STATE OF WISCONSIN
SUPREME COURT

Clean Wisconsin, Inc. p/k/a Wisconsin's Environmental Decade Institute, Inc., and SC Johnson & Son, Inc. and Calpine Corporation Petitioners-Respondents-Cross-Appellants-Cross-Respondents, Town of Caledonia Petitioner-Cross-Respondent, v. Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources, Respondents-Co-Appellants-Cross-Respondents, Wisconsin Electric Power Company, W.E. Power, LLC and Wisconsin Energy Corporation, Interested Parties-Appellants-Cross-Respondents, Dairyland Power Cooperative, Interested Party-Cross-Respondent, Madison Gas & Electric Company and Wisconsin Public Power, Inc., Interested Parties-Co-Appellants-Cross-Respondents, City of Oak Creek Interested Party-Respondent-Cross-Appellant, Robert H. Owen, Interested Party-Respondent-Cross-Respondent.	Appeal No. 04-3179 Circuit Court Case No. 03CV003478, 03CV003731, 04CV000133, 04CV000149, 04CV000530, 04CV000533

(Caption continued on following pages)

BRIEF OF PETITIONER-RESPONDENT-CROSS-APPELLANT-CROSS-RESPONDENT CALPINE CORPORATION

Calpine Corporation,
Petitioner,
v.
Public Service Commission of Wisconsin, and
Wisconsin Department of Natural Resources,
Respondents,
Wisconsin Electric Power Company, Wisconsin
Energy Corporation, W.E. Power, LLC,
Dairyland Power Cooperative, Madison Gas &
Electric Company, Robert H. Owen, Jr., and
City of Oak Creek,
Interested Parties.

Clean Wisconsin, Inc. p/k/a Wisconsin's
Environmental Decade Institute, Inc. and SC
Johnson & Son, Inc.,
Petitioners,
v.
Wisconsin Department of Natural Resources,
Respondent,
Wisconsin Public Power, Inc., City of Oak
Creek, Dairyland Power Cooperative, Madison
Gas & Electric Company, Wisconsin Electric
Power Company, Wisconsin Energy Corporation
and W.E. Power, LLC,
Interested Parties.

Calpine Corporation,
Petitioner,
v.
Wisconsin Department of Natural Resources,
Respondent,
City of Oak Creek, Dairyland Power
Cooperative, Madison Gas & Electric Company,
Wisconsin Public Power, Wisconsin Electric
Power Company, Wisconsin Energy Corporation
and W.E. Power, LLC,
Interested Parties.

City of Oak Creek,
Petitioner,
v.
Public Service Commission of Wisconsin,
Respondent.

Town of Caledonia,
Petitioner,
v.
Public Service Commission of Wisconsin,
Respondent,
Wisconsin Electric Power Company, Wisconsin Energy Corporation, W.E. Power, LLC, Dairyland Power Cooperative, Madison Gas & Electric Company, Robert H. Owen, Jr., and Wisconsin Public Power, Inc.,
Interested Parties.

BRIEF OF PETITIONER-RESPONDENT-CROSS-APPELLANT-CROSS-RESPONDENT CALPINE CORPORATION

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ISSUES PRESENTED FOR REVIEW

1. Does the Public Service Commission of Wisconsin's Final Decision violate the least cost requirement of the Plant Siting Law, Wis. Stat. § 196.491(3)(d)?

   Trial court decision: No.

2. Does the Public Service Commission of Wisconsin's Final Decision have a material adverse impact on competition in the wholesale electric service market in violation of the Plant Siting Law, Wis. Stat. § 196.491(3)(d)7?

   Trial court decision: No.

3. Does the Public Service Commission of Wisconsin's Final Decision have an undue adverse impact on environmental values relating to the water resources of the state in violation of the Plant Siting Law, Wis. Stat. § 196.491(3)(d)4?

   Trial court decision: No.

4. Does the Public Service Commission of Wisconsin's Final Decision violate the Wisconsin Environmental Policy Act, Wis. Stat. § 1.11 ("WEPA"), relating to the adequacy of the Environmental Impact Statement?

   Trial court decision: No.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case and already has been scheduled by the court.

Publication of the court's opinion is appropriate in this case. The court's decision will have a significant effect on the consistency of the interpretation and administration of statutes and regulations related to the approval of electric generating facilities in this state.

STATEMENT OF THE CASE

I. NATURE OF CASE, PROCEDURAL STATUS, AND DISPOSITION IN THE CIRCUIT COURT.

This case involves numerous issues emanating from the application for, and the grant of, a Certificate of Public Convenience and Necessity ("CPCN") for the construction and operation of a coal-fired electric generating facility knows as the Elm Road Generating Station ("ERGS") in Oak Creek, Wisconsin. Calpine Corporation ("Calpine") participated in this CPCN proceeding in order to propose a gas-fired power supply option, as an alternative to or in conjunction with the utility proposal, that would provide Wisconsin's utility ratepayers the least cost power supply available, consistent with Wisconsin's statutorily required energy priorities.

On November 10, 2003, the Public Service Commission of Wisconsin ("PSC") issued its Final Decision granting a CPCN for the ERGS project. R.18, Item 150, pp. 19-23. Regarding Calpine's proposal, the PSC decided that Wisconsin's Energy Priorities Law and Plant Siting Law, despite their clear language and the PSC's prior interpretations of those laws, allowed the PSC the discretion to issue an approval for a resource expansion plan that is a lower priority under the Energy Priorities Law and more costly under the Plant Siting Law than a plan which would include Calpine's proposed facility. *Id.*

The PSC also decided, again contrary to prior interpretations of the Plant Siting Law, that its ability to regulate the rates for power generated by ERGS

prevents any material adverse impact upon competition in the relevant market. *Id.* at 27-29.

Finally, the PSC simply deferred to the Wisconsin Department of Natural Resources ("DNR") in turning aside Calpine's position that the ERGS project could not be issued a CPCN because (1) WEC failed to establish the absence of undue adverse impacts on environmental values relating to water resources, as required by the Plant Siting Law, and (2) the Final Environmental Impact Statement ("FEIS") was inadequate as a matter of law under the Wisconsin Environmental Policy Act ("WEPA"). *Id.* at 51-56.

Consequently, Calpine filed two petitions seeking judicial review of the PSC's Final Decision. R.1 -- Dane County Case No. 03-CV-3731; R.1 -- Dane County Case No. 04-CV-149. On March 11, 2004, Calpine's petitions were consolidated with four other petitions seeking review of that same PSC decision. R.33. The consolidated case was assigned to and heard by the Honorable Judge David Flanagan. R.35.

On November 29, 2004, the circuit court issued its Order Upon Judicial Review of Public Service Commission Order (the "Order"). R.84; App.I.1-54[1]. In the Order, the circuit court vacated and remanded the PSC's Final Decision for numerous reasons. R.84:52-54; App.I.52-54. As it relates to the issues advanced by Calpine, the court determined that the PSC failed to follow the "plain,

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[1] References to "App.I.__" and "App.II.__" are to volumes I and II of Calpine's appendix, respectively.

straightforward command" of Wisconsin's Energy Priorities Law by failing to consider the feasibility and cost-effectiveness of Calpine's natural gas proposal as an alternative, in whole or in part, to the coal-fueled ERGS project. R.84:32-40; App.I.32-40. Instead, the circuit court held, the PSC usurped the policy setting role of the legislature by inappropriately reading into that law additional terms that allowed the PSC to favor the ERGS project. *Id.* at 37. This action by the PSC ran counter to the PSC's prior interpretations of the Energy Priorities Law, *see* R.53:24-25, and required reversal and remand to the PSC. R.84:40-41; App.I.40-41.

However, despite acknowledging the PSC's similarly inconsistent approach to the application of the Plant Siting Law, *id.* at 47, the court did not analyze the merits of Calpine's argument based on the prior inconsistent orders of the PSC relating to least cost. Instead, citing merely the complexity of the computer model used by the PSC to determine least cost -- a model which indisputably included Calpine's proposal as part of the least cost option -- the circuit court decided to defer to the PSC's decision to exclude Calpine's proposal from the expansion plan chosen. *Id.* at 48.

Similarly, in a mere two sentence analysis, again overlooking the PSC's inconsistent interpretations of the Plant Siting Law, the court ruled that the Final Decision did not violate the Plant Siting Law's requirement that there be no "material adverse impact upon competition" in the relevant market. *Id.* at 49. The

court also deferred to the PSC entirely in its finding of no adverse water impacts and approval of the FEIS. *Id.* at 46.

Six parties to the consolidated circuit court action filed notices of appeal, co-appeal, or cross-appeal of the Order. R.90, 91-96. In an order dated January 5, 2005, this court granted petitions seeking bypass of the court of appeals and issued an order regarding the filing of briefs by all parties.

II. STATEMENT OF FACTS.

The factual and regulatory context of this case is complex. Accordingly, a detailed overview of the facts is necessary for a thorough understanding of the issues raised in this case.

A. Calpine's Provision Of Power To Wisconsin.

Calpine specializes in the development and operation of independent power projects that provide electric power at wholesale to utilities for retail distribution to utilities' commercial and residential customers. Calpine has substantial expertise in all areas of independent power project development, and has been actively involved in the development and operation of numerous generation facilities throughout the United States. Calpine has the largest fuel-efficient fleet of gas-fired power plants in North America. R.18, Item 157, pp. 3365-3372.

Calpine has been an active participant in the wholesale generation market in Wisconsin. Calpine presently owns and operates the RockGen Energy Center in Christiana, and the Riverside Energy Center in the Beloit area. Calpine's Fox Energy Center in the Kaukauna area is currently under construction and will begin

operation in 2005. Calpine also is selling power to Wisconsin Electric Power Company ("WEPCO") from its Zion Energy Center, located in northeast Illinois. In addition, Calpine has received from the PSC a CPCN for its Fond du Lac Energy Center. R.18, Item 157, pp. 3365-3367.

Calpine has developed relationships with and entered into power purchase agreements or similar agreements with all of the major investor-owned utilities in Wisconsin. *Id.* at 3368. The following table summarizes the long-term agreements that have been entered into by Calpine and the major investor-owned utilities in the state.

Utility	Term of Agreement	Facility
WP&L	Eight years	RockGen Energy Center
WP&L	Nine years	Riverside Energy Center
MG&E	Nine years	Riverside Energy Center
WPS	Ten years	Fox Energy Center
WEPCO	Five to Ten years	Zion Energy Center

Id. In addition, Calpine is ready, willing, and able to enter into other relationships to sell capacity and energy to Wisconsin utilities. *Id.*

B. The ERGS Proposal.

On February 1, 2002, WEPCO, Wisconsin Energy Corporation ("WEC"), and W.E. Power, LLC ("W.E. Power") (referred to collectively as "WEC") sought to implement its "Power the Future" business plan by filing an application with the PSC seeking a CPCN for the proposed ERGS project. R.18, Item 157, p. 2945.

ERGS, as proposed by WEC, consisted of three coal-fired electric generation units with a combined capacity of 1,830 MW to be constructed adjacent to WEC's Oak Creek Power Plant ("OCPP") along the shore of Lake Michigan in southeastern Wisconsin. R.18, Item 157, p. 2945. Two of the units were super critical pulverized coal ("SCPC") units while the third unit was an integrated gasification combined-cycle ("IGCC") unit. As proposed by WEC, the SCPC units were to be placed in service in 2007 and 2009, and the IGCC unit was to be placed in service in 2011. *Id.*

All three ERGS facilities would be fueled primarily by bituminous coal from Pennsylvania, containing sulphur in excess of 1%. R.18, Item 157, p. 742. Consequently, the ERGS facilities would be the lowest energy priority under the Energy Priorities Law, Wis. Stat. § 1.12(4).

C. Calpine's Proposal.

Calpine submitted to the PSC and to WEC a power supply proposal during the course of the ERGS proceeding. R.38, Item 160, Exh. 201c. Calpine proposed to supply WEC with power to meet its needs in whole or in part, including providing electricity from Calpine's Fond du Lac Energy Center. *Id.*; R.18, Item 157, pp. 3366-3367, 3380-3382. The Fond du Lac Energy Center is a 523 MW combined cycle facility to be located in the Town of Fond du Lac, Wisconsin. The Fond du Lac Energy Center received a CPCN from the PSC on May 5, 2003. R.18, Item 157, pp. 3366-3367. Calpine's proposal did not preclude the

construction of coal-fired facilities by WEC at the Oak Creek site, or other locations.

Calpine's proposal is for clean burning, natural gas facilities to provide a flexible, low cost electric supply. The project site from which the capacity would be provided already has been permitted by the PSC and DNR and, thus, has been determined to meet federal and state electric and environmental regulations. Unlike WEC's proposal, Calpine's offer was a "firm price" proposal where Calpine, not the ratepayers, would absorb cost overruns and operating risk. R.38, Item 160, Exh. 202c; *see also* R.18, Item 157, p. 3372.

D. The PSC And DNR Evaluation Of Calpine's Proposal.

In July 2003, the PSC and the DNR jointly issued the Final Environmental Impact Statement ("FEIS") for the ERGS project, as required under Wis. Stat. § 1.11(2). R.18, Item 119.

As part of the FEIS, the PSC Staff used the Electric Generation Expansion Analysis System ("EGEAS") model to identify the cost-effective means of meeting WEC's future demand. Final Decision pp. 19-23. The EGEAS model is a quantitative tool the PSC uses to calculate the overall cost of adding new units to the electric system, using data about the utility's existing system, data for the proposed units, and a variety of base forecasts for demand and fuel prices. *Id.* The EGEAS model analyzed the ERGS project against several alternatives, including the Calpine proposal. R.18, Item 119, pp. 65-76.

The results of the EGEAS modeling were presented in the FEIS and in the testimony of PSC staff witness, Mr. Pilo. The PSC's EGEAS analysis primarily relied upon the assumptions provided by WEC, R.18, Item 119, pp. 66, 67, and addressed a number of scenarios and sensitivities. Based upon the EGEAS modeling, PSC staff concluded:

> Calpine has proposed natural gas-fired combined cycle projects with favorable pricing terms relative to the ERGS. Due to this pricing, the EGEAS model selects the 523 Calpine Fond du Lac project in 2007 as a lower cost alternative, by about $96 million on a present value basis, over WEPCO's proposed approach to have its first two supercritical coal plants begin operation in 2008 and 2009.

R.18, Item 157, p. 3899.

Regarding the costs and the claimed immediate need for the ERGS facility, as compared to the costs of the Calpine proposal, the FEIS concluded:

- The IGCC unit, which is the third unit in the ERGS proposal, is not cost-effective.
- The proposed timing of the SCPC units in 2007 and 2009, as WEC has proposed, is not the least cost scenario. This scenario is generally more than $100 million more expensive on a present value basis. ***Timing appears to be about two to three years premature.***
- The Calpine 523 MW CC Proposal in Fond du Lac using natural gas is lower cost than the ERGS – w/o IGCC Proposal. However, the Calpine proposal would not need to be put in-service until 2007. Selecting the Calpine proposal does not mean that coal plants would not be needed. Several scenarios suggest that ***a coal plant would not be needed until 2011, if not later, if the Calpine proposal is selected.***
- CO_2 monetization, as well as other emissions monetization scenarios, favors picking the Calpine proposal versus ERGS w/o IGCC because ERGS's supercritical pulverized coal unit produces approximately 2-3 times as much CO_2 per unit of electricity produced compared with Calpine's combined-cycle natural gas facility.

R.18, Item 119, Summary, pp. xxv, 68, 93 (emphasis supplied).

When used independently or in conjunction with a portion of WEC's ERGS proposal, the Fond du Lac Energy Center provides a lower cost electric supply

option, as compared to WEC's ERGS proposal with SCPC units alone or with IGCC. Under all sensitivities, including the high natural gas price case and regardless of the amount of wind energy, the overall electric supply cost for WEC is lower when Calpine's proposal is included in the supply mix. R.18, Item 158, Exh. 273. Moreover, these conclusions were reached without consideration of transmission costs, which, for the ERGS, were from $28 million to $111 million higher than for the Calpine proposal. R.18, Item 119, pp. 74-75.

Furthermore, the Calpine proposal was demonstrated to be least cost even though WEC, as the provider of the economic basis for the assumptions of the EGEAS model, built in a preference for its own project and consequently significantly understated the costs of ERGS. *See* R.18, Item 157, pp. 2946, 2967-2968. Correcting WEC's flawed input assumptions made the differential between the ERGS proposal and alternatives at least $526 million more expensive. *See* R.18, Item 157, p. 3003.

Unlike the ERGS project, the Calpine proposal promoted fuel diversity in the state. Wisconsin, and WEC in particular, already rely heavily on coal-fired electric generation. Statewide, 70% of electric generation is from coal whereas, nationally, coal accounts for 51% of total electric generation. WEC's electric generation from coal is 68.7% of its total generation. Only 3.3% of WEC's energy generation is from natural gas fired sources. R.18, Item 119, pp. 30, 89.

SUMMARY OF ARGUMENT

The energy policy of this state is crucial in furthering the public interest of its citizens. It is for this reason that Wisconsin's energy policy is found in the language of statutes promulgated by the legislature and the proper implementation of those legislative requirements by the designated administrative agencies, rather than in the business plan of an individual utility.

The fundamental problem with the decisions under review in this case is that the PSC and the DNR determinations are incompatible with the state's energy policy and the public interest because they are based upon: (1) interpretations of law which are inconsistent with the plain language of the applicable statutes; (2) interpretations of law which are inconsistent with the agencies' prior interpretations of the same laws; and, (3) inconsistent with prior orders of those agencies regarding the same issues. As a result of these errors, Calpine's Fond du Lac Energy Center was excluded from the chosen resource option even though it was the higher energy priority under the Energy Priorities Law and the least cost supply option under the Plant Siting Law.

Instead of implementing the legislature's directive under the plain language of the Energy Priorities Law in a manner consistent with its prior interpretations of that law's mandate, the PSC made its own policy determination regarding which fuel resource ought to be Wisconsin's priority. The PSC erroneously concluded

that the ERGS's high cost, lowest priority coal-fired plant should be selected over Calpine's lower cost, higher priority gas-fired proposal.[2]

The PSC similarly failed to adhere to its prior interpretations of the Plant Siting Law. That law, as interpreted by the PSC prior to the ERGS application, requires utilities to procure supply resources at "least cost." Calpine's Fond du Lac Energy Center is the least cost option for Wisconsin ratepayers as demonstrated by the FEIS and the PSC staff's own analysis, and was required to be selected.

Moreover, the Plant Siting Law, as interpreted by the PSC prior to the ERGS application, requires that the generation proposal selected not have a material adverse impact on competition in the relevant wholesale electric service market. However, the PSC's approval of the ERGS project will have a material adverse impact on competition in the wholesale power market in Wisconsin in several ways.

PSC approval of the ERGS facilities enhances WEC's already significant market power and sends a clear message to wholesale power generators that fair opportunities to compete do not exist. Furthermore, the PSC cannot conclude that WEC considered competitive alternatives in this proceeding using a reasonable and fair evaluation process, in violation of PSC requirements.

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[2] The circuit court reversed the PSC's flawed application of the Energy Priorities Law. R.84:32-40; App.I.32-40. Therefore, the application of that law is not the subject of Calpine's cross-appeal and is not discussed at length in this brief. While Calpine will address the PSC's misapplication of the Energy Priorities Law in detail in response to the initial brief of any party that argues that the PSC correctly applied that law, the discussion here provides context for positions explained in this brief.

In addition, contrary to the Plant Siting Law as interpreted in prior PSC orders, the ERGS will have an undue adverse impact on the environment resulting from the effects of the ERGS's proposed water intake, thermal discharge, and wetlands filling. This violation of the environmental requirements of the Plant Siting Law occurred because the PSC did not require the submission of necessary information to make the required determination and, instead, in effect delegated its mandate under the statute to the DNR. Moreover, the PSC did not require the ERGS to comply with the applicable environmental performance standards.

The only way for the PSC to have met its obligations under the Energy Priorities Law and the Plant Siting Law was to include Calpine's Fond du Lac Energy Center in the chosen resource supply option. The PSC was required to reject the WEC-only plan because the ERGS does not meet the requirements of these mandates. WEC's desire to have the PSC adopt its most recent business plan will have fundamental negative effects on ratepayers and competitors in Wisconsin and will result in the following circumstances:

1. Approval of a project which fails to implement the statutorily mandated energy priorities, in violation of Wis. Stat. § 1.12.
2. Approval of a project which clearly is not the least cost project, in violation of Wis. Stat. § 196.491(3)(d)3, and the PSC's longstanding policy.
3. Approval of a project which results in a significant adverse effect on wholesale competition in Wisconsin, in violation of Wis. Stat.

§§ 196.491(3)(d)7 and 133.01, and the PSC orders concerning consideration of alternative proposals.

4. Approval of a project which will have an undue adverse impact on the environment and natural resources, in violation of Wis. Stat. §§ 196.491(3)(d)3 and 4.

In order to remedy these agency actions, Calpine requests that the court reverse and vacate the PSC order and DNR determinations and require these agencies to follow the law.

ARGUMENT

I. THE PSC'S FINAL DECISION SHOULD BE REVIEWED *DE NOVO.*

The PSC interpreted Wisconsin's Plant Siting Law in several ways contrary to the clear meaning of that law and inconsistent with its prior interpretations of that law. Consequently, the PSC's interpretation of the Plant Siting Law should be reviewed *de novo* by this court.

Although this court ultimately will affirm or reverse the circuit court's decision, "[w]hen reviewing an appeal from a circuit court in an administrative review proceeding, this court reviews the decision of the agency, not that of the circuit court or ALJ." *See Bosco v. LIRC*, 2004 WI 77, ¶ 16, 272 Wis. 2d 586, 681 N.W.2d 157; *RURAL v. Public Serv. Comm'n of Wisconsin*, 2000 WI 129, ¶ 20, 239 Wis. 2d 660, 675, 619 N.W.2d 888.

Courts review an agency's decision *de novo* where the agency's interpretation of a statute is so inconsistent as to provide no real guidance to the court as to the appropriate interpretation. *See Marten Transp., Ltd. v. DILHR*, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993). Moreover, an agency's inconsistent interpretation of a statute precludes the application of the great weight deference standard. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996).

Significantly, even if a court decides to afford some weight to an agency's interpretation of a statute, no level of deference can save an agency's interpretation of a statute if that interpretation is contrary to the clear meaning of the statute. *See Bosco*, 2004 WI 77, ¶ 19; *UFE*, 201 Wis. 2d at n. 2 ("...even if an agency interpretation is accorded the highest level of deference by a court, great weight, it will not be upheld if the interpretation directly contravenes the clear meaning of the statute."); *Lisney v. LIRC*, 171 Wis. 2d 499, 493 N.W.2d 14 (1992). As demonstrated below, the Final Decision is based on interpretations of statutes that are contrary to the clear meaning of those statutes and contrary to prior agency interpretations and must be reversed.

II. THE PSC ORDER MUST BE REVERSED BECAUSE THE PSC INCORRECTLY INTERPRETED AND APPLIED THE LEAST COST REQUIREMENT OF THE PLANT SITING LAW.

Under its prior orders and interpretation of the Plant Siting Law, the PSC required approval of least cost alternatives in utility CPCN proceedings. However, despite the fact that the EGEAS analysis demonstrated that the Calpine proposal was least cost, the PSC did not include the Calpine proposal as part of the

approved resource plan in the ERGS proceeding. By granting WEC a CPCN for the ERGS project, and refusing to include Calpine's proposal as part of the authorized expansion plan, the PSC failed to implement the least cost requirement. The PSC's determination was thus in violation of Wis. Stat. § 196.491(3)(d)3, and should be reversed.

A. Prior PSC Orders Concerning Utility CPCN Applications Required Selection Of The Least Cost Resource Under The Plant Siting Law.

Pursuant to the requirements for the issuance of a CPCN regarding a utility application for approval, the PSC must ensure that alternative power supply options are evaluated and the least cost option based upon those evaluations is selected:

> [The PSC] shall approve an application for a certificate of public convenience and necessity *only* if the commission determines all of the following:
>
> * * *
>
> 3. The design and location ... is in the public interest considering *alternative sources of supply*, alternative locations or routes, individual hardships, engineering, *economics*, safety, reliability and environmental factors. . . .

Wis. Stat. § 196.491(3)(d)3. (Emphasis added).

It is a long-standing PSC policy "that utilities procure supply resources at least cost recognizing feasible alternatives; and that utilities implement their obligation to serve in a prudent, reasonable, timely and careful fashion." R.54:42.[3] Under the PSC's integrated planning and CPCN principles, the least cost overall

[3] Staff Memorandum, Docket No. 6630-DR-104 (April 26, 2001) ("*PTF-1 Staff Memorandum*")

choice is the option the utility will be authorized to pursue. R.54:86-137;[4] App.I.187-238.

In prior orders, the PSC followed this least cost requirement for the consideration of competing generation alternatives. In the *112 Order*, the PSC established a method for selecting among competing electricity generating proposals under the Plant Siting Law. R.54:101-102; App.I.202-203. The PSC required a methodology to "determine which of the competitors would increase a utility's electric system costs the least." *112 Order*, R.54:102; App.I.203. To make this determination, the PSC acknowledged that it required state-of-the-art modeling of the electric system. *112 Order*, R.54:103; App.I.204. The PSC consequently chose the EGEAS model to perform this analysis and found that "[u]nder the Commission's integrated planning and CPCN principles, the least cost overall choice is the option the utility will be authorized to pursue." *112 Order*, R.54:104; App.I.205.

As the PSC was considering the *112 Order*, the PSC issued its *Repap Order*,[5] in which it reviewed a number of proposals provided by utilities and independent power producers to supply power to WEC. The PSC analysis

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[4] Findings of Fact, Conclusions of Law and Order, Docket No. 05-EI-112, p. 19 (December 28, 1993) ("*112 Order*"). The court takes judicial notice or agency orders, such as this, and numerous orders cited in this brief are included in Calpine's Appendix, filed with this brief. *See* Wis. Stat. § 902.03(1) ("The courts of this state, including the court of appeals and the supreme court, shall take judicial notice of:... (b) All rules of state agencies which have been published in the Wisconsin administrative code or register and all orders of such agencies."); *Hastings Realty Corp. v. Texas Co.*, 28 Wis. 2d 305, 137 N.W.2d 79 (1965) (supreme court taking judicial notice of files of State Highway Commission).

[5] Findings of Fact, Conclusions of Law and Order, Docket No. 6630-CE-187 (November 5, 1993); App.I.133-186.

included "the use of a computer model to help determine which of the competing supply proposals should be included in a least-cost system supply plan," *Repap Order*, p. 4, App.I.136, and concluded that the "results showed the lowest system costs for a system containing the LS Power Whitewater proposal," *id.*, p.13, App.I.145, and authorized LS Power to apply for a CPCN for its project. *Id.*, p. 35, App.I.167. The PSC subsequently granted LS Power a CPCN to construct its Whitewater project, asserting again that the LS Power facility was "the least cost alternative overall for ratepayers."[6]

The PSC also implemented this least cost requirement in its *Rhinelander Order*.[7] R.79: 35-64; App.I.239-268. There, the PSC selected Wisconsin Public Service Corporation's ("WPS") Rhinelander Energy Center for construction over the bids of 16 alternative proposals. The PSC selected the WPS Rhinelander Project because it presented the least cost option for WPS ratepayers:

> The Commission finds that, on an overall cost basis, including life cycle system capital and operating costs, as well as dollar costs exogenous to the system expansion and production cost models, the WPS Rhinelander Project bid is the least-cost option for WPS ratepayers.
>
> The modeling analysis showed the WPS Rhinelander Project as having the lowest dollar costs for the range of likely future conditions. The result proved robust in the sensitivity analyses performed, including the sensitivity analyses which used monetized greenhouse gas emissions. . . .

Rhinelander Order, R.79:40; App.I.244.

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[6] Findings of Fact, Conclusions of Law and Order, Docket No. 6630-CE-187, p. 2 (March 9, 1995) ("*LS Power Order*"), App.II.269-297.

[7] Findings of Fact, Conclusions of Law and Order, Docket No. 6690-CE-156 (December 22, 1994) ("*Rhinelander Order*").

The PSC further recognized that of the alternatives offered in the case, the "DePere Project" offered by Polsky Energy Corporation, on balance, would provide ratepayers the second-lowest long term overall costs. *Rhinelander Order*, R.79:46; App.I.250. The PSC decided that:

> If the WPS Rhinelander Project fails to move forward and meet its milestones, the Commission expects WPS to enter into negotiations with Polsky Energy Corporation to arrive at a final power sales agreement at least as advantageous to ratepayers as the original bid, as evaluated. The economic analysis showed that the bids for projects other than WPS' Rhinelander Project and Polsky Energy's DePere Project are significantly higher cost to ratepayers than the two projects discussed above.

Rhinelander Order, R.79:47-48; App.I.251-252. In fact, this is exactly what happened. The Rhinelander project did not go forward and WPS entered into a contract for power from the DePere Project which received a CPCN from the PSC.[8]

In utility CPCN proceedings since the *Rhinelander Order*, the PSC has continued to use the EGEAS model to identify least cost generation plans.[9] In approving MGE's West Campus Cogeneration Facility, the PSC stated that "[t]he EGEAS analyses contained in the record show that the WCCF is a 'least-cost' generation option." App.II.462. Yet, despite its prior insistence that the least cost proposal is the proposal that is in the public interest and is the one that should be selected, the PSC in the ERGS proceeding took a different path, selecting the

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[8] *See* Findings of Fact, Conclusions of Law, Certificate and Order, Docket No. 9335-CE-100 (October 19, 1997), R.54:231-266, App.II.378-410.
[9] *See* Final Decision, Docket No. 05-CE-121 (October 9, 2003) ("*West Campus Order*"), App.II.448-498.

higher cost ERGS project and refusing to include the lower cost Calpine proposal in the expansion alternative chosen.

B. The PSC's EGEAS Analysis Shows The Calpine Project To Be Least Cost.

The PSC used the EGEAS model to analyze the projects proposed in the ERGS proceeding. EGEAS was not just the primary cost analysis tool utilized by the PSC it was the *only* such tool employed. *See* Final Decision pp. 23-27.

The EGEAS study addressed a number of scenarios and sensitivities. The results of the sole quantitative analysis presented to the PSC clearly demonstrated that Calpine's proposal, when used independently or in conjunction with a portion of WEC's proposal, provided a lower cost electric supply option than WEC's ERGS proposal alone. The PSC staff concluded that:

> Calpine has proposed natural gas-fired combined cycle projects with favorable pricing terms relative to the ERGS. Due to this pricing, the EGEAS model selects the 523 Calpine Fond du Lac project in 2007 as a lower cost alternative, by about $96 million on a present value basis, over WEPCO's proposed approach to have its first two supercritical coal plants begin operation in 2008 and 2009.

R.18, Item 157, p. 3899. Moreover, the FEIS concluded that the proposed timing of the SCPC units in 2007 and 2009, as WEC had proposed, was not the least cost scenario, R.18, Item 119, pp. xxv, 68, 93, and that the Fond du Lac Energy Center using natural gas is lower cost than the ERGS -- without IGCC proposal. *Id.*; *see also* Statement of the Case, *infra*, pp. 1-9.

Under *all* sensitivities, including the high natural gas case and regardless of the amount of wind energy, the overall cost determined in the EGEAS model was

lower when Calpine's proposal was included in the supply mix. R.18, Item 158, Exh. 273.

As the least cost alternative, and based upon the PSC's prior interpretations of the Plant Siting Law requirements, Calpine's proposal should have been chosen as part of the supply option. Instead, the PSC ignored its prior application of the Plant Siting Law without explanation.

C. Since The PSC's Application Of The Least Cost Requirement Is Inconsistent With Its Prior Orders Under The Plant Siting Law, The Final Decision Must Be Reversed.

The PSC's inconsistent and unfounded application of the Plant Siting Law in the Final Decision is contrary to law and should be reversed. *See* Wis. Stat. § 227.57(5) ("The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law."); Wis. Stat. § 227.57(8) ("The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is ... inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency..."). As recognized in *Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n of Wisconsin*, 109 Wis. 2d 256, 263, 325 N.W. 2d 867 (1982), "[a]gencies are not free to shift between decisions without a rational basis."

"Consistency, of course, is a virtue" in administrative determinations. *Robertson Transp. Co. v. Pub. Serv. Comm'n*, 39 Wis. 2d 653, 661, 159 N.W.2d 636 (1968). One benefit of consistency is "to give fair warning as to what the

agency will consider in making its decision." *Podger v. Indiana University*, 381 N.E. 2d 1274, 1283 (Ind. 1978). This benefit extends beyond the parties before the agency:

> The confidence of a reviewing court that these adjustments are made in accordance with the requirements of law is not enhanced when the prior precedents are not discussed, the swerves and reversals are not identified, and the entire matter is brushed off once over lightly.

Marine Space Enclosures, Inc. v. Federal Maritime Comm'n, 420 F. 2d 577, 585, (D.C. Cir. 1969). Consistency provides additional comfort for a reviewing court because:

> A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by [the legislature]. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 41-42 (1983) (citation omitted).

Through a course of decisions extending over many years, an agency succeeds in developing a clear policy that is applicable in similar cases, "and to discard the policy without explanation would be arbitrary."[10] *Continental Web Press, Inc. v. N.L.R.B,* 742 F. 2d 1087, 1093-94 (7th Cir. 1984). An agency action is arbitrary if "it is the result of an unconsidered, willful or irrational choice, and not the result of the sifting and winnowing process." *State v. Alston*, 92 Wis. 2d 893, 897 (Ct. App 1979); *Wisconsin Prof'l Police Ass'n v. Pub. Serv. Comm'n,* 205

[10] Also, because Wis. Stat. § 227.57(8) is a codification of the traditional "arbitrary and capricious" standard for reversal of agency actions, the "arbitrary and capricious" standard is also useful in demonstrating the unlawful nature of the PSC's actions in this case. *See* Legislative Reference Bureau Analysis, Laws of 1975, Ch. 414, Section 25.

Wis. 2d 60, 74, 555 N.W. 2d 179 (App. 1996) ("*WPPA*"). Moreover, agency action is viewed as capricious if it has a discriminatory effect:

> Typical of the cases in which the epithet *capricious* may properly be applied are those where an agency has given different treatment to two respondents in identical circumstances, or has exhibited an irrational unfairness which suggests malice or discrimination. *Scharping v. Johnson*, 32 Wis. 2d 383, 390, 145 N.W. 2d 691, 695 (1966)(citation omitted).

Alston, 92 Wis. 2d at 897 (emphasis in original).

In the Final Decision, the PSC changed its interpretation of the Plant Siting Law as found in prior orders concerning the least cost requirement without explanation. The PSC did not follow the reasoning of its earlier decisions and did not distinguish those decisions or reconcile them to this case. Moreover, lawfully distinguishing its prior orders could not be successful because the Plant Siting Law provides no support for the PSC's newly announced dichotomy between "baseload" and "non-baseload" facilities.[11] Indeed, at oral argument before the circuit court, the PSC's counsel acknowledged that it has never before made a distinction between baseload and non-baseload generation. R.89:46-47. Furthermore, in granting a CPCN to the Fond du Lac Energy Center, the PSC acknowledged that it was capable of operating as a baseload plant. R.54:9-10; App.I.60-61.

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[11] The PSC also relied upon this distinction between baseload and non-baseload in justifying its determination that ERGS does not violate Wisconsin's Energy Priorities Law. R.18, Item 150, pp. 14-23. However, the baseload/non-baseload dichotomy is not supported by the language of the Energy Priorities Law either, and is an additional basis to overturn the Final Decision, as will be explained in more detail in Calpine's response brief.

It is *not* in the public interest under the Plant Siting Law, and it is contrary to the PSC's prior orders, to select the ERGS option because it is not least cost compared to the Calpine supply option. Accordingly, the Final Decision violates Wis. Stat. § 196.491(3)(d)3 and should be reversed.

III. THE FINAL DECISION MUST BE REVERSED BECAUSE THE PSC INCORRECTLY INTERPRETED AND APPLIED THE WHOLESALE COMPETITION REQUIREMENT UNDER THE PLANT SITING LAW.

Instead of ensuring no adverse effect on competition in the wholesale electric service market, as required under Wis. Stat. § 196.491(3)(d)7, and instead of promoting competition as the fundamental economic policy of the state, as required under Wis. Stat. § 133.01, the Final Decision reinforced the existing market power possessed by WEC, and undermines competition in Wisconsin's wholesale electric market. The PSC's actions are contrary to the requirements of the Plant Siting Law, and should be reversed.

A. The PSC's Prior Orders Regarding The Competition Requirement Of The Plant Siting Law Have Focused On The Existence Of Competitors.

Wisconsin Stat. § 196.491(3)(d)7, permits the PSC to grant a CPCN "*only* if the PSC determines all of the following:

> 7. The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market.

In a number of prior orders, the PSC has applied this law by emphasizing the need for competitors in the wholesale electric service market. In the PSC's *BadgerGen Order*,[12] the PSC found that:

> The record shows that an adverse effect on competition is unlikely because BadgerGen would be adding a new competitor to WUMS [Wisconsin Upper Michigan System]. For this reason, the facility is likely to alleviate constraints in Wisconsin's transmission system and to improve the competitive market.

BadgerGen Order at 10; App.II.361.

Similarly, in the *Mirant Portage Order*,[13] the PSC found that:

> The record shows that an adverse effect on competition is unlikely because the Mirant Portage County power plant project would essentially act as a new entrant.... Consequently, the Portage County project would be adding a new competitor to WUMS, and thereby likely improving the competitive market.

Mirant Portage Order at 10; App.II.420.

The PSC further extolled the virtues of new competitors in the WUMS in granting a CPCN to the Fond du Lac Energy Center:

> The record shows that an adverse effect on competition is unlikely because, even with the addition of the Fond du Lac Energy Center, Calpine will remain a relatively small operator of power plants in Wisconsin.... In summary, even though WUMS is a highly concentrated wholesale electric service market, the fact that Calpine's Fond du Lac Energy Center will act as a new entrant means that the facility is unlikely to have a material adverse impact on competition in WUMS.

Fond du Lac Order, R.54:17-18; App.I.68-69; *see also Riverside Order*[14] at 14, App.I.122.

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[12] Findings of Fact, Conclusions of Law Certificate, and Order, Docket No. 9340-CE-100 (November 22, 2000), App.II.352-377.
[13] Findings of Fact, Conclusions of Law, Certificate, and Order, Docket No. 05-CE-116 (March 22, 2002), App. II.411-436.
[14] Final Decision, Docket No. 9346-CE-100 (September 24, 2002).

That the focus in these orders upon entry of competitors represents a proper application of Wis. Stat. § 196.491(3)(d)7 is confirmed by its consistency with the policy of this state to foster competitive markets:

> **133.01 Legislative intent. ...**It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

Wis. Stat. § 133.01.

The PSC confirmed the importance of competition in the 2002 Strategic Energy Assessment Final Report, Docket No. 05-ES-101 (December 2002) ("*2002 SEA*"):

> The nature of such competitive market forces ensures that capacity and energy will be available to the public at a reasonable price, just as competitive forces are used in other deregulated areas of the state's economy. Furthermore, in the situation where one of the state's public utilities wants to procure capacity and energy from the wholesale marketplace via an independent power producer's merchant power plant, ordinarily the electricity provider does so using a competitive bidding or alternative generation evaluation process in which numerous proposals are compared for least cost.

2002 SEA at 73.

It is beyond dispute that WEC has the ability to exercise market power in the state. In November 2000, a report sponsored by the PSC, at the request of the legislature, concluded that electricity prices could increase between 20 and 40 percent -- primarily due to WEC's ability to exercise market power in the region.

R.54:151-211.[15] The PSC staff accepted the *Market Power Report's* conclusions in the FEIS, noting the high level of concentration in the wholesale electric service market. R.18, Item 119, p. 44. PSC staff further acknowledged the adverse impact on the wholesale electric market of approving the ERGS as proposed. R.119:45. PSC staff concluded, "the 1,800 MW scale of the complete ERGS project could thwart wholesale market power development..." R.157, p. 3898. Moreover, WEC's own witness, Dr. Roberts, conceded that the existence of competitors is necessary for competition to exist. R.18, Item 157, pp. 2165-2166.

Contrary to the PSC's prior orders, and despite the existence of WEC's market power, the Final Decision never addressed and evaluated the effect of ERGS on wholesale electricity suppliers which are the competitors to WEC. Instead, the PSC focused exclusively on its rate review authority to determine compliance with Wis. Stat. § 196.491(3)(d)7. In approving ERGS, the PSC ignored the fact that the Calpine proposal was the only alternative that would increase competition within the state of Wisconsin. Instead, the Final Decision enhances WEC's already significant market power in the WUMS wholesale power market, and sends the signal to competitive power suppliers that the doors have been shut in Wisconsin to fair opportunities to compete.

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[15] *See* Tabors Caramanis & Associates, *Horizontal Market Power in Wisconsin Electricity Markets: A Report to the Public Service Commission of Wisconsin* (November 2, 2000) ("*Market Power Report*").

B. The PSC Mitigation Position Is Inconsistent With Prior Orders And Does Not Prevent An Adverse Impact On Competition.

The PSC dismissed concerns about WEC's increased market power resulting from ERGS by adopting the concept that "[c]apacity and energy from ERGS will be provided to WEPCO via the Facility Lease, at rates this commission regulates through its review of the lease's economic terms and conditions." Final Decision at 28. The PSC found further support in the concept that "fixed price contracts (such as the proposed Facility Lease) mitigate market power." *Id.*

However, the mitigation found by the PSC does not prevent an adverse impact on competition in the state. The fact that the PSC reviews the rates at which WEC sells power from the ERGS does not encourage the entrance of potential competitors in the wholesale electricity market in Wisconsin, which was the emphasis of the PSC's interpretation of the Plant Siting Law in prior orders. A rate proceeding that takes place years after a competitor has been shut out from the marketplace comes far too late to enhance wholesale competition. The additional concentration of resources can do nothing but make WEC even more dominant, regardless of whether the rates it can charge are regulated by the PSC.

Furthermore, the PSC's citation to the *Market Power Report* in support of its finding that fixed price contracts mitigate market power is flawed. Final Decision at 28. The *Market Power Report* does not address the issue of new competitors in the marketplace, the primary issue upon which the PSC relied in prior orders.

Moreover, the Final Decision fails to attribute any significance to the fact that the Lease Agreement found to mitigate WEC's market power is a contract between WEC and an affiliate. The *Market Power Report* does not address the issue of market power mitigation where the proffered mitigating contract is between affiliated entities, as is the case here. The legislature requires special scrutiny to be given to transactions between affiliated entities. *See, e.g.*, Wis. Stat. § 196.52(3)a. In addition, the PSC has given such arrangements between a public utility and an affiliate special scrutiny in the past.

In 2002, Alliant Energy Resources, Inc. ("AER") sought approval to purchase a wholesale merchant plant from a subsidiary of Mirant (the "Mirant Neenah" plant). AER is a subsidiary of Alliant Energy Corporation and an affiliate of Wisconsin Power and Light Company, a utility regulated by the PSC. To obtain approval of the transaction under § 196.4913m,[16] AER was required to demonstrate that its "ownership, control or operation [of the Mirant Neenah plant] will not have a substantial anticompetitive effect on electricity markets." *See* R.79:64-74; App.II.437-447.[17] In order to do so, AER was forced to submit a market power screen analysis "demonstrating that AER will not have, or be able to exercise, market power as a result of the proposed transaction." *Id.*

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[16] Under both Wis. Stat. §§ 196.491(3m) and 196.491(3)(d)7, the applicants are required to demonstrate that the transaction they wish to pursue will have no substantial anticompetitive effect on electric markets.

[17] Final Decision, Docket No. 9349-EB-100, p. 8 (December 20, 2002).

By contrast, here, even though WEC has been shown to possess market power, the PSC did not require WEC to perform a market screen analysis and ignored the affiliate nature of the transaction.

Instead, the PSC merely pointed to its duty to regulate rates. However, the PSC's regulation of rates was not intended by the legislature to be satisfy the PSC's responsibility to make a finding of no material adverse impact on wholesale competition under the Plant Siting Law. The legislature requires the PSC to regulate the rates paid by ratepayers to WEC for projects such as ERGS. *See* Wis. Stat. §§ 196.03, 196.19 and 196.37. The legislature also charged the PSC with the responsibility to make a finding of no adverse impact upon wholesale competition prior to issuing a CPCN. *See* Wis. Stat. § 196.491(3)(d)7. These two statutes should be construed together such that no term is rendered superfluous. *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wis.*, 81 Wis. 2d 344, 350, 260 N.W.2d 712 (1978) ("...all of chapter 196, Stats., should be considered together... because the entire chapter is *in pari materia*."); *see In re Disciplinary Proceedings Against Trewin*, 2004 WI 116, ¶ 38, 275 Wis. 2d 116, 684 N.W.2d 121 ("It is a cardinal rule that when interpreting a statute a court must attempt to give effect to every word, so as not to render any portion of the statute superfluous.") (internal quotation marks omitted).

By citing its responsibility to regulate rates as satisfying its separately codified mandate to issue a CPCN only after finding that there will be no material

adverse impact on wholesale competition, the PSC's interpretation inappropriately renders the latter mandate superfluous.

The Final Decision violates Wis. Stat. § 196.491(3)(d)7 because it results in a material adverse impact on the wholesale electric service market in Wisconsin, is inconsistent with the PSC's past interpretations of the statute, and renders the Plant Siting Law mere surplussage. Accordingly, the Final Decision should be reversed.

IV. THE FINAL DECISION SHOULD BE VACATED BECAUSE THE PSC AND DNR DID NOT COMPLY WITH THE ENVIRONMENTAL REQUIREMENTS OF THE PLANT SITING LAW AND WEPA.

A. The Final Decision Does Not Avoid Undue Adverse Impacts On Environmental Values In Violation Of The Plant Siting Law.

The PSC can issue a CPCN only if "[t]he proposed facility will not have undue adverse impact on... environmental values..." Wis. Stat. § 196.491(3)(d)4. The PSC cannot lawfully make such a finding here. First, the PSC inappropriately departed from its past interpretation of its mandate under Wis. Stat. § 196.491(3)(d)4 by not requiring the submission of sufficient data from WEC to make such a determination and, instead, the PSC improperly delegated its evaluation duty under the statute to the DNR. Second, the Final Decision confirms that ERGS's once through cooling system will not comply with applicable numeric environmental performance standards, resulting in undue adverse impacts on environmental values. Consequently, the Final Decision should be reversed.

1. The PSC inconsistently applied the environmental requirements of the Plant Siting Law and inappropriately delegated its responsibility under that law.

In the prior CPCN proceedings regarding the Fond du Lac Energy Center, the PSC required that impacts to the receiving body of water for discharges covered by the WPDES permit be described fully prior to issuance of a CPCN. R.18, Item 157, pp. 3342-3. The PSC required Calpine to provide a full characterization of the effluent stream from the facility including composition, flow rates, temperature, and proposed water treatment chemicals. *Id.* The PSC also required Calpine to confirm that all such characteristics were in compliance with applicable federal and state requirements. *Id.* The PSC placed no such requirement on WEC in this proceeding. Final Decision, pp. 53-54.

Similarly, in relation to wetlands at Calpine's proposed Sherry plant, the DNR applied Wis. Admin. Code ch. NR 103 standards for practicable alternatives analysis ("PAA") to require Calpine to examine certain extensive off-site non-project alternatives, such as the practicality of using another site already approved by the PSC, and the use of alternative power sources at the Sherry site. R.18, Item 158, Exh. 263. In the case of ERGS, the DNR stated it need only look at the four layouts in the PSC hearing, R.18, Item 158, pp. 4432, 4442, and there was no comparative analysis of avoidance or mitigation associated with the use of fuels other than coal or the construction of fewer units at the four layouts. *Id.*

In the Final Decision, the PSC merely listed, without explanation, the statutory factors it maintained militated in favor of ERGS on technical and

environmental grounds. Final Decision p. 15. Further, unlike its prior demands of Calpine, and without explanation, the PSC did not require WEC to confirm compliance of the effluent stream with applicable requirements or prepare a PAA with alternative sites or power sources. R.18, Item 157, pp. 4423 and 4426. The proponents of the ERGS project merely were allowed to substitute a pledge to do what it takes to satisfy the DNR with respect to environmental impacts, *see*, e.g., R.18, Item 157, pp. 1516, 1527, 1530.

To be consistent, the PSC should have required WEC to provide a commensurate level of analysis and information as it did with Calpine to clearly demonstrate that the proposed ERGS project can meet the requisite environmental standards. Additionally, the PSC should not have left it to the DNR to determine what environmental impacts are acceptable. Instead, the PSC improperly delegated to the DNR its responsibility to make a finding of no undue adverse environmental impact, deferring to WEC's negotiations with the DNR concerning what standards would apply to ERGS. *See* R.18, Item 157, pp. 1516, 1527, 1530; *see also* Final Decision, pp. 51-54. The delegation of responsibility from one governmental entity to another is "assumed to be improper absent an affirmative showing of [legislative] authorization." *See United States Telecom Assoc. v. FCC*, 359 F.3d 554, 565 (D.D.C. 2004) (and cases cited therein) (vacating portion of FCC order delegating to state commissions authority to make impairment determinations under 47 U.S.C. § 251(d)(2)); *see Park Building Corp. v. Indus. Comm'n*, 9 Wis. 2d 78, 100 N.W.2d 571 (1960) (authority vested by statute in

commission may not be delegated to a subordinate). When an agency improperly delegates authority, "lines of accountability may blur, undermining an important democratic check on government decision-making." *Id.* Further, "delegation to outside entities increases the risk that these parties will not share the agency's '... vision and perspective,' ... and thus may pursue goals inconsistent with those of the agency and the statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship." *Id.* at 565-66.

Through Wis. Stat. § 196.491(3)(d)4, the legislature charged the PSC with the responsibility to address the existence of all adverse environmental impacts, with but one exception -- air quality, if the DNR has issued a permit pursuant to Wis. Stat. ch. 285. In the case of ERGS, the PSC delegated to the DNR that responsibility on a host of non air quality issues, including specifically the water related impacts associated with once through cooling. The PSC's inconsistent application of the statute and unauthorized delegation to the DNR is contrary to the directive of Wis. Stat. § 196.491(3)(d)4. Consequently, the Final Decision should be reversed.

2. ERGS's water intake facility does not comply with legally recognized environmental standards, resulting in an undue adverse environmental impact in violation of the Plant Siting Law.

ERGS's once through cooling system results in adverse environmental impacts as judged by standards acknowledged to apply. To implement ERGS's

once through cooling, WEC will (1) construct a water intake facility on the bed of Lake Michigan designed to withdraw 2.6 billion gallons per day; (2) discharge the heated water at a temperature of 12° Fahrenheit greater than that of the receiving water; and (3) excavate at least 7.3 million cubic yards of soil that currently comprise the site's lake bluffs and dispose of the excavation spoils in wetlands.

The FEIS identified several major unresolved and unresolvable environmental issues associated with once through cooling resulting from inadequate or inconsistent information from WEC:

> No mitigation plans or strategies have been proposed by the applicants to avoid or minimize the potential adverse affects [sic] of the ***water intake structure, the thermal discharge from the plant, placing fill in wetlands***, or the loss of important biological resources. The new site layout brought forward by the applicants in May would result in more wetland filling and greater loss of natural resources and habitat than the original site layouts, if evaluated on a consistent basis.

