

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

ANN WIRTZ and JASON WIRTZ,

Complainant,

v.

Docket No. 9554-EI-100

INVENERGY LLC,

Respondent.

RESPONSE TO VERIFIED COMPLAINT

Respondent Invenergy LLC ("Invenergy"), by its attorneys, Reinhart Boerner Van Deuren s.c., pursuant to Wis. Admin. Code § PSC 2.07(4) hereby responds to the Verified Complaint of Ann and Jason Wirtz (the "Complaint").

INTRODUCTION

Ann and Jason Wirtz claim that the Forward Energy Center has caused them personal injuries and diminished the value of their property; they seek compensatory damages. There is no legal basis for the Commission to assert jurisdiction over the Wirtzs' claims or allow them to intervene in a Commission proceeding, and the Commission would set an unwise precedent by opening a docket based upon their Complaint:

- None of the procedural statutes identified by the Wirtzs, and no other statute relating to Commission jurisdiction, confer jurisdiction to the Commission over personal injury or property damage claims;
- The Commission has no common law power and cannot construct a basis for jurisdiction out of the common law to address the Wirtzs' apparently common law claims;

- Commission involvement in personal injury and property damage claims would transform its role from making decisions based on the "public interest" to making decisions with potentially far reaching effects based solely upon individual circumstances;
- Commission involvement in personal injury and property damage cases would bog the Commission down in the minutiae of personal injury claims, such as physician depositions and medical record discovery and review to name just a few, in which the Commission has little or no institutional expertise;
- Commission adjudication of personal injury and property damages claims would have a chilling effect on future wind energy development.

Simply put, the Commission has no authority to assert jurisdiction over the Wirtzs' claims. The Commission should deny the Wirtzs' request to open a new contested case docket and deny their request to intervene. The Commission should leave to a court the adjudication of any claims that the Wirtzs may chose to pursue.

BACKGROUND

On September 29, 2004, Invenergy's affiliate, Forward Energy LLC ("Forward Energy") filed with the Commission an application to construct a wind electric generation facility in Dodge and Fond du Lac counties—the "Forward Energy Center".¹ The Commission and the Department of Natural Resources prepared a joint Environmental Impact Statement ("EIS") and the Commission convened a public hearing on June 20-22, 2005. *Id.* at 4. The Commission

¹ See *Application of Forward Energy, LLC for a Certificate of Public Convenience and Necessity to Construct a Wind Electric Generation Facility and Associated High Voltage Electric Transmission Facilities, to be Located in Dodge and Fond du Lac Counties*, Final Decision, July 14, 2005, Docket No. 9300-CE-100 ("Final Decision") at 4.

provided notice concerning how persons could file a request to become a party to that proceeding, solicited comments from the public regarding the EIS, and invited public comments during the course of the hearing. *Id.* at 4-5; *see also* Notice of Proceeding and Prehearing Conference, Docket No. 9300-CE-100, January, 24, 2005, PSC Ref #: 27073 ("Forward Energy Center Notice").

On July 14, 2005, the Commission issued a Final Decision in which it granted a Certificate of Public Convenience and Necessity ("CPCN") to Forward Energy for the Forward Energy Center. In that Final Decision, the Commission rejected requests to impose a "property value protection plan" to address allegations that the facility would decrease property values in the area of the facility. *Id.* at 35. The Commission also found "that issuing a CPCN will promote the public health and welfare and is in the public interest." *Id.* at 42. The Final Decision included a "Notice of Appeal Rights"; no person appealed the Final Decision and the deadlines for instituting such an appeal have long since passed. *Id.* at 47.

Years earlier, in 1997, Ann and Jason Wirtz purchased residential property "inside what was to become the footprint of the [Forward Wind Energy facility]." *See* Complaint, April 1, 2010 at 3. The Wirtzs admit to being aware of the Forward Wind Energy facility when it was in the proposal stage. *Id.* Even so, the Wirtzs did not participate in the Forward Energy Center proceeding.

