

BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN

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Petition for Solar Siting Rulemaking of the  
Jewell Jinkins Intervenors

Docket No. 1-AC-254

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**RESPONSE IN OPPOSITION TO PETITION FOR SOLAR SITING RULEMAKING  
OF THE JEWELL JINKINS INTERVENORS**

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Pursuant to Wis. Admin. Code ch. PSC 2.07(4), Badger Hollow Solar Farm LLC ("Badger Hollow") provides its response in opposition to the Petition for Solar Siting Rulemaking ("Petition") of Jewell Jinkins Intervenors ("Petitioner"). For the following reasons, the Jewell Jinkins Intervenors' request should be denied.

**INTRODUCTION**

The Commission's review of large scale solar projects is governed by Wis. Stat. § 196.491, which outlines a detailed statutory process with which the Commission has extensive experience. There is no support or need to add additional layers of regulations to that process. There also is no support for the solar siting rules the Petitioner seeks—even the signatures on the Petition raise questions concerning who is pursuing this effort. The rules the Petitioner seeks also lack the legislative support that served as the impetus for the Commission to promulgate siting rules applicable to wind facilities. Moreover, the Petitioner states that it is pursuing rules similar to the siting rules that exist for wind facilities. It fails to disclose, however, that even those rules are not mandatory for large scale wind projects reviewed by the Commission, yet they seek to impose solar siting rules specifically on every large scale solar project. Finally, the Petitioner appears to model its requested rules on subject areas that are more appropriately addressed, and in many cases already addressed, by the Commission's application filing requirements.

In short, the Petitioner is asking the Commission to promulgate rules that will result in the broadest and most burdensome regulatory regime applicable to renewable energy facilities. The Petitioner seeks these rules so that it can improve its litigation position and advance its case-specific, individualized interests in another docket pending before the Commission, the CPCN Application proceeding relating to the Badger Hollow Solar Farm (Docket No. 9697-CE-100). These are not the circumstances under which the Commission will be able to conduct any appropriate and thoughtful rulemaking proceeding.

More troubling, however, is the gamesmanship employed by the Petitioner in its attempt to initiate a rulemaking proceeding. In the Solar Farm Docket, the Petitioner has alternated between pursuing its claims as individuals<sup>1</sup> and pursuing its claims as a corporate entity those individuals formed.<sup>2</sup> The Petitioner switches guises based only on its convenience and litigation strategy. As individuals, they intervened in the Solar Farm Docket by focusing on their ties to the community and their interests in land near the proposed Badger Hollow Solar Farm. Using the corporate entity, however, they are seeking intervenor compensation in that same docket by giving the appearance of a non-profit public interest organization with broad-ranging interests, but of limited financial means.

Unfortunately, the Petitioner's corporate shell game has extended into this potential rulemaking docket. As individuals, each separately signed the Petition, apparently to attempt to meet the statutory five person threshold for such petitions found in Wis. Stat. § 227.12(1). However, each Petitioner signed the Petition in their capacity as an officer of their corporate entity, Jewell Jinkins Intervenors, Inc. (*i.e.*, Alan Jewell, President; Marcia Jewell, Secretary;

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<sup>1</sup> The individuals are Richard and Patricia Jinkins, Alan and Marcia Jewell, and Wade Wendhausen.

<sup>2</sup> The corporate entity is Jewell Jinkins Intervenors, Inc. This corporate entity is not an intervenor in the Solar Farm Docket.

etc.). They cannot have it both ways, and the Petitioner's expanding and opportunistic manipulation of its status must end. For all of these reasons, the Petition should be denied.

### ARGUMENT

Petitions for rules are governed by Wis. Stat. § 227.12, which provides in part as follow:

- (1) Unless the right to petition for a rule is restricted by statute to a designated group or unless the form of procedure for a petition is otherwise prescribed by statute, a municipality, an association which is representative of a farm, labor, business or professional group, *or any 5 or more persons having an interest in a rule may petition an agency requesting it to promulgate a rule.*
- (2) A petition shall state clearly and concisely:
  - (a) The substance or nature of the rule making requested.
  - (b) The reason for the request and the petitioners' interest in the requested rule.
  - (c) A reference to the agency's authority to promulgate the requested rule.

Wis. Stat. § 227.12 (emphasis supplied).

The Commission rules govern how the Commission must address such petitions:

Within 60 days from the date of receipt of a request to open a docket, a petition for rules, or a petition for a declaratory ruling, the commission shall either deny the request or petition, or open a docket. If the request or petition is denied, the commission shall promptly notify the person making the request or filing the petition of its decision, including a brief statement of the reasons for its decision.

Wis. Admin. Code § PSC 2.07(5); *see also*, Wis. Stat. § 227.12(3).

