Driftless Area Land Conservancy et al v. Huebsch, Michael et al

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFEE FOUNDATION,

Plaintiffs, OPINION AND ORDER v. 19-cv-1007-wmc PUBLIC SERVICE COMMISSION OF WISCONSIN, MICHAEL HUEBSCH, REBECCA VALCQ, & ELLEN NOWAK, Defendants, and AMERICAN TRANSMISSION COMPANY LLC, BY ITS CORPORATE MANAGER, ATC MANAGEMENT, INC, DAIRYLAND POWER COOPERATIVE, and ITC MIDWEST LLC,

Intervenor-Defendants.

Plaintiffs are two Wisconsin conservation organizations who seek to challenge a , which granted three private transmission companies the right to exercise eminent domain in constructing a high- Driftless Area. 1

The defendants named in this case are the PSC and its three Commissioners, Michael Huebsch, Rebecca Valcq, and Ellen Nowak. The three

1 The Driftless Area is a region in the upper American Midwest covering southwestern Wisconsin, southeastern Minnesota, northeastern Iowa, and the extreme northwestern corner of Illinois. This region escaped the flattening effects of glaciation during the last ice age and is consequently characterized by steep, forested ridges, deeply carved river valleys, and karst geology characterized by spring-fed waterfalls and cold-water trout streams. See Driftless Area, Wikipedia, https://en.wikipedia.aorg/wiki/Driftless_Area (last visited Oct. 28, 2020).

transmission companies -- American Transmission Company, ITC Midwest LLC, and Dairyland Power Cooperative -- have joined the suit as intervening defendants.

In this suit, plaintiffs assert violations of their federal constitutional rights, claiming that: (1) ed to an unconstitutional taking of land for a private purpose; and (2) the PSC Commissioners also acted with bias in violation of procedural due process. B and intervening- , as well as their respective motions to stay.

(Dkts. #6, 16, 101, 129.) Having fully considered the arguments made by the parties in their briefing, as well as during oral argument held on November 9, 2020, the court will grant in part and deny in part their respective motions to dismiss. Specifically, for the reasons explained below, the court will

(1) dismiss the PSC itself as a party in suit, (2) dismiss plaintiff , remaining due process claim, and otherwise deny these motions.

ALLEGATIONS OF FACT both Wisconsin conversation and membership organizations.

Similarly, WWF an Id. ¶ 38.) While originally naming the

PSC and its three Commissioners as defendants, plaintiffs now concede that the PSC should be dis .

Accordingly, the PSC will be dismissed as a defendant from this suit. 2

On April 20, 2018, three private transmission companies -- the American Transmission Company, ITC Midwest LLC, and Dairyland Power Cooperative (the Transmission Companies or intervening defendants) -- applied for a Certificate of -voltage Iowa, through Grant and Iowa Counties in Wisconsin, and ultimately ending in Dane

County, Wisconsin. 3

The application triggered an adjudicatory proceeding under Wisconsin law, in which plaintiffs DALC and WWF intervened.

After a public comment period and a week-long evidentiary hearing, the Commissioners took a preliminary vote on August 20, 2019, approving the proposed Line application. One month after this preliminary vote, DALC and WWF moved to recuse Commissioners Valcq and Huebsch from further proceedings involving this application. The PSC not only denied recusal motion, but in the same decision, approved the CPCN application, granting them eminent domain powers to condemn private property in order to construct the Transmission Line.

Plaintiffs allege that the Line will reduce the economic and ecological value of their

2 Since under 42 U.S.C. § 1983, and it is well-established that a state agency may not itself be sued under that section, this concession is both appropriate and prudent. Will v. Mich. Dept. of State Police, 491 U.S. 58, 65-66 (1989). 3 Early in this case, the three transmission companies moved to intervene as defendants in this case. (Dkts. #10, 23, 28.) While this court denied their motions (dkt. #49), on appeal the Seventh Circuit reversed this decision and held that the transmission companies were entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) (dkt. #76).

Id. ¶¶ 30-36, 39-44.) DALC itself holds a conservation easement through which the -of-way will overlap. Further, plaintiffs have identified a number of DALC and WWF members who own land that will be affected by the Line. For example, DALC member Lisa Schlimgen owns a 280-acre farm through which the Line will run. Under the current plan, two or three transmission towers will be

built on her land. (See also id. ¶¶ 34-35, 42-43 (identifying various other DALC and WWF members whose land or other property interests will be affected by the Line).)

According to plaintiffs, the final decision from the PSC approving the Line amounts to an unconstitutional taking of private property for private use. (Id. ¶ 1.) Plaintiffs

presented that the proposed ATC Line would principally benefit private parties for private Id. ¶ 136.) More specifically, plaintiffs note that they and other intervenors contended that the proposed Line was not needed to meet anticipated electricity demand and sales in Wisconsin. At the same time, the Line will charge Midwest utility ratepayers more than $2.2 billion over 40 years and the Transmission Companies will be provided an annual rate of return of between 10 and 11.2 percent of their capital investment in the Line. (Id. ¶¶ 6, 135-37.) Plaintiffs and others also presented expert testimony and other evidence at the hearing that, according to most economic model runs, the cost of the proposed Line would exceed the benefits for etter, less costly, more flexible, more environmentally sound, and cleaner energy alternatives. Id. ¶¶ 12, 13.) The evidence also allegedly reduce the economic, ecological, and scenic value of private

property located near, on, or along the proposed ATC Line route. Id. ¶ 138.)