On April 1, 2010—nearly five years after the Commission issued its Final Decision—the Wirtzs filed with the Commission a Complaint against "Invenergy

LLC."² Apparently, after losing their home to foreclosure and filing for bankruptcy, *see* Complaint at 4, the Wirtzs believe that the Forward Wind Energy Center is the cause of their troubles. In their Complaint, the Wirtzs allege that the Forward Energy Center caused the value of their property to decrease and caused personal injuries to them and their children. *Id.* at 2-4. The Wirtzs demand that the Commission "require Invenergy to compensate the Wirtzs" for their lost property value, lost wages, and medical expenses. *Id.* at 9. The Wirtzs seek to have the Commission address their claims in a new contested case proceeding, as part of the Forward Energy Center proceeding, or as part of the pending Ledge Wind proceeding, which involves another Invenergy affiliate's application for a CPCN for a wind energy facility in Brown County, Wisconsin.³

The Commission lacks jurisdiction over the Wirtzs' claims. Moreover, there is no legal basis to allow the Wirtzs to intervene in either the Forward Energy Center proceeding or the Ledge Wind proceeding. Therefore, the Commission should deny the Wirtzs' request to open a new contested case docket and should deny their request to intervene in those proceedings.

² In addition to the jurisdictional flaws with the Wirtzs' Complaint, as demonstrated below, their failure to identify the appropriate party-respondent provides another basis for the Commission to deny the Wirtzs' request to open a docket.

³ *Application of Ledge Wind Energy, LLC for a Certificate of Public Convenience and Necessity to construct a 150 MW Wind Electric Generation Facility and Associated Facilities, to be located In the Towns of Morrison, Holland, Wrightstown and Glenmore, Brown County, Docket No. 9554-CE-100.*

ARGUMENT

I. THE COMMISSION DOES NOT HAVE JURISDICTION OVER THE WIRTZS' PERSONAL INJURY AND PROPERTY DAMAGE CLAIMS.

The Commission's jurisdiction over Forward Energy and the Forward Energy Center arises under Wis. Stat. § 196.491. That statute requires a party to obtain a CPCN before constructing a wind energy facility. Nothing in Wis. Stat. § 196.491, nor any of the statutes cited by the Wirtzs, nor the Final Decision in the Forward Energy Center proceeding confer jurisdiction on the Commission to address a claim for personal injuries or property damage allegedly caused by such a facility. Such claims, if allowed, would improperly transform the Commission into a repository of all manner of personal injury and property damage claims. The legislature did not authorize the Commission to take on that role, and the Commission should not assume that role in this case. The Commission should deny the Wirtzs' request to open a docket to address their claims and should deny their request to intervene in any other docket.

A. There Is No Statutory Basis For Commission Jurisdiction Over The Wirtzs' Personal Injury and Property Damage Claims.

The Commission's jurisdiction is delineated by statute, and no statute confers jurisdiction on the Commission to address claims for personal injuries or property damage allegedly resulting from the operations of a wind energy facility for which the Commission has granted a CPCN. The Commission should therefore deny the Wirtzs' request to open a docket to consider their claims.

The Wisconsin Court of Appeals has ruled that "...the subject matter jurisdiction of administrative agencies—that is, their authority to hear certain subject matters in general—is conferred and specified by statute." *Stern v. Wisconsin Employment Relations Comm'n*, 2006 WI App 193, ¶ 24, 722 N.W.2d 594 (citing *State v. DILHR*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977)). Moreover, an administrative agency has only those powers as are expressly conferred or necessarily implied from the statutory provisions under which it operates. See *Mid-Plains Telephone, Inc. v. Public Serv. Comm'n*, 56 Wis. 2d 780, 202 N.W.2d 907, 910 (1973); *State ex rel Castaneda v. Welch*, 2007 WI 103 ¶ 26, 735 N.W.2d 131.

If a specific statutory grant of authority to a state agency conflicts with a more general grant, the specific statute controls. See, e.g., *Martineau v. State Conservation Comm.*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970). Also, "[a]ny reasonable doubt as to the existence of an implied power in an agency should be resolved against the exercise of such authority." *Kimberly-Clark Corp. v. Public Serv. Comm'n*, 110 Wis. 2d 455, 329 N.W.2d 143, 146 (1983); *GTE North Inc. v. Public Serv. Comm'n*, 169 Wis. 2d 649, 486 N.W.2d 554, 559 (Ct. App. 1992), *rev'd on other grounds*, 500 N.W.2d 284.

