No. 22-1347

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

National Wildlife Refuge Association, et al.,
Plaintiffs-Appellees,

v.

Rural Utilities Service, et al.,
Defendants.

American Transmission Company, LLC, et al.,
Intervenor-Defendants-Appellants

On Appeal from the United States District Court
for the Western District of Wisconsin
The Honorable William M. Conley, Judge
Case Nos. 21-cv-00096-wmc & 21-cv-00306, consolidated

RESPONSE OF APPELLEES NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION, AND DEFENDERS OF WILDLIFE IN OPPOSITION TO APPELLANTS' MOTION FOR A STAY PENDING APPEAL, AND APPELLEES' MOTION FOR AFFIRMATIVE RELIEF UNDER F.R.A.P. 27(a)(3)(B)

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INTRODUCTION

Intervenor-Defendant-Appellants American Transmission Co., ITC Midwest, and Dairyland Power Cooperative's ("Transmission Companies") motion does not come close to meeting this Circuit's standard for granting a stay of the District's Court well-grounded Opinion and Final Judgments. "An injunction pending appeal is an extraordinary remedy, just like any other injunction." *Protect Our Parks, Inc. v. Buttigieg,* 10 F.4th 758, 763 (7th Cir. 2021). The Court must consider "the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *In re A & F Enterprises, Inc.*, 742 F.3d 763, 766 (7th Cir. 2014). The Transmission Companies are not likely to succeed on the merits of their appeal. They will suffer no real imminent, irreparable harm if the District Court's decision remains in place. On the other hand, the Plaintiff-Appellees National Wildlife Refuge Association, Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and Defenders of Wildlife ("Conservation Groups"), their members, the environment, and the public are suffering irreparable harm while the Transmission Companies aggressively build the costly huge "Cardinal-Hickory Creek" ("CHC") high-voltage transmission line. The stay motion should be denied. Instead, this Court should consider issuing an order pausing

construction to preserve the *status quo ante* pending this appeal. Fed. R. App. P. 27(a)(3)(B).

The federal agency Defendants—the Rural Utilities Service ("RUS"), U.S. Fish & Wildlife Service ("USFWS"), and U.S. Army Corps of Engineers ("Corps")—have not appealed, and they did not support the Intervenor-Defendants-Appellants' stay motion before the District Court.

The Intervenor-Defendants-Appellants are challenging the District Court's decision that the federal Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., National Wildlife Refuge System Improvement Act of 1997 ("Refuge Act"), 16 U.S.C. § 668dd-668ee, and Administrative Procedure Act ("APA"), 5 U.S.C. § 706, in granting permits and other approvals for the controversial CHC transmission line. This transmission line is proposed to run 102 miles from eastern Iowa through a new 260-foot-wide right-of-way (with towers up to 200 feet high) across the protected Upper Mississippi River National Wildlife and Fish Refuge ("Refuge"), and then bulldoze through southwest Wisconsin's Driftless Area scenic landscape, wetlands and waterways, family farms, and small-town rural communities, to Middleton, Wisconsin.

The District Court correctly concluded that: *First*, the huge CHC transmission line could not lawfully cut a wide swath through the protected

Refuge in light of the Refuge Act, which Congress specifically enacted in 1997 to prevent incompatible uses, including through land exchanges, that would undermine the statutory purposes of protected Wildlife Refuges, Appellants' App'x 31; *Second,* the Defendants' approvals of the Environmental Impact Statement ("EIS") and Record of Decision ("ROD") for the $500 million CHC transmission line violated NEPA and the APA based on *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), NEPA itself, and the Council on Environmental Quality's regulations implementing NEPA. Appellants' App'x 35-41.

The Transmission Companies fail to demonstrate any likelihood of success on the merits of either the Refuge Act or NEPA violations, and, for that reason alone, they don't satisfy the requirements for the "extraordinary remedy" of a stay. The District Court's NEPA ruling is based on *Simmons* and other clear precedent cautioning agencies against using unduly narrow statements of "purpose and need" that preclude consideration of "all reasonable alternatives." The Defendants "defined the purpose and need for the CHC project so narrowly as to define away reasonable alternatives." *Id.* at 35. As explained below, none of the cases cited by the Transmission Companies contravene the application of *Simmons* to the present case.

