

STATE OF WISCONSIN
DANE COUNTY BRANCH 9
CIRCUIT COURT

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

For official use

Case No. 19-CV-3418

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

v.

Public Service Commission of Wisconsin,
Respondent,

American Transmission Company, LLC,
ITC Midwest, LLC,
Dairyland Power Cooperative,
Midcontinent Independent System Operator, Inc.,
Clean Grid Alliance,
Fresh Energy,
Minnesota Center for Environmental Advocacy,
Intervenor-Respondents.

**PETITIONERS' BRIEF IN SUPPORT OF
EMERGENCY MOTION FOR TEMPORARY INJUNCTION**

Petitioners Driftless Area Land Conservancy and Wisconsin Wildlife Federation respectfully move the Court, pursuant to Wis. Stat. § 813.02 and Wis. Stat. § 196.43, to issue a temporary injunction to halt construction in Wisconsin of the proposed Cardinal-Hickory Creek transmission line until the latest of two things occurs: (1) this Court's ruling on the merits in this Chapter 227 appeal, and (2) the Supreme Court's resolution of non-party Michael Huebsch's

appeal in Case No. 2021AP001321. This injunction is necessary to preserve the status quo and prevent irreparable damage to Southwest Wisconsin's landscape, natural environment, family farms, rural communities, and businesses. No injunction bond is necessary under Wis. Stat. § 196.43 because no parties will suffer substantial pecuniary damages from an injunction of short duration. In light of the exigent circumstances presented by the Transmission Owners' intent to begin construction on October 25th, the Petitioners respectfully request a hearing within 7 days of this Emergency Motion or at the Court's earliest convenience.¹

INTRODUCTION

“The essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty.” *Mid-Plains Tel., Inc. v. Pub. Serv. Comm'n*, 56 Wis. 2d 780, 789, 202 N.W.2d 907, 911 (1973) (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953)). A hallmark of due process and fair play is the right to be heard “at a meaningful time and in a meaningful matter.” *Piper v. Popp*, 167 Wis. 2d 633, 644, 482 N.W.2d 353, 358 (1992) (quoting *State ex rel. Strykowski v. Wilkie*, 81 Wis.2d 491, 512, 261 N.W.2d 434 (1978)). Stated plainly, “litigants must be given their day in court.” *Piper*, 167 Wis. 2d at 644.

This fundamental principle of due process is at grievous risk in this case. On October 25, the Transmission Companies intend to begin building the Cardinal-Hickory Creek transmission line.² This project will require bulldozing through wetlands, waterways and conservation lands; knocking down trees through the hills and valleys of rural Iowa and Dane Counties; pouring deep foundations for 17-story transmission towers that can be seen for miles; taking private property that stands in the way of the transmission line; and forever damaging the unique scenic landscapes,

¹ Petitioners Dane County, Iowa County, Town of Wyoming, Village of Montfort, Chris Klopp, and Dr. Gloria Belken intend to file letters in support of this Emergency Motion for Temporary Injunction.

² Co-Owners' Notice of Status of Construction, *Nat'l Wildlife Refuge Ass'n v. Rural Utilities Service*, No. 21-cv-00096 (Sep. 24, 2021, W.D. Wis.).

family farms, rural communities, and small businesses that are part of community life and the local economy in Southwest Wisconsin's Driftless Area. Petitioners deserve "their day in court" before this irreparable damage begins. To employ the Court's metaphor, these are bells that cannot be "unrung."

