

**BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN**

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Joint Application of Wisconsin Public Service  
Corporation and Madison Gas and Electric  
Company for a Certificate of Authority to Purchase  
the Red Barn Wind Energy Center Generation  
Facility in the Towns of Wingville and Clifton,  
Grant County, Wisconsin

Docket 5-BS-256

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**WISCONSIN PUBLIC SERVICE CORPORATION'S AND  
MADISON GAS AND ELECTRIC COMPANY'S  
RESPONSE TO PETITIONS FOR REOPENING**

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**I. Introduction.**

Wisconsin Public Service Corporation and Madison Gas and Electric Company (the “Joint Applicants”) are responding to seven petitions<sup>1</sup> to reopen this docket, in which the Commission approved the Joint Applicants’ acquisition of the Red Barn Wind Energy Center (“Red Barn”). The petitions fail for at least two reasons. First, they allege permitting deficiencies over which the Commission has no jurisdiction. These claims principally relate to alleged shortcomings in local siting proceedings, and some petitions urge the Commission to exercise extra-statutory siting authority over the Red Barn project. Second, the petitions fail to allege grounds for reopening under Wis. Stat. § 227.49(3) because they do not identify any material error of fact or law by the Commission, and do not provide any new evidence that supports

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<sup>1</sup> Petitions were filed by Linda Grice (ERF No. 432108), Marilyn Brewer (ERF No. 432119), George Schwartzmann, Jr. (ERF No. 432146), Barbara Brown (ERF No. 432172), and Dr. Gloria Belken (ERF No. 432205). Dr. Belken also joined a petition filed by Dena Kurt and LeRoy Belken (ERF No. 432207). Finally, one unsigned petition was also filed. (ERF No. 432203). None of these individuals sought to intervene or participate in this docket in any manner before filing their petitions. All of the petitions make essentially the same arguments, and several of the petitions are copied verbatim from one another. This response will principally reference the Kurt/Belken joint petition, which is the longest and covers the arguments raised in each of the petitions. None of the petitions were served on Wisconsin Public Service Corporation, as is required by Wis. Stat. § 227.49(4). Only the Kurt/Belken petition was served on Madison Gas and Electric Company, on March 7, 2022.

reversing or modifying the Final Decision. The Commission should deny the petitions to reopen or allow them to be deemed denied by operation of law under Wis. Admin. Code. § PSC 2.28.

## **II. Background.**

The Joint Applicants filed for approval to acquire Red Barn on March 29, 2021. The Joint Applicants proposed to acquire the project from ALLETE Clean Energy (“ALLETE”) after construction and mechanical completion, and after it is placed into service. In other words, the Joint Applicants would not be responsible for constructing Red Barn or placing it into service, so they did not seek a Certificate of Authority to construct the project.

Because Red Barn will be less than 100 megawatts, it did not require a CPCN according to Wis. Stat. § 196.491(3)(a)1. The Commission recognized this in its Final Decision: “since the project is being developed and constructed by a wholesale merchant and has a nominal 92 MW alternating current (AC) nameplate capacity, the project does not come to the Commission for construction authorization and siting review.”<sup>2</sup> That is not to say that Red Barn avoided siting review. To the contrary, it was considered for and ultimately received local zoning approval from the towns in which it will be located – Wingville and Clifton, Wisconsin – and from Grant County. As noted in the Application, the local town boards recommended approval of a conditional use permit for the project in June of 2019.<sup>3</sup> There were two public hearings, and the Grant County Conservation Sanitation and Zoning Committee granted the conditional use permit following the second hearing in July, 2019.<sup>4</sup> There was no local opposition to the project at the hearing.<sup>5</sup> Indeed, the petitions to reopen – filed at the Commission two-and-a-half years after

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<sup>2</sup> Final Decision, at 1, Docket 5-BS-256 (Feb. 15, 2022) (ERF No. 431156) (“Final Decision”).

