No. 20-3325

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Driftless Area Land Conservancy and Wisconsin Wildlife Federation,
Plaintiffs-Appellees,

v.

Michael Huebsch and Rebecca Valcq
Defendants-Appellants.

American Transmission Company, LLC, et al.
Intervening Appellants

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
Case No. 19-cv-1007
The Honorable William M. Conley, Judge

MOTION SEEKING LEAVE TO FILE AND ATTACHED BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS SUPPORTING DEFENDANTS-APPELLANTS PETITION SEEKING REVERSAL

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January 22, 2021

Motion Seeking Leave to File as Amicus Curiae

Pursuant to Federal Rules of Appellate Procedure Rules 27(a) & (d)(2)(A) and 29 (a)(3) & (b)(2), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully request leave of Court to file a brief as *Amicus Curiae* supporting the January 15, 2021 *Initial Brief of Defendants-Appellants Michael Huebsch and Rebecca Cameron Valcq* ("*Initial Brief*"). The amicus brief is attached to this motion. We are filing this motion because, though NARUC requested consent of all parties to file, Plaintiffs-Appellees objected. Defendants-Appellants lodged this interlocutory appeal of *Opinion and Order* of the United States District Court for the Western District of Wisconsin entered November 20, 2020.[1] The *Opinion* denies in part and grants in part a Defendants motion to dismiss.

Movant's Interest

NARUC is a quasi-governmental nonprofit organization founded in 1889. For the last 130 years, NARUC has represented the interests of public utility commissioners from agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands. NARUC's member commissions include the State agencies engaged in the economic, rate, safety and the reliability regulation of public utilities that provide electricity and natural gas services. These State officials have

[1] *Driftless Area Land Conservancy v. PSCW*, No. 19-CV-1007-WMC, 2020 WL 6822707 (W.D. Wis. Nov. 20, 2020). ("*D.Ct. Opinion*") *App. Appendix at* 1–36.

the obligation under State law to assure the establishment and maintenance of such energy utility services as may be required by the public convenience and necessity, and to ensure that such services are provided at rates and conditions that are just, reasonable and nondiscriminatory for all consumers.

Congress references NARUC as "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities.[2] Both Congress and the courts[3] have consistently recognized NARUC as a proper entity to represent the generic interests of every State's utility commission.

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[2] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq*., Pub. L. No. 101-104, 110 Stat. 56 (1996). *See* 47 U.S.C. §410(c) (1971) (NARUC nominates members to Federal-State boards which consider universal service, separations, and other issues and provide recommendations the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing the universal service board's functions). *See also*, *NARUC, et al. v. ICC,* 41 F.3d 721 (D.C. Cir 1994) ("[c]arriers, to get the cards, applied to [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued.")

[3] *See United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985); (where the Supreme Court notes: "The District Court permitted (NARUC) to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. *See also*, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); *Compare*, *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

This appeal addresses one of two ongoing challenges brought by *Plaintiffs-Appellees* Driftless Area Land Conservancy ("DALC") and the Wisconsin Wildlife Federation ("WWF" and together with DALC, "Plaintiffs") to essentially vacate the Public Service Commission of Wisconsin's ("PSC") *2019 Decision*[4] to grant transmission companies a Certificate of Public Convenience and Necessity authorizing them to construct a high-voltage transmission line in Wisconsin. This PSC decision approves the last "multi-value project" subject to tariff provisions upheld by this Court in *Illinois Commerce Commission v. Federal Energy Regulatory Commission*, 721 F.3d 764, 771 (7th Cir. 2013).

NARUC's State commission members are concerned by the issues presented for review. This Court's disposition of this appeal is likely to have a national impact. Certainly it could have a critical impact on future State siting decisions and the ability of State commissioners to monitor Regional Transmission Operator/Independent System Operator ("RTO/ISO") action and plans. It could open the door for expensive, duplicative, and potentially unnecessary litigation wasting both the State commissions' and the federal judiciaries' limited resources. It will also increase the risk of meritless claims of commissioner bias as a basis for

[4] *Final Decision Approving the Joint Application for a Certificate of Public Convenience and Necessity to Construct and Operate the Cardinal-Hickory Creek 345-kV Transmission Line Project, Public Service Commission of Wisconsin*, Docket No. 05-CE-146 (Sept. 26, 2019) ("*PSC's 2019 Decision*" or "*2019 Decision*") *App. Appendix* 140 – 241.

delaying any decision. Any close examination of the record of this proceeding indicates, as pointed out in the *Initial Brief*, the Plaintiffs' failed to "identify any facts indicating there was a risk of actual bias" and "the record contains no support for such contentions." *Initial Brief* at 16. Because of the range of likely impacts, and also because of the threatened inappropriate expansion of the *Ex parte Young* doctrine,[5] *NARUC's counsel has been specifically instructed by its members to support the Wisconsin commissioners targeted by this litigation.*

Reason to Grant the Writ

The criterion for deciding whether to permit filing of an *amicus* brief is whether it will assist judges by presenting ideas, arguments, theories, insights, facts or data that are not to be found in parties' briefs. F.R.A.P. Rule 29, 28 U.S.C.A.; *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003).

