Nos. 22-1347, 22-1709, 22-1737

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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Driftless Area Land Conservancy, et al.,
*Plaintiffs-Appellees*, *Cross Appellants*,

v.

Rural Utilities Service, et al.,
*Defendants-Appellants, Cross-Appellees*

and

American Transmission Company, et al.,
*Intervener Defendants-Appellants-Cross Appellees*

---

**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 and 21-cv-00306, consolidated**

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# BRIEF OF IOWA AND DANE COUNTY, WISCONSIN AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES, CROSS APPELLANTS DRIFTLESS AREA LAND CONSERVANCY, ET AL.

---

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**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 22-1347,22-1709, 22-1737

Short Caption: Drifless Area Land Conservancy, et al. v. Rural Utilities Service, et al. and ATC, LLC et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

County of Dane, Wisconsin

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Office of the Dane County Corporation Counsel

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

---

Attorney's Signature: Carlos A. Pabellon Date: May 24, 2022

Attorney's Printed Name: Carlos Pabellon

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 22-1347,22-1709, 22-1737

Short Caption: Drifless Area Land Conservancy, et al. v. Rural Utilities Service, et al. and ATC, LLC et al.

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☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Iowa County

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Progressive Law Group, LLC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

---

Attorney's Signature: Frank Jablonski Date:

Attorney's Printed Name: Frank Jablonski

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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## STATEMENT OF AMICI CURIAE

Proposed Amici Iowa County and Dane County are bodies corporate under Wis. Stat. § 59.01 and parties to Dane County, Wisconsin, Case No. 19-CV-3418, *County of Dane, et al. v. Public Service Commission of Wisconsin, et al.* ("State Case") in which the Counties and other Parties, including the Plaintiffs-Appellees, Cross Appellants in this matter (the "Conservation Groups") are seeking an injunction. The State Case involves an appeal of an administrative decision of the Public Service Commission of Wisconsin ("PSC") granting a Wis. Stat. § 196.491(3)(d)3 Certificate under which the Intervener Defendants-Appellants-Cross Appellees in this case ("Utilities") are constructing the transmission line in Wisconsin up to the boundary of the Upper Mississippi River National Wildlife and Fish Refuge.

## STATEMENT ON AUTHORSHIP AND SUPPORT

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief or any part of the associated filing. The proposed amici do not have members. No person other than the amici curiae, or their counsel, contributed money or anything of value that was intended to fund or support preparing or submitting this brief or any part of the associated filing.

## ARGUMENT

### I. THE DISTRICT COURT SHOULD HAVE ISSUED A PERMANENT INJUNCTION AGAINST FURTHER TRANSMISSION LINE CONSTRUCTION.

One of the central issues before this Court is the scope of the permanent injunction that will be necessary if the Intervener Defendants-Appellants-Cross Appellees (the "Utilities") appeal is denied, and this Court determines that the district court should have issued a permanent injunction against construction. To date, the Utilities have acted with deliberate indifference to the fact that the Cardinal Hickory Transmission Line ("Transmission Line"), as currently designed, has no way of reaching completion. Rather than pausing construction until a viable alternative can be vetted by the courts, the Utilities have recklessly proceeded with construction and forced many private landowners in Iowa and Dane Counties to endure difficult eminent domain proceedings. They continue to do so even now. Any permanent injunction should enjoin construction until a new National Environmental Policy Act ("NEPA") review is completed.

When a party seeks a permanent injunction, it must satisfy a four factor test. It includes: (1) that the party has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate; (3) that considering the balance of hardships between the plaintiff and defendant, remedy in equity is warranted; and that the public interest will not be harmed in granting such an injunction. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-157 (2010). The Conservation Groups have sought an injunction stopping construction pending

appeal in the district court, and is appealing the district court's decision not to issue a permanent injunction.

In addition to the question of whether a court should grant a permanent injunction, a court must determine the appropriate scope. It is axiomatic that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Thus, a court must weigh two competing interests: the burden of the party being enjoined versus the need to provide "complete" relief to the party seeking an injunction.

Here, the district court failed to provide such relief to the Conservation Groups and by extension to those landowners who have lost the right to their real property. As of January 28, 2022, the Utilities have secured as much as 100 percent of the easements necessary for the transmission line in certain segments, and nearly 94 percent in other segments. See Public Service Commission of Wisconsin website, https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=430064/ (last visited June 29, 2022). For these individual landowners, no remedy is possible. In contrast, those landowners who have successfully avoided the Utilities' push to take their property so far would only be protected if this Court finds that a permanent injunction against construction should be granted. Any other relief would be far from complete.