Plaintiffs further allege that the PSC decision- least an appearance of bias and a lack of impartiality, if not actual bias and a lack of

Id. ¶¶ 2, 17.) in particular, plaintiffs allege that Commissioners Valcq and Huebsch had conflicts of interest and received ex parte information concerning the case. (Id. ¶ 17.) Plaintiffs did not include any specific allegations of bias as to Commissioner Nowak.

plaintiffs filed petitions for judicial review of the PSC decision in Wisconsin courts, seeking relief under Wisconsin state law. 4

Plaintiffs also filed this federal lawsuit, bringing procedural due process and takings claims under the U.S. Constitution and seek[ing] a declaratory judgment that Defendants have deprived Plaintiffs of their rights under the Fifth and Fourteenth Amendments to the United States Constitution and an injunction vacating D Final Decision and requiring that any new decision-making process meet constitutional

requirements. Id. ¶ 20.) 5

4 At least four related actions were filed in Wisconsin state court. See Dane Cty., v. Pub. Serv. of Wis., Case No. 19-CV-3418 (Wis. Cir. Ct. Dane Cty.); Driftless Area Land Conservancy v. Pub. , Case No. 19 CV 144 (Wis. Cir. Ct. Iowa Cty.); Wis. Wildlife Federation v. Pub. ., Case No. 19 CV 334 (Wis. Cir. Ct. Columbia Cty.); Iowa County et al. v. Pub. ., Case No. 19 CV 142 (Wis. Cir. Ct. Iowa Cty.). By order of

the Dane County Circuit Court, these actions have now been consolidated into a single case. See Dane Cty., Case No. 19-CV-3418 (Wis. Cir. Ct. Dane Cty. Jan. 24, 2020). 5 Wisconsin Constitution (see Compl. (dkt. #1) ¶ 1), but they do not include these state law claims in their formal counts. (Id. at 29-33.) Moreover, they do not mention them in their complaint or subsequent briefing. Accordingly, as confirmed during oral argument, the court therefore understands plaintiffs are only asserting the two federal claims in this lawsuit.

OPINION Defendants 6

advance a number of jurisdictional arguments, including that: (1) state sovereign immunity bars ; the court should decline to exercise jurisdiction under the Younger 7

and Colorado River 8 abstention doctrines; (4) plaintiffs lack standing; and (5) the claims are not ripe. Defendants also contend that plaintiffs have failed to state a claim on which relief may be granted. In response, plaintiffs maintain that their suit is excepted from state sovereign immunity under Ex parte Young, 209 U.S. 123 (1908), is not barred by judicial immunity, does not qualify for abstention, is justiciable, and properly states a claim on which relief may be granted. The court will address each argument in turn.

I. Jurisdictional Arguments

A. Sovereign Immunity

Defendants first argue that state sovereign immunit Br. (dkt. #7) 8- citizens against unconsenting states in federal court. Seminole Tribe of Fla. v. Fla., 517 U.S.

44, 54 (1996). This amendment also protects arms of the state, such as state agencies or state employees acting in their official capacity. See Barnes v. Bd. of Trustees of Univ. of

6 Because the arguments raised by defendants and intervening defendants overlap significantly, the , will the court call out which party made a given argument. 7 Younger v. Harris, 401 U.S. 37 (1971). 8 Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

Illinois, 946 F.3d 384, 391 (7th Cir. 2020); Indiana Prot. & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin., 603 F.3d 365, 370 (7th Cir. 2010).

Of course, there exist certain exceptions to state sovereign immunity, including the Ex parte Young doctrine, which permits federal jurisdiction over claims seeking prospective injunctive relief to remedy an ongoing violation of federal law. See Seminole Tribe of Fla., 517 U.S. at 73. If a suit seeks to remedy only a past legal violation that has no ongoing effects, it does not fall under the Ex parte Young exception to sovereign immunity. MCI Telecommunications Corp. v. Illinois Bell Tel. Co.

plaintiff must allege that the officers are acting in violation of federal law, and must seek

prospective relief to address an ongoing violation, not compensation or other retrospective Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 298-99 (1997) (Souter, J., dissenting)).

There appears no dispute that the Commissioners were sued in their official capacity. .) While thus purposes of state sovereign immunity, plaintiffs argue that the Commissioners do not enjoy

immunity because the Ex parte Young exception applies. Defendants dispute this, contending that plaintiffs challenge only a past action and not an ongoing violation of law. -12.) 9

Defendants further argue that Ex parte Young is inapplicable

9 Alternatively, the intervening defendants frame this argument as a failure to state a claim under § 1983. (See Plaintiffs do not allege an ongoing violation of federal law, nor do they seek prospective relief; rather, they allege a past violation of law and seek retrospective relief. However, this type of relief is not available under Section 1983.

Id. at 11.) Plaintiffs counter tha 15.) They also assert that the Commissioners continue to play a role in enforcing the

allegedly unlawful decision. (Id.)