Wis. Stat. § 813.02 provides circuit courts with discretion to enter temporary injunctions to preserve the status quo when "during the litigation it shall appear that a party is doing or threatens or is about to do ... some act to be done in violation of the rights of another party and tending to render the judgment ineffectual." Wis. Stat. § 196.43 sets forth specific procedures for injunctions in chapter 227 appeals of PSC decisions. The first clause requires "notice to the commission and any other party" and a hearing prior to entry of an injunction.³ The second clause requires the moving party to secure "at least 2 sureties" in an amount that the court determines, in its discretion, is "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."⁴ The amount of the bond "is peculiarly within the discretion of the trial court." *Nauman v. Cent. Shorewood Bldg. Corp.*, 243 Wis. 362,

³ The Wisconsin Supreme Court has interpreted a notice requirement under Wis. Stat. Ch. 227 to apply only to the "principal parties" with an active interest in the case and not "all persons who appear" in the administrative proceedings below. *Wisconsin's Env't Decade, Inc. v. Pub. Serv. Comm'n*, 84 Wis. 2d 504, 530, 267 N.W.2d 609, 623 (1978). Petitioners have complied with Wis. Stat. § 196.43 by serving this filing on the commission and the parties to this case. Wis. Stat. § 196.43(1). In addition, although they do not believe it is required, Petitioners are providing courtesy service to additional parties who formally intervened in the PSC proceeding but who are not parties to this case.

⁴ "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." Wis. Stat. § 196.43(2).

365, 10 N.W.2d 151, 152 (1943). In this case, the Court should exercise its discretion to set the injunction bond at zero dollars because no party will suffer substantial pecuniary harm from a short delay of the construction schedule.

- First, the Transmission Companies cannot reasonably claim they would be harmed by a temporary injunction when they themselves have already asked the PSC to *rescind* the CPCN altogether.
- Second, the Transmission Companies are more than adequately protected from any financial risk of project delay or cancellation through FERC’s “incentive-based rate treatment” that is intended to insulate and protect regulated transmission companies from “the risk of non-recovery of costs” traditionally associated with project development.⁵
- Third, any claimed impact to the Transmission Companies’ future profits resulting from a short pause in the construction schedule is extraordinarily speculative and likely lost in the wash of other construction and project management uncertainties that affect any large infrastructure project (labor, supply chain, weather, etc.).

Petitioners find themselves in this emergency situation through no fault of their own. Dane County and Iowa County and the other municipality, conservation group and private landowner Petitioners appealed the PSC’s September 26, 2019 Final Decision *twenty-two months ago*. Since then, the Transmission Companies have acted to delay disposition of this case while, simultaneously, they have pressed forward with a construction schedule that, if left unchecked, will make the transmission line a *fait accompli*. This summer, after uncovering a series of secret communications between their agents and a former commissioner, the Transmission Owners asked this Court for a stay of unspecified duration so they could pursue a rescission of the Final Decision

⁵ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 163.

at the PSC.⁶ After the PSC deadlocked and did not act on their request, the Transmission Owners changed course.⁷ On September 7th, less than three weeks before the scheduled evidentiary hearing, the Transmission Owners and PSC filed briefs supporting former Commissioner Michael Huebsch’s petitions to the Supreme Court that resulted in his unavailability for trial.⁸ Then, a few weeks later, Respondents argued that an evidentiary hearing “cannot be comprehensive or fair” without Michael Huebsch testifying as a witness. (Dkt. 1043 at 2).

The Transmission Owners have nearly run out the clock. Despite this Court’s best effort to set a discovery and hearing schedule that would have enabled a ruling before construction begins, the Petitioners now find themselves at the brink of imminent harm. If construction begins, the resulting harm to Wisconsin’s landscape and Petitioners’ rights will be severe. The old adage that “justice delayed is justice denied” applies with force in this case. *See In re Snyder v. Adams*, 184 Wis. 10, 198 N.W. 616, 617 (1924).

At the end of the day, Petitioners and the public deserve a judicial process they have confidence in and that affords due process. Petitioners have a right to present their case and obtain a judicial resolution before the transmission companies begin clearing trees, bulldozing through

⁶ Letter from Brian Potts to PSCW Secretary, *Application of American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative*, PSC Docket No. 5-CE-146, REF#: 414396 (June 28, 2021), <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=414396>.

