**BEFORE THE**
**PUBLIC SERVICE COMMISSION OF WISCONSIN**

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| Joint Application of American Transmission Company, ITC Midwest LLC, and Dairyland Power Cooperative, for Authority to Construct And Operate a New 345 kV Transmission Line From the Existing Hickory Creek Substation in Dubuque County, Iowa, to the Existing Cardinal Substation in Dane County, Wisconsin, to be Known as the Cardinal-Hickory Creek Project | ) | 5-CE-146 |

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**DRIFTLESS AREA LAND CONSERVANCY AND WISCONSIN WILDLIFE FEDERATION REPLY COMMENTS ON AMERICAN TRANSMISSION CO., ITC MIDWEST LLC, AND DAIRYLAND POWER COOPERATIVE'S REQUEST TO RESCIND THE CPCN AND REOPEN THE RECORD**

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## INTRODUCTION

The Applicants' self-serving proposal following their own admission of wrongdoing would once again take the PSC down a circular path that, ultimately, will bring the matter right back to this very point because it is erroneous as a matter of law, is contrary to the decisions by both the state court and the federal court in this case, relies on outdated data and ignores today's electricity realities, and would violate fundamental fairness. The Applicants are betting that, in doing so, they can build the line before the courts can address their wrongdoing. However, the PSC is obliged to re-instill public confidence in the fairness, impartiality and integrity of its regulatory decision-making. The necessary first step to do that: the PSC should reject the Applicant Transmission Companies' request to rescind and re-vote based on an outdated record. "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *County of Dane, et al. v. Public Service Commission of Wisconsin*, 2019CV3418, Decision and Order at 2 (May 25, 2021) (Dkt. 322) ("Circuit Court Decision")

(quoting *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016)).

The Applicants' extraordinary request for the PSC to rescind the CPCN for the Cardinal-Hickory Creek transmission line is an admission that they unlawfully interfered with the PSC's decision-making process to produce a favorable Final Decision that is no longer defensible. While many of the facts remain shrouded from public view, what we know so far shocks the conscience. ATC and ITC have admitted wrongdoing as their agents engaged in years of secret encrypted communications with a PSC Commissioner while at the same time seeking the PSC's approval of a costly high-voltage transmission line. This latest revelation, together with other highly irregular conduct that has been revealed through discovery in the state and federal courts,[1] creates a serious risk of bias or at least the appearance of bias that violated the due process rights of the parties and the public. The PSC's decision-making process was thus tainted in ways that undermine "public confidence that the PSC acts impartially," which the Circuit Court characterized as "a vital state interest." Circuit Court Decision at 5.

The Transmission Companies are asking the PSC to sweep evidence of misconduct under the carpet by rescinding the CPCN and "expeditiously" re-voting to approve the same CPCN on a stale record that no longer reflects the factual reality on the ground.[2] The PSC ought not be complicit and sanitize the flawed proceedings below by rescinding the CPCN with two of the same three Commissioners, tainted by the wrongdoing of the Applicants and their colleague, "re-voting" on a stale record for several reasons. Here's what the PSC should do now, and why the PSC must do so now:

[1] *See* DALC/WWF Comments of July 12, 2021 at pp. 6–7 (PSC REF#: 415816) (describing the extent of other *ex parte* communications and irregular conduct that establish a serious risk of bias, or at least the appearance of bias and unfairness, in the CPCN proceedings below).

[2] *See* "The Applicants' Comments On The Proposed Rescission Of The Final Decision And Next Steps," filed with the PSC on July 12, 2021 (PSC REF#: 415806).

First, the Applicants' motion to reopen the record is untimely and improper as it was filed much more than 20 days after the PSC's September 26, 2019, Final Decision. Wis. Stat. § 196.39(2) plainly limits a Party's right to "request the reopening of a case" to a manner consistent with Wis. Stat. § 227.49, which requires a Party to make its request within 20 days of the Order for which reopening is sought. The Applicants' request filed on June 28, 2021, should therefore be either ignored or dismissed as untimely.

