfort, Town of Wyoming, Driftless Area Land Conservancy (“DALC”) and Wisconsin Wildlife Federation (“WWF”) oppose the Intervenor-Respondent Transmission Companies’ motion for a stay of this case (Dkt. 355), which the Respondent Public Service Commission (“PSC”) has joined (Dkt. 357). The Court’s May 25, 2021 Decision and Order (Dkt. 322) resolves the legal consequences of Commissioner Huebsch’s potential bias, or at least appearance of bias, and sets forth a discovery schedule to determine more facts before the scheduled trial date on September 29–30, 2021. The Transmission Companies’ stay request would delay discovery and potentially the trial date for resolving the threshold due

process issues on the merits. At the same time, the Transmission Companies continue to state their intent to start construction in October 2021 of their huge costly proposed transmission line and 17-story-high towers that would cut a wide swath through Southwest Wisconsin's scenic Driftless Area landscape, communities, family farms and vital natural resources.¹ They “can’t have it both ways.”

It is now clear that the Commission’s approval of the Certificate of Public Convenience and Necessity (“CPCN”) for the Cardinal-Hickory Creek transmission line was fatally flawed and is no longer defensible. The Transmission Companies have admitted wrongdoing and effectively confessed error by: (1) revealing that their officials and representatives engaged in extensive *ex parte* encrypted text-messaging with Commissioner Huebsch and other unidentified persons during the pendency of the CPCN case before the PSC, and (2) asking the PSC to “rescind” its September 26, 2019 “Final Decision” approving the CPCN. (Dkt. 356) The new disclosure of these secret encrypted messages, on the eve of the discovery production deadline following this Court’s May 25, 2021 Opinion, supplements the already known evidence of extensive entanglements and *ex parte* communications involving executives and representatives of ATC, ITC, Dairyland, MISO, and WEC (which owns more than 60% of ATC) with Commissioner Huebsch while the case was pending below and while Commissioner Huebsch led the PSC’s deliberations and decision-making process.²

¹ See “The Applicants’ Comments on the Proposed Rescission of the Final Decision and Next Steps” at 2 [[JPSC Ref#: 4158061](#)], Docket 5-CE-146 (July 12, 2021) (“Construction of the Project is slated to begin in Wisconsin in October of this year”); <https://www.cardinal-hickorycreek.com/> (accessed July 13, 2021) (stating: “Project Schedule...Initiate Construction – Wisconsin...October 2021”).

² This joint response brief of Petitioners Dane County, Iowa County, Village of Montfort, Town of Wyoming, DALC and WWF supplements the “correspondence” (Dkt. 358) filed by DALC/WWF on June 28, 2021, when the Intervenor-Respondents filed their Motion to Stay. Petitioners stated they would file a full response to the Motion for Stay “in due course or on such date as otherwise directed by this Court.” This brief is the joint Petitioners’ full response.

The Intervenor Transmission Companies' game plan following this Court's May 25, 2021 Decision and Order now seems clear:³ First, freeze proceedings before this Court as established by the May 25, 2021 Decision and Order. Second, delay the discovery and trial date ordered by this Court, thereby hiding the full facts of the Transmission Companies' wrongdoing and Commissioner Huebsch's bias, or at least appearance of bias, from the parties, the Court and the public. Third, argue that the PSC should ignore this Court's holding in the May 25, 2021 Decision and Order that Chair Valcq's and Commissioner Nowak's votes to approve the CPCN were "tainted" by Commissioner Huebsch's bias if proven. Fourth, argue that the PSC through Chair Valcq and Commissioner Nowak should: (1) "expeditiously" rescind their previous CPCN approval in Docket No. 05-CE-146; (2) not reopen the evidentiary record in the docket even though many key facts on the ground are outdated (e.g., the exponentially larger amount of Wisconsin-based solar energy generation in development since the Transmission Companies filed their CPCN Application with the PSC); and (3) push for a quick "re-vote" by two of the tainted Commissioners from the flawed proceeding below in an attempt to sanitize the CPCN. That legally flawed path, which is contrary to this Court's May 25, 2021 Decision and Order, if allowed, would further undermine public confidence in the fairness and impartiality of the PSC and would bring this case right back to this Court.