## II. ENJOINING CONSTRUCTION WOULD SERVE THE PUBLIC INTEREST.

Of the factors that must be present in order to demonstrate the need for a permanent injunction, the strongest is that the public interest would be served by stopping the Utilities from continuing to recklessly construct the transmission line. The Utilities lost the key issues before the District Court. Further, this Court has not deemed them likely to succeed on appeal. Nonetheless, the Utilities continue to build the project and spend money that others – utility ratepayers – will have to reimburse. And they continue to take and destroy private property using the extraordinary power of eminent domain. Thus, a permanent injunction against construction would benefit the public interest.

The Utilities' aim appears to be to overrun orderly legal processes and vaporize other parties' rights by creating "facts on the ground" that will make it hard to deny them what they want. Discussing the Utilities strategy, the District Court noted the Utilities to be "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' Appendix ("App'x" filed on April 13, 2022, Dkt. 10, p. 13 [PDF:18])

After imposing harm that no court decision has deemed legally warranted, Utilities will have arranged "facts on the ground" to their preference. They will then argue that any alternative other than giving them the rest of what they want will cause more harm than just giving in to them. Their strategy thus seems to make a mockery of court decisions, of other parties' due process rights, and of the

constitutionally protected rights of landowners. It is on this last element – the constitutionally protected rights of affected landowners – that this brief asks the Court to carefully consider. The Utilities are arranging the "facts on the ground" by exercising the extraordinary power of eminent domain. No court has deemed the associated "takings" warranted, and two have deemed them unwarranted.

The District Court accurately characterized the Utilities' strategy:

> "… the Utilities 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.

(App'x at 13 [PDF:18].)

The Citizens Utility Board of Wisconsin also understands the Utilities' strategy:

> Each day that the Utilities continue with construction is a day they are knowingly and intentionally spending Wisconsin customer dollars not just imprudently, but recklessly.

(App'x at 152 [PDF:53], Dkt. 13-3).)

Two courts have issued separate injunctions – the District Court, in this case, on substantive issues, including, e.g., the sufficiency of the Environmental Impact Statement – and the state circuit court in the State Case[1] on procedural irregularities in the administrative proceeding. Amici Appendix ("Amici App'x")

[1]Dane County, Wisconsin, Case No. 19-CV-3418, *County of Dane, et al. v. Public Service Commission of Wisconsin, et al.* (State Case). Recently, the Wisconsin Supreme Court held that the allegations of bias that constituted the procedural irregularities did not present a cognizable due process claim. *See County of Dane, et al., v. Public Service Commission of Wisconsin, et al*, 2022 WI 61 ¶ 4, ____ Wis. 2d ____, ____ N.W.2d ____. Remittitur is pending.

at 3, [PDF:5]. In addition, this Court, in denying the Utilities' motion for a stay, reveals that the Utilities have not convinced this Court that they are likely to succeed on appeal. But the Utilities continue construction anyway.

The Counties, in the public interest, ask this Court, as it considers the Conservation Groups' request, to exercise due regard for landowners whose properties are being taken and damaged. Photos in the Court's records show some of the kinds of damage construction requires. If the court gives due regard to the landowners' rights, it will also be addressing both the Counties' interests in the visual amenities and environmental quality that add so much to Southwest Wisconsin and ratepayers' interests in not having to cover the Utilities' misspent funds.

Private landowners are the only ones affected by this Project who have rights of constitutional dimension[2] at issue. Given the substantive and procedural decisions issued by reviewing courts, burdening those rights is not justified. The essence of property rights is the exclusive power to use, enjoy and control – to exercise *dominion* over – property. Property owners' land rights are part of our nation's framework of "ordered liberty" *Griswold v. Connecticut,* 381 U.S. 479, 481 (1965) (Harlan, J., concurring) *(quoting Palko v. Connecticut,* 302 U.S. 319, 325 (1937) (Cardozo, J.)) and are "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The importance of control over home property, for example, prompted the founders to include the Third Amendment in the U.S. Constitution, which basically said "leave us alone at home."

[2] Wisconsin Const., Art. I, Sec, 13; US Const. Amend V.

Fundamental notions of personal liberty require that intrusions be avoided or minimized. *Griswold* at 484 (1965).

Landowners' "property rights" are not mere abstractions. Property does not have rights. People have rights in property. Eminent domain involves raw exercise of power to take those rights away from people against their will. It is a "harsh" power. The compensation that is constitutionally required does not address the array of impacts experienced by landowners. Accordingly, use of eminent domain power should be limited:

> "The right to condemn is an attribute of sovereignty and is often indispensable for the common good but it is, nevertheless, so harsh a right that even the sovereign may not exercise it unless the public purpose is clear and the public use, for which the private owner is to be compelled to surrender his property, is assured." *Schumm v. Milwaukee Cty.*, 258 Wis. 256, 261, 45 N.W.2d 673, 676 (1951).

The injunction issued in state court and the Final Decision and injunction issued by the District Court make clear that neither the "public purpose" nor the "public use" here is "assured." Three decisions have either deemed injunctions warranted or deemed the Utilities unlikely to succeed on appeal.