The District Court's straightforward application of the Refuge Act is consistent with the statute's language and purpose and the agency's rules. Congress enacted this "improvement" statute in 1997 specifically to prevent the types of maneuvering that the Transmission Companies are trying here to end-run Congress' purposes in creating the Upper Mississippi River National Wildlife and Fish Refuge in 1924. 16 U.S.C. § 723.

Likewise, the District Court properly rejected the Transmission Companies' attempts to evade judicial review. Their ripeness argument was properly rejected because the issues are purely legal and delay would work an extraordinary hardship: while this appeal is pending, the Transmission Companies are aggressively clearcutting and bulldozing in attempting to build the entirety (or almost all) of their costly transmission line, and, only then, would allow the Conservation Groups to challenge it. Appellants' App'x 13–16. NEPA's core purpose is requiring agency decisionmakers to evaluate all reasonable alternatives *before* final actions are taken. Here, the Transmission Companies are seeking to create what the District Court aptly described as an "orchestrated trainwreck," *id.* at 16, to effectively preclude the full and fair consideration of alternatives on remand, contrary to NEPA and this Court's holding in *Simmons*.

The Transmission Companies' standing argument evades the reality that the NEPA-required EIS and ROD were triggered *both* by the federal funds that

they are seeking *and also* by the federal permits and other approvals that are required. Appellants' App'x 439, 531. That's why all three federal agency Defendants engaged in the EIS and all three agencies signed the ROD. *Id.* at 532. Nor can the argument that the Midcontinent Independent System Operator ("MISO") included the CHC transmission line in a package of 17 lines more than a decade ago—since then, the electricity market, demand, and technologies have rapidly changed—somehow insulate against NEPA's requirements. Congress has provided no such statutory exception to NEPA's requirements.

Second, the Transmission Companies do not face imminent and irreparable harm because they do not plan to begin clearing in the Refuge until October 2022 at the earliest. The Conservation Groups, however, *do* face imminent harm because the Transmission Companies are continuing construction in Wisconsin, including plans to begin erecting towers in May 2022 while they continue bulldozing and building right up to the Refuge's borders. App'x 167. The District Court found that the Transmission Companies:

> are pushing forward with construction on either side of the Refuge, even without an approved path through the Refuge, in order to make any subsequent challenge to a Refuge crossing extremely prejudicial to their sunk investment, which will fall on their ratepayers regardless of completion of the CHC project, along with a guaranteed return on the Utilities' investment in the project. Thus, if the court does not treat consideration of the essentially inevitable re-proposal for a Refuge crossing as ripe for consideration now, the Utilities will have built up to either side of the Refuge, making entry of a permanent injunction

> later all the more costly, not just to the Utilities and their ratepayers, but to the environment they are altering on an ongoing basis.

Appellants' App'x 13.

The Companies are currently insulated from economic harm because they are charging utility ratepayers all of their construction costs, plus a 10.52% guaranteed "rate of return" (*i.e.*, profit). Order 679, FERC Stats. & Regs. ¶ 31,222 at 163.

The Conservation Groups, not the Transmission Companies, are likely to succeed on the merits. The most imminent, irreparable harm is the environmental damage currently being done by ongoing construction, and the resulting harm to the Conservation Groups', their members', and the public's interests. *See* App'x 103-46 (Decls. of Anderson and Kurt).

ARGUMENT

The Intervenors-Defendants-Appellants have not demonstrated a "likelihood of success on the merits," or "irreparable harm … if the stay is …denied," and, on the other hand, "the public interest favors" the Conservation Groups. *In re A & F Enterprises,* 742 F.3d at 766; *see Protect Our Parks,* 10 F.4th at 763.

I. The Transmission Companies Are Not Likely to Succeed on the Merits of Their Appeal.

The District Court's decision is fully consistent with this Circuit's precedent and the clear language of the applicable statutes and regulations. There is no likely basis for reversal.

A. The District Court Correctly Decided, and Had Jurisdiction to Decide, that the CHC Transmission Line Is Not Compatible with the Purposes of the Protected Upper Mississippi River National Wildlife and Fish Refuge.