FEIS, p. ii.; emphasis supplied. These problems were never rectified prior to or during the hearing itself. Instead, WEC's witnesses on these matters merely made generalized statements of WEC's intent to meet whatever standard could be negotiated with DNR. *See*, e.g., R.18, Item 157, pp. 1516, 1527, 1530. In fact, several aspects of ERGS's once through cooling system violate known numerical standards.

a. The ERGS does not comply with water intake standards.

The United States Environmental Protection Agency and the DNR agree that the proposed intake structure must be designed to attain Best Technology Available ("BTA") requirements to minimize the adverse impacts known as

impingement[18] and entrainment[19] to aquatic organisms. *See* R.18, Item 157, p. 4286; FEIS p. 204. At the time of the hearing before the PSC, however, the DNR had yet to receive any specifics that would demonstrate how the ERGS intake facility would achieve any, much less all, BTA requirements for water intake. R.18, Item 157, pp. 4468, 4497. By its testimony, the DNR advised the PSC:

> it is clear ... that significant additional discussion must occur on the technical aspects associated with the intake design and the impacts on the biological community before we will be able to decide on and direct, through the WPDES permit process, a BTA design configuration.

R. 18, Item 157, p. 4466.

Indeed, while WEC acknowledged that to meet BTA the intake must be designed for an intake velocity of ***less than*** 1.0 feet per second, the FEIS states that "[t]he ***proposed*** design velocity at the entrance to the proposed offshore structure...***is*** 1.0 feet/second;..." FEIS p. 208 (emphasis supplied). The FEIS also states that the Electric Power Research Institute reports a velocity of 1.0 feet/second has the potential to pull in (impinge) salmon that are less than 10 cm. in length. *(Id.)* Thus, by its own admission, ERGS will not comply with the intake velocity standard.

---

[18] Impingement is the capture and death of larger organisms, particularly fish, on filter screens designed to stop debris from entering the condensers.
[19] Entrainment is the injury or death of small organisms that pass through the condenser circuits.

b. The ERGS does not comply with thermal plume requirements.

With once through cooling, the heated water from the condensers is not cooled before it is discharged into Lake Michigan. The ERGS's proposed cooling water discharge point will serve its facilities. The existing units, OCPP 5-8, have their own separate but uncontrolled thermal plumes (discharges), which will overlap with the ERGS's thermal discharge.

The ERGS's thermal discharge will be subject to regulation under the Wisconsin Pollutant Discharge Elimination System ("WPDES") permit program. R.18, Item 158, p. 4462. Regulation will entail meeting essentially two conditions: (i) confining the thermal plume to an area known as the "mixing zone"; and (ii) preventing the maximum temperature differential between the plume and lake water from exceeding 3° F at the edge of the mixing zone. *See* R.18, Item 119; Wis. Admin. Code § NR 102.07(1)(b) and (a), respectively.

WEC could not state at the hearing whether its discharge can comply with the maximum plume size. R.18, Item 157, pp. 1550-1. Furthermore, the heated water from the ERGS (without taking into account the thermal plumes from OCPP units 5-8) is predicted to exceed the thermal standard limit for the July-September period as well as the average temperature limit for the period of May-November. R.18, Item 119, p. 218. *Id.*, p. 219. Again, the ERGS fails to meet a recognized environmental standard.

c. The ERGS has not been shown to comply with wetlands regulations.

The North-CUP is the location the PSC approved for the ERGS. It results in the "greatest wetland filling of the four" layouts proposed by WEC. *See, e.g*, R. 18, Item 119, Table 8-10 and Table 12-3. R. 18, Item 119, pp. ii, 217, 400. The DNR exercises its jurisdiction over these wetlands through the water quality certification processes found in Wis. Admin. Code chs. NR 103 and 299. The former establishes a three step process: (i) avoiding wetland filling altogether; (ii) where filling or otherwise adversely affecting wetlands cannot be avoided, minimizing the filling and its adverse impacts; and (iii) where minimization is not adequate, mitigating the impacts, including the restoration of other wetlands or the creation of new ones with comparable functional values. *See* R.18, Item 157, pp. 4422-23.

Neither avoidance nor minimization of wetlands filling was ever analyzed in the record. Without these analyses the PSC could not know whether some of ERGS's adverse impacts on wetlands and bluffs will be undue.

Despite these admitted violations of recognized standards with respect to water intake and thermal plume and non-compliance with the NR 103 process for wetlands, the PSC found that the ERGS would not have undue adverse impacts on environmental values. The PSC provided no reasoning process to explain how, despite information in the record that the applicable standards will not be met,

ERGS's once through cooling could satisfy the no undue adverse impact requirement.

By making a finding of no adverse impacts in the face of noncompliance, and in the absence of any contrary explanation or reasoning, the PSC has failed to meet its duty under the Plant Siting Law to approve only projects that avoid undue adverse impacts on environmental values.[20] Accordingly, the Final Decision should be reversed.

B. The FEIS Fails To Satisfy The Requirements For Environmental Impact Statements.

Because of the nature and scope of the environmental impacts of the ERGS project, it is a "major action that significantly affects the quality of the human environment within the meaning of [section] 1.11(2)(c), Stats.", requiring an environmental impact statement ("EIS"). Although an EIS was prepared jointly by the PSC and DNR, it was inadequate under the criteria established by the PSC's own rules.

The purpose of an EIS is to take a "hard look" at the environmental consequences of a proposed project. *Wisconsin Envtl. Decade v. Pub. Serv. Comm'n of Wisconsin*, 98 Wis. 2d 682, 690, 298 N.W.2d 205 (Ct. App. 1980). Under the PSC's rules the purpose of the hard look is to inform the "commission

[20] The Circuit Court addressed only one issue under Wis. Stat. § 196.491(3)(d)4: whether the cost of health impacts due to air pollution had to be factored in as part of the project's cost. All other environmental issues were glossed over merely by stating that environmental matters are within the PSC's expertise, not the Court's. As a result the Circuit Court never analyzed the numerous other and far reaching environmental impacts, especially those water related impacts associated with the ERGS's once through cooling.

and the public about significant environmental impacts of a proposed action ***and its alternatives, and reasonable methods of avoiding or minimizing adverse environmental effects***..." Wis. Admin. Code § PSC 4.30(1) (emphasis supplied). The minimum content of an adequate EIS includes the following:

> (b) An analysis of the probable impact of the proposed action on the environment, including:
> 1. An evaluation of positive and negative effects on the affected local and regional environments, ***including the proposed action's direct, indirect and cumulative environmental effects.***
>
> ***
>
> (c) ***An evaluation of the reasonable alternatives to the proposed action and significant environmental consequences of the alternatives***, including those alternatives that could avoid some or all of the proposed action's adverse environmental effects ***and the alternative of taking no action.***

Wis. Admin. Code. § PSC 4.30(3) (emphasis supplied); *see Oregon Natural Res. Council v. Marsh*, 628 F. Supp. 1557 (D.C. Or. 1986) (an EIS must present the proposal's environmental effects and provide a clear basis for choice among reasonable alternatives, in comparative forms), *rev'd in part on other grounds*, 820 F.2d 1051 (9th Cir. 1987). The DNR's regulatory scheme and obligations under its duty to complete an EIS are similar to the PSC's, if not identical. *See* Wis. Admin. Code § NR 150.22.

1. The FEIS for the ERGS project did not properly identify or compare meaningful alternatives as required.

While the hearing record and the Final Decision provide a measure of the financial impact to the ERGS project if once through cooling is replaced by the use of cooling towers -- adding $200 million to the cost of the project -- no

analysis of the alternative environmental impacts of cooling towers was undertaken. *See* R.18, Item 119 (FEIS, ch. 4). For example, had the PSC and DNR analyzed the type of alternatives regarding wetland impacts that were demanded for Calpine's Sherry project, the FEIS for ERGS would have analyzed the ERGS's impacts in relation to: (i) Calpine's gas-fired combined-cycle facility at Fond du Lac and one SCPC unit at Elm Road; or (ii) no units at Elm Road with two Calpine units. R.18, Item 157, pp. 1548, 1549. These alternatives represent practicable options to minimize, if not avoid altogether, the water related impacts of the ERGS. That the PSC and DNR undertook no such evaluations in the FEIS demonstrates that the FEIS was inadequate and the subsequent grant of a CPCN was not the end product of a searching, "hard" look.

2. The FEIS is inadequate because it does not consider cumulative impacts on the environment.

To be adequate, an EIS must account for cumulative impacts by providing (1) a list of the project's elements producing related or cumulative impacts, (2) a summary of the expected impacts and (3) a reasonable comparison of the combined or cumulative impacts. *Sterlingworth Condo. Ass'n., Inc. v. State Dep't of Natural Res.*, 205 Wis. 2d 710, 556 N.W.2d 791 (1996). The FEIS did not even describe the cumulative impacts of the ERGS project much less compare those impacts as among the alternatives.

The enormity of the ERGS's impacts on water related resources makes the full scrutiny required by Wis. Admin. Code § PSC 4.30(3) concerning alternatives

analysis and environmental effects -- direct, indirect and cumulative -- an unavoidable obligation. Otherwise, the purpose of WEPA and Wis. Admin. Code § PSC 4.30(1), to inform about the significant environmental impacts of the proposed action, will not be achieved. Nor can this court ignore the fact that its own review of the ERGS, including whether and how the PSC and DNR fulfilled their duties, has been thwarted because the FEIS is missing an array of alternatives; fails to consider cumulative impacts; and fails to "provide a clear basis for choice among reasonable alternatives, in comparative forms." These failures violate Wis. Admin. Code chs. PSC 4 and NR 150, as well as WEPA. Those defects rendered the FEIS inadequate as a matter of law and require its remand to the PSC and DNR.

CONCLUSION

The Final Decision cannot be allowed to stand. The Final Decision does not support the conclusion that a project which was the lowest priority under the Energy Priorities law and was more expensive under the Plant Siting law was nevertheless chosen as the sole expansion plan, even though the Fond du Lac Energy Center was both a higher priority and the least-cost project under these laws. The Final Decision is contrary to prior agency interpretations of law and contrary to the language and purpose of the applicable statutes. Consequently, the court should set aside the Final Decision and require the PSC and DNR to follow the law.

Dated this 4th day of February, 2005.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of this brief is 10,543 words.

Dated this 4th day of February, 2005.

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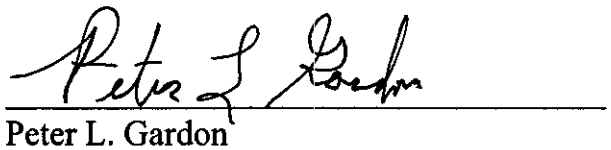

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STATE OF WISCONSIN
SUPREME COURT

Clean Wisconsin, Inc. p/k/a Wisconsin's Environmental Decade Institute, Inc., and SC Johnson & Son, Inc. and Calpine Corporation
Petitioners-Respondents-Cross-Appellants-Cross-Respondents,
Town of Caledonia
Petitioner-Cross-Respondent,
v.
Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources,
Respondents-Co-Appellants-Cross-Respondents,
Wisconsin Electric Power Company, W.E. Power, LLC and Wisconsin Energy Corporation,
Interested Parties-Appellants-Cross-Respondents,
Dairyland Power Cooperative,
Interested Party-Cross-Respondent,
Madison Gas & Electric Company and Wisconsin Public Power, Inc.,
Interested Parties-Co-Appellants-Cross-Respondents,
City of Oak Creek
Interested Party-Respondent-Cross-Appellant,
Robert H. Owen,
Interested Party-Respondent-Cross-Respondent.

Appeal No. 04-3179

Circuit Court Case No. 03CV003478, 03CV003731, 04CV000133, 04CV000149, 04CV000530, 04CV000533

Calpine Corporation,
Petitioner,
v.
Public Service Commission of Wisconsin, and Wisconsin Department of Natural Resources,
Respondents,
Wisconsin Electric Power Company, Wisconsin Energy Corporation, W.E. Power, LLC, Dairyland Power Cooperative, Madison Gas & Electric Company, Robert H. Owen, Jr., and City of Oak Creek,
Interested Parties.

Clean Wisconsin, Inc. p/k/a Wisconsin's Environmental Decade Institute, Inc. and SC Johnson & Son, Inc.,
Petitioners,

v.

Wisconsin Department of Natural Resources,
Respondent,

Wisconsin Public Power, Inc., City of Oak Creek, Dairyland Power Cooperative, Madison Gas & Electric Company, Wisconsin Electric Power Company, Wisconsin Energy Corporation and W.E. Power, LLC,
Interested Parties.

Calpine Corporation,
Petitioner,

v.

Wisconsin Department of Natural Resources,
Respondent,

City of Oak Creek, Dairyland Power Cooperative, Madison Gas & Electric Company, Wisconsin Public Power, Wisconsin Electric Power Company, Wisconsin Energy Corporation and W.E. Power, LLC,
Interested Parties.

City of Oak Creek,
Petitioner,

v.

Public Service Commission of Wisconsin,
Respondent.

Town of Caledonia,
Petitioner,

v.

Public Service Commission of Wisconsin,
Respondent,
Wisconsin Electric Power Company, Wisconsin Energy Corporation, W.E. Power, LLC, Dairyland Power Cooperative, Madison Gas & Electric Company, Robert H. Owen, Jr., and Wisconsin Public Power, Inc.,
Interested Parties.

APPENDIX TO
BRIEF OF PETITIONER-RESPONDENT-CROSS-APPELLANT-CROSS-RESPONDENT CALPINE CORPORATION
(Volume 1 of 2)

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February 4, 2005

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Clean Wisconsin, Inc. et. al.,

Petitioners

vs. Case No. 03 CV 3478

Wisconsin Public Service
Commission and Department
of Natural Resources,

Respondents

ORDER UPON JUDICIAL REVIEW OF PUBLIC
SERVICE COMMISSION ORDER

Application of Wisconsin Electric Power Company; Wisconsin Energy Corporation; and W.E., Power, LLC; for a Certificate of Public Convenience and Necessity for Construction of Three Large Electric Generating Facilities, the Elm Road Generating Station, and Associated High Voltage Transmission Interconnection Facilities to be Located in Milwaukee and Racine Counties.

Public Service Commission Docket No. 05-CE-130

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I. Statement of the Case

This proceeding arises from a Final Decision and Order of the Public Service Commission (PSC), rendered November 10, 2003, (Order). In the Order, the PSC issues a Certificate of Public Convenience and Necessity (CPCN) for the construction of two large coal-fired electric power plants by the Wisconsin Energy Corporation (WEC). The two unit facility is known as the Elm Road Generating Station (ERGS) and is to be located on the shore of Lake Michigan at an existing Oak Creek Power Plant (OCPP) owned by Wisconsin Electric power Company (WEPCO). Each of the two new plants is to be a Super Critical Pulverized Coal unit (SCPC 1 and SCPC 2) and each is to be capable of producing 615 megawatts (MW) of electric power. WEC had sought authorization to build a third new coal-fired facility, that being a 600 MW Integrated Gasification Combined Cycle (IGCC) unit but the PSC, in the Order, declined to authorize construction of the third unit. The projected cost of the two new authorized units is 2.15 billion dollars and apparently will be the largest, most expensive generating facility ever constructed in Wisconsin.

The PSC Order resolves what has been designated as second and final part of a WEC proposal initially submitted to the PSC January 31, 2002 and known as Power the Future (PTF). The original combined proposal was a plan to construct five new power generating facilities, two natural gas-fired units at Port Washington and three new coal-fired units at the existing Oak Creek Power plant (OCPP) site. The Port Washington plants were approved[1] and, thereafter, the PSC undertook consideration of the remaining three proposed new facilities at the Oak Creek site. The new Oak Creek facilities, known

[1] Final Decision, Application of Wisconsin Electric Power Company, Wisconsin Energy Corporation and W.E. Power, LLC, PSCW docket 05-CE-117.

also as the Elm Road Generating Station (ERGS) thus became phase II of the PTF proposal.

This Circuit Court action is a consolidation of five separate petitions[2] for judicial review pursuant to sec. 227.52, Wis. Stats. in the Circuit Court of Dane County; Clean Wisconsin, Inc. and S.C. Johnson & Sons, Inc. v. Wisconsin Public Service Commission and Wisconsin Department of Natural Resources, 03 CV 3478; Clean Wisconsin, Inc. and S.C. Johnson & Sons, Inc. v. Wisconsin Department of Natural Resources, 03 CV 133; Calpine Corporation v. Public Service Commission of Wisconsin, Case no. 04 CV 149; Calpine Corporation v. Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources, Case no. 04 CV 3731; City of Oak Creek v. Public Service Commission of Wisconsin, Case no. 04 CV 533. By order of March 11, 2004, the foregoing separate cases were consolidated into Case no. 03 CV 3478.

The record of the proceedings before the PSC is extensive. Hearings were held on nineteen days and the record contains some 5,945 pages of testimony transcript, of which 302 pages have been designated as confidential pursuant to secs. 134.90 and 196.14, Wis. Stats.

The record begins with a three volume application filed January 31, 2002 by WEC and includes twenty six volumes of testimony, correspondence and exhibits. The record contains a draft Environmental Impact Statement (EIS), issued April, 2003 and a final EIS, issued July, 2003, R. 77 and R. 119, respectively.

---

[2] Initially there was a sixth case which was part of the consolidated proceeding, Town of Caledonia v. Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources, Dane County Case no. 04 CV 533. This case was filed in the Circuit Court of Racine County as Case no. 03 CV 2084 and venue was thereafter transferred to the Circuit Court of Dane County. The parties thereafter submitted a stipulation seeking dismissal and, by order of September 2, 2004, this matter was dismissed.

II. Standard of Review

The PSC Order is the product of extensive consideration of complex engineering, economic and environmental matters. Wisconsin must provide adequate electric power for the future and that requires careful, thoughtful planning for facilities needed many years down the road. Generation facilities cannot be built quickly. The planning must consider extremely complex technical, financial and environmental considerations. The PSC is charged by the legislature with oversight of state utilities and possesses both expertise and long experience in that role. In this particular proceeding, involving what is described as the largest utility construction proposal in the history of the state, the PSC has shared regulatory responsibility, as to environmental aspects of the proposal, with the Wisconsin Department of Natural Resources (DNR). This truly is an area where a specialized agency is likely to be far more qualified than any court to analyze the extraordinary volume of relevant factual information. Thus the role of the Circuit Court, in an action which seeks judicial review of an agency Order, should properly be limited. The overarching structure for this great administrative responsibility, however, is a framework of legal principle and while the discretion assigned to the Commission is very great, that discretion must work within the tangible, visible limits of the applicable law.

Section 227.52, Wis. Stats., authorizes a Circuit Court to review a Order of the PSC in this matter and sets forth statutory guidance for court review.

> 2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.
>
> (3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's

exercise of delegated discretion.

(4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(7) If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

9) The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.

Section 227.57, Wis. Stats.,

Certainly the PSC Order reflects determinations of fact reached by the PSC as well as interpretations of law. The petitioners challenge factual determinations reached by the PSC and in undertaking judicial review as to such matters, the court is required to,

> accept findings of the agency if they can be supported by substantial evidence. Section 227.20(6), Stats. Substantial evidence does not mean the preponderance of evidence, but rather whether reasonable minds could reach the same conclusion reached by the agency.
>
> Citizens' Utility Board. v. Public Service Commission, 211 Wis.2d 537, 565 N.W.2d 554 (Ct App. 1997)

As to legal interpretations adopted by the PSC the court must determine, in each instance, the proper level of deference which should be given to the PSC interpretation. All parties recognize that the court should employ one of three levels of deference which may be regarded as a continuum; great weight, due deference and de novo review. If the court accords great weight deference, the court largely defers to the determination adopted by the agency.

> Great weight deference is afforded to an agency's decision under the following circumstances: (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute."
>
> Brauneis v. State, 236 Wis.2d 27, 612 N.W.2d 635, citing Harnischfeger Corp v. LIRC, 196 Wis.2d 650, 660, 539 N.W.2d 98 (1995)

Moreover, the court is obligated to regard an agency's interpretation of its own administrative regulation as controlling unless that interpretation is "inconsistent with the language of the regulation or clearly erroneous." Pfeiffer v. Board of Regents, 110

Wis.2d 146, 155, 328 N.W.2d 279 (1983), quoting Beal v. First Federal S. & L. Ass'n. 90 Wis. 2d 171, 183, 279 N.W.2d 693 (1979).

At the other end of the spectrum lies de novo review in which the court begins anew to determine independently what should be the proper legal interpretation. De novo review is the appropriate standard when the court is presented with a circumstance in which the agency's interpretation conflicts with the plain meaning of the statute.

> A court does not, however, give deference to an agency's interpretation of a statute when the court concludes that the agency's interpretation directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis.
>
> State ex rel. Parker v. Sullivan, 184 Wis.2d 668, 669, 517 N.W.2d 449 (1994), see also, Lisney v. LIRC, 171 Wis.2d 499, 506, 493 N.W.2d 14, (1992)

De novo review is also proper "where there is no evidence that the agency used any special knowledge or expertise, the issue is clearly one of first impression, or the agency's position on an issue has been inconsistent." RURAL v. PSC, 239 Wis.2d 660, 679, 619 N.W.2d 888 (2000)

The middle of the road approach is for the court to give what is termed due weight to the agency's legal interpretation, a level of deference that is appropriate when the agency is acting within its jurisdictional area but with regard to a particular matter that is unusual or novel.

> Due weight deference, the middle ground between great weight deference and *de novo* review, is warranted where an agency has some experience in the area, but has not developed any particular expertise in interpreting and applying the statute at hand that positions the agency more favorably to interpret that statute than a reviewing court.
>
> RURAL v. PSC, supra, 239 Wis.2d at 678, 679

And finally, it must be noted that the burden is upon the petitioners to demonstrate a proper and adequate basis to modify, vacate or remand the Order of the Commission, Shoreline Park Preservation, Inc. v. DOA, 195 Wis.2d 750, 761, 537 N.W.2d 388 (Ct. App. 1995).

The challenges posed by the petitioners may usefully be placed in two groups. The petitioners argue that the Commission's proceeding began based upon an application for CPCN approval which was incomplete and thus legally insufficient. The petitioners also find fault with various aspects of the Order which resulted. This judicial review will discuss first the issues relating to the application and thereafter will consider the Commission's Order.

III. WEC Application for CPCN Approval

WEC is required to obtain from the PSC, prior to beginning construction of the proposed ERGS, a certification that the proposed new facilities that public convenience and necessity require the project (CPCN), sec, 196.49(3)(b); sec. 196.491(3)(a), Wis. Stats. The process of obtaining certification begins with an application in a form prescribed by the Commission, sec. 196.49(2), Wis. Stats. and Wis. Admin. Code. Section 196.491, Wis. Stats. creates a process whereby the PSC has a limited time to consider an application for authorization to construct a new electric generating facility. The procedure includes, at critical points, default provisions which provide to the applicant a favorable determination, if the Commission fails to act within statutorily determined periods.

The first step in the process is a determination by the PSC as to whether the application for a CPCN is complete. The Commission must review the application and

advise the applicant as to whether it is complete, within 30 days. The applicable statute provides,

> The commission shall determine whether an application filed under subd. 1. is complete and, no later than 30 days after the application is filed, notify the applicant about the determination. If the commission determines that the application is incomplete, the notice shall state the reason for the determination. An applicant may supplement and refile an application that the commission has determined to be incomplete. There is no limit on the number of times that an applicant may refile an application under this subdivision. If the commission fails to determine whether an application is complete within 30 days after the application is filed, the application shall be considered to be complete.
>
> Section 196.491(3)(a)(2), Wis. Stats.

Section 196.491(3)(g), Wis. Stats. provides that the PSC must take final action within 180 days from the point that the application is complete. The 180 day time limit can be extended one time, upon approval by a circuit court, by an additional 180 days. Thus, from the date that an application is complete, the PSC has no more than 360 days to take final action. If the Commission fails to do so the application is deemed approved.

The determination that the application is complete is a crucial element in this process. At that point, the statutory deadline for determination is fixed. 360 days appears to be a substantial period of time until consideration is given to the size, cost and complexity of the current proposal as well as the opportunity for public participation that the Commission must provide.

There is a compelling logic to the statutory process which is all the more apparent in this case where extraordinary factual complexity and the need for timely resolution confront the finite resources of a regulatory agency. It is significant and appropriate that the key date in the process, the starting gun as it may be envisioned, is in the hand of the party most interested in the application, the applicant utility. WEC

presumably has the best access to the information that must be assembled to produce a complete application. The applicant utility has the direct, immediate concern and is likely possesses the resources necessary to assemble the required information.

Petitioners now assert that the PSC improperly determined that the WEC application was complete and seek an order vacating the PSC Order upon that basis. The arguments that the application was incomplete evolve essentially to three primary assertions;

1. The application did not present at least two proposed sites as required by sec. 196.491(3)(d)3, Wis. Stats. and Wis. Admin. Code, sec. 111.53(1)(e).

2. The application did not contain the regulatory approvals required by Wis. Admin. Code, sec. 111.53(1)(f) 1.

3. The application did not contain the information about needed new transmission line facilities as required by Wis. Admin. Code, sec. 111.53(1)(f) 4.

A. Alternative Location/Site Requirement

The WEC application offers three proposed configurations of the three proposed new generating plants. The Final EIS describes a 1000 acre parcel owned by WEPCO and states the proposal is one for three new units, "all constructed on or adjacent to a site containing WEPCO's existing Oak Creek Power Plant (OCPP)." Ex. 274, Vol. 1, Final EIS, p. xvii. In the course of the proceeding, a fourth configuration, known as "North CUP", evolved and eventually was the choice of the PSC. This too is located within the 1000 acre parcel.[3]

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[3] At an earlier point, petitioners Clean Wisconsin and Johnson sought reconsideration of the determination that the multiple OCPP configurations were sufficiently separate sites. On April 17, 2003, the PSC issued an order denying the request for reconsideration and the petitioners sought review in the circuit court. The court ruled that the April 17, 2003 order was a

Wisconsin law directs the PSC to consider "alternative locations" for a proposed new power plant facility,

> Except as provided under par. (e) and s. 196.493, the commission shall approve an application filed under par. (a)1. for a certificate of public convenience and necessity only if the commission determines all of the following:
>
> ...
>
> 3. The design and location or route is in the public interest considering ... alternative locations...
>
> Sec. 196.491(3)(d), Wis. Stats. , in part.

Moreover, the Commission has adopted a rule which requires the applicant to identify "[a]t least two proposed sites" in order for an application to be deemed complete.

> (1) Contents of a CPCN application. Except as provided in sub. (2), a CPCN application for a large electric generating facility is not complete until the applicant has filed all of the following information with the commission:
>
> ...
>
> > (e) At least two proposed sites for the proposed facility, including a description of the siting process and a list of the factors considered in choosing the alternatives.
>
> Wis. Admin. Code, sec. 111.53, in part.

Finally, the Commission has also adopted a provision which provides that in specific circumstances, there is to be no requirement that an alternate location be identified and described in the application.

> 1. An application for a cogeneration facility may meet the requirement under sub. (1) e) by filing information on 2 sites that are both located at the steam host's existing industrial plant, if the cogeneration facility will be a qualifying facility under 18 CFR 292.205 and none of the needed infrastructure improvements would constitute a major action significantly affecting the quality of the human environment under s. 1.11 (2) (c), Stats.
>
> 2. An application for repowering an existing generating facility may meet the requirement under sub. (1) (e) by filing information on 2 sites that are both

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preliminary decision not subject to judicial review prior to the issuance of a final decision, Clean Wisconsin, Inc. and S.C. Johnson & Son, Inc. v. Wisconsin Public Service Commission, Case No. 03-CV-1480, Dane County Circuit Court, Order, July 8, 2003.

> located at the existing generating facility site, if none of the needed infrastructure improvements would constitute a major action significantly affecting the quality of the human environment under s. 1.11 (2) (c), Stats.
>
> Wis. Admin. Code, sec. 111.53(2)(b), in part.

The Order of the PSC acknowledges the requirement that alternative locations/sites must be considered and interprets that requirement as follows,

> the fact alternate sites may be geographically close together does not automatically render them unreasonable alternatives ... The Commission determines that whether proposed site alternatives are reasonable by applying two standards: the site alternatives must each be feasible locations and they must be sufficiently distinct to offer different packages of costs and benefits
>
> PSC Order, page 45

The Commission reads the statute and the rule to require only that the alternative sites be feasible locations which offer alternative costs and benefits. The present application presents three configurations each of which used the 1000 acre parcel, to some degree, in a different manner. Apparently, none of the three submitted alternatives used precisely the same portion of the parcel. But, using the commission's interpretation of the alternative locations/sites requirement, each of the three WEC alternatives could use precisely the exact same land so long as they were each feasible and involved different costs and benefits. Thus the PSC's interpretation of the law permits elimination of the core requirement, the presentation of at least two different locations.

This formulation is one of law and the question becomes one of determining first the degree of deference owed by the court to the PSC as to this determination. Interpretation of the alternative site provisions of sec. 196.491(3)(d), Wis. Stats. and Wis. Admin. Code sec. 111.53, are matters squarely within the jurisdiction of the PSC. It may be that the agency has called upon a degree of expertise in rendering this

interpretation but it does not appear that the interpretation is a matter of long standing. Nor does it appear that the interpretation will provide uniformity of interpretation.[4]

There is no ambiguity as to what is meant by "alternative locations" in sec. 196.491(3)(d)3, Wis. Stats. Similarly, there is no ambiguity as to what is meant by "[a]t least two proposed sites " in Wis. Admin. Code sec. PSC 111.53(1)(e). The statute and the rule require that not less than two distinct locations be submitted as proposed alternate sites. There is no ambiguity and therefore no need to look to other sources for assistance. If there was ambiguity, however, two other related rules adopted by the PSC make clear the intent of Wis. Admin. Code sec. PSC 111.53(1)(e). The PSC, by adopting Wis. Admin. Code secs. PSC 111.53(2)(b)1 and 111.53(2)(b)2 expressly provides for two specific situations where the logic of the alternate proposed sites rule is declared inapplicable. Those two exceptional situations arise when a utility may seeks to undertake a substantial renovation of an existing generation plant or seeks to build a co-generation facility to capture the energy otherwise wasted in steam produced by some other industrial process. In either instance, the proposal is by definition site-specific. In such situations, the Commission has acknowledged that the two site requirement cannot be applied, Wis. Admin. Code, secs. 111.53(2)(b) 2 and 3. If alternate configurations of the same parcel is a sufficient demonstration of alternatives, then these two specific exceptions are needless surplusage. The more reasonable interpretation is that the exceptions are necessary because Wis. Admin. Code sec. PSC

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[4] The decision approving a CPCN as to the Fond du Lac Energy Center includes a consideration of two separate, distinct proposed locations for the new facility, Application of Fond du Lac Energy Center, LLC, Final Decision, May 5, 2003, pp. 6-8, Docket 9343-CE-100, as does the decision in approving the Joint Application of Fox Energy Company, LLC and American Transmission Company, LLC, Final Decision, November 8, 2002, pp. 7, 8, Docket 05-CE-115.

111.53(1)(e) is intended to mean precisely what is clearly says, the applicant must propose at least two distinct, alternative sites for a new plant.

In argument submitted to this court, the PSC suggests that the alternate location requirement should be viewed as a "rule of reason" based upon a requirement in the Wisconsin Environmental Policy Act that state agencies consider "alternatives to the proposed action", sec. 1.11(2)(c)3, Wis. Stats. and caselaw interpreting that statute, together with a parallel provision within the National Environmental Policy Act, 42 U.S.C. sec. 4332 (1970), Wis. Environmental Decade v. Public Service Commission, 79 Wis.2d 161, 175, 255 N.W. 2d 917 (1977). The WEPA requirement is intended to offer general guidance to an extremely wide range of government actions. It is a broad, statement of an approach to be taken generally. By contrast, the statute and rule applicable here speak directly to the number of "proposed sites" or "alternative locations" that must be identified. The express requirement is that more than one must be included in the application and neither the WEPA nor the NEPA are intended to offer guidance of such specificity.

In the alternative, if the court accepts the interpretation offered in the PSC Order, there remains a question as to whether the three alternatives submitted in the WEC application actually meet the test stated, whether the record reflects sufficient evidence upon which the PSC could reasonably conclude that the sites really offer distinct costs and benefits. A fair review of the record reflects the clear picture that there is no significant distinction between the costs and benefits offered by each of the three alternatives. These are not alternative sites or locations; They simply are three

different configurations or utilizations of a single site which means that the application does not meet the legal minimum for consideration by the PSC.

The interpretation of sec, 196.491(3)(d)3, Wis. Stats. and Wis. Admin. Code sec. PSC 111.53(1)(e) is clearly erroneous. It is error for the PSC to deem the WEC application complete on November 15, 2002 because the application failed to include at least two alternative sites as required by applicable rule. The Order based upon that application is hereby vacated and the matter is remanded to the Commission to permit the applicant to submit an application which does comply with sec. 196.491(3)(d)3, Wis. Stats., and Wis. Admin. Code sec. PSC 111.53(1)(e).

B. Regulatory Approvals

The Commission requires that an application for CPCN must demonstrate that regulatory approvals, other than that of the PSC, have been obtained.

> (1) Contents of a CPCN application. Except as provided in sub. (2), a CPCN application for a large electric generating facility is not complete until the applicant has filed all of the following information with the commission:
>
> ...
>
> (f) Site-related information for each proposed power plant site, including all of the following:
>
> 1. The regulatory approvals required for construction and operation of the facility.

Wis. Admin. Code, sec. 111.53, in part.

The WEC initial application was filed in January, 2002. WEC thereafter filed a series of four supplements to the application, the fourth on October 23, 2002. On November 15, 2002, PSC Electric Division Administrator Robert Norcross rendered a

determination that the WEC application was complete.[5] That determination was expressly based, however, upon the applicant's commitment to provide further data related to wetlands issues, subsurface sampling as well as aquatic, benthic and lake bottom information. Specifically, the Norcross correspondence stated,

> While the application is determined to be complete at this time, our determination is, in part, based on WE Energies' commitment to supply additional information related to items 6, 7, and 18 of the Commission's October 7, 2002, incompleteness letter. Substantial amounts of information relating to items 6, and 7 have been provided and will allow our review of the wetland delineations to begin. based upon the information contained in Supplement 4 and conversations with WE Energies staff, it is my understanding that the remaining information relative to items 6 and 7, consisting of final wetlands report from the Southeast Regional Planning Commission, will be available in approximately two weeks. In addition, the information relative to the subsurface drilling, sampling and resting survey, the wave/environmental climate date survey and the aquatic/benthic environmental and lake bottom characterization survey in item 18 will be available on the time line set out as answer 5-SUP-021 of Supplement 4.
>
> Norcross correspondence, November 15, 2002, in part.

There is no dispute that the application was deemed complete by Administrator Norcross despite the lack of certain environmental information which was to be submitted later. The Norcross letter speaks in terms of missing information rather than missing regulatory approvals but the PSC Order makes clear that all regulatory approvals still had not been obtained 360 days after the Norcross letter, as of the November 10, 2003 issuance of the Order.

> DNR must also issue a number of water-related permits and approvals before construction may commence. These include: permits for grading work for the generating facilities and for the railroad improvements; the approvals for dredging and for use of lakebed and shoreline structures to construct breakwater and harbor facilities; the approval for use of lakebed to install the cooling water intake and discharge structures; and the water quality certification needed for wetland

[5] The November 15, 2002 correspondence of Administrator Norcross is attached as Exhibit A to the April 30, 2004 brief of Clean Wisconsin/Johnson. This document, the authenticity of which is not challenged by any party, does not appear otherwise to be within the record.

> fill. As of the date the record closed, DNR has deemed the joint state/federal application for water regulatory permits and approvals for ERGS to be incomplete.
>
> Order, at page 53

With regard to air pollution, the legislature has expressly committed such matters to the DNR, sec. 196.491(3)(d) 3, Wis. Stats., but water-related approvals are to be part of the application. Specifically, the applicant is required to provide an engineering plan to the DNR not less than 60 days before the PSC application is submitted which then triggers an obligation by the DNR to list, within 30 days, the permits that will be required, sec. 196.491(3)(a) 3.a, Wis. Stats. This begins a time-limited application and approval process before the DNR, sec. 196.491(3)(a) 3. b., Wis. stats., which is similar to but shorter than that applicable before the PSC under sec. 196.491(3)(g), Wis. Stats. The coordination between the DNR application process and CPCN process before the PSC, particularly the requirement that the DNR process precede that of the PSC is readily apparent in the explicit requirement that the CPCN not issue until all required regulatory permits have issued.

> The commission may not issue a certificate of public convenience and necessity under this subsection until the department has issued all permits and approvals identified in the listing specified in par. (a)3.a. that are required prior to construction.
>
> Section 196.491(3)(g), Wis. Stats., in part.

Here the plain language of the applicable rule states that an application, in order

to be deemed complete, must include the regulatory approvals necessary for construction and operation of the proposed new facility, Wis. Admin. Code, sec. 111.53(1)(f) 1. The requirement of the administrative rule is plain and unambiguous.[6] The application does not contain the required regulatory approvals and thus to deem it complete is an action undertaken in violation of an applicable administrative regulation.

It is error for the PSC to deem the WEC application complete on November 15, 2002 because the application fails to include the regulatory approvals required by Wis. Admin. Code, sec. 111.53(1)(f)1. The Order based upon that application is hereby vacated and the matter is remanded to the Commission to permit the applicant to submit an application which does comply with Wis. Admin. Code sec. PSC 111.53(1)(f)1.

C. Transmission Line Agreements

The third primary area of objection to the completeness of the application is the question of transmission line facilities. The applicable administrative rule provides,

> Contents of a CPCN application. Except as provided in sub. (2), a CPCN application for a large electric generating facility is not complete until the applicant has filed all of the following information with the commission:
>
> ...
>
> (f) Site-related information for each proposed power plant site, including all of the following:
>
> ...
>
> 4. Any required transmission line construction, agreements for use of the transmission system to deliver plant power, transmission losses, and effects on system reliability. If a certificate of authority under s. 196.49, Stats., is required to construct the transmission line, the location of termini, length in miles, and voltage for each transmission line.

[6] There is an obvious logic to this requirement. It is clear that the legislature has decreed that the PSC bats last, sec. 196.491(3)(g), Wis. Stats., and that the PSC has a limited period of time within which to consider an application. It follows therefore that the Commission should have before it a truly complete application before it undertakes its significant responsibility.

Wis. Admin Code, PSC, section 111.53(1), in part.

There are other administrative rules which appear to have application as well. A complete application is required to include,

> The estimated capital cost of the generating facility *and all related facilities*, broken down by major plant accounts. All cost escalation factors used in the estimate shall be identified.
>
> Wis. Admin. Code, sec. 111.53,(1)(c) 1, in part, emphasis added.

There is no dispute that the application did not contain agreements for the use of transmission lines for the 1230 MW of new power to be produced by the two proposed plants which were approved, nor does the record appear to contain the much of the other information required by Wis. Admin. Code, sec. 111.53(1)(f) 4.[7] The Commission offered an estimate of $166 million, Order, p. 10.[8] Potentially, construction of the required transmission facilities will require a CPCN from the PSC, Sec. 196.49, Wis. Stats.,Wis. Admin. Code, sec. 111.53(1)(f) 9,[9] which will in turn require a careful consideration of the technical, environmental and economic facts by the PSC, Wis. Admin. Code, sec. 111.55.

In argument, the PSC suggests that recent reorganization of the state utilities, involving the transfer of transmission lines to an entity known as the American Transmission Company (ATC) makes it difficult to obtain the information required by the

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[7] As will be discussed below, the Commission notes that the available transmission data is preliminary and contingent, for resolution at a later time, Order, p. 10, 11.

[8] The total estimate in the Final EIS is $266,216,753 but of that amount, $102,164,662, apparently is allocated for operation of the third, IGCC unit, as to which the PSC did not give approval which would produce an estimate of $164,052,091, Final EIS Vol 1, pp. 15, 126-132.

[9] Hearing transcript, Circuit Court, October 8, 2004, p. 62, ll. 2-7.

applicable rule.[10] The study of the need for transmission facilities does appear to be an on-going process, [11] however, and other recent orders do include transmission facility information.[12]

This is a matter of consequence. The substantial power to be produced is of no use without adequate facilities to transmit it for distribution. A related and necessary facility, required for the use of the power, with an estimated cost equal of $166 million, 7.5% of the cost of the largest utility construction project in the history of the state, appears to be one of the "related facilities" to be considered in the approval process, Wis. Admin. Code sec. PSC 111.53(1)(c)1. In any event, there is no dispute that the applicable Administrative rule requires that agreements for the use of transmission facilities be part of a complete application but that no such agreements are included in the WEC application. The requirement is both clear and unambiguous and it has not been complied with.

It is error for the PSC to deem the WEC application complete on November 15, 2002 because the application fails to include the transmission line agreements required by Wis. Admin. Code, sec. 111.53(1)(f)4. The Order based upon that application is hereby vacated and the matter is remanded to the Commission to permit the applicant

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[10] Hearing transcript, Circuit Court, October 8, 2004, p. 63, l. 1 to p. 64, l. 6.

[11] The Final EIS refers to a 10 year assessment update and interconnections studies relating to the ERGS project prepared by ATC, Final EIS, V. 1, p. 128, R. 119.

[12] Joint Application of Fox Energy Company LLC and American Transmission Company LLC, Final Decision, pp, 10-18, PSC Docket 05-CE-115; Application of Fond du Lac Energy Center, Final Decision, pp. 3, 7 & 8, PSC Docket 9343-CE-100.

to submit an application which does comply with Wis. Admin. Code sec. PSC 111.53(1)(f)4.

D. Identity of Contingent Owners

Petitioner Robert Owen submits that the WEC application was incomplete because it did not identify properly the contingent interests held by Wisconsin Public Power, Inc. (WPPI) and Madison Gas & Electric (MGE). WPPI is a wholesale supplier of power to thirty-seven Wisconsin communities and MGE is a utility located in Dane County. Both WPPI and MGE hold options each to purchase a 50 MW ownership interest in the proposed new facility and the Commission's Order contemplated both the probability that the options would be exercised as well as the possibility that they would not, Order, pp. 31, 32. With regard to the identity of utility owners, the applicable administrative regulation provides,

> Contents of a CPCN application. Except as provided in sub. (2), a CPCN application for a large electric generating facility is not complete until the applicant has filed all of the following information with the commission:
>
> (a) The operating characteristics of the proposed facility, including all of the following:
>
> ...
>
> 4. The names and addresses of owners and investors and the percent of ownership.
>
> Wis. Admin Code, Sec. PSC 111.53(1), in part.

The PSC has interprets the above rule not to require the listing of the type of potential ownership interest, an option to become an owner, which were held by WPPI and MGE at the point that the application was filed. The question posed initially is the level of deference that this court should give to the interpretation adopted by the Commission.

This appears to be a question squarely within the Commission's jurisdiction and one which has been adopted by the Commission in the past. The interpretation adopted by the Commission is not in conflict with the plain meaning of the regulation and will promote uniformity of interpretation. Therefore the court believes great deference should be given to the Commission's interpretation, Pfeiffer v. Board of Regents, supra. The court concludes the Commission acted properly in its treatment of the ownership option interests of WPPI and MGE.

E. Completeness of the Application as of November 15, 2002

The PSC argues that it may properly deem an application substantially complete notwithstanding failure to include every item required by statute or rule. This is, however, a novel interpretation of the law by the Commission[13] and should properly be given no more than due deference, RURAL v. PSC, supra 239 Wis.2d at 679.

The petitoners question the wisdom of embarking upon this complex approval process without the required information but the question now presented is limited to whether the PSC holds the authority to forego the benefit of rules created to assure to the Commission that sufficient information is available in a timely manner to render a decision upon an application. If the PSC is intended to be the exclusive beneficiary of the information required to be included in an application, it might be possible for the Commission, in effect, to waive the right to receive the information in question. The consideration of CPCN is, however, very much a public process. The public is entitled

[13] Hearing transcript, Circuit Court, October 8, 2004, p. 17, L. 4-25

to participate in the process and full participation requires access to a full record of information, the first and perhaps the most critical element of which is a complete application. The PSC therefore must assure that the application be complete, not simply so it has before it all necessary information but also to provide to the public an opportunity to examine the basis for the proposed construction.

The requirements set forth in administrative law defining a complete application serve an important public purpose. The application pending on November 15, 2002, fails to identify at least two alternative locations, fails to include all required regulatory approvals and fails to set forth transmission line agreements. The November 15, 2002 determination by administrator Norcross is that the application was complete and the Commission's April 17, 2003 Order affirms that determination. Both determinations are in violation of the plain meaning of the applicable regulation and are therefore entitled to no deference, State ex rel. Parker v. Sullivan, supra, 184 Wis.2d at p. 669. It is the ruling of this court, as a matter of law, that the application is not complete within the meaning of sec. 196.491(3)(d), Wis. Stats. The law, sec. 196.491(3)(e), Wis. Stats., gives to the PSC only two choices when faced with the incomplete application, it can "reject the application or approve the application with such modifications as are necessary for an affirmative finding under" sec. 196.491(3)(d), Wis. Stats. The PSC chose a third course, however, and permitted the process to begin based upon an incomplete application. In doing so, the PSC acted in violation of the law and the Order which resulted from that procedure must therefore be vacated and the matter remanded to the PSC to do that which is required under sec. 196.491(3)(e), Wis. Stats. Specifically, the Commission must give the applicant an opportunity to submit an

application which meets the requirement of the Wis. Admin. Code secs. PSC 111.53(1)(e), 111.53(1)(f)1 and 111.53(1)(f)4.

IV. Commission's Order

A. Energy Need Projections

The touchstone of any petition for authorization to build a new generating facility is the obvious question of whether there will be a need for the power that will be produced. The WEC has included within its application, forecasts of growing demand over the period 2003 through 2012. Petitioners CW/Johnson and Robert Owen question the projections of need submitted by WEC and Mr. Owen, particularly, asserts that appropriate investment in alternative power sources could reduce the requirements asserted by the applicant. The PSC, in its order, concludes that the proposed plants would not be needed as quickly as WEC suggested and further directs that there be an increased reliance upon alternative sources. The PSC, however, does accept the fundamental position that more generation capacity will be needed both to replace aging facilities and to respond to increasing demand. This is a determination involving both fact and law, a determination squarely within the jurisdiction and expertise committed to the PSC. This clearly is an area as to which the court should properly accord great deference to the legal interpretation of the PSC and also an equivalent deference as to the fact determinations that were made. The criticism and suggestions offered by the petitioners as to projected need are plausible and reasonable. That, however, is not the test and for the court to intrude upon the PSC's determination of future need. That which the petitioners urge would be an improper interference with the agency's exercise

of its expertise and discretion as contemplated and protected by sec. 227.57(6), Wis. Stats. The court therefore affirms the Order of the Commission in this respect.

B. EGEAS Computer Model

The applicant, the PSC and the petitioners, in varying degree, all rely upon a computer program known as the Electric Generation Expansion Analysis System (EGEAS). The operator of the program introduces assumptions as to future power need together with estimates of construction cost, maintenance expense, fuel cost and fuel availability. The program is designed to calculate what are thought to be optimal plans to meet the needs defined. No party suggests that it is error for the PSC to rely, at least in part, upon the EGEAS model and indeed, the program appears to be simply a device that is able to describe and compare alternative future construction scenarios through consideration of a wide range of variables. All parties appear to acknowledge that the product of the AGEAS model can be no more valuable, accurate or complete than the assumed facts that are introduced into the program. As with the projection of future power need, the question of whether the data relied upon by the AGEAS model is reasonable or not, appears to be every bit as much within the PSC's area of responsibility and expertise. The petitioners offer reasonable critiques and suggestions but the test is whether the petitioners have shown that the choices made by the PSC, in selecting the data used in the various AGEAS reports, were unreasonable. That showing has not been made.

The petitioners suggest that the assumptions upon which AGEAS studies are based were inaccurate, improper or incomplete but no petitioner suggests that it was an error of law for the Commission to use the AGEAS program. In essence, the argument

is one of fact; the petitioners suggest that the factual basis for the AGEAS studies relied upon by the PSC began with erroneous assumptions. The question arguably evolves to whether or not the factual assumptions relied upon by the PSC, in utilizing the AGEAS program, are supported by substantial evidence, within the meaning of sec. 227.52(6), Wis. Stats. The burden to demonstrate the basis to vacate the Order is upon the petitioners, Shoreline Park Preservation, Inc. , supra, and it is the determination of the court that petitioners have not shown that the factual assumptions upon which the AGEAS studies were based to be lacking the support of substantial evidence, within the meaning of sec. 227.52(6), Wis. Stats.

C. Health Care Costs

The PSC Order does not attribute any health-related cost to the construction and operation of the two new facilities but instead suggests that the evidence offered as to health cost should be considered by the DNR as that agency considers air pollution permits applicable to the new facility, Order, p. 52.

Petitioners CW & Johnson submit that the record contains competent evidence that reflects that there will be a quantifiable economic impact, that is, a cost attributable to health care and disability caused by the proposed new facilities. The argument is that while there is dispute as to the magnitude of that cost, the Commission must determine there will be operating cost in some amount caused by a need for increased health care. The petitioners' argument flows to the assertion that the PSC does not hold the discretion simply to make no finding as to that cost; Cannot ignore it entirely.

Petitioners CW & Johnson argue that, as part of determining whether or not the PSC should approve a CPCN, the commission must include as an operational cost of

the project, the on-going health costs attributable to air emissions from the new facility. The petitioners assert that the PSC is not precluded from including the on-going economic impact upon health care caused by the operation of the new facilities and they go on to argue that it is reversible legal error to fail to include that as an element of project cost.[14]

The legislature has imposed upon the PSC an obligation to consider environmental issues by requiring that the Commission approve an application for CPCN only if it determines that the proposed facility "will not have an undue adverse impact on other environmental values, such as ... public health and welfare", sec. 196.491(3)(d)4, Wis. Stats., in part. Moreover, the legislature has limited that authority by providing that "[i]n its consideration of the environmental factors, the commission may not determine that the design and location or route is not in the public interest because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285," Sec. 196.491(3)(d)3, in part. The limitation in sec. 196.4191(3)(d) 3, Wis. Stats. is specific and is focused upon the power to approve an application for CPCN. The statute does not expressly preclude the PSC, however, from considering quantifiable health care cost as an operating expense.[15]

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[14] If the DNR had issued air pollution permits pursuant to Chapter 285, it might be arguable that sec. 196.491(3)(d) 3, Wis. Stats. implies an absence of PSC jurisdiction for any consideration of air pollution matters. The petitioners observe correctly, however, that no DNR permit has been issued.

[15] Should the Commission choose to do, however, that would lead to other issues. Typically, operational cost estimates are directed in large part to determining the sums that may be recovered by the utility from rate-payers. In the case of future health care costs to be incurred, the question arises as to how such anticipated costs are to be measured and to whom are they to be paid.

It may be that the PSC could choose to include within its projection of operational cost, presumably as part of the effort to select between various equipment options and alternative locations, the costs attributable to public health matters. That is something very different, however, from the claim that the PSC must, as a matter of law, determine a health care cost whenever a record contains competent evidence as to such costs. Within the statute in question, Sec. 196.491(3)(d) 4, Wis. Stats., the term "public health and welfare" is part of a larger list of factors that the commission is to consider, including "ecological balance, ... geological formations, esthetics of land and water and recreational use," If there is a legal duty to include whatever quantification may be available as to public health, would not that same duty also apply to "esthetics of land ... use"? It may be that certain of the listed concerns can be measured in cost but it appears equally true that other concerns may not be quantifiable. Unquantifiable does not mean unimportant. Another, more reasonable interpretation of Sec. 196.491(3)(d) 4, Wis. Stats., is that the legislature identified important categories of concern which should properly be considered, even if it may not be possible to assign a clear economic value.