NARUC's brief fits that criterion. It does not merely duplicate *Defendants-Appellants'* arguments. Knowledge of the likely impact of permitting the District Court litigation to proceed on State procedures and the formation of energy policy nationwide provides this court with a necessary backdrop to the arguments presented by *Defendant-Appellants*. Because of its members and experience, NARUC is well positioned to highlight that impact. Moreover, there is no question that in this case, NARUC members have a "direct interest . . . that may be materially affected by a

[5] *Ex parte Young*, 209 U.S. 123 (1908).

decision in this case" and that NARUC "has a unique perspective or specific information that can assist the court." *Id.*

Mindful of Judge Michael Scudder, Jr.'s instructions in *Prairie Rivers Network v. Dynergy Midwest Generation, LLC,* 976 F.3rd 761, 763 (7th Cir. 2020), *Amicus* scrutinized the arguments presented by *Defendants-Appellants* and Intervenors-Appellants filed last Friday to limit any repetition. This brief will amplify some of those arguments as a preface to its focus on the likely broad national consequences if the District Court litigation is allowed to continue. NARUC also provides a slightly different angle to one aspect of the legal argument provided by *Defendants-Appellants*. For the forgoing reasons, NARUC requests leave to file.

Respectfully submitted,

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January 22, 2021

F.R.A.P. AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. Its members include the governmental bodies of the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands, responsible for the intrastate operation of carriers and utilities. NARUC does not have a parent company, subsidiary, or affiliate. NARUC's General Counsel Brad Ramsay, a member of the bar of this court, is NARUC's counsel of record. Jennifer Murphy, NARUC's Director of Energy Policy & Senior counsel is also on brief.

[1] Full name of every party the attorneys represents in this case: National Association of Regulatory Utility Commissioners.

[2] Law firms whose lawyers have/may appear for NARUC: N/A

[3] NARUC's parent corporations, if any: N/A

Publicly held company with 10% of NARUC stock: N/A

[4] Information required by FRAP 26.1(b): N/A

[5] Debtor information required by FRAP 26.1 (c) 1 & 2: N/A

[6] Who will enter an appearance for NARUC:

/s/ James Bradford Ramsay GENERAL COUNSEL*
/s/ Jennifer Murphy DIRECTOR OF ENERGY POLICY & SENIOR COUNSEL

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Interest of Amicus

NARUC is a quasi-governmental nonprofit organization founded in 1889. For the last 130 years, NARUC has represented the interests of public utility commissioners from agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands. Member commissions are engaged in the economic, rate, safety and the reliability regulation of public utilities that provide, among other things, electricity and natural gas services. These officials have the obligation under State law to assure that energy utility services are established and maintained. They are charged with ensuring such services are provided at rates and conditions that are just, reasonable and nondiscriminatory for all consumers.

Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities.[6]

[6] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq*., Pub. L. No. 101-104, 110 Stat. 56 (1996). *See* 47 U.S.C. §410(c) (1971) (NARUC nominates members to Federal-State boards which consider universal service, separations, and other issues and provide recommendations the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing the universal service board's functions). *See also*, *NARUC, et al. v. ICC,* 41 F.3d 721 (D.C. Cir 1994) ("[c]arriers, to get the cards, applied to [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued.")

Both Congress and the courts[7] have consistently recognized NARUC as a proper entity to represent the generic interests of every State's utility commission.

Defendants-Appellants' ("Defendants") have asked this court to review the *Opinion and Order* ("*D.Ct. Opinion*") of the United States District Court for the Western District of Wisconsin entered November 20, 2020.[8]

This appeal addresses one of two ongoing challenges brought by Plaintiffs-Appellees Driftless Area Land Conservancy ("DALC") and the Wisconsin Wildlife Federation ("WWF" and together with DALC, "Plaintiffs"). Both appeals raise the same alleged bias and ask different Courts to essentially vacate the Public Service Commission of Wisconsin's ("PSC") *2019 Decision.*[9] That decision granted three transmission companies a Certificate of Public Convenience and Necessity

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[7] *See United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985); (where the Supreme Court notes: "The District Court permitted (NARUC) to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. *See also*, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); *Compare*, *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[8] *Driftless Area Land Conservancy v. Public Service Commission of Wisconsin*, No. 19-CV-1007-WMC, 2020 WL 6822707 (W.D. Wis. Nov. 20, 2020).