⁷ Minutes and Informal Instructions of the Open Meeting of Thursday, July 29, 2021, Docket No. 05-CE-146, *Joint Application of American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative*, PSC Docket No. 5-CE-146, REF#: 418174 (August 5, 2021), <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=418174>.

⁸ Public Service Commission of Wisconsin’s Response to Michael Huebsch’s Petition For Expedited Review And Emergency Motion For Administrative Stay And Stay Pending Appeal, *County of Dane, et al. v. Public Service Commission of Wisconsin, et al.*, Appeal Nos. 2021AP1321-LV, 2021AP1325, 2021AP1495-W (S.Ct. Wis., Sept. 7, 2021); American Transmission Company LLC, ATC Management Inc., Dairyland Power Cooperative, and ITC Midwest LLC’s Response to Huebsch’s Emergency Motion for Administrative Stay and Stay Pending Appeal and Emergency Petition For Supervisory Writ or Exercise of Superintending Authority, *County of Dane, et al. v. Public Service Commission of Wisconsin, et al.*, Appeal Nos. 2021AP1321-LV, 2021AP1325, 2021AP1495-W (S.Ct. Wis., Sept. 7, 2021).

farms and conservation lands, wetlands and waterways, and pouring foundations. Petitioners respectfully request that the Court set a hearing that would allow for the entry of a temporary injunction by no later than October 25, 2021.⁹

ARGUMENT

I. Petitioners Satisfy All of the Factors for a Temporary Injunction.

In Wisconsin, the authority for the issuance of a temporary injunction is statutory:

When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

Wis. Stat. § 813.02. A court may issue a temporary injunction “when the moving party demonstrates four elements: (1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.” *Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App 56, ¶ 20 (citing *Werner*, 80 Wis.2d 513, 520–21). In this case, Petitioners satisfy all four elements.

A. Construction of the Cardinal-Hickory Creek Transmission Line will have a significant and irreparable impact on Southwest Wisconsin's communities, culture, economy, and natural environment.

The facts of this case are presented in full in the Petitioners' respective merits briefs which need not be repeated here.¹⁰ However, when deciding whether an injunction is warranted, the Court

⁹ Petitioners Dane County, Iowa County, Town of Wyoming, Village of Montfort, Chris Klopp, and Dr. Gloria Belken intend to file letters in support of this Emergency Motion for Temporary Injunction.

¹⁰ Dkt. 181 (Opening Br. of Dane County); Dkt. 184 (Opening Br. of Iowa County, Village of Montfort, Town of Wyoming); Dkt. 185 (Opening Br. of DALC/WWF); Dkt. 187 (Opening Br. of Klopp); Dkt. 189 (Opening Br. of Belken); Dkt. 219 (Reply Br. of Dane County); Dkt. 220 (Reply Br. of DALC/WWF);

should take into serious consideration this huge high-voltage transmission line's harmful and irreparable adverse impacts on Southwest Wisconsin's environmental, economic, aesthetic, and cultural values. There can be little reasonable dispute that these damages constitute "irreparable harm" for the purposes of a temporary injunction. No party to this or related litigation, or to the proceeding before the PSC has ever denied that these harms are consequential and irreversible.

The Cardinal-Hickory Creek transmission line is planned to run for about 101 miles between Dubuque County, Iowa, and Middleton, Wisconsin, with the majority of the line on the Wisconsin side. The transmission line towers will be about 195 feet high (*i.e.*, 20 stories high) on either side of the Mississippi River crossing, and 150 to 175 feet high (*i.e.*, 17+ stories) along most of the route. The route would comprise over 1500 acres, well over half of which would be new right-of-way (*i.e.*, not using or near existing highway or utility line right-of-way). Doc. 1193, FEIS at 226, 278, 343, 435-36, Doc. 19, Final Decision at 87 (identifying approved route segments). This does not include additional acres needed for access roads, the sixteen laydown yards of 10+ acres each, helicopter landing zones, or work platforms. Doc. 829 at 18-19.