Second, because there is a pending appeal, which remains active and open in the Dane County Circuit Court, the PSC lacks jurisdiction to evade that Court's review. If the PSC now believes that its September 26, 2019, Final Decision is legally flawed because of bias or at least the appearance of bias, then the PSC should file a motion before the Circuit Court confessing error, thereby leading to the Court's invalidation of the Final Decision and appropriate remedies. Contrary to Applicants' brief, rescinding the CPCN will not "moot" the Circuit Court case. The remedy for the admitted due process violations that occurred in this proceeding must be crafted by the Circuit Court, not by the PSC.

Third, the PSC must not simply "paper over" the flaws in the proceeding below. The Applicants' request for Chair Valcq and Commissioner Nowak to quickly "re-vote" on the CPCN would violate the Dane County Circuit Court's holding that "one tainted member taints an entire proceeding." *See* Circuit Court Decision at 5. With due respect, Chair Valcq and Commissioner Nowak ought not and cannot defeat transparency with a simple "do-over" without further undermining public trust in the fairness and integrity of the PSC. "Appearances matter," and the Applicants' proposal does not appear fair to the public. *Id.* at 8. The PSC should consider that more than 150 members of the public filed comments over the past ten days expressing strong dismay and opposition to the Applicants' proposal. It looks like a cover-up to the public. Or, put in the

vernacular, "if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck."

Fourth, the PSC must ensure that any future CPCN proceeding for this high-voltage transmission line is based on a new factual record that reflects the extraordinary boom in Wisconsin-based solar development and continuing decline in solar and battery storage prices since the transmission line was conceived. The PSC Staff's expert testimony demonstrated that the economic benefits of the Cardinal-Hickory Creek transmission line turn negative as more Wisconsin-based solar is developed.[3] However, the Applicants' economic modeling runs for the CHC project did not account for Wisconsin-based solar at the time of the 2018–2019 proceeding. The Applicants' request for the PSC to reissue the CPCN without considering these fundamentally changed facts and circumstances is irresponsible and risks saddling Wisconsin and other Midwest ratepayers with hundreds of millions of dollars in unnecessary costs.

In the final analysis, the Applicants' misguided "rescind/reopen/re-vote" strategy would take the PSC in the wrong direction. It would lead to more litigation, more uncertainty, more expense, and more frustration for all involved in this unfortunate and highly unusual case. This is bigger than one transmission line. The PSC should consider the damage to its institutional reputation that would result from handling this improperly.

## ARGUMENT

### I. The Applicants' Highly Unusual Request for the PSC to Reopen This Contested Case is Procedurally Improper and Would Violate the Due Process Rights of the Parties.

ATC and ITC's June 28, 2021 request to reopen this contested case fails to comply with Wisconsin law and should be ignored or dismissed. The Applicants' June 28 request relies on Wis.

[3] E.g. Ex.-PSC-Vedvik-7p at 5–6 (PSC REF#: 368843).

Stat. § 196.39 as its only legal authority.[4] Wis. Stat. § 196.39(2), however, plainly limits a Party's right to "request the reopening of a case" to a manner consistent with Wis. Stat. § 227.49, which requires a Party to make its request within 20 days of the Order for which reopening is sought. That 20-day period expired in October 2019—almost two years ago. The Applicants' request is therefore improper.

Perhaps recognizing that they had no legal basis to request a reopening of this docket, the Applicants styled the request as an invitation for the PSC to act "on its own motion." This is a legal fiction. The Applicants' request was their own, and the PSC should have ignored it as untimely and procedurally improper.

Furthermore, the Applicants' proposal for the Commission to re-vote and reissue the CPCN without a hearing would violate the due process rights of the parties. The Wisconsin Supreme Court has explained that the PSC's authority to modify prior orders under Wis. Stat. § 196.39 is expressly limited by requirements of due process, which require, at a minimum, notice and an opportunity to be heard consistent with the requirements of Ch. 196. *Mid-Plains Tel., Inc. v. Pub. Serv. Comm'n*, 56 Wis. 2d 780, 787, 202 N.W.2d 907, 910 (1973).