<sup>3</sup> Application, at 6, Docket 5-BS-256 (May 6, 2021) (ERF No. 411086) (“Application”).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Red Barn received the only siting approval it required – are seemingly the first indication of any opposition to the project.

### **III. Argument.**

To support a request for the Commission to reopen a docket, a petitioner must, at a minimum: (1) identify a remedy that is within the Commission’s jurisdiction; and (2) identify a material error of fact or law, or “new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.” Wis. Stat. § 227.49(3).

The petitioners have done none of these.

#### **A. The Commission lacks jurisdiction over siting for Red Barn because it is less than 100 megawatts and also lacks authority over local siting decisions.**

The petitioners’ claims largely boil down to concerns over project siting, expressed as questions about “the threats to the Public interests, health and welfare,”<sup>6</sup> “long-term health and community effects,”<sup>7</sup> and “disruption to the community.”<sup>8</sup> The petitioners argue that Red Barn “should have been reviewed under CPCN standards ... or have incorporated aspects therein....”<sup>9</sup> The Kurt/Belken Petition and several of the other petitions also argue that Red Barn conflicts with Grant County’s Comprehensive Development Plan, and raise concerns about whether sufficient notice was provided when the project was considered at the local level.<sup>10</sup>

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<sup>6</sup> Kurt/Belken Petition at 2.

<sup>7</sup> Grice Petition at 1.

<sup>8</sup> Brewer Petition at 2; Schwartzmann Petition at 2; Brown Petition at 2; Belken Petition at 2; Unsigned Petition at 2.

<sup>9</sup> Kurt/Belken Petition at 3.

<sup>10</sup> *See, e.g.*, Kurt/Belken Petition at 7-10.

The Commission lacks authority to require a CPCN for electric generating projects under 100 megawatts. Wis. Stat. § 196.491(3)(a)1. As such, the siting considerations contained in the CPCN statute do not apply to such projects, and the Commission would be acting *ultra vires* if it attempted to impose restrictions on how such projects are sited. Of course, the Commission has an indirect influence on how wind turbines are sited through its development and administrative oversight of Wis. Admin. Code ch. PSC 128, Wisconsin’s Wind Energy System Siting Rules. However, none of the intervenors argue that Red Barn will violate those rules. Finally, the Commission has no authority to involve itself with local siting decisions like Grant County’s decision to grant a conditional use permit for Red Barn or whether the project is consistent with the local Comprehensive Development Plan. If the petitioners disagree with the siting and permitting decisions made at the local level, they need to take that up with the local authorities.

**B. The petitioners have not identified any basis to reopen this docket under Wis. Stat. § 227.49(3).**

Most of the petitions claim “new facts” have come to light that require reopening, but only the Kurt/Belken Petition attempts to set forth any such facts or identify alleged errors of law. In some cases it is not clear whether the petitioners are alleging material errors of fact, material errors of law, or newly-discovered evidence. Nevertheless, we will address their arguments in the order presented.

First, the Kurt/Belken Petition claims that as a result of Judge Conley’s recent order in the Western District of Wisconsin litigation arising from the Cardinal-Hickory Creek transmission project, the Hill Valley substation cannot be constructed so there will be no way for Red Barn to connect to the grid.<sup>11</sup> The petitioners are incorrect. There is nothing preventing or

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<sup>11</sup> Kurt/Belken Petition at 3.

enjoining construction of the Hill Valley substation, which was approved in the Commission’s decision in Docket 5-CE-146. Indeed, the only federal court injunction in place at present would prevent construction of the Cardinal-Hickory Creek line via ATC’s preferred route across the Mississippi, but that river crossing would be far to the west of the Hill Valley substation, and would not affect its construction whatsoever. Further, ATC has indicated that it has another path across the Mississippi, and it has appealed Judge Conley’s injunction to the Seventh Circuit.<sup>12</sup>