The language of the statute does not require quantification but rather directs the PSC to look to the overall impact of a proposal. Moreover, the legislature has not said that no adverse impact may be allowed. Rather it requires the Commission to withhold approval if it determines there to be an "*undue* adverse impact on ... public health", sec. 196.491(4)(d), Wis. Stats., emphasis added. This requirement is one which affords to the Commission substantial discretion to determine whether or not a particular impact is too great or "undue". The Commission has permitted evidence as to such costs to be

presented, apparently has even provided funding to assist the petitioners to prepare and present such evidence.

The court concludes that sec. 196.491(3)(d), Wis. Stats. cannot be read to impose a clear obligation upon the commission to include within the project cost calculation, any amount attributable to health costs. Further, in the alternative, if the statute could be so interpreted, the interpretation adopted by the Commission is one to which great deference should properly be given by this court, Brauneis v. State, supra.

D. Transmission Facility Design, Location and Cost

The cost of additional facilities to permit the transmission of the power generated by the approved plants poses a somewhat different question than that of projected health care costs. The proposed facility cannot serve any purpose whatsoever until sufficient transmission lines are constructed to distribute the power generated. As noted above, no application is complete until it contains whatever agreements are necessary for access to the transmission facilities and, again as noted above, the estimate of cost for these facilities is set at $166 million.[16] This is a cost of a necessary, directly related physical facility. The Commission is prohibited from granting the CPCN until it determines that,

> the design ... is in the public interest considering ... engineering, economic... and environmental factors...
>
> Sec. 196.491(3)(d) 3, Wis. Stats.

[16] The available information, described by the Commission as incomplete, Order, pp. 10 & 11, includes a Generation Interconnection Study Report, dated December 21, 2001, prepared by the American Transmission Company is in the Record at R.1, Vol. 3, Appendix Y.

As to design. cost and location of transmission facilities, the Commission essentially elects not to address the issue. In the Order, the Commission candidly states that it does not have the required information,

> American Transmission Company (ATC) has conducted several studies to determine the cost of interconnecting ERGS to the transmission system and the cost of up grading the transmission system so it can transmit power from ERGS. It has completed a partial transmission restudy of ERGS on July 25, 2003, estimating the transmission costs associated with SCPS 1 and SCPC 2 at $65.5 million and $100.5 million, respectively. Determining transmission system requirements for ERGS, though, depends upon the amount of forecasted generation in southeast Wisconsin and northern Illinois ... This will require ATC to restudy interconnection needs to minimize the amount fo transmission facilities installed and recalculate the costs involved. The analysis is quite complex, depends upon the site chosen, and requires several months of sequential computer model runs.
>
> Order, p. 10-11

Given the lack of definitive information, the Commission is able only to provide as follows in the Order,

> The applicants shall work with the ATC, DNR and neighboring communities to minimize the cost and the environmental impact of moving and reconfiguring the 138 kV and 345 kV substations. The applicants shall inform the Commission of the results of this work, documenting the estimated cost involved the proposed layout of the substations, and the associated transmission line interconnection routes for exiting the plant site.
>
> Order, p. 58, para. 7

The Commission is prohibited from granting the CPCN until it determines that the design of the proposed facility is in the public interest, with particular attention to the engineering, economic and environmental facts, sec. 196.491(3)(d)3, Wis. Stats. The Order, however, grants the CPCN approval while expressly stating that the Commission does not know what the cost or design of the required transmission facilities will be. This determination to approve construction of the largest generating facility in state

history without also determining the cost, design and location of the transmission facilities appears to be unprecedented and is, at best, puzzling. This determination to go forward without the transmission information is, nonetheless, a decision that is within the area of concern assigned to the PSC and it may well be the product of the special expertise possessed by the Commission. The granting of CPCN approval without considering the question of transmission facilities, however, does not appear to be an interpretation of long standing, nor does it appear that this approach will provide uniformity and consistency. It certainly is true that sec. Sec. 196.491(3)(d) 3, Wis. Stats., does not expressly compel the inclusion of transmission facilities but this court concludes that the those facilities are so integral and necessary to the planned generation plant that the decision to grant approval without determining the design, cost and location of those facilities to be contrary to the legislature's intent, sec. 196.491(3)(d) 3, Wis. Stats. and "otherwise unreasonable or without rational basis" within the meaning of State ex. rel. Parker, supra. It is therefore the order of the court that the Order is hereby vacated and the matter remanded to the Commission for a determination as to the design, cost and location of transmission facilities needed to serve the proposed new plant.

E. Energy Priority Law

The PSC Order approves the construction of two 615 MW plants which will use high sulfur coal as the fuel source. The Order considers the contribution that renewable energy sources, wind generation and energy conservation could make to the future energy needs of the state. The PSC also considers a competing proposal,

submitted by Calpine, which would have provided power using equipment that uses natural gas as the fuel. The Commission determines the following as fact,

> Energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. Secs. 1.12 and 196.025, or their combination, are not cost-effective or technically feasible alternatives to the projects proposed in this docket.
>
> Finding of fact, no. 1, Order, p. 4

The petitioners argue that the PSC, in its process, fails to comply with the requirements of the Wisconsin Energy Priority Law, sec. 1.12, Wis. Stats. That statute provides,

> **(4) Priorities.** In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed:
> 1. Natural gas.
> 2. Oil or coal with a sulfur content of less than 1%.
> 3. All other carbon-based fuels.
>
> **(5) Meeting energy demands.** (a) In designing all new and replacement energy projects, a state agency or local governmental unit shall rely to the greatest extent feasible on energy efficiency improvements and renewable energy resources, if the energy efficiency improvements and renewable energy resources are cost-effective and technically feasible and do not have unacceptable environmental impacts.
>
> (b) To the greatest extent cost-effective and technically feasible, a state agency or local governmental unit shall design all new and replacement energy projects following the priorities listed in sub. (4).
>
> Sec. 1.12, Wis. Stats. in part.

Moreover, the foregoing fuel priority policy is reinforced in Chapter 196 where it is stated,

> To the extent cost-effective, technically feasible and environmentally sound, the commission shall implement the priorities under s. 1.12(4) in making all energy-

related decisions and orders, including advance plan, rate setting and rule-making orders.

Sec. 196.025(1), Wis. Stats.

The Order addresses the two top priorities, energy conservation and renewable energy, Order, pp. 16-19, but selects, for the great majority of the future power need, equipment which uses the lowest priority fuel, high sulfur coal.

The question of compliance with the Wisconsin Energy Priorities Law appears to resolve into two distinct issues; The selection of high-sulfur coal over natural gas as the primary energy source for baseload facilities and the lack of consideration of oil and low-sulfur coal as potential fuels.

1. Selection of High-Sulfur Coal over Natural Gas as the Primary Energy Source

The Order of the PSC bases the decision to use high-sulfur coal upon the need to provide what is termed, "baseload" power and a determination that high sulfur coal is substantially better suited to the production of baseload power than is the top priority fuel, natural gas, Order, pp. 19-22, and the petitioners argue that this is in violation of the Wisconsin Energy Priorities Act. . The term, "baseload" is not defined in the statutes, in the administrative regulations or in the Order of the PSC. In the argument submitted to this court, it has become apparent that the parties understand "baseload" to be a generating facility intended to provide power effectively on a constant basis, not less than 70% of the time, day in, day out. [17]

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[17] At hearing, the PSC indicated that the distinction is one of economics rather than technical capacity.

"What you need to recognize is the commission has never contested the fact that

The petitioner's objection is framed as a legal issue, whether the Order reflects PSC compliance with the obligations imposed by sec. 196.025(1), Wis. Stats. which requires the Commission to "implement" the fuel priorities of the Energy Priorities Law Wisconsin to the extent that it is "cost-effective, technically feasible and environmentally sound" to do so. The petitioners suggest that, as to each of the fuel sources listed, the Commission must require the applicant to begin with the highest priority fuel and rely upon that source unless it can be shown that the reliance is not cost effective, not technically feasible or not environmentally sound. The Commission asserts, in effect, that it need only consider or contemplate the priority concept without requiring an actual examination of each possibility.

The Energy Priorities Law lists four types of non-renewable fuels; natural gas, oil, low sulfur coal and everything else. The high sulfur coal that the applicant seeks to rely upon falls into the last and lowest priority. In the decision, the PSC repeatedly states that natural gas is not an appropriate fuel for a power plant intended to provide baseload power but does so without offering a clear factual basis. This appears to be in response to a competing proposal submitted by petitioner Calpine, the owner of a natural gas generating plant recently approved by the PSC to provide baseload power. Calpine submitted to the PSC, as a confidential exhibit pursuant to sec. 196.14, Wis.

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a gas plant is capable of running in baseload mode. It is not a question of whether or not the machinery is strong enough to run night and day. It is a question of whether the gas is available and at what price. And at this point the commission is worried that it would be over extending the use of gas because we are already using it for peakers, we are already using it for intermediate load plants. It is a slightly different question. When you go back are these plants capable of running at baseload? Yes, they are. We are not contesting that."

Hearing transcript, Circuit Court, October 4, 2004, p. 47, l. 19 to p. 48, l. 6

Stats., a proposal to provide the power needed by WEPCO, using natural gas-fired equipment located at Calpine's Fox Energy Center and Fond du Lac Energy Center, R-160, Exhibit 202(c); R-157, pp. 3366, 3367. Calpine argues that its proposal would have provided the power needed at less cost and through the use of a fuel determined to be a highest non-renewable fuel priority by sec. 1.12(4)(d), Wis. Stats.

The rationale for the Commission's preference for high-sulfur coal is not clear and appears to be more of an assumption than a determination of fact. Essentially, the Order simply states, repeatedly, that coal-fired equipment must be used because the need is for baseload power.

> The Commission also considered whether gas-fired generation is a cost-effective or technically feasible alternative that could *replace the need for new baseload generating facilities*.
>
> Order, p. 19, emphasis added

> A critical part of the Commission's ultimate preference for coal-fired generation over gas-fired generation rests heavily on the discretion accorded the Commission under the Energy Priorities Law and the Power Plant Siting Law. More significantly, the crux of this case is really about the appropriate timing to construct new baseload generation. A fundamental policy choice presented in this case is whether the Commission believes that WEPCO needs to take steps now to address needs for new baseload facilities over the next decade.
>
> Order, p. 20

> There are qualitative factors set forth in Wis. Stat. sec. 196.491(3)(d) that also support the Commission's conclusion that new coal-fired generation is in the public interest and that ERGS is the most cost-effective and technically feasible way to address WEPCO's baseload needs. The Commission's decision to approve SCPC 1 and 2 balances its obligations under the Energy Priorities Law and the Power Plant Siting Law.. . The evidence in this proceeding demonstrates the advantages of using cleaner burning coal technologies like SCPC as a baseload resource over gas-fired generation.
>
> Order, p. 21

The problem is that the "qualitative factors" alluded to above are not stated in the Order nor can they readily be inferred. The Commission candidly describes the preference for high-sulfur coal equipment as one which,

> reflects the *Commission's policy judgment* that while natural gas-fired generating facilities may be better suited for peak and intermediate load generation, coal-fired generation provides the most practical means to serve WEPCO's needs for baseload capacity
>
> Order, p. 21, emphasis added.

The above passage is revealing. The selection of the appropriate fuel is not a policy choice. The policy choice has been made by the legislature with the enactment of sec. 1.12, Wis. Stats. The role of the Commission is to implement that policy choice. What is required is a fair examination of fact in the context of the statutorily-enacted policy choice giving preference, where appropriate, to natural gas over high sulfur coal. There is to be a determination of fact as to whether natural gas or natural gas in combination with another fuel would produce power that is "cost-effective, technically feasible and environmentally sound", sec. 196.025, Wis. Stats.

No "policy" as to which fuel is always best for baseload operation has been identified. The Order itself says there has been no approval of "any new baseload, coal-fired generation in Wisconsin since 1980", Order, p. 21.[18]

It is not possible to escape the conclusion that sec. 196.025(1), Wis. Stats. imposes an obligation to make a determination as to each of the four fuel types. That is the plain, straightforward command of the statute. The argument is offered that the

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[18] Although the Order approving construction of the Calpine Fox Energy facility in Outagamie County finds that the gas-fired facility is capable of providing baseload power, Final Decision, p, 7, PSC Docket 05-CE-115 as did the Order approving construction of the Calpine Fond du Lac Energy facility, final decision, p. 5, PSC Docket 9343-CE-100.

PSC considered all priorities, but there is not a single word in the order to suggest that either oil or low sulfur coal[19] was ever, in any manner or degree, contemplated as a potential fuel.

The Commission Order looks to the prefatory note of the Energy Priorities Law to find language that suggests that an agency is to possess great flexibility in meeting the obligations created by the law. There is, however, no need to refer to secondary sources and it would be improper to do so when the language of the statute is as clear and plain as it now the case, City of Muskego, v. Godec, 167 Wis.2d 536, 545, 482 N.W.2d 79 (1992).

The Order further suggests that there is a need to harmonize the Energy Priorities Law and the Power Plant Siting Law but does not explain the need to do so. There is no obvious conflict between the two and each deals with an entirely separate question. The Commission, in argument, suggests the petitioners urge that there be two alternative locations identified for each of the priority list fuels. This claim attempts to mix together two entirely separate requirements. As noted above, the PSC must require the applicant to identify two separate proposed locations and there must be an examination as to feasibility of the various energy sources at each identified location. The minimum number of locations begins at two and does not increase.

The real world application of the Energies Priority Law by the Commission may well be complex and may require sophisticated technical and financial analysis but the intent of the law is extremely simple and clear. There is no ambiguity as to what the

[19] The court was advised during oral argument that the very substantial existing OCPP generating facility currently relies upon low sulfur coal. Hearing transcript, October 4, 2004, p. 20, l. 10.

legislature intended and, as a matter of law, there is no need nor any justification for looking to legislative history or other secondary materials to discern legislative intent. [20]

The PSC argues that it cannot be required to select a higher priority source which is not technically feasible or not cost-effective, Order, p. 15, and that is absolutely true. What is required by the statute as to non-renewable fuels, however, is precisely what the Commission actually did do in looking at renewable sources. As to both energy conservation and wind generation, the PSC carefully considered the extent to which it was feasible and cost-effective to rely upon each as a source of future power, Order, pp. 16-19. That is precisely what was required as to natural gas, oil and low sulfur coal.

Further, the Commission's determination that only high-sulfur coal may be considered as a fuel source to provide baseload power is not supported by facts identified with sufficient clarity in the Order.[21] It is the order of the court that the Order shall be remanded to the Commission to permit the Commission to offer further justification for the determination that only high-sulfur coal can be the fuel source for the proposed new facilities, Connecticut General Life Ins. Co. v. DILHR, 86 Wis.2d 393, 405, 273 N.W.2d 206 (1979).

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[20] Petitioner Clean Wisconsin seeks to buttress its statutory interpretation argument by reference to a transcript description of a public proceeding conducted October 29, 2003. Because, in the view of the court, the language of the Energies Priorities Law is plain and unambiguous, this court need not and does not base its determination as to the intent of the Energies Priorities Law upon any statement made at the October 29, 2003 proceeding.

[21] It may well be true, possibly self-evident, that if one starts with the premise that a demonstrated need for additional baseload capacity must be satisfied by new facilities located at the OCPP site, the logical choice would be additional coal-fired equipment given the existing coal-fired facilities at that location and potential for economies of scale. Sec. 196.491(3)(d)(3 and Wis. Admin. Code PSC sec. 111.53(1)(e), however, require that the analysis begin with not less than two realistic, alternative locations and that was done in this case.

It appears the Commission begins with a policy decision that the need for baseload power requires that the fuel must be high-sulfur coal. That may be a perfectly reasonable choice but the factual analysis to support that choice does not appear within the Order. The Order, in its determination as policy that only high-sulfur coal is an appropriate primary energy source, does not demonstrate compliance with the legislative mandate set forth at secs. 1.12 and 196.025, Wis. Stats. and must be remanded to the Commission for further proceedings. It is the order of the court that the Order shall be remanded to give to the Commission the opportunity to determine as fact, pursuant to sec. 196.025(1), Wis. Stats., the cost-effectiveness, technical feasibility and environmental impact of high sulfur coal in comparison to natural gas as a potential source for the future energy needs to be met.

2. Lack of Consideration of Oil and Low-Sulfur Coal as Potential Fuels

There is simply no basis whatsoever, for the court to infer that the Commission considered in any degree two of the higher priority fuels, oil and low sulfur coal. In rendering the Order without completing the required analysis, the Commission has acted upon an interpretation of law which is directly contrary to the plain meaning of sec. 196.025(4), Wis. Stats. and no deference to that interpretation is appropriate, State ex rel. Parker v. Sullivan, supra, 184 Wis.2d at p. 669. It is the order of the court that the Order shall be remanded to give to the Commission the opportunity to determine, as required by sec. 196.025(1), Wis. Stats., the cost-effectiveness, technical feasibility and environmental impact of oil and low-sulfur coal as potential sources for the future energy needs determined by the Commission to exist.

It is entirely possible that the required consideration will result in the conclusion that neither oil nor low sulfur coal would be both feasible, cost-effective or environmentally appropriate but the Order reflects no consideration, whatsoever, as to either. The Order is therefore vacated and the matter remanded to the Commission to undertake an examination, pursuant to sec. 196.025, Wis. Stats., as to whether either oil or low sulfur coal would be feasible, cost-effective and environmentally sound.

F. Approval of Expansion Capacity

The PSC concludes that CPCN is not demonstrated as to a third new generation facility that the applicant proposed to build, a 600 MW Integrated Gasification Combined Cycle (IGCC) unit and therefore the Order refuses authority to construct that unit, Order, p. 26. The Commission does, however, approve a total construction budget in a total amount which contemplated building "common systems" for 3000 MW capacity rather than the 2400 MW approved capacity at the OCPP site.[22] The Order indicates that this extra capacity would add an additional approved construction cost of "approximately 20 million", Order, p. 32.

The record reflects that the added capacity is in a cooling water structure which will extend from the site into Lake Michigan and also coal handling facilities. [23] The rationale offered is the possibility that there will be a future need to provide the full 3000 MW capacity and it will be far less expensive to include larger structures for that possibility as part of the current project. Further, the suggestion is offered that

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[22] The existing capacity at the OCPP site is 1200 MW. WEPCO sought CPCN authority to expand that site by an additional 1800 MW but the Commission only permitted expansion of an additional 1200 MW for a total site capacity of 2400 MW rather than the 3000 MW total capacity initially requested.

[23] R-157, Kenneth J. Detmer, Transcript, V. 14, pp. 4535 & 4640.

"approximately $20 million" is a negligible amount, "lost in the maze" in a $2.2 Billion dollar project. On the other hand, what is being done is that ratepayers are being assigned a construction cost for public utility facilities for which public convenience and necessity has not been determined, indeed has been expressly refused.

The argument offered in favor of enlarging the facility carries an immediate suggestion of prudent foresight and reasonableness. There is, however, another aspect of the problem. Preparation for yet another expansion of what is already the most expensive power plant in Wisconsin is very meaningful step toward selecting OCPP as the site for construction of future utility expansion. It does not completely control future site selection but it is likely to influence it. It does not preclude wholesale competition but, again, it is likely to confer advantage upon the owner of the OCPP facility.

The applicable statute is quite clear, there is to be no construction of any generating facility until there has been the issuance of a CPCN, sec. 196.491(3)(a) 1, Wis. Stats. There is no suggestion that the Commission has ever before interpreted its authority to include the power to permit partial construction of a facility for which CPCN has not been determined, let alone a facility as to which CPCN has been expressly denied by Commission order. It is clear that the PSC Order contemplates an extension of the Commission's authority in a manner which is directly contrary to the plain meaning of the applicable statute. This is an interpretation which should properly be reviewed on a de novo basis and, upon that review, it is the determination of the court that the Order, to the extent it approves ratepayer payment for construction

elements not necessary to operate a 2400 MW facility, is hereby vacated and the Order remanded for modification by the Commission to eliminate such approval.

G. Issuance of CPCN Prior to Obtaining Regulatory Approvals

The PSC issues the Order approving CPCN as to the construction of the two new 630 MW generating facilities while expressly acknowledging that necessary government permits had not been issued. The Order notes expressly that there were then water-related DNR permits which had not been issued, Order, p. 53, 54, and the following appears as a finding of fact,

> Requiring that ERGS-SCPC 1 LLC commence construction within 12 months after it receives all necessary government permits and approvals is reasonable, so the generating plant will satisfy the reasonable needs of the public for electric energy in a timely manner.
>
> Finding of Fact no. 15, in part, Order, p. 6

Wisconsin law provides,

> The commission may not issue a certificate of public convenience and necessity under this subsection until the department has issued all permits and approvals identified in the listing specified in par. (a)3.a. that are required prior to construction.
>
> Sec. 196.491(3)(e) Wis. Stats., in part.

The Commission's Order candidly describes the water-related permits that had not been issued as of the date of the Order.[24] Argument submitted by the PSC explains the administrative advantage of deferring to DNR wherein presumably superior expertise regarding water quality may be found. The Commission makes no attempt to respond to the problem posed by the express provisions of sec. 196.491(3)(d) 3. Wis.

[24] As noted earlier, air quality permits are treated entirely differently from water-related permits. The legislature has expressly decided that the PSC may not hold up issuance of CPCN based upon any concern that potential air pollution may not meet standards imposed by Chapter 285, enforced by the DNR, sec. 196.491(3)(d) 3, Wis. Stats.

Stats., above, and in argument suggests that what was done has been in this proceeding is a standard practice of the Commission.[25]

It is instructive to refer to the decision of RURAL v. PSC, 239 Wis.2d 660, 679, 619 N.W.2d 888 (2000), in which the court did consider a related matter. RURAL arose from a non-statutory legislative enactment, Section 96 of 1997 Wisconsin Act 204, which created a brief opportunity for particular utilities to seek CPCN approval as to a narrowly defined class of generation plants. Approval or rejection was to be determined by the PSC in a notably short, 90 day period. In the RURAL case, as in this one, the PSC issued a CPCN approval subject to a requirement that the applicant thereafter obtain DNR regulatory permits. An opponent to the application objected, arguing that the PSC could not issue a conditional CPCN. The PSC responded suggesting that the general authority of sec. 196.395, Wis. Stats.,[26] conferred the needed power to issue a conditional CPCN. The supreme court, in upholding the issuance of the conditional CPCN, noted that the Commission could do so because the CPCN was being approved pursuant to the non-statutory authority, not pursuant to the normal process set out in sec. 196.419, Wis. Stats.[27] The court suggested that if sec.

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[25] Hearing transcript, October 4, 2004, p. 34, ll. 3-13.

[26] Sec. 196.395, Wis. Stats., provides,

> The commission may issue an order calling for a test of actual results under requirements prescribed by the order, during which test period the commission may retain jurisdiction of the subject matter. The commission may issue conditional, temporary, emergency and supplemental orders. If an order is issued upon certain stated conditions, any party acting upon any part of the order shall be deemed to have accepted and waived all objections to any condition contained in the order.

[27] The CPCN in RURAL, supra, was issued pursuant to the authority of the non-statutory enactment, not pursuant to sec. 196.491, Wis. Stats.

196.491, Wis. Stats. had been the basis for the CPCN, then 196.491(3)(e), Wis. Stats., would control over sec. 196.395, Wis. Stats., and would not permit the Commission to issue a conditional CPCN.[28]

Here, the CPCN was issued pursuant to the authority given to the PSC by sec. 196.491, Wis. Stats. That statute plainly states that the Commission shall not do what is being done here, issue the CPCN before the regulatory permits have been obtained, sec. 196.491(3)(e), Wis. Stats. Potentially, this is a matter of substantial consequence. The Commission in its Order notes the possibility that the planned draw of 1.4 billion gallons of Lake Michigan water daily[29] is not approved, cost of the proposal will escalate by some $200 million and may even preclude project viability, Order, p. 54. The approval stated in the Order was issued in clear violation of sec. 196.491(3)(e), Wis. Stats. It is the Order of this court that the PSC Order is hereby vacated and the matter remanded to the Commission to permit the applicant to demonstrate that the required regulatory permits have been obtained.

H. Adequacy of the Final EIS

The Wisconsin Environmental Protection Act (WEPA) requires state agencies to take a "hard look" at the environmental consequences of a proposed new facility, Wis. Environmental Decade, v. PSC, 98 Wis.2d 682, 690, 298 N.W.2d 205 (Ct. App. 1980). The law provides that all state agencies shall include in every major action, a detailed statement, substantially following the guidelines of the National Environmental Protection Act, 42 U.S.C. sec. 4331 (NEPA), describing,

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[28] RURAL, 239 Wis.2d at p. 698-700, paras. 58-61.

[29] Order, p. 9; Final EIS, V. 1, p. 200, R. 119.

1. The environmental impact of the proposed action;
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented;
3. Alternatives to the proposed action;
4. The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;
5. Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; and
6. Such statement shall also contain details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages and disadvantages of the proposal.

Sec. 1.11(2)(c), Wis. Stats. in part.

Moreover, the PSC has adopted an administrative rule to assure compliance with WEPA, Wis. Admin. Code, sec. PSC 4.10(1).

Petitioners argue that the EIS prepared in this proceeding does not meet the standard of the law. The EIS in this matter is comprised of a 446 page draft document, R. 77, together with a significantly larger final document, R. 119. The criticism of the EIS document includes the suggestion that alternatives were not adequately examined and the absence of information about necessary transmission facilities. These are matters which arguably could be considered in an EIS but, as noted above, for purpose of this proceeding, both issues are resolved based upon statutes specifically applicable to the Commission's process. As to a lack of quantified health care costs, as well as potential impact upon natural resources, local communities and transportation, these are matters which are within the range of matters committed by the legislature to the Commission. The interpretations of law adopted by the Commission to the effect that the draft and final EIS documents represent an adequate examination of environmental issues are not shown to be legal error.

I. Least Cost Alternative.

Petitioner Calpine is a wholesale producer of electric power that seeks to provide to WEPCO, using its own generating facilities, the power that the WEPCO claims will be needed. Calpine argues that it can provide the needed power at less cost and suggests the PSC has committed legal error by not selecting their 'least cost' proposal. Calpine argues that Wisconsin law requires the commission to select whichever proposal can be shown to result in the lowest cost to consumers. Calpine looks to the following provision as authority for that concept,

> the commission shall approve an application ... for a certificate of public convenience and necessity only if the commission determines all of the following:
>
> > 3. The design and location ... is in the public interest considering *alternative sources of supply*, alternative locations or routes, individual hardships, engineering, *economic*, safety, reliability and environmental factors ..."
>
> Sec. 196.491(3)(d), Wis. Stats., in part, emphasis added.

Calpine looks to the term, "alternative sources of supply", in conjunction with the term, "economic", to find a clear legal duty, incumbent upon the commission, to select whatever alternative proposal offers the least cost of operation. Calpine looks also to a prior commission decision which does offer language describing the successful proposal as being the one which appeared to offer the needed power at the "least cost".[30]

Calpine's least cost argument goes well beyond the requirement that there be a fair comparison between fuel sources. Returning briefly to the requirements of the

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[30] Application of Wisconsin Public Service Corporation For Authority To Increase Electric Generating Capacity (Stage One, Competition Among Alternative Suppliers), Docket No. 6690-CE-156, December 22, 1994, p. 6;

Wisconsin Energy Priority Law, sec. 1.12(5)(a), Wis. Stats, requires that the Commission consider alternative energy sources with the requirement that a selected source meet three separate requirements; cost effectiveness, technical feasibility and no unacceptable environmental impact. The Calpine least cost theory would look only to cost effectiveness and ignore the remaining two criteria.

The Calpine least cost argument embraces a factual element; the suggestion that the AGEAS computer model actually selected natural gas as the preferred fuel or would have done so if proper data entry had been made. The comparisons of cost, timing, equipment and fuel presented to the Commission are very complex and do not offer an obvious alternative which may be readily identified as the least cost option. What is asserted as the least cost alternative appears to be a plan of using Calpine capacity, in combination with some future WEC facility expansion so as to defer significantly the date at which the WEC expansion will be needed, R.119, Final EIS, pp. 72 and 73.[31] As with the earlier discussion of criticism of the AGEAS program, however, the reality here is that the court does not possess any expertise, let alone that of the Commission regarding the proper use of the computation and comparison of the complex elements cost and timing. Suffice it to say that this is an area where great deference should be given to Commission.

As a question of law, the PSC is obligated to consider and to balance numerous elements of cost, environmental impact and technical feasibility. The Commission argues that the applicable law requires that it consider a myriad of factors, cost being a

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[31] Calpine refers also to the testimony of Commission employee Randal Pilo, who described a Calpine proposal as the lower cost alternative but appears to be based upon what is described as a "snapshot for one year', that being 2007, R.167, V. 18, transcript V. 11, p. 3900, l. 3.

primary factor but not an exclusive factor. This is clearly an area in which the PSC has been assigned significant jurisdiction and discretion by the legislature. Petitioner Calpine does not demonstrate that the Commission has acted contrary to applicable law.

J. Wholesale Power Competition.

Calpine asserts that in approving the WEC application to build the two SCPC plants, the Commission has failed to take into account the harm that will be visited upon competition in the wholesale power market. Wisconsin law requires that the Commission not issue approval until it has determined that,

> The proposed facility will not have a material adverse impact upon on competition in the relevant wholesale electric service market.
>
> Sec. 196.491(3)(d) 7, Wis. Stats.

The Commission did render the following determination of fact,

> The two SCPC units will not have a material adverse impact on competition in the Wisconsin Upper Michigan (WUMS) wholesale electric service market.
>
> Finding of Fact, no. 9, Order, p. 5

The determination of impact upon competition is a matter which has been committed by the legislature to the Commission. The petitioners express disagreement with the conclusions reached by the Commission but they do not demonstrate a basis upon which this court could properly do other than have give great deference to the determinations and interpretations of the Commission in this area.

K. City of Oak Creek Mitigation Payment Agreement

WEC and petitioner City of Oak Creek reached an agreement whereby WEC will pay to the city annual mitigation payments of $1.5 million for SCPC 1 and $750,000 for SCPC 2. The PSC Order reviews that agreement and considers as well a significant modification in the formula by which shared revenue payments form the state to the city are now to be computed. Prior to the enactment of 2003 Wis. Act 31, shared revenue was based upon the net book value of a power plant and thus the initial shared revenue amount derived upon the commencement of generation, capped at a maximum of $750,000 annually, declined thereafter as the net book value declined through depreciation. 2003 Wis. Act 31, enacted July 15, 2003, and applicable to plants that begin operation after December 31, 2003, provides that shared revenue is to be based upon MW capacity and other factors which may not decline with time. The PSC calculates that the new shared revenue formula will produce revenue to the city of $1.6 million for SCPC 1, an amount that will rise to $3.2 million when SCPC 2 begins operation. The PSC notes that the new shared revenue amounts, when paid to the city upon completion and operation of the new facilities, will exceed the payment called for by the agreement between the city and WEC and the Commission therefore includes a provision in the Order which requires that the payments called for by the agreement are to be offset by shared revenue payments made to the city. Thus the PSC order permits mitigation payments to the city pursuant to the agreement but provides that payments are to be reduced by shared revenue received which presumably will eliminate all payment pursuant to the agreement at a future point. The City of Oak Creek petitions the court seeking review of that portion of the Order.

The parties agree that the agreement between the City of Oak Creek and WEC was submitted to the PSC before June 10, 2003 and involves a "mitigation payment" within the meaning of sec. 196.20(7), Wis. Stats., as amended by 2003 Wisconsin Act 33. The parties further agree that the treatment of the agreement by the PSC is to be governed by section 196.20, Wis. Stats., as amended by 2003 Wisconsin Act 89, Section 33, effective December 18, 2003, which enacted the following provision,

> (7)(a) In this subsection, "mitigation payment" means, as approved by the commission, an unrestricted or recurring monetary payment to a local unit of government in which an electric generating facility is located to mitigate the impact of the electric generating facility on the local unit of government. "Mitigation payment" does not include payments made or in-kind contributions for restricted purposes to directly address health or safety impacts of the electric generating facility on the local unit of government.
>
> (b) Except as provided in par. (c), an electric public utility may not recover in rates any of the following:
>
> 1. The cost of mitigation payments paid by the utility.
>
> 2. The cost of mitigation payments paid by the owner or operator of an electric generating facility that the owner or operator recovers from the utility by selling electricity to the utility, by leasing the facility to the utility, or by any agreement between the owner or operator of the electric generating facility and the public utility.
>
> (c) The commission shall only approve a mitigation payment agreement that is received by the commission before June 10, 2003,
> and, if the commission finds the agreement to be reasonable, shall not subsequently modify the agreement.
>
> Sec. 196.20(7), Wis. Stats., as created by 2003 Wisconsin Act 89, Section 33.

The petitioner city reads subsection (c) above to give to the PSC only two choices, to approve or to reject a mitigation payment agreement as submitted. The city submits that what the PSC Order did was first to modify the agreement and thereafter to

approve the modified agreement. The city asserts that sec. 196.20(7)(c), Wis. Stats. expressly precludes that modification. The PSC, by contrast, submits that subsection (c), above permits the modification of a submitted agreement at the point of initial approval but precludes modification thereafter.

The language chosen by the legislature in this instance is uncommonly plain and direct. It deals with "a mitigation payment agreement that is received by the commission" and confers authority to do one of two things, approve or reject that agreement. The modified agreement is not the agreement that the Commission received. An administrative agency may exercise only such authority as has been expressly conferred or necessarily implied. Here the clarity of the legislation is such that it cannot be read to imply the power that the Commission seeks to exercise, the authority to modify "a mitigation payment that is received by the commission." The court concludes, as a matter of law pursuant to sec. 227.57(8), Wis. Stats, that the portion of the PSC Order which modifies the mitigation agreement to require that future shared revenue is an act beyond the jurisdiction of the PSC. The court orders that, upon remand, the PSC re-consider the mitigation agreement and either approve or reject the agreement as submitted.

V. Summary and Order

On November 15, 2002, the Public Service Commission determined that an application submitted by Wisconsin Energy Corporation to construct the largest power plant in the history of the state at the Oak Creek Power Plant site met the legal requirements to be a "complete" application thereby beginning starting a process before the Commission in which the application was required to be resolved within no more

than 360 days. It is the conclusion of this court that the Wisconsin Energy Corporation application, as of November 15, 2002, does not meet the legal requirements in that it does not propose at least two alternative sites for the new plant, it does not present the required regulatory approvals and it does not include agreements for the use of the substantial transmission line facilities that inevitably must be constructed as an integral part of this project. It was therefore legal error to commence the approval process based upon that incomplete application and the resulting Order is hereby vacated and the matter remanded to the Commission to permit the applicant to submit a legally sufficient application.

On November 10, 2003, the Public Service Commission issued a Order modifying the proposed new Oak Creek facility and approving the application as modified. It is the conclusion of this court that the Order does not reflect adherence to the Wisconsin Energy Priorities Law nor does it include required cost and design information about substantial new power transmission lines that will be needed in order for the proposed new plant to operate. Moreover, the Order approves funding for construction intended to permit future expansion of the Oak Creek Power Plant site to accommodate new generation facilities that the Commission has determined there to be no present need to build and the approval order has been issued despite the fact that required regulatory approvals for the proposed new plants have not been obtained. For these reasons, the Order is hereby vacated and the matter remanded to the Commission for further proceedings consistent with the foregoing rulings.

Finally, the Order modified and thereafter approved an agreement whereby the City of Oak Creek agreed to accept from Wisconsin Energies Corporation, certain

annual payments to mitigate the cost to the city of the new facilities. It is the conclusion of the court that the applicable law required that the Commission either approve or reject the proposed agreement as submitted to the Commission. The modification of the agreement is therefore vacated and the matter is remanded to the Commission for further proceedings.

By the court this 29th day of November, 2004.

Judge David Flanagan

Date Mailed
May 5, 2003

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Fond du Lac Energy Center, LLC, a Calpine Subsidiary, for a Certificate of Public Convenience and Necessity to Construct and Place in Operation a Large Electric Power Generating Facility in Fond du Lac County, Wisconsin	9343-CE-100

FINAL DECISION

This is the final decision concerning the application of Fond du Lac Energy Center, LLC (Calpine) for a Certificate of Public Convenience and Necessity (CPCN) that would grant it authority to construct a large electric generating facility in the town of Fond du Lac, Fond du Lac County.

The CPCN for the Fond du Lac Energy Center electric generating facility at the Scott Road site is granted, subject to the conditions set forth in this order.

Introduction

On June 18, 2001, Calpine filed an application with the Commission for a CPCN that would grant it authority to construct a large electric generating facility. Amendments to the application were filed in December, 2001, and April, 2002. The application was declared complete on May 9, 2002. This new electric generating plant, known as the Fond du Lac Energy Center, will be a combined-cycle, natural gas-fired electric generating facility comprised of two combustion turbines, two heat recovery steam generators, and a single steam turbine and generator. The facility will have an electrical output of approximately 523 megawatts (MW) in

combined-cycle mode. Approximately 197 MW of additional power could be produced through the use of duct firing in the heat recovery steam generator and steam injection into the combustion turbines. Calpine proposes to build and operate the Fond du Lac Energy Center as a merchant plant at one of two sites, which will provide power in the competitive electric market of the Midwest. The Scott Road Site is along Hickory Road, southwest of U.S. Highway (USH) 41, and the River Road Site is adjacent to the existing South Fond du Lac Energy Center operated by Wisconsin Power and Light Company (WP&L).

In its application, Calpine states that it will obtain natural gas for operation of the plant from the competitive natural gas supply market. Natural gas is transported into the area by ANR Pipeline Company (ANR). An ANR 16-inch interstate natural gas pipeline with sufficient capacity to supply the proposed project is located approximately 1.6 miles from the Scott Road Site alternative and 2.3 miles from the River Road Site alternative. Calpine will pay for required new natural gas facilities as part of the cost of the project.

The proposed plant will be connected to the existing South Fond du Lac-Edgewater 345,000 volt (345 kV) transmission line. This double-circuit 345/138 kV transmission line crosses the Scott Road Site and is less than 1,000 feet from the River Road Site. In order for the output of the plant to be accommodated by the existing electric transmission system, it is also likely a new 345 kV switching station will need to be constructed near the Edgewater power plant. The American Transmission Company (ATC) intends to construct and own the transmission improvements needed to interconnect the proposed plant, including this switching station, and will pay the associated capital costs of the switching station. ATC will need to apply for a separate Certificate of Authority or CPCN prior to construction of this switching station,

depending on the exact characteristics of the switching station. The capital costs associated with the substation (also called a switchyard), transmission upgrades and other interconnection facilities associated with the Fond du Lac Energy Center will be paid by Calpine or through a cost allocation between Calpine and ATC.

Calpine will obtain its water supply for the proposed plant from Lake Winnebago and will discharge a portion of this water back to the lake. Calpine will pay for the new water facilities as a cost of the project and, after a test period, will dedicate the new water facilities to the City of Fond du Lac Water Utility. Calpine will be a customer of the city of Fond du Lac Water Utility.

The Commission scheduled public hearings on the project application on January 28, 2003, which were held at the town of Fond du Lac Town Hall, Fond du Lac, Wisconsin.

Persons who appeared and testified are listed in the Commission's files.

The application is GRANTED, subject to conditions.

Findings of Fact

1. Calpine is proposing to construct a merchant plant, as defined in Wis. Stat. § 196.491(1)(w).

2. Determining whether energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. §§ 1.12 and 196.025, or their combination, will be cost-effective alternatives to a generating plant is not possible when the project under consideration is a merchant plant, because the applicant is not required to submit information about the project's costs.

3. The generating facility approved in this order is reasonable and in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors.

4. The Fond du Lac Energy Center will not have undue adverse impact on other environmental values such as ecological balance, historic sites, or aesthetic and recreational use.

5. The Fond du Lac Energy Center will not unreasonably interfere with orderly land use and development plans for the area involved.

6. The Scott Road Site is in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors. Other alternative sites for the Fond du Lac Energy Center, brought forth in the record, are not in the public interest.

7. It is reasonable to make a CPCN for the Fond du Lac Energy Center conditional upon the following requirements:

a. The CPCN takes effect only after the issuance of all permits and approvals that the Wisconsin Department of Natural Resources (DNR) identified, pursuant to Wis. Stat. § 196.491(3)(a)3.a.

b. Calpine shall comply with other conditions concerning environmental protection, as described below.

8. The facilities approved in this order will not have a material adverse impact on competition in the relevant wholesale electric service market.

9. It is reasonable to require that Calpine complete its project and that the Fond du Lac Energy Center be fully operational by June 1, 2007.

Conclusions of Law

1. The Fond du Lac Energy Center will be a wholesale merchant plant, as defined in Wis. Stat. § 196.491(1)(w).

2. The Commission has jurisdiction under Wis. Stat. §§ 1.11, 1.12, 196.025, 196.395, 196.40, and 196.491 to issue certificates authorizing Calpine to construct and place in operation the generation and water pipeline facilities at the site described below, and to impose the conditions specified in this order.

Opinion

General Description of Facility

Calpine proposes to construct a natural gas-fired combined-cycle power plant, with a maximum capacity of approximately 720 MW. The power plant will consist of two combustion turbines, two heat recovery steam generators, and a single steam turbine coupled to an electric generator, which will convert mechanical power produced in the turbine into electricity. The generator will be connected to a transformer to step up the voltage to 345 kV.

Calpine intends to procure the combustion turbine and electric generator from General Electric Company. The combustion turbine will be equipped with dry low nitrogen oxide (NO_x) combustors, and the power plant will utilize good combustion practices, selective catalytic reduction and an oxidation catalyst to control NO_x, carbon monoxide (CO), and volatile organic compound (VOC) emissions. Because the power plant will use natural gas as the primary fuel with no back-up fuel, the project will not emit significant amounts of sulfur dioxide.

Calpine expects to operate the Fond du Lac Energy Center as either a base load or intermediate load plant, at an overall plant efficiency of up to approximately 52 percent,

depending on ambient conditions. Calpine forecasts that it could begin commercial operation as soon as 2005, but will likely begin commercial operation in 2007, and that the plant will have a useful life of 40 years.

Calpine proposed two site alternatives for the location of the plant. Calpine conducted a site screening process that involved the existing electric transmission grid, natural resource factors, fuel supply availability, and other criteria to identify locations for the Fond du Lac Energy Center. Two potential site locations, referred to as the Scott Road Site and the River Road Site, were ultimately identified.

The Scott Road Site, which is approximately 47.5 acres in size, is located in the town of Fond du Lac in Fond du Lac County in the northeast quarter of Section 33, Township 15 North, Range 17 East. Located on the southwest side of the city of Fond du Lac approximately 4.5 miles south of Lake Winnebago, the site is bounded by Hickory Road on the east, Scott Road on the south, and agricultural fields on the north and west. It consists of a 37.5 acre parcel currently owned by George Scott and an additional 10 acres immediately to the west that is owned by Milton Scott. Calpine has obtained options to purchase both parcels.

The River Road Site, which is about 50 acres in size, is located in the town of Fond du Lac in Fond du Lac County in the west half of the southwest quarter of Section 29, Township 15 North, Range 17 East. The site is about 0.5 mile southwest of the Fond du Lac city limits and 4.9 miles southwest of Lake Winnebago. USH 151 lies approximately 400 feet northwest of the property and County Highway D is 1,900 feet to the west. The Wisconsin Power and Light Company peaking facility is directly east of the site on River Road.

The proposed Fond du Lac Energy Center will be interconnected to the transmission system via the double-circuit 345/138 kV South Fond du Lac-Edgewater line that passes through the Scott Road Site. The new plant will be connected to the 345 kV grid system. A new substation will be constructed at the location on the site to accommodate the interconnection with the transmission system. The substation, also referred to as a switchyard, will include a four-breaker ring bus with four positions, constructed to meet the National Electric Code and ATC's criteria. The loop-in and loop-out ends of the 345 kV South Fond du Lac-Edgewater line would be connected to two opposite positions on the ring bus. The remaining two positions on the ring bus would be shared by the high-voltage ends of the three step-up transformers that are connected to the turbine generators. The ATC will own and operate the switchyard.

The alignment of the existing 345/138 kV line will have to be modified slightly to accommodate the interconnection. At the Scott Road Site, the transmission line currently passes over this site on a straight diagonal running from the southeast to the northwest. Under the proposed interconnection plan, a new corner structure will be placed along the existing alignment about 250 feet from Hickory Road. The double-circuit line will turn due north. Approximately 450 feet north of the turning structure, the 345 kV line will separate and turn west to enter the new switchyard. The 138 kV circuit will continue running north toward the northern site boundary and then turn west for about 1,200 feet. Just before reaching the western site boundary, the 138 kV line will turn south to rejoin the 345 kV line exiting the new switchyard and the existing transmission line alignment.

At the River Road Site, a short new double-circuit 345 kV transmission line would be constructed from the new switchyard on-site east across River Road. The new line would then

turn and follow the east side of River Road about 1,300 feet south to the existing South Fond du Lac–Edgewater 345 kV line. The width of the new easement needed would be about 100 feet. Calpine or the ATC would have to acquire this new right-of-way (ROW).

The estimated capital costs for the substation, transmission upgrades, and other interconnection facilities will be included in the cost of the project. Capital costs will be paid either by Calpine or through a cost allocation between Calpine and ATC. The cost allocation between Calpine and ATC will be detailed in the agreement between these two parties, which will be negotiated during the development of the interconnection agreement.

The Fond du Lac Energy Center will be a combined-cycle plant. Calpine will get its non-contact cooling water through a diversion of water from Lake Winnebago. The water system will supply non-potable water and will contain an intake structure, zebra mussel control, a pump station and a water supply pipeline.

The intake structure will be located approximately 1,550 feet off the south shore of Lake Winnebago. It will be submerged in approximately six feet of water. An inlet screen will be located at the end of the intake pipe. The velocity across the inlet will be held to approximately 0.25 feet per second. From the intake opening, a pipe will extend to the wet well of the pump station located near the shoreline. A zebra mussel control system will be needed, consisting of an injection system, control system, chemical storage and chemical injection pumps. The injection system will be located at the intake, with the rest of the zebra control system housed adjacent to the pump station. The pump station will be located at the city of Fond du Lac's wastewater treatment plant on the southern shore of Lake Winnebago. The chemicals used to control zebra mussels will be subject to review and approval by the DNR.

The water supply pipeline will extend approximately 5.1 miles to the Scott Road Site or 5.7 miles to the River Road Site. Generally, the utility corridor will extend south from the pump station until it meets the Chicago and Northwestern rail corridor. For the Scott Road Site, the utility corridor will follow the rail corridor until just northwest of the intersection of the rail corridor and Pioneer Road. The utility corridor will then run south and west until it joins Hickory Road at Willow Lawn Road. It will then run south along Hickory Road to the Scott Road Site. If the Commission were to choose the River Road Site, the water pipeline corridor would run along the rail corridor to a point on the south side of Willow Lawn Road. The corridor would then run west along Willow Lawn Road, and then angle over to River Road and the proposed site.

Calpine will be solely responsible for obtaining, maintaining, and complying with the water diversion permit associated with plant use. Calpine will permit, design, prepare plans and specifications, and construct the water system, solely at its expense. The water system will be designed for a maximum daily capacity of 14.4 million gallons per day (MGD), of which Calpine will use a maximum daily flow of 6.4 MGD. Water use at the proposed facility with the unit at full capacity and an average ambient temperature of 45 degrees Fahrenheit will be about 4.3 MGD. The city of Fond du Lac will have use of the remaining daily capacity.

Upon completion, Calpine will operate the water system for a period of two months to verify performance of the system. The industrial water system will then be dedicated to the city of Fond du Lac. Once ownership of the water system is assumed by the city of Fond du Lac, the city will operate the water system and include it as part of the city's municipal water utility.

The cooling water blowdown will be discharged to Lake Winnebago through the city of Fond du Lac's wastewater treatment plant outfall. Calpine will construct a discharge force main that will convey the cooling water blowdown to the city's wastewater treatment plant. The force main will be constructed within the same corridor as the water supply system. The force main will connect to the city's wastewater treatment plant at a location between the water treatment process and the discharge pipe. Thus, the cooling water blowdown discharge will mix with the city's treated wastewater effluent prior to discharge. The costs associated with construction of the cooling water blowdown discharge facilities will be borne by Calpine.

Upon completion of construction, Calpine will operate and dedicate the cooling water blowdown discharge facilities to the city of Fond du Lac in the same manner as described above for the industrial water system.

Calpine will be responsible for obtaining a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit from the DNR in order to discharge its cooling water blowdown in the manner described. Calpine will be required by the city of Fond du Lac to monitor the cooling water blowdown discharge to ensure it meets the parameters of the WPDES permit and will supply the city with a copy of its monthly monitoring report.

Under Calpine's agreement with the city of Fond du Lac, the volume of cooling water blowdown discharge cannot exceed 1.0 MGD on any day and 0.85 MGD on a monthly average basis. The agreement further requires that the cooling water blowdown discharged by Calpine cannot increase the temperature of the city's wastewater effluent at the point of discharge to Lake Winnebago by more than four degrees Fahrenheit during the months of November through March, and by more than two degrees Fahrenheit during the months of April through October.

Wastewater resulting from employee domestic water use will be discharged to the existing city of Fond du Lac Wastewater Treatment plant via a sewer lateral extension. The sanitary sewer mains will be constructed within the same corridor as the water supply system. Calpine will also pay the cost of the sewer lateral extension.

To supply natural gas to the facility, ANR is expected to build a new 12-inch diameter pipeline that would be approximately 1.6 miles long to the Scott Road Site or approximately 2.3 miles long to the River Road Site. While Calpine described a preliminary route for the natural gas pipeline, ultimate approval of the gas pipeline route is under the jurisdiction of the Federal Energy Regulatory Commission (FERC). ANR will comply with the FERC application and approval requirements for the natural gas pipeline. The natural gas pipeline routes described by Calpine follow the water line routes into each alternative site.

Several DNR permits will be required to construct and operate the Fond du Lac Energy Center. These include an air pollution control permit, a construction storm water permit, and a Chapter 30 water quality certification for wetland impacts.

Statutory Energy Priorities

Wis. Stat. § 1.12 (4) establishes energy priorities for Wisconsin. The statute provides as follows:

> **1.12(4)** PRIORITIES. In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed.
> 1. Natural gas.
> 2. Oil or coal with a sulphur content of less than 1 percent.
> 3. All other carbon-based fuels.

In addition, Wis. Stat. § 196.025 declares that the Commission must implement these priorities in its energy-related decisions, to the extent "cost-effective, technically feasible and environmentally sound."

Were this a project proposed by a public utility, the Commission would need to examine the alternatives of demand-side management (DSM) and renewable resources to determine if they meet the statutory tests for priority. This docket concerns a wholesale merchant plant, however, and state law exempts such projects from this examination. Under Wis. Stat. § 196.491(3)(d)2, an applicant for a wholesale merchant plant need not show that the project would satisfy reasonable needs of the public for electricity. In addition, Wis. Stat. § 196.491(3)(d)3 specifies that the Commission "may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant."