Depositions are scheduled to begin this week. The Transmission Companies and their allied parties, however, are attempting to head off the discovery specifically provided for by this Court's

³ This game plan is outlined by the Transmission Companies in ["The Applicants' Comments On The Proposed Rescission Of The Final Decision And Next Steps,"](#) Docket 5-CE-146, filed on July 12, 2021 with the Public Service Commission [PSC Ref#: 415806]. Petitioners ["Driftless Area Land Conservancy And Wisconsin Wildlife Federation Comments On American Transmission Co., ITC Midwest LLC, And Dairyland Power Cooperative's Request To Rescind The CPCN And Reopen The Record,"](#) Docket 5-CE-146, were also filed on July 12, 2021 with the Public Service Commission [PSC Ref#: 415816].

May 25, 2021 Decision and Order on the theory that, if and when the PSC *may* choose to act, that could somehow moot this lawsuit. In addition to the request being premature before the PSC *actually* acts, the Transmission Companies' mootness theory is incorrect as a matter of law. Even if the PSC were to grant the Transmission Companies' request to "rescind" the CPCN, this appeal would not become moot. As explained in Section III below, this case falls into several well-established exceptions to the mootness doctrine and, therefore, this appeal will continue and there is no good reason to further delay the discovery process in this case of great public importance.

As the Court held:

With such a meaningful impact on this State, the need for public trust in a fair and impartial process before the PSC cannot be understated. The requirement for impartial decision makers applies at least as strongly here as it does before a circuit court or court of appeals. The need to protect public confidence that the PSC acts impartially is equally a vital state interest.

May 25, 2021 Decision and Order at 5. This case is about issues of great public importance on the merits *and* it's about public trust in Wisconsin's government, which is a "vital state interest." *Id.* at 2 (quoting *State v. Herrmann*, 2015 WI 84, ¶ 39, 364 Wis. 2d 336, 353, 867 N.W.2d 772, 781). For the further reasons explained below, the Court should deny the Transmission Companies' motion for a stay. The scheduled discovery and depositions should proceed, and the case should go to trial as resolved in the Court's May 25, 2021 Decision and Order.

ARGUMENT

I. THIS COURT SHOULD DENY THE MOTION FOR STAY, WHICH SEEKS TO EVADE THE MAY 25, 2021 DECISION AND ORDER AND PRECLUDE PETITIONERS FROM FULLY PROVING THE FACTS OF DUE PROCESS VIOLATIONS WHILE THE TRANSMISSION COMPANIES MOVE FORWARD WITH THEIR TRANSMISSION LINE CONSTRUCTION PLANS.

By making the extraordinary request that the CPCN be rescinded and revoked, the Transmission Companies are plainly recognizing that the PSC's approval of the CPCN was tainted

by bias, or at least the appearance of bias. Notwithstanding the admission of serious irregularities that contaminated the Commissioners' decision-making process below, the Transmission Companies have now effectively asked the PSC to sanitize its actions by rescinding the CPCN and "expeditiously" re-voting to approve the very same CPCN on the same existing record. The votes would be cast by the same two tainted Commissioners who previously voted to approve the CPCN in the flawed proceedings below. (Current Commissioner Huebner, who replaced Commissioner Huebsch after he resigned in February 2020, has recused himself from this case.)⁴

The Transmission Companies make their game plan clear in ["The Applicants' Comments On The Proposed Rescission Of The Final Decision And Next Steps"](#) filed on July 12, 2021, with the Public Service Commission, in which they state, among other things:

- "In short, the Applicants encourage the Commission to rescind the CPCN, reconsider the existing evidentiary record, and re-vote as expeditiously as reasonably possible." *Id.* at 2.
- "Because there is no reason to reopen the underlying evidentiary record, the Applicants respectfully request that the Commission decline to do so." *Id.* "[T]he Commission should not reopen the evidentiary record." *Id.* at 4.
- "[T]he Applicants do not believe that Chair Valcq or Commissioner Nowak need to recuse themselves from reconsideration of this case." *Id.* at 2. "Commissioners Valcq and Nowak can and should decide the case again." *Id.* at 8.
- "First and most importantly, rescinding the CPCN and then re-voting without former Commissioner Huebsch's participation will remove all questions of potential bias in the proceeding." *Id.* at 3.
- "Rescinding the CPCN and expeditiously re-voting on the existing record without Commissioner Huebsch's participation will resolve any questions of bias while also helping to ensure that the Project can be timely put into service if it is reapproved." *Id.* at 7.

⁴ Commissioner Huebner, who took over former Commissioner Huebsch's position on the Commission, "has recused himself from participating in this docket pursuant to his recusal policy due to his prior involvement in the docket before his appointment to the Commission." *Agenda Memorandum – Request to Rescind Final Decision* (July 1, 2021), PSC REF # 414998 at 1 n.1, <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=414998>.