The Commission issued a CPCN to Forward Energy for the Forward Energy Center pursuant to Wis. Stat. § 196.491. That statute defines the scope of the Commission's jurisdiction over Forward Energy and the Forward Energy Center. It sets forth the criteria the Commission must apply to an application for a

CPCN and the actions that the Commission may take with regard to that application. *See id.* That statute does not, explicitly or implicitly, confer jurisdiction on the Commission over personal injury or property damage claims allegedly caused by a project for which the Commission has granted a CPCN. *See e.g.,* Wis. Stat. § 196.491(3).

Although the Commission must consider whether "individual hardships" affect its determination of whether the "design and location or route" of a proposed project is in the public interest, *see* Wis. Stat. § 196.491(3)(d)3, that consideration is made only in relation to a broader conclusion regarding the public interest. The statute does not explicitly or implicitly empower the Commission to award compensatory damages for alleged individual hardships after it has made that public interest determination. The notion of civil damages or compensation in the nature sought by the Wirtzs, on an individualized basis, is foreign to that statute. No published Commission decision that Invenergy is aware of involves the Commission addressing a claim for compensatory damages for personal injuries or property damage under Wis. Stat. § 196.491 or any other statute.

None of the statutes or regulations cited by the Wirtzs provide the Commission with jurisdiction to hear their Complaint. Wisconsin Statute § 196.02(1) generally describes the Commission's powers:

(1) Jurisdiction. The commission has jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient to its jurisdiction.

Wis. Stat. § 196.02(1). This statute is inapplicable on its face given that it relates to the Commission's jurisdiction over public utilities—neither Invenergy nor Forward Energy is a public utility.

Even if applicable, this general statute—as well as Wis. Stat. §227.42, cited by the Wirtzs and which defines a contested case proceeding—does not confer jurisdiction on the Commission where, as here, another statute, *i.e.* Wis. Stat. § 196.491, more specifically outlines the contours of the Commission's jurisdiction regarding Forward Energy and the Forward Energy Center. *See e.g., Martineau v. State Conservation Comm.*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970). As shown above, Wis. Stat. § 196.491 neither explicitly nor implicitly grants jurisdiction to the Commission to address personal injury or property damage claims in which compensatory damages are sought.

The Wirtzs' reliance on Wis. Stats. §§ 196.26 and 196.28, and Wis. Admin. Code §§ PSC 2.07 and 2.08 is misplaced. Those statutes and regulations define procedures for a matter to be brought to the Commission's attention, but do not independently confer jurisdiction on the Commission. *See GTE North*, 486 N.W.2d 554; *Complaint of McLeodUSA Telecommunications Services, Inc. against Wisconsin Bell, Inc., d/b/a AT&T Wisconsin*, Notice of Proceeding, February 13, 2009, Docket 6720-TI-216 PSC Ref# 107969 ("Cause 4, asserting a violation of Wis. Stat. § 196.26, will not be investigated in this proceeding as the statute is procedural in nature and does not establish any substantive obligation that AT&T may owe to McLeod.").

Similarly, Wis. Stat. § 196.39 is also a procedural statute governing circumstances under which the Commission may reopen an order, and does not provide the Commission with jurisdiction over the Wirtzs' claims. First, Wis. Stat. § 196.39(1) does not speak to the areas of the Commission's subject matter jurisdiction except, arguably, that the Commission has jurisdiction over certain "rates, tolls, charts or schedules" of a public utility, none of which are implicated by the Wirtzs' Complaint. Second, Wis. Stat. § 196.39(2) provides that a request to reopen a case may only be made by "an interested party. . .under s. 227.49." The Wirtzs' chose not to become "parties" in the only case that could even conceivably be "reopened" here—the Forward Energy Center Proceeding—and the deadlines for requests to reopen have long since expired. *See* Wis. Stat. § 227.49 (requiring that requests be filed within twenty days of a final order); *see also* Wis. Stat. § 227.53 (requiring that petitions for review be filed within thirty days of a final order).

In its Final Decision granting a CPCN to Forward, the Commission adhered to the limits of its jurisdiction over Forward and the Forward Energy Center. The Final Decision contains no language or condition that suggests that the Commission has jurisdiction over personal injury or property damage claims emanating from a facility for which it granted a CPCN. Rather, the Commission ordered Forward Energy to "work with those residents who testified regarding their particular potential adverse health and safety consequences..." and "to the extent practicable [] mitigate these effects..." *See* Complaint at 2. The scope of

this order is consistent with the extent of the Commission's jurisdiction and does not reflect any ability by the Commission to assert jurisdiction over personal injury and property damage claims for compensatory damages.