Because of the statutory exclusions, the Commission lacks information to compare the cost of equivalent DSM to the cost of energy that the Fond du Lac Energy Center will produce. Without this information, the type, amount, and cost of DSM that could replace the plant cannot be determined. Wis. Stat. § 196.491(3)(d)3 also precludes considering renewable resources as an alternative source of supply, and the lack of cost information about the Fond du Lac Energy Center prevents any analysis of whether renewable resources would be more cost-effective than this project.

The electric transmission line and substation improvements necessary to connect the plant to the existing electric transmission system are directly related to the Fond du Lac Energy Center. As a result, it is also impossible to determine whether any of the energy priorities

identified in these statutes would be a cost-effective alternative for the transmission improvements.

Effects on Wholesale Competition

Under Wis. Stat. § 196.491(3)(d)7, the Commission may not issue a CPCN unless it can find, "The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market." The record shows that an adverse effect on competition is unlikely because, even with the addition of the Fond du Lac Energy Center, Calpine will remain a relatively small operator of power plants in Wisconsin. Including the 720 MW Fond du Lac Energy Center, Calpine will own about 1,820 MW of capacity in Wisconsin, comprised of a 450 MW project in the town of Christiana near Madison and a 650 MW project in Beloit. At 1,820 MW, Calpine will be smaller in size than WP&L which, according to the FERC, can sell electricity products at market-based rates in Wisconsin due to the lack of market power. In addition, the Christiana and Beloit projects are under long-term contract to WP&L, which maintains dispatch control over the respective power plants. In such situations, any market power issues are assigned to the respective utility and not Calpine. This means that the 720 MW of capacity from the Fond du Lac Energy Center that is not under contract to any Wisconsin Upper Michigan System (WUMS) utility is a new entrant to the WUMS market, not an incumbent firm planning a merger or additional capacity. In economic theory, new entrants can discipline the potential for the exercise of horizontal market power. Under the federal antitrust guidelines, ease of entry is a specific mechanism that can make even a highly concentrated market conform to the normal price behavior found in typical competitive

markets.[1] In summary, even though WUMS is a highly concentrated wholesale electric service market, the fact that Calpine's Fond du Lac Energy Center will act as a new entrant means that the facility is unlikely to have a material adverse impact on competition in WUMS.

Site Alternatives

Existing electric transmission lines currently cross the Scott Road Site. The site is cropped, supporting corn and alfalfa. No trees are present on the site. A low swale in the center of the site and two small drainage ditches present along the western and southern boundaries of the site drain south toward the East Branch of the Fond du Lac River. Zoning of the site is currently A-1, Exclusive Agricultural. The town of Fond du Lac has not adopted a land use plan, but is in the process of developing such a plan. The plan is being developed to provide a long-term community development strategy through the year 2012. At this time, the town's proposed land use plan identifies the eastern three-fourths of the land on the Scott Site as "Industrial." The remainder is "Agricultural Transition."

The River Road Site is currently part of a large farm owned by the Streblow family. The fields that comprise the site are usually planted in corn or soybeans. Although the topography is generally flat, there are several low swales, drainage ways and wet basins present on the site. A few former fence lines consisting of low-growing trees and brush cross the site. The East Branch of the Fond du Lac River encroaches on the southeast corner of the proposed property and the South Fond du Lac-Edgewater double-circuit 345/138 kV transmission line runs across the southern boundary of the site. The entire River Road Site is also currently zoned as A-1,

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[1] See Section 3.0, Entry Analysis, 1992 Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, as revised April 8, 1997.

Exclusive Agricultural. At this time, the proposed land use plan shows future land use for the site as "Agricultural Transition."

The applicant, the town of Fond du Lac, the city of Fond du Lac, Fond du Lac County, and most members of the public prefer that the Fond du Lac Energy Center be constructed on the Scott Road Site. Constructing the proposed facility should not irrevocably harm natural resources at either the Scott Road Site or the River Road Site, if Calpine adheres to the conditions described in this order. Calpine has declared its willingness to do so.

In its application, Calpine provided the Commission with data describing the ambient sound levels in the area of the project, in accordance with the Commission's "Measurement Protocol for Sound and Vibration Assessment of Proposed and Existing Electric Power Plants." This protocol requires that an applicant repeat these measurements using the same procedures and reporting formats after the project is completed. It is reasonable to require that Calpine perform these measurements after the Fond du Lac Energy Center is fully operational, studying the sound and vibration levels when all units are running at full capacity and when all units are off and that Calpine report these post-construction measurements to the Commission as quickly as is practicable.

The Commission finds that the Scott Road Site is reasonable and in the public interest. This site is properly zoned, and conforms to the preference of the local municipalities, the applicant, and most residents in the area. Construction of the project at the Scott Road Site will not interfere with orderly land use and development. In addition, selecting the Scott Road Site for the plant will not unduly affect the area's ecological balance or other environmental values.

Environmental Protection

Calpine has agreed that it would seek input from local officials and the public when developing a landscape plan for the selected site and that it would use native vegetation planting and seeding as appropriate. Similarly, when constructing the water supply and discharge lines and working with ANR in constructing the natural gas supply lines, Calpine has stated that it intends to work with the DNR to protect existing prairie remnants located in and near the railroad ROW that is adjacent to the proposed water and natural gas pipelines.

Purple loosestrife, a non-native invasive plant, is present along the East Branch of the Fond du Lac River where Calpine intends to bore the water supply and discharge lines. The applicant has agreed to work with the DNR to ensure that the boring operation does not cause erosion along the river banks or further the spread of purple loosestrife.

In its tentative agreements with the town of Fond du Lac, Calpine has agreed to implement a number of sound mitigation measures designed to minimize impacts in the community. These measures include:

1. Heat recovery steam generators (HSRG) — Exhaust stack silencers, outlet silencers on all safety and vent valves, and thicker casing panels to minimize radiated noise through the sides of HRSGs.

2. Steam system — Vent silencers on outlet of HRSG blowdown tanks and steam turbine area drain tank.

3. Combustion turbines — Inlet silencers, exhaust diffuser acoustic enclosure and low-noise enclosure vent fans.

4. Cooling tower — Low-noise fans, acoustic enclosures around fan drive motors.

5. Boiler feed pumps — Acoustic enclosures around pumps.

6. A building that will enclose the combustion turbines, steam turbine, heat recovery steam generators and other major noise-generating equipment associated with the plant.

Calpine also agrees to notify nearby neighbors when it plans activities that will cause the plant to emit loud noise related to steam and air blows.

Certificate

Calpine may commence construction of the Fond du Lac Energy Center and the associated water pipeline facilities, described in this order and in its project application as amended, at the Scott Road Site in the town of Fond du Lac, Fond du Lac, Wisconsin, subject to the conditions described below.

Order

1. The approved site for the Fond du Lac Energy Center is the Scott Road Site. Calpine shall construct the project in conformance with the design specified in its application, and subject to the conditions specified in this order.

2. The CPCN for the Fond du Lac Energy Center takes effect only after the DNR issues all permits and approvals that it identified, pursuant to Wis. Stat. § 196.491(3)(a)3.a., as being required prior to construction of the facility. In all other respects, this order takes effect on the day after it is mailed.

3. As a condition of this certificate:

a. Calpine shall complete the post-construction sound and vibration measurements for the project, as described in the Opinion section of this order.

b. Calpine shall complete a landscape plan for the selected site with input from local officials and the public, as described in the Opinion section of this order. Plantings should use native vegetation as appropriate.

c. Calpine shall work with the DNR to protect existing prairie remnants located in and near the ROW of the water and natural gas pipelines, as described in the Opinion section of this order.

d. Where purple loosestrife is present along the East Branch of the Fond du Lac River, Calpine shall keep the boring pits needed for directional drilling the water lines under the river far enough from the riverbank to minimize erosion and further spread of purple loosestrife.

e. Calpine shall not undertake construction activities in Lake Winnebago from "ice out" or March 15 (whichever is earlier) through May 15, to protect fish during spawning season.

f. Calpine shall implement the sound mitigation measures designed to minimize impacts in the community, as described in the Opinion section of this order.

g. Calpine shall notify nearby neighbors when it plans activities that will cause the plant to emit loud noise related to steam and air blows, and shall submit a plan for notification of nearby neighbors to the Commission within six months of the date of this order.

h. If archeological materials or human remains are found during the construction of the plant or any of its auxiliary facilities, Calpine shall stop construction immediately and notify the Wisconsin Historical Society (WHS) and Commission for further direction. Calpine shall follow the WHS's directives to mitigate adverse impacts to any discovered archeological sites.

4. Until the Fond du Lac Energy Center is fully operational, Calpine shall submit semi-annual progress reports to the Commission that summarize the status of construction, the anticipated date of the start of construction, the anticipated in-service date, the status of environmental control activities, and the overall percent of physical completion. Calpine shall include a summary of its consultations with the DNR and other agencies concerning the issuance of necessary permits. The reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed environmental protection or control standards. The date when construction commences shall be duly included in the report for that six-month

period. The first report is due for the six-month period ending October 31, 2003; and each report shall be filed within 31 days after the end of the six-month period.

5. Calpine shall complete its project, so that the Fond du Lac Energy Center is fully operational by June 1, 2007. Calpine shall begin construction activities in a manner such that an in-service date of June 1, 2007, can be achieved. The CPCN shall expire upon this date, unless the Commission grants an extension.

6. Calpine shall promptly inform the Commission of any substantial scope or design modifications in the approved facilities.

7. Calpine shall notify the Commission, in writing, within 14 days of any decision not to proceed with the Fond du Lac Energy Center or to enter into any partnership or other arrangement with a third party concerning the ownership or operation of the facility.

8. Jurisdiction is retained.

Dated at Madison, Wisconsin, _____

By the Commission:

_____

Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

APPENDIX A
(CONTESTED)

In order to comply with Wis. Stat. § 227.47, the following parties who appeared before the agency are considered parties for purposes of review under Wis. Stat. § 227.53.

Public Service Commission of Wisconsin
(Not a party but must be served)
610 N. Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

FOND DU LAC ENERGY CENTER, LLC
By
Mr. Jason M. Goodwin
Calpine Central, L.P.
700 Milam Street, Suite 800

CALPINE CORPORATION
By
Mr. Peter L. Gardon, Attorney
Reinhart, Boerner, Van Deuren, Norris & Rieselbach, S.C.
22 East Mifflin Street, Suite 600
P.O. Box 2018
Madison, WI 53701-2018

AMERICAN TRANSMISSION COMPANY, LLC and
ATC MANAGEMENT, INC.
By
Mr. Daniel Sanford, Attorney
N19 W23993 Ridgeview Parkway, West
P.O. Box 47
Waukesha, WI 53187-0047

TOWN OF FOND DU LAC
By
Mr. John A. St. Peter, Attorney
Edgarton, St. Peter, Petak, Massey & Bullon
10 Forest Avenue
P.O. Box 1276
Fond du Lac, WI 54936-1276

Date Mailed
November 8, 2002

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Joint Application of Fox Energy Company LLC and American Transmission Company LLC for a Certificate of Public Convenience and Necessity to Construct a Natural Gas-Fired Electric Power Generation Plant in Outagamie County, Including Related Water and Gas Pipeline Facilities, Electrical Interconnection Facilities and Upgrades of Electrical Transmission Facilities

05-CE-115

FINAL DECISION

Introduction

On October 25, 2000, Fox Energy Company LLC (Fox Energy), a wholesale merchant power plant developer, filed an application with the Commission for a Certificate of Public Convenience and Necessity (CPCN) under Wis. Stat. § 196.491(3) and Wis. Admin. Code ch. PSC 111, to construct and operate a large natural gas-fired combined cycle power plant and associated high voltage transmission and natural gas interconnections at one of two possible sites in Outagamie County. The power plant would include two combustion turbines (CT), two heat recovery steam generators (HRSG), and a steam turbine (ST). Each CT and ST would be connected to its own electric generator. The HRSGs would have supplemental duct firing capability. The plant would be capable of producing 635 MW with supplemental duct firing. The plant would have an expected life of 30 years.

On March 14, 2001, Fox Energy and American Transmission Company LLC (ATC) amended the application to include ATC as a CPCN co-applicant, responsible for constructing and operating the proposed transmission facilities to be owned by ATC. Fox Energy and ATC

withdrew the joint application on August 2, 2001, as Fox Energy sought a different water source for the power plant.

Fox Energy and the ATC resubmitted the application on February 1, 2002. Supplements to the application were filed on March 25 and 27, 2002. The Commission determined the application complete on April 25, 2002. Under Wis. Stat. § 196.491(3)(g)1, the Commission must take final action on this CPCN application no later than 180 days after it finds the application complete. An order extending the CPCN review period an additional 180 days until April 21, 2003, was issued by Dane County Circuit Judge Moria Krueger on September 6, 2002.

On October 3, 2002, the Commission held hearings on the project before Administrative Law Judge David Whitcomb at Appleton, Wisconsin.

Persons certified as full parties are listed in Appendix A. Other persons who appeared and testified are listed in the Commission's files.

This application is GRANTED, subject to conditions.

Findings of Fact

1. Fox Energy is proposing to construct a merchant plant, as defined in Wis. Stat. § 196.491(1)(w) and is proposing to construct, own, and maintain associated natural gas pipeline facilities for the plant. ATC is proposing to construct associated high voltage transmission facilities for the merchant plant. The Commission determined their joint application to be complete on April 25, 2002.

2. Determining whether energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. §§ 1.12 and 196.025 or their combination would be cost-

effective alternatives to a generating plant is not possible when the project under consideration is a merchant plant, because the applicant is not required to submit information about the project's costs. Because the transmission improvements proposed by ATC are directly related to serving the Fox Energy power plant, determining whether a statutory energy priority would be a cost-effective alternative to either of these projects is also impossible.

3. The generating facility approved in this order is reasonable and in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors. The proposed interconnection to the existing electric transmission system approved in this order is reasonable and in the public interest after considering alternative routes, individual hardships, engineering, economic,[1] safety, reliability, and environmental factors.

4. Construction, operation, and maintenance of the proposed facilities, as described herein, will not have undue adverse impacts on environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formation, the aesthetics of land and water, and recreational use.

5. It is in the public interest for Fox Energy to move forward with construction of the proposed power plant in a timely manner and to complete the project by a predictable date so that the Commission can predict potential impact on the state's electric system.

6. The Kaukauna site is in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors.

[1] State law declares that engineering and economics are not relevant factors if the Commission is considering whether to issue a CPCN for a wholesale merchant plant. When the Commission examines a CPCN application for a high-voltage transmission line, however, it must consider these two issues regardless of who is proposing to construct the line. *See* Wis. Stat. § 196.491(3)(d)3.

7. The interconnection loop solution using the Existing Right-of-Way (ROW) Route for connecting the power plant is reasonable after considering alternative routes, individual hardships, engineering, economics, safety, reliability, and environmental factors.

8. It is reasonable to require ATC and Fox Energy to work with landowners along both the electric transmission line and intrastate direct sale natural gas transmission line right-of-ways to minimize landowner hardships.

10. The facilities approved in this order will not have undue adverse impact on other environmental values.

11. The facilities approved in this order will not unreasonably interfere with the orderly land use and development plans for the area involved.

12. It is in the public interest and in accordance with Wis. Stat. § 44.40 for the Commission to consider and attempt to avoid potential adverse impacts to archeological resources, human remains, and historic properties.

13. The facilities approved in this order will not have a material adverse impact on competition in the relevant wholesale electric service market.

14. Fox Energy has received the Wisconsin Department of Natural Resources (DNR) air pollution control construction permit required for constructing and operating the proposed facility. DNR water discharge and intake related permits are pending and may be issued after the DNR's Record of Decision is issued. It is in the public interest to condition project construction on the issuance of all permits and approvals that the DNR identified pursuant to Wis. Stat. § 196.491(3)(a)3a as being required prior to construction of the facility.

15. ATC's proposed 345 kV transmission line will provide usage, service, or reliability benefits to Wisconsin wholesale and retail customers, and its benefits are reasonable in relation to its cost.

16. It is reasonable and necessary to require the applicants to work with the Wisconsin Department of Transportation (DOT) in the construction of the project, in order to minimize adverse impacts of the project.

17. Fox Energy shall measure sound levels after the plant is operating, as required by the Commission's noise protocol. The noise measurements shall be submitted to the Commission.

18. It is reasonable to require that construction of the Fox Energy project commence within 24 months of issuance of the CPCN.

19. It is reasonable, if construction is not started within 12 months of the issuance of the CPCN, to require Fox Energy to report to the Commission as to its plan for beginning construction.

20. The conditions specified in this order are in the public interest after considering individual hardships, safety, reliability, and environmental factors.

21. The EIS accurately describes the environmental effects of this project and complies with Wis. Stat. § 1.11(2)(c).

22. The public convenience and necessity require completion of this project.

Conclusions of Law

1. Fox Energy's Outagamie County power plant will be a merchant plant, as defined in Wis. Stat. § 196.491(1)(w).

2. The Commission has jurisdiction under Wis. Stat. §§ 1.11, 1.12, 44.40, 196.025, 196.395, 196.40, and 196.491 to issue a certificate authorizing Fox Energy and ATC to install and place in operation the generation, transmission, natural gas, and water facilities at the site and route described in the Findings of Fact, and to impose the conditions specified in this order.

Opinion

Description of the Proposed Facility

Fox Energy would construct and place in operation a natural gas-fired, combined-cycle, electric generation plant. The power plant would include two CTs, two HRSGs, and a ST. The HRSGs would have supplemental duct firing capability. The plant would be capable of producing 635 MW with supplemental duct firing and 530 MW without duct firing.

Each CT and ST would be connected to its own electric generator, which, in turn would be connected to its step-up transformer. Electric generators would produce power at 16.5 or 13.8 kV, and the step-transformer would step-up the power produced at these voltages to 345 kV. The plant would have an expected life of 30 years.

The plant would use waste water from the Heart of the Valley Metropolitan Sewerage District (HOV) treatment plant. HOV currently discharges into the Fox River as regulated under its own DNR Wisconsin Pollution Discharge Elimination System (WPDES) permit. HOV effluent would be treated at the power plant site and stored in a 17-million gallon pond, covering

about 7.5 acres. The plant would use, on average, 4.3 million gallons of water per day for evaporative cooling and discharge up to 0.9 million gallons per day into the Fox River. The power plant's discharge would be conducted according to a WPDES permit issued specifically for the Fox Energy plant. Potable water would be supplied either by a low capacity well or from a local municipal water supply.

In order to serve a gas-fired power plant, Fox Energy would build a short natural gas pipeline and related facilities to connect ANR natural gas facilities with the generating plant. Fox Energy would design, construct, operate, and maintain those natural gas facilities in accordance with state and federal pipeline safety regulations, including Wis. Admin. Code ch. PSC 135 and 49 CFR Part 192.

The transmission interconnection and water supply and discharge for the plant are discussed below.

The generating plant would be capable of either base load or intermediate load operation. Actual operation would depend on market conditions and the market price for natural gas. Fox Energy stated in its CPCN application that it expects its plant in service in 2005. Fox Energy reiterated at the hearing that it would begin construction of the plant within 24 months of issuance of the CPCN.

Generation Facility Site Alternatives

Fox Energy proposes to build its facility on either the Kaukauna or the Freedom site in Outagamie County[2]. The Kaukauna site is located adjacent to the Wisconsin Central Limited

[2] In addition to its two proposed sites, Fox Energy considered several other sites in the area. The EIS describes Fox Energy's site selection and screening criteria. The descriptions in the EIS and in Fox Energy's application show that Fox Energy's method of selecting the Freedom and Kaukauna Sites is reasonable.

Railroad north of State Trunk Highway (STH) 96, southeast of U.S. Highway (USH) 41 and west of County Line Road in the town of Kaukauna, in the western portion of Section 4, Township 21 North, Range 19 East (T21N-R19E). The Freedom site is located south of the southwest corner of the intersection of County Trunk Highway (CTH) UU and STH 55 in the town of Freedom. The Freedom site is located in the northeast quarter of T22N-R19E. Each site will use about 30 acres of farmland. Officials of the town of Kaukauna and Outagamie County testified in favor of locating the plant at the Kaukauna site.

Water Supply and Discharge Pipelines

A water supply pipeline would be built from HOV to the Fox Energy plant, and a water discharge pipeline would be built from the Fox Energy plant to the Fox River. For the Kaukauna site, the supply pipeline would be located primarily within existing road ROW if the Wisconsin DOT allows it. Otherwise, it would be located just outside road ROW on private land. It would be bored under the Fox River lock north of HOV and would follow the south side of Augustine Road eastward to Plank Road. There it would extend northward, following the east side of Plank Road for about 500 feet to the 138 kV transmission line corridor. It would lie in the transmission corridor from Plank Road to STH 96. Between the transmission corridor and the Fox Energy plant, it would follow the north side of STH 96. The water discharge line would be cross-country to the river, following the electric transmission corridor southward for about 1,500 feet. It would enter the river just upstream of the Rapide Croche Dam.

For the Freedom site, both the supply and discharge pipelines would be installed in or near road ROW, depending on DOT permission. Two routes were proposed for the discharge

pipeline from the Freedom site. If the Freedom site were selected for the plant, a route for the water discharge line would also need to be selected.

Effects on Wholesale Competition

Under Wis. Stat. § 196.491(3)(d)7, the Commission may not issue a CPCN unless it can find that "The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market." The relevant market for this project is the Wisconsin Upper Michigan System (WUMS). The record examines this project's impact on WUMS, using the analysis that the U.S. Department of Justice and Federal Trade Commission have prescribed in their 1992 Horizontal Merger Guidelines (revised April 8, 1997). The record shows that an adverse effect on competition is unlikely because the Fox Energy power plant project would act as a new entrant. Essentially, the Fox Energy project would be adding a new competitor to WUMS, thereby improving the market.

Statutory Energy Priorities

Wis. Stat. § 1.12 (4) establishes energy priorities for Wisconsin. The statute provides as follows:

> **1.12(4)** PRIORITIES. In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed.
> 1. Natural gas.
> 2. Oil or coal with a sulphur content of less than 1 percent.
> 3. All other carbon-based fuels.

In addition, Wis. Stat. § 196.025 declares that the Commission must implement these priorities in its energy-related decisions, to the extent "cost-effective, technically feasible and environmentally sound."

Were this a project proposed by a public utility, the Commission would need to examine the alternatives of demand-side management (DSM) and renewable resources to determine if they meet the statutory tests for priority. This docket concerns a merchant plant, however, and state law exempts such projects from this examination. Under Wis. Stat. §196.491(3)(d)2, an applicant for a wholesale merchant plant need not show that the project would satisfy reasonable needs of the public for electricity. In addition, Wis. Stat. § 196.491(3)(d)3 specifies that the Commission "may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant."

Transmission Interconnection

ATC would construct a six-position, 345-kV ring bus switchyard at either of the two sites. The three step-up transformers of the plant would connect to three of the six positions of the 345-kV ring bus. The other three positions would be used to connect the switchyard to the ATC transmission system. Two interconnection solutions, loop and no-loop, have been proposed to connect the switchyard at either site to the ATC transmission system. Transmission lines associated with these solutions can be constructed for each site on either an existing ROW or new ROW. In the loop solution, the existing Point Beach - North Appleton 345-kV line would be looped in and out of the switchyard, and a new 345 kV line would be constructed between the switchyard and the north end of the de-energized Forest Junction 345-kV line. In the no-loop solution, a new 345-kV line would be constructed to the North Appleton Substation

from the switchyard, and a new 345-kV line would be constructed between the switchyard and the currently de-energized Forest Junction 345-kV line.

ATC studied the impact on the transmission system that could result from interconnecting the Fox Energy plant with ATC's 345 kV Point Beach-North Appleton line, which crosses the Freedom and Kaukauna sites. ATC's interconnection study showed that directly connecting the plant to the existing 345 kV Point Beach-North Appleton line was not a feasible solution. ATC offered two interconnection solutions, both of which would require construction of a new line. The interconnection of the power plant to the ATC transmission system would also require constructing about one-half mile of new 345-kV transmission line between the south end of the de-energized Forest Junction line and the new Forest Junction Substation, bus work to connect the 345 kV line to this substation, and installation of a third 345/138 kV, 500 MVA transformer at the new Forest Junction Substation. The cost of these upgrades is estimated between $3 million and $3.2 million.

ATC and Fox Energy entered into a transmission interconnection agreement effective January 15, 2002. The agreement specifies that ATC would construct the switchyard, transmission line, and other system upgrades that are necessary for interconnecting the Fox Energy plant. Fox Energy would finance the construction of these facilities. ATC would reimburse Fox Energy for the cost of these facilities and an appropriate carrying charge when the Fox Energy plant begins commercial operation.

The estimated cost for the switchyard at either site is $6.3 million for the loop solution and $5.1 million for the no-loop solution. The estimated cost of transmission system upgrades,

(not including transmission line costs which are discussed further below) for either site is $3.2 million for the loop solution and $3.0 million for the no-loop solution.

Transmission Line

Benefits of a 345 kV Transmission Line

Operation of the proposed power plant requires a new 345 kV transmission interconnection. The Commission may not issue a CPCN for a transmission line of this size unless it finds that "the high-voltage transmission line provides usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state and the benefits of the high-voltage transmission line are reasonable in relation to the cost of the high-voltage transmission line." See Wis. Stat. § 196.491(3) (d) 3t. Because the proposed transmission line is part of Fox Energy's power plant project, this line will offer Wisconsin's electric utilities an opportunity to benefit from a new, local source of power. As described above, this can increase the reliability and competitiveness of Wisconsin's electric market, to the advantage of both wholesale and retail customers in the state.

Transmission Line Route

Each of the transmission interconnection "solutions" (Loop and No-Loop) for connecting the new power plant to the transmission system has two routing options, which can be applied to either power plant site. The options are: 1) using existing transmission line ROW and building the new line on new single-circuit structures parallel to the existing line where only one line presently exists, and building the new line on new double-circuit structures with one of the existing lines where two parallel lines presently exist; or 2) constructing a new single-circuit transmission line on mostly new ROW.

Loop Solution - Existing ROW Route

A new 345 kV transmission line would be constructed from the switchyard to the north end of the de-energized Forest Junction 345 kV line in the town of Wrightstown in Brown County. This routing option uses existing transmission line ROW for its entire length. No additional ROW would likely be needed, but easement contracts with landowners under the line might need to be renegotiated.

For the Freedom Site - The plant switchyard would be looped into the existing Point Beach-North Appleton 345-kV line. A new 345-kV transmission line, about nine miles in length, would be built from the switchyard to the north end of the de-energized Forest Junction 345-kV line in the town of Wrightstown in Brown County. This line would be built parallel and directly adjacent to the existing Point Beach-North Appleton 345-kV line, on the north half of a double-width easement corridor. The Point Beach-North Appleton 345-kV line and the existing Kaukauna Substation 138-kV line (KKSS) share a ROW for approximately four miles between the Freedom site and where the KKSS 138-kV line heads south to the Kaukauna Substation. The four-mile length of 138-kV line would be dismantled and rebuilt as a double-circuit line with the new 345-kV line. East of where the KKSS line leaves the ROW, the new 345 kV line would continue approximately five miles to the north end of the de-energized Forest Junction 345 kV line. It would cross the Fox River next to the existing Point Beach-North Appleton line just upstream from the Rapide Croche Dam. South of the Fox River crossing, the new 345 kV line would turn eastward, parallel with the existing Point Beach-North Appleton line to the de-energized Forest Junction 345 kV line connection. The estimated cost of this transmission line alternative is $7.8 million.

For the Kaukauna Site - The proposed Kaukauna site switchyard would be built adjacent to the existing Point Beach-North Appleton 345 kV line. This line would be reconfigured to loop in and out of the switchyard. A new 345 kV transmission line, about five miles in length, would be built from the switchyard to the north end of the de-energized Forest Junction 345 kV line in the town of Wrightstown in Brown County. This line would be built parallel and directly adjacent to the existing Point Beach-North Appleton 345 kV line, on the north half of a double-width easement corridor. The estimated cost of this transmission line alternative is $4.3 million.

Loop Solution - New ROW Route

The loop solution on a new ROW includes looping the proposed power plant into the existing Point Beach-North Appleton 345 kV line and constructing a new transmission line on mostly new ROW to connect the plant to the north end of the de-energized Forest Junction 345 kV line, leading to the Forest Junction Substation.

For the Freedom Site - Similar to the Existing ROW Route discussed above, this solution and transmission routing would include looping the Freedom site into the existing Point Beach-North Appleton 345 kV line at the Freedom site switchyard. The connection to the north end of the de-energized Forest Junction 345 kV line would require the construction of approximately 13 miles of new 345 kV line.

The new 345 kV line route would extend north from the switchyard for approximately 0.5 miles along STH 55. From that point, the line would extend eastward, cross-country for approximately 3.5 miles, then southward cross-country between Section Line Road and McCabe Road for approximately 2.0 miles to the existing Point Beach-North Appleton line at

Wrightstown Road. From there, the new line would extend approximately one mile to the southeast within the existing 345 kV ROW, crossing the Fox River and continuing south to the location where the Point Beach-North Appleton line turns east. From this point, the new 345 kV line would continue south in a new ROW approximately 1.4 miles, turn east, and continue approximately four miles to the north end of the existing de-energized Forest Junction 345 kV line. Out of the 13 miles of this line, approximately 11 miles of new ROW would be required. The estimated cost of this transmission line alternative is $11.4 million.

For the Kaukauna Site - Similar to the Kaukauna connection for the Existing ROW Route, this connection would include looping in and out of the Point Beach-North Appleton 345 kV line to the switchyard. The connection from the switchyard to the Forest Junction Substation would require construction of approximately six miles of a new 345 kV transmission line from the Kaukauna switchyard to the north end of the de-energized Forest Junction 345 kV line.

The Kaukauna to Forest Junction transmission line would travel south from the site in the existing Point Beach-North Appleton 345 kV ROW, cross the Fox River, and continue south for approximately one mile to the point where the Point Beach-North Appleton line turns east. At this point, the new 345 kV line would continue southward approximately two miles in a new ROW, then turn east and continue approximately four miles to the existing de-energized Forest Junction line. This portion of the new transmission route would be the same as the corresponding route described for the Freedom site. It would require approximately five miles of new ROW. The estimated cost of this transmission line alternative is $6.9 million.

No-Loop Solution - Existing ROW Route

In addition to the connection to the north end of the de-energized Forest Junction 345 kV line, similar to that required for the loop solution, this solution would require a new transmission line to the North Appleton Substation directly from either site. Under this transmission solution, a new 345 kV line would be built entirely in the existing ROW to the North Appleton Substation and to the north end of the de-energized Forest Junction 345 kV line.

For the Freedom Site - The Freedom site would be connected to the North Appleton and Forest Junction substations via newly constructed 345 kV transmission lines within the existing KKSS 138 kV and Point Beach-North Appleton 345 kV ROW. The North Appleton connection would require the new 345 kV line to be built as a double circuit with the existing KKSS 138 kV transmission line that crosses the site. The 138 kV line would be dismantled and built as a double circuit with the new 345 kV line. This new 138 kV/345 kV transmission line would be built parallel, and directly adjacent, to the north side of the existing Point Beach-North Appleton 345 kV line from the Freedom site westward to the North Appleton Substation. The route would cover approximately three miles.

The Freedom site to the north end of the de-energized Forest Junction line would be the same routing alternative discussed earlier under "loop solution on existing ROW." The estimated cost of this transmission line alternative is $11.5 million.

For the Kaukauna Site - The Kaukauna site would also be connected to the North Appleton Substation and the Forest Junction Substation directly via new 345 kV transmission lines within the existing transmission ROW.

The 345 kV North Appleton connection would be built parallel and directly adjacent to the existing 345 kV line. Proceeding northwest from the site, the two 345 kV lines would be parallel for approximately one mile to the point where the existing KKSS 138 kV line joins the ROW from the south. The new 345 kV line to North Appleton would be built in a double circuit configuration with the 138 kV line for the seven-mile distance to the North Appleton Substation. As discussed previously, the existing KKSS 138 kV line would be dismantled and rebuilt to the double circuit configuration. The new transmission line route would cover a total of approximately eight miles and would be entirely within existing ROW.

The Kaukauna site would also be connected to the Forest Junction Substation via a newly constructed 345 kV transmission line to the de-energized Forest Junction line. This portion of the line would be built parallel, and directly adjacent, to the existing Point Beach-North Appleton 345 kV line in existing ROW. The total length of the new line would be approximately five miles. The estimated cost of this transmission line alternative is $11.5 million.

No-Loop Solution - New ROW Route

The no-loop interconnection connection solution would again not include any on-site loop to the existing Point Beach-North Appleton 345 kV line. It would require new 345 kV line construction that would connect the proposed power plant to the North Appleton Substation and de-energized Forest Junction line. Under this transmission routing option, a new 345 kV transmission line would be built in new ROW for nearly its entire length.

For the Freedom Site - The direct connection to the North Appleton Substation would require a new 345 kV line that would extend north from the site approximately 0.5 miles, westward for two miles and cross over the existing Point Beach-North Appleton 345 kV and

KKSS 138 kV lines at one point. At the two-mile mark, it would turn north for 0.5 miles and run parallel to the existing lines westward for 0.6 miles to the North Appleton Substation in the existing ROW. The last 0.6 miles would require configuration of the new 345 kV line and the existing KKSS 138 kV line as a double circuit. Approximately three miles of new ROW would be required.

The proposed Freedom site to Forest Junction connection would be identical to the Forest Junction connection discussed in detail under "Loop solution - New ROW Route." About 13 miles of new ROW would be required for this connection. The estimated cost of this transmission line alternative is $14 million.

For the Kaukauna Site - The Kaukauna site's connection to the North Appleton Substation would extend northwest from the site, parallel and directly adjacent to the existing 345 kV line in the existing ROW for approximately 0.6 miles. At this point, the new 345 kV line would leave the existing ROW, turn north for approximately two miles, then west for six miles, crossing over the existing 345 kV and KKSS 138 kV lines at a point east of the North Appleton Substation. The new line would then turn northward for 0.5 miles and run parallel to the existing 345 kV and 138 kV lines, turning westward and continuing approximately 0.6 miles within the existing ROW to the North Appleton Substation. The last 0.6 miles would require construction of the new 345 kV line and the existing 138 kV line as a double circuit. Approximately nine miles of new ROW would be required.

The Forest Junction connection, requiring about five miles of new ROW, would be identical to the Forest Junction New ROW Route connection discussed above under "Loop solution - New ROW Route." The estimated cost of this line alternative is $13.2 million.

Environmental Impacts of Each Site, Its Water Connection and Natural Gas Connection

Fox Energy's proposed Kaukauna site is on land already zoned for industrial use, but the Freedom site is not. Both sites are mostly cropland. In both cases, very little vegetation needs to be removed. At both sites, care must be taken to work and landscape with very poorly drained soils. At the Freedom site, small wetlands must be addressed. The water pipelines for each would require consultation with the DOT if the facilities are to be installed in road ROW. The water supply would be the HOV for each site, and the water discharge point for each site would be in the Fox River directly south of the Kaukauna site upstream from the Rapide Croche Dam.

By law, the Commission must cooperate with the Wisconsin Historical Society (WHS) to protect historical and archeological sites that may be affected by a project under the Commission's review. See Wis. Stat. §§ 44.39, 44.40, and 157.70. Surveys of the two sites and their connecting facilities by a qualified archaeologist have revealed no significant or undisturbed archeological or historic resources. However, the WHS has warned that construction may encounter heretofore unknown archeological resources and has set directions to follow if they are found, particularly if there are burials involved under Wis. Stat. § 157.70.

In each site case, the company can install detention ponds and control runoff so that the existing drainage ways and wetlands of the surrounding area are not affected. Groundwater would not be affected because facilities would be installed to capture potential contaminants, and wastewater would otherwise be deposited into the Wisconsin River under a DNR WPDES permit. A DNR water loss approval is also necessary. Discharge facilities are being designed in compliance with a permit from the DNR under Wis. Stat. ch. 30. The WPDES permit will also control potential water quality impacts during construction at either site, and could be modified if

the discharge point is relocated. All three DNR water permits are pending at the time of this order, but are expected to be issued without complication.

A new natural gas connection to either plant site is not expected to have undue adverse impact on environmental values. At each site, the environmental impacts of the gas pipeline construction would be part of the overall impacts of construction of the power plant itself. The natural gas pipeline at the Freedom site actually crosses the site, while the pipeline at the Kaukauna site is only 230 feet off the site boundary across agricultural land.

While the Outagamie County Development plan and the Town of Freedom Land Use and Development Plan call for encouraging industrial development, the power plant at the site would most certainly be a new, large feature on the landscape, with the nearest industrial area over a mile away. Since the Freedom site has remained zoned agricultural, a power plant at that site perhaps would interfere with the orderly land use and development plans for areas more than a power plant at the Kaukauna site would for its area. The Kaukauna site is at the edge of a growing urbanized area and is already zoned industrial.

Residential and agricultural neighbors of each site have expressed concerns in the hearing record, including concerns about air quality, fogging and icing, and visual and noise effects of the plant. Air quality impacts are addressed for each site in the DNR's air pollution control construction permits. Permits for both sites have been approved and issued. Fogging and icing would indeed occur a number of hours per year on STH 55 at the Freedom site and on STH 96 at the Kaukauna site.

Visual impacts at the Freedom site would probably be more difficult to mitigate than visual impacts at the Kaukauna site, overall. The company has developed noise design goals that

appear reasonable at either site, although the Freedom site appears inherently quieter so that new noise perception might be greater there. Measurements taken and evaluated as part of the application and review processes at either site can serve as baselines for measured increases in noise during plant operation. Post-construction measurements can be made conditions of this order, regardless of the site selected. More landowners testified that the Freedom site is undesirable, but there were landowners near the Kaukauna site that found that site undesirable as well.

Several members of the public, including some representatives of the local chapter of an environmental advocacy organization, objected to the plant at either site because of their perception of the potential for adverse air quality impacts and impacts to the Fox River. Several people proposed more conservation as an alternative.

The proposed plant sites are both in an area of the state presently classified as in attainment for critical pollutants under the federal Clean Air Act. Operation of the facility would emit nitrogen oxides, carbon monoxide, carbon dioxide, ammonia, formaldehyde, and particulate material. The DNR has conducted a Prevention of Significant Deterioration Review at both sites for particulates, nitrogen oxides, carbon monoxide, and sulfur dioxide, as well as a New Source Review for volatile organic compounds. The plant at either site would use the current Best Available Control Technology to address nitrogen oxides, carbon monoxide, carbon dioxide, and particulates.

The water supply and discharge pipeline impacts are not expected to be significant, regardless of the power plant site selected. However, they could differ from each other. The Freedom supply pipeline from HOV would be longer and would potentially affect a greater

amount (17.5 acres as opposed to 11 acres) of farmland during construction. The Kaukauna supply pipeline from HOV would be about two miles shorter, but would potentially affect a greater amount (5.6 acres as opposed to 0.4 acres) of woodland. The Freedom discharge pipeline routes would both be longer (7 miles and 3.2 miles) than the lone Kaukauna pipeline route (0.5 mile). They would both affect more farmland, wetland, and woodland than the Kaukauna discharge. None of the water supply or discharge lines would be expected to affect endangered or threatened species or known archeological sites.

Environmental Impacts of the Transmission Interconnection

Environmental impacts of the interconnection to a plant approved at either site would depend on whether the loop or no-loop solutions were selected and the Existing ROW or New ROW routes were chosen. The longer the transmission lines involved, the greater the potential for impact to the local environment, farmland, and residents. For either power plant site, the no-loop solution requires more new transmission line. Also, for either power plant site, the New ROW Route requires more new transmission line than the Existing ROW Route. For either power plant site, the New ROW Route would involve more direct impacts on farmland and woodlands. All solutions and routes for either power plant site affect about the same low total acreage of wetland. A new line along the New ROW Route would present a striking new feature on the local landscape. Considering both plant sites, both solutions (loop and no-loop), and both routes, the least impact would be expected from using the Existing ROW Route in the loop solution connecting the plant at the Kaukauna site.

However, several landowners testified about the potential impact to their farmland, trees, and viewscapes from a transmission line located along the Existing ROW Route to the Forest

Junction line from the Kaukauna site. Several wished to renegotiate their easements, signed in the 1960s, with ATC. At least one asked for single-pole structures on his fields instead of new additional H-frame structures.

With local permitting, the new line for either solution and route would fit into the local zoning plan. It would not interfere with any general land use plans for the area. However, there is the potential for it to interfere with individual land use, particularly farm use. There is also the potential for new structures to affect plowing and other tractor operations, increasing the time and difficulty of field work and increasing the potential for field accidents. ATC stated in the hearing record that it will work with farm operators to minimize adverse impacts to fields and field operations. It would be reasonable for ATC to consider the use of single poles instead of H-frame structures where necessary to minimize farming operation impacts.

.No route presented a particular concern about electromagnetic fields. Each route is principally located in open country away from homes.

No known historic properties exist along most of the transmission routes. If one is found to exist along the New ROW Route between the two power plant sites, it would have to be surveyed and avoided by structure construction if that route were selected. If an historical or archeological site is discovered along the route during construction of the approved project, WHS has requested that the Commission require ATC to stop construction at that location and contact the WHS to avoid harming the site.

Approved Plant Site and Transmission Route

The Commission finds that the Kaukauna site is reasonable and in the public interest. This site is already zoned industrial, and the town of Kaukauna and Outagamie County officials

prefer that the plant be constructed at that site. Construction of the plant at the Kaukauna site will not interfere with orderly land use development. The Kaukauna site has no jurisdictional wetlands, and it is close to transmission lines, water supply, and water discharge points.

The Commission finds that the interconnection loop solution on the existing ROW from the Kaukauna site is reasonable and in the public interest. The transmission line from the Kaukauna site to the de-energized Forest Junction line offers the lowest cost alternative, shortest route, the least environmental effects, and it would affect the fewest landowners compared to the other alternatives.

Selecting the Kaukauna site for the plant and the interconnection loop solution on the existing ROW for the transmission route, subject to the conditions specified in this order, would not unduly affect the area's ecological balance or other environmental values.

Certificate

Fox Energy may commence construction of the 635 MW natural gas-fueled, combined cycle, electric generating plant described in this order, in the town of Kaukauna, Outagamie County. ATC may commence construction of the switchyard, 345 kV electric transmission line, and system upgrades at an estimated cost of $13.8 million as described in this order and in the application.

Order

1. The approved location for the Fox Energy 635 MW combined cycle plant is the Kaukauna site in Outagamie County as described. Fox Energy shall construct the project in

conformance with the design specified in its application, and subject to the conditions specified in this order. The water supply and discharge pipeline and the natural gas pipeline facilities for the Kaukauna site are approved as described in the EIS.

2. The approved interconnection solution and associated 345 kV transmission line route are the Loop solution and the Existing ROW Route, as described in the EIS. ATC shall construct the transmission line in conformance with the design specified in its application, and subject to the conditions specified in this order.

3. Fox Energy shall construct all gas facilities in accordance with applicable state and federal codes, including Wis. Admin. Code ch. PSC 135.

4. ATC and Fox Energy shall inform any property owners from whom right-of-way easements are required of their rights and obligations pursuant to Wis. Stat. § 182.017.

5. ATC shall work with landowners to design and locate transmission poles, guy wires, structures, or appurtenances in locations that are reasonably acceptable to the landowners, particularly to farm operators and woodlot owners. Documentation of the concerns and resolutions for each affected landowner shall be submitted to the Commission for review.

6. ATC and Fox Energy shall reasonably restore and grade, to its original condition or better, any property adversely affected by trucks or equipment used for the project. Property restoration shall include restoration of the city streets affected during construction.

7. ATC and Fox Energy shall take reasonable action to remedy any operational problems of any business or property owners along the approved route, which are directly attributable to the operation of the new facilities.

8. ATC and Fox Energy shall provide each landowner with a minimum of 24 hours prior notice before entering the landowners' property, except in emergencies. Prior notice is not needed in writing; it may consist of a personal contact or telephone call.

9. Fox Energy shall provide the Commission with copies of all final executed agreements related to the construction, operation, or ownership of the project when they are obtained.

10. Within three months of the date when the project is fully operational, Fox Energy shall repeat the noise measurements that it took before project approval. Post-construction, Fox Energy shall measure the maximum noise generated at the site (i.e. all units on), and measure the noise at the site with all units off. Fox Energy shall report its findings to the Commission, using the same format as its pre-approval noise studies.

11. Fox Energy shall not begin construction on the project until all air and water permits and approvals that the DNR identified pursuant to Wis. Stat. § 195.491(3)(a)3a as being required prior to construction of the facilities have been obtained from the DNR and documentation to that effect has been given to the Commission.

12. Fox Energy and ATC shall take measures necessary to minimize soil erosion from the site and routes during project construction.

13. Fox Energy shall consult with the DOT District 3 before beginning construction of the pipelines related to the water supply to and discharge from the Kaukauna site and shall document to the Commission the results of that consultation.

14. If archeological materials or human remains are found during the construction of the plant, electric transmission line, natural gas or water facilities, Fox Energy and ATC shall

stop construction immediately and notify the WHS and Commission for further direction. Fox Energy and ATC shall follow the WHS's directives to mitigate adverse impacts to any discovered archeological sites.

15 If easements are made on neighboring farm fields in addition to the proposed project site during construction, Fox Energy shall work with the landowners to minimize wind erosion, compaction, and related impacts to farm operations.

16. During construction of the transmission lines and switchyard, and other upgrades, documentation shall be provided by Fox Energy or ATC to the Commission on (1) measures taken to prevent soil erosion by wind during construction, (2) cooperation with farm operators on structure placement and construction equipment access, and (3) contact with and direction from the WHS in the event that archeological artifacts or human remains are encountered, or the DOT if road ROW is to be used or forbidden.

17. Documentation shall be provided to the Commission of all work with individuals who develop concerns about noise, interference with radio or television reception, or fogging and icing from cooling tower plumes and the resolution of those concerns.

18. Fox Energy shall prepare a construction and mitigation plan to protect vulnerable resources at the Kaukauna site. ATC shall submit a similar plan to protect vulnerable resources, including farmland, along the selected transmission route. The plans shall be reviewed by the Commission and DNR staff as necessary, and the Commission shall approve the plan prior to the commencement of construction.

19. Fox Energy shall submit quarterly progress reports to the Commission that summarize the status of construction, the status of environmental control activities, and the

overall percent of physical completion. Each report shall include a summary of its consultations with the DNR and other agencies concerning the issuance of permits. The reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed environmental protection or control standards. The first report is due for the quarter ending March 2003. The reports shall be filed within 31 days after the end of each quarter.

20. Fox Energy shall notify the Commission within five working days of the date actual, on-site, physical construction of the natural gas connection and pipeline is started and shall notify the Commission that construction is completed within 20 working days after completion.

21. Fox Energy and ATC shall inform the Commission of any substantial design modifications in the approved facilities. If the estimated cost of the switchyard, 345 kV line, and system upgrades exceeds the amount specified in the Certificate more than 10 percent, ATC shall promptly notify Commission staff.

22. Fox Energy shall begin construction of the proposed facilities within two years of the date of this order. If construction is not started within 12 months of the date of this order, Fox Energy shall report to the Commission as to its plan for beginning construction.

23. Fox Energy shall notify the Commission, in writing, within 24 hours of any decision by Fox Energy, of a decision not to proceed or to cancel this project or to enter into any partnership or other arrangement with any outside entity with respect to this project..

24. Jurisdiction is retained.

Dated at Madison, Wisconsin, _____

By the Commission:

_____
Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

Docket 05-CE-115

APPENDIX A

In order to comply with s. 227.47, Stats., the following parties who appeared before the agency are considered parties for purposes of review under s. 227.53, Stats.

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Docket 05-CE-115

PUBLIC SERVICE COMMISSION OF WISCONSIN
(Not a party, but must be served)
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Courtesy Copy:

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Date Mailed
September 24, 2002

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Rock River Energy LLC (an Affiliate of Calpine Corporation) for a Certificate of Public Convenience and Necessity to Construct and Operate a 650 MW Natural Gas-Fired, Combined-Cycle Electric Power Plant, Known as the Riverside Energy Center, in the Town of Beloit, Rock County, Wisconsin	9346-CE-100
Application of Wisconsin Power and Light Company for Authority to Construct and Place in Operation the Necessary Facilities to Render Natural Gas Service to the Riverside Energy Center, in the Towns of Beloit, Rock, La Prairie and Turtle, Rock County, Wisconsin	6680-CG-146
Application of American Transmission Company for Authority to Construct Electric Transmission Facilities at the Wisconsin Power and Light Company's Rock River Generating Station, Located in Rock County	137-CE-107

FINAL DECISION

Introduction

On December 21, 2001, Rock River Energy LLC, now known as Riverside Energy Center LLC and an affiliate of Calpine Corporation (Calpine), filed an application with the Commission for a Certificate of Public Convenience and Necessity (CPCN) that would grant it authority to construct a large generating facility. This new electric generating plant, known as the Riverside Energy Center, would be a combined cycle electric generating facility comprising two combustion turbine generators, two heat recovery steam generators, and one steam turbine generator. The facility would have a net electrical output of approximately 600 megawatts

(MW). Calpine proposes to build the Riverside Energy Center as a merchant plant, which would provide power in the competitive electric market of the Midwest.

Calpine developed this project in response to a Request for Proposals that Wisconsin Power & Light Company (WP&L) had issued in April, 2000, seeking proposals to build a new gas-fired 500 to 600 MW power plant in Wisconsin. After evaluating the proposals submitted, WP&L initiated negotiations with Calpine for an agreement to purchase power from the Riverside Energy Center, which would be located in the town of Beloit, Wisconsin on land owned by WP&L that is adjacent to WP&L's Rock River Generating Station. The utility ultimately reached a "tolling agreement" with Calpine; under this agreement, Calpine would own the Riverside Energy Center and WP&L would have dispatch rights to the first 453 MW of its electrical output. WP&L would also manage the purchase and delivery of natural gas to the plant. In addition, Madison Gas & Electric Company has negotiated a contract with Calpine for dispatch rights to call on a substantial portion of Riverside Energy Center's remaining energy output.

On January 8, 2002, WP&L filed an application with the Commission seeking a Certificate of Authority (CA) to construct a 20-inch natural gas pipeline, approximately five miles long. This gas main would extend from the Tiffany Gate Station of ANR Pipeline Company (ANR), near Tiffany, Wisconsin, to the Riverside Energy Center. ANR Pipeline also intends to apply to the Federal Energy Regulatory Commission for authority to reinforce its existing pipeline system in this area. The Riverside Energy Center would interconnect with the existing electric transmission system through 138 kilovolt (kV) transmission lines that currently cross the WP&L property that is being proposed to site this plant. American Transmission

Company (ATC) submitted an application to the Commission on June 27, 2002, seeking a CA to construct the necessary interconnection facilities, which consist of a substation that would be located at the plant site.

On May 3, 2002, the Commission determined that Calpine's CPCN application was complete. The Commission scheduled public hearings on these project applications on August 15, 2002, which were held at Beloit Town Hall, Beloit, Wisconsin.

Persons certified as full parties are listed in Appendix A. Other persons who appeared and testified are listed in the Commission's files.

The application is GRANTED, subject to conditions.

Findings of Fact

1. Calpine is proposing to construct a merchant plant, as defined in Wis. Stat. § 196.491(1)(w).

2. Determining whether energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. §§ 1.12 and 196.025 or their combination would be cost-effective alternatives to a generating plant is not possible when the project under consideration is a merchant plant, because the applicant is not required to submit information about the project's costs. Because the natural gas line proposed by WP&L and the transmission improvements proposed by ATC are directly related to serving the Riverside Energy Center, determining whether a statutory energy priority would be a cost-effective alternative to either of these projects is also impossible.

