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SUPREME COURT OF WISCONSIN
Appeal No. 2021 AP 1321-LV
Appeal No. 2021 AP 1325
Circuit Court Case No. 2019 CV 3418

COUNTY OF DANE, COUNTY OF IOWA, TOWN OF WYOMING, AND CITY OF MONTFORT,

Petitioners-Respondents,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent-Respondent,

DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION, CHRIS KLOPP, LEROY BELKEN, GLORIA BELKEN, S.O.U.L. OF WISCONSIN, CLEAN ENERGY ORGANIZATIONS, DAIRYLAND POWER COOPERATION, I.T.C. MIDWEST, LLC, AMERICAN TRANSMISSION COMPANY, MIDCONTINENT INDEPENDENT SYSTEM OPERATIONS, INC. AND WEC ENERGY GROUP WISCONSIN,

Intervenors-Respondents,

MICHAEL HUEBSCH,

Other Party-Petitioner-Petitioner.

BRIEF OF NON-PARTY ORGANIZATION OF MISO STATES, INC. AS *AMICUS CURIAE*

COUNTY OF DANE, IOWA COUNTY, TOWN OF WYOMING, AND VILLAGE OF MONTFORT,

Petitioners-Respondents,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent-Respondent-Respondent,

DRIFTLESS AREA LAND CONSERVANCY,

Intervenor-Petitioner-Respondent,

WISCONSIN WILDLIFE FEDERATION, CHRIS KLOPP, LEROY BELKEN, GLORIA BELKEN, S.O.U.L. WISCONSIN, CLEAN ENERGY ORGANIZATIONS, DAIRYLAND POWER COOPERATIVE, ITC MIDWEST LLC, AMERICAN TRANSMISSION COMPANY, LLC, MIDCONTINENT INDEPENDENT SYSTEM OPERATOR INC., ATC, LLC AND WEC ENERGY GROUP, INC.,

Intervenors-Respondents,

MICHAEL HUEBSCH,

Other Party-Appellant-Petitioner,

ROBERT M. GARVIN,

Other Party.

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INTRODUCTION

The Organization of MISO States, Inc. ("OMS") files this brief to clarify the role of state and local electric regulators ("retail regulators") in the transmission planning processes of the Midcontinent Independent System Operator ("MISO").[1]

The discovery process at issue in this appeal stems from, in part, allegations that retail regulators' participation on the board of directors of OMS and their associated interactions with MISO create an appearance of impropriety which jeopardizes their ability to both engage in policy discussions on MISO committees and also consider individual electric transmission projects in subsequent state and local approval processes. Communications between retail regulators and MISO representatives are routine and desirable, and federal regulators encourage discussions between retail regulators and grid planners as

[1] OMS submits this brief because a majority of its members support it being filed. The following members generally support the filing of this brief: The Arkansas Public Service Commission, the Illinois Commerce Commission, the Indiana Utility Regulatory Commission, the Iowa Utilities Board, the Kentucky Public Service Commission, the Louisiana Public Service Commission, the Michigan Public Service Commission, the Minnesota Public Utilities Commission, the Mississippi Public Service Commission, the Missouri Public Service Commission, the Council of the City of New Orleans, the North Dakota Public Service Commission, the South Dakota Public Utilities Commission, the Public Utility Commission of Texas, and the Public Service Commission of Wisconsin. The Manitoba Public Utilities Board and the Montana Public Service Commission did not participate in the vote on the filing of this brief.

these discussions concern transmission planning policy and not the merits of individual transmission projects.

At the heart of this controversy, the Driftless Area Land Conservancy and the Wisconsin Wildlife Federation (collectively, "DALC") have challenged the Public Service Commission of Wisconsin's ("PSCW") approval of the Cardinal-Hickory Creek transmission project which will run from Dubuque, Iowa to Middleton, Wisconsin. Michael Huebsch, a former PSCW commissioner and OMS board member, has sought to quash the most recent, and now-withdrawn, subpoena compelling the release of information that could shed light on his decision-making process. (Huebsch Br. at p. 25-30.) He argues that the circuit court failed "to apply the well-established presumptions of impartiality and honesty that attach to adjudicators' decisions and which protect adjudicators from baseless discovery and factfinding" which if applied differently may have forestalled some of the discovery requests and could still obviate the need for a trial in this matter. (Huebsch's Pet. for Exp. Rev. at p. 5.)

OMS has an interest in this appeal because it too has been the subject of two subpoenas for information from DALC, one in the Circuit Court of Dane County and one in the United States District Court for the Western District of Wisconsin. Should this court permit DALC's discovery requests and any future trial simply based on routine, federally approved interactions between retail regulators and regional grid planners, it could have profound implications for retail regulators' ability to effectively regulate the planning and expansion of the electric transmission system.