The Wirtzs have failed to identify a statutory basis for the Commission to take jurisdiction over their claims. In fact, there is no statutory basis for the Commission to assert jurisdiction over their claims. Consequently, the Commission lacks jurisdiction over the Wirtzs' claims and the Commission should not open a docket to address them.

B. The Wirtzs' Complaint Attempts To Assert A Common Law Claim, Over Which The Commission Lacks Jurisdiction.

Without a statutory basis for jurisdiction, the Commission cannot address the Wirtzs' claims. As the Supreme Court of Wisconsin has held, "[a]dministrative boards and commissions have no common law power." *Nekoosa-Edwards Paper Co. v. Public Serv. Comm'n*, 8 Wis. 2d 582, 99 N.W.2d 821, 827 (1959). The development of the common law is restricted to the courts, and ". . . the [C]ommission, being an administrative agency and not a court, never acts in a strictly judicial capacity. . ." *Muench v. Public Serv. Comm'n*, 261 Wis. 492, 55 N.W.2d 40, 48 (1952). Significantly, if the Commission asserted jurisdiction over common law claims, it would be unable to afford either claimants or respondents their constitutional right to trial by jury, which right extends to common law claims. *See State v. Ameritech Corp.*, 185 Wis. 2d 686, 517 N.W.2d 705 (Ct. App. 1994); *Village Food & Liquor Mart v. H & S Petroleum*, 2002 WI 92, ¶ 16, 254 Wis. 2d 478, 647 N.W.2d 177; *see also State v. Schweda*, 2007 WI

100, 736 N.W.2d 49. Therefore, it follows that every administrative agency "must conform precisely to the statutes from which it derives power." *Mid-Plains*, 202 N.W.2d at 910.

In *Nekoosa-Edwards*, a statute barred the Commission from issuing a permit to divert water from a stream unless the party seeking the permit obtained the consent of certain riparian landowners. *Nekoosa-Edwards*, 99 N.W.2d at 825. The Commission contended that it had jurisdiction to issue a permit even if such consents had not been obtained, provided that the Commission determined that the riparian landowners would not be harmed by the diversion. *Id.* The Supreme Court of Wisconsin rejected the Commission's assertion of jurisdiction, stating that "[w]e find no authority in the statute for this position." *Id.* The Court explicitly rejected the notion that the Commission could craft a common law basis for its assertion of jurisdiction. *Id.* at 827.

Here, the Wirtzs' claims are not grounded in any statute that the Commission administers nor are they based upon an alleged violation of any Commission order or rule. Rather, their claims appear to be premised on the common law relating to tort or nuisance. *See, e.g.*, Wisconsin Jury Instructions Civil 1920, *et. seq.* The Commission does not have statutory jurisdiction over such common law claims, cannot construct a common law basis for jurisdiction over such claims, and cannot supply an appropriate forum for the adjudication of such claims. The Wirtzs' request to open a docket should be denied.

C. Denying The Wirtzs' Request To Open A Docket Is Consistent With The Commission's Purpose And Sound Public Policy.

The Commission's lack of jurisdiction over personal injury and property damage claims such as those brought by the Wirtzs is consistent with the Commission's role and public policy. Asserting jurisdiction over the Wirtzs' claims, on the other hand, would improperly transform the Commission into a court, with all of the attendant obligations that the Commission is ill-suited to fulfill. Moreover, asserting jurisdiction over the Wirtzs' claims would inappropriately counteract the Wisconsin legislature's determination in favor of the development of alternative energy resources. Therefore, the Commission should not assert jurisdiction over the Wirtzs' claims.

First, asserting jurisdiction over the Wirtzs' claims would dramatically alter the role of the Commission. The limitation on Commission jurisdiction embodied by Wis. Stat. § 196.491 is consistent with the role and function of the Commission in such proceedings. In CPCN proceedings, the Commission must make findings regarding whether a proposed energy facility is, among other things, within the public interest. *See* Wis. Stat. § 196.491(3)(d)3. The Commission must bring its specialized knowledge to bear on complex issues and determine whether a proposal advances the policy of the state, as articulated by the legislature, after balancing certain interests. Entertaining individual claims for personal injury or property damage would improperly divert the Commission's role away from securing the public interest and toward trying to address individual claims on a case-by-case basis.