[9] *Final Decision Approving the Joint Application for a Certificate of Public Convenience and Necessity to Construct and Operate the Cardinal-Hickory Creek 345-kV Transmission Line Project, Public Service Commission of Wisconsin*, Docket No. 05-CE-146 (Sept. 26, 2019) ("*PSC's 2019 Decision*" or "*2019 Decision*") *App. Appendix* 140 - 241

authorizing the construction of a high-voltage transmission line in Wisconsin. The *2019 Decision* approves the last "multi-value project" subject to tariff provisions upheld by this Court in *Illinois Commerce Commission v. Federal Energy Regulatory Commission*, 721 F.3d 764, 771 (7th Cir. 2013). The second Plaintiff appeal was filed in State court and is ongoing.

NARUC's State commission members are concerned by the issues presented for review. The disposition of this appeal is likely to have a national impact. Certainly it could have a critical impact on future State siting decisions and State commission's ability to monitor Regional Transmission Operator/Independent System Operator ("RTO/ISO") action and plans.

Several factors appear relevant to the proceeding's impact on public policy and resources. First, there is the Court's misapplication of the standard to evaluate a bias claim. Second, and perhaps most significantly, there is the Plaintiff's failure to provide any actual evidence of bias. Third, there is the fact that NARUC member commissioners around the country, to do their job effectively, are routinely required to engage in practices the Plaintiffs uses in this case as a pretext to allege bias. Finally, there is an ongoing State judicial proceeding to available vindicate any due process violations that may have occurred. All weigh in favor of granting Defendants request.

If the District Court litigation proceeds, it will encourage expensive, duplicative, and potentially unnecessary litigation that wastes both the State and the federal judiciary's limited resources. It will certainly also increase the risks (and costs) of meritless claims of commissioner bias by any party unhappy with a commission decision. Any close examination of the record indicates, as Defendants point out, the Plaintiffs' utterly fail to "identify any facts indicating there was a risk of actual bias" and "the record contains no support for such contentions."[10] Because of the range of likely impacts, and also because of the threatened inappropriate extensive expansion of the *Ex parte Young* doctrine,[11] *NARUC's counsel has been specifically instructed by its members to support the Wisconsin commissioners targeted by this litigation.*

Mindful of Judge Michael Scudder, Jr.'s instructions in *Prairie Rivers Network v. Dynergy Midwest Generation, LLC, 976 F.3rd 761, 763 (7th Cir. 2020), Amicus* scrutinized the arguments presented by *Defendants-Appellants* and Intervenors-Appellants to limit repetition. This brief will amplify some of those arguments as a backdrop to a focus on the likely broad national consequences if District Court litigation is allowed to continue.

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[10] *Initial Brief of Defendants-Appellants Michael Huebsch and Rebecca Cameron Valcq* (filed January 15, 2021 in 7th Circuit Case No. 20-3325), at 16. ("*Initial Brief*")

[11] *Ex parte Young*, 209 U.S. 123 (1908).

Rule 29(a)(4)(E) Certification

The undersigned certify that they authored the brief and that no other entity, party, or parties' counsel contributed funds to support its preparation or submission.

Argument Summary

Defendants, on Brief, have already demonstrated that none of the "evidence" below amounts to bias, let alone constitutionally cognizable bias that passes muster in the Seventh Circuit. Without question, if this litigation is allowed to progress beyond the motion to dismiss, it will greenlight the bootstrapping of bare allegations of bias into a potentially duplicative standalone §1983–based lawsuits.

If other disgruntled parties use Plaintiff's conduct below as a template, the bias complaints will be filed shortly before a final decision is released but after the commission has telegraphed the expected resolution. And, the allegations of bias will be largely based on information well known to utility sector professionals.

Unfortunately, the damage will not be limited to the waste of time and resources associated with duplicative federal and state proceedings that target the same issue.

The unsupported allegations of bias are also all based on two circumstances common to most commissions across the country: employees with some work history in the regulated sector and commission participation in FERC-approved (and required) regional transmission planning procedures.

For example, in the absence of demonstrated bias,[12] Plaintiffs rest their case for claiming Chair Valcq is biased, principally on the fact she had prior experience representing a non-party that held a majority stake in a party involved in the PSC proceeding.[13] She is not alone. Many Commissioners previously held jobs in regulated sectors. In some cases, that's *why* they are chosen to be commissioners. The opportunities for abusive duplicative federal lawsuits filed for tactical advantage is obvious. All that would be required to pierce sovereign immunity and gain an additional forum focused solely on allegations of due process violations (along with broader discovery and additional press) is a simple statement of fact – with no supporting evidence of bias. A party merely has to point out that a commissioner once worked for or with a company that is not a party to a proceeding, but has some connection – tenuous or otherwise - to a company or party who is.

There are well-developed state rules that establish when recusal by a commissioner is appropriate. For commissioners to also be subject to a parallel, less-defined constitutional due process set of "bias" restraints, which potentially could be raised collaterally in virtually every case without a sovereign immunity bar,

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[12] The Plaintiffs did not provide the PSC with any evidence of bias with respect to Chair Valcq's work history or otherwise. *2019 Decision, App. Appendix* at 220 – 226.