The Court should reject the Transmission Companies' attempted legal sanitization of their wrongdoing and Commissioner Huebsch's bias or at least appearance of bias, which establishes a due process violation. This attempt to circumvent the Court's May 25, 2021 Decision and Order, stall and evade discovery before this Court, and jam through a "second verse same as the first" truncated decision by tainted Commissioners, if allowed, would once again undermine public confidence in the integrity and fairness of the decision-making process and would just bring this case right back to this Court.

The Transmission Companies' request to the PSC to expeditiously re-vote on the *same evidentiary record* despite the fundamental market and technology changes that have occurred over the past three years since they filed their CPCN proposal with the PSC is egregious. For example, as explained in the Petitioners' legal brief on the merits in this appeal, the proposed Cardinal-Hickory Creek transmission line becomes *less* cost-effective as more Wisconsin-based solar projects are developed. (Dkt 185 at 8–9) The Transmission Companies' CPCN application assumed only one small 30-megawatt solar array for its economic modeling. The facts on the ground and on the rooftops are remarkably different. In the two years since the PSC approved the CPCN, there are now *well over 2,000 megawatts of solar energy generation under active development in Wisconsin* with more on the way.⁵ Likewise, the costs of battery storage have also plummeted since the Cardinal-Hickory Creek transmission line was proposed. The Applicants never seriously explored lower-voltage transmission upgrades coupled with Wisconsin-based solar and battery storage development in their CPCN Application, and their new request for the

⁵ See, e.g., Danielle Kaeding, *Wisconsin Witnessing Rapid Transition to Solar Energy: 20 Solar Projects Under Development Representing 2.2. GW of Power*, Wisconsin Public Radio (Dec. 31, 2020), <https://www.wpr.org/wisconsin-witnessing-rapid-transition-solar-energy>.

Commissioners to quickly “re-vote” on the CPCN based on a *profoundly outdated evidentiary record* would further undermine the legitimacy of the PSC process.

“[T]he need for public trust in a fair and impartial process before the PSC cannot be understated.” May 25, 2021 Decision and Order at 5. More than 150 individuals and organizations have already filed comments with the PSC in response to the Transmission Companies’ request for an expedited “re-vote” by tainted Commissioners on an outdated and flawed evidentiary record. The overwhelming majority of these comments express dismay about the wrongdoing that has already come to light and distrust of the fairness and integrity of the PSC going forward.⁶ The PSC cannot simply paper over the flawed proceedings below by having two of the same three tainted Commissioners “re-vote” on the same record. As the Court explained: “Petitioners’ argument that one tainted member taints an entire proceeding is persuasive. Indeed, arguably this is the controlling law in Wisconsin and in the majority of courts to have addressed the issue.” *Id.* The Court further explained:

Appearances matter. ... Because of this, even if no actual harm occurred by virtue of Comm. Huebsch’s alleged bias, meaning that the other commissioners would still have reached the same decision regardless of his comments, there is still a real harm by the proceedings forever appearing tainted due to his involvement. Allowing a decision rendered in violation of the parties’ due process rights to stand damages the public’s ability to trust the PSC process and the integrity of its decisions.

Id. at 8–9.

“Appearances matter” not only for the PSC’s deliberations leading up to the challenged PSC decision, but also for what it decides to do next. This Court must retain jurisdiction and allow the discovery process to continue so that it has a full view of the facts and can craft an appropriate

⁶ See PSCW e-docket for Case No. 5-CE-146, available at <https://apps.psc.wi.gov/APPS/dockets/content/detail.aspx?id=5&case=CE&num=146>.

remedy to established due process violations.

The PSC is not empowered to do the legal equivalent of “Lucy yanking away the football as Charlie Brown prepares to kick it through the goal posts”⁷ by taking belated regulatory actions to avoid the remedies appropriate to the due process violation and the facts of the case. Otherwise, the PSC or another agency could simply game an appeal by waiting to see how interim rulings or oral argument go, and then refine and alter their Final Decisions to paper over and avoid adverse judicial determinations. *See* Section III below and, for example, *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 831 (7th Cir. 2014). That approach does not provide for public confidence in the integrity of either the regulatory or judicial processes.