In the *Mid-Plains* case, the reviewing Court struck down a PSC Order that changed a provision in Mid-Plains' tariff schedule without affording the utility an adequate hearing on notice. The PSC cited § 196.39 as providing broad authority for the Commission to reopen and alter its prior orders. The Court rejected that position and held that the PSC's authority under § 196.39 is limited by the requirements of due process. As the Court explained, "[t]he cardinal test of the presence of [sic] absence of 'due process' of law in an administrative proceeding is the presence

[4] *See* ATC/ITC Request to Rescind and Reopen (PSC REF#: 414396) fn. 1 (quoting Wis. Stat. § 196.39(1) ("The commission at any time, upon notice to the public utility and after opportunity to be heard, may rescind, alter or amend any order fixing rates, tolls, charges or schedules, or any other order made by the commission, and may reopen any case following the issuance of an order in the case, for any reason.")).

or absence of the rudiments of fair play long known to law." *Id.* at 787 (citing *State ex rel. Madison Airport Co. v. Wrabetz*, 231 Wis. 147, 285 N.W.2d 504 (1939)).

The Applicants' expedited rescind/reopen/re-vote strategy would deny the due process of law to parties that would be harmed by the lack of opportunity to present new facts and evidence and have them heard by an unbiased and untainted panel of adjudicators. The Court concluded in the *Mid-Plains Telephone* case that "[t]he essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty." *Id.* at 789. Any PSC action to re-vote on a CPCN for the Cardinal-Hickory Creek transmission line in the absence of a fair hearing, a new evidentiary record, and an untainted panel would exceed the PSC's statutory power, would violate due process, and would therefore be void.

## II. The Commission Lacks Jurisdiction to Act in Light of the Pending Appeal in the Dane County Circuit Court.

To state the obvious, there are appeals pending before the Dane County Circuit Court and the U.S. District Court for the Western District of Wisconsin. The PSC may not reopen this docket to make a substantive change to the CPCN unless and until the Dane County Circuit Court concludes its judicial review of the Final Decision on appeal. The Petitions for Review filed under Wis. Stat. Ch. 227 in the Dane County Circuit Court have divested the PSC from jurisdiction to resolve the due process issues in this case. The U.S. Court of Appeals for the Seventh Circuit explained in *United States v. Brown*, 732 F.3d 781, 787 (7th Cir. 2013):

> "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 [lower tribunal] 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 PSC's September 26, 2019 Final Decision. Thus, the Applicant Transmission Companies' unusual request that the PSC "rescind" its Final Decision while this appeal is pending is contrary to the general jurisdictional rule explained in *United States v. Brown*. This makes sense as a practical matter as well as a legal matter. The pending appeal has charged the PSC with violating the due process rights of the parties in the tainted CPCN proceedings below. It would offend notions of fair play for the PSC to short-circuit the Dane County Circuit Court's continuing investigation of the facts and remedy on appeal.

## III. Even if the PSC Attempts to Rescind the CPCN, the Dane County Circuit Court Appeal Would Not Become Moot.

Applicants' argument that "rescinding the CPCN and then re-voting will moot the pending state court action" is incorrect as a matter of law and fundamental fairness. Applicants' Comments at 3 (PSC REF#: 415806). Even if the PSC were to attempt to rescind and reopen the CPCN in this docket (despite its lack of jurisdiction and authority to do so), the Circuit Court appeal would not become "moot" and the case would likely continue to a final resolution on the merits. The Applicants ignore several applicable exceptions under Wisconsin law that would support the continuing jurisdiction of the Circuit Court regardless of the PSC's next steps here. The Wisconsin Supreme Court has held that courts should apply 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.

**A. The Case Presents Issues of Great Public Importance.**

This case raises a number of issues of great public importance: (1) the compelling need and "vital state interest" in 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; (2) the public's interest in protecting and preserving the environment of the southwestern Wisconsin Driftless Area and vital natural resources; (3) the property rights of hundreds of landowners including family farmers; and (4) the extraordinary cost—more than $2.2 billion over time—of the proposed transmission line.