The National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd-668ee, is unique among the federal lands statutes. It makes wildlife conservation and wildlife-dependent recreation the *sole* purpose of the National Wildlife Refuge System, and imposes stringent land use restrictions. The Refuge Act prohibits new or expanded existing uses that are not "compatible" with the Refuge System's purposes and any particular Refuge, *id.* § 668dd(d)(3)(A)(i), and it requires that compatibility determinations be based on biological, not economic or social, considerations. *Id.* § 668ee(1)-(3). There is no "grandfather" clause for existing uses; indeed, the Refuge Act directs the USFWS to eliminate existing non-compatible uses as soon as practicable, *id.* § 668dd(d)(3)(B)(vi).

USFWS regulations further prohibit Refuge managers from accepting "compensatory mitigation"—land, dollars, restoration project assistance—to justify compatibility findings that would otherwise not be justified. 50 C.F.R.

§ 26.41(b), (c). The proliferation of "right-of-way projects," such as transmission lines and pipelines running through National Wildlife Refuges, was a prime motivator for the 1997 amendments, and USFWS policy expressly disfavors those projects.

Starting in 2014, the National Wildlife Refuge managers expressed that the proposed CHC transmission line could not meet the Act's compatibility requirements, and the Transmission Companies should look to non-Refuge-crossing alternatives. The U.S. Environmental Protection Agency likewise strongly recommended considering alternative routes that would avoid the Refuge. App'x 75, 78. The Refuge managers had long recognized that massive "right-of-way" projects cause substantial irreparable environmental harm—loss and fragmentation of wildlife habitat, invasive species, contaminated stormwater runoff and erosion, bird strikes, lost recreational opportunities and aesthetic harms—that are not compatible with the Refuge's wildlife protection purposes. App'x 97–99; *see also* 340 FW 3.3. To their credit, neither the Refuge managers nor USFWS ever found that the CHC transmission line crossing would be compatible with these Refuge purposes.

The Transmission Companies have advanced two theories for why the Refuge Act's compatibility-with-wildlife-purposes requirement does not apply to the CHC transmission line. First, they argued for "grandfathering in" their

project under 50 C.F.R. § 26.41(c) as a supposedly simple "maintenance" or a "minor" realignment for "safety purposes" of pre-1997 low-voltage transmission lines about a mile away. Second, while this litigation was proceeding, they proposed restructuring their requested right-of-way easement into a "land exchange." Same right-of-way, same 20-story towers, same location, same impact on the Refuge, but the Transmission Companies would get fee simple ownership of the corridor. The theory of this legal legerdemain was that if the land was deeded out of the Refuge, then the Refuge Act's requirements would no longer apply. The Refuge managers indicated their intent to begin processing a land exchange to replace the prior easement. Appellants' App'x 68.

The Transmission Companies then started arguing that their "maintenance" theory was now moot, but their "land exchange" theory was unripe because all the details had not been finalized.

The District Court properly rejected the Transmission Companies' attempted evasion of judicial review and arguments that the CHC transmission line was somehow exempt from the Refuge Act's requirements.

First, the District Court correctly concluded that a brand-new high-voltage transmission line with much higher towers and wider right-of-way, could not reasonably be treated as "maintenance" or a "minor" realignment for "safety purposes" under 50 C.F.R. § 26.41(c).

Second, the District Court properly concluded that the issue was not moot. USFWS did voluntarily withdraw its initial right-of-way approval, but "[i]t is well settled that a 'defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth v. Laidlaw Envt. Servs.*, 528 U.S. 167, 189 (2000). A controversy is not moot unless "it is absolutely clear [that] the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* In this case, all signs indicate that the wrongful behavior—allowing this transmission line to cross the Refuge—will indeed recur absent judicial intervention.

Third, the District Court appropriately rejected the Transmission Companies' more recent claims that structuring the transaction as a "land exchange"[1] instead of an easement would exempt them from the requirement that Refuge uses serve only wildlife purposes. The Court recognized that such a reading of USFWS's land exchange authority would essentially nullify the Refuge Act's compatibility requirement and emphasis on wildlife purposes. Appellants' App'x 33. That would facilitate carving up National Wildlife Refuges for private development if developers make land exchange offers that the government can be persuaded to accept. This is precisely what Congress'

[1] The Act authorizes USFWS to "[a]cquire lands or interests therein by exchange . . . for acquired lands or public lands, or for interests in acquired or public lands, under his jurisdiction which he finds to be suitable for disposition." 16 U.S.C. § 668dd(b)(3).

passage of the Refuge Act in 1997—and the rule forbidding the purchase of favorable compatibility determinations with "compensatory mitigation"—was intended to avoid.

