STATE OF WISCONSIN
SUPREME COURT

Appeal Nos. 2021AP1321, 2021AP1325

COUNTY OF DANE, ET AL.,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.,

Respondents.

Appeal from the Dane County Circuit Court
The Honorable Jacob Frost, Presiding
Case No. 19CV3418

PUBLIC SERVICE COMMISSION OF WISCONSIN'S RESPONSE TO MICHAEL HUEBSCH'S PETITION FOR EXPEDITED REVIEW AND EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL

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INTRODUCTION

This Court's August 31, 2021 Corrected Order invited all parties to the Dane County Circuit Court action *County of Dane, et al. v. Public Service Commission of Wisconsin, et al.*,[1] to file responses to Petitioner Michael Huebsch's Emergency Petition for Expedited Review, Emergency Petition for Supervisory Writ, Emergency Motion for Administrative Stay, and Memorandum in Support of Emergency Motion for Stay Pending Appeal and Emergency Petition for Supervisory Writ or Exercise of Superintending Authority, and his five-volume appendix. Through the various filings, Huebsch seeks appellate review of a decision of the circuit court, which denied his motion to quash a subpoena that had been served upon him as a non-party.

The Public Service Commission of Wisconsin ("Commission") responds to express its agreement with Huebsch that appellate guidance would clarify, develop, and harmonize the law on several important issues that have been raised below, and could assist the circuit court in resolving this case appropriately, while avoiding further irreparable harm, delay, and waste of judicial and party resources. The Commission further agrees that a stay is appropriate to pause further proceedings while appellate consideration of the issues is ongoing, due to the likelihood of success on the merits and the irreparable harm that could otherwise occur. The Commission is not a party to the docket relating to Huebsch's Emergency Petition for Supervisory Writ, and takes no position on that request, other than to agree, for the reasons discussed below, that the circuit court could benefit from appellate guidance sooner rather than later.

[1] Dane County Circuit Court number 19-cv-3418.

ARGUMENT

I. There Are Special and Important Reasons Presented by Huebsch's Appeal that Make this Court's Review Appropriate.

This Court grants review "when special and important reasons are presented." Wis. Stat. § 809.62(1r). In determining whether to exercise its discretion in granting a petition, among the Court's considerations are whether:

> (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.

Wis. Stat. § 809.62(1r). The Court also weighs "whether the matter is one that should trigger the institutional responsibilities of the Supreme Court." Wis. S. Ct. IOP III.

The Commission agrees that the Court should appropriately exercise its discretion to grant Huebsch's petition for review for a number of reasons, including that the appeal presents real and significant questions of state law, and

that a decision from this Court would help to develop, clarify and harmonize the law and avoid the recurrence of disagreements regarding the legal questions presented. Wis. Stat. § 809.62(1r).

A. The Circuit Court Is Erroneously Interpreting Law on an Important Question of Law that Is Likely to Recur and Has Statewide Impact.

Huebsch's requests for appellate assistance, and the convoluted path this case has taken, can be best understood with an eye towards its unique context as arising from a petition for judicial review of an agency decision. As an administrative agency, the Commission is protected by sovereign immunity, and can only be sued where the state has consented to suit. *See Turkow v. D.N.R.*, 216 Wis. 2d 273, 281-82, 576 N.W.2d 288, 291-92 (Ct. App. 1998).

Petitioners' action challenges the Commission's Final Decision which authorized the construction of the Cardinal Hickory Creek Transmission line.[2] Such a challenge, through a petition for judicial review, is available as a limited exception to the Commission's sovereign immunity, which the Wisconsin Legislature created in Chapter 227 of the Wisconsin Statutes. Under Chapter 227, the Court's scope of review is prescribed by statute, and generally must be limited to the record on review. Wis. Stat. § 227.55; Wis. Stat. § 227.57(1). *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, ¶ 26, 335 Wis.2d 47, 65, 799 N.W.2d 73, 82 ("*Lake Buelah*") (citing *Clean Wis., Inc. v. Pub. Serv. Comm'n, 2005* WI 93, ¶¶ 35-36, 282 Wis.2d 250, 700 N.W.2d 768).

