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SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

TOWN OF CHRISTIANA,
Petitioner-Appellant,

ROXANN ENGELSTAD AND CHRIS KLOPP,
Intervenors-Co-Appellants,

EDWARD LOVELL AND TARA VASBY,
Intervenors,

v.

Case No. 23AP2230

PUBLIC SERVICE COMMISSION
OF WISCONSIN,
Respondent-Respondent

KOSHKONONG SOLAR ENERGY CENTER,
LLC,
Intervenor-Respondent.

**PUBLIC SERVICE COMMISSION OF WISCONSIN'S
RESPONSE TO PETITION FOR REVIEW**

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INTRODUCTION

This Court should deny the Petition for Review. Wisconsin Stat. § 809.62(1r) clarifies that “Supreme [C]ourt review is a matter of judicial discretion, not of right” and sets forth limited criteria that will be considered by the Court in determining whether or not to grant review. This case meets none of the enumerated criteria.

The Town of Christiana (the Town) in conclusory fashion argues that the Court should grant review in order to “develop, clarify and harmonize the law, and resolve a question of law likely to reoccur unless resolved by the Court.” (Pet¹. 5) Unfortunately for the Town, this case presents no such opportunity. Contrary to the Town’s creative assertions, this case is a rather run of the mill approval by the Public Service Commission of Wisconsin (the Commission) of a solar photovoltaic (PV) electric generation facility and a battery energy storage system (BESS) (collectively, the Project).

In the underlying Commission Docket No. 9811-CE-100, Koshkonong Solar Energy Center LLC (the Applicant, or Koshkonong) filed an application for a Certificate of Public Convenience and Necessity (CPCN) seeking approval to construct the Project. The Project is a key component of Wisconsin’s transition to more renewable energy generation. The Commission appropriately utilized its decades of specialized knowledge and accumulated experience in

¹ “Pet.” denotes citation to the Town’s Petition for Review.

reviewing electrical generation projects to carefully consider the record before it and find that the statutory criteria of Wis. Stat. § 196.491(3)(d) were met. Approval of the Project is in the public interest and serves the public policy of increasing renewable-based electric generation. Wis. Stat. § 1.12. The Commission memorialized its approval in a written Final Decision. (Appx². 00056-00121).

In an effort to pique this Court's interest, the Town transposes its arguments against a different Commission decision into this docket, impermissibly expanding the scope of the record before this Court and creating a controversy where none exists. The Town's principal complaint is not with the Commission's granting of a CPCN to Koshkonong in this case, but rather the subsequent acquisition of the Project by a group of public utilities in a separate docket not under consideration here³. The court of appeals correctly rejected the Town's strategy, holding that "[i]t is the [Commission's] decision to issue a CPCN to Koshkonong that we are reviewing, and the appellants' arguments are thus beyond the scope of our review." (Appx. 00015). This Court should do the same and deny the Town's petition.

² "Appx." denotes citation to the Town's Appendix to Petition for Review.

³ The Commission approved the acquisition of the Project by the utilities in Docket No. 5-BS-258. As noted in the Town's Petition for Review, that decision is currently under review by the Dane County Circuit Court in Case No. 23 CV 1149.

ISSUE PRESENTED⁴

1. Is this Court's review of the court of appeals' decision necessary in order to develop, clarify or harmonize the law pursuant to Wis. Stat. § 809.62(1r)(c)?

This Court should answer no.

ARGUMENT

The Town's Petition for Review presents only a single issue, "may a public utility . . . build, own and operate a large-scale electric generation facility by purchasing a [CPCN] from a proxy posing as a merchant plant?" (Pet. 12). A party seeking review by this Court must present all of the issues it believes warrant the granting of review, because "[i]f an issue is not raised in the petition for review or in a cross petition, the issue is not before [the Court]." *Jankee v. Clark Cnty.*, 2000 WI 64, ¶ 7, 235 Wis.2d 700, 612 N.W.2d 297 (internal quotation omitted). As noted in the introduction, this case and the underlying Commission record deal solely with the Commission's granting of a CPCN to Koshkonong. The public utilities' acquisition of the rights to "build, own and operate" the facility is the subject of a completely separate proceeding still pending in the circuit court. Thus, this Court's decision is made easy. Because the singular issue for review presented by

⁴ The Commission only includes the criteria from Wis. Stat. § 809.62(1r) cited by the Town. For the reasons argued in its response, the Commission does not believe any of the criteria justify review by this Court.

the Town is outside of the record developed in this case, this Court should deny review.

I. The Commission correctly applied the “wholesale merchant plant” CPCN criteria to Koshkonong.

Wisconsin Stat. § 196.491(3)(a)(1) imposes the requirement that “no person may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity.” Within the statute, “facility” is further defined as either “a large electric generating facility,” generating 100 megawatts (MW) or more of capacity, or a “high-voltage transmission line.” Wis. Stat. § 196.491(1)(e) through (g). The CPCN statute provides certain criteria for Commission review and requires that an application be approved only if they are met. Wis. Stat. § 196.491(3)(d). Some of those criteria expressly do not apply to a “wholesale merchant plant,” which is defined by statute:

1. “Wholesale merchant plant” means . . . electric generating equipment and associated facilities located in this state that do not provide service to any retail customer and that are owned and operated by any of the following:

a. Subject to the approval of the commission under sub. (3m) (a), an affiliated interest of a public utility.

b. A person that is not a public utility.