Second, the Kurt/Belken petitioners parrot the argument, raised recently in several renewable energy dockets, that the Wisconsin Constitution bars leases of agricultural land for more than fifteen years.<sup>13</sup> As the Joint Applicants and other parties have explained in those dockets, this argument woefully misunderstands the state Constitution, which contains no such restriction where land will be taken out of agricultural production and dedicated to a non-agricultural use, such as hosting wind turbines. Rather than repeating the many pages of briefing that have been dedicated to answering the petitioners’ specious argument in other dockets, the Joint Applicants rest on the briefing that has been submitted in those cases.<sup>14</sup>

Third, the Kurt/Belken petitioners argue that due to “unprecedented circumstances” – seemingly a reference to the size of the turbines that may be used for Red Barn – the Commission erred in declining to require an Environmental Assessment or Environmental

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<sup>12</sup> See ATC’s Response to Requests to Reopen Docket No. 5-CE-146, Feb. 21, 2022 (ERF No. 431418); Joint Notice of Appeal, No. 3:21-CV-00306 (W.D. Wis. Mar 3, 2022).

<sup>13</sup> Kurt/Belken Petition at 3-4.

<sup>14</sup> See Wisconsin Electric Power Company’s, Wisconsin Public Service Corporation’s and Madison Gas and Electric Company’s Response to Motion to Dismiss, Docket 5-BS-258 (ERF No. 431815); Koshkonong Solar Energy Center LLC’s Response to the Motion to Dismiss, Docket 9811-CE-100 (ERF No. 431873); and Wisconsin Electric Power Company’s, Wisconsin Public Service Corporation’s and Madison Gas and Electric Company’s Response to Motion to Rescind, Dockets 5-BS-228 and 9697-CE-100 (ERF No. 431817).

Impact Statement for the project.<sup>15</sup> Again, they are wrong as a matter of law. Red Barn is categorized as a Type III action under Wis. Admin. Code § PSC 4.10(3), and therefore presumptively does not require preparation of an Environmental Assessment or Environmental Impact Statement. *See* Wis. Admin. Code § PSC 4, Table 3 (listing “Purchase, sell or transfer utility property” as a Type III action). The size of the turbines is not new information – to the contrary, the potential size was identified in the Application and was part of the record the Commission considered in reaching its decision.<sup>16</sup> And, again, the Wind Energy System Siting Rules were specifically designed to protect neighbors, including by adopting setback distances that take into account the height of the turbine. Therefore, the petitioners have not identified any material error of fact or law relating to the Commission’s decision not to require an Environmental Assessment or Environmental Impact Statement.

Finally, the petitioners argue that the *force majeure* notification filed on March 2, 2022 somehow supports reopening the docket.<sup>17</sup> Of course, the Commission anticipated the possibility of such a notification in its decision (and it can hardly be surprising given current economic and supply chain challenges). The Commission’s Final Decision approved the acquisition of Red Barn at a cost of \$162 million, and continued:

Notwithstanding the foregoing, the applicants may request in a future rate case recovery of acquisition costs in excess of \$162 million in the event acquisition costs increase as a result of *force majeure* event(s) (provided, however, that the applicants have provided notice to the Commission within 30 days of learning of any such *force majeure* event(s)). This exception does not bind the

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<sup>15</sup> Kurt/Belken Petition at 5-7.

<sup>16</sup> Application, Appx. E.

<sup>17</sup> Kurt/Belken Petition at 8.

Commission to any specific treatment or recoverability of acquisition costs in any future rate case proceeding.<sup>18</sup>

Thus, the Commission has already said what the effect of a *force majeure* notice will be: examination of the excess costs in a future rate proceeding, not reopening this docket.

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<sup>18</sup> Final Decision at 14.

**IV. Conclusion.**

For the reasons stated above, the Commission should reject the petitions to reopen this docket or allow them to be rejected by operation of law.

Respectfully submitted this 21st day of March 2022.

**Wisconsin Public Service Corporation**

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