The distinction between prospective and retrospective relief has been described as Verizon Maryland, Inc.

v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635, 636 (2002) (quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296, 298-99)). Still, as the Supreme Court has recognized, e of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that Edelman v. Jordan, 415 U.S. 651, 667 (1974).

finds it helpful to

parties themselves did not fully address this distinction in their briefing). The relief sought by plaintiffs to remedy the alleged violation of the takings clause presents a relatively straightforward example of a prospective remedy for an ongoing legal violation. According violation of the takings clause, and they seek an injunction vacating the CPCN and

prohibiting the Commissioners from enforcing it prospectively, as well as a related

declaration that the decision is unlawful. This is akin to the situation presented in Verizon Maryland

Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002). The plaintiff in that case challenged a final decision by the Maryland Public Service Commission, arguing that it was not consistent with the federal Telecommunications Act of 1996 and tate officials be restrained from enforcing an order in contravention of Id. at 638-42. Accordingly, the Supreme Court concluded that Ex parte Young exception. Id. at 645. In Verizon Maryland, the Court recognized plaintiff also sought a declaration that the

declaration of the past, as well as the future, ineffectiveness of Id. of the State is concerned, the prayer for declaratory relief adds nothing to the prayer for

ed no monetary loss on the state for any past breach of legal duty. Id; see also MCI Telecommunications Corp. v. Illinois Bell Tel. Co., 222 they occurred in the past, and that therefore the Ex parte Young doctrine should not apply.

We cannot accept this argument. The challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing

egal violation for which a prospective remedy is sought is arguably a closer question. Unlike the cases cited above, in which the challenged orders were (allegedly) substantively in contravention of

was arrived at via a procedurally unconstitutional hearing. In some ways, this case is similar to Sonnleitner v. York, 304 F.3d 704 (7th Cir. 2002), in which the plaintiff brought suit after being demoted by his employer, a state-run psychiatric facility, arguing that his procedural due process rights had been violated. Id. at 706. In that case, the Seventh federal law, his official capacity claims were barred by the Eleventh Amendment. Id. at

718-19.

In Sonnleitner, however, the plaintiff had already received a post-deprivation hearing before a commission that found in his favor. Id. an opportunity to tell his side of the story, and the Personnel Commission found it to be

persuasive. The Commission determined that only one of the charges had merit and that interpreting Sonnleitner have found this fact to be significant. See, e.g., Nelson v. Univ. of

Texas at Dallas, 535 F.3d 318, 324 n.4 (5th Cir. 2008); Moore v. Shaw, No. 07-1253, 2008 WL 2692123, at *6 (C.D. Ill. July 1, 2008); Kinney v. Anglin, No. 10-2238, 2011 WL 1899345, at *7 (C.D. Ill. Apr. 25, 2011), report and recommendation adopted, No. 10-CV- 2238, 2011 WL 1899560 (C.D. Ill. May 19, 2011). This court, too, finds that the holding in Sonnleitner was contingent on the fact that a favorable, post-deprivation hearing had already been granted. Because no post-deprivation hearing has been provided in the present case, Sonnleitner is not controlling.

Moreover, in other cases involving procedural due process claims in the employment

context, the Seventh Circuit has concluded that the Ex parte Young exception applies. For example, in Levenstein v. Salafsky, 414 F.3d 767 (7th Cir. 2005), the Seventh Circuit indicated (albeit without much discussion) that a procedural due process claim could proceed against state officials under Ex parte Young. Id. at 772. In Levenstein, the plaintiff sued state university officials for various adverse employment actions, alleging procedural due process and equal protection violations, with a request for reinstatement to his former position. Id. at 768-71. The Seventh Circuit expla -recognized theory of Ex parte Young defendants. Id. at 772. Although the specific relief requested in Levenstein differs from that proposed here, the court assumed that a refusal to reinstate the plaintiff for the allegedly Id.; see also Elliott v. Hinds, 786 claims challenging his discharge and seeking reinstatement and expungement of personnel

records fell under the Ex parte Young exception to state sovereign immunity). As the court egal violation under Ex parte Young can include the continued effect and enforcement based on a past, unconstitutional decision.

Further, courts outside of this circuit have held that a request for a new hearing to remedy an alleged procedural due process violation qualifies as prospective relief from an ongoing legal violation under Ex parte Young. See Brown v. Georgia Dep't of Revenue, 881 F.2d new hearing could proceed against state officials under Ex parte Young doctrine); Martin

Marietta Materials, Inc. v. Kansas Dep't of Transp., 953 F. Supp. 2d 1176, 1187 (D. Kan.

2013), aff'd, 810 F.3d 1161 (10th Cir. 2016) (request for a new hearing based on alleged violations of procedural due process, among other claims, was prospective relief for an ongoing law violation); Columbian Fin. Corp. v. Stork, 702 F. App'x 717, 721 (10th Cir. 2017) (same, not disqualify the action from the Ex Parte Young (quoting Opala v. Watt, 454 F.3d 1154, 1158 (10th Cir. 2006)). As the Tenth Circuit

requiring them to comply with federal due process standards simply by providing a sham

Columbian Fin. Corp. In sum, this court concludes that egal violations for which they seek prospective relief.