There is a narrow exception to the bar on extra-record evidence which allows the reviewing court itself to consider extra-record information.[3] Pursuant to Wis. Stat. § 227.57, "in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such

[2] Huebsch was one of the three commissioners at the time of the Final Decision's issuance, each of whom voted to approve the project.

[3] Pursuant to Wis. Stat. §§ 227.55, 227.56 and 227.57, even if a circuit court determines that there were good reasons for a failure to present material evidence in the proceedings before the agency, and that such evidence should be considered, the court may only order that the additional evidence be taken before the agency itself. *See* Wis. Stat. § 227.56(1).

testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor." Wis. Stat. § 227.57(1) (emphasis added). Testimony, depositions, and written interrogatories in petitions for judicial review are exceedingly rare. Supplementation of the record through Wis. Stat. § 227.57 testimony is only appropriate for material procedural errors. The remedy should such a material procedural error be found is remand to the agency for further action:

> The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

Wis. Stat. § 227.57(4) (emphasis added). Only errors that create an intolerably high risk of unfairness are material. *Bracegirdle v. Board of Nursing*, 159 Wis. 2d 402, 415-16, 464 N.W.2d 111 (Ct. App. 1990).

In this case, the supposed irregularities in procedure before the agency that Petitioners contend should give rise to discovery, are based on allegations that Petitioners were deprived of due process because former Commissioner Huebsch was biased. App. 240-248. An administrative decision can violate due process either by bias in fact on the part of the decision maker or when the risk of bias is impermissibly high. *See State ex rel. DeLuca v. Common Council*, 72 Wis.2d 672, 684, 242 N.W.2d 689 (1976); *Guthrie v. WERC*, 111 Wis.2d 447, 454, 331 N.W.2d 331 (1983). Petitioners must plead and establish "a serious risk of actual bias-based on objective and reasonable perceptions." *In re Paternity of B.J.M.*, 392 Wis.2d 49, 63, 944 N.W.2d 542 (2020). The courts have defined the types of cases in which the risk of bias could be impermissibly high to include: (1) cases in which the adjudicator has a pecuniary interest in the outcome of the proceeding; (2) cases in which the adjudicator has been the target of personal abuse or criticism from the party before him or her; (3) cases in which the decision maker has previously acted as counsel to any party in the same action or proceeding; and (4) cases in which the

decision maker has prejudged the facts and the application of law. *DeLuca*, 72 Wis.2d at 684; *Guthrie*, 111 Wis.2d at 455, 460; *Marris v. City of Cedarburg*, 176 Wis.2d 14, 26, 498 N.W.2d 842 (1993).

Importantly, Wisconsin law recognizes a presumption of impartiality that must be afforded to commissioners like then-Commissioner Huebsch, and that extreme circumstances are required to overcome it. *See In re B.J.M.*, 2020 WI 56, ¶¶ 16, 21; *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 286 Wis. 2d 252, 273-74, 706 N.W.2d 110 (2005). In the *Marder* case, the Court thus found that even when a party and an adjudicator flew to a hearing together in a private plane, discovery into what was discussed was not merited.

To be entitled to discovery in a petition for judicial review, including to have some basis to delve into Commissioner Huebsch's personal communications, the law requires that Petitioners needed to make a *prima facie* showing of procedural irregularities that occurred before the Commission; there is no authority for a reviewing court to enter into an investigation outside of the record to investigate whether the decisionmaker might have been biased or prejudiced. *See Wisconsin Tel. Co. v. Pub. Serv. Comm'n*, 232 Wis. 274, 287 N.W. 122, 141 (1939); *Forman v. Labor and Industry Rev. Comm'n*, 196 Wis. 2d 643, 539 N.W.2d 335, 1995 WL 478449, at *4 (Ct. App. 1995) (unpublished).