This huge transmission line would run through and adjacent to numerous small rural communities and sensitive resource areas, causing significant conflicts with the communities' land use plans and their own visions for development. Doc. 1158 at 13-15; Doc. 1168 at 2-6. This picture depicts how the transmission line would look as it runs directly through the small town of Dodgeville, Wisconsin. Doc. 559.

Dkt. 221 (Reply Br. of Iowa County, Village of Montfort, Town of Wyoming); Dkt. 224 (Reply Br. of Klopp).



As explained in DALC/WWF’s merits brief, the transmission line route would run through and damage many important environmental resources in Southwest Wisconsin’s Driftless Area, including the Upper Mississippi River National Wildlife and Fish Refuge (which “contains one of the largest blocks of riverine habitat in the contiguous United States,” Doc. 1193, FEIS at 56), multiple state and private conservation areas and parklands, the Military Ridge Prairie Heritage Area (identified by Wisconsin DNR as the “highest priority for landscape-scale grassland protection and management in Wisconsin” and “one of the best opportunities in the Midwest to protect prairie remnants and area sensitive species, such as grassland birds,” Doc. 1270 at 14), and the Black Earth Creek Watershed Area, among others. Doc. 1193, FEIS at 55. The transmission line will run through 114 wetlands.

Before constructing the line, the Transmission Owners will clear-cut trees and other vegetation from the full width of the transmission right-of-way, Doc. 356, Application at 96, which would generally be 150 feet wide (*id.* at 3). This will fragment habitat, encourage the spread of invasive species, contribute to soil and water erosion, raise water temperatures, and damage

wetlands and aquatic habitats. And once the line is built, there will be even more negative impacts, especially to Wisconsin's migrating bird populations. The proposed transmission line would cut (1) directly across the Mississippi Flyway, the "most important bird migration corridor in central North America," Doc. 1108 at 26; (2) through the National Wildlife Refuge, which provides critical migratory bird habitat; and (3) through or near five dedicated Important Bird Areas—which "provide essential habitat to one or more species of breeding or non-breeding birds, particularly species of conservation concern." Doc. 1193, FEIS at 56-57. DALC/WWF presented expert testimony from four natural resource experts (Terry Ingram, Dr. Curt Meine, George Meyer and Dr. Don Waller) who provided detailed explanations and an inventory of the significant adverse impacts of the projects. Docs. 1042, 1069, 1080, 1099, 1105, 1106, 1107, 1108, 1136, 1137, 1138, 1158, 1165, 1171, 1174. The adverse impacts of the CHC transmission line and high towers are significant and irreparable.

All of the activities associated with the construction of this Project—filling wetlands, clearing trees, and irreversibly altering water quality and aesthetics—constitute the kind of irreparable injury that courts account for when deciding to issue a temporary injunction. *See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011) (concluding that the filling of wetlands constituted irreparable harm); *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 323–26 (D.C. Cir. 1987) (affirming a finding of irreparable injury based on the permanent destruction of wildlife habitat, water quality, natural beauty, and other environmental and aesthetic values and interests); *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (finding irreparable harm from logging mature trees and holding that "[n]either the planting of new seedlings nor the paying of money damages can normally remedy" such harm); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135

(9th Cir. 2011) (rejecting argument that ability of plaintiffs to visit other natural areas means no irreparable harm).

This Court cannot simply order Respondents to put the trees back into the ground like match sticks if Petitioners ultimately prevail on the merits. *See Habitat Educ. Ctr., Inc. v. Bosworth*, 381 F. Supp. 2d 842, 863-64 (E.D. Wis. 2005) (granting injunction in Wisconsin logging case). “Environmental 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.” *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). Petitioners have no adequate remedy at law and a temporary injunction is necessary to avoid irreparable harm.