Second, by asserting jurisdiction over the Wirtzs' claims, the Commission would become a magnet for personal injury claims, where claimants could attempt to exploit the less formal procedural and evidentiary rules that govern administrative contested cases.⁴ *See* Wis. Stat. § 227.45(1) ("[e]xcept as provided in s. 901.05, an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. . . "). Moreover, contrary to its current role, the Commission would need to begin supervising the extensive and invasive discovery that personal injury cases require, including depositions of treating physicians and other fact and expert witnesses, independent medical examinations, the disclosure of personal health records, and other case-specific investigations that have no significance other than to the particular individuals making injury and damage claims. Thus, rather than addressing issues of statewide concern regarding Wisconsin's energy policies, the Commission would be forced to address all manner of potential individual claims for personal injuries and property damage that would consume and exhaust its resources.

Third, asserting jurisdiction over individual claims for personal injury or property damage would have a chilling effect on future energy resource

⁴ It appears that claimants would require the less stringent evidentiary standards to demonstrate essential elements of their claims, such as causation, given that (i) only a miniscule fraction of individuals living within the footprint of a wind energy facility have even complained about alleged adverse health issues, much less demonstrated that such health issues are related to the wind energy facility and (ii) the "evidence" that currently exists concerning adverse health and property value consequences is unreliable and insubstantial. *See* Section I.D., *infra* (citing *Application of Wisconsin Electric Power Company for a Certificate of Public Convenience and Necessity to Construct a Wind Electric Generation Facility and Associated Electric Facilities to be known as the Glacier Hills Wind Park, Located in the Towns of Randolph and Scott, Columbia County, Wisconsin*, Docket No. 6630-CE-302).

development. In this case, the assertion of jurisdiction over the Wirtzs' claims would provide a disincentive to the further development of wind energy resources contrary to the clear legislative support for such alternative energy development. *See, e.g.*, Wis. Stat. §§ 1.12(4), 196.025(1)(ar); 196.378. Wind energy resource development proceedings already face opposition from a variety of "NIMBY" organizations and individuals; allowing individuals to bring personal injury and property damage claims before the Commission would raise further barriers to development.

The legislature did not empower the Commission to adjudicate personal injury claims. Adjudicating such claims would be inconsistent with the Commission's purpose, would mire the Commission in personal injury claims, and would stifle alternative energy development. The Commission should deny the Wirtzs' request to open a docket to address their claims, and thereby preserve the Commission's appropriate purpose and function.

D. The Wirtzs' Attempt To Undermine The Forward Energy Center Final Decision Must Be Rejected.

The Final Decision has not been appealed and remains the governing document for the Forward Energy Center CPCN. Perhaps recognizing that the Final Decision, on its face, does not provide grounds for Commission jurisdiction over their claims, the Wirtzs attempt to stage a collateral attack on the Final Decision. The Wirtzs alleged that the noise limitations set forth in the Forward Energy Center CPCN were based upon evidence that "is no longer probative." Complaint at 5. They then claim that the record in another docket substantiates

the existence of health consequences related to wind energy facilities. Complaint at 5, citing to *Application of Wisconsin Electric Power Company for a Certificate of Public Convenience and Necessity to Construct a Wind Electric Generation Facility and Associated Electric Facilities to be known as the Glacier Hills Wind Park, Located in the Towns of Randolph and Scott, Columbia County, Wisconsin*, Docket No. 6630-CE-302, (the "Glacier Hills Wind Park" docket). The Wirtzs' arguments are meritless and should be rejected.

First, the Wirtzs' collateral attack on the Forward Energy Center Final Decision is barred by statute. Wis. Stat. § 196.491(3)(j) defines how a person may obtain relief from any alleged adverse effects of a CPCN:

Any person whose substantial rights may be adversely effected...by a certificate of public convenience and necessity for which an application is filed under par. (a)1. may petition for judicial review under ch. 227, of any decision of the Commission regarding the certificate.

Wis. Stat. § 196.491(3)(j). The Wirtzs chose not to become parties to the Forward Energy Center proceeding and did not exercise any appeal rights they may have had with respect to the Forward CPCN. Consequently, even if the Commission had jurisdiction to hear and adjudicate a personal injury claim (which it does not), the Wirtzs have no legal basis for their collateral attack on the Forward Energy Center Final Decision.