The Intervenor-Respondent Transmission Companies have effectively confessed error and admitted wrongdoing through improper *ex parte* communications and other activities. They have done so, however, without having fully informed the PSC and, importantly, this reviewing Court of the full extent of the facts upon which they have acted. Those facts, yet to be revealed through the Court-ordered discovery process, will affect the remedy in this case. The Transmission Companies’ suggested stay combined with their July 12, 2021 comments filed with the PSC would shift the decision on remedy from this Court to the very body that has been tainted by wrongdoing. This, again, would undermine public confidence in the process. It is the job of the *Court* not of the perpetrator of the violation, to determine the remedy for due process violations.

Discovery in this case is proceeding on an expedited timeline to allow for a September 29–30, 2021 trial before the Transmission Companies’ insistence on starting construction in October 2021. There are multiple depositions scheduled. This Court should keep the discovery process on

⁷ <https://www.youtube.com/watch?v=9jvn0C8oebg>.

track, especially when the newly revealed secret text messaging that prompted the Transmission Companies' Motion to Stay supports Petitioners' claims that the PSC's proceedings below have been irrevocably tainted by a serious risk of bias. The Court and the public need a full view of the facts to craft an appropriate remedy that will begin rehabilitating public trust in the PSC. The Transmission Companies' request to stall discovery so that Chair Valcq and Commissioner Nowak can vote, again, to quickly approve the CPCN despite their participation in the contaminated proceedings below would continue to undermine the public's ability to trust the PSC process and the integrity of its decisions.⁸ This case needs a fresh, updated evidentiary record and a fresh set of eyes.

The Court should deny the requested stay, allow discovery to proceed, and decide the case that is now before this Court. The Court should not allow the Transmission Companies and the PSC to evade further discovery and decide, for themselves, the appropriate remedy for the serious due process violations that contaminated the PSC's decision-making process.

II. IT WOULD BE PREMATURE FOR THIS COURT TO STAY DISCOVERY NOW WHEN NEXT STEPS BEFORE THE PSC ARE UNCERTAIN.

The PSC has joined the Transmission Companies in asking the Court for a stay of factual development through discovery, but has not confessed error before the Court or otherwise ended its defense of the disputed Final Decision approving the CPCN. Despite this Court's having stated

⁸ Moreover, Chair Valcq should have, in any event, recused herself from participation due to the conflicts of interest and lack of impartiality issues that DALC and WWF have raised. We note that the U.S. District Court denied the PSC's motion to dismiss DALC/WWF's federal constitutional due process claims, including the conflict of interest and lack of impartiality issues with regard to both Chair Valcq and Commissioner Huebsch. *Driftless Area Land Conservancy, et al. v. Huebsch, et al.*, Case no. 19-cv-1007-wmc (W.D. Wis.). At oral argument before the U.S. Court of Appeals for the Seventh Circuit on the Commissioners' pending sovereign immunity interlocutory appeal, we note that at least one of the Judges appeared to express considerable skepticism with regard to Chair Valcq hearing this case.

that improper *ex parte* communications of the nature to which ATC and ITC have now confessed would require recusal of the tainted commissioners who participated in the process, the Transmission Companies and, perhaps the PSC, are proceeding down that same errant path. Chair Valcq and Commissioner Nowak have already issued an Order for the parties and the public to submit comments about how the PSC should now proceed.⁹

The PSC has not said when, if, or how it will act. If the PSC believes that its September 26, 2019 Final Decision, now properly on appeal, is no longer defensible because of the existence of bias or at least an appearance of bias, then the PSC should so inform the Court and confess error with the consequential due process disqualifications of the tainted Commissioners and invalidation of the Final Decision recognized and resolved. That should lead to a concluding Opinion and Order by the Court determining the merits of this appeal and the appropriate remedy going forward.

The PSC could join with the Transmission Companies before this Court and clearly confess error for purposes of resolving the appeal. The PSC cannot act on its own administrative process, however, to somehow undo the appeal that is now pending before the Court. Otherwise, an administrative agency faced with unpleasant facts or legal arguments before a reviewing court could keep shifting the grounds while an appeal is pending. The remedy here is for the Court to issue an Opinion and Order invalidating the PSC's Final Decision approving the CPCN based on the bias, or the appearance of bias sufficient to constitute a due process violation.

It would also be premature for this Court to stay this case now while: (1) the Transmission Companies say that they plan to begin construction in October; (2) the Respondent PSC's next steps are uncertain; and (3) the challenged September 26, 2019 Final Decision is pending on appeal

⁹ Notice of Intent and Request for Comments (July 1, 2021), PSC REF# 415003, <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=415003>.

in this Court.