3. The generating facility approved in this order is reasonable and in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors.

4. The Riverside Energy Center will not have undue adverse impact on other environmental values.

5. The Riverside Energy Center will not unreasonably interfere with orderly land and development plans for the area involved.

6. Site B is in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors. Other alternative sites for the Riverside Energy Center, brought forth in the record, are not in the public interest.

7. It is reasonable to make a CPCN for the Riverside Energy Center conditional upon the following requirements:

a. That the CPCN takes effect only after the issuance of all permits and approvals that the Wisconsin Department of Natural Resources (DNR) identified, pursuant to Wis. Stat. § 196.491(3)(a)3.a., as appearing to be required for construction or operation of the facility.

b. That Calpine shall conduct a wetlands monitoring and mitigation program, at wetlands on or near the Riverside Energy Center site that may be adversely affected by operation of the Ranney Well.

c. That Calpine shall conduct the private well monitoring program it described in its testimony, to protect private wells in the vicinity that may be adversely affected by operation of the Ranney Well.

d. That Calpine and WP&L shall restore an oak savanna located on WP&L's property.

8. It is reasonable to require that construction of the Riverside Energy Center commence within one year after Calpine has received all necessary federal, state, and local permits and approvals, in order to ensure that the project moves forward in a timely manner.

9. It is reasonable to require that Calpine complete its project and that the Riverside Energy Center be fully operational within three years after the date that construction commences, so the utilities that have contracted to purchase energy from the facility, and their ratepayers, will gain the benefit of these contracts in a timely manner.

10. WP&L's construction of a natural gas pipeline to serve the Riverside Energy Center will not substantially impair the efficiency of WP&L's service, will not provide facilities unreasonably in excess of the utility's probable future requirements, and, when added to the cost of service, will proportionately increase WP&L's value or available quantity of service.

11. The public convenience and necessity require construction of WP&L's proposed natural gas pipeline.

12. Route 3 for the pipeline is in the public interest. Other alternative routes for the pipeline, brought forth in the record, are not in the public interest. It is reasonable to require that WP&L construct the gas main underneath the Rock River, using directional boring. If this boring proves not to be feasible, in order to protect the rare species found in this area it is reasonable to require that WP&L return to the Commission and seek an amended CA for any alternative crossing that the utility proposes.

13. ATC's construction of the Townline Road Substation and three associated transmission improvements to serve the Riverside Energy Center will not substantially impair the efficiency of ATC's service, will not provide facilities unreasonably in excess of the utility's probable future requirements, and, when added to the cost of service, will proportionately increase ATC's value or available quantity of service.

14. The public convenience and necessity require ATC to construct the Townline Road Substation and three associated transmission improvements to serve the Riverside Energy Center.

Conclusions of Law

1. Riverside Energy Center will be a merchant plant, as defined in Wis. Stat. § 196.491(1)(w).

2. The Commission has jurisdiction under Wis. Stat. §§ 1.11, 196.025, 196.395, 196.40, 196.49, and 196.491 to issue certificates authorizing Calpine, WP&L, and ATC to install and place in operation the generation, transmission, and pipeline facilities at the site and route described below, and to impose the conditions specified in this order.

Opinion

Calpine proposes to construct a gas-fired combined-cycle power plant, with a maximum capacity of approximately 600 MW. It will normally generate about 460 MW, but will have an additional peaking capacity of 140 MW through the use of duct firing in the heat recovery steam generators and steam injection into combustion turbines.

The power plant will have two combustion turbines, two heat recovery steam generators, and one steam turbine. The heat recovery steam generators capture hot gases exhausted from the combustion turbines to produce steam, which expands in the steam turbine to produce mechanical energy without burning any additional fuel. The steam that is exhausted from the steam turbine is then condensed in a cooling tower. Each combustion turbine and steam turbine will couple to an electric generator, which will convert mechanical power produced in turbines into electricity. Each of the three generators will be connected to a transformer, to step up the voltage from 18 kV to 138 kV. These transformers are then connected through motorized disconnect switches to a new switchyard, which ATC proposes to construct at either of the two proposed sites.

Calpine intends to procure the two combustion turbines and their electric generators from General Electric Company, the steam turbine and its electric generator from Siemens-Westinghouse and the two heat recovery steam generators from Nooter/Eriksen. The combustion turbines will be equipped with dry low nitrogen oxide (NO_X) combustors, and the power plant will include selective catalytic reduction and oxidation catalyst equipment for controlling NO_X, carbon monoxide (CO), and volatile organic compound (VOC) emissions. The power plant will use natural gas as the primary fuel and No. 2 fuel oil as the back-up fuel.

Calpine expects to operate the Riverside Energy Center as an intermediate load plant, with a capacity factor of about 40 to 60 percent, that will achieve a plant efficiency of about 50 percent and an equivalent plant availability of 97 percent. Calpine forecasts that it will begin commercial operation in 2004 and the plant will have an expected life of 30 years.

The Riverside Energy Center would require, under maximum summer operating conditions, a water withdrawal volume of 5.44 million gallons per day (mgd). Under typical summer operating conditions, the Riverside Energy Center would require an average withdrawal volume of 3.81 mgd. The water would be withdrawn in virtually equal parts (50:50) from the Rock River and from the local sand and gravel aquifer system. The project's net loss of water, through evaporative and plant processes, would be approximately 75 percent of the volume of water withdrawn.

Calpine is proposing to install a Ranney Well Collector, a high-capacity groundwater well, to provide a raw water supply for generation processes, cooling water for the cooling towers, and fire protection. The Ranney Well would be built as a reinforced concrete caisson (a watertight structure), 17 feet in diameter, installed to a depth of approximately 115 feet. The Ranney Well positions multiple lateral screens at different depths, which enable the well to draw water from multiple aquifer levels and create a larger surface area within the saturated zone of an aquifer to draw water into the well casing.

The project application lists two alternative process wastewater outfall locations. In either location, the wastewater outfall would be installed underneath the riverbed, using directional boring methods. One location is in the main channel of the Rock River, approximately 700 feet from the west river bank, west of the I&M Railroad bridge and just upstream from a small island in the middle of the main river channel. The alternate location for the wastewater outfall is 500 to 600 feet downstream, approximately 200 feet from the west river bank. The design of the outfall would incorporate a 20-foot by 20-foot riprap pad, so the

riverbed site would have to be dredged to a depth of approximately 16 inches below grade to accommodate the stabilization pad.

Several DNR permits would be required to construct and operate the Riverside Energy Center, including: an air pollution control permit; a water loss approval; a storm water permit and a structure permit for the storm water basin and outfall structure; a permit to grade more than 10,000 square feet along a navigable waterway; a permit to construct an enlargement within 500 feet of a navigable waterway; an approval to construct a high-capacity well; and a permit to discharge wastewater to the Rock River.

In its RFP, WP&L offered the property west of its Rock River Generating Station in the town of Beloit, Rock County, Wisconsin as a potential site for a generating facility. The entire 325-acre WP&L property, which includes the existing Rock River Generating Station, is located in Sections 1 and 2, T1N, R12E. Calpine evaluated the WP&L property by conducting a screening process that involved the existing electric transmission grid, natural resource factors, fuel supply availability, and other criteria to identify locations for the Riverside Energy Center. Calpine ultimately selected two potential site locations, Site A and Site B, within the WP&L 325-acre property. Both sites are located to the west of WP&L's existing generating facility in Section 2, T1N, R12E.

Site A is approximately 44 acres and is bounded on the north by Townline Road and Valley North Central Irrigation, on the east by the I&M Railroad right-of-way (ROW), on the south by agricultural and wooded land, the Rock River and private property, and on the west by Walters Road. A 138 kilovolt (kV) transmission line runs east and west across the southern boundary of Site A. Current land use at this site is primarily agricultural (soybeans).

Site B consists of approximately 33 acres and is bounded on the west by the I&M Railroad ROW, on the north by Townline Road, on the east by the existing WP&L facilities, and on the south by WP&L property. An existing 138 kV transmission line runs east and west across the southern boundary of Site B. Portions of this site are used by the WP&L Service Center for training and storage and the remainder of the site is undeveloped land with field grass cover.

WP&L proposes to construct a 20-inch diameter steel gas line to serve the proposed power plant. The WP&L gas line would be approximately five to six miles long, depending on which route alternative and which power plant site is selected, and would cost an estimated $5.0 to $5.5 million. Three alternate gas line routes were developed. The three gas line routes run generally westward from ANR's existing Tiffany Gate Station. The Tiffany Gate Station is located along Townline Road in section 34 of the town of La Prairie, Rock County.

Calpine stated that in order for the proposed power plant to receive firm rather than interruptible transportation capacity on ANR's interstate pipeline, Calpine would participate, along with other gas shippers, in a planned expansion of ANR's system. ANR's expansion would consist of adding new pipeline segments to its existing pipelines (referred to as "looping"). A portion of ANR's expansion project includes about six miles of new looped pipeline along the existing ANR Beloit lateral. This ANR Beloit Loop line would be built only if the Riverside plant is built, while other portions of ANR's expansion are independent of the Riverside project. ANR expects to file an application with the FERC for authorization to construct the Beloit Lateral Loop gas line at a future date. FERC's authorization, if granted, will determine the design and location of the gas line and the construction conditions that must be met in building this segment of gas line. A preliminary review of the potential impacts of ANR's

pending project was conducted in this proceeding and did not identify any significant environmental or land use concerns.

The Riverside Energy Center will be connected to the ATC transmission system through existing 138 kV transmission lines that cross the land owned by WP&L at its Rock River Generating Station. Four 138 kV transmission lines from the Janesville Substation (X7), Russell Substation (X32), North Monroe Substation (X12), and Paddock Substation (X39) currently terminate at WP&L's existing Rock River Substation. ATC proposes to change the termination point for these four lines to a new 138 kV substation, to be known as Townline Road Substation, which will serve the Riverside Energy Center. ATC designed this substation based on its interconnection studies for 600 MW of generation capacity at the Riverside Energy Center, and estimates that construction of the Townline Road Substation will cost $10 million. ATC will finance the proposed substation through internal funds or the issuance and sale of securities.

The proposed Townline Road Substation will use a breaker and a half bus with nine terminations. Four of the terminations will connect the four existing transmission lines (X7, X32, X12, and X39), two more terminations will connect two rebuilt lines between the Townline Road Substation and the Rock River Substation, and the remaining three terminations will connect the Riverside Energy Center's two combustion turbine generators and steam turbine generator. The breaker and a half bus design offers flexibility for maintenance outages of transmission facilities.

The proposed interconnection design will not require any new transmission lines. However, in addition to the construction of a new Townline Road Substation, ATC states that it will need to make some improvements to its transmission system to accommodate the delivery of

453 MW of power from the Riverside Energy Center to WP&L loads. ATC has filed, or intends to file, separate construction applications for some of these improvements because their principle purpose is independent from serving the Riverside Energy Center. Three other transmission improvements, however, are solely related to the delivery of power from this generating plant. One pair of the existing transmission lines that currently cross the project site (either X7 and X32 or X12 and X39) must be rebuilt between the Townline Road Substation and the existing Rock River Substation. These two circuits, which will remain on WP&L's Rock River plant property, will replace the four circuits currently in this corridor. The length of the rebuild is 0.5 to 0.75 mile, depending on which site is chosen for the Riverside Energy Center. ATC estimates that rebuilding these as double-circuit lines using 2156 ACSR or equivalent conductors, on steel poles, will cost $350,000. Another transmission improvement needed to handle the delivery of power will be the upgrading of terminal equipment at the Russell Switching Station and the McCue Substation, to allow 1,200 ampere current flows. ATC estimates that this work will cost $50,000.

ATC estimates that construction of the Townline Road Substation and these three additional facility improvements will require about twelve months to complete, following receipt of a CA. ATC will need to coordinate its construction schedule, as will WP&L and ANR for their pipeline construction, so these improvements are complete prior to the scheduled dates for start-up, testing, and commercial operation of the Riverside Energy Center. In order to promote the coordination of schedules among these parties, it is reasonable to specify that this order shall take effect the day after it is mailed.

Statutory Energy Priorities

Wis. Stat. § 1.12 (4) establishes energy priorities for Wisconsin. The statute provides as follows:

> **1.12(4)** PRIORITIES. In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed.
>
> 1. Natural gas.
> 2. Oil or coal with a sulphur content of less than 1 percent.
> 3. All other carbon-based fuels.

In addition, Wis. Stat. § 196.025 declares that the Commission must implement these priorities in its energy-related decisions, to the extent "cost-effective, technically feasible and environmentally sound."

Were this a project proposed by a public utility, the Commission would need to examine the alternatives of demand-side management (DSM) and renewable resources to determine if they meet the statutory tests for priority. This docket concerns a merchant plant, however, and state law exempts such projects from this examination. Under Wis. Stat. §196.491(3)(d)2, an applicant for a wholesale merchant plant need not show that the project would satisfy reasonable needs of the public for electricity. In addition, Wis. Stat. § 196.491(3)(d)3 specifies that the Commission "may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant."

Because of the statutory exclusions, the Commission lacks information to compare the cost of equivalent DSM to the cost of energy that Riverside Energy Center would produce. Without this information, the type, amount, and cost of DSM that could replace the plant cannot

be determined. Wis. Stat. § 196.491(3)(d)3 also precludes considering renewable resources as an alternative source of supply, and the lack of cost information about Riverside Energy Center prevents any analysis of whether renewable resources would be more cost-effective than this project.

The natural gas line that WP&L is proposing and the transmission improvements that ATC is proposing are directly related to serving the Riverside Energy Center. As a result, it is also impossible to determine whether any of the energy priorities identified in these statutes would be a cost-effective alternative either of these projects.

Effects on Wholesale Competition

Under Wis. Stat. § 196.491(3)(d)7, the Commission may not issue a CPCN unless it can find that "The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market." The record shows that an adverse effect on competition is unlikely because, even with the addition of the Riverside Energy Center, Calpine will remain a relatively small operator of power plants in Wisconsin. In addition, the majority of power from Riverside Energy Center will be under contract to WP&L, which has authority from the FERC to sell electricity at market-based rates. Any excess energy or capacity from the Riverside Energy Center that Calpine markets as an independent power producer should facilitate additional competition in Wisconsin wholesale electricity markets, not harm it.

Site Alternatives

Current land use on Site A is primarily agricultural and the site is zoned by the town of Beloit as I-1, Light Industrial District. The construction and operation of a power generation facility would most likely require a rezoning request before this site could be considered for the proposed facility. Site B is zoned by the town of Beloit as I-2, Heavy Industrial District and appears to be zoned appropriately for the type of facility proposed. The town of Beloit expressed its support for constructing the proposed facility on Site B, because this site already has the proper zoning designation. In addition, the town prefers Site B because it is closer to the existing WP&L facilities and would promote more orderly land development in the region. One local resident who owns a home and property directly across Townline Road from Site B, supported the project but opposed the use of Site B because he believed this location would devalue his property.

Constructing the proposed facility should not irrevocably harm natural resources at either Site A or Site B. The most significant difference between the sites is that Site A is currently being farmed, while Site B is undeveloped grass land. Approximately 44 acres of land would be removed from agricultural use if Site A were selected. On the other hand, some valuable natural resources can be found both on and adjoining the WP&L property that require protection regardless of site selection. These resources are the Rock River, three local wetlands on or adjacent to the WP&L property, and an oak savanna adjoining the Rock River that is also on the WP&L property.

The Rock River, in the project area, is already affected by thermal discharge from the Rock River Generating Station, with adverse effects on native fish species. In order to control

the additional thermal impact that would be contributed by the Riverside Energy Center, Calpine has worked with the DNR and reached an agreement regarding a thermal discharge limit that would protect the resource by staying within the temperature range of a warm water sport fishery, as the Rock River has been identified. The DNR wastewater discharge permit will include these voluntary conditions.

The record identifies three wetlands on or adjacent to the WP&L property that would be affected, if operation of the Ranney Well results in any groundwater and river water drawdown. One of the wetlands is next to the Rock River and two wetlands are located on islands in the main channel of the river. The aquifer test data collected for the Ranney Well indicate that up to one foot of water drawdown could be expected in the wetland on the WP&L property. Calpine reached an agreement with DNR to conduct wetland monitoring, to monitor the impacts of this water drawdown. To protect this land-based wetland, it is reasonable to require that Calpine follow the recommendations of DNR regarding where and how deep any monitoring wells should be installed to monitor shallow groundwater. It is reasonable to require that all monitoring wells be installed according to state private well codes and that Calpine monitor the wells (electronically or manually) on a daily basis for two years, reporting the results to DNR every quarter. This will provide base information about the impact on the wetland. If impacts are noted in the wetland, it is reasonable to require that Calpine work with Commission staff to develop a mitigation plan.

In addition to these water resources, initial site investigations by Calpine and DNR identified an overgrown oak savanna that could be adversely affected by either the wastewater discharge or the storm water discharge pipeline. The area, on property owned by WP&L, is

located directly south of Site A, west of the railroad ROW, and adjacent to the Rock River. In order to avoid undue adverse impact to the overall ecological balance in this area and to protect the public interest, as required by Wis. Stat. § 196.491(3)(d)4 and Wis. Admin. Code § PSC 112.07(2), it is reasonable to require that Calpine and WP&L restore this savanna as a condition of their CPCN and CA. This restoration process can mitigate the consumption of natural resources that is a necessary part of constructing the Riverside Energy Center and the gas pipeline that will serve it. Calpine and WP&L should work with Commission staff to develop reasonable restoration techniques for this savanna.

Calpine proposes to locate the Ranney Well approximately 300 feet northwest of the intersection of Walters Road and Groves Road, in the SE ¼, NW ¼, Section 2, T1N, R12E. The record does not clearly demonstrate whether operation of the Ranney Well may adversely affect local private wells. As a result, the town of Beloit stated that it is negotiating a private well monitoring program as part of its Conditional Use Permit for the project. Under the monitoring program, as proposed, Calpine would monitor water levels in three test wells that it installed for the aquifer test. These test wells are between the Ranney Well location and the nearest private well, and between the Ranney Well and the WP&L ash disposal landfill located east of the railroad right-of-way. The monitoring plan requires daily electronic monitoring of water levels when the Ranney Well is in operation, with quarterly reporting for the first two years of operation, semi-annual reporting for the third year and annual reporting for the balance of the program. This is a reasonable means of determining whether the Ranney Well is harming any private wells.

In its application, Calpine provided the Commission with data describing the ambient sound levels of the sites under consideration, in accordance with the Commission's "Measurement Protocol for Sound and Vibration Assessment of Proposed and Existing Electric Power Plants." This protocol requires that an applicant repeat these measurements after the project is completed. It is reasonable to require that Calpine perform these measurements within three months after the Riverside Energy Center is fully operational, studying the sound and vibration levels when all units are running at full capacity and when all units are off, and that Calpine report these post-construction measurements to the Commission as quickly as practicable.

The Commission finds that Site B is reasonable and in the public interest. This site is properly zoned and the town of Beloit is in favor of this site because it is adjacent to WP&L's existing Rock River Generating Station. As a result, the use of Site B will promote orderly land use and development. In addition, selecting Site B will reduce any agricultural impact associated with this project. Subject to the conditions specified in this order regarding the control of thermal load in the Rock River from wastewater discharge, the monitoring (and mitigation, as needed) of any impacts at nearby wetlands, the restoration of the local oak savanna, and the private well monitoring program, the Commission finds that the use of Site B will not unduly affect the area's ecological balance or other environmental values.

ATC entered into an interconnection agreement with Calpine effective April 5, 2002, for construction of the Townline Road Substation and the other related transmission improvements described in this order. The record demonstrates that these improvements are necessary to maintain the efficiency of ATC's service, and that the facilities are reasonably necessary when

considering ATC's probable future requirements. The cost of these facilities, as identified by ATC, is proportionately related to the service improvement that they will provide. The Commission therefore finds that the public convenience and necessity require construction of ATC's proposed interconnection, as detailed in its application, and that its project is in the public interest.

Three alternate gas line routes for the WP&L gas line were considered. Routes 1 and 2 were initially filed as part of Calpine's application. Subsequently, Route 3 was developed to address routing concerns found along Route 1.

The record evaluates Routes 2 and 3 for potential land use and environmental impacts. Full information for Route 1 was not developed, because WP&L had difficulty obtaining landowner survey permission on portions of the route. In addition, the likely presence of one or more endangered or threatened plant species along Route 1 caused WP&L to develop Route 3, which avoids the concerns found along Route 1. The evaluation of the proposed gas line routes during the hearings thus focused on Routes 2 and 3.

WP&L prefers Route 3 over Route 2 because of difficult construction conditions along Route 2 in the vicinity of the existing WP&L Rock River Generating Station, because Route 2 would require more directional boring to cross the Rock River, and because a new gas line along Route 3 would be less intrusive to landowners. The Commission agrees with these conclusions. Route 3, which WP&L estimates would cost $5.2 million to construct, represents the best overall balance of land use, environmental, and ease of construction considerations.

Several rare fish and mussel species are known to exist in nearby stretches of the Rock River. In addition, wetlands located along the Rock River are known to harbor several rare plant

species. As a result, it is reasonable to require WP&L to install the proposed gas line across the Rock River using a directional boring construction method. Installing the proposed gas line by directional boring under the Rock River would eliminate any potential impacts to the rare species that might be present and to the associated wetlands. If the directional bore of the Rock River proves not to be feasible or fails, WP&L must return to the Commission for further review and approval of any alternative construction design for installing the gas line across the Rock River.

The plans, specifications, and estimated costs of WP&L's proposed gas project are reasonable. Construction of this project, as conditioned in this final decision, is in the public interest to provide adequate and reliable service to present and future natural gas customers, and would not have undue adverse impacts on the human or natural environments.

Certificate of Public Convenience and Necessity

Calpine may commence construction of the Riverside Energy Center, described in this order and in its project application, at Site B in the town of Beloit, Rock County, Wisconsin.

Certificates of Authority

WP&L may commence construction of the connecting gas main to serve the Riverside Energy Center, as described in this order and in WP&L's project application, on Route 3 at an estimated cost of $5.2 million. ATC may commence construction of the Townline Road Substation and the three transmission improvements needed to deliver power from the generating plant to load, as described in this order and in ATC's project application, at an estimated cost of $10.4 million.

Order

1. The approved site for the Riverside Energy Center is Site B. Calpine shall construct the project in conformance with the design specified in its application, and subject to the conditions specified in this order.

2. The approved route for WP&L's connecting gas main is Route 3. WP&L shall construct this gas main in conformance with the design specified in its application, and subject to the conditions specified in this order.

3. ATC shall construct its Townline Road Substation and three transmission improvements, to connect the Riverside Energy Center to the transmission system and to accommodate the delivery of its power to load, on the same site as the generating facility and in conformance with the design specified in its application.

4. The CPCN for the Riverside Energy Center takes effect only after the DNR issues all permits and approvals that it identified, pursuant to Wis. Stat. § 196.491(3)(a)3.a., as appearing to be required for construction or operation of the facility. In all other respects, this order takes effect on the day after it is mailed.

5. If WP&L is unable to use directional boring to install its gas main beneath the Rock River, WP&L shall return to the Commission with a proposed alternate design and may not commence construction of this design until after receiving the Commission's approval in the form of an amended Certificate of Authority.

6. As a condition of these certificates:

a. Calpine shall conduct the wetland monitoring program that is described in the Opinion section of this order.

b. Calpine shall conduct the private well monitoring program that is described in the Opinion section of this order.

c. Calpine shall complete the post-construction sound and vibration measurements for the project, as described in the Opinion section of this order.

d. Calpine and WP&L shall restore the oak savanna that is located on the WP&L site, as described in the Opinion section of this order.

7. Until the Riverside Energy Center is fully operational, Calpine shall submit quarterly progress reports to the Commission that summarize the status of construction, the status of environmental control activities, and the overall percent of physical completion. Calpine shall include a summary of its consultations with the DNR and other agencies concerning the issuance of necessary permits. The reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed environmental protection or control standards. The date when construction commences shall be duly included in the report for that quarter. WP&L and ATC shall provide similar reports for the natural gas main and the transmission switchyard, respectively. The first report is due for the quarter ending December 31, 2002; each report shall be filed within 31 days after the end of the quarter.

8. Calpine shall commence construction of the Riverside Energy Center no later than one year after Calpine has received all necessary federal, state, and local permits and approvals. Calpine shall complete its project, so that the Riverside Energy Center is fully operational, within three years after construction commences. The CPCN shall expire upon this date, unless the Commission grants an extension.

9. Calpine, WP&L, or ATC shall promptly inform Commission staff of any substantial scope or design modifications in the approved facilities. If the estimated cost of constructing ATC's Townline Road Substation and the three related transmission improvements, or of constructing WP&L's gas pipeline, exceeds the amounts specified in the Certificate of Authority more than ten percent, the utility shall promptly notify Commission staff.

10. WP&L shall notify the Commission within five working days of the date actual on-site physical construction of the approved gas pipeline is started.

11. Upon completion of construction of the approved gas pipeline project, WP&L shall file with the Commission a complete report of the final costs segregated by plant account and shall explain any variances between the authorized and actual costs.

12. Calpine shall notify the Commission, in writing, within 24 hours of any decision not to proceed with the Riverside Energy Center or to enter into any partnership or other arrangement with a third party concerning the ownership or operation of the facility.

13. Jurisdiction is retained.

Dated at Madison, Wisconsin, _____

By the Commission:

_____

Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

DATE MAILED

NOV 5 1993

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Wisconsin Electric Power Company for Authority to Construct and Place in Operation a Nominal 210 MW Combined-Cycle Cogeneration Facility, Known as the Kimberly Cogeneration Facility, With Associated Transmission Facilities, Located in Outagamie County	)	6630-CE-187
Application of Wisconsin Gas Company for Authority to Construct and Place in Operation a Natural Gas Pipeline, Located in Outagamie County, to Serve Wisconsin Electric Power Company's Proposed Kimberly Cogeneration Facility	)	6650-CG-124

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

Procedural Summary

On May 22, 1992, Wisconsin Electric Power Company (WEPCO), filed an application for a Certificate of Public Convenience and Necessity (CPCN) with the Public Service Commission (Commission) to build a 210 MW combined-cycle cogeneration facility, known as the Kimberly Cogeneration Facility, with associated transmission facilities. The generating facility was proposed by WEPCO to be constructed in the Village of Kimberly, adjacent to the Repap Wisconsin, Inc. (Repap), Kimberly paper mill. The plant would supply electrical energy to the WEPCO system and thermal energy in the form of steam to the paper mill. WEPCO intended to construct and own the proposed cogeneration facility, and Repap intended to operate it.

The application states that the purpose of the proposed project is to provide additional generating capacity for WEPCO's system and to replace the aging boiler system currently in operation at the Repap paper mill.

Wisconsin Gas Company (WGC) filed a companion amended application with the Commission on August 14, 1992, to install and operate a high pressure natural gas main extension to serve the proposed Kimberly Cogeneration Facility.

The need for electric generating capacity in Wisconsin was reviewed in Advance Plan 6 (docket 05-EP-6). In its September 1992, Advance Plan 6 order, the Commission found a need for 150 MW of cogeneration capacity in 1994 on the statewide joint utility system, which the utilities later identified as the Kimberly project. The Commission also approved six nonutility cogeneration projects, as alternatives, for planning purposes.

In the course of reviewing the Kimberly project, the Commission became aware of a number of proposed cogeneration projects put forward by independent power producers (IPPs), some of which could be system alternatives to the Kimberly project.

Under §196.491 (2) and (3), Wis. Stats., the Commission must consider alternate sources of supply and alternate designs and locations for proposed electric generating facilities. Several IPP projects are potentially able to meet WEPCO's system needs in the same time period as the Kimberly project, and are system alternatives to the project.

The existing CPCN review process is not designed to handle multiple competing projects, each with possible alternate sites and each with its own size, timing, cost, operating characteristics, environmental aspects and other elements. The necessary full environmental review of all the possible projects would expend considerable amounts of valuable time and resources, and would create delays that could jeopardize reliable electric service.

To avoid these problems, the Commission determined to use an initial screening process [1] to choose the appropriate system alternative before proceeding with the full environmental review.

During this same period, the Commission has been examining the implementation of its responsibilities under the federal Public Utilities Regulatory Policy Act of 1978 (PURPA), and has been attempting to devise an appropriate method for including IPP projects in the Wisconsin electric generation planning and certification process. These efforts include docket 05-EI-112, a generic "Investigation into Barriers to Contracts Between Electric Utilities and Nonutility Generators."

The Commission instituted this proceeding in September 1992, shortly after three IPPs filed complaints with the Commission related to negotiations that they were conducting with WEPCO and Wisconsin Public Service Corporation (WPS).

In docket 05-EI-112, the Commission's staff has developed a proposal for a two-stage CPCN process to be used in the future.

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[1] or "first stage of a two-stage CPCN."

Currently, all of the elements of the decision to authorize construction of an electric generating plant are reviewed in a single CPCN proceeding. Staff proposed a two-stage CPCN process which would choose the system alternative that best meets the needs for power in a first stage of the CPCN proceeding, and then continue to review the other elements of the chosen alternative in a second stage.

The first stage is a screening procedure which includes the use of a computer model to help determine which of the competing supply proposals should be included in a least-cost system supply plan. Other cost and noncost factors are also evaluated. Projects selected in the first stage of the process would proceed to Stage 2, which closely resembles the existing CPCN process.

On April 30, 1993, staff sent material to the parties in the generic policy-making proceeding (docket 05-EI-112) describing staff's proposed two-stage CPCN process. A meeting was held in Madison on May 10, 1993, to discuss the use of an expedited modification of staff's proposed procedure from the generic docket to screen system alternatives for WEPCO's Kimberly cogeneration project. The Commission decided to use the modified procedure in this case. None of the parties objected.

On May 19, 1993, the Commission issued a Notice of Opportunity to File Alternative Projects in Dockets 6630-CE-187 and 6650-CG-124, WEPCO's Kimberly Cogeneration Facility CPCN application. In this notice, the Commission stated that all persons proposing projects as alternatives to Kimberly must file a letter of intent with the Commission by May 28, 1993.

The Commission received letters of intent from the following companies:

1. The AES Corporation
2. Destec Energy, Inc.
3. EnerTran Technology Company
4. Genoa Generating Limited Partnership
5. LS Power Corporation
6. Polsky Energy Corporation
7. Wisconsin Electric Power Company
8. Wisconsin Power and Light Company
9. Wisconsin Public Service Corporation

The notice also established June 21, 1993 as the date for WEPCO and the other parties to file detailed information on their project costs, schedules, operating characteristics, contract terms and environmental factors, and for WEPCO to file information about its system. The format for these filings was described in staff's April 30, 1993 letter to the parties in docket 05-EI-112. A schedule was also established for staff to screen the projects for viability and environmental fatal flaws, and to run a system expansion computer model, using the filed information, to help establish a least-cost supply plan for WEPCO. Periods for comments from the parties were also built into the schedule.

Five of the IPPs (The AES Corporation, Destec Energy, Inc., EnerTran Technology Corporation, LS Power, and Polsky Energy Corporation) filed the following motions with the Commission on May 28, 1993:

1. Motion for Contested-Case Hearing Procedures
2. Motion for Compliance with PURPA Rules
3. Motion for Determination of Steam-Utility Status

4. Motion for Determination on Scope and Availability of Data.

The Commission considered these motions at its open meeting of June 15, 1993, and determined that the process for this case as set out in the Notice of Opportunity to File Alternative Projects dated May 18, 1993, was sufficient to address the concerns of the five IPPs.

On June 10, 1993, Genoa Generating Limited Partnership informed the Commission that it had decided not to participate further in the Kimberly screening process.

On June 21, 1993, all of the parties filed information to the Commission on their respective projects. Staff subsequently conducted an initial screening of the projects and found that the proposals submitted by WPS and Wisconsin Power and Light Company (WP&L) were not adequate to warrant further analysis. Staff informed these two parties of its finding on June 28, 1993. WP&L appealed staff's decision to exclude WP&L from the Kimberly bidding process to the Commission on June 30, 1993. At its July 8, 1993 open meeting, the Commission granted WP&L's appeal. Staff then proceeded to model the WP&L proposals, along with the proposals of the other parties.

All of the parties submitting proposals in this case, except WP&L, filed part or all of their proposal(s) under the Commission's confidentiality protection procedures. The primary reason given by the parties for this treatment was the necessity to protect sensitive commercial information belonging to the cogeneration projects' steam hosts. Pursuant to the procedure

for sensitive information set forth in the notice, the bidders who survived the initial screening, on their initiative executed a series of mutual confidentiality agreements. The Commission issued a protective order on June 28, 1993, and a supplemental protective order on July 6, 1993. Under the orders and the agreements, all the filed information was made available to all the surviving bidders, except that WEPCO's system modeling information was not provided to WP&L. The confidential treatment set up by this process also governed all comments and correspondence that contain the protected information.

On July 16, 1993, suggestions were received from the IPPs and utilities about modeling the proposals in this case. Commission staff distributed its Preliminary Modeling Results to the various parties on August 11, 1993. The modeling results provided an initial ranking of the projects in the order of apparent least system cost.

The IPPs and utilities provided comments to the Commission on the modeling information, unmodeled costs and the intangible factors of the various proposals on August 25, 1993. Staff reviewed these comments and then submitted and distributed its September 3, 1993 report to the Commission on staff's final modeling results and review of the proposals. All the parties to the proceeding were given until September 13, 1993, to comment on staff's September 3 report and on the other parties' prior comments. The parties were also given until September 13, 1993, to ask for hearing on any factual matters they believed merited hearing. Polsky Energy Corporation was the only party to make a

timely request. This request was tentative, however, and after the Commission's decision at its open and closed meetings of September 16, 1993, the request was withdrawn. No other hearing request was filed by September 13, 1993.

The Commission discussed the confidential information on the system alternatives in this case in a closed meeting which was attended by the participants in the confidential process. The Commission discussed the non-confidential information and chose the winning project at an open meeting on the same day.

A list of the parties to this case is attached as Appendix A. Parties who participated in the confidential portions of the proceeding are identified with an asterisk.

The application of Wisconsin Electric Power Company is denied, without prejudice to refile as described in this order if the LS Power project does not meet the conditions herein. LS Power is authorized to proceed with licensing of its Whitewater project, subject to conditions. If neither of these projects meets the conditions herein, EnerTran Technology Company is authorized to proceed with its West Milwaukee project, subject to conditions.

FINDINGS OF FACT

Background

This order is the Commission's first effort to include competitive options to supply electric generating capacity into its planning and siting responsibilities under § 196.491, Wis. Stats. This effort is designed to use competition to provide ratepayers with low-cost electricity in accordance with long-term system plans at the same time that it provides competitors with a fair opportunity to become the supplier of the electricity.

The Commission believes that §210, Public Utilities Regulatory Policy Act of 1978, 16 U.S.C. §824 (PURPA), creates a responsibility on its part to insure that Wisconsin utilities under its jurisdiction purchase cost-effective electricity generated by Qualifying Facilities (QFs), as defined in PURPA. At the same time, the Commission is required to protect the interests of ratepayers, utility security holders and the environment under Chapters 1.11, 184, 196, and other sections of the Wisconsin statutes. The Commission's consideration of competing applications to construct new electric generating plants under §196.491, Wis. Stats., must now meet both the state and federal requirements.

The Commission also believes that competition among suppliers is likely to provide low-cost electricity over the long term and should be encouraged. In order for competition to provide benefits in what has been, up to now, a monopoly enterprise, it is necessary to provide mechanisms that allow

responsible competitors to compete fairly; or, as the Commission described it in its Advance Plan 6 order, "on a level playing field."

The Commission also believes that the utilities are experienced and reliable providers of electricity and should generally be allowed to compete. If the competition is to be demonstrably fair, the host utility cannot both compete and select the winner. Allowing the host utility to compete creates a strain on the mechanisms necessary to provide fairness that is not present in jurisdictions that do not allow the utility to compete in its own service territory.

The difficult part of this exercise is to determine which of the competing supply options is most likely to be in the public interest and provide electricity to ratepayers at lowest total cost. The first part of this task is new to the Commission. Until this case, the Commission has not had system supply alternatives to the proposed plant offered by parties other than the utility seeking authorization. In this case, a total of 11 such alternative proposals were offered.

In order to harmonize the state and federal interests in this case and to encourage competition, the Commission used the two-stage Certificate of Public Convenience and Necessity (CPCN) proceeding that Commission staff had suggested in docket 05-EI-112. The procedure in this case was in the nature of an experiment, and lessons learned from it will inform the Commission's choice of a procedure in the generic case, docket 05-EI-112.

The procedure used was essentially a separation of the consideration of alternatives required by §196.491 (3)(d), Wis. Stats., into a threshold consideration of the system alternatives to the utility's proposed construction project (Stage 1) and a later determination of the site alternatives for the chosen system alternative along with all the other elements of a CPCN under §196.491 (3), Wis. Stats. (Stage 2).

This order is the culmination of Stage 1 of the CPCN in this docket.

Description of the Process Used in This Case

In response to a Notice of Opportunity to File Alternative Projects issued May 19, 1993 (Appendix B to this Order), WEPCO filed data describing its present and projected operating system along with data describing the operating and financial characteristics of its Kimberly proposal on June 21, 1993.

At the same time, five IPPs filed operating and financial data describing alternative generating projects that they proposed to build to meet WEPCO's needs for capacity and energy. Some developers submitted multiple proposals. Two Wisconsin utilities also submitted data on their proposals to sell WEPCO capacity and energy. All of these proposals were in the nature of bids, wherein the proponents represented that they would be bound by their representations if their project were to be chosen.

Staff performed an initial rough screening on the proposals to see if they were adequately described and had no obvious fatal environmental or other flaws. Staff eliminated the proposals of Wisconsin Power and Light Company (WP&L) and Wisconsin Public Service Corporation (WPS) as being inadequately described for the selection process. WP&L appealed this decision, and the Commission determined to reinstate WP&L's bid, which was to resell two blocks of capacity from Minnesota Power and Light Company to WEPCO.

Staff then performed an extensive system expansion analysis of the WEPCO system, using the IRP Workstation computer model which the Commission has directed the utilities to use for system optimization in Advance Plan 7. [2] The dynamic programming capabilities of this model allow the analyst to make a direct comparison of the long-term system costs of supply options which vary as to size, type of capacity, fuel type, capacity factor, dispatchability and in-service date. Staff's analysis used consistent assumptions about the future behavior of major variables, such as fuel costs and inflation rates.

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[2] Optimization is the process of determining which supply options to add to an electric utility's system to match its projected need for power most efficiently. It includes choosing appropriate plant sizes, timing and types of plants that will allow the need for power to be met at the lowest combination of capital and operating costs over the long term. In order to optimize a system it is necessary to know the operating characteristics of the existing system, and to make predictions about load growth and other parameters for the period being modeled.

Using voluntary, party-initiated confidentiality agreements among the surviving bidders and a protective order of the administrator of the Commission's Examining Division, a confidential process was established whereby all the bidders, including WEPCO, received and could comment upon all the filed bids. The staff received valuable suggestions as to how to model the bid information from all of the bidders.

Staff's preliminary model results were circulated to all the bidders for comment by memo of August 11, 1993. The staff then revised its modeling in response to the comments. Based solely on projected long-term system capital and operating costs, the model showed that the most economical additions to WEPCO's system would be a series of combustion turbines and combined cycle plants which were not bid by any party.

Based solely on the model results, the second choice would be the WP&L purchases, which were shorter term than the modeling horizon. The model included a number of the nonbid combustion turbines and combined cycle plants to meet the capacity needs in the later part of the period, which added to the apparent economic attractiveness of WP&L's bid.

Among the independent power construction projects, the preliminary model results showed the lowest system costs for a system containing the LS Power Whitewater proposal. This project is a combined-cycle, gas-fired cogeneration plant which would sell steam to the Whitewater campus of the University of Wisconsin. The other bids, in order of lowest modeled cost first, were:

Polsky Energy Corporation, Kaukauna project

Polsky Energy Corporation, DePere project

WEPCO Kimberly project (One configuration of the bid)

EnerTran Technology Corporation, West Milwaukee project

EnerTran Technology Corporation, Milwaukee project (another configuration of the bid)

The AES Corporation, Plover project

Destec Energy, Combined Locks project

All the bidders commented on the preliminary model results and provided staff with comments on cost factors that were not reflected in the modeling, such as transmission wheeling costs and the cost effects of various contract provisions like bonuses for capacity availability in excess of specifications. When these comments were evaluated and taken into account, the result was that LS Power's Whitewater project, WEPCO's Kimberly project, and one configuration of the EnerTran West Milwaukee project moved upward in the rankings, and the WP&L bids and the two Polsky projects moved down somewhat.

The factors that were addressed in these adjustments to the corrected model results were: potential capacity availability bonus, potential operation and maintenance cost adjustments, interconnection costs, capacity wheeling costs and losses, start-up costs, contract extension options, weekend dispatch option, capital recovery cost adjustment, steam revenue adjustment, debt equivalency and equity adder, and miscellaneous other potential costs. Apart from the capital recovery cost adjustment, which

affected all the bids, these factors were applied only to those projects whose bid specifications required them.

The bidders' comments included their proposed rankings of the projects based on the system cost analysis and their view of other project aspects which were not addressed by the modeling. These included proposed contract terms and conditions, environmental benefits as well as factors affecting the potential viability of the projects such as site control, environmental concerns, financial security performance and construction guarantees, and fuel supply ("intangible factors").[3]

Staff prepared a report for the Commission addressing both the dollar costs and the intangible factors. This report, dated September 3, 1993, was circulated to the parties for comment.[4] All the bidding parties, as well as several parties who were not bidders commented on it, except The AES Corporation.

All parties also were given until September 13, 1993, to include a request for hearing with their comments if they believed one was needed. Staff's report and all the comments

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[3] The term "intangible factors," or (ungrammatically) "intangibles," was also sometimes used, somewhat loosely, to refer to the items of cost listed above that were expressed in dollars but not included in the IRP Workstation modeling. The costs which were addressed in the modeling were usually referred to as "system costs." There were three types of elements balanced by the Commission in arriving at its decision: (1) "system" or "modeled" costs, (2) "exogenous" or "unmodeled" costs, and (3) "intangible" or "nonmonetary" factors.

[4] This report was in two parts: an open overview of the results which was circulated to all the parties to the case, and a more detailed confidential section which was distributed to the bidders only.

received upon it, as well as the bids and all the previous comments of the parties, were provided to the Commission.

None of the parties made a timely request for a hearing, although one bidder included a tentative request which it did not pursue after the Commission made its initial determination on September 16, 1993.

On September 28, 1993, Repap Wisconsin, Inc., filed a request for hearing with the Commission. EnerTran Technology Company filed a request for hearing on October 8, 1993. There was a significant amount of media coverage of these requests. The Commission received comments from the parties on these requests, as well as numerous letters from citizens in the areas where projects were proposed, legislators, and other public officials. Some of these communications were in opposition to the requests, but most were in support.

The Commission circulated such of the letters as were ex parte to the parties, and considered the requests and all the comments upon them. At its open meeting of November 2, 1993, the Commission determined to deny the requests.

The reasons for the denial are:

1. Both requests are untimely. The process established for this case, by the May 19, 1993, Notice of Opportunity to File, which no party objected to, clearly set forth that any request for hearing would be timely when comments on the intangibles were received. The Commission's letter order of June 17, 1993, responding to a Motion for Contested Case Hearing filed by multiple parties, including EnerTran,

states that if a hearing is required, it would be appropriate at the intangibles stage of the case.

In the staff's memo of September 3, 1993, the final comments on all the elements of the analysis were solicited, and any requests for hearing were required to be filed by September 13, 1993. Neither Repap nor EnerTran made such a request before September 13, 1993.

2. The public hearing required in the area affected by the project under §196.491 (3)(b) will be held in the second stage of this case, in the area where the winning project will be built. Until the Commission has determined a winning project, it is not possible to know which area is affected by the project. The statute does not require public hearing in the area of all alternative sites. If all alternative sites were to receive hearings in their respective areas, there are seven such areas in this case.

WEPCO and EnerTran have filed CPCN applications for the Kimberly project and the West Milwaukee project. The Commission does not believe that every entity which files an application with the Commission is automatically entitled to a contested case hearing in the area of the proposed project, whether there is competition to meet the system need for power or not. The contrary view would allow any entity to force the Commission to hold public hearing on a limitless number of nonviable CPCN applications, presumably with full environmental analysis required for each.

The parties other than WEPCO and EnerTran would also probably have filed applications, if the process that was set out for this case provided such an advantage to entities who filed applications. The delay and unnecessary effort that would ensue would defeat the entire purpose of the time limits in the Siting Law, as well as making it impossible to provide IPPs with their rights under PURPA on any practicable schedule.

3. The public's desire to inspect the information leading to the Commission's decision in this case would not be furthered by holding hearing, since most of the relevant information is protected under confidentiality procedures requested by the parties to the case. The Commission believes that it is obliged to protect information which is covered by §§19.36, 134.90 and 196.14, Wis. Stats.

Repap's interest in furthering the Kimberly project has been represented in this process by its partner in the project, WEPCO. This arrangement was clearly set forth in the Commission's May 19, 19993 Notice of Opportunity to File. Repap had no objection to WEPCO's representation of the Kimberly project in the confidential portion of the case at that time, or at any time during the process until after the decision was made.

4. All the information that forms the basis of the Commission's decision has been subjected to exhaustive comment from all the bidders. It is very unlikely that any material information on the technical facts that could not

have been raised in the comments would be uncovered in a hearing.

5. Holding hearing at this point would significantly delay the case, as Repap and WEPCO argued in their briefs filed June 10 and June 14, 1993 in opposition to the IPP and CUB Motion for Contested Case hearing.

6. The Commission has considered an appropriate level of environmental information for the purposes of this first stage of the CPCN, in accordance with the process established at the commencement of this stage of the case, which no party objected to. All parties, including WEPCO and, by representation, Repap, had full opportunity to present any environmental information they considered pertinent in their filings, to be considered in the review of intangible items. WEPCO presented such information in its filing and its comments.

No environmental information has been submitted to the Commission in support of these requests for hearing that was not either previously considered or capable of being provided timely. Repap has admitted that the environmental figures it gave the Commission with its request for hearing and also disseminated widely in the media are inaccurate. Further environmental analysis will ~~take place in stage~~ two of the process being used in this case.

Comparison of the Bids

The Commission chose the LS Power Whitewater project based on a balanced consideration of cost and intangible factors of all the bids. To evaluate dollar costs, the Commission used both the staff's modeled system expansion cost evaluation and the cost factors which could not be modeled using IRP Workstation. The bidders provided valuable comments on both the modeled and the unmodeled cost factors, which the Commission used in its determination. To evaluate intangibles, the Commission relied on the comments of staff and all the bidders, as well as the filed bids themselves.

LS Power Whitewater Project

This project is a 215 MW gas-fired combined cycle cogeneration facility which could supply steam to meet the heating requirements of the Whitewater campus of the University of Wisconsin. The Commission finds that, on an overall cost basis, including lifetime system capital and operating costs as well as dollar costs exogenous to the system expansion model, the LS Power Whitewater bid is lowest in dollar costs to ratepayers.

Other positive features of this project are:

1. The proposed contract contains a very strong construction guarantee, providing a high likelihood that the project will be constructed within the time schedule. [5]

2. LS Power is committed to provide reasonable compensation to WEPCO if the project is not constructed on schedule.

3. The facility being proposed is highly efficient.

4. The proposed contract's force majeure clause, as clarified by LS Power in its comments, is very favorable to ratepayers in that LS Power is not likely to be excused from performance under its terms.

5. The proposed site is open field and has no apparent archaeological, historic or endangered species problems which might delay or prevent siting of the facility.

6. The University of Wisconsin Whitewater campus is not subject to the financial uncertainties of a private enterprise, and is very likely to remain a viable steam host, although the University would need to go through a formal bidding process before committing to buy steam.

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[5] The need for power identified in the Advance Plan 6 order for which WEPCO is proposing the Kimberly project occurs in 1994. Because of the complications arising from the Kimberly project's siting problems and the time required to develop a procedural mechanism to evaluate system alternatives offered by entities other than WEPCO, the project chosen in this case will have to meet a very tight schedule in order to be licensed, receive its necessary permits, and achieve operating status between now and 1996.

7. The project has strong community support, as do the West Milwaukee and Kimberly projects, and will have a positive effect on the area's job market. The project has the capability to improve its efficiency benefits by selling more steam, if as planned, future industrial loads develop in its vicinity. The presence of the LS Power facility should increase the likelihood of such development.

The weaknesses of the project as proposed are:

1. The steam load as proposed is a small proportion of the project's output. More efficient use of fuel, with the concomitant reduction in air pollutants, could be achieved with a larger and less seasonal steam load.
2. The contract feature of a pass-through of the operation and maintenance costs increases risk to ratepayers.
3. The guarantees of performance once the unit is in operation are not very strong.
4. The transmission and steam transport connection corridors are relatively long.

On balance, considering dollar costs and intangible factors, the Commission finds that the LS Power project is likely to provide ratepayers with the lowest overall long-term costs of all the alternatives offered in this case. In the course of negotiating the final purchased power contract for this project, WEPCO and LS Power can benefit ratepayers by mitigating the contract weaknesses noted above. It is in LS Power's interest to

attempt to increase the steam load portion of the project's output as opportunities to do so may arise.

WEPCO's Kimberly Project

This project is a 218 MW gas-fired combined cycle generating plant, with an auxiliary back up boiler, to supply steam to the Repap Wisconsin, Inc., paper mill in Kimberly, Wisconsin. The Commission finds that this project is likely to be among the projects at the low end of the overall dollar cost continuum of projects evaluated in this case.

Other positive features of WEPCO's Kimberly project are:

1. The project has the largest steam load of all the projects evaluated. While this does not necessarily equate to the most efficient use of fuel, this project would reduce the SO_2 emissions in the region due to replacement of Repap's current coal-fired boilers.

2. WEPCO has extensive experience in building reliable plants.

3. WEPCO is committed to meet the construction cost estimates, and would not seek to include any construction costs beyond the bid estimations in rates to ratepayers.

4. The project has strong local support, and would help to retain jobs in the area.

The Kimberly project has the following weaknesses:

1. Its modeled and unmodeled long-term dollar costs to ratepayers are significantly higher than those of the LS Power Whitewater project.

2. There are significant problems with its proposed site and both of the alternative sites WEPCO has proffered, which create a strong possibility that WEPCO may not be able to proceed with construction of the project so as to put it in operation on schedule. The Commission takes administrative notice of its order in docket 6630-EI-104. [6]

3. The proposal contemplates placement of the entire project on the electric utility rate base, although a large part of the capital and operating costs will be incurred to supply steam to Repap. The capital and operating costs are proposed to be offset by revenues from sales of steam.