The Transmission Companies rely on *Town of Superior v. U.S. Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087 (D. Colo. 2012). That case, however, did not involve the Refuge Act, but instead a special bill—the Rocky Flats National Wildlife Refuge Act—in which Congress ordered USFWS to do a land exchange. There is no such Congressional direction here.

Fourth, the District Court properly rejected the argument that the land exchange issue was unripe because the details had not been finalized. Appellants' App'x 13. Again, this issue falls squarely within the well-established exception to the ripeness doctrine (or the APA's "final decision" requirement) because: (1) the issues are purely legal, and "would not 'benefit from further factual development,'" *Whitman v. American Trucking Ass'n,* 531 U.S. 457, 479 (2001) (*quoting Ohio Forestry Assn., Inc., v. Sierra Club,* 523 U.S. 726 (1998)); and (2) "withholding court consideration" would work a hardship on the plaintiffs. *Metro Milwaukee Ass'n of Commerce v. Milwaukee Cty.,* 325 F.3d 879, 882 (7th Cir. 2003) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 149 (1967)).

Here, the specific terms of the land exchange are largely immaterial to the purely legal question of whether the land exchange device improperly evades

the Refuge Act's wildlife purpose and compatibility requirements. As the Transmission Companies aggressively build up to the edges of the Iowa and Wisconsin sides of the Refuge, the hardship of "withholding court consideration" is and was acute. Forcing the Conservation Groups to file a new lawsuit and try to get a court to stop construction six months from now, on the day the land exchange is signed and sealed, would deny them an effective remedy. *See Kettle Range Conservation Group v. BLM,* 150 F.3d 1083, 1087 (9th Cir. 1998) (Reinhardt, J. concurring).

The Transmission Companies argue that cases like *Abbott Labs.* are inapplicable because they involved pre-enforcement challenges to administrative rules, not permitting decisions. That is a distinction without a difference. In *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.,* 578 U.S. 590 (2016), the Court unanimously agreed that the Corps' "jurisdictional determinations"—whether waterways are regulated "waters of the United States"—were ripe final decisions under the APA even though they preceded the ultimate decision whether to grant permits or commence enforcement actions. The Court concluded it would be grossly unfair to force the owners to wait, when the key issues had already been fully developed. *Id.* at 600-01 (*citing Abbott Labs.).*

The same logic applies here. The appraisal, legal descriptions, and title reviews of the specific corridor chosen have nothing to do with whether a land

exchange provides a "get out of jail free" card whenever USFWS and private developers want to carve up a National Wildlife Refuge.[2] Nothing is gained by waiting to resolve this legal issue until the title work is done.

Their plan has obviously been to evade judicial review of the Refuge Act issues as long as possible, while continuing construction right up to the Refuge borders, thereby creating two costly and environmentally destructive "transmission segments to nowhere." The District Court properly rejected this attempt to avoid judicial review of the proposed Refuge crossing, but it did not yet take the necessary remedial steps to stop the Companies' "orchestrated trainwreck."

[2] The other cases cited by the Companies do not support their argument. The issue in *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759 (8th Cir. 2019), was not whether a lawsuit was premature because a ROD had not yet been issued, but an implied private right of action against non-Federal actors under NEPA. *Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065 (7th Cir. 2020), involved Michigan's 1984 assumption of regulatory authority from the Corps under section 404(g) of the Clean Water Act. 33 U.S.C. § 1344(g). This Court found that a letter from EPA advising the Tribe that Michigan, not the Corps, had jurisdiction was not a "final action" under the APA. *Dhakal v. Sessions*, 895 F.3d 532 (7th Cir. 2018), was a failure to exhaust administrative remedies case, where an asylum seeker filed an APA case instead of following the Immigration Act's administrative process to its conclusion. *Audubon of Kansas, Inc. v. U.S. Dept. of Interior*, No. 221CV02025, 2021 WL 4892916 (D. Kan. Oct. 20, 2021), involves tentative agency memoranda of understanding and agency failures to act, which are only reviewable under the APA if "action [is] legally required." 5 U.S.C. § 706(1); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). None of those circumstances apply here, and none deal with either the "purely legal" or "hardship" questions that are relevant in this case.