The Petitions for Appeal filed under Ch. 227 in this Court have divested the PSC from jurisdiction to resolve the due process issues in this case. As the U.S. Court of Appeals for the Seventh Circuit has explained in *United States v. Brown*, 732 F.3d 781, 787 (7th Cir. 2013):

[T]he [district court] judge lacked the power to amend his decision once the case was in this court. “The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982) (per curiam); see also *United States v. Burton*, 543 F.3d 950, 952 (7th Cir. 2008); *United States v. McHugh*, 528 F.3d 538, 540 (7th Cir. 2008). “Only one court at a time has jurisdiction over a subject.” *McHugh*, 528 F.3d at 540. The point of the rule is to “avoid the confusion of placing the same matter before two courts at the same time and to preserve the integrity of the appeal process.” *In re Teknek, LLC*, 563 F.3d 639, 650 (7th Cir. 2009).

The Seventh Circuit then went on to hold: “Because jurisdiction had shifted to this court, the judge lacked authority to make this substantive change, so we will disregard it. See *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) (an action taken by the district court without jurisdiction is a ‘nullity’).” *Id.* at 787.

In this case, the Dane County Circuit Court is acting in an appellate role to review the Final Decision of the PSC. Thus, the Intervenor-Respondent Transmission Companies’ unusual request to the PSC to “rescind” the Final Decision while this appeal is pending is at odds with the general jurisdictional rule reflected in *United States v. Brown*.

Even if this Court determines that the PSC has jurisdiction to act, there is considerable uncertainty over whether and how the PSC will eventually choose to act and, if it does, how that could affect this pending appeal. Because of the Transmission Companies’ stated intent to begin transmission line construction in October 2021 in Wisconsin (after already having begun construction of the shorter portion in Iowa), and the compressed timeline for the scheduled written discovery and depositions before the September 29–30, 2021 trial date in this Court, the stay

should be denied. A stay at this point would be contrary to the interests of justice: it would create an unnecessary roadblock to Petitioners' fair and reasonable opportunity to receive a decision from the Court on the merits of their case while the Transmission Companies continue to press ahead with their desire to begin construction in October.

The Court should allow discovery to proceed so that it can craft an appropriate remedy to the due process violations that have essentially been admitted in this case. Commissioner Huebsch's bias, or at least appearance of bias, constitutes a due process violation that taints the full panel of Commissioners in this case, including Chair Valcq and Commissioner Nowak, and it would be premature for this Court to stay discovery now when next steps before the PSC are uncertain.

III. EVEN IF THE PSC WERE TO RESCIND THE CPCN, THIS APPEAL TO THE CIRCUIT COURT WOULD NOT BE MOOT.

The Transmission Companies argue that a stay is warranted because it's possible that their requested rescind/reopen/re-vote strategy at the PSC will moot this appeal. That's not correct as a matter of law, as a matter of fundamental fairness, or as a matter of common sense. Even if the PSC were to rescind the CPCN at the Transmission Companies' request, this state court appeal will not be moot because: (1) the propriety of "tainted" Chair Valcq and Commissioner Nowak's ongoing participation in decision-making on the proposed Cardinal-Hickory Creek transmission line remains a live controversy before both the state court and federal courts; (2) the claims raised under the Wisconsin Environmental Policy Act remain a live controversy so long as the environmental impact statement for the huge controversial proposed Cardinal-Hickory Creek transmission line is not also revoked; and (3) this case falls into multiple exceptions to mootness under Wisconsin case law because it involves issues that are of great public importance, arise under the Wisconsin Constitution, and would potentially evade review unless this Court decides the

issues on the pending appeal. *See, e.g., Wisconsin's Env't Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 161, 171, 255 N.W.2d 917, 924 (1977).

A. Regardless of the PSC's Action, Several Important Issues Remain in Dispute.

Even if the PSC were to attempt to rescind the CPCN despite this Court's appellate jurisdiction, the appropriate remedy for the PSC's due process violation remains for this Court to decide. Both Chair Valcq and Commissioner Nowak should be recused from further proceedings related to the proposed CPCN for the Cardinal-Hickory Creek transmission line because Commissioner Huebsch's participation tainted "the entire proceeding." Decision and Order of May 25, 2021, at 1. As the Court explained, "[t]he right to an impartial decision maker is fundamental to due process." *Id.* If one commissioner is biased, then the entire proceeding is contaminated, including the other members of the commission. There is simply "no way which we know of whereby the influence of one upon the others can be quantitatively measured." *Id.* at 4 (quoting *Berkshire Emps. Ass'n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 238–39 (3d Cir. 1941)).