Alternatively, the intervening defendants argue that because the Transmission Companies will be the ones to take the actual land at issue, the Commissioners have no further role in the alleged ongoing violation, and thus puts the claims here outside of the Ex parte Young exception. The court does not find this argument persuasive either. Doe v. Holcomb, 883 F.3d 971,

requirements of causation and redressability. Id. injury is causally connected to [the] enforcement [of

the challenged determination] and

Id. at 975-76. However, Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992). and the defendant's putatively illegal conduct, the relief

requested will personally benefit the plaintiffs Servs. Admin., 997 F.2d 231, 239 (7th Cir. 1993).

with respect to a third party is sufficiently conne For example, in ,

412 U.S. 669 (1973), various environmental groups brought suit against the United States and the federal Interstate Co rate charge. Id. at

669- nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to

use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national Id. at 688. Still, the Court concluded that these allegations establishing standing. Id. at 688-90; see also Bantam Books, Inc. v. Sullivan, 372 U.S. 58

injury to permit suit); Central Arizona Water Conservation Dist. v. EPA, 990 F.2d 1531, 1537-38 (9th Cir. 1993) (same).

Here, the Commissioners issued the CPCN, which authorizes the Transmission Companies to take the land at issue; without the CPCN, the Companies would not have the authority to do so. See Wis. Stat. § 196.491(3). Moreover, even defendants concede the Commissioners have a direct, ongoing role in enforcing the CPCN, albeit a limited one. (De ; see also PSC Final Decision

Approving the CPCN (dkt. #7-1) 99- actions will be against the Transmission Companies, need not be

directly against the plaintiffs for a sufficiently strong causal nexus to be found. Finally, an order from this court requiring the Commissioners to vacate the CPCN and hold a new

Thus, this case is unlike Doe v. Holcomb, 883 F.3d 971 (7th Cir. 2018), in which the state officials. Id. at 975-78. In Holcomb, plaintiff sued the Governor and Attorney General

of Indiana, as well as the Executive Director for State Court Administration, 10

challenging -change statute. Id. The Seventh Circuit found that none of the named state defendants played any role in enforcing the challenged statute, and thus their actions did not fall under the Ex parte Young exception to state sovereign immunity. Id. In contrast, the PSC Commissioners play a direct role in defending and

10 The plaintiff also sued a county official, but that is not relevant to the present discussion of state sovereign immunity.

enforcing the challenged CPCN. Accordingly, plaintiffs have shown an adequate connection betw to satisfy the requirements of Ex parte Young and avoid the assertion of sovereign immunity

under the Eleventh Amendment.

B. Judicial Immunity

Next, intervening defendants (although not the Commissioners themselves) argue that the Commissioners enjoy judicial immunity. Like other official immunity doctrines, however, judicial immunity is not relevant in claims brought against state officers acting in their official capacity. This is because an official capacity suit is treated as a suit against the state, not against the individual. See Kentucky v. Graham, 473 U.S. 159, 165-66 (1985) (a suit against a state official in his official capacity is, in all respects other than name, to be treated as a suit against the state itself). While official capacity suits may, therefore, be vulnerable to state sovereign immunity challenges, this case falls under the Ex parte Young exception as discussed above.

As noted above, the parties appear to agree that the Commissioners were sued in their official capacity. (See .) Indeed, the Commissioners

themselves indicated that they did not assert judicial or qualified immunity based on their understanding that the suit was purely an official capacity one. (See assert judicial and qualified immunity

C. Abstention Doctrines

Defendants next argue that this court is required to abstain from exercising its -39.) 11

More specifically, defendants decision in state court and, therefore, contend that this court must abstain under the

Younger and Colorado River abstention doctrines pending completion of ongoing state proceedings. (Id. -24 (citing Younger v. Harris, 401 U.S. 37 (1971); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).)

Colo.

River Water Conservation Dist., 424 U.S. at 817 (quoting McClellan v. Carland, 217 U.S. required to abstain so as not to interfere with ongoing state proceedings. See id. at 813.

For example, in Colorado River, the Court held that a federal court may defer to a Colorado River purposes when substantially the same parties

are contemporaneously litigating substantially the same issues. . . . In essence, the question is whether there is a substantial likelihood that the state litigation will dispose of all claims

11 Intervening defendants frame this same argument in terms of whether the plaintiffs have adequate remedies in state law without explicitly asking that this courSee 37-40.) However, the relevant discussions in the cases they cite all deal with federal court abstention in the presence of related state court proceedings. (See id. (citing cases).) Accordingly, the court also addresses this section.

Adkins v. VIM Recycling, Inc., 644 F.3d 483, 498 (7th Cir. 2011) (internal quotations omitted). Younger and its progeny also hold that a federal court Sprint

Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 73 (2013) (quoting New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 367-68 (1989)).

Neither abstention doctrine squarely applies here. First, the Younger abstention is state proceedings requiring abstention. , 571 U.S. at 73 (where a

rule that a court must exercise jurisdiction over a case properly before it governs). Indeed,

the Supreme Court has expressly instructed that a parallel state court review of a state utility board order did not require abstention of a federal court action challenging the same order. Id. at 72-73. Second, the Colorado River abstention does not apply because the state court petitions do not assert any of the federal constitutional issues before this court; similarly, this case does not concern any of the state law claims plaintiffs are bringing in state court. Since the cases do not involve substantially the same issues, and the state cases would not dispose of the claims brought in this court, abstention is not appropriate.