Petitions for rules invoke a comprehensive, labor intensive, deliberative, and quasi-legislative process, but has been filed here in the midst of the Commission's review of a pending solar project which must be addressed within a tight statutory time frame. The Petition does not meet the statutory prerequisite to commence a rulemaking proceeding and fails to advance a persuasive argument in favor of a rulemaking proceeding.

**I. THE PETITION DOES NOT IDENTIFY A BASIS FOR THE COMMISSION TO PROMULGATE SOLAR SITING RULES.**

The Petition does not present information demonstrating a need for solar siting rules or a clear and concise "reason for the request" as required by Wis. Stat. § 227.12(2). Instead, the Petition merely makes a few conclusory statements about how a lack of "rules for guidance" is "a set up for improper siting." (Petition, p. 2). The Petitioner cites its "experience thus far with a very large solar project" as if that demonstrates the Petitioner's knowledge or competence in this area. However, Richard and Patricia Jinkins, Alan and Marcia Jewell, and Wade Wendhausen have only been parties in the Solar Farm Docket since November 1, 2018, and Jewell Jinkins Intervenors, Inc. has only existed since November 20, 2018. There is no evidence that the Petitioner has any other involvement with any kind of generation development.

The Petitioner's comparison of its request for solar siting rules to the wind siting rules further demonstrates that there is no basis to promulgate solar siting rules. The wind siting rules did not arise from a petition under Wis. Stat. § 227.12 by a group of individuals. Rather, the state legislature first created the Wind Siting Council through 2009 Wis. Act 40 and gave it the following charge: "The wind siting council shall survey the peer-reviewed scientific research regarding the health impacts of wind energy systems and study state and national regulatory developments regarding the siting of wind energy systems." Wis. Stat. § 196.378(4g)(e). The legislature mandated the ongoing nature of that Council: "No later than October 1, 2014, and every 5 years thereafter, the wind siting council shall submit a report to the chief clerk of each house of the legislature . . . describing the research and regulatory developments and including any recommendations of the council for legislation that is based on the research and regulatory developments." *Id.*

The legislature also directed the Commission to consult with the Wind Siting Council before promulgating the rules applicable to wind energy systems. Wis. Stat. § 196.378(4g)(c). The legislature also ordered the Commission to promulgate those rules. *Id.*

Here, no one other than the Petitioner—who happens to simultaneously be trying to halt the development of the Badger Hollow Solar Farm—has sought such rules. In the Solar Farm Docket, Alan Jewell has explicitly cited the lack of rules as a reason to deny the Application: "It is absurd to attempt to site a project of this 22 magnitude with a large number of potential impacts, without solar specific regulations." (Direct-Jewell Jinkins Intervenors-Jewell-15) (PSC REF#:355346). The current Petition merely closes the circle on the Petitioner's litigation strategy, and does not otherwise justify the opening of a rule-making docket.

## **II. THE PETITION DOES NOT IDENTIFY A REASONABLE SCOPE OF THE RULES IT WANTS THE COMMISSION TO PROMULGATE.**

The Petitioner wants the Commission to promulgate rules that would either be inapplicable to the large scale solar projects about which they voice concern, or that would be inconsistent with the Commission's approach to the wind siting rules that the Petitioner wants to emulate. Either way, the Petitioner's request, if granted, would lead to the unprecedented promulgation of unnecessary additional rules in an already heavily regulated area.

The Petition states that "This rulemaking is targeted at promulgating rules for solar similar to those for wind found in Wis. Code Chapter 128. . ." (Petition, p. 1). If a similar set of rules are promulgated for solar facilities, then they would not have the binding effect on large scale solar projects that the Petitioner seems to desire.

The wind rules found at Wis. Admin. Code Ch. PSC 128 apply to "a political subdivision's review of a proposed wind energy system or regulation of a wind energy system under s. 66.0401, Stats." Wis. Admin. Code § PSC 128.02(1)(a). A "political subdivision"

means "a city, village, town, or county," and does not include the Commission. *See* Wis. Stat. § 66.0401(c) and Wis. Admin. Code § PSC 128.01(16). The rules impose mandatory requirements on wind energy systems reviewed by a "political subdivision," as evidenced by the repeated use of the word "shall" in terms of siting, noise, and other design criteria, *e.g.*, "An owner *shall* design and construct a wind energy system using the wind turbine setback distances shown in Table 1." *See* Wis. Admin. Code § 128.13(1)(a).