[13] *Complaint of Plaintiffs Driftless Area Land Conservancy and Wisconsin Wildlife Federation* (Dec. 11, 2019) filed in United States District Court, Western District of Wisconsin Case No. 19-cv-1007. ("*Bias Complaint*") *App. Appendix* at 46 – 47.

will be disruptive. It also will make commissioners targets of unsubstantial and unsupported personal attacks on their character – attacks that will impair the willingness of individuals to serve.

But there is an additional practical impact that is arguably worse in terms of its potential effect on public policy. The District Court's decision to proceed to examine bare allegations of bias against Commissioner Huebsch based on his interactions with MISO. That threatens to upend national RTO/ISO governance and undermine efficient regional transmission planning.

Finally, the District Court's analysis appears to create a new standard to permit a parallel federal court proceeding piercing sovereign immunity because of alleged unconstitutional bias: plaintiffs need only allege ***some*** facts that indicate personal bias, regardless of plausibility or evidentiary support, to survive a motion to dismiss. That approach ignores both (i) Seventh Circuit precedent specifying the standard necessary to dispose of procedural due process claims of judicial bias and (ii) the presumption that state public service officials are "presumed to act in good faith, honestly, and with integrity."[14]

The law provides no basis for this lawsuit to continue. The Court should grant the relief sought by Defendants and reverse the decision below.

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[14] *Head v. Chicago School Reform Board of Trustees*, 225 F.3d 794, 804 (7th Cir. 2000).

Argument

I. Because the facts presented do not meet the standard necessary to find constitutionally cognizable bias, allowing the District Court proceeding to continue will have negative policy consequences nationwide.

The facts as stated by the Court simply do not meet the high standard to find constitutionally cognizable bias in an administrative proceeding. All of the legal issues raised hinge entirely on unsupported claims that two State Commissioners were biased. The "fact-specific" allegations the District Court found persuasive as evidence of potential bias include: (1) "Commissioner Huebsch served as a member of the advisory committee for an organization that developed, approved, and was a proponent of the Transmission Line;" and (2) "Commissioner Valcq had recently been employed by a company whose parent corporation owned a controlling interest in ATC, one of the three transmission companies applying for the CPCN permit."[15] The Court further relied on conclusory allegations that the named commissioners "received *ex parte* information regarding the case" and "had conflicts of interest."[16]

The *Initial Brief*, at 15, 21, 45, and 49-56, and the January 15, 2021 *Initial Brief of Intervening Appellants American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative*, at 44-50 demonstrate that none of

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15 *D.Ct. Opinion*, *App. Appendix* at 33.

16 *Id.*

the evidence relied upon below amounts to bias, let alone constitutionally cognizable bias that passes muster in the Seventh Circuit.[17]

Without question, if the District Court litigation is allowed to progress beyond this motion to dismiss, it will greenlight the bootstrapping of bare allegations of bias into a potentially duplicative 42 U.S.C. §1983 – based lawsuits. If other disgruntled parties use Plaintiff's conduct below as a template, the bias complaints will be filed shortly before a final decision is released but after the commission has telegraphed the expected resolution. And, as in this case, the allegations of bias will be largely based on information that any observant participant, much less an attorney appearing in the case, will know before any state proceeding is initiated.

Unfortunately, the damage will not be limited to the waste of time and resources associated with duplicative federal and state proceedings that target the same issue. The unsupported allegations of bias are also based on circumstances common to general commission practice that are required by FERC-approved transmission planning procedures both in the Midcontinent Independent System Operator ("MISO")[18] territory and elsewhere.

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[17] *See*, *Suh v. Pierce*, 630 F.3d 685 (7th Cir. 2011) and the discussion, *infra*, at 21 -23.

[18] MISO is an RTO operating across 15 states, including Wisconsin, along with the Canadian Provision of Manitoba. *MISO, About MISO,* https://www.misoenergy.org/about/ (last visited Jan 19, 2021).

For example, Plaintiffs rest their case for bias against Chair Valcq principally on the fact she had prior experience working in-house for, and subsequently at a law firm, representing We Energies – a company that held the majority stake in in one company that was involved in the PSC proceeding.[19] But Commissioner Valcq's work history is far from an aberration. According to an August 20, 2020 survey, about 35 percent of all the 236 commissioners serving 60 State (and two federal) commissions are lawyers.[20] The rest come from a wider range of occupations. But a significant number of all appointed commissioners are chosen in part, *because* of their related work experience or interests in the utility space. Often that work experience does require recusal from some proceedings pending before the agency. The record below reflects that the PSC, like all State commissions, has a process in place for Commissioners, and in particular attorneys,[21] to assure that they are recused from cases where bias might actually be an issue. But the record in this proceeding

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19 *Bias Complaint, App. Appendix* at 46 – 47.