Wis. Stat. § 196.491(1)(w).

The Town does not dispute that Koshkonong as an entity is not a public utility, nor that the Project would be a wholesale merchant plant if owned and operated by Koshkonong. *See* (Pet. 11) (The Town concedes that the

CPCN issued in this case is valid so long as “restricted to Koshkonong or a successor merchant plant.”) Instead, the Town, with the benefit of hindsight, attempts to argue that the Project is not truly a wholesale merchant plant because the Commission later approved the acquisition of the Project by a group of utilities in a separate docket. (Pet. 12).

The Commission directly addressed the Town’s argument in its Final Decision:

Certain intervenors argued that this project is not or should not be treated as a wholesale merchant facility because, at some point in the future the applicant may sell some or all of the project to a public utility. The Commission disagrees and finds that the applicant’s project has been appropriately reviewed and considered by this Commission as a wholesale merchant plant. While there may be an acquisition of the solar facility in the future, as of the date of this Final Decision, there has been no sale. Therefore, it remains appropriate to evaluate the proposed project as a merchant plant.

(Appx. 00064). The circuit court agreed with the Commission and upheld the Final Decision finding that “[the Commission] did not erroneously define [the Project] as a wholesale merchant plant when it relied upon the plain statutory text of § 196.491(1)(w)1.” (Appx. 00044). The court of appeals similarly rejected the Town’s argument, holding that:

[the Commission’s] subsequent final decision authorizing the Utilities to acquire Koshkonong’s CPCN and construct the proposed facility is not at issue here, and does not negate that, within the scope of the proceedings that are under review in this case, the proposed facility is a wholesale merchant plant as defined in § 196.491(1)(w).

(Appx. 00016). The Town’s dissatisfaction with the underlying courts’ decisions does not change the record. The

argument the Town seeks to make simply is not possible based on the record of this case. The Commission correctly considered Koshkonong's application based solely upon the facts before it. Therefore, this Court should deny review.

II. The Town has not made a satisfactory showing that any of the Wis. Stat. § 809.62(1r) criteria are present.

Supreme Court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. *See* Wis. Stat. § 809.62(1r). The Town has provided no such reasons to review the court of appeals' decision, and its petition makes no colorable argument that any of the statutory criteria this Court considers in its determination whether to take up a matter are present. Those statutory criteria are found in Wis. Stat. § 809.62(1r):

(1r) CRITERIA FOR GRANTING REVIEW. Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

(a) A real and significant question of federal or state constitutional law is presented.

(b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

2. The question presented is a novel one, the resolution of which will have statewide impact; or

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

(d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

(e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

In its Petition for Review, the Town cites no case law. Thus, this Court can quickly conclude that Wis. Stat. § 809.62(1r)(d) and (e) are inapplicable as there cannot be either a conflict with controlling opinions nor a need to reexamine controlling opinions where none are cited. Similarly, the Town's petition does not invoke any provisions of constitutional law and therefore Wis. Stat. § 809.62(1r)(a) does not support review. The Town also does not make an argument that Wis. Stat. § 809.62(1r)(b) is applicable. This leaves only Wis. Stat. § 809.62(1r)(c) of possible application.

The Town alleges, without elaboration, that this Court should grant review to help “develop, clarify and harmonize the law” and that doing so will “resolve a question of law likely to recur unless resolved by the Court.” (Pet. 5). Considering the factors of Wis. Stat. § 809.62(1r)(c) and its subparts, it appears that the Town is only arguing that sec. (1r)(c)3. justifies review. The Town, however, cannot credibly argue that the ability of utilities to acquire CPCN rights from a merchant developer is a “question of law of the type that is likely to recur unless resolved by [this Court]” because the Commission's approval of the utilities' acquisition of the Project is currently under review by the circuit court in another proceeding. If this Court were to accept the Town's invitation, it would require this Court not only to exceed the scope of the

record in this case but also to reach into a separate controversy and resolve the matter before the lower courts have had an opportunity to decide the case. That is not what is contemplated by Wis. Stat. § 809.62(1r)(c)3., nor is it the function of this Court. Therefore, without a satisfactory showing that any of the criteria justifying review are present, this Court should deny review.

The Town has not demonstrated that there are special or important reasons for this Court to grant review. The Commission's decision to grant a CPCN to Koshkonong for the Project was reasonable, consistent with its statutory authority under Wis. Stat. § 196.491, based on substantial evidence, and was made after a careful and deliberate consideration of the extensive record developed in this proceeding. The Commission has decades of technical experience and expertise in making precisely such decisions. This case presents no novel or unique circumstances. This Court should deny review and allow the Commission's Final Decision to stand.

CONCLUSION

For the aforementioned reasons, review and a decision by this Court is not necessary, nor are the issues the Town seeks to argue properly before the Court in this case. This case deals exclusively with the Commission's decision to grant a CPCN to Koshkonong to construct the Project. Any subsequent approvals or acquisitions of the Project, or rights associated with it, are not part of this record and cannot be used

to justify this Court's granting of review. The Town's arguments against acquisition are currently being considered by the circuit court and this Court should respect that court's ability to resolve the controversy. Therefore, this Court should deny review.

Respectfully submitted this 10th day of July, 2025.

By: Electronically signed by Evan B. Weitz

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,091 words.

Dated this 10th day of July, 2025.

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