OMS provides this brief for informational purposes only and does not advocate for the resolution of this appeal in any party's favor. Most important to OMS is that this court understand that MISO and OMS are separate organizations, and that retail regulator participation on OMS board in no way constitutes prejudgment of any specific transmission project that may come before them in state or local proceedings.

ARGUMENT

I. IN CARRYING OUT THEIR DUTIES TO ENSURE THE RELIABILITY AND AFFORDABILITY OF THE ELECTRIC SYSTEM, RETAIL REGULATORS MUST COMMUNICATE WITH GRID PLANNERS AND STAKEHOLDERS IN THE REGION

Retail electric utility regulators have a duty to ensure the transmission system is reliable and that any transmission investment serves the public interest. To do this, retail regulators must participate in federally regulated transmission planning processes to ensure these processes are working for their citizens. Since Wisconsin's electric utilities are served by the transmission system that is operated and planned by MISO, Wisconsin regulators must follow and participate in MISO's transmission planning processes to ensure these processes benefit its citizens. Part of this oversight includes understanding and responding to the perspectives of other stakeholders in the region. Decisions made in MISO processes and at FERC impact the ultimate costs passed on to residential and industrial customers across the MISO region.

In recognition that retail regulators have jurisdiction over establishing retail electric rates and the future addition or retirement

of electric generating units, the FERC-approved MISO tariff encourages retail regulator participation in its policy discussions. It is important that the perspective of state and local regulators have a voice in these policy discussions.

Therefore, retail regulators in the MISO region came together to create OMS in 2003 to conserve and share resources, facilitate effective engagement at MISO and FERC, and to promote their common interests.

II. OMS IS INDEPENDENT, AND SEPARATE FROM MISO. RETAIL REGULATOR PARTICIPATION ON OMS BOARD OF DIRECTORS DOES NOT INDICATE ANY DEFERENCE TO OR IMPROPER COORDINATION BETWEEN RETAIL REGULATORS AND MISO

It is important to describe what OMS is and how it is separate from MISO as it appears that the distinction may have been unclear at the circuit court.

OMS is a non-profit corporation that provides a forum for retail regulators to represent their collective interests before FERC and MISO.[2] OMS is led by a board of directors made up of one regulator

[2] OMS, Articles of Incorporation of the Organization of MISO States, Inc. at Section 2.2 (May 28, 2003) ("OMS Articles of Incorporation") available at: https://www.misostates.org/images/OrgDoc/Incorporation.pdf.

from each of the 17 state or local jurisdictions in the MISO footprint.[3] This region extends from Montana to Michigan in the north to Mississippi, Louisiana, and Texas in the south. OMS membership also includes representation from the Canadian province of Manitoba and the City Council of New Orleans. Groups of state and local electric regulators, like OMS, are known as regional state committees and exist in all regions of the country with multi-state organized electricity markets.[4]

OMS is "an autonomous self-governing body" as explained in MISO's FERC-approved tariff.[5] Retail regulators in the MISO region voluntarily formed OMS, and only those members can compel the dissolution of OMS. Its rights are detailed throughout MISO's legally-binding tariff and specifically in the MISO Transmission Owner Agreement, which details, among other things, the governance

[3] OMS, OMS History, available at https://www.misostates.org/index.php/about.

[4] To the west of MISO, the Southwest Power Pool's retail regulators coordinate through the SPP-Regional State Committee ("SPP-RSC"). To MISO's east, the Organization of PJM States ("OPSI"), allows for retail regulator coordination in the Mid-Atlantic region, and retail regulators in the Northeast have organized through the New England States Committee on Electricity ("NESCOE").

[5] MISO, FERC Electric Tariff, Schedule A, MISO Rate Schedule 01, Section VI.C (pg. 104), OMS Committee ("Transmission Owner Agreement") available at: https://docs.misoenergy.org/legalcontent/Rate_Schedule_01_-_Transmission_Owners_Agreement.pdf.

of MISO.[6] Some of these legal rights include the ability to request MISO file specific proposals with FERC regarding the allocation of the costs of transmission projects as well as well-defined rights in the transmission planning process itself.[7] Since MISO is an independent entity, all other input or recommendations MISO stakeholders develop, including those from retail regulators, are purely advisory in nature.