The public's great interest in this case and concern about the Applicants' 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 by all of the elected state representatives of the affected area. *See* Ex.-PSC-FEIS-r (PSC REF#: 370355) (internal links to comments), Ex.-PSC-Public Comments (PSC REF#: 372384) (internal links to comments), DEIS Comment by Sondy Pope, Todd Novak, Travis Tranel, Jon Erpenbach, Howard Marklein (PSC REF# 361228).

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. The Dane County Circuit 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.

Circuit Court Decision at 4–5.

**B. This Case Presents Important Constitutional Questions.**

An exception to mootness is also appropriate because this case 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). The Dane County Circuit 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." Circuit Court Decision at 2, 5. It is the *Court's* job to implement a remedy for the constitutional violations and misconduct that the Applicants have now admitted.

**C. The Applicants' Request is a Clear Attempt to Evade Pending 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; *see also 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").

This issue was directly addressed by 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 present case presents far stronger reasons to apply an exception to mootness than *Wisconsin's Environmental Decade.* This case 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. The Applicants' request to cut off the discovery process in state court and have the PSC quickly "re-vote" on the CPCN before the full story is revealed is an obvious attempt to evade judicial review in a case that the Applicants apparently recognize that they are losing. The Circuit Court is likely to see through this gambit and the general public already does. The PSC

must not be perceived as an accomplice to this transmission company strategy to avoid disclosure and accountability.

## IV. Reissuing a CPCN Without Taking New Evidence of New Wisconsin-Based Solar Power and Battery Storage Improvements Would Violate Due Process, Result in Arbitrary Decision Making, and Undermine the PSC's Duty to Protect Wisconsin Ratepayers.

**The rapid influx of new Wisconsin-based solar development since the PSC's September 26, 2019 Final Decision undermines the economic case for the proposed Cardinal-Hickory Creek transmission line.** Applicants proposed the Cardinal-Hickory Creek project on the theory that a new transmission line is necessary to carry low-cost renewable energy to Wisconsin customers from Iowa and elsewhere in the West. However, as explained in the expert testimony of Staff witnesses Alexander Vedvik, Daniel Grant, and Ajinkya Rohankar, the addition of low-cost solar power in Wisconsin severely curtails the economic and technical value of the project. *See* Direct-PSC-Vedvik (PSC REF#: 365153); Direct-PSC-Grant-p (PSC REF#: 365082); Direct-PSC-Rohankar (PSC REF#: 365096).

The Applicants did not account for the surge in solar that was being approved and built in Wisconsin during the application process. For example, the Applicants' "non-transmission alternative" (NTA) included only 30 MW of new solar generation. PSC Staff found that assumption to be unrealistic since the PSC already had recently approved two large-scale solar projects—Badger Hollow and Two Creeks—with a combined nameplate capacity of 450 MW. When Staff included those two projects in their modeling runs, they found that the Applicants' economic case for the CHC transmission line collapsed to "*near zero* 40-year net benefits" using realistic assumptions. Direct-PSC-Vedvik at 36–37 (emphasis added). Staff expert witness Alexander Vedvik explained:

> The inclusion of the Commission approved Badger Hollow and Two Creeks solar facilities and the proposed Red Barn Wind Farm … lowered the calculated energy

> cost savings associated with the proposed Cardinal-Hickory Creek project.
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> ….
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> The results of Mr. Grant's PROMOD analysis appear to suggest that targeted integration of new renewable resources in southwestern Wisconsin ***can drop the energy cost savings associated with the proposed Cardinal-Hickory Creek project by 66 to 77 percent*** …
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> ….
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> Commission staff's analysis of the PROMOD modeling of the Policy Regulations future that includes certain new renewable projects in Wisconsin ***shows near zero 40-year net benefits*** ($2.87 million using a nominal discount rate of 6.4 percent and negative $4.35 million using a nominal discount rate of 8.41 percent) to Wisconsin transmission customers, using the applicants' formula and methodology.

*Id.* at 35–37 (emphasis added).