Second, the Wirtzs cite *Ecker Bros. v. Calumet County*, 2009 WI App 112, 772 N.W.2d 240 (*pet. denied* Nov. 12, 2009), as undermining the basis for the Commission's approval of the Forward Energy Center. To the contrary, *Ecker*

Bros. provides further support for the CPCN that the Commission issued to Forward. In *Ecker Bros.*, the Court of Appeals stated:

We read the Wisconsin statutes to say that our legislature favors alternative energy systems, such as the proposed wind energy system at issue in this case. We also read the statutes to disfavor wholesale local control which circumvents this policy.

Ecker Bros., 2009 WI App 112, ¶ 1; *see also id.* at ¶ 19 ("Here, the legislature already made the policy decision that it favors wind energy systems.") The Wirtzs' reliance on *Ecker Bros.* to support their effort to further burden wind resource developers is contrary to the intent of the legislature and the central holdings of that case.

Third, the Wirtzs' assertion that certain evidence relied on by the Commission in the Forward Energy Center proceeding is "no longer probative" does not advance the Wirtzs' argument. In the Final Decision, and contrary to the Wirtzs' contention, the Commission did not limit its finding that "the turbines will be sufficiently quiet to avoid undue hardship" on only a county ordinance and certain EPA guidelines. Complaint at 5. Rather, the Commission refers to "the record" as a whole in drawing this conclusion. Final Decision at 35.

Moreover, even if the Commission relied only on a county ordinance that has since been invalidated or on EPA guidelines that were in existence for a substantial amount of time, the Wirtzs provide no authority for their argument that the Commission should therefore revisit those rulings now. In fact, as the Wirtzs admit, the county ordinance was invalidated as a result of the Court of Appeals' decision in *Ecker Bros.* Complaint at 5. Consequently, as explained above, the

invalidation of that ordinance did not detract from the legitimacy of the Forward CPCN, and actually created additional bases for the issuance of that CPCN, *i.e.*, the overriding legislative intent to promote wind development. Also, the age of EPA guidelines says nothing about their substantive merit, and the Wirtzs fail to describe whether or how those guidelines are deficient.

Finally, in a subsequent decision, the Commission cemented the propriety of its conclusions in the Forward Energy Center Final Decision. In the recent Glacier Hills Wind Park docket, the Commission considered evidence that was offered to try to show that wind energy facilities diminish property values and cause adverse health effects. Complaint at 5-6. Despite a so-called "mass of evidence" on these issues, the Commission found that there was not sufficient evidence in the record to require a "property value protection plan" that would address a diminution in property value.⁵ The Commission also found that "there is not sufficient evidence in the record to conclude that the project would cause adverse health effects." *Id.* at 45.

The Commission does not have jurisdiction to adjudicate personal injury and property damage claims for which compensatory damages are sought. Moreover, it would be ill-advised policy for the Commission to entertain jurisdiction over claims like the Wirtzs', which would mire the Commission in cases that the legislature did not intend for the Commission to address and for

⁵ *Glacier Hills Wind Park*, Final Decision, January 22, 2010, Docket No. 6630-CE-302, at 31.

which the Commission is ill-suited to adjudicate. Finally, the Wirtzs' attempts to collaterally attack the record and Final Decision in the Forward Energy Center proceeding is prohibited by statute and substantively hollow. The Commission should deny the Wirtzs' request to open a docket and should not otherwise address their claims.

II. THE WIRTZS FAIL TO MEET THE REQUIREMENTS FOR INTERVENTION IN THE FORWARD ENERGY CENTER PROCEEDING OR THE LEDGE WIND PROCEEDING.

The Wirtzs seek a forum for their claims in either a new contested case proceeding, the Forward Energy Center proceeding, or the Ledge Wind proceeding. As shown above, the Commission lacks jurisdiction over their claims and should deny their request to open a new docket. The Wirtzs' attempt to inject themselves into the Forward Energy Center proceeding or the Ledge Wind proceeding is a transparent attempt to gain leverage against Invenergy and its affiliates with the extortive threat of disrupting regulatory proceedings in which those entities have a significant interest. The Wirtzs fail to demonstrate a basis to intervene in either proceeding and their requests to intervene should be rejected.