In the circuit court proceedings, the parties fully briefed the merits of Petitioners' challenge to the Final Decision, with reply briefs submitted on July 10, 2020, more than a year ago. On October 19, 2020, ten days before the scheduled oral argument, Petitioners filed the Motion to Accept Non-Record Evidence of the Driftless Area Land Conservancy and Wisconsin Wildlife Federation ("Motion") App. 240-248. Petitioners claimed that the proceeding, which was fully briefed and ready for oral argument, needed to be cracked open at the eleventh hour because of supposedly "salient facts" relating to Huebsch's alleged bias that they had recently discovered. None of the information Petitioners sought to introduce in any way suggested a material procedural error or

irregularity before the Commission that created an intolerably high risk of unfairness that could merit record expansion. Wis. Stat. § 227.57(4); *Bracegirdle*, 159 Wis. 2d at 415-16. None of the supposed "facts" involved a pecuniary interest in the outcome of the proceeding, nor evidenced any prejudgment by Huebsch, nor ex parte communications about the subject matter of the docket that would have been precluded under Wis. Stat. § 227.50. To the contrary, the supposedly crucial information amounted to public information about Huebsch's required job duties relating to Midcontinent Independent System Operator ("MISO") participation that were already known and referenced in the case, mundane emails establishing nothing more than that Huebsch was in the presence of MISO's executive director for logical reasons a handful of times during the pendency of the docket, and communications with individuals associated with a party to the docket that occurred after the Final Decision had been issued, most of which (including any related to future employment) occurred after Huebsch had left the Commission. As discussed in Huebsch's petition, and as repeatedly briefed before the circuit court, the information Petitioners attempted to rely upon to unlock the discovery door was benign, and their argument that discovery should be allowed was based on speculation.

The circuit court's May 25, 2021 order nonetheless allowed discovery to proceed based on a possible "appearance of bias." App. 20, 27, 29-30. The decision to allow discovery declined to make specific rulings on what discovery was permissible. App. 28-30. The court deemed particular discovery disputes to be premature, as discovery requests had not yet been served, and stated that it would not resolve "potential discovery disputes presumptively in [Petitioners'] favor." *Id.*

In the months following that decision, Petitioners have served wide-ranging discovery requests to fish for some basis that could support their suspicions of something untoward that could have amounted to an irregularity in procedure before the agency. *See e.g.* App. 205-207, 211-220, 233-238. The discovery motions and depositions have swallowed this case to such an extent that Petitioners have now

claimed that they do not have the resources to continue their appeal. App. 210. Yet Petitioners still have not found anything that would suggest an ex parte communication about the subject matter of the docket, nor any pecuniary interest on the part of Commissioner Huebsch, nor anything else that could rise to the level of the extreme circumstances that could meet their burden to establish a prima facie case of an irregularity in procedure. They still have no evidence that could justify deviation from the rule that the circuit court serves an appellate function and reviews only what was before the agency itself.

As Petitioners acknowledge, expensive and time-consuming proceedings continue. Petitioners have continued their scorched-earth attempts to comb through individual Commissioners' personal communications to find some basis for possible bias that they did not have when they filed their Petition for judicial review, and still do not possess. Meanwhile, the circuit court has continued to signal that it intends to continue to apply an incorrect "appearance of bias standard" to Petitioners' due process claims, and has continually failed to recognize or address the presumption of impartiality due to a Commissioner as an adjudicator. App. 41, 44-45.

By correcting the circuit court's errors now, this Court could materially advance this litigation by stopping the invasive and unjustified discovery, clarifying what Dane County Circuit Court Judge Frost's limited role in the petition for judicial review must be, and what standard he must apply. Petitioners, Intervenors, the public, and the Commission will all be served by moving towards a prompt resolution of this case on the merits, rather than wasting time on distractions that have no bearing on the ultimate resolution of the case.[4]

[4] Notably, remand would only be appropriate in the case of a material error in procedure. Wis. Stat. § 227.57(4). Even if Huebsch had been biased, of which there is no evidence, Commissioners Valcq and Nowak's votes and the substantial evidence in the record would be sufficient to support the Final Decision.