D. Standing

standing to assert their federal claims, the required elements are (1) an injury-in-fact suffered by the plaintiff that is (2) fairly traceable to the

challenged action and (3) likely to be redressed by a favorable decision. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992). An organization may establish standing either by asserting an injury to its own interests or by bringing suit on behalf of its members provided standing to sue in their own right, the interests at stake Friends of the

Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000) (citing Hunt v. , 432 U.S. 333, 343 (1977)).

Moreover, only one plaintiff is required to establish standing in order for a dispute to be justiciable. Tierney v. Advocate Health & Hosps. Corp., 797 F.3d 449, 451 (7th Cir. Ezell

v. City of Chicago, 651 F.3d 684, 696 n.7 (7th Cir. 2011)). Of particular relevance to this case, the Supreme Court has explained that a

person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 n.7 (1992).

As Lujan Id; see also Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009)

at is affected by the deprivation -- a procedural right in vacuo -- A concrete interest may be established through allegations that a challenged action has or

See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 368 n.1 (2018) (a decrease sufficiently concrete injury for standing purposes); MainStreet Org. of Realtors v. Calumet

City, Ill. ordinance would decrease the value of property and hence the commissions of plaintiffs,

who were real estate brokers who serviced the land at issue, was adequate to confer Article adequately allege injury in fact when they aver that they use the affected area and are

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S.

167, 183 (2000). As to this latter interest, t Protect Our Parks, Inc. v. Chicago Park Dist., 971 F.3d 722 (7th Cir. 2020), is instructive. There, a nonprofit

presidential memorial center on land in a city park. Id. at 736. The court noted that leged property right -- -- ly unusual, yet still constituted a cognizable injury. Id.

Defendants assert that plaintiffs here lack both standing to sue on their own behalf

and associational standing. (I - court disagrees. Due to an alleged, constitutionally deficient

procedure, plaintiffs claim

the PSC approved the condemnation of land for a transmission line that will injure their own concrete interests. In particular, they allege that DALC and members of both plaintiff organizations own land, conservation easements, and other property interests on and near the proposed site of the line, and further that the construction of the line will reduce both the economic and ecological value of those properties. Moreover, they seek redress through an injunction vacating the allegedly flawed PSC decision and enjoining enforcement of the CPCN, as well as various declarations of the law. Consistent with the Seventh Circuit decision in Protect Our Parks, these allegations are adequate to establish standing, at least at the pleading stage. 971 F.3d at 736.

E. Ripeness

claims are not ripe, since they have yet to experience any actual injury -22 (dkt. #17) 25-27.) 12

Claims relating to governmental taking of property are to be

12 Both defendants and intervening defendants dedicate a separate section of their brief to the question of ripeness. (See -22; Int. -24.) Both also weave ripeness arguments into various other parts of their brief. For example, defendants argue that plaintiffs have failed to state a § 1983 claim because they do not allege that any property has yet been condemned and, thus, have not alleged a deprivation of a constitutionally protected right. (See id. Similarly, intervening defendants argue that plaintiffs have failed to state a due process violation because they have not yet suffered a deprivation of a -27.) However, since all of these arguments relate to timing (i.e., yet come to pass), the court will address them under the general category of ripeness. Church of Our Lord & Savior Jesus Christ v. City of Markham a question of Buckley v. Valeo, 424 U.S. 1, 114-18 (1976)).

evaluated under a unique ripeness standard. See Wright & Miller, 13B Fed. Prac. & Proc. Forseth v. Vill. of Sussex, 199 F.3d 363, 368 (7th

may apply to both directly under the takings clause of the Fifth Amendment, as well as plaintif procedural due process claim. See Forseth, 199 F.3d at 368 (explaining that a procedural or

special ripeness standard for

takings claims); Unity Ventures v. Lake Cty., 841 F.2d 770, 775 (7th Cir. 1988) (in case challenging governmental land use, special ripeness standard for takings claims applied to .

Under this ripeness standard, a plaintiff may initiate an government entity charged with implementing the regulations has reached a final decision

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985), overruled on other grounds by Knick v. Twp. of Scott, Pennsylvania, 139 S. Ct. 2162 (2019); 13

Church of Our

13 Two rules were set forth in Williamson County, the Court required that in order to ripen a takings case for federal judicial review, a takings plaintiff (1) receive a final state agency decision and (2) exhaust state court remedies. See Williamson Cty., 473 U.S. at 186. While the former state exhaustion requirement was recently overruled in Knick, the Court specifically did not disturb the latter finality requirement. See Knick validity of [the Williamson See also 2 Am. Law. Knick overruled Williamson County only to the extent that it forced takings plaintiffs to seek just compensation in state court in order to ripen their federal court takings action. The decision expressly states that it does not affect the

Lord & Savior Jesus Christ v. City of Markham, Ill., 913 F.3d 670, 678 (7th Cir. 2019) (noting ; see also Goldstein v. Pataki, No. 06 CV 5827 NGG RML, 2007

WL 1695573, at *13 (E.D.N.Y. Feb. 23, 2007), report and recommendation adopted in relevant part, rejected in part, 488 F. Supp. 2d 254 (E.D.N.Y. 2007) when state commission issued final determination approving a redevelopment project, even

though condemnation proceedings against plaintiffs had not yet commenced); but see Samaad v. City of Dallas, 940 F.2d 925, 934 (5th Cir. 1991) (questioning the applicability of the Williamson County ripeness test in private purpose takings claim).