The Staff analysis also concluded that upgrading existing transmission lines ("asset renewal") and adding new Wisconsin-based solar would relieve congestion on the Wisconsin transmission system in a manner similar to the proposed Cardinal-Hickory Creek transmission line, but at a greatly reduced cost:

> The results of Mr. Rohankar's PowerWorld analysis appear to suggest that the incorporation of forecasted asset renewal projects in the modeling would alleviate the major constraints on the existing transmission system in southwestern Wisconsin
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> ….
>
> The results of his analysis showed the incorporation of the Commission approved Badger Hollow and Two Creeks solar facilities ***greatly reduced flows across existing constrained transmission system elements in Wisconsin*** in the absence of the proposed Cardinal-Hickory Creek project.
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> ….
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> The inclusion of these solar facilities in the PowerWorld modeling shows lower power flows across the constrained transmission system assets in the project study area for the base with asset renewal alternative, as compared to the proposed Cardinal-Hickory Creek project alternative. Thus, I would conclude that ***the base with asset renewal alternative also boosts the ability of the transmission system in southwestern Wisconsin to integrate additional new renewable generation in Wisconsin in a similar manner as the proposed Cardinal-Hickory Creek project.***

Direct-PSC-Vedvik-19, 37 (emphasis added).

Staff's PROMOD and PowerWorld analysis, combined with the massive recent influx of new solar projects in Wisconsin, completely undermines the Applicants' economic modeling runs

that were relied upon by the PSC in its September 26, 2019 Final Decision.

Developers are now moving forward with more than 2,000 MW of Wisconsin-based solar energy generation, and more is on the way.[5] That's the real-world reality. The PSC Staff found that the proposed Cardinal-Hickory Creek transmission line had "near zero" benefits when accounting for just *two* of these new solar projects (Badger Hollow and Two Creeks) comprising 450 MW—what is the result of adding in the next 1,500 MW? How many more solar projects will be proposed in the next five years? The Applicants would prefer that we do not find out. But ignoring reality is not a responsible way to make policy.

**Rapid improvements in battery storage technology and other alternative transmission solutions provide yet another reason to take a second look at the need for this proposed new high-voltage transmission line in Southwest Wisconsin.** In 2019, the PSC Staff analysis and intervenor testimony found that targeted upgrades to the existing Wisconsin transmission system, assisted by Wisconsin-based solar development, would be a reasonable and cost-effective way to relieve congestion on Wisconsin's transmission network and "integrate additional new renewable generation in Wisconsin in a similar manner as the proposed Cardinal-Hickory Creek project."[6] The DALC/WWF expert testimony by Jon Wellinghoff, Kerinia Cusick, Mihir Desu and Rao Konidena described further rapid improvements in battery storage, Wisconsin-based renewables development, and other "alternative transmission solutions" (ATS) that are increasingly being deployed to avoid or defer large-scale transmission projects but that

[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.

[6] *See* Direct-PSC-Vedvik (PSC REF#: 365153); Direct-PSC-Grant-p (PSC REF#: 365082); Direct-PSC-Rohankar (PSC REF#: 365096).

were not seriously considered by the Applicants.[7]

Since that expert testimony was filed, the economic and technical case for alternative transmission solutions has further improved. Lithium-ion battery costs have fallen by an additional 25% and more utilities—including ATC—are implementing "storage as transmission" alternatives. ATC's own website states:

> The costs of energy storage are dropping and in certain circumstances it has advantages over wires and other traditional transmission equipment … ***ATC has been among the key stakeholders that have worked with MISO since 2018 to develop tariff revisions which will enable storage to be recognized as a transmission asset***, providing another tool that ATC can use to reliably and cost-effectively serve customers. Those tariff revisions were recently conditionally approved by the Federal Energy Regulatory Commission, which required MISO to make some clarifications.[8]

Utilities across the world are increasingly exploring these "virtual transmission line" projects as viable replacements for traditional poles and wires.[9] In Australia, for example, Fluence has proposed the installation of two separate 250MW / 125MWh battery storage systems at two substations of a congested transmission corridor that it believes can be executed faster and at lower cost than a build-out of transmission lines.[10] ATC itself is developing a "storage as transmission" project near Waupaca, Wisconsin to solve a local reliability need.[11] In August 2020 (after the PSC's Final Decision in this case), FERC approved a proposal by MISO for rules and processes

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[7] E.g. Direct-DALC/WWF-Cusick-r (PSC REF#: 369221); Direct-DALC/WWF-Wellinghoff-r (PSC REF#: 366140); Direct-DALC/WWF-Desu-p (PSC REF#: 365193); Direct-DALC/WWF-Konidena-pr (PSC REF#: 366903).