For matters coming before the Commission, however, which include projects in excess of 100 MW like the Badger Hollow Solar Farm, these rules are only non-binding "considerations": "The commission shall consider whether the installation or use of a wind energy system is consistent with the standards specified in this chapter when reviewing an application under s. 196.491 (3) (d), Stats., filed on or after March 1, 2011." *See* Wis. Admin Code § PSC 128.02(3). The Commission is able to "apply[] requirements to an individual wind energy system that may be lesser, greater, or different from those provided in this chapter." Wis. Admin. Code § PSC 128.02(4).

Therefore, promulgating solar rules "similar to those for wind found in Wis. Code Chapter 128" would not necessarily accomplish the Petitioner's goal. If, on the other hand, the Petitioner wants solar rules "similar to those for wind found in Wis. Code Chapter 128" but made binding on the Commission's review of solar projects, then the Petitioner is seeking rules that go well beyond the effect of the wind rules in Wis. Admin. Code Ch. 128, but fails to provide any reason for the Commission to so drastically alter its approach to its CPCN application review process.

### **III. THE PETITION SEEKS RULES ADDRESSING SUBJECTS ALREADY ADEQUATELY ADDRESSED IN THE CURRENT CPCN REVIEW PROCESS.**

The CPCN process currently in place for large scale utility projects like the Badger Hollow Solar Farm includes the submission of a detailed application that covers a broad range of topics. In the Badger Hollow Solar Farm Docket, Commission staff provided guidance to Badger Hollow regarding the content of its Application. Commission staff used the Commission's "Application Filing Requirements-Wind Energy Projects" as a starting point, and customized them to address the different and peculiar aspects of a solar project. These "Application Filing Requirements" are not formal rules or regulations, but merely help ensure that the Commission is presented with sufficient information to adequately evaluate a CPCN application.

The Petition identifies a laundry list of subject areas in which it wants the Commission to impose additional rules and regulations. (Petition, p. 2). Its extensive list appears more like the set of "Application Filing Requirements" than the non-binding wind rules that the Petitioner wants to use as a model. The Petition goes even further and requests that the Commission also "update categories of environmental review," (Petition, p. 2), apparently so that an Environmental Assessment or an Environmental Impact Statement would become mandatory for large scale solar projects (neither is currently required, *see* Wis. Admin. Code § PSC 4.10(3) and Table 3). The Petition also seeks rules relating to noise. (Petition, p. 3).

These areas identified in the Petition, however, already are addressed or can be addressed without the new, unprecedented regulatory regime that the Petitioner seeks. The Petitioner wants rules that presumably would bind solar project developers and the Commission to a host of requirements on a seemingly endless list of project characteristics—the Petition's list concludes with "and other issues that become apparent in the rulemaking process." (Petition, p. 2). The

subject areas listed in the Petition and that are material to solar projects already are addressed under the current CPCN review process. (Compare the Application with Petition, p. 2). Moreover, the Petitioner's request that environmental review requirements be updated is irrelevant in the case of the Badger Hollow Solar Farm because, in that matter, the Commission has conducted an Environmental Assessment even though it is not required by applicable rules.

The Commission has a wealth of experience in evaluating electric generation projects under the CPCN process, including the subject areas identified in the Petition, without the constraints and diminished discretion that a new set of rules would impose. The Petitioner has failed to demonstrate that the current process is in need of burdensome new rules to operate properly and effectively.

#### **IV. THE PETITION DOES NOT MEET THE THRESHOLD SIGNATURE REQUIREMENT.**

A petition for a rule may only be submitted by a group of five or more persons. Under Wisconsin law, a "person" includes individuals as well as "all partnerships, associations and bodies politic or corporate." Wis. Stat. § 990.01(26). Therefore, if individuals wanted to submit a petition for a rule, then at least five distinct individuals would need to join in that effort. If a group of corporations wanted to submit a petition for a rule, then at least five distinct corporations would need to join in that effort. Here, the Petitioners each signed the Petition but, as the signature lines show, they did so solely in their capacity as officers of a single corporation. Therefore, only one "person," *i.e.*, Jewell Jinkins Intervenors, Inc., submitted the Petition. The

Petitioner failed to meet the statutory threshold of five "persons," and therefore the Petition must be denied.<sup>3</sup>

### **CONCLUSION**

The Petition appears to be a delaying tactic filed to try to put off Commission action on Badger Hollow's Application for a Certificate of Public Convenience and Necessity in Docket No. 9697-CE-100. Not surprisingly, as a contrivance, the Petition lacks any substantive merit. For the foregoing reasons, the Petition should be denied.

Dated this 27th day of December, 2018.

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SOLAR FARM LLC

*/s/ Bryan K. Nowicki*

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<sup>3</sup> The Petitioner's counsel also signed the Petition. Even if the Petitioner's counsel comprised a separate "person" for purposes of Wis. Stat. § 227.12(1), which seems doubtful, the Petitioner still falls three "persons" short of the statutory requirement.