20 Beecher, Janice A, *IPU-MSU Annual Demographics of U.S. Public Utility Commissioners* (Revised February 18, 2020), online at: https://ipu.msu.edu/wp-content/uploads/2020/02/IPU-MSU-Annual-Commissioner-Demographics-Feb.-2020-1.pdf (last visited January 21, 2021).

21 *Compare*, *Bias Complaint*, *App. Appendix* at 47, which notes Chair Valcq filed a Recusal Policy acknowledging her obligation to comply with Wisconsin's statutory and rule-based ethical obligations, and did recuse herself from several cases, and *D.Ct. Opinion*, *App. Appendix* at 224, noting, *inter alia*, her obligations, as a licensed attorney, to comply with SCR 20:1:11.

does not demonstrate any bias – with respect to her work history or otherwise. In connection with Chairperson Valcq, Plaintiffs merely allege:

> [t]he breadth and depth of Chair Valcq's relationship with We Energies, . . . when objectively and reasonably viewed, creates an appearance of bias in light of WEC Energy Group's 60% controlling ownership interest in ATC, and her participation in previous joint WE/ATC applications to the Commission.[22]

Before the commission, Plaintiffs provided virtually no evidence to support this allegation.[23] The opportunities for abusive and unfounded lawsuits filed for tactical advantage is obvious. All that would be required to pierce sovereign immunity and gain an additional forum focused solely on allegations of due process violations (along with broader discovery and additional press) is a simple statement of fact – with no supporting evidence of bias. A party merely has to point out that a commissioner once worked for or with a company that is not a party to a proceeding, but has some connection – tenuous or otherwise - to a company or party who is.

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22 *PSC 2019 Decision*, *App. Appendix* at 220. (Where the PSC points out that Plaintiffs had (i) "submitted no information or documentation that either Chairperson Valcq or Commissioner Huebsch made or received any information relative to the merits of the project," (ii) not set forth any alleged facts showing either commissioner had a pecuniary interest in the outcome of the proceeding, bet the target of abuse by a party, or represented any party in the proceeding, and (ii) not "set forth any facts, verified or not, that otherwise show any actual instances, statements, communications or other substantiated events that show bias, prejudice , or improper contacts.")

23 *Id*., *App. Appendix* at 220 – 226.

A *WEC Energy Group's Response in Opposition to Plaintiff's Motion to Revoke Confidentiality Designations,* ("WEC Response") at 1, filed December 12, 2020 in the District Court proceedings below provides additional insight:

> What started as an already implausible federal complaint of state regulator bias in a unanimous transmission siting decision has come to this: a motion filed in federal court arguing the public has an immediate right to see state officials' private, personal communications *with non-parties*—including, inexplicably, a picture of a child playing basketball—based on nothing more than Plaintiffs' bare assertion that they may want to use these materials in an (unidentified) filing someday. An outsider familiar with basic norms of federal pleading and discovery could be forgiven for thinking this case has gone off the rails. In their quest to publicly undermine the Commission's reputation for fairness, impartiality, and independence, Plaintiffs have blown past the usual safeguards of plausibility, relevance, privacy, and (to use an old-fashioned term) decency. We are now in the realm of the absurd.

NARUC was not a party to the proceedings below, so cannot attest to the relative merits of this characterization. But it is clear Plaintiffs were attempting to get lists of phone numbers of anyone that had called one of the targeted commissioners, along with other personal materials, released to the general public. It does not matter if the disputed items were ultimately released or not. The collection of such information and its threatened release has an impact.

The *WEC Response*, at 6, contends the Plaintiff's efforts to publically release pictures of the son of a friend of one of the targeted Commissioners playing basketball, along with the phone numbers of everyone that called him -- "an

unvarnished attempt to litigate this case through the press, when Plaintiffs know full well that they lack the evidence they need to prevail in this Court." Whatever the relative merits of that allegation, it is clear the press has paid attention to the charges.[24]

The broad scope of permitted discovery implied by this filing certainly suggests that such suits could cause some commissioners to consider leaving public service prematurely. Indeed, it's possible it could even dissuade qualified persons from accepting a commissioner post. It certainly would inject angst into any proceeding where a commissioner has any connection, however tenuous or remote, with anyone that is a party to or otherwise involved with a case or, as in this case, any non-party associated with a party. Given the relatively small universe of utility professionals that practice before specific State commissions, the odds are high that heightened concern will attach to almost all significant commission proceedings.