While MISO does provide a mechanism to collect the funding for OMS, OMS' independence is the foundational principle in the funding agreement it has executed with MISO.[8] In the funding agreement itself, OMS explicitly "retains exclusive control over its operations", and MISO has no say in OMS' internal decision-making process or leadership decisions.[9] Membership on OMS board in no way affects the decision-making process of retail regulators in any

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[6] *Id.*

[7] *See generally*, MISO, FERC Electric Tariff, Attachment FF, Section B available at: https://docs.misoenergy.org/legalcontent/Attachment_FF_-_Transmission_Expansion_Planning_Protocol.pdf.

[8] OMS and MISO, OMS Funding Agreement (June 11, 2003) ("OMS Funding Agreement") ("OMS independence is a fundamental principle of this Agreement. The OMS retains exclusive control over its operations.") available at: https://www.misostates.org/images/OrgDoc/OMS_Funding_Agreement_with_Amendment_Final.pdf.

[9] *Id.*

other forum.[10] OMS' budget is established every year by the OMS board and is incorporated without modification into the overall MISO budget before the independent MISO board of directors approves it. OMS and its members are in no way bound by any requirement or code of conduct to continue receiving funding.

MISO, on the other hand, is the organization that plans and operates the electric transmission system. MISO is entirely separate and distinct from OMS. MISO's membership is made up of companies that own and utilize the transmission system as part of their business model. MISO encourages the participation of other groups like retail regulators and environmental groups in its policy discussions as well.[11]

Retail regulators must be able to remain apprised of the evolution of electric transmission planning processes in order to regulate in the best interests of their constituents. Part of this

[10] OMS, Organization of MISO States Bylaws at Article X (revised September 13, 2002). ("States Not Bound – No vote of, or resolution passed by, the Board of Directors has any binding effect upon any state, local, or provincial regulatory authority, or any individual Member thereof.") available at: https://www.misostates.org/images/OrgDoc/BYLAWS_OMSasAmended13September2012.pdf.

[11] MISO, MISO Region Engagement available at: https://www.misoenergy.org/stakeholder-engagement/miso-engagement/

responsibility requires retail regulators to discuss and understand the various stakeholder perspectives on transmission planning policy in the region. There are adequate safeguards to ensure that retail regulators can participate in MISO processes and maintain their ability to independently consider individual projects this process produces in subsequent state and local proceedings.

III. RETAIL REGULATOR INTERACTION WITH MISO REPRESENTATIVES IS ROUTINE AND DESIREABLE. RETAIL REGULATORS DISCUSS IMPROVEMENTS TO ELECTRIC TRANSMISSION PLANNING PROCESSES AND ABSTAIN WHEN ASKED TO WEIGH IN ON SPECIFIC ELECTRIC TRANSMISSION PROJECTS

A. OMS members in leadership positions are expected to serve as representatives to the MISO Advisory Committee and discuss current topics in the electric industry and reforms to MISO processes with the MISO board of directors.

Retail regulators' primary opportunity to talk with the MISO board of directors comes at MISO's quarterly board of directors meetings. At these meetings, the MISO Advisory Committee discusses current issues with the MISO board and serves as a forum for stakeholders in the MISO region to discuss current issues and aggregate stakeholder positions for presentation to the MISO board of

directors. The MISO Advisory Committee is made up of stakeholder representatives from all of the sectors that participate in policy discussions with MISO ranging from transmission owners and industrial customers to public consumers and environmental groups, among others. The "State Regulatory Authorities" sector, which has the same membership as OMS, has the most seats on the Advisory Committee in recognition of the critical role retail regulators have in ensuring a reliable and economic transmission system that benefits the region's citizens.[12]

At these quarterly board meetings, the MISO board of directors and stakeholders only discuss process improvements and other policy matters and do not discuss individual electric transmission projects. Indeed, transmission planning is only one area of focus for the MISO Advisory Committee. Its members also discuss all other relevant policy matters including the efficient operation of the electric markets that MISO runs, the reliability of the system, and stakeholder governance concerns among others. The MISO Advisory Committee

[12] Transmission Owner Agreement at Section 6.1 (*supra*, footnote 5).

is, as its name implies, purely advisory, and the MISO board of directors is not required to act on any of its recommendations.

As OMS members move into leadership roles on OMS board such as vice-president, secretary, or at-large board member, OMS bylaws require these leaders to participate as representatives to the MISO Advisory Committee.[13] This requires increased communication with other MISO sector members at MISO Advisory Committee meetings and elsewhere to understand their policy positions. Huebsch served on the OMS board of directors as secretary, and as such was one of OMS' representatives to the MISO Advisory Committee in accordance with OMS Bylaws.

It appears that DALC, and the circuit court, were concerned with discussions that may have taken place between Huebsch as an OMS member and other stakeholder sectors during the course of regular MISO stakeholder meetings, including Advisory Committee meetings, and OMS board of director meetings. Further, in the subpoena OMS received from DALC in the federal district court, DALC asked for documents related to a breakfast meeting between

[13] OMS Bylaws at Article V.3 (b)-(d) (*supra*, footnote 10).