A. The Wirtzs Cannot Intervene In The Forward Energy Center Proceeding.

The Forward Energy Center proceeding concluded nearly five years ago when the Commission issued its Final Decision granting a CPCN.⁶ In their

⁶ The Wirtzs claim that the Commission has not closed the Forward docket and continues to require Forward to report on the progress of that project. Complaint at 8. The requirement of submitting progress reports does not render the Final Decision incomplete. The notice of appeal rights appended to the Final Decision make clear that the Final Decision effectively terminated the Forward docket, but for Forward's (footnote continued)

Complaint, the Wirtzs do not contend that Forward Energy has violated the terms of the CPCN in any manner. Under the Commission's rules, the Wirtzs cannot intervene in that proceeding. Even if the Commission entertains the Wirtzs' request to intervene in the Forward Energy Center proceeding, the Wirtzs have failed to make the requisite showing for intervention. As for the Ledge Wind proceeding, that matter relates to property in Brown County—many miles away from the Wirtzs' residence. The Wirtzs lack standing to pursue intervention in the Ledge proceeding. The Wirtzs should not be permitted to intervene in either the Forward Energy Center proceeding or the Ledge Wind proceeding.

The Forward Energy Center proceeding concluded nearly five years ago, and all appeal rights have terminated. The Commission's rules do not anticipate intervention at this stage of the proceedings, presumably in recognition of the fact that allowing additional parties to intervene would serve no purpose. Intervenors in Commission proceedings have the right to:

- Serve discovery on other parties (Wis. Admin. Code § PSC 2.24);
- Prepare and file pre-filed testimony (Wis. Stat. § 227.18(c));
- Participate in technical hearings by submitting testimony and cross examining witnesses (Wis. Stat. §§ 227.18(1)(c), 227.18(2)(b));
- Submit post-hearing briefs (Wis. Admin. Code § PSC 2.26);
- Comment on briefing memoranda and decision matrices prepared by Commission Staff (Wis. Admin. Code § PSC 2.25); and

compliance with certain conditions none of which relate to providing compensation to individuals allegedly adversely affected by the project. *See e.g.*, Final Decision at 44 and Appendix B.

- Appeal Commission orders within 30 days (Wis. Stat. § 227.53(1)(a)2).

In the Forward Energy Center proceeding, the opportunity for each of these actions has come and gone. There is no provision in the Wisconsin Statutes or Administrative Code that allows intervention in a proceeding after the Commission has rendered its decision and the time for appeal has run, and for good reason. Simply put, there is nothing for new intervenors to do at that stage.

Even if intervention were possible, the Wirtzs have failed to make the requisite showing to obtain party status. In the Forward Energy Center proceeding, the Commission issued a Notice of Proceeding and Prehearing Conference on January 24, 2005 in which it stated that "[a]ny person desiring to become a party shall file a request pursuant to Wis. Stat. § 227.44(2)(m) and Wis. Admin. Code. § PSC 2.21 no later than fourteen days from the date of this notice. *See* Forward Energy Center Notice. The Wirtzs do not claim to have sought party status in the Forward Energy Center proceeding. Consequently, the Commission's rules relating to "intervention out of time" would govern the Wirtzs' request to intervene in the Forward proceeding, rather than the "intervention by right" or "permissive intervention" standards cited by the Wirtzs.

The Commission's rules establish requirements for intervention out of time, which the Wirtzs cannot meet. Intervention out of time is governed by Wis.

Admin. Code § PSC 2.21(4) which provides as follows:

- (4) Intervention out of time.** (a) If a person fails to request intervention within the time prescribed in sub. (3), the person must request to intervene out of time. In acting on such a request, the

commission or administrative law judge may consider all of the following:

1. Whether the requestor had good cause for failing to file the request within the prescribed time.
2. Whether any disruption of the proceeding or docket may result from permitting intervention.
3. If any prejudice to, or additional burdens upon, the existing parties may result from permitting the intervention.

Wis. Admin. Code § PSC 2.21(4).⁷ Further, Wis. Admin. Code § 2.05(3)(a)

provides:

When an act is required by law or by order to be done at or within a specified time, the period of time may be enlarged, but only for good cause shown and upon just terms. Requests shall be made within a reasonable time prior to the expiration of the period in question. *Requests made after the expiration of the period in question shall not be granted unless the failure to act was the result of excusable neglect.*

(emphasis added). The Wirtzs are unable to meet these standards, and their request should be denied.