There are well-developed state rules regarding when recusal by a commissioner is appropriate. For commissioners to also be subject to a parallel, less-defined constitutional due process set of "bias" restraints, which potentially

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[24] *See, e.g.,* Hubbuch, Chris, *2 PSC regulators accused of bias in Cardinal-Hickory Creek power line case, outside ruling sought*, Wisconsin State Journal (September 24, 2019), online at: https://madison.com/wsj/news/local/environment/2-psc-regulators-accused-of-bias-in-cardinal-hickory-creek-power-line-case-outside-ruling/article_88475f4b-b997-55cd-bef6-bcd6a9dd0ae2.html (last visited January 21, 2021). The article quotes Plaintiff representatives extensively. A Google search for "Due Process" and "Wisconsin Public Service Commission" was headed by three articles from November and December 2020 about this federal lawsuit.

could be raised collaterally in virtually every case without a sovereign immunity bar, would be exceedingly disruptive. As discussed earlier, it obviously will lead to wasteful parallel review proceedings in a large number of cases. But, just as obviously, it also will make commissioners targets of unsubstantial and unsupported personal attacks on their character – attacks that will impair the willingness of individuals to serve.

Unfortunately, there is an additional practical impact that is arguably worse in terms of its potential effect on public policy. The District Court's decision to proceed to examine bare allegations of bias against Commissioner Huebsch based on his interactions with MISO threatens to upend national RTO/ISO governance. Presumably it would also provide grist to challenge – with similar unsupported allegations of bias – any State decision where one of the commissioner is involved in regional transmission planning in areas that lack an RTO/ISO.

The U.S. electricity transmission system has over 445,000 miles of high-voltage (at least 100 kV) transmission lines.[25] Whether transmission lines are overseen by an RTO/ISO or by vertically integrated utilities, regional planning is vital to assure there each region maintains transmission capacity sufficient to reliably meet projected demand. The Federal Energy Regulatory Commission's (FERC)

[25] Luciani, Ralph, Shober, Maggie, *Transmission Planning White Paper* (NARUC January 2014), at page 10, available online at: https://pubs.naruc.org/pub.cfm?id=53A151F2-2354-D714-519F-53E0785A966A (Last visited January 20, 2021).

Order No. 1000,[26] issued in 2011, requires each public utility transmission provider to participate in a regional transmission planning process, and coordinate with neighboring transmission planning regions for cost-effective solutions to mutual transmission needs. The order specified that its requirements do not affect State regulations regarding the construction of transmission facilities, including authority over siting or permitting.

In subsequent orders, FERC recognized the important role States play in the formation and governance of RTOs, and approved MISO and other RTO/ISO tariffs[27] that included extensive procedures and advisory bodies for stakeholder input, including the MISO Advisory Committee on which Commissioner Huebsch served.

Because of roles in transmission siting, cost recovery, and oversight of the energy sector, State participation as a stakeholder in the regional transmission

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[26] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61051, para. 6 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. South Carolina Public Service Authority* v. *FERC*, 762 F.3d 41 (D.C. Cir. 2014).

[27] *Compare*, *e.g., PJM Interconnection, L.L.C.*, 113 FERC ¶ 61292 at P. 2 - 3 (2005), which notes that FERC "has recognized the important role of the states in the formation, governance and development of regional transmission organizations (RTOs) in its key orders and policy statements" and goes on to approve PJM funding of a pre-existing separate Organization of PJM States, Inc. ("OPSI"). PJM also pointed out that the OPSI concept "has the support of Congress, which has included . . .a legislative mandate in the Energy Policy Act of 2005 to convene joint state boards on a regional basis in order to study and develop recommendations regarding the use of economic dispatch in various regions."

process is crucial. A State perspective is needed to assure transmission planning includes consideration of other supply reliability solutions, including generation, smart grid, demand response, distributed generation, energy storage, and energy efficiency.

Each RTO has a mechanism to assure State involvement in the process. The Organization of MISO States, Inc. ("OMS") coordinates regulatory oversight among all states in the MISO region. This includes Wisconsin. OMS provides recommendations to MISO, the MISO Board of Directors, FERC, other relevant government entities, and State commissions.

The mere facts that Commissioner Huebsch served on the MISO Advisory Committee and the OMS Board are insufficient to rebut the presumption that, as an adjudicator, he is "presumed to act in good faith, honestly, and with integrity."[28]

Even the *D.Ct. Opinion* that is the subject of this appeal specifies that is the standard that applies in these circumstances.[29]

The MISO Advisory Committee Charter states that it "shall be a forum for its members to be apprised of the MISO's activities and to provide information and

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[28] *Head v. Chicago School Reform Board of Trustees*, 225 F.3d 794, 804 (7th Cir. 2000).