B. A temporary injunction is necessary to preserve the status quo.

Wis. Stat. § 813.02 states that a temporary injunction may be granted when it appears that a party is about to take an action “tending to render the judgment ineffectual.” Thus, temporary injunctions are appropriate “in all cases where it appears that a party’s rights cannot be effectually vindicated unless the opposing party be restrained from so acting or proceeding in such a way as will clearly tend to defeat the object of the suit.” *St. Hyacinth Congregation v. Borucki*, 141 Wis. 205, 124 N.W. 284, 287 (1910) (citing *Bartlett v. L. Bartlett & Son Co.*, 116 Wis. 450, 93 N.W. 473 (1903)). Cases involving irreparable injury to land and “tearing up the ground” are particularly appropriate for injunctions. In such cases “it is well-nigh an imperative duty of the court to preserve the status quo by temporary injunction, if its disturbance pendente lite will render futile in considerable degree the judgment sought, or cause serious and irreparable injury to one party.” *De Pauw v. Oxley*, 122 Wis. 656, 100 N.W. 1028, 1029 (1904). This is a quintessential case for a temporary injunction. Without a temporary injunction to preserve the status quo, the Transmission Companies’ actions could “defeat the object of the suit.”

C. Petitioners have a strong probability of success on the merits.

Petitioners will not repeat their extensive arguments on the merits here. The parties' merits briefs are available to the Court and have been pending since July 2020. However, the circumstances that have unfolded since Petitioners filed their merits briefs last year have only strengthened their likelihood of success on the merits. Several of the problematic entanglements between former commissioner Michael Huebsch, the Transmission Companies, and other parties in interest to the CPCN proceeding are now a matter of public record.

No party disputes that Mr. Huebsch formally served on MISO's influential Advisory Committee (reporting to MISO's Board of Directors and meeting with its Executive Director) and took on this role even though MISO chose to intervene as a full party in interest in the CPCN proceeding. *See, e.g.*, Dkt. 202 at 74. The sheer number of phone calls, texts, and other communications between Mr. Huebsch and Robert Garvin (the chief lobbyist for WEC, the utility holding company that owns 60% of transmission company ATC) are staggering for a commissioner responsible for regulating that company's public utility businesses. For example, Mr. Garvin's former attorneys admitted in filings to this Court that Huebsch and Garvin "exchanged approximately 200 phone calls over the eighteen months between April of 2018, when ATC filed its application for the Cardinal-Hickory Creek transmission line with the Commission, and September of 2019, when the Commission issued its final decision unanimously approving the project." Doc. 345 at 4.

Most shockingly, on June 28, 2021, the Transmission Owners filed a letter with the Public Service Commission and with this Court revealing that:

former Commissioner Michael Huebsch engaged in regular communications with an ATC employee, a former independent contractor for ITC, and other individuals over several years and while the CPCN application was pending. The communications occurred using the Signal software application ... [which] is used

by companies and individuals because it enables users to send private, encrypted messages, which, depending on the user's settings, can be automatically deleted after a preset time period.¹¹

The fact that the Transmission Companies took the extraordinary step of requesting that the PSC *rescind* their CPCN indicates that the Petitioners have a strong probability of success on their bias claim. Otherwise, why would the Transmission Companies have made such a drastic request?

The Petitioners' merits case on the PSC's compliance with the CPCN factors at Wis. Stat. § 196.491(3)(d) and with the Wisconsin Environmental Policy Act at Wis. Stat. § 1.11 is equally strong, and is further strengthened by the rapid acceleration of Wisconsin-based solar development that has occurred since the PSC issued the CPCN in 2019. The Transmission Companies 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.¹² 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* Doc. 1046; Doc. 1047; Doc. 1048.

The Transmission Companies 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 despite the fact that the PSC had already (in 2019) approved two large-scale solar projects—Badger Hollow and Two Creeks—with a combined nameplate capacity of 450 MW. Doc. 94 at 12. When PSC

¹¹ Letter from Brian Potts to PSCW Secretary, *Application of American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative*, PSC Docket No. 5-CE-146, REF#: 414396 (June 28, 2021), <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=414396>.