This arrangement does not comport with standard utility accounting practice. It would be acceptable practice to treat the steam sales and the portion of the plant that generates the

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[6] WEPCO's preferred site contains a residence which is a National Historic Landmark. Its alternate Site 5 requires the displacement of 42 residences. The only other alternate site WEPCO offered is Site 12, which is across the river from the Repap plant. This site requires an archaeological survey, and the landowner has refused permission to conduct such a survey. WEPCO has estimated a minimum of six months would be required to condemn the right to make the survey, and the survey itself may be delayed further because it cannot be performed when the ground is frozen. In addition, Repap Wisconsin, Inc., has stated that Site 12 is wholly unacceptable to it and that it would withdraw from the project rather than proceed on Site 12.

steam as nonutility business, or to allocate the steam plant expenses and revenues to the WEPCO steam utility, or for WEPCO's parent holding company, Wisconsin Energy Corporation, to hold the plant (presumably through a subsidiary) and sell electricity to WEPCO as an affiliated interest transaction.

The failure to institute an acceptable treatment for the steam costs and revenues creates unnecessary risks for ratepayers and could give rise to litigation which would delay or preclude the project.

If the accounting treatment for steam costs and revenues were not corrected, it would impose unnecessary additional costs on electric ratepayers. It is not clear if WEPCO is relying on the return from the entire project to make the project viable, or if it will abandon the project when steam costs and revenues are properly treated. This increases the risk that the project may not be completed.

The Commission finds that, if WEPCO can promptly cure the problems relating to site selection and accounting treatment set forth above, the Kimberly project is, on balance, likely to provide ratepayers with the second lowest long-term overall costs, including intangible factors, of the alternative options offered in this case. Chairman Parrino dissents on the possibility of WEPCO's preferred site and alternate Site 5 becoming viable.

EnerTran Technology Company's West Milwaukee Project

This project is a 237 MW gas-fired combined cycle cogeneration plant which would sell steam to Froedtert Malt and other manufacturing firms in West Milwaukee. The Commission finds that EnerTran's West Milwaukee project has the best combination of intangible factors among the alternative options evaluated. Positive features of the EnerTran proposal are:

1. The EnerTran project has strong construction guarantees and a very strong financial backer, which increases the likelihood that the project will meet the operating schedule.
2. The EnerTran project demonstrates high fuel efficiency and the electric production is well matched to its steam load. It has the second largest steam load of the projects reviewed, and would be partially replacing existing inefficient boilers.
3. The force majeure provision in the EnerTran proposed contract is limited to one and one-half years, which places more of the risk of non-performance on the developer than an open-ended clause.
4. The project has strong community support, and would improve the job market in the area.
5. The proposed site is an existing industrial site with no apparent siting difficulties. The corridor needed for transmission lines, gas pipeline, and steam would be very short.

6. The project is well advanced toward securing necessary permits and completing required studies, which gives it a high likelihood of being able to complete construction on schedule.

The EnerTran West Milwaukee project's principal drawback is that it is considerably more costly, considering modeled and unmodeled dollar costs, than either LS Power's Whitewater project or WEPCO's Kimberly project, although it is within the range of reasonable dollar costs. The project also lacks performance guarantees covering the operation of the facility.

The Commission finds that EnerTran's West Milwaukee project, on balance, considering long-term dollar costs and intangible factors, is likely to provide ratepayers with the third least-cost project overall of the alternative options under review in this case. If WEPCO does not cure its siting and steam sales accounting problems promptly, the EnerTran West Milwaukee project would become the second overall least-cost project which can meet the projected need for power. Forty days from the date of this order is a reasonable period for WEPCO to cure its siting and steam sales accounting problems, given the short schedule necessitated by the 1996 need for power on WEPCO's systems and the prior warnings WEPCO has had of Commission concerns about these problems, starting before the application was filed.

The need for power in this case is already imminent enough that it will be necessary for WEPCO to find short-term sources to cover the system's interim needs before any plant can be built.

Since LS Power's offer to sell WEPCO electricity from the Whitewater project is set forth as part of its bid in this case, and has been evaluated extensively by WEPCO as well as by other parties and the Commission, it is reasonable to expect LS Power and WEPCO to work out the details of a purchased power contract promptly.

However, the Commission finds that the designation of the Kimberly project as the back-up choice if LS Power cannot proceed provides WEPCO with a significant incentive not to agree to a purchased power contract with LS Power for the Whitewater project. Therefore, in the instant order, the Commission will establish a process to resolve any impasse fairly and promptly. A reasonable period for negotiations to achieve closure would be 40 days from the date of this order. If agreement is not reached, it is the Commission's intention to act promptly thereafter. Within 55 days of the date of this order, LS and WEPCO should provide testimony, if agreement is not reached, to address:

1. Whether LS Power's final offer in the negotiations is at least as advantageous for ratepayers as its bid as evaluated in this stage of the case; and to what extent LS Power's final offer has also addressed the weaknesses of the project described above.

2. Whether WEPCO has negotiated in good faith. WEPCO should be able to provide testimony to address this issue. It is the Commission's intention to disqualify WEPCO from

this competition and possibly from future competitions if it finds that WEPCO has not negotiated in good faith;

3. Whether WEPCO has cured the siting and accounting problems that affect the Kimberly project as evaluated in this stage of the case.

The Commission will then hold a hearing to determine whether to issue an order requiring WEPCO to enter into an agreement based on LS Power's final offer. In its exercise of discretion whether to issue such an order, the Commission will consider whether LS Power's final offer is at least as advantageous to ratepayers as its bid, and the extent to which it has addressed the weaknesses described in the above findings of fact. After such hearing, the Commission may also determine whether to disqualify WEPCO from further consideration in this proceeding and in future competitions.

The eight other bids received in this case were more costly overall, considering modeled and exogenous costs and intangible factors, than the three described above. All of the participants provided valuable comments on the evaluation as it proceeded, and all of them contributed to a robust competition, which is in the interest of Wisconsin ratepayers as well as potential sellers of power. The Commission commends all the bidders in this case for their cooperation with this experimental procedure and the time and thought that went into their offerings and comments.

The one-stage process which has been appropriate up to now for individual electric generation projects was not designed to handle competition. The experimental two-stage process being

used in this case is an attempt, in part, to solve the extraordinary problems that the one-stage process would cause for this agency and for the Department of Natural Resources, due to the necessity to perform multiple environmental analyses for the multiple competing projects that can result from PURPA.

This order is a separate determination of the appropriate system alternative to meet WEPCO's 1996 need for power. It is the culmination of the first stage of the two-stage process. The competing projects received only a general screening for environmental fatal flaws and any major environmental factors that would be apparent from a very preliminary analysis. Apart from the siting problems at Kimberly, no fatal flaws that would preclude licensing or unusual environmental factors were detected in any of the projects. DNR staff cooperated in this preliminary screen, and did not foresee any problems with obtaining necessary DNR permits for any of the projects.

This order does not permit any construction activity which could have an effect on the environment. The project which goes forward to the second stage will receive a full environmental analysis, including an Environmental Impact Statement, before any CPCN will be granted.

This first-stage order is, in itself, presumed not to have a significant effect on the human environment under Sec. PSC 2.90 (4), Wis. Adm. Code. No circumstances have come to the Commission's attention in its preliminary environmental screen in this case that require a full, separate environmental analysis at this stage of the two-stage CPCN process.

ULTIMATE FINDINGS OF FACT

THE COMMISSION FINDS THAT:

1. LS Power's Whitewater Project, WEPCO's Kimberly Project, and EnerTran's West Milwaukee Project are competing alternatives to meet the need for power on the WEPCO system in 1996. No more than one of them is necessary to satisfy the reasonable needs of the public for an adequate supply of electric energy on WEPCO's system in 1996.

2. Any one of the three projects named in paragraph 1, above, if in operation in 1996, would be in substantial compliance with the plan approved by the Commission in its last Advance Plan order, docket 05-EP-6.

3. LS Power's Whitewater Project and EnerTran's West Milwaukee Project have no fatal siting flaws that are apparent to the general environmental overview that was performed on the alternative proposals offered in this case.

4. WEPCO has not shown that it has a viable site for its Kimberly Project. The three sites that WEPCO has offered all have complications which are likely to preclude the project's completion of construction by 1996.

5. Of the eleven sources of supply which are competing in this case to meet WEPCO's 1996 need for power, LS Power's Whitewater Project, as bid and analyzed in this case, is overall the least-cost alternative for ratepayers, considering both dollar costs and intangible factors. As long as the LS Power Whitewater project remains viable, construction of WEPCO's

Kimberly project would add to the cost of service to ratepayers without proportionately increasing the benefits to ratepayers, because the Whitewater project is a lower-cost alternative.

6. The design and general location of LS Power's Whitewater Project are in the public interest when considering alternative sources of supply.

7. WEPCO's proposed accounting treatment for the steam sales from its Kimberly Project is inconsistent with generally accepted principles of utility accounting. It imposes unnecessary risk on ratepayers, including the risk the project will be delayed or not completed.

8. If WEPCO were to cure the defects set forth in paragraphs 4 and 7, above, its Kimberly Project would be overall the second least-cost alternative for ratepayers offered in this case, considering dollar costs and intangible factors.

9. If LS Power's Whitewater Project were not to go forward, or failed to meet the milestones set forth in its bid without good cause, the design and general location of WEPCO's Kimberly Project would be in the public interest when considering alternative sources of supply, if WEPCO had cured the defects set forth in paragraphs 4 and 7, above.

10. EnerTran's West Milwaukee Project is overall the third least-cost alternative for ratepayers offered in this case, considering dollar costs and intangible factors.

11. If neither LS Power's Whitewater Project nor WEPCO's Kimberly Project were to go forward, the design and general

location of EnerTran's West Milwaukee Project would be in the public interest when considering alternative sources of supply.

12. The AES Corporation's Plover Project, Polsky Energy Corporation's Kaukauna and DePere Projects, Destec Energy's Combined Locks Project and WP&L's resale power options are all higher in overall cost to ratepayers than the three projects listed above in paragraph 1, considering dollar costs and intangible factors.

13. The AES Corporation's Plover Project, Polsky Energy Corporation's Kaukauna and DePere Projects, Destec Energy's Combined Locks Project and WP&L's resale power options are not in the public interest at this time, given the available alternative sources of supply to meet the need for power on the WEPCO system in 1996.

14. LS Power's Whitewater Project cannot go forward without a contract between LS Power and WEPCO for the purchase of the electricity to be generated by the project.

15. If LS Power offers WEPCO a contract for the purchase of electricity from the Whitewater project that is at least as favorable to ratepayers as the LS Power offer that the Commission evaluated in this case, the offered contract would constitute WEPCO's long-term, least-cost alternative to meet its system need for power in and beyond 1996.

16. It would not be just or reasonable for WEPCO's Kimberly Project to become the least-cost surviving alternative to meet the 1996 need for power if LS Power's Whitewater Project were to

fail to go forward because WEPCO had refused to enter into a contract that meets the specifications of paragraph 15, above.

17. If LS Power's Whitewater Project fails to go forward, and if WEPCO does not make the showings described in order paragraphs 3, 4 and 5, below, it is reasonable and just that EnerTran's West Milwaukee Project be considered the least-cost alternative to meet WEPCO's 1996 need for power.

18. If neither LS Power's Whitewater Project nor WEPCO's Kimberly Project were to go forward, and if EnerTran were to offer WEPCO a contract for the purchase of electricity from the West Milwaukee project that is at least as favorable to ratepayers as the EnerTran offer that the Commission evaluated in this case, the offered contract would constitute WEPCO's long-term, least-cost alternative to meet its system need for power in and beyond 1996.

19. The implementation of the competitive process used in this case will save ratepayers a very large sum of money, consisting of both the differential between the Kimberly project bid submitted by WEPCO and that submitted by LS Power, and the significant reduction of the costs of the Kimberly Project (as set out in the initial contract between WEPCO and Repap) that took place due to the competition.

20. No sufficient legal or factual reason has been shown for granting the untimely requests of Repap Wisconsin, Inc., and EnerTran Technology Company for hearing at this time.

CONCLUSIONS OF LAW

The Commission concludes that it has the authority under sections 1.11, 19.36, 134.90, 196.02 and 196.03, 196.14, 196.395, 196.49, 196.491, Wis. Stats., 16 U.S.C. §824 and 18 C.F.R. §292 to issue the following order, and that the following order should be issued.

ORDER

THE COMMISSION THEREFORE ORDERS:

1. LS Power is hereby authorized to apply in this docket for a Certificate of Public Convenience and Necessity for its Whitewater Project, as described in the findings of fact.

2. The application of Wisconsin Electric Power Company for a Certificate of Public Convenience and Necessity for its Kimberly Cogeneration Facility is hereby denied, without prejudice to refile in this docket if the LS Power Whitewater Project fails to go forward, providing the other conditions set forth below as to negotiating in good faith and curing the defects related to the siting and accounting treatment of the Kimberly Project are met. This denial is also without prejudice to refile in another docket if the siting and accounting problems are cured and the Kimberly project is selected as a winner in another competition, either for some other utility's need, or for a future need on the WEPCO system.

3. WEPCO's Kimberly Project shall not be considered a viable alternative to meet the need for power at issue in this case unless WEPCO shows within 40 days from the date of this order that it has an available site for the project which can be timely licensed to meet a 1996 in-service date.

4. WEPCO's Kimberly Project shall not be considered a viable alternative to meet the need for power at issue in this case unless WEPCO shows within 40 days from the date of this order that it will account for the steam sales from the Kimberly Project in accordance with good utility accounting practice, as set forth in the findings of fact.

5. WEPCO's Kimberly Project shall not be considered a viable alternative to meet the need for power at issue in this case unless WEPCO shows that it has negotiated in good faith, using its best efforts to attempt to arrive at a purchased power contract with LS Power for electricity from LS Power's Whitewater Project and that its best efforts have been unsuccessful.

6. WEPCO shall proceed forthwith to negotiate a purchased power contract with LS Power for electricity from the Whitewater project, allowing representatives from the Commission staff to monitor the negotiating sessions.

7. Within 40 days from the date of this order, WEPCO shall either show the Commission that it has an executed purchased power contract with LS Power for electricity from the Whitewater project, or, within 55 days from the date of this order, file testimony at the Commission and serve it upon LS Power to show that it negotiated in good faith and used best efforts to achieve

such a contract and that it has cured its siting and accounting problems described in order paragraphs 3 and 4 above. At the same time, LS Power may file testimony as to whether its latest contract offer was consistent with, or more advantageous for ratepayers than, its bid as modeled and analyzed by staff in this case. Either WEPCO or LS Power may provide the Commission with a waiver of its right to hearing in lieu of the testimony described above.

8. Unless both parties waive hearing, if no purchased power contract is reached between LS Power and WEPCO, and testimony as described above is filed, as soon thereafter as feasible, the Commission will hold a hearing to determine whether to order WEPCO to enter into a contract, or to authorize WEPCO to refile its Kimberly Project application for a Certificate of Public Convenience and Necessity, or to authorize EnerTran to proceed with its West Milwaukee Project.

9. Whichever entity (LS Power, WEPCO, or EnerTran) proceeds to procure a CPCN and build its project under this order, permission to do so is contingent on timely achievement of the milestones set forth in its bid, or good cause shown for failure to meet such milestones.

10. Whichever entity (LS Power, WEPCO, EnerTran) proceeds to procure a CPCN and build its project under this order, permission to do so is contingent on that entity's being bound and committed to perform in accordance with its bids as supplemented by any clarifications or interpretations it has filed in its comments in this case.

11. This order constitutes the Commission's selection, among competing alternative sources of supply, of the project that may submit a CPCN application. It does not constitute consideration of the other elements of a CPCN under § 196.491 (3), Wis. Stats.

12. The requests of Repap Wisconsin, Inc. EnerTran Technology Company and the Citizens' Utility Board for hearing are hereby denied.

13. All other motions and requests that may be outstanding are hereby deemed denied.

14. The Commission retains jurisdiction in this matter.

Dated at Madison, Wisconsin, November 4, 1993

By the Commission.

Lynda L. Dorr
Secretary to the Commission

LLD:BEJ:11019301.ERB/ORDER

See attached Notice of Appeal Rights.

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in s. 227.53, Stats. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in s. 227.01(3), Stats., a person aggrieved by the order has the further right to file one petition for rehearing as provided in s. 227.49, Stats. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with s. 227.48(2), Stats., and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Rev. 4/22/91

APPENDIX A

In order to comply with s. 227.47, Stats., the following parties who appeared before the agency are considered parties for purposes of review under s. 227.53, Stats. Parties marked with an asterisk participated in the confidential portions of the process.

Public Service Commission of Wisconsin (Not a party but must be served)
4802 Sheboygan Avenue
P.O. Box 7854
Madison, WI 53707

*WISCONSIN ELECTRIC POWER COMPANY
by
Mr. Larry J. Martin, Attorney
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(PH: 414-277-5000)
(FAX: 414-277-5237)

WISCONSIN GAS COMPANY
by
Mr. Gregory A. Wheeler, Attorney
626 East Wisconsin Avenue
Milwaukee, WI 53202
(PH: 414-291-7000)
(FAX: 414-291-6672)

MR. DAVID GEENEN
MRS. ANNE RETIF-GEENEN
416 North Sidney Street
Kimberly, WI 54136
(PH: 414-788-9615)
(FAX: 414-788-9615)

MRS. HELENE ALTERGOTT, SR.,
HELENE ALTERGOTT FAMILY TRUST AND
ALTERGOTT, INCORPORATED
by
Mr. Robert G. Lorge, Attorney
Lorge & Lorge
P.O. Box 14704
Madison, WI 53714-0704
(PH: 608-244-0608)

CITIZENS' UTILITY BOARD
by
Mr. Thomas Lonsway
16 North Carroll Street, Suite 300
Madison, WI 53703
(PH: 608-251-3322)
(FAX: 608-251-7609)

REPAP WISCONSIN
by
Mr. Gary B. Fenton
Vice President and General Manager
433 North Main Street
Kimberly, WI 54136
(PH: 414-788-3511)
(FAX: 414-788-5368)

Mr. Allen W. Williams, Attorney
Foley and Lardner
777 E. Wisconsin Avenue, Suite 3800
Milwaukee, WI 53202-5367
(PH: 414-271-2400)
(FAX: 414-289-3791)

*POLSKY ENERGY CORPORATION
by
Mr. Michael P. Polsky, President
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(PH: 708-559-9800)
(FAX: 708-559-1805)

Mr. Peter L. Gardon, Attorney
Whyte & Hirschboeck, S.C.
One East Main Street, Suite 300
P.O. Box 2996
Madison, WI 53701-2996
(PH: 608-255-4440)
(FAX: 608-258-7138)

*WISCONSIN POWER AND LIGHT COMPANY
by
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WISCONSIN PUBLIC SERVICE CORPORATION
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(FAX: 608-258-4258)

*ENERTRAN TECHNOLOGY COMPANY
by
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Cullen, Weston, Pines & Bach
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(FAX: 608-251-2883)

Mr. Scott Hempling
417 St. Lawrence Drive
Silver Spring, MD 20901
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(FAX: 301-681-7211)

*AES CORPORATION
by
Mr. Robert E. Shapiro
Chadbourne & Parke
1101 Vermont Avenue N.W., Suite 100
Washington, DC 20005
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(FAX: 202-289-3002)

*DESTEC ENERGY, INC.
by
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2500 CityWest Blvd., Suite 150
Houston, TX 77042
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(FAX: 713-735-4309)

Mr. Clarence J. Lamers
Destec Energy, Inc.
1039 West Mason Street
Green Bay, WI 54303
(PH: 414-497-6004)
(FAX: 414-497-5983)

*LS POWER CORPORATION
by
Mr. William H. Wilson, Jr.
Brown, Olson & Wilson, P.C.
501 South Street
Concord, NH 03304
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(FAX: 603-225-6394)

GENOA GENERATING LIMITED PARTNERSHIP
by
Mr. John P. Leifer, Vice President
P.O. Box 817
La Crosse, WI 54602-0817
(PH: 608-787-1260)
(FAX: 608-787-1462)

EBASCO CONSTRUCTORS, INC.
by
Mr. William P. Dillon
160 Chubb Avenue
Lyndhurst, NJ 07071-3586
(PH: 201-460-1900)
(FAX: 201-460-5929)

LG&E POWER SYSTEMS
by
Mr. Carl E. Podwoski
LG&E Development Corporation
12500 Fair Lakes Circle, Suite 260
Fairfax, VA 22033-3822
(PH: 703-968-7200)
(FAX: 703-968-0145)

ALLIANCE FOR COMPETITIVE ENERGY (ACE)
by
Mr. Philip G. Frank, President
Enertran Technology Company
759 North Milwaukee St., Ste. 410
Milwaukee, WI 53202
(PH: 414-224-1500)
(FAX: 414-224-7777)

WISCONSIN PAPER COUNCIL
by
Mr. Earl Gustafson
111 East Wisconsin Avenue, P.O. Box 718
Neenah, WI 54957-0718
(PH: 414-722-1500)
(FAX: 414-722-7541)

11019301.ERB/ORDER

APPENDIX B

DATE MAILED

MAY 19 1993

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Wisconsin Electric Power Company for Authority to Construct and Place in Operation a Nominal 210 MW Combined-Cycle Cogeneration Facility, With Associated Transmission Facilities, Located in Outagamie County	)	6630-CE-187
Authority to Construct and Place in Operation a Natural Gas Pipeline, Located in Outagamie County, to Serve Wisconsin Electric Power Company's Proposed Kimberly Cogeneration Facility	)	6650-CG-124

NOTICE OF OPPORTUNITY TO FILE ALTERNATIVE PROJECTS

Wisconsin Electric Power Company (WEPCO), as an electric public utility, filed an application with the Public Service Commission on May 22, 1992, to build a 210 megaWatt (MW) combined-cycle cogeneration facility, known as the Kimberly Cogeneration Facility (Kimberly Project), with associated transmission facilities. The generating facility is proposed by WEPCO to be constructed in the north-central area of the Village of Kimberly, adjacent to and west of the Repap Wisconsin, Inc., (Repap) Kimberly Paper Mill. A Notice of Assessment and Assessment of Costs was issued on December 11, 1992.

The plant would supply electrical energy to the WEPCO system and thermal energy in the form of steam to Repap. A short double-circuit 138 kV transmission line, approximately 1,500 feet long, would connect the facility to WEPCO's existing Maes Substation in the Village of Kimberly. Wisconsin Gas Company has filed a companion application to construct and operate a high pressure natural gas main extension to serve the proposed facility.

In the course of reviewing this project, the Commission has become aware of a number of proposed cogeneration projects put forward by independent power producers (IPPs), some of which may be system alternatives to the Kimberly Project. During this same period, the Commission has been examining the implementation of its responsibilities under the federal Public Utility Regulatory Policy Act of 1978, and attempting to devise an appropriate method for including IPP projects in the Wisconsin planning and certification process. These efforts include docket 05-EI-112, a

generic investigation into Barriers to Contracts Between Electric Utilities and Nonutility Generators.

Under §§ 196.491 (2)(i) and (3), Stats, the Commission must consider alternate methods of generating electricity and sources of supply when it determines whether to grant WEPCO a Certificate of Public Convenience and Necessity (CPCN) for the Kimberly Project. Since several IPP projects are potentially able to meet WEPCO's system needs in the same time period as the Kimberly Project, these system alternatives will have to be addressed in the Kimberly Project CPCN proceeding. Serious confusion and lengthy delay are likely to occur in this case due to multiple projects, each with possible alternate sites and each with its own size, timing, cost, operating characteristics, environmental aspects and other elements, unless some method is devised to screen the system alternatives before moving to address the siting concerns.

In docket 05-EI-112, the Commission's staff has developed a proposal for a two-stage CPCN process to be used in the future. The first stage of this process is a screening procedure which includes the use of a system expansion model to determine which of the competing supply proposals should be included in a least-cost system supply plan. Other non-cost factors are also used in the screening.

This proposal is currently being evaluated to determine if the Commission will adopt it for future generation construction, and docket 05-EI-112 is not yet completed. In the interim, however, the Commission has decided to use a modification of the staff's Stage 1 screening procedure from the generic docket to screen the system alternatives for WEPCO's Kimberly Project, so as to simplify the hearing and decision on the final CPCN in this case. The modified procedure will allow IPPs to compete fairly for the authority to build the necessary generating capacity, without requiring the analysis of multiple sites for multiple projects.

While the modified process is shorter than the complete process and will not use all the steps that the complete process would be expected to, the Commission recognizes that WEPCO demonstrated a need for near-term generation in Advance Plan 6, and it would not be practical to wait for the development of the entire two-stage CPCN process in docket 05-EI-112 before processing the Kimberly Project application.

Consequently, the Commission will restrict the consideration of system supply alternatives in this case to those projects

which are chosen to proceed under the modified screening procedure set forth below.

1. All persons proposing projects as alternatives to the Kimberly Project must file a letter of intent with the Commission by May 28, 1993, stating that they intend to participate in the screening process, and will proceed with their projects if they are chosen.

2. On June 21, 1993, WEPCO will file data on its existing system, committed and generic units and forecasted load and DSM, as well as the data on the Kimberly Project, in IRP Workstation format, simultaneously with the Independent Power Producer (IPP) filings. The IPP projects will be described in IRP Workstation format, and accompanied by a description of the IPP offer, including contract terms and conditions and assurances of viability. These filings are described in Attachments A through E to the staff's letter to the parties dated April 30, 1993 in docket 05-EI-112.

3. Staff will screen the projects for viability and environmental fatal flaws, and run the IRP Workstation System Expansion Model using the filed input to establish a least-cost supply plan for WEPCO. If necessary, staff modelers will adjust the filed information to insure uniformity in the modelling. The least-cost supply plan will be circulated to the parties for comment by approximately July 23, 1993. WEPCO and the other parties may rank the projects and give reasons for their choices based on system cost combined with other factors in the proposals. The comments will be due two weeks after the circulation of the model results.

4. By approximately September 1, 1993, the Commission will review the comments and staff's analysis of them and determine which project(s) may continue to pursue a CPCN to meet the system supply need identified in the Kimberly Project application.

THIS PROCESS WILL ESTABLISH THE CHOSEN SUPPLY SYSTEM ALTERNATIVE(S) TO MEET THE NEEDS FOR WHICH THE KIMBERLY PROJECT IS PROPOSED. ONLY THE PROJECT(S) WHICH (ARE)IS CHOSEN BY THIS PROCESS WILL BE ELIGIBLE TO SEEK A CPCN.

Information about the Kimberly Project is filed at the Commission under docket 6630-CE-187. This information includes WEPCO's application for the project, its Engineering Plan, and an Environmental Impact Report. Some of the modelling parameters that staff intends to use in the model runs are set out in Attachment A to this notice.

Information about the WEPCO system can be gleaned from the most recent Advance Plan order, and underlying exhibits in that case (Docket 05-EP-6). Since the filed information was updated during the Advance Plan 6 process, and further modified in the Commission order, care should be taken to use the approved numbers for any analysis. WEPCO's latest proposed system plan modifications are attached to this notice as Appendix B. They have not been reviewed by the Commission or staff at this time.

PLEASE TAKE NOTICE THAT ALL PERSONS WHO INTEND TO OFFER SUPPLY ALTERNATIVES TO WEPCO'S PROPOSED KIMBERLY COGENERATION FACILITY MUST FILE NOTICE OF THAT INTENTION WITH THE COMMISSION BY MAY 28, 1993, IN ORDER TO HAVE THEIR PROJECTS CONSIDERED IN THIS CASE. Alternatives to the Kimberly Project will be required to meet an on-line milestone date of June 1, 1996. The Commission is willing to process a maximum of two project alternatives for any one site.

PLEASE TAKE FURTHER NOTICE that, by 3:00 p.m. on June 21, 1993, all participants who are sponsoring projects in this case must file the appropriate information as set forth in Attachments A through E of the staff's letter to parties of April 30, 1993, in docket 05-EI-112. WEPCO shall file information as set out in Attachments A, B, C.2, D and E. Alternative suppliers shall file information as set out in Attachments B, C.1, D and E. Copies of the filing requirements can be obtained from the Commission on request.

Parties are encouraged to include with their filings any suggestions they may have as to the appropriate way to input their particular proposal into the IRP Workstation model.

Filings should be arranged so that data which are not sensitive are separated from any data for which protective treatment is requested. Any such materials should be accompanied by an explanation of the need for confidentiality and a description of the persons whose receipt of the information would harm the filing party. Confidentiality requests should be minimized.

ALL THE DATA FILED IN THIS STAGE OF THIS CASE WILL BE GIVEN TO THE PARTIES WHOSE PROJECTS ARE ADMITTED THROUGH THE INITIAL SCREENING AND INCLUDED IN THE MODELLING. IF DATA ARE SUBMITTED WHICH ARE LEGITIMATELY PROTECTIBLE FROM THE GENERAL PUBLIC, OR FROM PARTICULAR THIRD-PARTY COMPETITORS, APPROPRIATE IN CAMERA TREATMENT WILL BE USED TO PROTECT THEM.

Due to the compressed time schedule required to meet the apparent need for power and to the fact that all viable parties will have all the filings, the Commission does not see a need for discovery before filing. Staff will consider parties' suggestions which are received before July 9, 1993, about

particular modelling methods for various aspects of the projects other than their own.

If you have further questions about this opportunity, please direct them to Barbara James, Chief Counsel Electric Division, at (608) 267-9203, or Randel Pilo at (608) 267-1474.

Dated at Madison, Wisconsin, May 18, 1993

By the Commission.

Lynda L. Dorr
Secretary to the Commission

LLD:BEJ:05139301.BAP/NOTICE

Evaluation Assumptions and Data To Be Used During EGEAS Modeling If Necessary

Real Discount Rate 5.5%

GDP and CPI price escalation rates per Data Resources national forecast

Coal and Gas price escalation rates per U.S. Department of Energy forecast

Wisconsin Electric Capital Structure:
- Equity 51.3%
- Preferred 3.7%
- LT Debt 43.1%
- ST Debt 1.9%

Capital Costs:
- Equity 12.30%
- Preferred, LT Debt, & ST Debt per financial markets on date of filing

Forecast Demand:
The latest WE estimate of base peak demand for 1992 will be used and increased according to the approved Advance Plan 6 growth rates. These growth rates are 2.1% annually 1991 to 2000 and 1.70% annually for the complete period 1991 to 2010. The forecast will be adjusted to reflect Advance Plan 6 estimated DSM for WE.

Known fuel escalation rates will be used for all current fuel contracts.

Other Assumptions:
System modelling assumptions consistent with WE's latest projections will also be used. These include unit ratings, variable O&M costs, outage rates, and heat rates.

Planning reserve margin: 18%

Externality Values Per Ton:
- SO_2 $250
- CO_2 $15

ATTACHMENT A

ATTACHMENT B

6630-CE-

Wisconsin Electric POWER COMPANY

RECEIVED APR 28 ELECTRIC DIVISION

231 W Michigan, PO Box 2046, Milwaukee, WI 53201-2046

(414) 221-2345

April 27, 1993

Ms. Barbara E. James
Chief Counsel, Electric Division
Public Service Commission of Wisconsin
Post Office Box 7854
Madison, WI 53707 - 7854

Dear Ms. James,

Wisconsin Electric Power Company
Proposal for an Intermediate Load Range Plant in 1998

Your letter of April 14, 1993, raised several questions on behalf of the PSCW's Electric Division Core Management Team concerning Wisconsin Electric's plan to pursue construction of an Intermediate Load Range plant in 1998. We appreciate the preview of Staff interest in the matter. Our responses are provided below:

1. **What is Wisconsin Electric's current plan? We would like to see a full layout of your twenty-year supply plan both before and after the ILR proposal is included. The circle and polygon format used in AP-6 might be useful**

A copy of Wisconsin Electric's *3/93 Interim Supply Plan* (in "bubble diagram" format) is attached for your reference.

2. **What changes in planning parameters are incorporated into the new plan? If forecast changes are involved, what is the date of the new forecast, and how does it vary from the approved AP-6 forecast? What are the causes of the variations? Have any other planning parameters changed?**

The forecast used in the development of this "interim" plan was developed in the fall of 1992. The effort that resulted in this forecast was not a "full blown" Advance Plan type effort in that it was not a comprehensive end-use analysis for a twenty-year period. Our activity focused on an analysis of trends in energy use by broad economic sectors within the rate classes using historical data through mid-1992, and, based upon that analysis, projected that those trends would continue into the near future (1993 to 1997 period). As such, the forecast reflected the observed use per customer growth in both the residential and commercial sectors and the continued strength of the industrial sector. The forecast also reflects the fact that 1991 and 1992 weather normalized peaks were 60 MW and 81 MW above the Advance Plan 6 Updated (AP6U) Net forecast, respectively. [Please refer to Table GF03 on page D1.F-6U of Exhibit 40 (DAL-2), Docket 05-EP-6.]

In 1993, the forecast (before including the needs of WPPI) is 101 MW higher than the filed AP6U Net forecast. By the year 1997, it is 202 MW higher. Extending the short term trends to the year 2000 produces a forecast that is 348 MW higher than

that filed in AP6U. The resultant 1993 to 2000 period net forecasted growth rate is 2.1% versus about 1.5% in the AP6U.

In Mr. Landgren's letter of January 4, 1993, Wisconsin Electric's share of the approved statewide AP-6 forecast was provided. Wisconsin Electric's share of the approved AP-6 forecast requires downward adjustments in 1993, 1997, and 2000 of 27 MW, 114 MW, and 186 MW respectively. Thus, in 1993 the current net forecast is 128 MW higher than the estimated share of the approved statewide forecast. In 1997, the current net forecast is 316 MW higher, and by the year 2000, it is 534 MW higher. The current net forecasted growth rate for the 1993 to 2000 period, as noted above, is 2.1% versus a growth rate of 1.0% when using the Wisconsin Electric share of the AP-6 ordered forecast.

3. **How have the changes in forecast affected the demand side of Wisconsin Electric's new plan? Is the demand side of the new plan different from the approved AP-6 plan? What causes the differences?**

A complete reassessment of demand-side options was not undertaken in developing the plan used in this reevaluation of capacity need. The change in load forecast did not directly affect the amount of demand-side resources assumed in the integrated resource plan. A complete analysis of demand-side options will be done as part of WE's AP7 filing.

The demand-side analysis for this reevaluation looked at conservation and load management separately. For the impacts of conservation programs, it was assumed that the annual historical level of achievement in terms of MWs since 1988 (about 50 MW per year) would continue into the future indefinitely. By the year 2000 this implies approximately 175 MW more in load reduction from conservation programs than that included in WE's updated plan filed in AP6.

For load management, individual options were reviewed. This resulted in approximately 75 MW more of load management peak reduction being included in the plan by the year 2000 than was included in WE's updated AP6 Plan. This comes primarily from the inclusion of residential and commercial air conditioning load control, and energy cooperatives (a form of group curtailment for commercial customers), but is reduced by the impact of phasing out the residential water heater control program.

The total of conservation and load management in this new plan is 250 MW higher than that included in WE's updated plan in AP6 for the year 2000. WE's allocated share of the MW added to utility plans by the Commission in AP6 was 135 MW in the year 2000. Thus, this plan includes 115 MW more of demand-side resources in the year 2000 than the Commission ordered in AP6.

4. **How has the new plan been coordinated with the plans of the other Wisconsin utilities? How does the allocation of AP-6-approved capacity that was attached to Mr. Landgren's letter of January 4, 1993, change with the new ILR proposal? Do all the utilities agree on the new apportionment?**

Wisconsin Electric coordinated the revised plan through the Wisconsin Integrated Planning Committee (WIPC) in February 1993. Each of the WIPC members were

contacted and were asked whether they had any substantial differences from AP6 in the early years which would lead to competing applications prior to the AP7 order. None of the other utilities in the state responded that they had any such changes in the early years. A more formal coordination of statewide capacity needs will be performed later this year as part of the AP7 process.

5. **How has purchased power been factored into the plan, both power from IPPs and power purchased from other utilities?**

Power purchases offers from IPPs and from other utilities have been reviewed and thus far have been found to be more costly than the addition of an ILR plant in 1998. The Company will continue to assess other resource options including DSM, renewable energy sources, peaking capacity, cogeneration opportunities, and power purchases from IPPs and other utilities. The need for the 1998 ILR plant will be examined in AP7 studies. Results of these analyses will be available in the fall of 1993 prior to the time that a CPCN application for the 1998 ILR plant would need to be made.

The problem that immediately comes up is whether the new ILR proposal is "in substantial compliance" with the approved AP-6 integrated plan. ...

Wisconsin Electric believes that an ILR plant installed as early as 1998 is in compliance with the approved AP6 integrated plan. The 200 MW ILR plant should be considered as the AP6-approved 200 MW need in 1999 advanced by one year. This is consistent with the position of the Commissioners as stated in the AP6 open meetings regarding the flexibility to consider new units within at least a plus or minus two-year range compared to an approved plan.

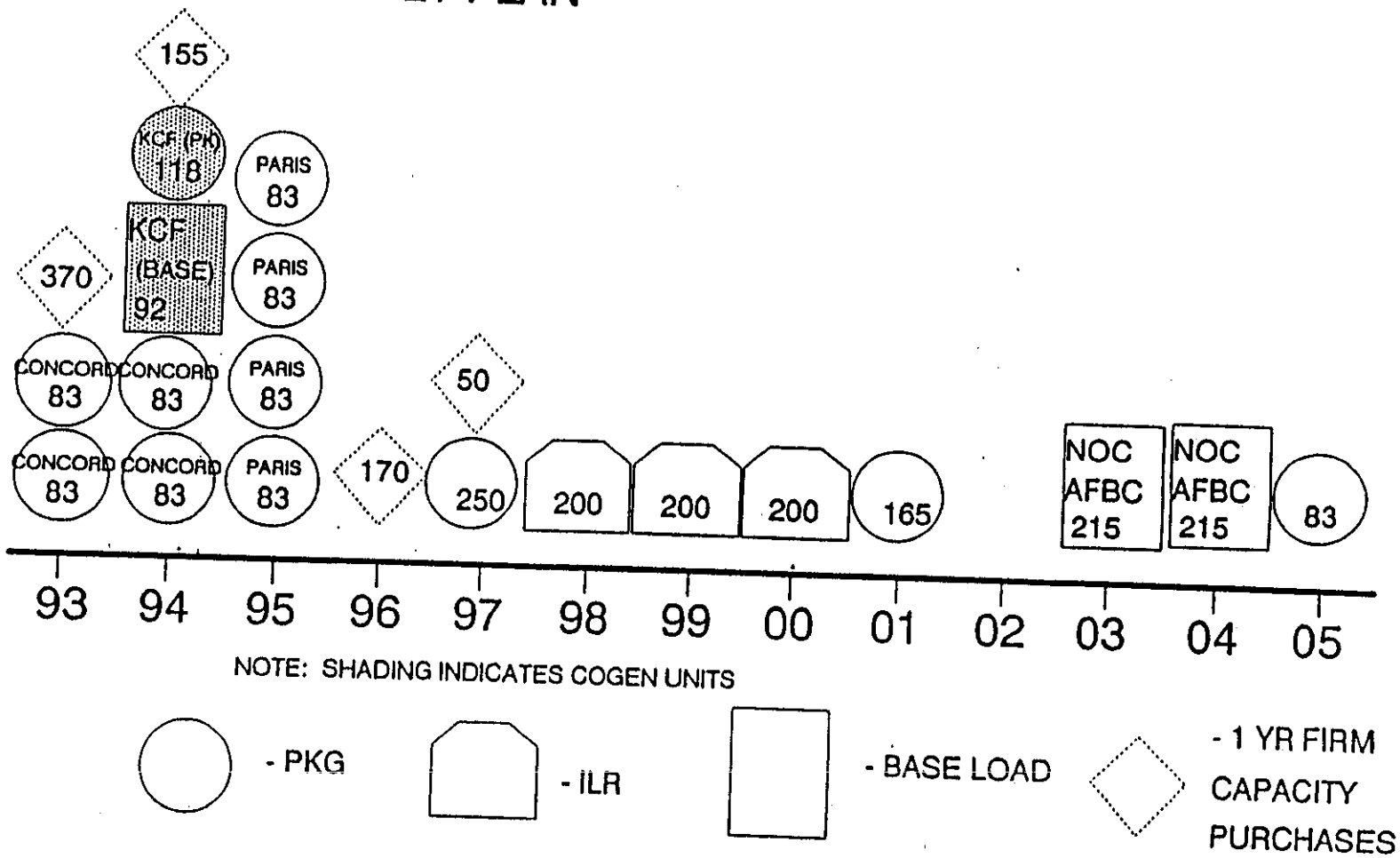
Another immediate concern is how the changes in Wisconsin Electric's plans have been coordinated with the plans of other utilities. ...

An informal check of capacity plans has been performed. (See the response to Question 4.) Capacity requirements for the years 1998 and beyond will be revisited in Advance Plan 7.

The third area of concern is your intention to proceed with public meetings in your four preferred site areas. ... Staff would want to attend any such meetings, and to consult with you before any steps are taken to involve the public in this project.

We appreciate the need to approach the public with sensitivity and the need to involve staff in our public participation activity. We will coordinate with Ms. Nancy McGee in setting dates for the public information meetings so that PSCW and WDNR staff can attend. In addition, PSCW staff will be supplying an insert for inclusion in our public meeting announcements and will make a presentation at the meetings.

WISCONSIN ELECTRIC CAPACITY EXPANSION PLAN 1993-2005
3/93 INTERIM SUPPLY PLAN *



GENERATION PLANNING
APRIL 26, 1993
G:\EC\GP\XP\9D0426

* Interim plan based on interim load forecast and before the inclusion of additional DSM, renewables, purchase power, IPP's, and other options into the integrated plan. Also, before statewide coordination.

If you have any further questions concerning our plans for an ILR plant in 1998, please contact Mr. Jim Keller at (414) 221-2533 or Mr. Dale Landgren at (414) 221-2521.

Very truly yours,

David K. Porter
Senior Vice President

Attachment

cc: Commissioners' Office
Mr. J. R. Keller
Mr. D. A. Landgren
Susan Stratton, PSCW
Nancy McGee, PSCW
Steven Ugoretz, WDNR

DATE MAILED

DEC 28 1993

RECEIVED
WHYTE HIRSCHBOECK DUDEK S.C.
MADISON, WI

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

DEC 29 1993

Investigation on the Commission's Own Motion Into Barriers to Contracts Between Electric Utilities and Nonutility Cogenerators and Certain Related Policy Issues	)))))	05-EI-112

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND AND SUMMARY OF PROCEEDINGS

On September 23, 1992 the Public Service Commission of Wisconsin (Commission) issued a notice that it would consider several significant non-utility cogeneration issues in Wisconsin. A formal complaint from Destec Energy Inc., and two informal complaints from EnerTran Technology Company and LS Power Corporation brought to the Commission's attention problems that were arising in negotiations between utilities and non-utility generators. The Commission's notice stated that it was opening a generic docket to investigate the matter, as it related to the practices of Wisconsin Electric Power Company, Wisconsin Public Service Corporation, Wisconsin Power and Light Company, Madison Gas and Electric Company, Northern States Power Company and Superior Water, Light and Power Company.[1] This order resolves the complaints filed, both formal and informal.

The Commission recognized that holding a separate hearing on each complaint would be complicated and time consuming; each

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[1] Unless otherwise specified, use of the term "utility" in this order refers to these utilities.

hearing would be likely to attract a large number of interested developers, utilities and public intervenors because of the precedential nature of a Commission decision. The complaints contained several common issues and represented that resolution of certain issues would resolve the disputes. The Commission therefore decided to review these complaints by consolidating major, common issues. The Commission chose to schedule a hearing, at which it would sit, on some issues and to expedite the treatment of other issues that did not require a factual record by ordering briefs without hearing.

Commission staff, the utilities, several non-utility developers, the Citizens' Utility Board and other intervenors[2] filed briefs in the fall of 1992 on four issues:

1. Does the Public Utility Regulatory Policies Act[3] (PURPA) give a Qualifying Facility (QF) the right to the host utility's avoided cost calculated as of the time that the QF establishes a legally enforceable obligation?

2. What are the attributes of a legally enforceable obligation?

3. Under what circumstances, if any, and under what authority can the Commission order a utility to enter into a contract with a QF?

4. Does PURPA require the Commission to compel a utility to accept a QF offer that is less than the utility's avoided cost? If so, must the utility take the terms and conditions of the offer, or just the cost provisions? Do the mandatory cost provisions include payment streams? Do they include long-term fixed payments?

---

[2] A list of parties in this docket is attached as Appendix A.

[3] Section 210 of the Public Utility Regulatory Policies Act of 1978, 16 USC 824a-3; 18 CFR Part 292.

The Commission considered these issues at its open meeting on December 3, 1992. It made final decisions on some of the issues that were briefed. On issues where testimony at the upcoming hearings could be helpful, the Commission made only tentative decisions on the basis of the briefs. The Commission then held hearings on December 14 to 18, 1992 on three issues:

1. Should the peaker method be applied so as to produce a single marginal energy cost regardless of the size of the project, or should the marginal energy costs be adjusted depending on the size of the project?

2. Can utilities be required to lock in marginal energy cost prices for long periods of time, such as a twenty-year contract? Is a long lock-in period a necessity for viable non-utility cogeneration? What is an appropriate lock-in period?

3. For purposes of calculating avoided cost, setting buyback rates and getting regulatory attention, what is the appropriate way to establish priority among projects which are competing to provide the same capacity needs?[4]

The parties and Commission staff filed briefs on these issues in January and February, 1993. On March 18 and 25, 1993, the Commission met in open meeting to render a decision. Part of its decision involved a conclusion that further hearings would be needed on Issue 3, to elicit additional testimony in the record concerning Commission staff's proposed queuing method.

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4 The Notice of Hearing listed a fourth issue that the Commission would consider at hearing, if it determined that PURPA does not give a QF the right to an avoided cost calculation at the time the QF first establishes a legally enforceable obligation (the first question to be briefed). Since the Commission determined otherwise at its December 3, 1992 open meeting, this fourth issue became moot.

The Commission held these further hearings about Issue 3 on June 28 and 29, 1993. After considering a third round of briefs, the Commission met in open meeting on September 28, October 28 and November 4, 1993 to decide this final issue.

Cogeneration, PURPA and non-utility generation have been subjects of several Commission orders. In 1983 the Commission issued an order in Docket 05-EI-11, 12 and 13. That order sets out Commission policies to encourage cogeneration and small power production. These policies included the establishment of buyback tariffs for utility purchases of electric power from non-utility generators. In Docket 05-EI-11, 12 and 13 the Commission also approved net energy billing for small customer-owned generators (i.e., allowing the electric meter to run backwards when a customer is generating electricity), discussed methods of calculating utility avoided costs and established procedural guidelines for utilities to follow when negotiating rates for the purchase of power from customer-owned generating systems.

In Advance Plan 5 the Commission declared that major investor-owned utilities should calculate avoided costs on a utility-specific basis, but should consider the needs and plans of interconnected utilities. Utilities were also required to share avoided cost information and customer-owned generation proposals among members of their planning group, in order to match these proposals with capacity-deficient utilities. Docket 05-EP-5, pages 38 to 40, 86 and 87. In Advance Plan 6, the Commission set forth basic principles for establishing a level playing field, on which utilities and non-utility generators

could compete fairly. Docket 05-EP-6, Appendix 4C. Appendix 4D of Advance Plan 6 also lists a number of matters that should be negotiated as part of cogeneration contracts.

ISSUES SET FOR BRIEFING

Issue 1. Does PURPA give a QF the right to the host utility's avoided cost calculated as of the time that the QF establishes a legally enforceable obligation?

In their briefs, all parties agreed that PURPA does give a QF this right. The Commission also agrees, based on Federal Energy Regulatory Commission (FERC) regulations set forth in 18 CFR 292.304 (d) (2). See Snow Mountain Pine Co. v. Maudlin, 734 P.2d 1366, 1371 (Or. App. 1987), where the Oregon Court concluded, "The rate to be paid by a utility for power is to be based on the utility's actual 'avoided costs' vis-a-vis the particular qualifying facility on the date the obligation is incurred, projected to apply over the life of the obligation."

The answer to Briefing Issue 1 highlights the need to decide what constitutes a "legally enforceable obligation," which is the second issue briefed by the parties.

Issue 2. What are the attributes of a legally enforceable obligation?

The attributes of a legally enforceable obligation (LEO) depend on the type of project a QF is offering. If the project requires a certificate of public convenience and necessity (CPCN) under s. 196.491, Stats., to create a LEO it must successfully pass through stage one of the two-stage process described below.

If the project does not require a CPCN, general principles will define whether a LEO exists. Specific characteristics cannot be set forth exhaustively, because of the infinite variability of QF projects.

A utility's obligation to purchase power is not governed by common law concepts of contract law; it is created by statutes and administrative regulations. Since a LEO is a creature of federal law under PURPA, its existence does not depend on state rules generally applicable to contracts. This is true regardless of whether the QF developer is proposing a project that would require a CPCN. It is also true that federal law uses the term "legally enforceable obligation" rather than "contract for purchased power" in order to prevent a utility from circumventing the requirement that it provide capacity credit for an eligible QF merely by refusing to enter into a contract.

The remaining discussion of Briefing Issue 2 concerns QF projects that do not need CPCNs. For such projects, the following two principles define the attributes of a LEO:

1. A LEO is a QF's offer to sell electric power to a utility. It does not determine the parameters of the final agreement that is struck between the parties, nor does it necessarily establish the reasonableness of the agreement. A LEO establishes the time for an avoided cost calculation. It does not automatically lock in other terms or conditions of a final agreement between a QF and a utility.

2. A QF developer should be able to obtain a utility's avoided cost based on the conditions in effect when it establishes

a LEO. The Commission is charged with the responsibility of determining a utility's avoided cost, if the parties cannot agree.

A LEO is created if a QF reaches agreement with a utility for the sale of electricity. Otherwise, a QF can create a LEO for a project that does not need a CPCN by demonstrating the existence of certain basic elements. These elements are:

1. The QF must have done everything in its power to establish with the utility a contract that does the following:

a. Describes the sale of a specific amount of electricity over a specific time span. The following examples are provided to illustrate what types of specific information would be useful in determining the reasonableness of the QF's attempt to establish a contract:

i. The proposed operations of the facility, as well as capacity.

ii. The firmness of the commitment, as shown by guarantees of performance and various risk-reduction assurances.

iii. The status of steam host agreements, fuel purchase agreements, proof of financial viability, and necessary permits.

b. Includes a price that is not unreasonable on its face, and includes other terms and conditions that comply with Commission policy and PURPA. Although the price in the LEO does not determine final pricing, requiring a price offer that is not unreasonable on its face is designed to show that the QF has tried everything reasonable to reach a contract.

The Commission reserves judgment as to what would be a useful benchmark of reasonableness, such as a price offer that is not more than the utility's marginal cost (as calculated in the most recent Advance Plan or rate case order), or an offer that is within 10 percent of the utility's calculation of avoided cost.

c. Describes a particular project that is eligible for QF certification from FERC, with an advanced project design and a proposal for an agreement. The QF must show it has received a QF certificate, that it meets the requirements for QF certification or that it has applied for a certificate. The nature of the project will determine how much and what type of particulars are needed about the project.

2. The QF must have made a good faith attempt to resolve as many aspects of the transaction as it could with the utility. The number of meetings between the QF and the utility, the time to respond to offers and the similarity of terms and conditions to those used successfully elsewhere may also be relevant to the question of good faith.

3. The QF must have given the utility a reasonable amount of time to review its proposal.

Other information may be used to show that a LEO exists for a project that does not require a CPCN, even if one or more of these required elements is absent. The Commission will use the best indicators available when determining if a LEO has been created. If the nature of the project precludes the use of some of the required elements, or if different pertinent information is likely

to be more useful, the Commission may adopt a different means of measuring whether a LEO exists for the particular project under review.