[8] American Transmission Company, *ATC's storage as transmission project featured on podcast* (Sept. 1, 2020), https://www.atcllc.com/whats-current/atcs-storage-as-transmission-project-featured-on-podcast/.

[9] *See* Sharon Thomas, *Storage As a Transmission Asset is Gaining Traction in Many RTOs/ISOs,* Energy Storage Association (Dec. 15, 2020), https://energystorage.org/storage-as-a-transmission-alternative-is-gaining-traction-in-many-rtos-isos/.

[10] Andy Colthorpe, *Australian Energy Market Operator publishes Fluence's 250MWh 'virtual tranmission line' proposal* Energy Storage News (June 4, 2020), https://www.energy-storage.news/news/australian-energy-market-operator-publishes-fluences-250mwh-virtual-tranmis.

[11] MISO, *Review of ATC Proposed 15947 Waupaca Area Storage as Transmission Only Asset (SATOA) Project,* 20190531 WSPM Item 03d ATC SATOA review results349901.pdf (misoenergy.org).

by which storage will be treated as a transmission asset for transmission planning and project selection.[12] Much has changed over the past three years, and Wisconsin deserves a transmission system designed for the future, not one that is stuck in the past.

State law mandates that the PSC protect the best interests of Wisconsin ratepayers and ensure that utility rates are just and reasonable. Wis. Stat. §§ 196.487(2) and 196.491(3)(d). This requires a searching inquiry into the facts as they exist today, not burying the PSC's head in the sand. PSC Staff expert witness Daniel Grant testified that "modifications to the generation portfolio modeled, especially in Wisconsin, can cause ***significant changes*** to the energy cost savings ***which are often a reduction*** from the energy cost savings benefits ATC has claimed." Direct-PSC-Grant-28-p (emphasis added). Considering the dramatic changes in solar deployment and energy storage economics since the Application was filed in 2018, the Applicants' argument that the Cardinal-Hickory Creek transmission line and the CPCN are in the best interests of Wisconsin ratepayers is no longer credible. The Applicants' request for the Commissioners to rescind and quickly re-vote to approve the CPCN for the proposed Cardinal-Hickory Creek transmission line based on this outdated record would violate the due process rights of the parties and would exacerbate the appearances of bias and unfairness that have already plagued this proceeding.

## V. The Applicants' Request for Chair Valcq and Commissioner Nowak to "Re-Vote" to Approve the CPCN Would Not Cure the Continuing Due Process Violation in This Proceeding.

The Applicants' legally flawed argument that Chair Valcq and Commissioner Nowak can somehow re-vote on the CPCN relies on cases in which Wisconsin and federal courts have remanded for a decision-making body to reconsider its prior decision without the participation of

[12] FERC Docket No. ER20-588-000, Midcontinent Independent System Operator, Inc, Order Accepting Tariff Revisions Subject to Condition (Aug 10, 2020).

a biased decisionmaker. Crucially, *none of these cases* hold that the decision-making panel may re-vote on the *same exact record, with no further proceedings*. That would be tantamount to saying that a panel's decision still stands once the biased decisionmaker's vote has been excised, whereas those cases actually held that the participation of a single biased decision-maker tainted the *entire* decision, requiring reversal of the panel's decision. That's what the Circuit Court held in its May 25, 2021 Decision and Order.