¹² The expert testimony submitted by Wisconsin Citizens Utility Board witness Mary Neal confirmed by use of her power system modeling concluded that the Transmission Companies "greatly overstated the wind-related benefits of the Project," and explained that the CHC transmission line could actually increase coal-generated electricity. Doc. 1104 at 8, 19.

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. *Id.*; Doc. 1048 at 36–37.

Today, there are more than 2,000 MW of Wisconsin-based solar in active development and more is on the way. Doc. 94 at 7-8; *see* DALC/WWF Reply Comments on Transmission Companies' Request to Rescind the CPCN and Reopen the Record (PSC REF# 416306) (July 19, 2021) at 12-16.¹³ Simply put, the reality on the ground today supports the PSC Staff and Petitioners' expert testimony that Transmission Companies failed to consider faster, cheaper, and more effective alternatives that could have avoided or deferred the need for a massive high-voltage transmission line cutting through Wisconsin's scenic Driftless Area landscape and the Upper Mississippi River National Wildlife and Fish Refuge. Petitioners' case on the merits is strong.

II. A Temporary Injunction Will Not Significantly Harm the Respondents and Therefore No Injunction Bond Should be Required Under Wis. Stat. § 196.43.

Wis. Stat. § 196.43(2) directs the Circuit Court to require sureties that are sufficient 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." The determination of the amount of the sureties "is peculiarly within the discretion of the trial court." *Nauman*, 243 Wis. at 365; *see Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, 826 F.3d 1030, 1043 (8th Cir. 2016) ("The amount of the bond rests within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion.") (internal quotation marks and citation omitted).

¹³ *See also* 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>.

Trial courts may (and often have) exercised this discretion to set minimal or zero bonds if the injunction carries little risk of monetary loss to the defendant. *See* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Requirement of Security for the Issuance of a Preliminary Injunction or Temporary Restraining Order*, 11A Fed. Prac. and Proc. § 2954 (3d ed.) (collecting cases); *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003) (“bond amount may be zero if there is no evidence the party will suffer damages from the injunction”); *Int’l Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974) (“[T]he district court may dispense with security where there has been no proof of likelihood of harm to the party enjoined.”); *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1180, 1194 (W.D.N.Y. 1995) (no injunction bond required in an electric utility case where the electric utility would not suffer any long-term harm); *Highland Co-op. v. City of Lansing*, 492 F. Supp. 1372, 1382 (W.D. Mich. 1980) (delay in construction project did not require an injunction bond).¹⁴

In *Town of Holland v. Pub. Serv. Comm’n of Wis.*, the Court of Appeals held that the circuit court’s injunction precluding work on a segment of the Badger-Coulee transmission line did not comply with Wis. Stat. § 196.43. 2018 WI App 38, ¶ 48, 382 Wis. 2d 799, 824, 913 N.W.2d 914, 927. However, the appellate court’s opinion does not make clear whether it considered the error in that case to be the circuit court’s failure to enter an injunction bond *per se* or the circuit court’s

¹⁴ The text of Wis. Stat. § 196.43(2) is very similar to Federal Rule of Civil Procedure 65(c), which allows federal courts to issue a preliminary injunction “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.” Fed. R. Civ. Pro. 65(c). Although there is little direct state law precedent interpreting Wis. Stat. § 196.43(2), there is ample case law interpreting the similar language of Rule 65. The circuit court can therefore look to these federal cases for guidance in interpreting the bond requirement of Wis. Stat. § 196.43. *See State v. Poly–America, Inc.*, 164 Wis. 2d 238, 246, 474 N.W.2d 770, 773 (1991) (“When a state statute is modeled after a federal rule, we look to the federal interpretation of that rule for guidance and assistance.”); *State v. Dobbs*, 2020 WI 64, ¶ 35, 392 Wis. 2d 505, 528, 945 N.W.2d 609, 621 (same); *Luckett v. Bodner*, 2009 WI 68, ¶ 29, 318 Wis. 2d 423, 437, 769 N.W.2d 504, 511 (“When a state rule mirrors the federal rule, we consider federal cases interpreting the rule to be persuasive authority.”) (internal quotation marks and citations omitted).