OMS Advisory Committee representatives and the leadership of the MISO Transmission Owner sector. DALC also asked for many publicly available materials from open OMS and MISO board of director meetings. OMS provided the requested documents to the extent they exist, and these documents showed, among other things, routine preparation for policy-level discussion on MISO processes both within OMS and with other stakeholder sectors.

These interactions between retail regulators, MISO, and MISO stakeholders are ongoing and desirable and in no way relieve retail regulators from applicable rules governing their impartiality. During these quarterly in-person board meetings, OMS meets with and has met with many different stakeholder groups including the public consumer sector, the transmission owners, and the environmental sector among any others that help retail regulators understand the issues and perspectives that could affect the citizens of their states.

It would be counterproductive to the mission of retail regulators both individually, and collectively through organizations like OMS, if regulators were subject to the threat of litigation simply due to their participation as representatives on MISO committees that

primarily discuss forward-looking policy levels and rarely discuss individual transmission projects.

B. Retail regulators provide input and voice concerns during the development of MISO's annual transmission plan but abstain in approving recommendation of this plan to the MISO board of directors.

Lastly, one of the primary responsibilities for the MISO board of directors is approving MISO's annual transmission expansion plan. Each year, MISO conducts analysis and solicits the input necessary to complete its transmission expansion plans. It is a previous version of this plan that the Cardinal-Hickory Creek transmission project, which is the subject of this controversy, was approved.

In MISO's legally binding and FERC-approved tariff, there are provisions that provide OMS with specific rights to guide the development of each year's transmission planning process.[14] The MISO tariff contemplates extensive involvement from retail

[14] Transmission Owner Agreement at Appendix F Section 6.3 ("OMS Committee:… "The OMS Committee has the opportunity to provide input into the transmission planning, resource adequacy, and transmission cost allocation approach and processes, and may report periodically to the Transmission Provider Board. To enable it to exercise the authority described herein, the OMS Committee will be adequately supported by the Transmission Provider through reasonable in-kind services and through the provision of reasonable funding, with the costs recovered from Transmission Customers under Schedule 10 of the Tariff.") (*supra*, footnote 5).

regulators in the development, progression, and evaluation of each year's plan. MISO's plan considers hundreds of projects and their possible alternatives, whereas state and local proceedings, such as the one before this court, often only consider a single project at a time and its localized impacts.

At the end of the stakeholder process that produces these plans, stakeholders vote on their recommendation regarding the plan for the MISO board of directors to consider. However, OMS members abstain from providing a recommendation on approval of the annual transmission plan in recognition of the fact that individual projects in these plans may come before them in state proceedings in the future. This is important because retail regulators specifically do not want to project prejudgment on any project that may come before them in a future state-proceeding.

It sometimes takes years from the time the MISO board of directors approve particular transmission lines before they appear in state-level processes for approval, and often the retail regulators that participated in the MISO stakeholder process are no longer regulators by the time this process plays out. State and local approval processes

for transmission projects often consider jurisdiction-specific considerations such as need, environmental impacts, and other local considerations that are not a part of the MISO process.

Retail regulators are aware of their responsibility to ensure that they can participate in MISO processes without jeopardizing their ability to neutrally consider electric transmission projects in subsequent state and local proceedings.

CONCLUSION

OMS respectfully submits this amicus brief to clarify the importance of interactions between retail regulators and MISO and to underscore how desirable and important they are. Should retail regulators be subject to constant litigation stemming from their proper participation in MISO processes, it could limit their understanding of issues and their ability to adequately protect the interests of the citizens in their states. It would also limit an important source of information and oversight role that is critical in planning the electric transmission system. This undesirable outcome would leave transmission planning to those with a financial incentive to build

transmission and remove the voice of the regulator who is charged with ensuring reliable electric service at reasonable cost.

Retail regulators understand applicable rules that ensure they can adjudicate disputes and consider infrastructure development impartially. They should be afforded this presumption. The processes described above are not only routine, they are beneficial and indeed critical to the cost-effective and efficient development of infrastructure across our country. These processes exist to foster communication, and communication between retail regulators, MISO, and other stakeholders in the region benefits consumers. Ensuring that retail regulators are aware of the constantly evolving nature of the debates ongoing in the region is crucial for them to effectively carry out their roles and protect the public interest.

Dated this 1st day of December, 2021.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 16 pages and 2,882 words.

Dated this 1st day of December, 2021.

Electronically signed by Matthew M. Fernholz
MATTHEW M. FERNHOLZ
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of December, 2021.

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