The cases the Applicants cite do not stand for the proposition that the non-biased members of a panel may cure a decision tainted by another panel member's bias through the mere formality of retracting and then immediately re-instating their votes. In *Marris*, the Wisconsin Supreme Court remanded "for a new hearing, without chairperson Kuerschner's participation." *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 31, 498 N.W.2d 842, 849 (1993). In *Keen*, the court remanded for the Dane County Zoning and Natural Resources Committee to reconsider an application for a conditional-use permit without the participation of a biased member, as well as to additionally consider factors required by ordinance that the Committee had failed to consider on its first vote. *Keen v. Dane Cty. Bd. of Supervisors*, 2004 WI App 26, ¶ 21, 269 Wis. 2d 488, 499–500, 676 N.W.2d 154, 160. A mere formality of retracting and recasting votes, as Applicants ask for here, would have been inconsistent with the court opinions in both those cases.

None of the cited federal cases support Applicants' proposed process, either. The court in *Hicks* stated that "if Ms. Diffey is found to have been biased when she cast her vote on Mr. Hicks' dismissal, her presence will have tainted the tribunal and violated Mr. Hicks' due process rights," but because the court was reviewing the district court's decision on qualified immunity for damages from a § 1983 suit, it never ordered any remand to the decision-making bodies that had made adverse employment decisions about Mr. Hicks, merely a remand to the district court to

continue with the case. *Hicks v. City of Watonga, Okl.*, 942 F.2d 737, 748 (10th Cir. 1991). The court in *Antoniu* directed the Commission "to make a de novo review of the evidence," *Antoniu v. S.E.C.*, 877 F.2d 721, 726 (8th Cir. 1989), and the court in *Cinderella* remanded with instructions that "the Commissioners consider the record and evidence in reviewing the initial decision." *Cinderella Career & Finishing Schs., Inc. v. F.T.C.*, 425 F.2d 583, 592 (D.C. Cir. 1970). Nothing in either opinion suggests that Applicants revoke/revote ploy would be an acceptable remedy.

Any process that is tantamount to sanitizing a tainted decision by merely striking a biased decisionmaker's vote contradicts the cases from the United States Supreme Court, the Wisconsin Supreme Court, and many federal appellate courts that have held that judicial bias is a "structural error" that requires automatic reversal "even if the judge in question did not cast a deciding vote." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016); *see In re Paternity of B.J.M.*, 2020 WI 56, ¶ 35, 392 Wis. 2d 49, 70–71, 944 N.W.2d 542, 552–53 (quoting Williams), cert. denied sub nom. *Carroll v. Miller*, 141 S. Ct. 557 (2020). See also *Berkshire Employees Ass'n of Berkshire Knitting Mills v. N.L.R.B.,* 121 F.2d 235, 239 (3rd Cir. 1941); *Am. Cyanamid Co. v. Fed. Trade Comm'n,* 363 F.2d 757, 767–98 (6th Cir. 1966); *Stivers v. Pierce,* 71 F.3d 732, 748 (9th Cir. 1995). Indeed, the cases the Applicants cite also held that an entire decision is tainted by the participation of one biased decisionmaker. *Marris*, 176 Wis. 2d at 31; *Keen*, 2004 WI App 26, ¶ 17 ("Hamre's impermissibly high risk of bias alone warrants reversal"); *Cinderella Career & Finishing Schs., Inc. v. Fed. Trade Comm'n,* 425 F.2d 583, 592 (D.C. Cir. 1970); *Antoniu v. Sec. Exch. Comm'n,* 877 F.2d 721, 726 (8th Cir. 1989); *Hicks v. City of Watonga,* 942 F.2d 737, 748 (10th Cir. 1991).

The Circuit Court has ruled on this tainting of the panel issue in its May 25, 2021 Decision. If the PSC somehow believes that the Court should allow the remaining two tainted Commissioners to vote, then the PSC should raise that approach and its safeguards to ensure due

process directly with the Circuit Court before acting on their own in a manner that is contrary to the Court's jurisdiction and May 25, 2021 Circuit Court Decision.

## CONCLUSION

The PSC should not reward the Applicant Transmission Companies by granting their request to quickly "paper over" their admitted serious misconduct and secret communications with a PSC commissioner. Doing so would send the wrong message and would further undermine public trust in the fairness of the PSC. Instead, the PSC should confess error with the Dane County Circuit Court and ensure that any new consideration of this Project is based on an updated evidentiary record that reflects the electric system reality in Wisconsin today.

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Respectfully Submitted,

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