failure to discuss and explain why an injunction bond was not warranted in this particular case. *Cf. Roth v. Bank of the Commonwealth*, 583 F.2d 527, 539 (6th Cir. 1978) (finding error, not because the trial court failed to require a bond in any particular amount, but because the court “failed to exercise the discretion required of him by Rule 65(c)” of considering the question of requiring a bond”); *Richland/Wilkin Joint Powers Auth.*, 826 F.3d at 1043 (“This court will reverse if the district court ... fails to require an adequate bond *or to make the necessary findings in support of its determination.*”) (emphasis added) (internal quotation marks and citations omitted). In this case, for the reasons explained below, the Court can make sufficient findings to support its discretion to set a zero or minimal bond.

A large bond is not warranted here because a short pause in the construction schedule will not substantially harm any of the parties. First and fundamentally, the Transmission Companies cannot reasonably claim they would be harmed by a temporary injunction when they have asked the PSC to *rescind* the CPCN altogether. The injunction would only do (in part and temporarily) what the Transmission Companies have already asked the PSC to do. The Transmission Companies should be estopped from claiming damages from a short delay of their planned construction start date while they still have not withdrawn their request to the PSC to rescind the CPCN altogether.

The Transmission Companies are also more than adequately protected from any financial risk of project delay or cancellation through FERC’s “incentive-based rate treatment” that insulates regulated transmission companies from “the risk of non-recovery of costs traditionally associated with project development.”¹⁵ ATC, ITC, and Dairyland have all applied for, and received, these incentive-based rates that allow them to recover 100% of prudently incurred costs associated with

¹⁵ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 163.

the delay or abandonment of a transmission project for reasons beyond the control of the utility.¹⁶ The Transmission Companies are also entitled to recover 100% of their “construction work in progress” (CWIP) and precertification and regulatory approval costs for the Cardinal-Hickory Creek project as they are incurred.¹⁷ In short, these regulated transmission utilities have significant advantages not available to typical competitive market participants. As a result, the Court should view with great skepticism any claim that a short delay in the construction schedule would somehow result in significant financial damages for these transmission companies.

The limited duration of the requested temporary injunction in comparison to the lifetime of this project also weighs against the need for an injunction bond. *See* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Requirement of Security for the Issuance of a Preliminary Injunction or Temporary Restraining Order*, 11A Fed. Prac. and Proc. § 2954 (3d ed.) (explaining that the risk of damage during the pendency of temporary equitable relief “may be minimized by such factors as the relatively short duration of the order”); *Richland/Wilkin Joint Powers Auth.*, 826 F.3d at 1039 (waiving bond requirement in a case where “the injunction would likely be short in duration”).

Petitioners are only asking for a temporary injunction of the short duration necessary to allow this Court to rule on the merits of this case. In comparison, the Cardinal-Hickory Creek transmission line has been in development for more than a decade. Construction projects of this size and scale are subject to any number of risks, including supply chain slowdowns, labor shortages, or bad weather, not to mention the COVID-19 global pandemic. Any one of these factors

¹⁶ *See* Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 76; 18 C.F.R. § 35.35(d); Order Granting Abandoned Plant Incentive, 166 FERC P 61025 (F.E.R.C.), 2019 WL 256477 (Jan. 17, 2019) (American Transmission Company, LLC); Order Granting Abandoned Plant Incentive, 166 FERC P 61024 (F.E.R.C.), 2019 WL 256471 (ITC Midwest, LLC); Order on Transmission Rate Incentives, 161 FERC P 61301 (F.E.R.C.), 2017 WL 6673236 (Dairyland Power Cooperative).