B. The Appeal Would Clarify Several Issues of General Statewide and Nationwide Importance.

As discussed above, and in Huebsch's appellate filings, the question of whether a petitioner can use the narrow exception to sovereign immunity that is provided in Wisconsin Chapter 227 to search for some basis for a due process claim against an administrative official, and disregard the presumption of impartiality afforded to such officials, is of the utmost importance. The law instead requires that a petitioner has the burden of establishing a *prima facie* case of an irregularity in procedure before an agency before discovery can be had, and before a court could require such an official to allow adverse parties to rifle through his or her personal communications. *See Marder*, 286 Wis.2d 252, ¶¶ 33-34, 41. The need to protect that standard before the harm can be done cannot be understated. What is occurring in the Dane County circuit court threatens the separation of powers as it upends the court's limited role in administrative review. Rather than a narrow exception allowing discovery where, at the time that a petition to review an agency is served, there is cause to allege that there were irregularities in procedure before the agency, this new process would encourage anyone displeased with agency action to petition for review, make generic allegations of bias, and use the discovery process to search for some basis for such a claim. As Huebsch points out, one possible result of such a change to administrative law would be that commissioners' decision-making process could be improperly influenced by the fear of inquiry into their personal affairs should they decide an issue the wrong way. *See* Michael Huebsch's Memorandum in Support of Emergency Motion for Administrative Stay and Stay Pending Appeal and Emergency Petition for Supervisory Write or Exercise of Superintending Authority ("Huebsch Mem.") at 3, 10, 78-80.

Clarifying that petitioners cannot disregard the presumption of impartiality or engage in discovery without some basis for alleging irregularities in the procedures before the agency and that more than an "appearance of bias" needs to

be alleged and proven, is also important to signal to current Commissioners and to agency officials nationally what the standard is. Discovery into the personal communications of Commissioners other than Huebsch has already been requested, and will likely become part of the playbook for individuals searching for some way to challenge a decision they don't like. *See* Huebsch Mem. at 79-81; *see also McLaughlin v. Mont. State Leg., et al.,* No. OP 21-0173 at 3, 4 (Mont. Sup. Ct. June 29, 2021) ("matter at hand is one of serious public interest" when "a ruling on the matter will guide public officers in the performance of their duties" and address susceptibility of public officials to subpoenas).

When Petitioners brought their motion to engage in discovery regarding procedural irregularities in procedure before the Commission, their only "facts" relating to anything that occurred while the docket was pending, were facts establishing that Commissioner Huebsch was involved in MISO, something that was far from a secret and was in line with his official duties. Huebsch Mem. at 13-16. Petitioners' eleventh hour attempt to search for some impropriety rather than proceeding to oral argument on the merits, which should have occurred in October of 2020, has delayed the resolution of their merits claims. Petitioners, Intervenors, the public, and the Commission could have had a decision from the circuit court long ago. Whether resolution of the merits of a petition for judicial review can be delayed by looking for some possible basis for bias that was not identified in the petition itself, or suggested in the record that is before the reviewing court, and is based on a vague "appearance of bias" standard that disregards the presumption of impartiality, has important implications for how all petitions for judicial review may go forward in the future. If Petitioners' view is allowed to stand, the legislatively created limited exception to sovereign immunity that allows a suit against an administrative agency will be expanded such that a full-blown lawsuit with discovery into information having nothing to do with the decision under review can be expected after every agency final decision.

If the machinations that are occurring in this case can go on, with no opportunity for review until the damage has already been done, future potential petitioners will have an incentive to make unfounded bias allegations in every case, in the hope that they might find something when given the opportunity to dig. Justice, whether it is ultimately in the form of a judicial decision upholding the challenged agency decision, modifying that decision, or remanding back to the agency, will be delayed. The swift review process contemplated by the Legislature, with the scope limited to what was before the agency with no discovery except in the narrowest of circumstances, will be thwarted.

The administration of justice would also particularly be harmed if the circuit court's orders subjecting Huebsch to broad discovery of his personal communications based on bare allegations that he may have been biased due to his work with MISO is allowed to stand. The current Public Service of Wisconsin Commissioners, as well commissioners across the country, would be hobbled in their attempts to perform their duties to be informed experts on the utility issues within their area of responsibility. Without appellate correction, and with unknown standards that would apparently require full disclosure of their private lives even after they have left public service and would preclude any future employment even that which the statutes on the issue would otherwise allow,[5] very few would want to engage in or remain in public service. This Court has the opportunity, and the institutional responsibility, to step in now to reinforce the separation of powers and the legislative scheme, and to guard the boundaries of the state's sovereign immunity.

[5] Wisconsin law does not preclude a commissioner from applying for a job with a utility after he or she has left state service. Wisconsin Statute § 19.45(8) describes the manner in which Wisconsin has, for decades, constrained the circumstances under which a former state public official may legally obtain private employment. There is no allegation that Huebsch has violated that statutory guidance. Petitioners thus essentially argue that the courts should find a due process error in a proceeding based on an action a public official took after he left public service, which is in compliance with a detailed and longstanding statutory scheme that is designed specifically to protect the citizens of the state from having due administration of the law subverted by a public official's pursuit of private interests. This cannot be the law.