The Court's May 25, 2021 Decision and Order explains how Commissioner Huebsch, Chair Valcq, and Commissioner Nowak's decision-making process is inextricably linked in ways that cannot be reversed or negated by simply removing Commissioner Huebsch and voting again. *See id.* at 8–9. The public comments filed to date in the PSC's docket reveal a significant lack of trust in the current PSC's ability to render an impartial decision on the CPCN for the proposed Cardinal-Hickory Creek transmission line. So long as either Chair Valcq or Commissioner Nowak continues to be involved in the proceeding, there remains a controversy about whether their participation is consistent with principles of due process and fairness. The Transmission Companies' requested stay of proceedings would then lead to this case coming back to this Court with the same issue. Except that it will reappear after irreparable harm has been done if the

Transmission Companies are allowed to continue with their October 2021 construction plans.

Wisconsin statutes generally allow for the PSC to delegate decision-making authority to a staff member, but not if that staff member has already been tainted by *ex parte* communications or by the statements and positions of Commissioners who have been disqualified from hearing the matter. The Circuit Court and the parties could also consider appointment of a reserve or retired judge, or other such special master, to adjudicate the case. Whatever path this Court orders, the Commission must conduct itself with a view towards rehabilitating its reputation so that the public may regain confidence in the integrity of its decisions. There are other potential remedies as well. Further discovery can help to determine which of these potential remedies may be available and most consistent with principles of due process and fairness.

In addition to raising unresolved questions about the appropriate remedy for the PSC's due process violation, the Petitioners' appeal also raises issues about whether the constricted environmental impact statement ("EIS") issued by the PSC for this transmission line complies with the Wisconsin Environmental Policy Act ("WEPA"), Wis. Stat. § 1.11.¹⁰ That part of the case remains a live controversy on appeal, and this Court retains jurisdiction to determine these issues that have been fully briefed for more than a year.

B. Several Mootness Exceptions Apply in this Case.

Even if the PSC were to attempt to rescind the CPCN before the Court reaches the merits of this appeal, there are several applicable exceptions to the mootness doctrine under Wisconsin law that provide for this Court to retain jurisdiction to issue a ruling on the merits of the due process

¹⁰ Counts 4 and 5 of each of DALC's and WWF's petitions for review state WEPA claims. Columbia County Circuit Court Case No. 19-cv-334, Dkt. 2, ¶¶ 85–94 (WWF petition); Iowa County Circuit Court Case No. 19-cv-144, Dkt. 2, ¶¶ 85–94 (DALC petition).

issues in this case. As explained by the Wisconsin Supreme Court, courts have generally applied exceptions to the general rule of mootness where:

the issues are of great public importance; the constitutionality of a statute is involved; the precise situation under consideration arises so frequently that a definitive decision is essential to guide the trial courts; the issue is likely to arise again and should be resolved by the court to avoid uncertainty; or, a question is capable and likely of repetition and yet evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within a time that would result in a practical effect upon the parties.

Matter of G.S., 118 Wis. 2d 803, 805, 348 N.W.2d 181, 182–83 (1984). Each one of these mootness exceptions apply in this case.

1. The Issues Are of Great Public Importance.

This case raises a number of issues of great public importance—the most prominent is the public confidence and trust in the integrity and fairness of the PSC’s adjudicative processes in the face of an apparent wrongdoing, misuse of public office, and attempts to evade transparency about that misuse. There are additional issues of great public importance presented by the merits on appeal including the public’s interest in protecting and preserving the environment of the southwestern Wisconsin Driftless Area and vital natural resources, the property rights of hundreds of landowners including family farmers, and the Transmission Companies’ own projection that more than \$2 billion will be charged to Wisconsin and other Midwest utility ratepayers for this massive proposed transmission line with 17-story-high towers cutting a wide swath through the protected Upper Mississippi River Wildlife and Fish Refuge, which “is designated as a Wetland of International Importance (Ramsar) and a Globally Important Bird Area,”¹¹ and Southwestern Wisconsin’s Driftless Area. As a result of the flawed procedure below, the PSC failed to lawfully

¹¹ See https://www.fws.gov/refuge/Upper_Mississippi_River/about.html; see also <https://rsis Ramsar.org/ris/2417> (Lower Wisconsin Riverway in the Southwest Wisconsin Driftless Area).

consider less expensive, more cost-effective, and less environmentally-damaging alternatives—including those proposed by its own PSC Staff as well as DALC/WWF and other intervenors. The public’s great interest in this case and concern about the PSC’s failure to adequately examine less damaging and costly alternatives are evidenced in part by the outpouring of letters to the PSC by members of the public and all of the elected state representatives of the affected area. *See* Record Docs. 1193 (internal links to comments), 1194 (internal links to comments), and 1195–1325.