B. The District Court's Determination that the Federal Agencies' Failure to Seriously Consider and Evaluate Non-Refuge-Crossing Alternatives Violated NEPA Is Fully Consistent with *Simmons* and this Court's Other Clear Precedents.

Major federal actions are not valid unless and until preceded by an EIS and ROD that comply with NEPA's requirements. 42 U.S.C. § 4321 *et seq.* The heart of an EIS is the full analysis of and "hard look" at "all reasonable alternatives" that involve fewer direct, indirect, and cumulative adverse environmental impacts.

In *Simmons*, 120 F.3d 664, this Circuit recognized that project developers have an incentive to define "purpose and need" unduly narrowly to limit the range of alternatives to essentially pre-select what they want to build. This Court squarely held that, although courts can and should consider a project proponent's proffered statement of purpose and need, courts must look at those proposals with a "degree of skepticism," and reject purpose and need statements that, in effect, prevent full and fair consideration of a reasonably broad range of alternatives. *Id.* at 669 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991)).

That is precisely what the District Court concluded. Following *Simmons*, the court rejected a "purpose and need" statement that could *only* be met by the Transmission Companies' proposed high-voltage transmission line that would specifically transfer power between the Hickory Creek substation in Iowa and the Cardinal substation in Wisconsin, and run through the protected Refuge.

Appellants' App'x 447. The District Court found that, as a result, the EIS did not adequately consider alternatives that would run north or south of the Refuge, or potential packages of non-wires alternatives that would eliminate the need for a new transmission line in this location altogether. That is a straightforward application of *Simmons* and the other cases cautioning against too-narrow purpose and need statements and the resulting too-narrow range of alternatives. *See generally* Council on Environmental Quality ("CEQ"), *National Environmental Policy Act Implementing Regulations Revisions,* 86 Fed. Reg. 55,757, 55,760 (Oct. 7, 2021) (endorsing *Simmons* as the correct interpretation of NEPA). CEQ is directly responsible for environmental review rules and guidelines that apply to all federal agencies.

The District Court determined that the three federal agency signatories of the EIS and ROD should not have accepted the "purpose and need" statement from the Companies that only their proposed huge high-voltage transmission line on basically a straight line between the two substations and through the protected Refuge could satisfy. Appellants' App'x 40-41. This holding is well-grounded, not reversible error.

The Transmission Companies offer two arguments for overturning the District Court's NEPA ruling. First, they claim that the Plaintiff Conservation Groups lack standing. They do not dispute that the Conservation Groups

submitted several declarations from members who live, work, or recreate near the route of the CHC transmission line, and whose interests in recreation, aesthetics, water quality, wildlife will be irreparably injured as construction continues. App'x 35-73. Rather than denying injury-in-fact, the Companies argue redressability. Their argument is that the only decision premised on the EIS is Defendant RUS's offer of a loan to Dairyland Power, which will not actually be made until after the transmission line is completed. Since the transmission line will go forward regardless of whether Dairyland gets federal financial assistance, they contend, a court ruling in their favor will not redress the injuries to the Conservation Groups and their members.

That is simply an inaccurate description of the facts. The EIS for the entire 102-mile transmission line was required *both* because federal permits were involved *and* because federal funds were requested. Appellants' App'x 439, 531. All three Defendant agencies fully participated in the environmental review process—scoping, meetings and hearings, working with consultants, draft EISs, responses to comments, and eventually formally deciding that the final EIS met the requirements of NEPA. All three agencies stated explicitly in the Record of Decision that their final decisions on permitting would be informed by the EIS, and they signed the ROD. Appellants' App'x 532. Yet now, the Companies argue that neither USFWS nor the Corps is accountable for legal flaws with the EIS—

we note, however, that the Defendant federal agencies are *not* making this argument.

There is no authority for the proposition—and the Transmission Companies have not cited any—that federal agencies can participate fully in an environmental review process, sign a Record of Decision finding that an EIS meets NEPA's requirements, then argue that they were not legally required to do an EIS and that NEPA's requirements don't apply to them. That would make a mockery out of the NEPA process. If agencies represent to the public that they are doing the full review that NEPA requires, then later claim that their decisions will be valid whether or not they comply with NEPA, the message is that the environmental review process is meaningless.