The Wirtzs fail to credibly explain why they did not participate in the Forward Energy Center proceeding. Moreover, the disruption that would result in the Forward Energy Center proceeding is significant—the Wirtzs have signaled their intent to challenge the record in that proceeding as well as the conclusions in the Final Decision. The Forward CPCN formed the basis of the economics of that development. The Forward Energy Center is currently operating consistent with

⁷ This Administrative Code provision also discourages late additions or modifications to the record: "Except as otherwise ordered, a late intervenor shall accept the record of the proceeding or docket as the record was developed prior to the late intervention." Wis. Admin. Code § PSC 2.21(4)(d). This provision further contravenes the Wirtzs' collateral attack on the record in the Forward Energy Center proceeding.

its CPCN, to change the rules under which Forward has been operating at this point, or to penalize Forward despite its compliance with those rules, is patently unfair, disruptive, burdensome, and prejudicial. The Wirtzs' attempt to inject their claims into the Forward Energy Center proceeding should be rejected.

B. The Wirtzs Cannot Intervene In the Ledge Wind Proceeding.

As for the Ledge Wind proceeding, the Wirtzs' request to intervene should be denied because the Wirtzs lack standing to intervene in the Ledge Wind proceeding. The Wirtzs do not claim to be entitled to "intervention by right" under Wis. Admin. Code § PSC 2.21(1), which requires that the potential intervenor have "substantial interests [that] may be affected by the Commission's action or inaction in a proceeding..." *See* Wis. Admin. Code § PSC 2.21(1). Rather, it appears that the Wirtzs seek "permissive intervention" under Wis. Admin. Code § PSC 2.21(2) because they claim that "[p]articipation by the Wirtzs [in the Ledge Wind proceeding] would assist the Commission..." *See* Complaint at 9. The Wirtzs' claim appears to be premised on their assertion that "Invenergy cannot meet its burden of proof unless, at a minimum, it satisfies the Commission that it has fairly treated the Wirtzs and other similarly situated residents of the [Forward Energy Center]." Complaint at 9.

The Wirtzs' position is without basis. The residents within the Ledge Wind footprint are capable of representing their interests before the Commission without the Wirtzs. Further, intervention by the Wirtzs is intended to create a distraction that relates to a different wind energy facility several counties away. Finally, the

"burden of proof" identified by the Wirtzs is not based on any statute that governs the Ledge Wind proceeding, which explains the Wirtzs' failure to provide any citation to authority for its proposition. The Ledge Wind project is not dependent on Invenergy, Forward, or any other entity having met some unspecified standard of fair treatment in other projects. The Ledge Wind CPCN application will stand on the record related to the Ledge Wind project.

Neither the Forward Energy Center proceeding nor the Ledge Wind proceeding should be manipulated into a forum for the Wirtzs' baseless claims, over which the Commission has no jurisdiction. At a minimum, the Commission should turn aside the Wirtzs' novel attempt to intervene in a proceeding by filing a complaint, as opposed to following the procedural requirements of Wis. Admin. Code § PSC 2.21(3), and should reject the Wirtzs' request as premature given that no notice of proceeding has been issued in that case and the Commission has not yet voted to open a docket to address that matter. *See* Wis. Admin. Code § PSC 2.21(3).

CONCLUSION

The Commission's jurisdiction does not extend to claims for personal injury and property damage that allegedly result from the operations of an energy facility operating pursuant to a CPCN. Moreover, the Wirtzs have failed to identify any legal basis, or demonstrate the existence of any facts, that would permit their intervention in the Forward Energy Center proceeding or the Ledge Wind proceeding. Consequently, the Commission should deny the Wirtzs' request to

open a docket to address their claims and should deny their request to intervene in the Forward Energy Center proceeding or the Ledge Wind proceeding.

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Attorneys for INVENERGY LLC

/s/ Bryan K. Nowicki _____

Peter L. Gardon
Bryan K. Nowicki
Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, WI 53703
Telephone: 608-229-2200
Facsimile: 608-229-2100
pgardon@reinhartlaw.com
bnowicki@reinhartlaw.com

and

William Borders
Deputy General Counsel
Invenergy LLC
One South Wacker Drive
Suite 1900
Chicago, IL 60606
Telephone: 312-582-1460
Facsimile: 312-224-1444
wborders@invenergyllc.com

REINHART\3501805