Conversely, the Commission also finds that the following are not required elements of a LEO, and a QF that needs no CPCN is not required to provide them to the utility: plans for interconnections and necessary electrical system modifications; proof that the project is at or below avoided cost; proof that the utility would be imprudent not to enter into the contract; a contract offer that is complete in all respects; or an executed purchase power contract.

If a QF developer requests the Commission to determine whether it has met the LEO standard, the developer must include a series of milestone dates with its request. These dates must specify when the developer expects to achieve each of the following elements, as applicable, to show continued progress towards a completed project:

1. Receiving all necessary permits.
2. Signing a steam sales contract.
3. Signing a fuel purchase contract.
4. Acquiring financing or proof of financial viability.
5. Acquiring the site.
6. Completing project installation.
7. Commencing operation.

Unexcused failure to meet these milestones establishes that the project is no longer active or viable, which invalidates the QF's LEO. The milestones may be stated in number of days from

purchased power contract execution, or from some other landmark event.

Issue 3. Under what circumstances, if any, and under what authority can the Commission order a utility to enter into a contract with a QF?

The primary agents for implementing PURPA are the parties themselves. The Commission can facilitate the negotiations, resolve disputes, and implement its CPCN responsibilities in conjunction with the federal law, but PURPA provides the QF with access to federal court to enforce its rights. If necessary, the Commission will determine whether a LEO has been created and determine the utility's avoided cost.

The Commission's enabling statutes provide its fundamental source of authority. Even the responsibilities imposed upon the Commission by PURPA relate to its underlying state authority. FERC v. Mississippi, 456 U.S. 742, 759 to 761, 72 L. Ed. 2d 532, 546 to 548 (1982). The purpose of the public utility law, ch. 196, Stats., is to protect the ratepaying public and to preserve the public interest. Sections 196.03 and 196.37, Stats., require utilities to furnish reasonable and adequate service, at reasonable rates. A utility that refuses to contract at or below avoided cost with a QF that has created a LEO would be compromising one or both of these responsibilities.

If a utility refuses an offer from a QF whose project does not need a CPCN, and the ratepayers and the public interest are likely to be harmed by the refusal, the Commission has sufficient authority to order the utility to enter into a contract.

Voluntary agreement between the parties, however, is preferable to forced Commission intervention. The Commission also has a number of less drastic measures available to induce a utility to enter into a contract that serves the public interest. In order for the Commission to consider granting a petition to compel a utility to sign a contract, it would be necessary for the QF to show all of the following:

1. The ratepayers of Wisconsin and the public interest would be materially harmed by the utility's failure to sign.

2. It would be just and reasonable to remedy the situation by compelling a contract, rather than less intrusive measures.

3. The QF's federal remedies are inadequate to protect the public interest.

A QF developer whose project requires a CPCN can request assistance from the Commission. If the project is selected as the winning bid in the Two-Stage CPCN competitive bidding process, but it is unable to negotiate a contract with the utility, ordering a utility to contract with the QF is one of the remedies available to the Commission. The Commission may also consider monitoring the progress of the bargaining, holding a hearing to determine if bargaining has been in good faith, or otherwise facilitating the process.

Issue 4. Does PURPA require the Commission to compel a utility to accept a QF offer that is less than the utility's avoided cost? If so, must the utility take the terms and conditions of the offer, or just the cost provisions? Do the mandatory cost provisions include payment streams? Do they include long-term fixed payments?

PURPA does not require the Commission to compel a utility to accept such an offer, nor do FERC regulations or relevant case law. Since the answer to the first question of Briefing Issue 4 is in the negative, the remaining questions become moot.

ISSUES SET FOR HEARING

Issue 1. Should the peaker method be applied so as to produce a single marginal energy cost regardless of the size of the project, or should the marginal energy costs be adjusted depending on the size of the project?

The "peaker method" is a means of calculating utility avoided costs, which the Commission approved in Advance Plan 6. Docket 05-EP-6, pages 43 to 45. Hearing Issue 1 addresses some of the details of its application. The discussion that follows applies to QF projects that do not need a CPCN and have not submitted bids in the Two-Stage CPCN competitive bidding process.

The size of an independent power producer (IPP) project affects the level of a utility's marginal energy costs, which should be adjusted depending on project size. To do so, two sets of computations by a production cost model are necessary. The first computation would use the base expansion plan most recently approved in an Advance Plan, modified to account for actual, major changes that have occurred since issuance of the Advance Plan order. The second computation would use a decrement equal to the

size of the IPP project. Assumptions used in each run, on inflation and other variables, should be consistent for utility and IPP projects.

Avoided capacity costs should be based on the capital cost of a peaking unit, most likely a combustion turbine, for which the utility has a CPCN application pending, if available. If necessary, a representative combustion turbine can be used. Operation and maintenance costs that do not vary with operation ("fixed O&M") should be included as avoided capacity costs.

When the production cost model is run, readily quantifiable adjustments to marginal costs (such as minimum loading requirements) should be factored into the marginal energy cost calculations. Other adjustments, to move from marginal costs to avoided costs, should be negotiated if a substantial basis in fact exists for the adjustments. Utilities should release generic marginal cost figures annually, to assist IPPs in developing projects. The utilities can work with Commission staff in determining what information may be confidential and need not be released.

Northern States Power Company (NSP) proposed the use of a proxy plant method for IPP projects smaller than 12 MW, in lieu of calculating avoided costs in the manner described above. This method declares a plant in the NSP system, or to be added to the NSP system, as the proxy whose costs will be "avoided" by an IPP project. The Commission finds this method to be a reasonable alternative for NSP, in order to unify NSP's approach to avoided costs throughout its multi-state jurisdiction.

Issue 2: Can utilities be required to lock in marginal energy cost prices for long periods of time, such as a twenty-year contract? Is a long lock-in period a necessity for viable non-utility cogeneration? What is an appropriate lock-in period?

Fixing (locking in) energy payments or prices at a given level, or to a given index, over a certain period affects the cost of an IPP contract proposal to ratepayers and the level of risk for shareholders. For an IPP bid that is entered in the Two-Stage CPCN competitive bidding process, the extent to which energy costs are locked in will be evaluated for total cost and risk. The Commission may require a utility to lock in marginal energy costs in accordance with an IPP bid that wins the Two-Stage CPCN competition, just as it may order a utility to contract with the winning bidder.

For an IPP project that does not require a CPCN, the extent to which marginal energy costs are locked in is an appropriate subject for negotiation between the IPP and a utility. The remainder of this discussion about Hearing Issue 2 applies to IPP projects that do not require CPCNs.

Locking in some energy payments is acceptable, if the total payment stream to the IPP (payments per year) is similar to the stream of payments to a utility for its own project. A measure of whether locking in energy payments would be appropriate is ratepayer indifference--i.e. the risk of forecast error is offset by other contract terms. For example, the utility's ability to dispatch an IPP project lowers the forecasting risk associated with locked-in energy payments. A contract term of 15 to 20 years

is reasonable, although a shorter period may also be reasonable depending on all the contract terms.

Using a fuel index, such as changes in the utility's overall gas price, would be appropriate for dispatchable projects, if the IPP project is gas-fired. For nondispatchable projects the system marginal energy cost can be used, with a price cap or reopener clause to control increases. Indexing to a tariffed rate may be another appropriate method.

The Commission finds that utilities should negotiate levelized payments to QFs as long as ratepayers are not exposed to uncompensated, higher incremental risks or costs than those of a utility project. The risk to shareholders associated with entering into contracts with IPPs is a reasonable item to consider when determining a utility's allowable rate of return, as is any reduction in risk associated with a utility's not being obliged to build its own projects.

Issue 3: For purposes of calculating avoided cost, setting buyback rates and getting regulatory attention, what is the appropriate way to establish priority among projects which are competing to provide the same capacity needs?

The third hearing issue was how to choose among competing supply-side resources to meet Wisconsin's electric capacity needs. This was called the queuing issue. Utilities in Wisconsin have not built major generating plants other than peaking plants since the Edgewater 5 license was issued in 1983. Consequently, the Commission has never dealt with multiple system alternatives

offered by independent developers in the licensing process before and has no existing process for choosing among them.

Several queuing approaches were proposed. One approach was to establish the queue based on the dates a developer established a LEO. There was support for competitive negotiations with varying levels of Commission involvement. Several utilities proposed bidding processes conducted by the host utility, in some cases using an independent evaluator or review panel for some portion of the process. Staff proposed a bidding process that would be conducted by staff, with the results to be presented to the Commission for final decision.

Wisconsin is entering a new phase in the market for generating electricity. Instead of a monopoly market in which a utility is the sole provider, IPPs are competing for the right to generate electricity in Wisconsin, which they will sell at wholesale to the utility. Under PURPA, qualifying facilities have a right to sell power to a utility at or below its avoided cost. QFs also have a right to a Commission determination of a utility's avoided cost.[5] The purpose of these avoided cost provisions is to ensure that the special treatment federal law has granted to QFs does not harm ratepayers by costing them more than they otherwise would be charged for electricity.

These developments in the electric generating market require the Commission to establish a method of selecting among the

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[5] See 16 USC 824a-3 (b) and 18 CFR 292.304 (a) (ii).

competitors. Other states, addressing the same problem, have chosen various solutions. They include allowing the utility to run its own bidding system and select a provider, the creation of standard contracts that utilities must use when dealing with IPPs, and legislatively-imposed declarations of price (utility avoided cost) at which utilities must purchase from IPPs. None of these methods, however, has been particularly successful, nor do they satisfy the statutory duty of this Commission to protect the general public interest in acquiring the least-cost project, considering engineering, economic, health, safety, reliability, efficiency and environmental factors and alternative sources of supply.

In Wisconsin, our integrated planning and CPCN processes are designed to perform this statutory function. Both ss. 1.11 and 196.491 (3), Stats., require the Commission to consider alternative sources of supply when determining whether to issue a CPCN, approving the construction of an electric generating plant. Thus, it is necessary to create a method of choosing among competing applicants that conforms to both federal and state law. Part of this method's function must be to determine which of the competitors would increase a utility's electric system costs the least.

It is reasonable to use a bidding mechanism to solicit and evaluate competitive applications. Such a mechanism, however, requires that bidders receive adequate information on which to prepare a bid and that the bids submitted be fairly and impartially evaluated. Bidders must receive sufficient

information to design offers that will minimize the utility's system costs in advance of submitting their bids.

If the bidding process is administered by a utility that is simultaneously a competitor, it is crucial that all of the information used in the evaluation be made available to all the bidders. This would include the bids and supplemental information provided by all the competitors, as well as the host utility's system information and evaluation criteria and assumptions. Allowing the full exchange of information provides several advantages. First, each bidder can conduct its own evaluation of all other bids to judge the appropriateness of the utility's evaluations and detect any slanting of the analysis to favor the utility's own project. Second, review by each competitor of the modeling and analysis of each bid will prevent errors. Third, the value of comments from each bidder to be considered by the host utility and the Commission will be greatly enhanced.

Proper evaluation of these bids, to determine the costs they would impose on a utility's electric system, requires state-of-the-art modeling of the electric system. Dynamic integrated resource planning computer models are now available to compare system effects of different options, based on their operations, directly and simultaneously. This allows the analyst to quantify many of the variables inherent in system costs that previously could only be roughly estimated. This kind of system modeling is an important element in bid evaluation.

Evaluations must also be performed impartially. A utility that is competing to build a generating plant cannot simultaneously act as the umpire of the competition; a fully informed neutral analyst is necessary to avoid self dealing. The Commission is logically that neutral decision-maker and, under s. 196.491 (3), Stats., it must be so. It is reasonable, however, for the utility to perform its own evaluation of bids and propose a preferred plan to the Commission. The Commission anticipates that competitors may also evaluate the bids and propose their preferred plan to the Commission through the commenting process. After reviewing competitors' evaluations of bids and conducting its own evaluation, the Commission will then decide which system alternative (or alternatives) is in the public interest and may submit a CPCN application.

First choosing which alternative source of supply may submit a CPCN application, then evaluating the winning alternative's CPCN application for compliance with all the other requirements of s. 196.491 (3), Stats., is a two-stage process that conforms to the Commission's statutory obligations and authority. It is also fully consonant with PURPA, although it is not a common approach to avoided cost calculations. The winner of the competition at Stage One is, by definition, the lowest overall cost alternative the utility has available, considering engineering, economic, health, safety, reliability, efficiency and environmental factors. Under the Commission's integrated planning and CPCN principles, the least-cost overall choice is the option the utility will be authorized to pursue.

Consequently, the overall costs of the winning bidder are the utility's avoided cost.

A Two-Stage CPCN competitive bidding process is also essential to control the Commission's own docket and manage its workload. Without some method of weeding out what could be hundreds of competing providers, the Commission would be forced to perform complete analysis, including full environmental analysis, of each competitor's CPCN application. This would be impossible, given the Commission's resources. If the Commission was required to perform such an analysis on all applications, it could also harm the reliability of the electric system as needed capacity could not be approved and constructed in a timely fashion. It would also be contrary to the public interest, as it would unnecessarily arouse the public in each location where a competitor has proposed a site, even though all but one of the sites will be rejected.

The process selected by the Commission, as explained step-by-step in Appendix B, combines features of several of the proposals. Fundamentally, the Commission has selected a utility-run competitive bidding process in which the Commission makes the final resource selection. This Commission decision would be incorporated as part of a process required by statute for Commission review of construction of electric generation facilities over 12 megawatts (MW).

Construction of new electric generation larger than 12 MW requires a CPCN from the Commission under s. 196.491(3), Stats. Previously, Commission review of CPCN applications involved only

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one project developer, usually a regulated utility, and was a one-stage review process. That is, a utility would propose a project in its application and the Commission would accept, reject or modify this proposal. The Commission's new process, necessitated by the arrival of competition in Wisconsin's electric generation market, creates an additional stage in the CPCN process to select the best of the competing projects. In this new Two-Stage CPCN process, only the successful competitors from Stage One would be allowed to move to Stage Two. Stage Two is identical to the CPCN process as it has existed; Stage One is the new queuing process as described in Appendix B.

The Two-Stage CPCN process relies heavily on the Advance Plan which precedes it. The Advance Plan establishes statewide electric capacity needs in a Commission-approved Integrated Resource Plan. It is the capacity need established in the Advance Plan that developers are competing to supply in the Two-Stage CPCN process.

The Advance Plan establishes policy choices about supply technologies (e.g., no new nuclear projects) and general parameters for use in the Two-Stage CPCN process. Examples of parameters that are set in the Advance Plan are demand-side management (DSM) levels, escalation rates, inflation rates, treatment of externalized costs and fuel price estimates. The Advance Plan is also the forum for policy decisions such as appropriate pricing structure for long-term contracts, treatment of risk associated with long-term purchases, or standards for other contract provisions.

In the Two-Stage CPCN process, the Advance Plan results and assumptions are used in the development of the host utility's system expansion plan. The utility must identify any changes it is proposing from the parameters set in the most recently approved Advance Plan so other parties to the CPCN process may comment on the reasonableness of such changes. These assumptions are vital to the bidding process because the system expansion computer model, currently IRP Workstation, provides the primary economic evaluation of all bids. Explicit use of such a dynamic modeling tool provides a uniform basis for comparison between proposals. It also captures the system impacts of each project proposal's operation and dispatch. These important system effects are ignored in the simplistic "block of capacity" approach to bid solicitation and evaluation.

A unique feature of the Commission's Stage One bidding procedure is that all bidders have access to the utility's system information and to all the bids. This open information approach greatly expands the critical analysis provided to the Commission in cases where the utility itself is a bidder. The openness of the Commission's process allows staff and all the bidders the opportunity to conduct their own evaluations of each bid and review the utility's evaluation. The process also allows comments by the bidders during the process to assist and clarify the review by the utility and the other developers. The transparency of this approach, in which the bidders see all information and comments, helps develop the analysis and facilitates mutual review. The transparent process helps create

the level playing field that is needed to provide meaningful competition. Any attempt to restrict participation in the confidentiality agreements will be appealable to the Commission.

The bidding process uses a threshold screen to eliminate proposals that are not likely to be viable competitors, or that fail to provide the necessary information for the analysis. As detailed in Appendix B, each developer must provide reasonable assurance of site control, fuel availability, ability to get financing, and ability to secure all necessary permits. In addition, the developer must list milestones that demonstrate the project can be completed on time, knowing that failure to meet those milestones can eliminate the project. Commission staff, in cooperation with the Department of Natural Resources (DNR), will review the site information and visit the sites of all proposed projects to assess their viability as part of the screen. Rigorous screening criteria will minimize resources needed for bid evaluation, and will reduce the likelihood of failure to provide capacity when it is needed.

The bidding process selected by the Commission requires consideration of a wide range of factors in selecting the winning bid(s). First, the Commission will consider the computer model's calculation of the direct costs of each proposal, allowing a comparison of projects based on the great majority of the projects' monetary costs. The Commission will also consider other costs that can be quantified (or at least reasonably estimated), but cannot be captured in the system modeling (such as the costs of transmission interconnections). Third, there are

a number of factors which are important, but defy a reasonable assignment of dollar costs, such as performance guarantees and community support/opposition. Appendix B provides a list of the non-model costs and the intangible factors that are likely to be considered. The Commission recognizes that one of the valuable aspects of competition for generation supply is the diversity of developers' proposals. The many variations and nuances that are possible in the bids may provide unanticipated benefits to ratepayers. Some parties requested that the Commission identify the weight each non-modeled cost and intangible factor will have in the Commission's assessment of projects. Insufficient record exists to establish such weights and ranks, nor would they necessarily be helpful. In a richly diversified competition, no mechanical formula or complicated weighting scheme can select the best project(s). The Commission will use its judgment to balance all of these factors in making its determinations in the bidding process, acknowledging that minimizing long-term total cost to ratepayers is the primary criterion.

When the host utility has completed its evaluation of all the bids, it will present its preferred plan to the Commission for consideration. The utility's preferred plan must provide the analysis and rationale it used to arrive at its recommendation. All other bidders will have an opportunity to review the utility's preferred plan and provide comments and plan alternatives. Any party may then comment on the plans, the alternatives and the analysis, and any party may request a contested case hearing.

After all parties have provided comments, or at the end of the hearing process if one is held, the Commission selects the winning proposal(s). This decision may be consistent with the utility's preferred plan; it may agree with a recommendation of one of the other parties, or it could combine options in a new way. The Commission has exercised its authority to select the best system alternative over a long period, in a number of circumstances; for example, the selection of a smaller coal plant over the utilities' proposed Tyrone nuclear plant in docket CA5447, and the choice of transmission facilities different from the utility's proposal in dockets 4220-CE-24 and 3270-CE-3. The requirement that the utility provide service, and the plan which shows the need for supply that initiates the competition make it impractical to address the utility's need for power by simply rejecting its preferred proposal without designating a better alternative. If the utility's preferred proposal is selected, this problem does not arise. Clearly, a utility's chosen project that loses the open competition is not in the public interest considering alternate sources of supply.

The project(s) selected by the Commission moves to Stage Two of the CPCN process. For non-utility projects, this will usually require negotiating a purchased power agreement with the utility. The Commission expects some flexibility by the negotiating parties, with the goal of reaching agreement on a contract that is at least as advantageous to ratepayers as the contract reviewed and analyzed by the Commission in Stage One.

In Stage One, the Commission will also select and rank alternative projects. These alternative projects will move up in order if the primary project(s) fail to proceed. The Commission will ascertain from the developers of the alternatives whether they are able to maintain a stand-by status as the Stage One winner(s) moves through its milestones.

The Commission prefers that all of the information provided in the Two-Stage CPCN be open to the public. A completely open process is the Commission's normal way of conducting its business under the Wisconsin sunshine laws. However, the Commission realizes that certain parts of the filings in this competitive process may be legitimately protected under Wisconsin law. Similarly, the host utility may believe that some of the detailed information on its system operations would provide a competitive advantage to other utilities. To accommodate these materials, the Commission expects that confidentiality agreements will be a necessary part of the Two-Stage CPCN process. Legitimate protectible information filed at the Commission can be held under a protective order issued by the hearing examiner or the Administrator of the Examining Division.

The Commission expects that confidentiality agreements will be necessary at two steps in the process. First, an agreement will probably be needed between each potential bidder and the host utility. This will cover the utility's system information and the developer's bid. A second agreement will probably be requested among the developers that survive the threshold

screening. This will allow each developer to review and comment on each project proposal.

The Commission stresses its intention to keep confidential materials to a minimum. Treatment of confidential material is cumbersome at best, and creates skepticism in those who are not privy to all the information on which the Commission is making its decisions. In conformity with s. 19.36(6), Stats., the Commission will require information which is partly, but not wholly, confidential to be separated into open and confidential sections, and will require a showing made that material for which protection is sought actually is secret.

The Commission requires the utilities to initiate the Two-Stage CPCN process. Each utility will conduct the competitive bidding process approximately once every two years unless otherwise designated by the Commission. A utility may apply to the Commission for a waiver from the process if it does not have a need for new capacity that requires a CPCN in that time period. Wisconsin Public Service Corporation is currently conducting a competition, and staff will work with the other utilities to establish a schedule for future filings.

The Commission is aware that NSP is developing a separate bidding process as part of its Resource Plan in other regulatory jurisdictions. If that process is approved by the relevant regulatory agencies, NSP may request from this Commission an exemption from the Two-Stage CPCN process. Staff will continue to work with NSP and the regulatory agencies of other states to

develop a process for NSP that complies with the other siting and permitting requirements in Wisconsin.

A utility may also seek exemption from conducting the Two-Stage CPCN process if it is not going to be proposing a project as part of the competition. In that circumstance, the utility may use a resource selection process of its own choosing, keeping in mind that its decision will later have to pass Commission review as to whether it has chosen the best system alternative. To seek this exemption, the utility must not have any relationship with a bidding entity, be it an affiliate, subsidiary or partnership.

The Two-Stage CPCN process is expected to undergo continual modification and improvement with each application. Therefore, the Commission will review this new process at the end of a three-year trial period, to assess its effectiveness in meeting the goals of ratepayer protection, fair competition, and reasonably efficient use of resources. At the end of the assessment, the Commission will consider abandoning the process, modifying the process, continuing the process, or proceeding to rule making.

It is appropriate for the utility to charge all bidders a filing fee to defray the costs of running the competition and to help eliminate frivolous bids. The utility may propose a fee in its initial information packet and allow potential participants to comment on the magnitude and type of fee. The Commission would then consider these comments and decide the appropriate fee when it decides the modeling and economic assumptions at Step 5

of the process. The fee would be due when the bidders submit their project information filings at Step 6.

The Commission has considered the impact of a "best efforts" clause in a contract between a utility and a steam host, when the utility is submitting the contract as a bid in the Two-Stage CPCN process. The utility could theoretically face a conflict between its neutral role as administrator of the bidding and its advocacy role for its projects and the steam host's interests. To eliminate this potential conflict, it is reasonable for this order to suspend such "best efforts" clauses and hold them to be without effect during Stage One of the Two-Stage CPCN process.

One of the reasons discussed above for choosing the Two-Stage CPCN process is that it avoids the problem of multiple CPCNs. It is, therefore, reasonable and just to reject a CPCN application as incomplete if the project described in the application has not been approved to proceed with Stage Two by the order in a Stage One competition. Such a project would not be able to demonstrate that it was the system alternative in the public interest for meeting a particular electric capacity need.

ULTIMATE FINDINGS OF FACT

THE COMMISSION FINDS:

1. For IPP projects that do not require CPCNs, the size of the project affects the level of a utility's marginal energy costs. It is appropriate to adjust marginal energy costs to account for the size of the IPP project. It is reasonable to

calculate these costs by running a production cost model twice, as specified in the Findings of Fact.

2. For IPP projects that do not require CPCNs, it is reasonable to base avoided capacity costs on the capital cost of a peaking unit, usually a combustion turbine, for which the utility has a CPCN application pending. If necessary, a representative combustion turbine may be used. Capital costs include the operations and maintenance costs that do not vary with operation.

3. It is reasonable for an IPP and a utility to negotiate adjustments to marginal costs when determining avoided costs for a project, if a substantial basis in fact exists for the adjustments. It is reasonable for utilities to release generic marginal cost figures annually.

4. If NSP uses a proxy plant method in Wisconsin to calculate avoided costs for IPP projects smaller than 12 MW, it will be consistent with the method used by the entire NSP system. Inconsistent methods for calculating avoided costs between the Wisconsin and Minnesota companies would create unreasonable institutional problems.

5. It is reasonable for utilities to negotiate with IPPs over the extent to which marginal energy costs are locked in, for IPP projects that do not require CPCNs. Any increase in ratepayer risk due to locked-in energy costs should be offset by other contract terms, so that ratepayers are not harmed.

6. It is reasonable for utilities to negotiate levelized payments to QFs, but they should not expose ratepayers to

uncompensated, higher incremental risks or higher costs than those of a utility project.

7. It is reasonable to consider the risk to shareholders associated with entering into contracts with IPPs as well as the risks attendant on constructing utility generating plant when determining a utility's allowable rate of return.

8. That the Two-Stage CPCN process, as discussed above and described step-by-step in Appendix B, is a reasonable and just process for choosing among competing proposals to supply needed electric capacity in Wisconsin.

9. It is reasonable and just to require Wisconsin Public Service Corporation, Wisconsin Electric Power Company, Wisconsin Power & Light Company, Madison Gas and Electric Company, and Northern States Power Company to implement the Two-Stage CPCN process to procure capacity needs that require a CPCN from the Commission.

10. It is reasonable and just that Wisconsin Public Service Corporation, Wisconsin Electric Power Company, Wisconsin Power & Light Company, Madison Gas and Electric Company, and Northern States Power Company, in instances where they wish to be exempt from conducting the Two-Stage CPCN process, be required to request such waivers from the Commission.

11. It is reasonable and just to reject a CPCN application as incomplete if the CPCN applicant should have successfully competed in the Two-Stage CPCN process, but did not.

12. That the complaints of Destec Energy Inc., EnerTran Technology Company and LS Power Company have been reasonably

addressed in this docket, and no longer raise live issues under the new procedures adopted in this order.

13. It is reasonable to adopt this process on a trial basis for three years, and evaluate the results at the end of that period.

14. It is reasonable for this order to suspend "best efforts" clauses as discussed above and hold them to be without effect during Stage One of the Two-Stage CPCN process.

Conclusion of Law

THE COMMISSION CONCLUDES:

The Commission concludes that it has jurisdiction under 16 USC 824a-3, 18 CFR Part 292 and ss. 1.11, 19.36, 196.02(1) and (7), 196.03 and 196.491, Stats., to issue the following order.

Order

THE COMMISSION THEREFORE ORDERS:

1. A utility shall calculate avoided costs for a QF when the QF establishes a LEO, based on the conditions in effect at the time the LEO is created.

2. When using the peaker method to calculate its avoided costs, a utility shall complete two computations using a production cost model in order to determine how the size of the IPP project under consideration affects the utility's marginal energy costs. The utility shall perform the computations as

described in the Findings of Fact. The utility shall include readily quantifiable adjustments to its marginal costs when running the production cost model, and shall negotiate other adjustments if they are supported by a substantial basis in fact. The utility shall base its avoided capital costs on those of a peaking unit, generally a combustion turbine, including operations and maintenance costs that do not vary with operation, as described in the Findings of Fact.

3. In lieu of complying with Order paragraph 2 to calculate avoided costs, Northern States Power may use its proxy plant method when considering IPP projects smaller than 12 MW.

4. A utility shall release generic marginal cost figures annually.

5. A utility shall negotiate levelized payments to a QF, unless the payments would expose ratepayers to uncompensated, higher incremental risks or costs than those of a similar project of the utility's own.

6. Wisconsin Public Service Corporation, Wisconsin Electric Power Company, Wisconsin Power & Light Company, Madison Gas and Electric Company, and Northern States Power Company shall implement the Two-Stage CPCN competitive bidding process to procure capacity needs that require a CPCN, under s. 196.491(3), unless the Commission grants a request for waiver.

7. The complaints of Destec Energy Inc., EnerTran Technology Company and LS Power Corporation have been incorporated into this docket and are hereby dismissed.

8. A utility administering Stage One of the Two-Stage CPCN process should suspend "best efforts" clauses as discussed above and hold them to be without effect during Stage One.

Dated at Madison, Wisconsin, December 23, 1993

By the Commission.

Lynda L. Dorr
Lynda L. Dorr
Secretary to the Commission

LLD:DAL:12139303.ERB/ORDER

See attached Notice of Appeal Rights.

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in s. 227.53, Stats. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in s. 227.01(3), Stats., a person aggrieved by the order has the further right to file one petition for rehearing as provided in s. 227.49, Stats. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with s. 227.48(2), Stats., and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Rev. 4/22/91

APPENDIX A

In order to comply with s. 227.47, Stats., the following parties who appeared before the agency are considered parties for purposes of review under s. 227.53, Stats.

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05EI112.APP/GENERAL.EXA

Two-Stage CPCN Process - Description

It is expected that utilities will make minor variations to the Two-Stage CPCN process with each bidding competition to incorporate lessons learned from previous applications, and to accommodate unique circumstances of a particular competition. A time frame for each step is provided below to indicate the approximate number of days for each step. The Commission expects that variations will occur in the time frames for each competition, but from start to finish the process is expected to be completed in no more than nine months.

As described in the body of this order, the Two-Stage CPCN process relies on information and decisions in the Advance Plan process. The decisions made in the Advance Plan form the foundation for the need for supply and for the analysis of the bids.

Step 1 -- Utility Issues Notice of Intent -- Day 1

The utility advertises in national trade publications its intent to issue a request for proposal (RFP) soliciting proposals for supplying capacity to the utility's system. The notice indicates the type of capacity that the utility would build to supply the need, but makes it clear that proposals will be judged by the system costs, not by comparison with the utility proposal. The notice also includes a general description of the bidding process and the expected timing of initial key dates such as the

RFP issuance, bidders' conference, and deadline for bid submittals.

The utility's notice explains the need for confidentiality agreements in this process. Standard confidentiality agreements are available on the date the notice is issued. Interested participants have two weeks to review and sign these agreements. In all these materials, an open public document will contain the nonconfidential information about the utility's system and the proposals, and the confidential filings will contain only information which is actually protectible under the Wisconsin statutes.

Step 2 -- Utility System Information/RFP Issuance -- Day 14

The utility provides its system information and the detailed RFP package to participants and provides the confidential portions to those that have signed a confidentiality agreement. The system information constitutes the utility's proposed "base case" modelling parameters for evaluating bids. Unless specifically noted and justified, the utility's system information is consistent with the forecasts and assumptions approved as part of the most recent Advance Plan. The information presented will be in a clear format, suitable for input into the IRP workstation model, and include detailed information on the generic units used in the long-term expansion plan. The IRP Workstation model is currently approved by the

Commission for system expansion analysis. In the future, the Commission may specify other models to perform this function.

The RFP is made up of several parts. The RFP includes the detailed instructions to bidders on the bidding procedures and requirements. It also includes a bid package that requests the information required from bidders in a specific format. The information that is solicited includes price and non-price factors that will be considered in each project's evaluation. The RFP describes the evaluation criteria that the utility will apply to each project proposal. The description of evaluation criteria also covers both cost and non-cost factors. In addition, the RFP may include a model purchased power agreement that the bidders can modify to match their individual bids.

Step 3 -- Bidders' Conference -- Day 25

The utility sponsors a conference for all potential bidders to discuss the information it has sent out. The purpose of the conference is to clarify the utility's system information and RFP material. If the number of potential bidders is extremely large, discussion may also be held on an appropriate method to create a "short list" of surviving proposals later in the process.

Step 4 -- Bidders Comments on RFP/ Intent to Bid -- Day 35

Bidders who disagree with the utility system information or the assumptions the utility proposes to use for evaluation, submit written comments to the Commission. The utility has the opportunity to reply. The purpose of these comments is to

establish reasonable "base case" parameters for performing comparative analysis of the projects. Bidders are also required to submit their notice of intent to bid at this step.

Step 5 -- Commission Decision on Assumptions -- Day 42

The Commission considers all comments and decides all contested issues relating to the "base case" parameters. The Commission's decision is promptly conveyed in writing to the parties.

Step 6 -- Project Information filings -- Day 70

All bidders (including the utility) submit their project information filings to the utility and the Commission. The filing to the utility must be accompanied by the filing fee. Only one bid will be allowed per site. The filings must be in the required format, must be complete in all respects, and must include a draft engineering plan responsive to s. 196.491(2m), Stats. Bidders will be allowed to submit information beyond that specifically requested in the RFP if they believe it should affect the evaluation of their projects. Bidders may also suggest ways in which their proposals and others should be evaluated, including computer modeling inputs and sensitivities. Bids may not be altered or supplemented after the initial project information filing.

Step 7 -- Threshold Screen of Bids -- Day 71 to Day 84

The utility reviews the project information filings for compliance with the requirements listed in the RFP. Staff, with the cooperation of the Department of Natural Resources, also reviews the filings and conducts a rough on-site environmental review of each proposed site. Both the utility and staff may propose to screen out projects, and must explain the reasons for their recommendations. Bidders have the opportunity to appeal the staff/utility recommendations to the Commission. After notice and comment, the Commission decides which projects will proceed and which will be rejected.

Step 8 -- Bidders Exchange Project Information Filings -- Day 85

Each developer (including the utility) that passes the threshold screen shares its entire project information filing with all other developers. This exchange includes any confidential portions, which will be covered by a confidentiality agreement among all bidders. Any party, such as a public interest group, which is acceptable to the bidders may also sign a confidentiality agreement and participate in the confidential portion of the case. Exchanging bids allows each bidder to review and evaluate its competitors. Bidders that choose not to enter into the confidentiality agreement will not have access to the confidential portions of the other bids. Any attempts to restrict participation in the confidentiality agreements will be appealable to the Commission.

Step 9 -- Review of Bids -- Day 85 to Day 140

The utility inputs the information from each surviving project into the IRP Workstation system expansion model to analyze the system cost effects of each proposal. The results are distributed to all parties. Sufficient back-up detail to allow the bidders the opportunity to comment on the utility's modelling is given to the parties to the confidential portion of the proceeding. The utility also evaluates the monetary cost factors of each project that cannot be modeled and reviews each project's information filing to judge the non-monetary or intangible attributes of each proposal. The parties are allowed to submit comments to both the utility and the Commission during this review period to express their views on any aspect of any proposal. Any party may comment, although parties that are not included in the confidential portion of the case will only be able to address issues which are open to the public. Staff will conduct an on-going review of the utility's evaluation, and may perform modeling and other analysis of its own.

Step 10 -- Utility Proposes Preferred Plan -- Day 140

Based on its evaluation of all of the information provided by the parties, the utility proposes to the Commission a plan which the utility finds best meets its resource need. Justification must be provided for its choice(s) which includes its evaluation of each of the competing proposals. The utility may request a contested case hearing at this step. If this

request is made and granted, the utility submittal may be in the form of testimony and exhibits.

Step 11 -- Parties Comment on Utility's Plan -- Day 154

All parties and the staff may comment on the utility's preferred plan and alternate plans and the evaluation presented by the utility, and may also present their evaluations and conclusions. Parties may request a contested case hearing at this step. If it is granted, the parties' and staff's comments may be in the form of exhibits and testimony.

Step 12 -- Contested Case Hearing -- Day 200

Assuming a hearing request is made and granted, normal contested case hearing procedures are used. The Commission will set the schedule for prefiling of testimony and exhibits, hearing, and briefs.

Step 13 -- Commission Decision -- Day 260

The Commission reviews all of the information presented by all the parties in comments or in the formal hearing process. In an open meeting, the Commission decides which system alternative(s) is in the public interest and may proceed to stage two of the process. Part of the open meeting may be in camera. The Commission may also determine which projects are next in line if the winner fails to move forward with its stage two activities.

Step 14 -- Commission Order -- Day 290

The Commission issues its order embodying the decisions made in open meeting.

Step 15 -- Negotiations -- Day 290

If an entity other than the utility holding the competition wins, so that a purchased power contract is necessary, negotiations to arrive at a contract that is at least as advantageous to ratepayers as the initial bid begin. A time frame for negotiations will be specified, and staff may become involved to assist and monitor the process. If negotiations are not successful, the Commission will resolve disputes and determine the next steps.

NON-MODELED COST FACTORS

Most of the costs associated with each bid in the Two-Stage CPCN process will be reflected in the system expansion and production cost modeling. However, there may be additional cost factors which cannot be adequately modeled but must be considered. A list of such potential factors is provided below for illustrative purposes. This is not intended to be an exhaustive list, nor will each of the factors listed apply to all bids in all competitions.

1. Contract Bonus Payments
2. O&M Cost Adjustments
3. Performance Penalties
4. Transmission Interconnection Costs
5. Wheeling Charges
6. Transmission Losses
7. Taxes
8. Start-up Costs
9. Debt Equivalence and Equity Adders
10. Contract Extension Options
11. Dispatch Options
12. Treatment of Steam Revenues

INTANGIBLE FACTORS

To choose among competing projects, the Commission must consider both modeled cost factors and non-modeled cost factors. In addition, the Commission considers factors which are not easily quantifiable in dollars; these factors are sometimes referred to as "intangibles," and represent important project considerations which cannot readily be assigned a dollar impact. A list is provided below of potential intangible factors the Commission could weigh in the evaluation of competing bids. This list is not intended to be exhaustive, nor does each intangible factor have an impact on every bid in every competition.

1. Level of Project Development
2. Developer Experience
3. Site Control
4. Location
5. Transmission Construction Impacts
6. Water Use
7. Steam Host Risk
8. Efficiency of Fuel Use
9. Construction Guarantees
10. Turnkey Construction
11. Security for Construction Extension
12. Performance Guarantees
13. Force Majeure and Conditions of Default
14. Pass Through of Taxes, O&M, Fuel, etc.
15. Contract Renewal Rights

16. Air Emissions
17. Land Use and Other Environmental Impacts
18. Front Loading of Payments
19. Community Support
20. Fuel Availability
21. Fuel Contract Length
22. Local Distribution Company Bypass
23. Treatment of Tax Law Changes
24. Options for Utility Purchase of Project
25. Steam Sales Agreement
26. End of Contract Options
27. Renewable Resource
28. Use of an LDC for Gas Supply
29. Gas Pipeline Construction Impacts
30. Thermal Efficiency

THRESHOLD SCREENING CRITERIA

Immediately after the bids have been submitted, staff and the host utility conduct a threshold screen of each bid. The purpose of this screen is to eliminate projects that have filed incomplete information and projects that have fatal flaws.. Listed below is a set of factors which could be used to screen bids in the Two-Stage CPCN process. This list is not exhaustive, nor would each item necessarily apply to every bid.

1. Engineering certification
2. Showing of financeability
3. Showing of fuel availability
4. Project milestones, indicating the capacity would be available on schedule
5. QF status showing, if applicable
6. Air, water and land impacts
7. Site control
8. Transmission requirements
9. Proposed or signed purchase power agreement
10. Project description
11. Likelihood of obtaining necessary permits
12. Preliminary assessment of project economics
13. Commitment to proceed, if chosen
14. Consistency of bid information with proposed contract
15. No multiple bids for a single site
16. Information is complete, and in appropriate format

DATE MAILED
DEC 2 2 1994

DEC 2 3 1994

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Wisconsin Public Service Corporation	)	
For Authority To Increase Electric Generating Capacity	)	6690-CE-156
(Stage One, Competition Among Alternative Suppliers)	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Procedural Summary

On September 24, 1993, Wisconsin Public Service Corporation (WPS) filed an application for a Certificate of Public Convenience and Necessity (CPCN) to construct a 122 MW coal-fired steam and electric cogeneration facility adjacent to Rhinelander Paper Company (RPC) in Rhinelander, Wisconsin. The plant as proposed would supply electrical energy to the WPS system and thermal energy in the form of steam to RPC.

In compliance with the Commission's order in docket 05-EI-112, WPS issued a request for proposals on November 29, 1993, to solicit bids to meet its need for additional generating capacity identified in its CPCN application. Thirteen bids from nine bidders were received on February 15, 1994.

On April 25, 1994, WPS formally requested a contested case hearing for this docket. WPS evaluated the bids submitted and issued its preliminary evaluation results on May 6, 1994. An in camera technical conference was held on June 2, 1994, for the purpose of clarifying technical questions about the various bids. A prehearing conference was held on June 16, 1994.

Pursuant to due notice, hearing was held on July 18 to 22, 1994, and July 25 to 28, 1994, in Madison, before Examiner Donna Paske. A portion of these hearings was open to the public and a portion was restricted to only those parties with access to the confidential materials filed in this proceeding. A list of parties in this docket is attached as Appendix A. Parties who were allowed access to all of the confidential information filed in this proceeding are identified with an asterisk.

WPS is authorized to proceed with licensing its Rhinelander Project, subject to conditions. Polsky Energy is authorized to file an application for a Certificate of Public Convenience and Necessity for its DePere Project if, and only if, the WPS Rhinelander Project does not meet the milestones specified in its bid or the conditions specified herein. WPS is encouraged to negotiate with the New World Power Corporation for the wind capacity proposed by New World Power.

FINDINGS OF FACT

Background

This order is part of the Commission's second application of a competitive bidding process to evaluate alternative options for supplying electric generation capacity in accordance with its planning and siting responsibilities under s. 196.491, Wis. Stats. It is the first order issued using the procedure adopted by the Commission in docket 05-EI-112 (order dated December 28, 1993). This process has been designed to use competition to provide ratepayers with low-cost electricity in accordance with long-term system plans at the same time that it provides competitors with a fair opportunity to become the supplier of the electricity.

The Commission believes that s. 210, Public Utilities Regulatory Policy Act of 1978, 16 U.S.C., s. 824a (3) (PURPA), creates a responsibility for the Commission to insure that Wisconsin utilities under its jurisdiction purchase cost-effective electricity generated by Qualifying Facilities (QFs), as defined in PURPA. At the same time, the Commission is required to protect the interests of ratepayers, utility security holders and the environment under Sections 1.11 and 1.12, and Chapters 184, 196, and other sections of the Wisconsin Statutes. The Commission's consideration of competing applications to construct new electric generating plants under s. 196.491, Wis. Stats., must meet both the state and federal requirements.

The Commission also continues to believe that competition among generation suppliers is likely to provide low-cost electricity over the long term and should be encouraged. In order for competition to provide benefits to Wisconsin ratepayers, it is necessary to provide mechanisms to allow responsible competitors to compete fairly; or, as the Commission described in its Advance Plan 6 order, "on a level playing field."

The difficult part of this exercise is to determine which of the competing projects is most likely to be in the public interest and provide electricity to ratepayers at lowest total cost. Until recently (1993), there were no applications for CPCN under sec. 196.491 (3), Wis. Stats. for which system supply alternatives were offered by parties other than the utility seeking authorization to build a power plant. In this case, sixteen (16) alternative proposals were offered. In order to harmonize the state and federal interests in this case and to encourage competition, the Commission used the Two-Stage CPCN proceeding it approved in docket 05-EI-112.

The original CPCN review process, adopted in Chapter 68, Laws 1975, was not designed to handle multiple competing projects, each with possible alternate sites and each with its own size, timing, cost, operating characteristics, environmental aspects and other elements. The necessary full environmental review of all possible projects by this agency and the Department of Natural Resources (DNR) would consume unreasonable amounts of valuable time and resources, and would create delays that could jeopardize reliable electric service. The Commission was also concerned with its responsibilities under PURPA and with providing an appropriate method to include independent power producer (IPP) projects in the Wisconsin electric generation planning and certification process.

To address these complex issues, the Commission determined to adopt the Two-Stage CPCN process, on a three-year experimental basis, as outlined in the Commission's order in docket 05-EI-112, dated December 28, 1993. The first stage of the process includes the use of a computer model to help determine which of the competing supply proposals should be included in a least-cost system supply plan. Other non-modeled cost factors are also evaluated, as well as non-cost factors (referred to as intangible factors). The project or projects selected in the first stage of the process proceed to Stage 2. Stage 2 of the Two-Stage CPCN process closely resembles the prior CPCN process.

The procedures used in this case are essentially a separation of the consideration of alternatives required by s. 196.491 (3)(d) and s. 1.11, Wis. Stats., into a threshold consideration of system alternatives to the utility's proposed construction project (Stage 1) and a later determination of the site alternatives for the chosen system alternative along with all the other elements of a CPCN under s. 196.491 (3), Wis. Stats. (Stage 2). This order is the culmination of Stage 1 of the CPCN in this docket. Stage 1 will determine the system

alternative that best meets WPS's need for power. Stage 2 will include a full environmental review of the chosen alternative and a public hearing in the area affected by the project.

The need for electric generation capacity in Wisconsin was reviewed in Advance Plan 6 (docket 05-EP-6). In its September 1992 Advance Plan 6 order, the Commission found a need for 100 MW of cogeneration capacity, 50 MW in 1995 and 50 MW in 1997, which the utilities later identified as a need on the WPS system. Under s. 196.491 (2) and (3), Wis. Stats., the Commission must consider alternate sources of supply and alternate designs and locations for proposed electric generating facilities. The projects bid in the WPS solicitation for proposals, either individually or in combination with each other, are potentially able to meet WPS's system needs in the same time period as the project proposed by WPS and RPC. These bids represent system alternatives to the WPS Rhinelander Project.

Comparison of the Bids

The Commission chose the WPS Rhinelander Project based on a balanced consideration of the cost and intangible factors of all the bids. In evaluating dollar costs, the Commission considered the system expansion cost analyses provided by WPS and by staff, as well as cost factors which could not be explicitly modeled by means of ENPRO production cost and EGEAS system expansion models. The Commission also considered the testimony, comments and alternative cost analyses provided by the bidders and parties in this case. To evaluate intangible factors, the Commission considered the noneconomic evaluation performed by WPS, the intangible factor analyses performed by staff, the testimony and comments of the bidders and other parties, and the filed bids themselves.

WPS Rhinelander Project

This project is a fully dispatchable 122 MW circulating fluidized-bed-combustion cogeneration facility which will utilize coal and paper mill sludge as primary fuels. It will supply electricity to WPS and process steam to the Rhinelander Paper Company (RPC). The project is proposed to be owned by two wholly-owned nonutility subsidiaries of WPS: REC Electric, Inc., and REC Steam, Inc. (The entire installation as proposed by WPS is also known as the Rhinelander Energy Center or REC.) These subsidiaries will be capitalized with equity infusions from WPS and will obtain nonrecourse debt to finance the construction of the WPS Rhinelander Project. A separate nonutility subsidiary of WPS, REC Construction, Inc., will construct the facility on a turnkey basis. Upon construction, the electric portion of the project will be leased to WPS pursuant to the Electric Lease Agreement contained in the bid. WPS will also operate the facility, and operation costs will be allocated between electric and steam production pursuant to a Steam and Electric Sales Agreement (SESA) executed between WPS and RPC.

The Commission finds that, on an overall cost basis, including life cycle system capital and operating costs, as well as dollar costs exogenous to the system expansion and production cost models, the WPS Rhinelander Project bid is the least-cost option for WPS ratepayers.

The modeling analysis showed the WPS Rhinelander Project as having the lowest dollar costs for the range of assumed likely future conditions. This result proved robust in the sensitivity analyses performed, including the sensitivity analyses which used monetized greenhouse gas emissions. The least-cost nature of the WPS Rhinelander Project is enhanced by guaranteed aspects of the bid related to lease payments, operating performance, and to

certain elements of operating costs. The project's least-cost nature is diminished somewhat by risks to ratepayers resulting from less firm elements of the bid related to nonfuel operation and maintenance costs, and to cost and risk elements arising out of several provisions of the SESA between WPS and RPC.

Specific positive aspects of the WPS Rhinelander Project are:

1. It is a cogeneration project. Cogeneration promotes fuel efficiency and reduces environmental harm.

2. The project is proposed to be built on an existing industrial site. The proposed site appears to have no fatal flaws. Construction of the WPS Rhinelander Project would result in remediation of existing environmental contaminants on that site and would not occupy previously undisturbed land.

3. The project will replace coal-fired stoker boilers currently being used to produce steam at RPC. Replacement of those boilers will improve air quality in the Rhinelander area with respect to SO_2 and NO_x, and will result in more efficient use of fuel to meet RPC's steam requirements.

4. The unit will be co-fired with coal and paper mill sludge. The paper mill sludge will be available from the RPC operations and from Wausau Paper's Brokaw mill. Because those two entities are currently landfilling the sludge, utilizing it as fuel at the WPS Rhinelander Project will reduce landfill needs for that purpose and provide associated environmental benefits.

5. The project presents an innovative relationship between WPS and RPC. It includes significant participation by RPC and many of its benefits are shared between WPS ratepayers and RPC.

6. The WPS Rhinelander Project provides guarantees to ratepayers for capital-related lease payments and for a portion of the facility's operating costs.

7. The WPS Rhinelander Project provides guarantees for operating characteristics of the facility related to fuel usage, forced outage, and maintenance hours over the projected operating life. These guarantees will help to ensure that the WPS Rhinelander Project is available as a low-cost resource throughout its operating life.

8. The project has significant public and local government support in the Rhinelander area.

Specific weaknesses of the project as proposed are:

1. Coal is a more polluting fuel than natural gas, which was the fuel choice proposed by other competitive projects. The WPS Rhinelander Project will result in significantly higher emissions of carbon dioxide and some other greenhouse gases than a number of the competing projects, despite the retirement of existing boilers at RPC. This creates risk to ratepayers associated with the possibility of future environmental law or regulation.

2. The nonfuel operating and maintenance costs are passed through to ratepayers which creates some uncertainty about the ultimate cost of the project.

3. The agreement between WPS and RPC includes reliance on RPC's ability to continue to purchase power on the existing GDS rate, and also use a proposed NUP-1

rate. RPC's eligibility for the GDS rate is uncertain under the terms of the proposed WPS Rhinelander Project, and the NUP-1 rate may not be approved. These points may affect the cost of the project and RPC's willingness to pursue the project.

4. Uncertainty exists about the ultimate cost of the WPS Rhinelander Project due to varying levels of efficiency which might occur if the steam load of RPC changes.

5. The electric lease payments may have debt equivalence impacts which could lead to increases in WPS's capital costs.

Because the WPS Rhinelander bid contains a number of performance guarantees, it is necessary for the Commission to take measures to enforce those guarantees to ensure that the project provides the maximum benefit to ratepayers, consistent with the filed bid. In cases where the project sponsor is an independent developer, such enforcement would be guided by the final power sales agreement and carried out by the utility on behalf of its ratepayers, subject to prudence review by the Commission. However, in this instance, where the project sponsor is affiliated with the utility, it is necessary for the Commission to monitor performance and enforce the guarantees through its rate recovery procedures.

Successful enforcement of the performance guarantees contained in the WPS Rhinelander bid can only occur if WPS receives rate recovery for costs related to the project which are consistent with the cost guarantees and operating performance levels contained in the bid. In general, the guarantees can be enforced if values stated in the bid, or determined by formula included in the bid, are used in forecasting lease payments and guaranteed components of fuel and operating costs for the WPS Rhinelander Project and its interaction with the WPS system in future test years, or if any variations in the values used in setting

rates for WPS remain consistent with the stated guarantees. WPS has committed itself not to seek to recover costs in future rate cases which are inconsistent with the guarantees contained in the WPS Rhinelander bid. The Commission is basing its approval on this continuing commitment on the part of WPS.