[29] *D.Ct. Opinion*, *App. Appendix* at 34. ("Adjudicators such as Commissioners Valcq and Huebsch are "presumed to act in good faith, honestly, and with integrity." *Head v. Chicago Sch. Reform Bd. of Trustees*, 225 F.3d 794, 804 (7th Cir. 2000). While "[t]he presumption is a rebuttable one . . . the burden of rebuttal is heavy indeed.")

advice to the management and Board of Directors of the MISO on policy matters of concern to the Advisory Committee, or its constituent stakeholder groups, but neither the Advisory Committee nor any of its constituent groups shall exercise control over the Board or the MISO."[30]

Without more facts, absent from the record below, it is difficult to see how the commissioner's participation in such a group *could* rise to the level sufficient to rebut the presumption that he was acting without bias. MISO finished with the transmission planning aspect that generated the project proposal the commission voted upon years before Huebsch became a Commissioner.[31] Even if Commissioner Huebsch had been around, the Committee he served on – the Advisory Committee does not review or vote on the relevant MISO Transmission plan.[32] Mere

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[30] *MISO Advisory Committee Charter,* available online at: https://cdn.misoenergy.org/AC%202020%20Charter443601.pdf. (Last visited January 21, 2021).

[31] *Illinois Commerce Commission v. FERC*, 721 F.3d 764, 771 (7th Cir. 2013). This case affirmed FERC's order approving MISO's "Multi-value projects" in 2013. Commissioner Huebsch didn't come to the PSC until 2014.

[32] While there is a separate Planning Advisory Committee (PAC) that does have a vote related to MISO transportation plans, *Commissioner Huebsch did not serve there*. According to the PAC Mission Statement, available online at: https://www.misoenergy.org/stakeholder-engagement/committees/planning-advisory-committee/ (Last visited January 21, 2021) , even that PAC vote is far from dispositive:

> The Planning Advisory Committee shall be a source of input to the Planning Staff concerning the development of the MISO Plan. The Planning Staff shall exercise its discretion in how it utilizes the advice in carrying out its responsibilities.

The PAC sends an advisory to the System Planning Committee of the MISO Board of directors every fall after reviewing the annual transmission plan. In any case, only one OMS board member

participation in this group, standing alone, is not sufficient to permit Plaintiffs' bias claims to survive a motion to dismiss.

Furthermore, a determination here that mere participation in such an advisory body, without more, could thwart the exercise of sovereign immunity could discourage commissioners from participating in these crucial planning exercises. Commissioner participation offers tremendous value to these processes in a number of way: they share local knowledge integral to planning and siting of future energy projects; they bring other state priorities into the discussion, such as environmental impacts and conservation goals; because of their interactions with end users, they are closer to the problems at the state and regional levels; and this closeness to the end users could increase the responsiveness of regional markets to public concerns.[33]

As referenced earlier, collaboration with State officials has been a component of RTOs since their development.[34] But coordination between RTOs and State

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is on the PAC, and they always abstain on the vote. *See, e.g., May 2004 Minutes of the OMS Board of Directors*. At that meeting, the State representatives from all the MISO states discussed whether to vote on the first annual MISO transmission plan in 2004 (MTEP 2003) when it was being approved. At that time, the Board determined unanimously that OMS representatives would not vote on that Transmission Plan – and the practice has continued to this day.

[33] Dworkin, Michael H., Goldwasser, Rachel Aslin, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations* (43 Energy Law Journal 543 at 586 (2007), online at: https://www.eba-net.org/assets/1/6/10-Governance_of_RTOs.pdf (last visited January 21, 2021).

[34] *Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶61,285, *mimeo at p. 6* (December 20, 1999) ("Order 2000").

commissions is not just desirable from a policy perspective and actively encouraged by FERC. It also is a required function of RTOs. 18 C.F.R. 35.34(k)(7) ("The [RTO] must be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities.")

Yet, Plaintiffs seek to use Commissioner Huebsch's participation on the MISO Advisory Committee as one basis for its claim of unconstitutional bias.[35] Such claims, if allowed to proceed to burdensome discovery on the basis of a State commissioner's mere cooperation and involvement with an RTO, have the potential to chill state participation in the very purpose of such organizations, namely, regional optimization of the operation and reliability of electric transmission systems.[36]

Unsupported and conclusory claims of bias juxtapose a State commission's ability to engage with the RTO to further the public interest against specific state statutory obligations. Indeed, in the administrative proceedings that gave rise to this case, the PSC had an obligation to evaluate the application for a Certificate of Public Convenience and Necessity. Wis. Stat. § 196.491(3)(a). If Plaintiff's speculative

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35 *Bias Complaint, Appendix A PSC Recusal Motion, App. Appendix* at 93, note 4.

36 *See* Order 2000, 89 FERC ¶61,285, *mimeo at p. 2.*

claims based on commission involvement in RTO planning advance, then commissioners and commission staff may face a difficult choice: Adhere to their statutory duty to provide certificates for specific transmission projects or participate in regional transmission planning as envisioned by federal law. This is a conundrum as not participating in regional planning exercises is contrary their mission to serve the public interest. Federal regional planning decisions affect transmission development, the costs of which are passed through to the consumers for whom the State commissions are responsible.