The landowners, under the extraordinary power of eminent domain, are consequently being forced to bear a burden that the District Court has deemed unwarranted and that no court has deemed warranted.

Yet the Utilities plow ahead. This Court should stop them. In doing so, the public interest would be served.

Respectfully submitted this 12th day of July, 2022.

ELECTRONICALLY SIGNED BY:

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## CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Circuit Rule 29 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 1,753 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as modified by Circuit Rule 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in Century Schoolbook 12-point font using Microsoft Word.

Dated this 12th day of July, 2022.

ELECTRONICALLY SIGNED BY:

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**CERTIFICATE OF SERVICE**

I certify that on July 12, 2022, I electronically filed this document, AMICUS BRIEF OF IOWA AND DANE COUNTY, WISCONSIN IN SUPPORT OF PLAINTIFFS-APPELLEES, CROSS APPELLANTS- DRIFTLESS AREA LAND CONSERVANCY, ET AL., with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. The brief's associated Appendix was filed and served with this brief. I further certify that I provided counsel of record for the parties to this appeal a copy of the electronic filing by sending it electronically to their email addresses.

Dated this 12th day of July, 2022.

ELECTRONICALLY SIGNED BY:

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Madison, WI 53703

Court of Appeals Docket Nos. 22-1347, 22-1709, 22-1737

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

Driftless Area Land Conservancy, et al.,
*Plaintiffs-Appellees*, Cross Appellants,

v.

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*Defendants-Appellants, Cross-Appellees*

and

American Transmission Company, et al.,
*Intervener Defendants-Appellants-Cross Appellees*

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 and 21-cv-00306, consolidated

# APPENDIX OF AMICI CURIAE IOWA COUNTY AND DANE COUNTY

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STATE OF WISCONSIN
DANE COUNTY BRANCH 9
CIRCUIT COURT



*For official use*

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

Petitioners,

Chris Klopp,
Gloria and LeRoy Belkin,
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.

Case No. 19-CV-3418

**ORDER GRANTING EMERGENCY MOTION FOR TEMPORARY INJUNCTION**

For the reasons stated at the October 18, 2021 motion hearing, IT IS HEREBY ORDERED that Petitioners Driftless Area Land Conservancy and Wisconsin Wildlife Federation's October 8, 2021 Emergency Motion for Temporary Injunction, which was supported by Petitioners Dane

County, Iowa County, Village of Montfort, Town of Wyoming, and Intervenor-Petitioners Chris Klopp and S.O.U.L. of Wisconsin, is GRANTED. Petitioners have met the standards for a temporary injunction by demonstrating a reasonable likelihood of success on the merits of their bias claims, showing irreparable injury, that there is no adequate remedy at law, and that the public interest weighs in Petitioners' favor. The bond amount required by Wis. Stat. § 196.43 is set at $32,000,000 and requires two sureties. Intervenor-Respondents American Transmission Company, LLC, ITC Midwest, LLC, and Dairyland Power Cooperative shall be enjoined from commencing construction of the Cardinal-Hickory Creek Transmission Line upon Petitioners providing the required undertakings in the amount above.

**IT IS SO ORDERED**

**BY THE COURT:**

**DATE SIGNED: November 8, 2021**

Electronically signed by Jacob B. Frost
Circuit Court Judge

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

County of Dane et al,

Plaintiff,

v. 19CV3418

Public Service Commission of WI et al,

Defendant.

## DECISION AND ORDER

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

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

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

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

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

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

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

*Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶18, 351 Wis. 2d 237, 839 N.W.2d 388. Nobody asserts that Wis. Stat. §808.075 specifically authorizes me to continue review of the merits of the PSC decision. It does not. The statute and the Supreme Court's instructions are clear. Once the record left the Dane County Circuit Court and arrived in the Supreme Court's capable hands, Branch 9 lost competency to act "except in certain unsubstantial and trivial matters." *Id.* The merits review of the PSC decision is not unsubstantial or trivial. Thus, I cannot act further on it.

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

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

Even if I agreed with Petitioners, though, their argument still fails because Petitioners made clear they believe and intend to argue that the mere allegation of procedural defects affects the standard of review I apply on my review of the merits of the PSC decision. Thus, the merits review is connected to the bias issue before the Supreme Court and, thus, I am directly stripped of authority to act on the merits review.

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

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

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

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

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

> (1) makes a strong showing that it is likely to succeed on the merits of the appeal;
> (2) shows that, unless a stay is granted, it will suffer irreparable injury;
> (3) shows that no substantial harm will come to other interested parties; and
> (4) shows that a stay will do no harm to the public interest.

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

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

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

Dkt. 1137 at 4.

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

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

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

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

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

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

cc: Parties

CERTIFICATION OF APPENDIX

I certify that this APPENDIX includes all materials pertinent to the brief proposed for filing by Amici Curiae Iowa County and Dane County, Wisconsin.

Dated: July 13, 2022

s/ Carlos Pabellon

Carlos Pabellon