The overall purpose of the ripeness doctrine i prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements Thomas v. Union Carbide Agr. Prod. Co., 473 U.S. 568, 580 (1985) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967)). W substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality however, a plaintiff generally need not to wait until he is actually injured to bring suit. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506 (1972). Even more specifically, hile a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion - a takings claim is likely to have ripened Palazzolo v. Rhode Island, 533 U.S.

other prong of the Williamson County ripeness test, which requires takings plaintiffs to obtain a final

606, 620 (2001).

Here, plaintiffs have alleged that the September 2019 PSC decision approving the . (See Compl. (dkt. #1) ¶ 168.) Indeed, the Commissioners have represented that their only role going forward is to enforce the CPCN or defend it against legal challenges (see discretion over future land use decisions.

Curiously, only intervening defendants argue

that the CPNC is not final, asserting that there are still several steps the [Transmission Regardless, the court will leave any remaining factual dispute over

the finality of the CPCN to summary judgment or trial. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necess) (internal citations, quotations, and -pleaded facts as true, the CPCN is a , as such, they have demonstrated (at least at this stage) that their claims are ripe for adjudication yet been taken.

II. Failure to State a Claim

Putting these jurisdictional arguments aside, defendants assert that plaintiffs have

failed to state a claim upon which relief may be granted. In particular, the defendants argue Commissioner Nowak must be dismissed because plaintiffs have not adequately pleaded that she was personally involved in the alleged deprivations as required by § 1983. Defendants further argue that plaintiffs have not successfully pleaded a takings claim because: will be condemned; (2) the land at issue has not and will never be in the possession of the government; , which cannot amount to a taking; and (4) the proper relief for a taking is just compensation, not injunctive relief as requested by plaintiffs. Finally, defendants argue that plaintiffs failed to state a procedural due process claim because: (1) they failed to plead a lack of state law remedies; (2) they have not alleged a deprivation of a constitutionally protected property or liberty interest; (3) they have not alleged sufficient facts to show unconstitutional bias on the part of the Commissioners; and (4) they did not timely bias.

Dismissal pursuant to Rule Bell Atl. Corp. v. Twombly,

550 U.S. 544, 558 (2007). factual content that allows the court to draw the reasonable inference that the defendant

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). While detailed factual allegations are not required, plaintiff rai Riley v. Vilsack, 665 F. Supp. 2d 994, 997 (W.D. Wis. 2009). In reviewing the sufficiency of a complaint under the

plausibility standard, the court will accept well-pleaded facts in the complaint as true, but Brooks v. Ross, 578 F.3d 574, 581

(7th Cir. 2009). 14

A. Personal Involvement of Commissioner Nowak

Gossmeyer v. McDonald

reckless disregard of plaintiff's constitutional rights, or if the conduct causing the

Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985) (quoting Black v. Lane, 22 F.3d 1395,

1401 (7th Cir. 1994)).

Here, defendants contend that Commissioner Nowak in particular should be s no allegations that Novak was personally #17) 12-13.) Unquestionably, p

involvement are sparse, but they still allege that she personally voted to approve the Transmission Line, thereby authorizing a taking of land for allegedly private purposes in

14 Defendants also encourage the court to apply an additional gloss to the Rule 12 standards when , contending pleaded (See re brought via a constitutional due

process claim, and thus the § 455 pleading standards are not applicable here.

violation of the Fifth Amendment. Facially, at least, this would appear to be enough to establish personal involvement in an unlawful taking.

As to the due process claim, however, plaintiffs neither allege that Nowak was personally biased or conflicted, nor knew or should have known of her co- involved in any alleged due process violation, therefore, she will be dismissed as to that

claim.

B. Takings Claims

The Takings Clause of the Fifth Amendment, which has been incorporated against the states through the Fourteenth Amendment, Phillips v. Washington Legal Found., 524 U.S. 156, 163 (1998), prohibits the taking of private property for public use without just compensation, U.S. Const. Am. V. The clause has also been interpreted as prohibiting the taking of land , even where just compensation is paid Kelo v. City of New London, 545 U.S. 469, 477 (2005). Even if land is taken and transferred to a private owner, however, that taking can still be Protect Our Parks, Inc. v. Chicago Park Dist., 971 F.3d 722, 737 (7th Cir. 2020) (citing Kelo, 545 U.S. at 483-84).

The United States Supreme Court has held Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984). As a result, while the Supreme Court recognizes reviewing a legislature's judgment of what constitutes a public use it has held that role to be Id. (quoting Berman v. Parker,

rationally related to a conceivable public purpose, the Court has never held a compensated

Id. Similarly, the Sixth Circuit described nd

plaintiff will be able to succeed on such a claim. Montgomery v. Carter Cty., 226 F.3d 758, 766 (6th Cir. 2000). Finally, discussing such a claim, Judge Posner previously observed Gamble v. Eau Claire Cty., 5 F.3d 285, 287 (7th Cir. 1993).