The District Court understood that the presumptive remedy for NEPA and APA violations is vacatur and remand of the federal agency decisions involved. *See generally Standing Rock Sioux Tribe v. Army Corps of Eng'rs,* 985 F.3d 1032, 1050 (D.C. Cir. 2021) and cases cited. That is what the District Court's Final Judgment orders. App'x 2. The NEPA violations here mean that the CHC transmission line does not have its necessary federal approvals, which means it cannot be completed, which will indeed redress at least some of the injuries suffered by the Conservation Groups and their members. When the federal agencies redo the EIS, the Conservation Groups will be afforded the opportunity to comment and

participate in decision-making, on a fully informed basis, as NEPA intended. The District Court's finding that the Conservation Groups established standing is perfectly sound.

The Companies' second argument is that the purpose and need statement was the result of the MISO planning process, referring to the study MISO did over ten years ago to collectively justify 17 new high-voltage transmission lines in this region. Even if that were true, it is entirely beside the point. The federal agencies' EIS consultants—in collaboration with the Transmission Companies—made "increase[d] [transmission] capacity between Iowa and Wisconsin" the essential part of their proffered purpose and need statement, knowing that would allow them to reject reasonable non-wires alternatives, and to exclude non-Refuge-crossing routes with different terminus points. Appellants' App'x 447. That skewed approach violates NEPA, and that's why a new EIS needs to consider routes that avoid crossing the Refuge, and non-wires packages, even if they will not "increase capacity between Iowa and Wisconsin," but could meet the other goals identified in the purpose and need statement. *See* 40 C.F.R. § 1502.14 (2019).

In *Env't. L. & Policy Ctr. v. U.S. Nuclear Regul. Comm'n*, 470 F.3d 676 (7th Cir. 2006), the Seventh Circuit upheld the agency's purpose and need statement, but did not deviate from the *Simmons* holding, stating that "blindly adopting the

applicant's goals is 'a losing proposition' because it does not allow for the full consideration of alternatives required by NEPA." *Id.* at 683 (*quoting Simmons,* 120 F.3d at 669) (internal citations omitted). In that particular multistage licensing process, however, this Court agreed that the agency "could defer that [alternatives] analysis until a later … [second-stage EIS and permitting] proceeding." 470 F.3d at 684. There is no such multistage process, by contrast, in the present case.

The District Court saw through the NEPA violation and called it out. That is not reversible error.

II. The Transmission Companies Will Not Suffer Immediate Irreparable Harm If the District Court's Judgment Remains in Effect During This Appeal.

A. The Balance of Hardships Tips Decisively Against Granting the Transmission Companies' Motion for a Stay Pending Appeal.

The Transmission Companies are continuing to build the CHC transmission line on their preferred route up to the borders of the Refuge. They have publicly announced that they have or will imminently start laying structural foundations for the very high towers they plan to erect this summer. App'x 167.

At the same time, they have also publicly stated that they do not intend to begin construction in the Refuge until October 2022, six months from now. Dkt. 9

at 19. The District Court orders pose no serious threat now of actual or imminent injury to the Transmission Companies.

The Companies also have not demonstrated any imminent economic loss. Federal Energy Regulatory Commission ("FERC") Order 679 insulates regulated transmission companies from "the risk of non-recovery of costs traditionally associated with project development" (FERC Stats. & Regs. ¶ 31,222 at 163) if those costs are reasonable and prudent. All three companies have applied for, and received, incentive-based rates that entitle them to recover (a) 100% of their "construction work in progress "and precertification and regulatory approval costs for the CHC Project; *and* (b) 100% of prudently incurred costs associated with the potential delay or abandonment of the project.[3]

B. Utility Ratepayers and Consumers Will Likely Benefit If the CHC Project's In-Service Date Is Deferred. A Delay Would Not Negatively Impact Renewable Energy Proliferation.

Ratepayers will likely *benefit* economically if the District Court decision postpones the Project's completion date. The Public Service Commission of Wisconsin's ("PSCW") staff modeling expert testified in the state proceedings that a two-year delay of the in-service date would benefit ratepayers in most of the future scenarios modeled. App'x 4–25. Expert ratemaking accountant Aaron

[3] Continued reimbursement for construction costs may be denied as "imprudent" in light of the District Court's decision, but, as of today, the Companies are getting full reimbursement.