II. The District Court misapplied the legal standards applicable to a constitutional bias claim.

This Court should reverse the *D.Ct. Opinion* because it misapplied the legal standard for a constitutional bias claim and also failed to provide the applicable presumption of impartiality.

The flawed logic is apparent on the face of the decision.

The District Court concluded that "plaintiffs have alleged specific facts as to the alleged bias of two out of three decision-makers" and "[d]ue to the fact-specific nature of these allegations, the court is not prepared to declare as a matter of law that, considered as a whole, they do not state a claim for unconstitutional bias." *D.Ct. Opinion*, *App. Appendix* at 33-34. Using the same logic, the district court

dismissed the plaintiffs' claims against Commissioner Nowak because they "allege ***no*** facts demonstrating personal bias." *Id.* (emphasis added.).

By dismissing the complaint against Commissioner Nowak because Plaintiffs' failed to allege any facts demonstrating bias, the District Court created a new standard. To justify a parallel federal court proceeding piercing sovereign immunity because of alleged unconstitutional bias, plaintiffs need only *allege* ***some*** facts that indicate personal bias, regardless of plausibility or evidentiary support, to survive a motion to dismiss.

That approach ignores both (i) Seventh Circuit precedent specifying the standard necessary to dispose of procedural due process claims of judicial bias and (ii) the earlier referenced presumption that state public service officials are "presumed to act in good faith, honestly, and with integrity."[37]

"[B]ad appearances alone do not require disqualification." *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363, 1372 (7th Cir. 1994). To bypass the presumption, Plaintiffs are obligated to supply evidence of "a strong, direct interest in the outcome of a case . . . [to] . . . overcome the presumption of evenhandedness." *Id. at* 1373. The record reflects no evidence either Defendant

[37] *Head v. Chicago School Reform Board of Trustees*, 225 F.3d 794, 804 (7th Cir. 2000).

had such an interest.[38] In *Suh v. Pierce*, 630 F.3d 685 (7th Cir. 2011), this Circuit adopted a similar standard. There the plaintiff argued that "the due process clause requires recusal—even in the absence of any potential for actual bias—where it might 'appear' to an outsider that the judge had an interest in the outcome of the case." *Id.* at 691. This Circuit rejected plaintiff's argument and concluded that a mere "appearance of bias" without a high risk of actual bias or "where it might 'appear' to an outsider that the judge had an interest in the outcome of the case" does not by itself mean that "the due process clause requires recusal." *Id.* at 691-92. The Court continued that "recusal is required where the judge has 'a direct, personal, substantial, pecuniary interest' in the case." *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). In other words, the legal standard for a claim of constitutional bias to proceed requires allegations that a "serious risk of actual bias" was objectively present because of the "significant and disproportionate influence" of improper factors indicating "a high risk of actual bias." *Id.* (quoting *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884 (2009)).

The District Court concedes that these "alleged specific facts" have no record support specifying that "plaintiffs are on notice that they will ultimately face an

[38] *See also*, *Hess v. Board of Trustees of S. Illinois University*, 839 F.3d 668, 675 (7th Cir. 2016) ("The presumption is a rebuttable one, but the burden of rebuttal is heavy indeed: To carry that burden, the party claiming bias must lay a specific foundation of prejudice or prejudgment, such that the probability of actual bias is too high to be constitutionally tolerable.").

uphill battle in actually proving their allegations." *D.Ct. Opinion*, at 33-34. Indeed, in footnote 16, the District Court points out Plaintiffs' frequent assertions of "at least the appearance of bias and lack of impartiality" and specifies "is unlikely to be enough to state a claim for unconstitutional bias," but still permitted the case to proceed.

The District Court failed to hold the Plaintiffs to the rigorous standards of *Suh* and *Del Vecchio* and entertained their unsupported allegations.[39] This was error.

Defendants-Appellants were entitled to, and not given, a presumption of impartiality. Moreover, Plaintiffs did not provide any evidence that the commissioners had a direct, personal, substantial, pecuniary interest in the outcome of the case.

Because the District Court misapplied the legal standard for a constitutional bias claim, Plaintiffs' remaining claims against the commissioners fail.

[39] *D.Ct. Opinion*, *App. Appendix* at 34, n. 16.

CONCLUSION

The Plaintiffs have provided nothing but unsupported allegations of bias as a basis to pierce sovereign immunity to proceed with a duplicative action in federal court. The law provides no basis for this lawsuit to continue. Indeed, the only coherent application of law and precedent is to grant the relief sought by Defendants-Appellants and reverse the decision below.

Respectfully submitted,

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January 22, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that this brief contains (5665) words. In making this certification, counsel has relied on the word count function of Microsoft Word, the word processing system used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 pt. font Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that the electronic original of the foregoing Motion for Leave to file as Amicus Curiae and accompanying Amicus Curiae Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit on this 22nd day of January, 2021 through the CM/ECF electronic filing system, and thus also served on counsel of record.

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