

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

LA CROSSE COUNTY

TOWN OF HOLLAND,

Petitioner,

Case Nos. 15-CV-219
30607 Administrative Agency Review

v.

Honorable Judge Todd Bjerke

**PUBLIC SERVICE COMMISSION
OF WISCONSIN,**

Respondent.

**BRIEF IN SUPPORT OF INTERVENOR-RESPONDENTS' MOTION TO STRIKE
PORTIONS OF THE REPLY BRIEF FILED BY PETITIONER TOWN OF HOLLAND**

Pursuant to Wis. Stat. §§ 802.01(2) and 802.06(6), Intervenor-Respondents American Transmission Company LLC and ATC Management, Inc., Dairyland Power Cooperative, Northern States Power Company - Wisconsin, SMMPA Wisconsin, LLC, and WPPI Energy request that this Court strike certain portions of the Petitioner's Reply Brief.¹ The Petitioner's Reply Brief includes three new arguments, which were not presented in the Initial Brief (or during the proceedings below) and which are not responsive to any of the arguments in any of the response briefs filed in this case. The Intervenor-Respondents feel we must file this motion to strike in order to protect the record should this Court's final decision end up being appealed.²

¹ The abbreviated and defined terms used in this brief have the same meaning as they do in Intervenor-Respondents' Response Brief, which was filed with this Court on August 15, 2016.

² In the event this Court decides not to strike some or all of the portions of the Reply Brief at issue in this motion, the Intervenor-Respondents ask that the Court not move the oral argument date; although the Intervenor-Respondents have not had a chance to respond to the Petitioner's new arguments in writing, the Petitioner's actions should not be rewarded by delaying the oral argument further. Should it be necessary, the Intervenor-Respondents will be prepared to respond to the Petitioner's new arguments during the oral argument on October 10, 2016.

The grounds for this motion are set forth in greater detail below; Exhibit A contains a marked-up copy of the Petitioner's Reply Brief, which highlights those portions of the Reply Brief that are the subject of this motion.

ARGUMENT

This is an appeal of an administrative decision. It is well-settled that, on appeal, a court will not consider arguments that are raised for the first time in a reply brief. *See Bye v. Wis. Dep't of Natural Res.*, 2015 WI App 28 ¶ 17, 361 Wis. 2d 285, 862 N.W.2d 619 (unpublished); *Homeward Bound Svcs., Inc. v. Office of Ins. Comm'r*, 2006 WI App 208 ¶ 20, n.12, 296 Wis. 2d 481, 724 N.W.2d 380; *Northeast Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). This is because such arguments are often inadequately developed, *cf. Bye*, 2015 WI App 28 ¶ 17, "seek to expand the issues on appeal without effective notice to the opposing party[,] and come at a time when the opposing party has no opportunity to make a written response." *Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm'n*, 830 F.2d 610, 621 n.7 (7th Cir. 1987). This is our situation; the newly raised arguments have not been fleshed out by the parties and there is no opportunity for the other parties to respond to the Town's new arguments. Accordingly, Wisconsin courts have generally ruled that a party waives arguments that it fails to raise until its reply brief. *Northeast Wholesale Lumber*, 191 Wis. 2d 278, 294 n.11 (internal citations omitted).

The Petitioner raises three new arguments in its Reply Brief that the Court should strike. First, the Petitioner argues that the Badger Coulee Project is not needed because it is not necessary to satisfy Wisconsin's Renewable Portfolio Standard (RPS). (Pet'r's Reply Br. at 2-3, and 5). The Petitioner did not raise this argument in the proceedings below or in its Initial Brief before this Court. If the Petitioner sought to challenge the Project on these grounds, it should

have at least raised this issue in its Initial Brief, thereby giving the Respondents a chance to respond in writing.

Second, the Petitioner argues that another statute should have been followed—Wis. Stat. § 196.494(3)—which allows the Commission to initiate the development of a high-voltage transmission project intended to resolve congestion issues on the transmission grid. (Pet’r’s Reply Br. at 6-7, and 21). Again, the Petitioner did not raise this argument in the proceedings below—indeed, to the knowledge of the Intervenor-Respondents, no party did—or in its Initial Brief before this Court. If the Petitioner believes that the Commission should have initiated the development of this Project under the procedure in Wis. Stat. § 196.494(3), it should have raised this argument before the Commission, or at the very least, in its Initial Brief. The Petitioner did not do so, and the Intervenor-Respondents therefore request that the Court strike this argument from the Petitioner’s Reply Brief.

Finally, the Petitioner argues that, if it prevails in its appeal, the Court should direct the Commission to not allow the Project’s owners to recover from ratepayers the costs associated with terminating the Project. (Pet’r’s Reply Br. at 53-54). The Petitioner did not request this relief in its Petition for Judicial Review or in its Initial Brief to this Court, and as such, this argument should be stricken.

CONCLUSION

For the reasons set forth above, the Intervenor-Respondents request that the Court strike the highlighted portions of the Petitioner’s Reply Brief, as set forth in the attached Exhibit A.

[The remainder of this page is intentionally left blank]

Respectfully submitted this 29th day of September, 2016.

PERKINS COIE LLP

By: /s/ Brian H. Potts
Brian H. Potts (WBN 1060680)
David R. Zoppo (WBN 1094283)

*Attorneys for Intervenor-Respondent
American Transmission Company LLC
and ATC Management, Inc.*

PERKINS COIE LLP
One East Main Street, Suite 201
Madison Wisconsin 53703
Telephone: (608) 663-7498
Facsimile: (608) 663-7499
Email: bpotts@perkinscoie.com
dzoppo@perkinscoie.com

BRIGGS AND MORGAN, P.A.

By: /s/ Valerie T. Herring
Valerie T. Herring (WBN 1076996)

*Attorney for Intervenor-Respondent
Northern States Power Company, a
Wisconsin corporation*

BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 977-8501
Facsimile: (612) 977-8650
Email: vherring@briggs.com

MURPHY DESMOND S.C.

By: /s/ Matthew J. Frank
Matthew J. Frank (WBN 1003850)

*Attorney for Intervenor-Respondent
WPPI Energy*

MURPHY DESMOND S.C.
33 East Main Street, Suite 500
PO Box 2038
Madison, WI 53701
Telephone: (608) 268-5616
Facsimile: (608) 257-2508
Email: mfrank@murphydesmond.com

DORSEY & WHITNEY LLP

By: /s/ Joseph C. Hall
Joseph C. Hall (WBN 1098104)

*Attorney for Intervenor-Respondent
SMMPA Wisconsin, LLC*

DORSEY & WHITNEY LLP
1801 K Street NW, Suite 750
Washington, DC 20006
Telephone: (202) 442-3506
Facsimile: (202) 442-3199
Email: hall.joseph@dorsey.com

WHEELER, VAN SICKLE & ANDERSON, S.C.

By: /s/ Jeffrey L. Landsman

Jeffrey L. Landsman (WBN 1017670)
Justin W. Chasco (WBN 1062709)

*Attorneys for Intervenor-Respondent
Dairyland Power Cooperative*

WHEELER, VAN SICKLE &
ANDERSON, S.C.
44 East Mifflin Street, Suite 1000
Madison, WI 53703
Telephone: (608) 255-7277
Facsimile: (608) 255-600
Email: jlandsman@wheelerlaw.com
jchasco@wheelerlaw.com