Rothschild likewise concluded that "the financing cost savings to consumers from a delay in the project may actually save them as much or more than the increased construction cost." App'x 27. Rothschild further concluded that a "potential increase in construction costs is highly speculative, while the financing cost savings from a delay is assured." App'x 28.

The Citizens Utility Board of Wisconsin ("CUB"), which, unlike the Transmission Companies, actually *does* represent utility ratepayers, concluded that ratepayers would benefit most if the CHC Project was cancelled altogether, because "the Project's economic benefits are speculative, and the record shows there is significant risk that the line, if constructed, will result in net costs rather than net benefits for Wisconsin consumers." App'x 150-52. Likewise, Wisconsin's Dane County and Iowa County, and the Attorneys General of Illinois and Michigan, all of whom represent constituent utility ratepayers, concluded that the CHC transmission line's costs to their residents will substantially exceed its benefits. App'x 153–64.

The Transmission Companies claim that a delay in the CHC transmission line's in-service date will somehow compromise the reliability of the regional electrical system and lead to a disaster like the 2021 outages in Texas. That rhetoric is baseless. There is no data or evidence to suggest that the CHC transmission line is necessary to "keep the lights on." App'x 33. Nor will a CHC

delay stall renewable energy development in Wisconsin or the region. In the last two years, more than 2,000 megawatts of solar energy have been developed in Wisconsin, alone, without the CHC transmission line. Likewise, the Companies' assertion that an in-service delay would negatively impact wind energy interconnections is speculative. App'x 31–34. Interconnection applicants have to identify what transmission will be available to them, and, no doubt, several listed the CHC Project. That does *not* mean or even justify an inference that, in the absence of the CHC Project, these wind energy sources will be unable to operate.

Keeping the District Court's Opinion and Final Judgments in place during appeal is appropriate in this case. The Transmission Companies cannot prove irreparable harm, which, by itself, is enough to justify denying their stay motion.

C. The Continuing Construction of the CHC Transmission Line, On the Other Hand, Creates Irreparable Damage to the Environment, Conservation Groups, Their Members, and the Public Interest.

At the same time, the Transmission Companies' ongoing construction of the CHC transmission line is currently causing property damage, unnecessary environmental harms, and wasteful costs. As the U.S. Supreme Court has long recognized, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable." *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 545 (1987). USFWS and the Upper Mississippi Refuge managers themselves have explained

that "right-of-way projects" like large transmission lines result in irreparable environmental harms. App'x 97–99. The Conservation Groups and their members are suffering those injuries right now. *See* App'x 103-49. If any party is entitled to injunctive relief while this appeal is pending, it is the Conservation Groups, not the Transmission Companies.

III. REQUEST FOR AFFIRMATIVE RELIEF PURSUANT TO F.R.A.P. 27(a)(3)(B): IF THE STAY IS GRANTED, THE COURT SHOULD CONDITION IT ON STOPPING CONSTRUCTION TO AVOID THE "ORCHSTRATED TRAINWRECK."

The Transmission Companies' stay motion should be denied. If this Court is nonetheless inclined to grant the stay, then it should impose specific conditions requiring the Transmission Companies to stop construction. That standstill would maintain the *status quo*, and would avoid further waste of ratepayers' money and unnecessary environmental harm and property damage, as the District Court explained, before a permanent injunction is granted. Appellants' App'x 13. It would prevent the "orchestrated trainwreck" that the Transmission Companies are causing. *Id*. at 16. Depending on how the Court acts on the stay motion and what actions the Transmission Companies subsequently take, the Conservation Groups may file a motion for an injunction.

CONCLUSION

For the reasons stated above, Plaintiff-Appellee Conservation Groups respectfully request that: (1) the Intervenors-Defendants-Appellants' motion for a

stay pending appeal be denied; and (2) the motion for affirmative relief under Fed. R. App. P. 27(a)(3)(B) to pause construction be considered.

Respectfully submitted this 30th day of March 2022.

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Fed. R. App. P. 27(d)(a)(A) because this brief contains 5,195 words.

This document complies with the requirements of Fed. R. App. P. 27(d)(1)(D) & (E) and typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type-style requirements of Fed. R. App. P. Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 13-point Book Antiqua font, with 11-point footnotes.

Dated this 30th day of March 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 30th day of March 2022.

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