With this daunting burden in mind, plaintiffs have simply failed to allege sufficient facts to support their claim that the CPCN amounts to an impermissible, private purpose taking under the Fifth and Fourteenth Amendments. At most, plaintiffs allege that the costs of the Line will exceed the public benefits, and there are better alternatives available, but this argument invites judicial oversight over complicated policy considerations, rather than merely questioning Hawaii Hous. Auth., 467 U.S. at 240. narrow, which no doubt explain why the condemnation of land for the construction of

power lines has been regularly affirmed as serving a public purpose. E.g., Mont.-Dakota Utilities Co. v. Parkshill Farms, LLC, 905 N.W.2d 334, 338-39 (S.D. 2017); Rutland Ry. Light & Power Co. v. Clarendon Power Co., 83 A. 332, 336 (Vt. 1912); Rockingham Cty. Light & Power Co. v. Hobbs, 58 A. 46, 47 (N.H. 1904). Certainly, the present composition of the Clause, but this court is not authorized to act on such speculation. See Levine v. Heffernan, 864 F.2d 457, 461 (7th Cir. 1988 nly the Supreme Court may overrule one of its own precedents . . . [and] out of respect for the great doctrine of stare decisis, [lower courts] are ordinarily reluctant to conclude that a higher court precedent has been overruled by implication. Absent that, that the construction of the Transmission Line conceivable public

purpose, -advised it may be or prove to be. Accordingly, their taking claim must be dismissed. 15

C. Due Process Claim

1. Availability of State Law Remedies According to defendants, a plaintiff is required to plead a lack of adequate state law remedies to state a claim under the procedural due process clause 17, 20.) Since plaintiffs have not done so, defendants contend that they have failed to

state a claim. (Id. argument rests on a proposition purportedly derived from the United States Supreme Court in Parratt v. Taylor, 451 U.S. 527 (1981). In Parratt , ose materials never reached him, allegedly due to the actions of certain state prison guards. Id. at 529. The Supreme Court concluded that this deprivation of property occurred before any hearing and of a random and unauthorized act,

thus making it , at

15 The court emphasizes that plaintiffs are not arguing, and this court is not reaching, the issue of s grating of the CPCN.

least as a practical matter. Id. at 541. Moreover, the Court pointed out that a state tort claims procedure was available to plaintiff to redress this deprivation after the fact. Id. at 543. Accordingly, the Court held that the plaintiff failed to state a viable procedural due process claim. Id.

To begin, the Supreme Court itself has emphasized that Parratt departs from the . . . first bringing any sort of state lawsuit, even when state court actions addressing the

Knick, 139 S. Ct. at 2172-73 (quoting D. Dana & T. Merrill, Property: Takings 262 (2002)). Thus, the Seventh Circuit has described the holding in Parratt Brunson v. Murray, 843 F.3d 698, 715 n.9 (7th Cir. 2016). Indeed, the Seventh Circuit instructs that the Parratt and

init Bradley v. Vill. of Univ. Park, 929 F.3d 875, 886 (7th Cir. 2019).

In particular, the Supreme Court has questioned the applicability of Parratt to takings claims, noting that the decision:

did not involve a takings claim for just compensation. Indeed, it was not a takings case at all. Parratt held that a prisoner deprived of $23.50 worth of hobby materials by the rogue act of a state employee could not state a due process claim if the State provided adequate post-deprivation process. But the analogy from the due process context to the takings context is strained . . . . It is not even possible for a State to provide pre- deprivation due process for the unauthorized act of a single employee. That is quite different from the taking of property by the government through physical invasion or a regulation

that destroys a property's productive use. Knick, 139 S. Ct. at 2174.

Understood in this way, Parratt is inapplicable to the actions of the Commissioners in extending the powers of eminent domain to the Transmission Companies. In particular, the CPCN was granted after a contested case process, including the presentation of evidence at a week-long hearing; thus, the deprivation was not the result of a random and unauthorized act and occurred after a state-sanctioned predeprivation hearing. As the Supreme Court recognized in Knick, an alleged taking based on such a governmental process Parratt. As such, the court concludes that plaintiffs were not required to plead a lack of adequate state, post-deprivation remedies in order to proceed with their procedural due process claim.

2. Deprivation of a Constitutionally Protected Interest To state a procedural due process claim, a

plaintiff must allege a deprivation of a constitutionally protected property or liberty interest. Ky. Dept. of Corrs. v. Thompson, 490 U.S. 454, 460 (1989) condemnation of th the passage of the Line on land owned by them and their members. Defendants do not

appear to dispute that the seizure or permanent physical invasion of real property would amount to a deprivation of a property interest protected by the constitution, nor could they. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (holding this deprivation has not yet occurred, and therefore plaintiffs have no claim. But again, this

argument is best understood as a question of ripeness which the court has addressed above. See supra section I.E & n.12. Moreover, at the pleadings stage, it is at worst plausible and n reduced in value by the award of eminent domain rights to the Transmission Companies, whether ever exercised or not. Accordingly, plaintiffs have adequately stated a deprivation of a constitutionally protected property interest.

3. Bias next ar do not demonstrate unconstitutional bias by the Commissioners, even if accepted as true Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). This requirement extends to state

administrative proceedings of a quasi-judicial nature. See Gibson v. Berryhill, 411 U.S. 564, 578 (1973). The test for determining the existence of unconstitutional bias is an objective whether, as an objective matt [or her] position is likely to be

Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009)).