Wisconsin courts have found issues to fall into the “great public importance” exception when “they would affect a large number of persons in the Wisconsin State prison system.” *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶¶ 31–32, 366 Wis. 2d 1, 24–25, 878 N.W.2d 109, 119–20. Other examples of matters of great public importance that create an exception to mootness include: (1) whether a statute governing the counting and invalidating of votes had been properly applied to a school district referendum, *Roth v. Lafarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶¶ 13–14, 268 Wis. 2d 335, 345–46, 677 N.W.2d 599, 604 (2004); (2) “what measure of due process is required at [a high school] expulsion hearing and what power of review the state superintendent has on appeal,” *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 660, 321 N.W.2d 334, 336 (Ct. App. 1982); and (3) interpretation of a statute that would apply to every child visitation petition by a grandparent, great-grandparent, or step-parent under the statute. *In re Marriage of Meister*, 2016 WI 22, ¶ 18 n.10, 367 Wis. 2d 447, 457, 876 N.W.2d 746, 752. *See also Hahner v. Bd. of Ed.*, 89 Wis. 2d 180, 186–87, 278 N.W.2d 474, 477 (Ct. App. 1979) (holding “the proper interpretation of the statutes having to do with the transportation of pupils attending private schools,” is a matter of great public importance and collecting other cases on issues of great public importance).

The issues raised in this case are at least on par with and could arguably exceed the public

interests in those cases in terms of the level of public importance, as they would affect all electricity ratepayers and residents of the state of Wisconsin, ratepayers in other Midwestern states, landowners whose property could be taken, and the Driftless Area's residents, small business owners, farmers, communities, and tourists. This Court already recognized the importance of these issues in its May 25, 2021 Decision and Order:

Indeed, the PSC's decisions affect the entire state. They directly impact access to reliable electricity, affect property rights, affect the environment, and have direct physical effects on communities and properties, as things like power plants and power lines are highly visible and alter the natural landscape. With such a meaningful impact on this State, the need for public trust in a fair and impartial decision process before the PSC cannot be understated.

Dkt. 322 at 4–5.

2. This Appeal Presents Important Constitutional Questions.

An exception to mootness is also appropriate for this case because it involves important constitutional due process questions. Even when it is not the constitutionality of a *statute* that is at issue, courts have found exceptions to mootness when the case presents constitutional questions. Examples include when the case “deals with the unlawful restraint of personal liberty—a constitutional question,” *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 688, 608 N.W.2d 425, 427, or with the constitutional issue of whether the state Department of Transportation afforded proper procedural due process in allegedly having failed to promulgate ascertainable standards for the exercise of the administrative discretion in determining the length of license suspensions. *Best v. State, Dep't of Transp., Div. of Motor Vehicles*, 99 Wis. 2d 495, 496, 299 N.W.2d 604, 605–06 (Ct. App. 1980). This Court has already determined that the public's due process interest in a fair and impartial decisionmaker is a “vital state interest” that “must not be understated.” May 25, 2021 Decision and Order at 2, 5. The Court should not allow the PSC and the Transmission Companies to evade further discovery and a ruling on these important

constitutional issues by seeking to stay proceedings in this Court while returning to the PSC to paper over the serious due process issues that have tainted the PSC's decision-making process in this CPCN case.

3. The Issues Presented in this Appeal Are Likely to Recur, and a Court Ruling Will Provide Important Guidance to the Parties.

The issues presented in this case are likely to arise again, and a decision from this Court, which sits in appellate review of the PSC's decision, is likely to guide the PSC and the parties in further proceedings. The Wisconsin Supreme Court concluded that an issue about how to properly challenge involuntary commitments "recurs with some frequency" and thus should be decided, even if the issue would otherwise be considered moot. *In re Commitment of Morford*, 2004 WI 5, ¶¶ 8–12, 268 Wis. 2d 300, 306–08, 674 N.W.2d 349, 352 (2004).