¹⁷ *See, e.g., See American Trans. Co.*, 107 FERC ¶ 61,117 at P 3 (2004).

may result in a further delay of days, weeks, or months in the years ahead before the Cardinal-Hickory Creek transmission line is actually operational. (The current construction schedule indicates that the line will not be in service until at least 2024). Thus, any claimed “damage” resulting from a short pause in the construction schedule is extraordinarily speculative and likely lost in the wash of other factors that could slow down this project. *See Naden v. Johnson*, 61 Wis. 2d 375, 387, 212 N.W.2d 585, 591 (1973) (claimant must prove damages with “reasonable certainty”); *Sporleder v. Gonis*, 68 Wis. 2d 554, 559–60, 229 N.W.2d 602, 605 (1975) (damages “must be certain”) (quoting *Caygill v. Ipsen*, 27 Wis.2d 578, 589, 135 N.W.2d 284, 290 (1965)).

III. A Temporary Injunction Would Not Harm the Public and Would Serve the Public Interest.

The Court should also disregard any arguments that a short delay in the construction start date for this transmission line would somehow result in higher electricity rates or decreased electric reliability for the general public. The Transmission Companies did not propose this project to maintain reliability or “keep the lights on” in Wisconsin. Instead, this transmission line was proposed as an “economic” project that would carry electricity from Iowa and other states to the east. In voting to approve the project, however, the Commissioners overruled their own PSC expert Staff’s testimony that the proposed transmission line would *lose* money for customers in most of the Staff’s economic “model runs.” Doc. 94 at 8; Doc. 1048 at 37-38; Doc. 711. In fact, Staff’s lead project engineer, Alexander Vedvik, determined that the Project could actually lose between \$266.68 and \$576.53 million for ratepayers in 6 of the 8 modeled futures. Doc. 94 at 8; Doc. 1048 at 30-31.

Mr. Vedvik also testified that that a *two-year delay in the in-service date of the CHC transmission line—until at least 2025—would likely produce positive economic benefits for Wisconsin ratepayers*. Doc. 94 at 9; Doc. 944 at 6. This led DALC/WWF witness Jon Wellinghoff,

the former chairman of the Federal Energy Regulatory Commission and among the nation's leading energy experts, to testify that cancelling the ill-fated Cardinal-Hickory Creek transmission line is a "no regrets" opportunity that could result in more long-term benefits to Wisconsin consumers with fewer adverse environmental impacts. Doc. 1053 at 25.

The Court should find that the public's interest in due process and fair play significantly outweigh ATC's claims that its future profits may somehow be marginally affected by a short delay in the construction schedule in this case. *See Sierra Club*, 645 F.3d at 997-98 ("[J]ust as important as the public interest in potential economic gains is 'the public's confidence that its government agencies act independently, thoroughly, and transparently' ... and the public interests that might be injured by a preliminary injunction, such as temporary loss of jobs or delays in increasing energy output in the region, 'do not outweigh the public interests that will be served.'") (citation omitted); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) ("[T]he public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim.") (citation omitted).

This Court has already recognized that there is great public interest in this case that extends well beyond Petitioners Dane County, Iowa County, the two other municipalities, the conservation organizations and the private landowners who petitioned for review of the Commission's Final Decision. Doc. 322, Decision and Order of May 25, 2021 at 4-5 (finding that "the need for public trust in a fair and impartial process before the PSC cannot be understated"). The Transmission Companies should not be allowed to benefit from the delays that they have caused while Petitioners case on the merits has been fully briefed for 15 months. "Construction first, verdict later" is not equitable or reasonable.

CONCLUSION

Petitioners respectfully request a temporary injunction to prevent irreparable damage to Southwest Wisconsin's landscape, natural environment, family farms, rural communities, and businesses while the Court considers the merits of this case. No injunction bond is necessary under Wis. Stat. § 196.43 because no parties will suffer substantial pecuniary damages from an injunction of short duration. In light of the exigent circumstances presented by the Transmission Owners' intent to begin construction on October 25th, the Petitioners respectfully request a hearing within 7 days of this Emergency Motion or at the Court's earliest convenience.

Dated: October 8, 2021

Respectfully submitted,

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