Tumey v. Ohio, 273 U.S.

stances which, as an objective matter, require recusal, that the probability of actual bias on the part of the judge or decisionmaker is too high to

Caperton, 556 U.S. at 877 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). For example, recusal may be required where: an adjudicator was Ethicon Endo-Surgery, Inc. v. Covidien LP, 812 F.3d 1023, 1030-31 (Fed. Cir. 2016) (citing Liteky v. United States, 510 U.S. 540, 554 (1994)); a judge has an indirect financial interest in the outcome of a case, Ward v. Monroeville, 409 U.S. 57, 93 (1972); or a judge has a conflict of interest due to his participation in an earlier proceeding, e.g., In re Murchison, 349 U.S. 133, 133 (1955). In contrast, no unconstitutional bias has been found where: an adjudicator made a - in- , Impact Indus., Inc. v. NLRB, 847 F.2d 379, 382 (7th Cir. 1988); the government was a party to a case and the administrative law judge is previously employed by the government, Abdulahad v. Holder, 581 F.3d 290, 296 (6th Cir. 2009); or an adjudicator had a limited, past association with a party, Stivers v. Pierce, 71 F.3d 732, 744 (9th Cir. 1995).

For this reason [do] not rise to a Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 702 (1948). Even an allegation that recusal was required under state or federal ethics rules does not itself demonstrate a violation of constitutional due process. See Suh v. Pierce, 630 F.3d 685, 691- 92 (7th Cir. 2011) (explaining that cases interpreting 28 U.S.C. § 455, the federal recusal with So, too, a mere

Id.

As noted above, the court will dismiss Commissioner Nowak process claims as they allege no facts demonstrating her personal bias. This does not,

multimember panel may amount to a due process violation. See Williams, 136 S. Ct. at imember If anything, this is even more true in a case like this one, where plaintiffs have

alleged specific facts as to the alleged bias of two out of three decisionmakers, including that: (1) during the course of the CPCN proceedings, Commissioner Huebsch served as a member of the advisory committee for an organization that developed, approved, and was a proponent of the Transmission Line (id. ¶¶ 81, 92, 93); (2) Commissioners Valcq and Huebsch received ex parte information regarding the case (id. ¶¶ 17, 112, 151); (3) Commissioners id. ¶ 17); and (4) 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 (id. ¶¶ 56-74). Due 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. 16

At the same time, plaintiffs are on notice that they will ultimately face an uphill battle in actually proving their allegations. Adjudicators such as Commissioners Valcq and Head v. Chicago Sch. Reform Bd. of Trustees, 225 F.3d 794, 804 (7th Cir. 2000). he presumption is a rebuttable one . . . the burden of rebuttal is heavy indeed Hess v. Bd. of Trustees of S. Illinois Univ., 839 F.3d 668, 675 (7th Cir. 2016). 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. Head, 225 F.3d at 804; Navistar Intern. Transp. Corp. v. U.S. EPA, 941 F.2d 1339, 1360 (6th Cir. 1991) decisionmaker must be evident from the record and cannot be based on speculation or

4. Untimeliness Finally dispositive affirmative defense by indicating that the facts underlying their claims were a waived any bias argument by not raising it in a timely manner 16

Even so, t unlikely to be enough to state a claim for unconstitutional bias. Similarly, as discussed above, arguments that the Commissioners had an obligation under state or federal judicial ethics laws to recuse themselves does not by itself create a constitutional recusal obligation.

33-35.) In particular, d sed their conflict of interest claims at any point in time prior to [the decision] instead waited until a month after Id. at 34 (emphasis in original).) Defendants further observe that -- namely, in cases involving judicial recusal rules -- judge timely may result in a waiver of that argument. (Id.)

However, these judicial recusal cases are inapt to the present procedural due process claim. As defendants themselves point out elsewhere (id. at 27 n.15), the requirements under the due process clause are different than the requirements for judicial recusal governed by state and federal ethics statutes. Given that an element of a due process claim is the deprivation of a protected interest, plaintiff attempt to bring their bias claim before the final decision may have resulted in dismissal for lack of ripeness. Moreover, as plaintiffs point out, they did move to recuse both Commissioners before their vote on the final decision, albeit after the preliminary vote. Thus, even under the precedent cited by defendants, it would appear that plaintiffs did not in fact waive their claims of bias or, at least, did not plead facts to establish definitively an affirmative defense of untimeliness. on the pleadings alone.

III. Motions to Stay

The intervening defendants and defendants have also filed two motions to stay discovery, which are not briefed and pending before this court. (Dkts. #101, 129.) Both motions argue that discovery should be stayed pending resolution of asserted governmental

immunity defenses. However, as discussed above, the court has concluded that the Commissioners are not immune from suit. Moreover, the court does not believe that those defenses are likely to prevail in an interlocutory appeal. Accordingly, both motions to stay will be DENIED.

ORDER IT IS ORDERED that: 1) motion to dismiss (dkt. #6)

dismiss (dkt. #16) are GRANTED IN PART and DENIED IN PART as follows: defendants Public Service Commission of Wisconsin and Ellen Nowak are DISMISSED from this case; p ; and plaintiffs may proceed on their remaining claims as pleaded. 2) discovery (dkts. #101,

129) are DENIED. 3) The dispositive motion deadline is reset to January 4, 2021, with responses due

January 25, 2021, and replies due February 4, 2021. Entered this 20th day of November, 2020.

BY THE COURT: /s/ _____ WILLIAM M. CONLEY District Judge