II. An Administrative Stay Is Appropriate Because Huebsch Is Likely to Succeed on the Merits of His Appeal and Faces Irreparable Harm.

The Commission agrees with Huebsch that the circuit court erred in a number of ways, by allowing any discovery at all, by allowing discovery into personal communications, and by wholly disregarding the presumption of impartiality due to Commissioners, among other reasons. The Commission accordingly joins Huebsch's arguments which apply the standard for a stay pending appeal, discussed in *State v. Gudenschwager* to illustrate why a stay is appropriate in this case. 191 Wis. 2d 431, 439-40, 529 N.W.2d 225 (1995). In the Commission's view, Huebsch has shown "more than the mere 'possibility'" that the circuit court got it wrong. 191 Wis.2d at 441. Moreover, the irreparable harm that would be befall Commissioner Huebsch through discovery of his irrelevant personal affairs, if such discovery is not merited under the law, appears to be clear.

Once former Commissioner Huebsch has been required to comply with invasive discovery of his personal affairs, which is not permissible in a proceeding for judicial review, that ship will have sailed. The continuing discovery in this case has costs to his privacy, to the privacy of third parties, as well as litigation costs to him, to the other parties, to the courts, and to the public. Putting an end to pointless discovery is all the more appropriate because even if Commissioner Huebsch were found to have been biased in some way, it would not constitute a material error in procedure before the agency. The remaining votes of Commissioners Valcq and Nowak would be sufficient to support the Commission's Final Decision. Permitting an immediate appeal that could stop discovery that is not justified by the law would avoid that substantial and irreparable injury.

The Commission thus supports Huebsch's request for an administrative stay to maintain the status quo while this Court has the opportunity to weigh in and provide guidance on what, if any, additional discovery should continue. *See Waity v, LeMahieu*, No. 2021AP802 (July 15, 2021), App. at 521 (more than a

possibility of convincing the appellate court coupled with irreparable harm "requires that the effect of the circuit court's judgment or order be temporarily stayed while the appellate court is reviewing the case.").

The non-moving parties will not be injured by a stay. All parties and nonparties will benefit by having the circuit court apply the correct standard to any discovery and to any subsequent rulings. It would make little sense, and be inefficient and wasteful, to proceed to an evidentiary hearing without Huebsch if he may ultimately be required to testify and he and/or other witnesses may need to be called for rebuttal or other purposes after their respective testimony has been provided. The bounds of what can be examined in testimony from other witnesses may also depend on this Court's evaluation of the issues presented in this appeal.

Petitioners will no doubt argue that a stay will harm them because waiting for guidance from this Court will delay resolution of their case, which Petitioners want resolved before construction begins on the challenged transmission line. The Legislature provided a remedy to protect such interests, through Wis. Stat. § 196.43, however, which Petitioners have had the option of invoking throughout the pendency of this lawsuit and have chosen not to pursue. If that were not enough, the merits of Petitioners' challenge to the Final Decision were fully briefed, and oral argument was imminent, when Petitioners launched their strategy to expand this case far beyond the scope of a permissible petition for judicial review. It is their attempt to search for some basis for a bias claim that did not exist at the time of serving the petition, did not exist at the time that their Motion to expand the record was filed, and still does not exist, that has delayed resolution of their claims. If this Court ultimately determines that discovery should not have been had, or that it should be limited, the matter, which is fully briefed on the merits, can be swiftly decided. If Petitioners are entitled to the relief they seek they may get that sooner than if extensive discovery and discovery disputes continue.

CONCLUSION

For the reasons discussed above, the Commission supports Huebsch's Petition for Review and his request for a stay.

Respectfully submitted, this 7th day of September, 2021.

Electronically Signed By: Christianne A.R. Whiting

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and 809.62(4), and the Court's August 31, 2021 order, for a response produced with proportional serif font. The length of this response is 4,162 words.

Dated September 7, 2021.

Electronically Signed By: Christianne A.R. Whiting

Christianne A.R. Whiting