In *Wisconsin's Env't Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 161, 171, 255 N.W.2d 917, 924 (1977), the Wisconsin Supreme Court held that, even though the PSC order being challenged had been superseded by a later order, the Court would still hear the case because the controversy involved "environmental issues of public importance, is continuing in nature, and, if the court declines to resolve it because the order was superceded [sic], it will defy review." 79 Wis. 2d at 173. The Court reasoned that the disputed question—whether the Wisconsin Environmental Policy Act required a particular kind of alternatives review for orders on natural gas curtailment—could evade review because "[n]umerous orders are entered every year" by the PSC on natural gas curtailment "and the PSC oftentimes enters a superceding [sic] order" to accomplish modifications required by "[s]hifting gas supplies and customer demands." *Id.*

The current case presents far stronger reasons to apply an exception to mootness than even in *Wisconsin's Environmental Decade*. This current appeal involves similar environmental issues of great public importance, on top of allegations of longstanding misconduct involving public

officials, regulated transmission companies, and utilities. The encrypted secret text messaging revealed by the Transmission Companies in late June has, apparently, been taking place for “several years” among an unknown number of transmission company representatives, utility executives and other unknown individuals. Motion to Stay, Dkt. 355 at 2–3. The PSC has not said it will change its recusal policy, has not said that it considers communications of the types Commissioner Huebsch engaged in to be improper, and has not said that Chair Valcq and Commissioner Nowak will recuse themselves from future deliberations in this case notwithstanding their participation in the tainted decision-making process below.

The Transmission Companies have asked the PSC to act before the Petitioners can conduct discovery and prove up the facts to establish the full scope of the due process violations that tainted all Commissioners who participated in the contaminated PSC decision-making process. Thus, the due process issues in this case are likely to arise again before the PSC and other administrative agencies, especially with the *ex parte* communications that appear to be prevalent at the PSC. This issue will likely again be before this Court.

Under the circumstances, a court ruling on the propriety of the secret encrypted text messaging and other forms of *ex parte* communications between PSC commissioners and transmission company and utility officials here will provide useful guidance to the PSC and the parties in this and future proceedings. The Transmission Companies’ request to stay this appeal and cut off the discovery process before the full story is revealed does not serve the interests of justice and does not inspire public confidence in the integrity and fairness of the PSC’s decision-making process. May 25, 2021 Decision and Order at 2, 5.

4. Granting the Intervenor-Respondents’ Motion to Stay Would Wrongly Allow the PSC and the Transmission Companies to Defy and Evade Judicial Review.

Courts have been particularly skeptical of applying the mootness doctrine when a litigant

attempts to evade review by “voluntarily” rescinding a challenged action. “Voluntary cessation does not moot a case or controversy unless ‘subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,’ a heavy burden” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal citations omitted)). The burden is on the Defendant to demonstrate mootness: “[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth*, 528 U.S. at 190.

The logic underpinning these federal cases is sound and should be applied here if the challenged action is voluntarily stopped, but there is no guarantee that it will not recur. *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 831 (7th Cir. 2014) (finding case was not moot when Wisconsin Government Accountability Board agreed to stop enforcing allegedly unconstitutional statute against plaintiff, but “its inconsistent and shifting positions do not give [the court] much confidence in its representation” and court had “no assurance that [the Board] will continue to recognize [the statute’s] unconstitutionality”). If the PSC revokes an order at an applicant’s request every time a viable due process challenge rears its head and the court seems likely to rule in a petitioner’s favor, the matter will evade review because of the PSC’s voluntary actions. If this present appeal is not allowed to proceed, the full extent of improper *ex parte* communications and wrongdoings will not come to light, and members of the public who have an interest in open government will continue to distrust the integrity of the PSC, an outcome that this Court has deemed would be “dangerous.” May 25, 2021 Decision and Order at 9.

CONCLUSION

There is no reason to stay this case because it is not yet clear whether or how the PSC will respond to the Transmission Companies' motion to rescind the CPCN. Regardless of how the PSC acts, this case will not be moot. The Transmission Companies' retreat from state court on the eve of depositions and a trial avoids transparency and full accountability. This lawsuit is about both issues of great public importance on the merits and public trust in Wisconsin's government, which is a "vital state interest." Decision and Order of May 25, 2021 at 2 (quoting *State v. Herrmann*, 2015 WI 84, ¶ 39, 364 Wis. 2d 336, 353, 867 N.W.2d 772, 781)). Petitioners Dane County, Iowa County, Village of Montfort, Town of Wyoming, Driftless Area Land Conservancy and the Wisconsin Wildlife Federation therefore respectfully request that this Court DENY the Transmission Companies' motion for a stay and allow scheduled discovery and depositions to proceed and the case to go to trial as scheduled in the May 25, 2021 Decision and Order.

Dated: July 14, 2021

Respectfully submitted,

/s/ Electronically signed by Howard A. Learner

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