It will be necessary to track and verify the operating performance of the WPS Rhinelander Project in future rates cases, in order to ensure that these promises are kept. WPS will be required to set up tracking accounts for key operating parameters, including specific accounts related to unit availability, maintenance hours and full forced outage. Reports of these accounts shall be included in any application for future electric rate adjustments. WPS shall also make available to Commission auditing staff on a continuing basis the historical and projected steam use by RPC, and actual cost allocations pursuant to the SESA.

The Commission assumed the continued use of the GDS rate and the implementation of the proposed NUP-1 rate when considering the effects on ratepayers of the WPS Rhinelander Project. In this regard, the Commission continues to adhere to its previously-established process that "a bid is a bid." However, because of the uncertainty which exists with regard to the availability to Rhinelander Paper of either the NUP-1 rate or the GDS rate, the Commission believes it is important for it to note in this order that the NUP-1 rate discussed in this proceeding has neither been filed with nor approved by the Commission. Therefore, it does not exist at this time and the Commission has serious concerns as to whether such a rate is appropriate. Further, from the record in this proceeding, it is possible that once the WPS Rhinelander Project is constructed and in operation, Rhinelander Paper may no longer qualify for its current GDS rate for all or even part of its electricity

consumption. Because of these uncertainties and the need of WPS's ratepayers for reliable power, the Commission believes it is appropriate for WPS and Rhinelander Paper to be required to notify the Commission within 40 days of the date of this order whether they intend to pursue this project if neither rate would be available to RPC. If it becomes necessary for WPS and RPC to renegotiate the SESA as a result of the unavailability of the NUP-1 or GDS rates, the Commission will not allow any changes in the contract to adversely affect the cost to WPS ratepayers. The Commission is not making a final determination at this time on whether Rhinelander Paper may or may not continue to qualify for the GDS rate once the WPS Rhinelander Project is in operation.

Because of the timing of the issuance of the order in this proceeding, the filing from WPS that is due within 40 days of the date of this order should also include an update of the milestones for the WPS Rhinelander Project. Milestones which depend on governmental agency actions should be expressed as times relative to the agency action. Milestones for actions within the parties' control should be expressed as dates certain. The milestones should include dates for those actions related to putting the plant in operation, including any permits, affiliated interest agreements, Exempt Wholesale Generator (EWG) status and so forth.

Polsky Energy Corporation DePere Project

This project is proposed to be constructed in two phases. During the initial phase the project is proposed as a 179 MW simple cycle combustion turbine which would be fueled primarily by natural gas and secondarily by No. 2 fuel oil, and which would provide electrical energy to WPS. During the second phase, the project would be converted to a total

of 232 MW combined-cycle cogeneration plant providing electricity to WPS and process steam to the International Paper mill in DePere. The DePere Project would be fully dispatchable by WPS throughout its first and second phases. The DePere bid indicated that conversion to the combined-cycle phase would occur in 2004 and it was reviewed on that basis, but the bid also contained an option to alter the timing of that conversion if desirable.

The Commission finds that the Polsky Energy DePere Project is the second best project based on costs, its potential cogeneration benefits and timing flexibility, and other intangible considerations. The project is enhanced by guaranteed cost and performance elements, and is supported by a strong proposed power sales agreement.

Specific positive features of the DePere Project are:

1. The DePere Project would be converted to a cogeneration project in its second phase which would enhance fuel efficiency and reduce environmental harm.

2. Certain elements of operations and maintenance costs are guaranteed. This is favorable to WPS and its ratepayers and would help to ensure the DePere Project's availability as a low-cost resource throughout its contract life.

3. The proposed power sales agreement guarantees unit availability at the 90 percent level and contains explicit remedy provisions in the event the project fails to perform.

4. The DePere Project is supported by a proposed power sales agreement which, on balance, contains strong protections for WPS and its ratepayers.

5. The DePere Project would utilize natural gas as its primary fuel which contributes to fuel diversity for the WPS system and the state, and which has

favorable environmental attributes, particularly with respect to greenhouse gas emissions.

6. The DePere Project is proposed to be built on an existing industrial site. The proposed site appears to have no fatal flaws, and construction of the project would result in remediation of any existing environmental contaminants on that site and would not upset previously undisturbed land.

7. The DePere Project does not require significant transmission construction and would reduce losses on the WPS transmission system.

Specific weaknesses of the DePere Project as proposed are:

1. It is a higher dollar cost option than the WPS Rhinelander Project, as projected by the modeling analysis.

2. Some elements of operating performance are not guaranteed, which creates uncertainty about the ultimate cost of the project.

3. While the proposed power sales agreement is strong, on balance, a number of elements are open to negotiation which creates some uncertainty about the project's ultimate cost and viability.

4. The DePere Project bid identified a number of conditions which create uncertainty about the availability and final terms of financing the project, which creates uncertainty about viability.

Of the alternatives offered in this case, the DePere Project, on balance, would provide WPS ratepayers the second lowest long-term overall costs, including intangible factors. If

the WPS Rhinelander Project fails to move forward and meet its milestones, the Commission expects WPS to enter into negotiations with Polsky Energy Corporation to arrive at a final power sales agreement at least as advantageous to ratepayers as the original bid, as evaluated. The economic analysis showed that the bids for projects other than WPS's Rhinelander Project and Polsky Energy's DePere Project are significantly higher cost to ratepayers than the two projects discussed above.

In the event that WPS's Rhinelander Project fails to meet its milestones for some reason, then it will be necessary for Polsky Energy's DePere Project to proceed. WPS shall promptly notify both the Commission and Polsky Energy in the event it determines that the Rhinelander Project can not proceed. The Commission may also determine that the WPS Rhinelander Project has not met its milestones or can not proceed. In either event, it will be useful for the Commission to have established a process to encourage WPS and Polsky Energy to work out the details of a purchased power contract promptly so that WPS ratepayers will continue to have a reliable power supply.

Since Polsky Energy's offer to sell WPS electricity from the DePere Project is set forth as part of its bid in this proceeding, and has been evaluated extensively by WPS, other parties, the Commission staff and the Commission, it is reasonable to expect that WPS and Polsky Energy could achieve closure on such a contract within 60 days of the date that either WPS or the Commission determines that the Rhinelander Project could not meet its milestones. If the negotiations fail to reach agreement in this time period, it is the Commission's intention to act promptly thereafter. Within 75 days of the date of determination of termination of the WPS Rhinelander Project, if agreement is not reached, WPS and Polsky Energy should provide testimony to address:

1. Whether Polsky Energy's final offer in the negotiations is at least as advantageous for ratepayers as its bid evaluated in this stage of the proceeding; and to what extent, if any, Polsky Energy's offer has also addressed the weaknesses of the project described above; and

2. Whether WPS has negotiated in good faith. WPS should be able to provide testimony to address this issue. It is the Commission's intention to disqualify WPS from future competitions if it finds that WPS has not negotiated in good faith.

The Commission will then hold a hearing to determine whether to issue an order requiring WPS to enter into an agreement based on Polsky Energy's final offer. In its exercise of discretion whether to issue an order, the Commission will consider whether Polsky Energy's final offer is at least as advantageous to ratepayers as its bid, and the extent to which it has addressed the weaknesses described in the above Findings of Fact. After such hearing, the Commission may also determine whether to disqualify WPS from further consideration in future competitions.

New World Power Corporation Rosiere Wind Project

New World Power Corporation's (New World) proposed facility is a wind farm with a nameplate rating of 17.5 MW located 20 miles northeast of Green Bay in the Town of Rosiere. The project as proposed would be situated on farmland near the Rosiere substation in northern Kewaunee County. The project as bid would consist of 35 wind turbines each with a rated capacity of 500 kW, which would produce an estimated 38,500 megawatt-hours of electricity each year.

The Commission has often expressed its support for the cost-effective deployment of renewable energy in Wisconsin. In its Advance Plan 6 order (docket 05-EP-6), the Commission created a Renewable Energy Incentive Program to encourage utilities to develop viable alternative sources of electric power from renewable resources. The Wisconsin Legislature also adopted s. 196.377, Wis. Stats. which states:

> **196.377 Promotion of Renewable Energy Systems.** The commission shall encourage public utilities to develop and demonstrate electric generating technologies that utilize renewable sources of energy, including new, innovative or experimental technologies. The commission may ensure that a public utility fully recovers the cost of developing, constructing and operating such demonstrations through rates charged to customers of the utility.

In 1993, the Wisconsin Legislature adopted Wisconsin Act 414, which modifies s. 1.12, Wis. Stats. and creates s. 196.025 to read as excerpted below:

> **1.12 (3) Goals (b)** *Renewable energy resources.* It is the goal of the state that, to the extent that it is cost-effective and technically feasible, all new installed capacity for electric generation in the state be based on renewable energy resources, including hydroelectric, wood, wind, solar, refuse, agricultural and biomass energy resources.
>
> **(4) PRIORITIES.** In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Non-renewable combustible energy resources, in the order listed:
> 1. Natural gas.
> 2. Oil or coal with a sulphur content of less than 1%.
> 3. All other carbon-based fuels.
>
> **196.025 Duties of the commission.** To the extent cost-effective, technically feasible and environmentally sound, the commission shall implement the priorities under s. 1.12 (4) in making all energy-related decisions and orders, including advance plan, rate setting and rule-making orders.

The New World Power Rosiere Project as bid in this proceeding is more expensive than the WPS Rhinelander Project or the Polsky Energy DePere Project. The New World Power Project as bid, therefore, does not meet the cost-effectiveness requirements of sections 1.12 (3) and (4) and 196.025, Wis. Stats. However, the price of this wind bid was lower cost when compared with the other renewable projects offered in this proceeding and it has some attractive intangible factors, particularly the fact that it is a non-polluting source of renewable energy. Although it was higher cost than a number of projects, the Commission was encouraged with the cost of the project as bid. In its most recent Advance Plan order, the Commission approved 10 MW of wind generation to be placed in service in 1999. The Commission believes there is a high probability that WPS and New World could negotiate a satisfactory arrangement to provide this planned supply addition. The Commission encourages WPS to enter into negotiations with New World to bring the proposed wind capacity on to its system in a cost-effective manner. If such a contract agreement can be reached, WPS and New World should bring any such agreement back to the Commission for its review, if the capacity of the project as finally proposed exceeds 12 MW.

Other Bids Submitted In This Proceeding

The 14 other projects reviewed in this proceeding were significantly more costly overall, considering modeled and exogenous costs and intangible factors, than the WPS Rhinelander Project and Polsky Energy DePere Project described above. They also cost significantly more on a dollar cost basis. All of the participants provided valuable comments and testimony on the evaluation as it proceeded, and all participants contributed to a robust competition, which is in the interest of Wisconsin ratepayers as well as potential sellers of

participation in this process and the time and thought that went into their offerings and comments. Lessons learned from this proceeding will be used by the Commission to improve the process as it deems necessary.

Environmental Screening

Although some limited environmental analysis was done as part of the evaluations of the bids in this process, the Commission's decision in this first stage of the Two-Stage CPCN process will not permit any construction activity which could have an effect on the environment. The selected project will receive a full environmental analysis, including the preparation of an Environmental Impact Statement (EIS) and a public hearing in the area affected, before any CPCN will be granted. The first stage of this process is, in itself, presumed not to have a significant effect on the human environment under Sec. PSC 2.90 (4), Wis. Admin. Code. No circumstances have come to the Commission's attention in its preliminary environmental screen in this case that would require a full, separate environmental analysis at this stage of the Two-Stage CPCN process.

ULTIMATE FINDINGS OF FACT

THE COMMISSION FINDS:

1. WPS's Rhinelander Project, Polsky Energy's DePere Project, New World Power Corporation's Rosiere Project and the other bids submitted in this case are competing alternatives to meet the need for power on the WPS system in 1998. Only one of them is necessary to satisfy the reasonable needs of the public for an adequate supply of electricity on WPS's system in 1998.

2. Either the WPS Rhinelander Project or the Polsky Energy DePere Project, if in operation in 1998, would be in substantial compliance with WPS's latest approved Advance Plan, per the Commission's order in docket 05-EP-6. The New World Power Corporation Rosiere Project, if in operation by 1999, would be in substantial compliance with the latest approved Advance Plan, per order in docket 05-EP-6.

3. WPS's Rhinelander Project, Polsky Energy's DePere Project and New World Power Corporation's Rosiere Project have no fatal siting flaws that are apparent to the general environmental overview that was performed on the alternative proposals offered in this case. Any project which goes forward to a CPCN will be subjected to full environmental review, which may overturn this evaluation.

4. Of the 16 sources of supply which are competing in this case to meet WPS's 1998 need for power, WPS's Rhinelander Project, as bid and analyzed in this proceeding, is overall the least total cost alternative for ratepayers, considering both dollar costs and intangible factors. As long as the WPS Rhinelander Project remains viable, construction of Polsky Energy's DePere Project or any of the other proposed projects would add to the cost of service to ratepayers without proportionately increasing the benefits to ratepayers, because the Rhinelander Project is a lower-cost alternative.

5. Because of the timing of this order relative to WPS's originally proposed milestones for the project, it is reasonable to require WPS to file for Commission review and approval a revised set of milestones for the project to be completed as described in the Findings of Fact. It is also reasonable to require that milestones which depend on actions of governmental agencies be expressed as times relative to the agency action. Milestones for actions within the parties' control should be expressed as dates certain.

6. The design and general location of WPS's Rhinelander Project are in the public interest when considering alternative sources of supply.

7. The uncertainty associated with the viability of the WPS Rhinelander Project related to the availability to Rhinelander Paper of the GDS and proposed NUP-1 rates makes it reasonable to require WPS and Rhinelander Paper to notify the Commission as to whether they intend to pursue construction of the WPS Rhinelander Project within 40 days of the date of this order assuming the unavailability of both rates. If WPS and RPC find it necessary to renegotiate the SESA as a result of the unavailability of the NUP-1 or GDS rates, it is reasonable that any changes in the agreement shall not adversely affect the cost to WPS ratepayers.

8. The enforcement of the performance guarantees associated with the WPS Rhinelander Project requires that rate recovery for costs related to the project be consistent with the cost guarantees and operating performance levels stated in the bid. Reasonable tracking, accounting and reporting mechanisms will be necessary to ensure appropriate rate treatment.

9. Polsky Energy's DePere Project is overall the second least total cost alternative for ratepayers offered in this proceeding, considering dollar costs and intangible factors.

10. If WPS' Rhinelander Project were not to proceed, or failed to meet, without good cause, the revised milestones as approved by the Commission, the design and general location of Polsky Energy's DePere Project would be in the public interest when considering alternative sources of supply.

11. The New World Power Corporation Rosiere Project, WPS's Weston, Marinette, Pulliam and Generic Projects, Polsky Energy's Merrill Project, WP&L's Rock River Project, EnerTran's Oshkosh Project, Wind River's Buffalo Ridge Wind Project, Energy Initiative's GrayBear Project, U.S. Generating's Plover Project and MP&L's resale power option are all significantly higher in overall cost to ratepayers than the two projects listed above in paragraphs 4 and 9, considering dollar costs and intangible factors.

12. The New World Power Corporation Rosiere Wind Project is a highly attractive alternative for meeting WPS's stated need for wind power at the end of this decade. It is in the public interest for the Commission to encourage WPS and New World Power to attempt to negotiate a contract for the installation of the wind capacity proposed by New World Power Corporation. The cost for the wind power should be comparable to the overall total cost of the WPS Rhinelander Project.

13. WPS's Weston, Marinette, Pulliam and Generic Projects, Polsky Energy's Merrill Project, WP&L's Rock River Project, EnerTran's Oshkosh Project, Wind River's Buffalo Ridge Wind Project, Energy Initiative's GrayBear Project, U.S. Generating's Plover Project and MP&L's resale power option are not in the public interest at this time, given the available alternative sources of supply to meet the need for power on the WPS system in 1998.

14. The competitive process used in this proceeding will save ratepayers a very large sum of money, consisting of the differential in cost between the WPS Rhinelander Project and the other bids submitted by the various participants in this proceeding.

Conclusions of Law

THE COMMISSION CONCLUDES:

It has authority under ss. 1.11, 1.12, 19.36, 133.01, 134.90, 196.02, 196.025, 196.03, 196.14, 196.377, 196.395, 196.49, 196.491, Wis.Stats., 16 U.S.C. s. 824 and 18 C.F.R. s. 292 to issue the following order, including its stated conditions, and that the following order should be issued.

Order

THE COMMISSION THEREFORE ORDERS:

1. WPS is hereby authorized to proceed with its application for a Certificate of Public Convenience and Necessity for its Rhinelander Project, as described in the Findings of Fact.

2. WPS and Rhinelander Paper shall notify the Commission in writing within 40 days of the date of this order stating whether they intend to pursue the WPS Rhinelander Project assuming the GDS and NUP-1 rates will not be available to Rhinelander Paper once the proposed facility is in operation. If WPS and Rhinelander Paper find it necessary to renegotiate the SESA as a result of the unavailability of the NUP-1 or GDS rates, any changes in the contract shall not adversely affect the cost to WPS ratepayers.

3. WPS shall update its milestones for the WPS Rhinelander Project as described in the Findings of Fact and shall file this update with the Commission within 40 days of the date of this order. Milestones which depend on governmental agency actions shall be

expressed as times relative to the agency's action. Milestones for actions within the parties' control shall be expressed as dates certain.

4. WPS shall not seek to recover costs in future rates cases which are inconsistent with the cost and performance guarantees stated in the bid for the WPS Rhinelander Project.

5. WPS shall set up tracking accounts for key operating parameters related to the performance guarantees, including specific accounts for unit availability, maintenance hours and full forced outage. Reports of these accounts shall be included in any application for future electric rate adjustments. On a continuing basis, WPS shall also make available to Commission auditing staff information on the historical and projected steam use by RPC, and actual cost allocations pursuant to the Steam and Electric Sales Agreement.

6. If the WPS Rhinelander Project fails to meet its milestones, and no waiver is granted by the Commission, Polsky Energy is hereby authorized to apply in this docket for a Certificate of Public Convenience and Necessity for its DePere Project, subject to the other provisions of this order.

7. If the WPS Rhinelander Project fails to go forward, WPS shall proceed to negotiate a purchased power contract with Polsky Energy for electricity from the DePere Project, allowing representatives from the Commission staff to monitor the negotiating sessions.

8. Within 60 days from the date certain that WPS or the Commission determines that WPS will not proceed with the Rhinelander Project, WPS shall either show the Commission that it has an executed purchased power contract with Polsky Energy for electricity from the DePere Project, or within 75 days from that date, file testimony at the Commission and serve it upon Polsky Energy to show that it negotiated in good faith and

used best efforts to achieve a contract. At the same time, Polsky Energy may file testimony as to whether its latest contract offer was consistent with, or more advantageous for ratepayers than, its bid modeled and analyzed in this proceeding. Either WPS or Polsky Energy may provide the Commission with a waiver of its right to hearing in lieu of the testimony described above.

9. Unless both parties waive hearing, if the WPS Rhinelander Project fails to proceed and if no purchased power contract is reached between Polsky Energy and WPS, and testimony as described above is filed, as soon thereafter as feasible, the Commission will hold a hearing to determine whether to order WPS to enter into a contract or to pursue some other alternative supply option.

10. Whichever entity (WPS, Polsky Energy, and/or New World Power Corporation) proceeds to procure a CPCN and build its project under this order, permission to do so is contingent on timely achievement of the milestones set forth in its bid, or good cause shown for failure to meet such milestones.

11. Whichever entity (WPS, Polsky Energy, and/or New World Power Corporation) proceeds to procure a CPCN and build its project under this order, permission to do so is contingent on that entity's being bound and committed to perform in accordance with its bid as clarified in this proceeding.

12. This order constitutes the Commission's selection, from among competing alternative sources of supply, of the project(s) that may proceed with a CPCN application. It does not constitute consideration of the other elements of a CPCN under s. 196.491 (3), Wis. Stats.

13. All other motions and requests that may be outstanding are hereby deemed denied.

14. The Commission retains jurisdiction in this matter.

Dated at Madison, Wisconsin December 21, 1994

By the Commission.

Lynda L. Dorr

Lynda L. Dorr
Secretary to the Commission

LLD:PCN:RPCWPS.ORD
See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in s. 227.53, Stats. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in s. 227.01(3), Stats., a person aggrieved by the order has the further right to file one petition for rehearing as provided in s. 227.49, Stats. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with s. 227.48(2), Stats., and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 4/22/91

APPENDIX A

In order to comply with s. 227.47, Stats., the following parties who appeared before the agency are considered parties for purposes of review under s. 227.53, Stats.

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STATE OF WISCONSIN
SUPREME COURT

Clean Wisconsin, Inc. p/k/a Wisconsin's Environmental Decade Institute, Inc., and SC Johnson & Son, Inc. and Calpine Corporation
Petitioners-Respondents-Cross-Appellants-Cross-Respondents,
Town of Caledonia
Petitioner-Cross-Respondent,
v.
Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources,
Respondents-Co-Appellants-Cross-Respondents,
Wisconsin Electric Power Company, W.E. Power, LLC and Wisconsin Energy Corporation,
Interested Parties-Appellants-Cross-Respondents,
Dairyland Power Cooperative,
Interested Party-Cross-Respondent,
Madison Gas & Electric Company and Wisconsin Public Power, Inc.,
Interested Parties-Co-Appellants-Cross-Respondents,
City of Oak Creek
Interested Party-Respondent-Cross-Appellant,
Robert H. Owen,
Interested Party-Respondent-Cross-Respondent.

Appeal No. 04-3179

Circuit Court Case No. 03CV003478, 03CV003731, 04CV000133, 04CV000149, 04CV000530, 04CV000533

Calpine Corporation,
Petitioner,
v.
Public Service Commission of Wisconsin, and Wisconsin Department of Natural Resources,
Respondents,
Wisconsin Electric Power Company, Wisconsin Energy Corporation, W.E. Power, LLC, Dairyland Power Cooperative, Madison Gas & Electric Company, Robert H. Owen, Jr., and City of Oak Creek,
Interested Parties.

Clean Wisconsin, Inc. p/k/a Wisconsin's Environmental Decade Institute, Inc. and SC Johnson & Son, Inc.,
Petitioners,

v.

Wisconsin Department of Natural Resources,
Respondent,

Wisconsin Public Power, Inc., City of Oak Creek, Dairyland Power Cooperative, Madison Gas & Electric Company, Wisconsin Electric Power Company, Wisconsin Energy Corporation and W.E. Power, LLC,
Interested Parties.

Calpine Corporation,
Petitioner,

v.

Wisconsin Department of Natural Resources,
Respondent,

City of Oak Creek, Dairyland Power Cooperative, Madison Gas & Electric Company, Wisconsin Public Power, Wisconsin Electric Power Company, Wisconsin Energy Corporation and W.E. Power, LLC,
Interested Parties.

City of Oak Creek,
Petitioner,

v.

Public Service Commission of Wisconsin,
Respondent.

Town of Caledonia,
Petitioner,

v.

Public Service Commission of Wisconsin,
Respondent,
Wisconsin Electric Power Company, Wisconsin Energy Corporation, W.E. Power, LLC, Dairyland Power Cooperative, Madison Gas & Electric Company, Robert H. Owen, Jr., and Wisconsin Public Power, Inc.,
Interested Parties.

APPENDIX TO
BRIEF OF PETITIONER-RESPONDENT-CROSS-APPELLANT-CROSS-RESPONDENT CALPINE CORPORATION
(Volume 2 of 2)

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February 4, 2005

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54:231-266	Final Decision – Wisconsin Electric Power Company – 6630-DR-104, October 17, 2001	378 - 410
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DATE MAILED

MAR 9 1995

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of LSP-Whitewater Limited Partnership for Authority to Construct and Place in Operation a Nominal 220 MW Combined-Cycle Cogeneration Facility, Known as the Whitewater Cogeneration Facility, With Associated Electric Transmission Facilities Located in Jefferson and Walworth Counties	6630-CE-187
(Stage Two of the Proceeding to Supply Wisconsin Electric Power Company's 1996 Capacity Need; Formerly Known as the Application of Wisconsin Electric Power Company for Authority to Construct and Place in Operation a Nominal 210 MW Combined-Cycle Cogeneration Facility, Known as the Kimberly Cogeneration Facility With Associated Transmission Facilities Located in Outagamie County)	
Application of Wisconsin Natural Gas Company for Authority to Construct and Place in Operation a Natural Gas Pipeline, Located in Jefferson, Walworth, and Rock Counties to Service LSP-Whitewater Limited Partnership's Proposed Whitewater Cogeneration Facility	6670-CG-116

FINDINGS OF FACT, CONCLUSION OF LAW, CERTIFICATE AND ORDER

BACKGROUND

In Stage One of the Two-Stage Certificate of Public Convenience and Necessity (CPCN) certification process, the Commission evaluated alternatives to supply Wisconsin Electric Power Company's (WEPCO) 1996 capacity need. As a result of this process, the Commission selected Whitewater Cogeneration Facility as the system alternative that best meets WEPCO's capacity need. Therefore, on November 5, 1993, the Commission issued

an order authorizing LS Power Corporation to file a CPCN application for its Whitewater Cogeneration Facility and to proceed with Stage Two of the CPCN certification process to supply WEPCO's 1996 capacity need.

LSP-Whitewater Limited Partnership (LSP), an affiliate of LS Power Corporation, filed an application with the Commission on February 18, 1994, to build the Whitewater Cogeneration Facility (Facility) as a nominal 220 megawatt (MW) combined-cycle cogeneration facility, with associated electric transmission facilities. The net electrical capacity of the facility as bid was 229 MW. The net electrical capacity of the Facility was subsequently revised to 248.5 MW, without any increase in cost to WEPCO. The plant will supply electrical energy to WEPCO's system and steam, for heating and other purposes, to the University of Wisconsin-Whitewater and industries that may locate in the area in the future. WEPCO will purchase the electricity produced by the Facility and distribute it to its customers, pursuant to the power purchase agreement between LSP and WEPCO dated December 21, 1993, and approved by Commission order on August 25, 1994. A double-circuit 138 kV transmission line will connect a 138 kV substation to be constructed at the Facility to the existing WEPCO Whitewater-Sugar Creek 138 kV transmission line.

The Commission, in its Stage One review of the various alternatives to supply WEPCO's capacity need, found the LSP Facility to be the least cost alternative overall for ratepayers, considering both dollar costs and intangible factors. The actual cost of the Facility is confidential, as are the costs of the alternate proposals submitted by the other competitors.

Wisconsin Natural Gas Company (WNG), a gas public utility, filed a companion application with the Commission on February 23, 1994, to install and operate a high pressure

natural gas main extension to serve the proposed facility. WNG's pipeline route will be connected to a gate station to be constructed in the area. WNG estimates its project cost will be $1,600,000.

Applications granted subject to conditions.

On June 17, 1994, the Commission issued its Notice of Investigation and Assessment of Costs in this docket.

The Commission, with the assistance of the Wisconsin Department of Natural Resources (DNR), prepared a draft environmental impact statement and a final environmental impact statement. They were issued and circulated in August 1994 and October 1994, respectively.

Pursuant to the Commission's further Notice of Public Hearing, issued on October 27, 1994, public hearings were held on the proposed project before Examiner Ann Pfeifer at the Irvin L. Young Memorial Library in Whitewater at 1:30 p.m. and 7:00 p.m. on November 30, 1994. Persons certified as full parties are listed in Appendix A. Other persons who appeared and testified are listed in the Commission's files.

FINDINGS OF FACT

THE COMMISSION FINDS THAT:

Need for the Project

1. The Facility was approved for planning purposes, and that the need for approximately 150 MW of additional generating capacity in 1994 and thereafter was identified and approved in the Commission's Advance Plan 6 order of September 15, 1992, in docket 05-EP-6.

2. In May 1993, the Commission implemented its Two-Stage CPCN process and invited potential suppliers of electricity to meet WEPCO's capacity needs at lowest total cost. The size of capacity bids received from bidders in Stage One ranged from 75 MW to 237 MW.

3. The Commission selected the nominal 220 MW Facility in Stage One of the Two-Stage CPCN process to be installed in 1996, pursuant to the Commission's November 5, 1993 order in dockets 6630-CE-187 and 6650-CG-124. In Stage Two, LSP subsequently revised the net electrical capacity of its plant to 248.5 MW.

4. Advance Plan 6 and Advance Plan 7 filings have indicated a consistent, long-term capacity need within the WEPCO system. WEPCO's revised load forecast filed in Advance Plan 7 confirmed the need for the Facility. WEPCO's system loads experienced in the summer of 1994 were consistent with its Advance Plan 7 projections and have also reconfirmed WEPCO's long-term capacity needs.

5. The addition of the 248.5 MW Facility in 1996 will allow WEPCO to maintain a reserve margin of 18.3 percent, which is consistent with the reserve margin range of 12 to 20 percent established by the Commission in Advance Plan 5, docket 05-EP-5.

6. The power purchase agreement between WEPCO and LSP provides WEPCO the flexibility to delay the Facility's in-service date by up to two years.

7. If the project were to be delayed for one year, the reserve margin for 1996 would be 13.8 percent, which is below the 15 percent planning reserve margin preferred by Wisconsin utilities, although within the acceptable range of 12 to 20 percent established by the Commission.

8. Given WEPCO's demonstrated long-term need for additional capacity, a delay in issuing the CPCN is not warranted. Some parties requested that the Commission withhold final action on this CPCN application, pending resolution of lawsuits that have followed Stage One of this Two-Stage CPCN process. Given the possibility of further appeals, the delay involved in resolving the petitions for judicial review could be quite lengthy. This would frustrate reasonable needs for more capacity on the WEPCO system. Furthermore, suspending the issuance of the CPCN is not legally required. State law presumes the Commission's Stage One order is lawful and reasonable, even though court review has been instituted. Section 196.40, Stats. State law does not favor staying a Commission order while judicial review is pending. Section 196.43 and 227.54, Stats.

9. The proposed generation capacity addition of 248.5 MW in 1996 is necessary to satisfy the reasonable needs of the public for adequate electric service.

10. Intermediate capacity in the form of a combined cycle cogeneration plant is the appropriate type of capacity for addition at this time to maintain a reasonably optimum generation mix in WEPCO's system.

11. The gas pipeline proposed by WNG is needed to provide adequate gas supply and capacity to LSP for operating the cogeneration facility.

Description of the Proposed Facility

12. To meet this need for additional supply capacity, LSP will construct and place in operation a combined cycle cogeneration plant. The Facility will utilize four major systems: a combustion turbine generator, a waste heat recovery steam generator, a steam turbine generator, and two auxiliary boilers. The power plant will have a net electrical output of 248.5 MW.

13. A double-circuit 138 kV transmission line will connect a 138 kV substation to be constructed at the Facility to the existing WEPCO Whitewater-Sugar Creek 138 kV transmission line. LSP is responsible for licensing and building the transmission facilities. Upon commercial operation of the power plant, LSP will transfer ownership of the transmission facilities to WEPCO.

14. The Facility is planned to supply steam, for heating and other purposes, to the University of Wisconsin-Whitewater and possibly to industries locating in the area. The steam line will include a double pipe system to allow steam delivery and condensate return.

15. The principal fuel to be burned in the combustion turbine will be natural gas. To provide the required natural gas supply to the Whitewater site, co-applicant WNG will install and operate a 5.4-mile, 12-inch diameter high pressure natural gas main extension to serve the Facility at an estimated cost of $1,600,000. WNG's pipeline will be connected to a gate

station to be constructed in the area. The pipeline will be built in an area that may be subject to development. The proposed pipeline will have a Maximum Allowable Operating Pressure (MAOP) in excess of 950 pounds per square inch.

16. LSP is considering building a greenhouse next to the Facility. The Commission encourages LSP to employ the disabled in this greenhouse, if it is built.

17. The Federal Energy Regulatory Commission (FERC) has granted the Facility qualifying facility (QF) status.

Site and Route Description

18. LSP's preferred site for the Facility is located on farmland at the northern edge of the City of Whitewater (City), west of the Whitewater Wastewater Treatment Plant (WWTP) and a private recycling center, on land recently annexed by the City. The alternative site is located south of the WWTP, on idle agricultural land that is the City composting site.

19. Building the Facility would be significantly more costly on the alternative site due to a need to redesign the plant layout.

20. LSP proposed numerous possible route segments for the electric transmission line, as shown in Appendix B. LSP secured all the necessary easement options for its preferred route, consisting of segments A, B, C, part of D, and M. LSP also secured easement options for the majority of a route consisting of segments A, B, F, G, H, and E. This route is approximately one mile shorter than LSP's preferred route. LSP was unable to secure a necessary easement option from one landowner on segment H.

21. LSP proposed several possible steam line routes connecting its preferred and alternative Facility sites to the University of Wisconsin-Whitewater boiler house. LSP's

preferred steam line route from its preferred Facility site, as originally proposed, would have crossed Fremont Road Park and the center of the UW-Whitewater Nature Preserve, interfering with efforts to restore prairie to the preserve. The route would also have crossed a wetland located in the preserve. LSP agreed to modify this route to cross only the edge of the nature preserve, minimize impacts to Fremont Road Park, and more closely follow a drainage ditch on its 128-acre preferred Facility site.

22. Wisconsin Natural Gas Company (WNG) proposed its preferred natural gas pipeline routes between a new gate station and both LSP's preferred and alternative Facility sites. WNG also proposed alternative routes that lead from the existing Lima Gate Station to LSP's sites. These various routes largely follow existing roads and property boundaries.

Environmental Impacts of the Project

23. The project, constructed and operated as approved and required herein, can meet all applicable environmental protection requirements and will not have undue adverse impacts on the human and natural environment.

24. Construction of the Facility will divert land from agricultural use. For LSP's preferred site, this will amount to about 20 acres. The farmer now leasing this cropland would be significantly affected were he to lose use of all cropland on LSP's preferred site.

25. The City of Whitewater has annexed the 35-acre parcel where the Facility will be built at LSP's preferred site and has rezoned it to permit construction. The City prefers that the facility be built at this site.

26. Construction of the Facility at LSP's preferred site will extend development to the edge of the Whitewater Urban Service Area Boundary.

27. Construction of the Facility at LSP's preferred site will not interfere with the possible construction of the USH 12 north bypass of Whitewater.

28. Construction of the Facility at the alternative site would affect more wetlands than construction at LSP's preferred site. Wetlands lie nearer construction areas at the alternative site.

29. Construction work in wetlands can lead to purple loosestrife infestation, disruption of soil horizons, and alterations of water flow.

30. Construction on LSP's preferred electric transmission line route will minimally affect more wetlands, woodland, and agricultural land than construction on an alternative route consisting of segments A, B, F, G, H, and E (see Appendix B).

31. Construction of the Facility will require the extension of water lines to the site and the construction of a new municipal well by the City of Whitewater.

32. It could be necessary to use condemnation to acquire a transmission line easement from one landowner along Segment H (see Appendix B). LSP does not have statutory authority to condemn property, although WEPCO does. Condemnation is not needed for LSP's preferred route.

33. Operation of the Facility will emit nitrogen oxides, carbon monoxide, and volatile organic compounds from fuel combustion. When fuel oil is used, sulfur dioxide will also be emitted. No current air quality standards will be violated when operating the Facility on either natural gas or fuel oil.

34. The Environmental Impact Statement (EIS) prepared for this project (Exhibit 19) is a detailed statement that fully complies with ss. 1.11 and 1.12, Stats. The EIS accurately

describes the environmental effects of those portions of the project for which Commission review is required.

ULTIMATE FINDINGS OF FACT

THE COMMISSION FINDS THAT:

1. The proposed facilities, as described and approved herein, are necessary to satisfy the reasonable needs of the public for an adequate supply of electric energy. Delaying issuance of the CPCN, pending resolution of the judicial appeals that followed the Commission's Stage One order, would frustrate these needs.

2. The design, location, and routes are in the public interest based on analysis of alternative sources of supply (as determined in the Commission's November 5, 1993, order in dockets 6630-CE-187 and 6650-CG-124), alternative locations, alternative routes, individual hardships, engineering, economics, safety, reliability, and environmental factors.

3. The construction and operation of the proposed facilities, as discussed in the preceding Findings of Fact and described in the application, will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water, and recreational use.

4. The proposed facilities will not unreasonably interfere with the orderly land use and development plans for the area.

5. The general public interest and public convenience and necessity require that LSP purchase, construct, install, and place in operation a 248.5 MW combined cycle cogeneration

plant in the City of Whitewater, Jefferson County, and construct associated electric transmission facilities and steam line in parts of the City of Whitewater, Town of Whitewater, and Town of Cold Spring, Jefferson and Walworth Counties. LSP has acquired QF status for this project.

6. The general public interest and public convenience and necessity require that WNG construct, install, and place in operation natural gas pipeline facilities in parts of the City of Whitewater, Town of Whitewater, and Town of Cold Spring, Jefferson and Walworth Counties, to serve LSP's facility, at an estimated cost of $1,600,000, and that since the pipeline will be operating at pipeline pressure, it shall be constructed to Class 4 location standards, specified in s. PSC 135.192.5, Wis. Adm. Code.

7. The DNR issued the required pre-certification air permit on January 13, 1995. No other pre-certification permits are required.

8. Construction of the project, including electric transmission facilities, natural gas main facilities, and steam line can have adverse environmental impacts which can be mitigated. Applicants will be required to consult and work with the DNR, the Wisconsin Department of Agriculture, Trade and Consumer Protection, the counties, the City, the towns, and affected property owners to reasonably limit, avoid, or mitigate such adverse construction impacts as soil compaction, soil erosion, and wetland disturbance.

9. Construction and operation of the proposed facilities will not impair the efficiency of WNG's or WEPCO's service, will not provide facilities unreasonably in excess of probable future requirements and, when placed in operation, will not add to the cost of service without proportionately increasing the value or available quantity thereof.

10. The proposed facilities are in compliance with the Advance Plan 6 Order approved by the Commission on September 15, 1992 in docket 05-EP-6, and with the Stage One Order in this proceeding approved by the Commission on November 5, 1993, in dockets 6630-CE-187 and 6650-CG-124.

CONCLUSION OF LAW

THE COMMISSION CONCLUDES:

That it has jurisdiction under ss. 1.11, 1.12, 196.395, 196.49, and 196.491, Stats., and chs. PSC 111, 112 and 133, Wis. Adm. Code, to issue a certificate authorizing LSP-Whitewater Limited Partnership and Wisconsin Natural Gas Company to purchase, construct, install and place in operation the facilities described herein, subject to such conditions as are necessary to meet the requirements of these statutes and rules, and that such a certificate should be issued.

CERTIFICATE

THE COMMISSION THEREFORE CERTIFIES:

That LSP-Whitewater Limited Partnership, as an independent power producer, and Wisconsin Natural Gas Company, as a natural gas public utility, may purchase, construct, install, and place in operation a 248.5 MW combined cycle cogeneration plant, together with associated electric transmission, natural gas, and steam facilities. The applicants are granted this certificate upon the following conditions:

1. That applicants notify the Commission before proceeding with any major change in design, size, or location of the proposed facilities.

2. That applicants obtain all other necessary authorizations from any other governmental authorities.

3. That applicants comply with all conditions specified in this order.

4. That WNG notify the Commission before proceeding, should its costs deviate significantly from the authorized cost.

ORDER

THE COMMISSION THEREFORE ORDERS THAT:

1. The approved location of the proposed new cogeneration plant is LSP's preferred site in the City of Whitewater, Jefferson County, as described in the Findings of Fact.

2. LSP is prohibited from providing steam to any potential users locating north of CTH U in Jefferson County, to reduce the attractiveness for development of agricultural land beyond the Whitewater Urban Service Area Boundary.

3. LSP shall offer for lease by farmers the cropland that remains at the Facility site after construction, to minimize the loss of farmland there.

4. LSP shall preserve the wooded area northwest of the Facility construction area and the drainage ditch crossing LSP's preferred site.

5. LSP shall assist the City of Whitewater in the development of park land to be located south of the Facility construction area.

6. LSP shall avoid wetlands in constructing its wastewater discharge line.

7. The approved route of the electric transmission line is LSP's preferred route consisting of segments A, B, C, part of D, and M (see Appendix B).

8. Electric transmission line construction work in wetlands shall be done only when the ground is frozen.

9. The electric transmission line shall comply with the Wisconsin State Electrical Code; ch. PSC 114, Wis. Adm. Code.

10. The approved route of the steam line shall follow, as closely as feasible, the drainage ditch extending southwest from the Facility construction site while avoiding wetlands associated with the ditch; shall cross Whitewater Creek north of Fremont Road Park and minimize the length of steam line lying in Fremont Road Park; and shall cross to the west side of Fremont Street, parallel the west side of Fremont Street as closely as feasible, cross to the south side of Stadium Drive, parallel the south edge of Stadium Drive between Fremont Street and Prairie Street, and then proceed to the UW-Whitewater boiler house. This route is shown in Appendix C.

11. LSP shall encourage the City of Whitewater to locate the new water line for the Facility along Fremont Street between Lauderdale Drive and the north city limits, and then next to the new steam line between Fremont Street and the Facility construction site.

12. Upon completion of the project, LSP shall notify the Commission of the date the generating plant is placed in service, and the dates the transmission facilities and steam line are placed in service.

13. The approved route of the natural gas pipeline is WNG's preferred route to LSP's preferred site. This route is shown in Appendix D.

14. WNG shall avoid wetlands when constructing this pipeline.

15. WNG's pipeline shall be constructed to Class 4 location standards.

16. Prior to the commencement of any natural gas pipeline construction authorized by this order, WNG shall inform the Commission as to the date construction will begin.

17. Upon completion of construction of the natural gas pipeline facilities, WNG shall furnish the Commission with a tabulation of final costs segregated by plant account.

18. Upon completion of the natural gas pipeline facilities, WNG shall notify the Commission of the date the natural gas facilities are completed and ready for service.

19. The applicants shall consult with DNR concerning the control of purple loosestrife and implement the control techniques DNR recommends.

20. The applicants shall consult and work with the counties, the City, the towns, and affected property owners from whom right-of-way easements are required when completing the details of routing and when deciding on actual physical placement of electric transmission poles and the gas pipeline within the approved general route corridors. The applicants shall do so prior to construction to minimize impacts.

21. The applicants shall consult and work with the DNR, the Wisconsin Department of Agriculture, Trade and Consumer Protection, the counties, the City, the towns, and affected property owners to reasonably limit, avoid, or mitigate such adverse construction impacts as soil compaction, soil erosion, and wetland disturbance. They shall implement the conditions, guidelines, and techniques prescribed by these state agencies.

22. The certificate is valid only if construction begins within two years of the date this order takes effect.

23. Applicants shall submit quarterly progress reports to the Commission, summarizing the status of construction, the status of environmental control activities, and the

overall percent of physical completion. Environmental reporting shall include a summary of consultations with DNR and other agencies associated with permits or otherwise required herein. The reports shall list dates, names, and results (orders or recommendations received) of each contact and the company's progress in implementing prescribed environmental impact prevention or control measures. The first report is due in July 1995, covering the first and second quarter of 1995.

24. Jurisdiction is retained.

Commissioner Scott Neitzel dissents regarding the proper electric transmission line route.

Dated at Madison, Wisconsin, March 6, 1995

By the Commission.

Lynda L. Dorr
Secretary to the Commission

LLD:TKK:bap:h:\elec\lspower\lsporder

See attached Notice of Appeal Rights.

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in s. 227.53, Stats. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in s. 227.01(3), Stats., a person aggrieved by the order has the further right to file one petition for rehearing as provided in s. 227.49, Stats. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with s. 227.48(2), Stats., and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

4/22/91

APPENDIX A

In order to comply with s. 227.47, Stats., the following parties who appeared before the agency are considered parties for purposes of review under s. 227.53, Stats.

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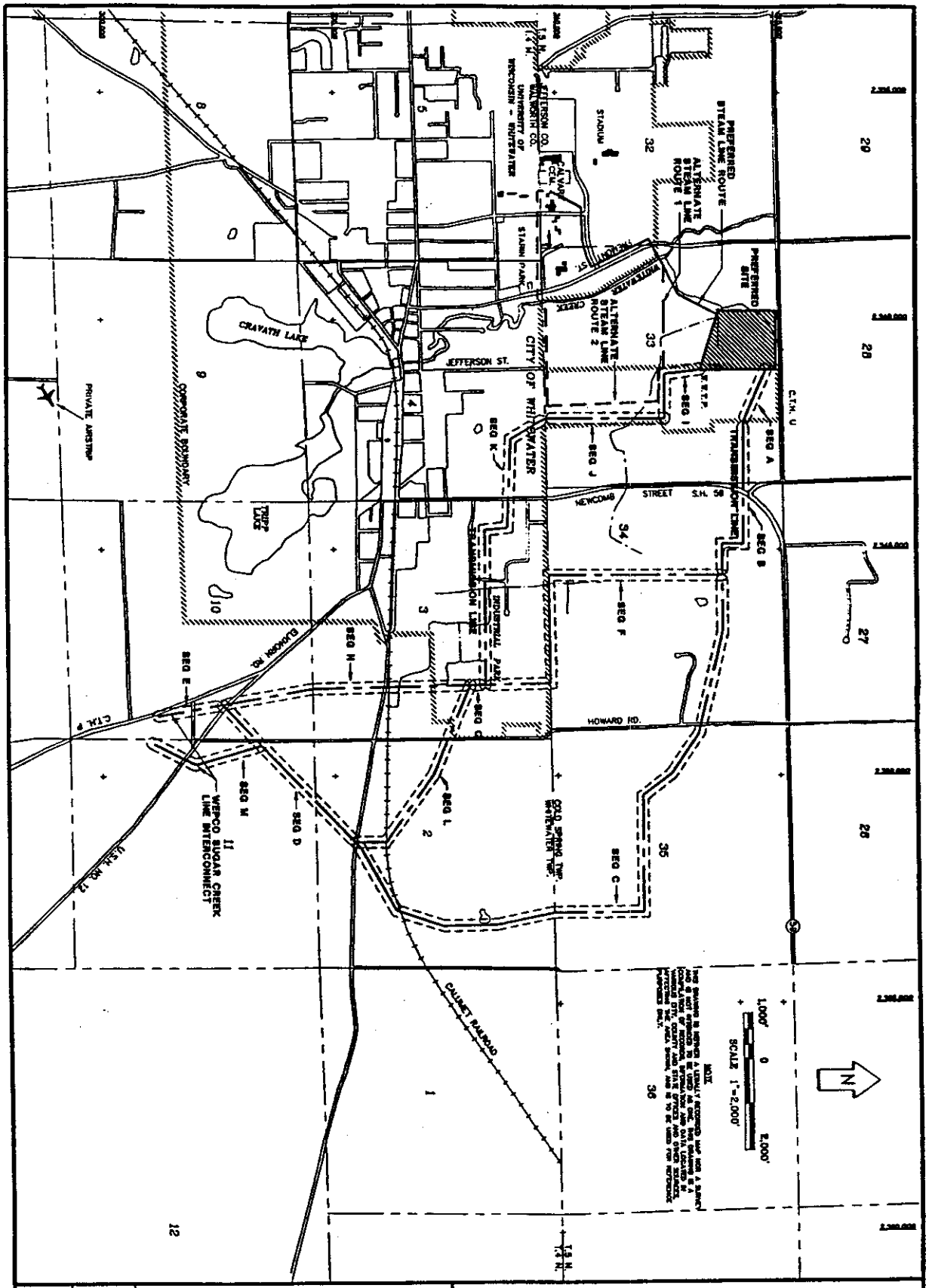
Appendix B

Whitewater Cogeneration Facility

Electric Transmission Line Route Segments



BLACK & VEATCH

PROJECT 25098

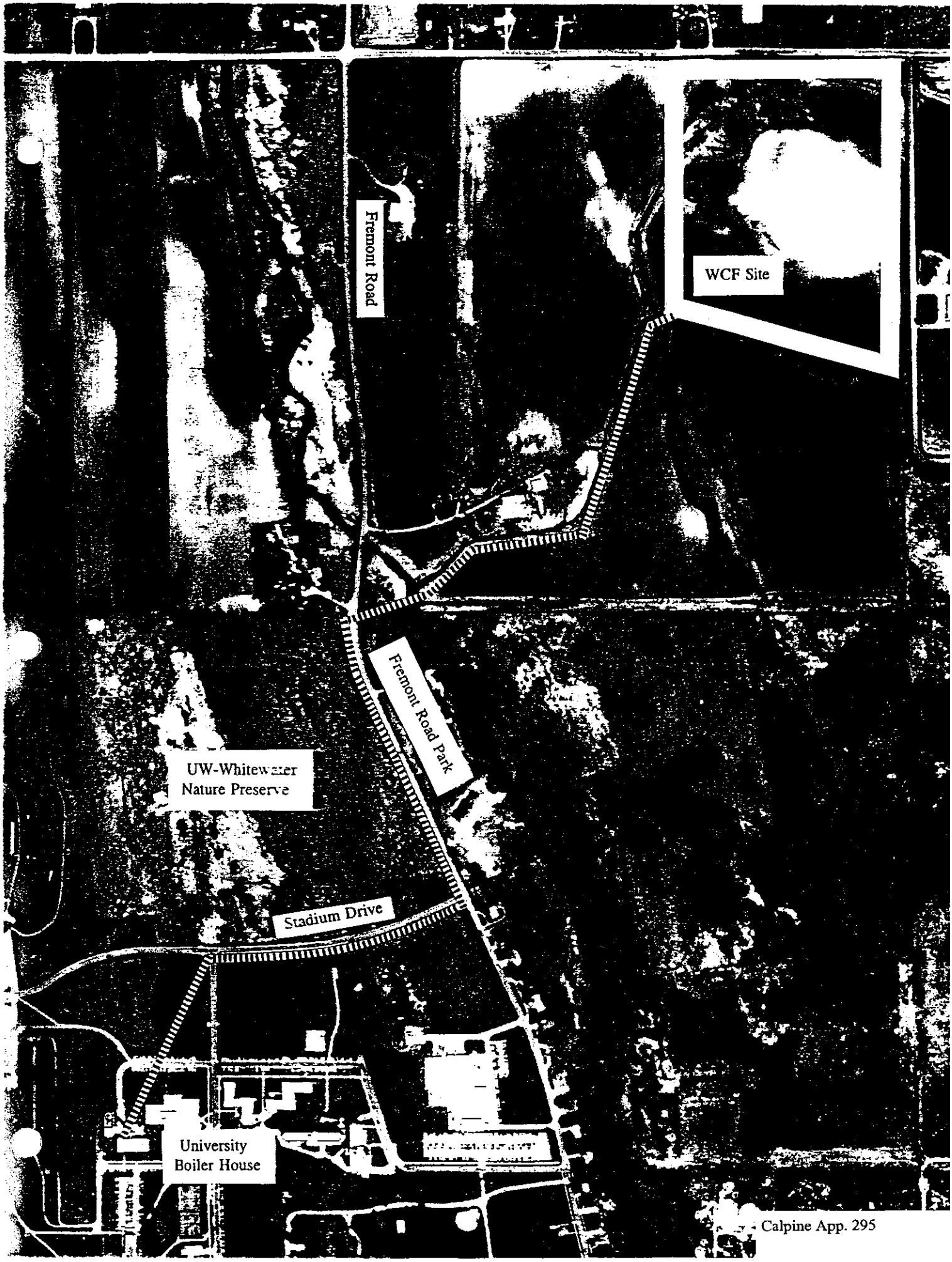
FIGURE 2-9

ELECTRIC TRANSMISSION LINE SEGMENTS
FOR LSP'S PREFERRED SITE LOCATION
LSP – Whitewater Limited Partnership
Whitewater Cogeneration Facility

Appendix C

Whitewater Cogeneration Facility

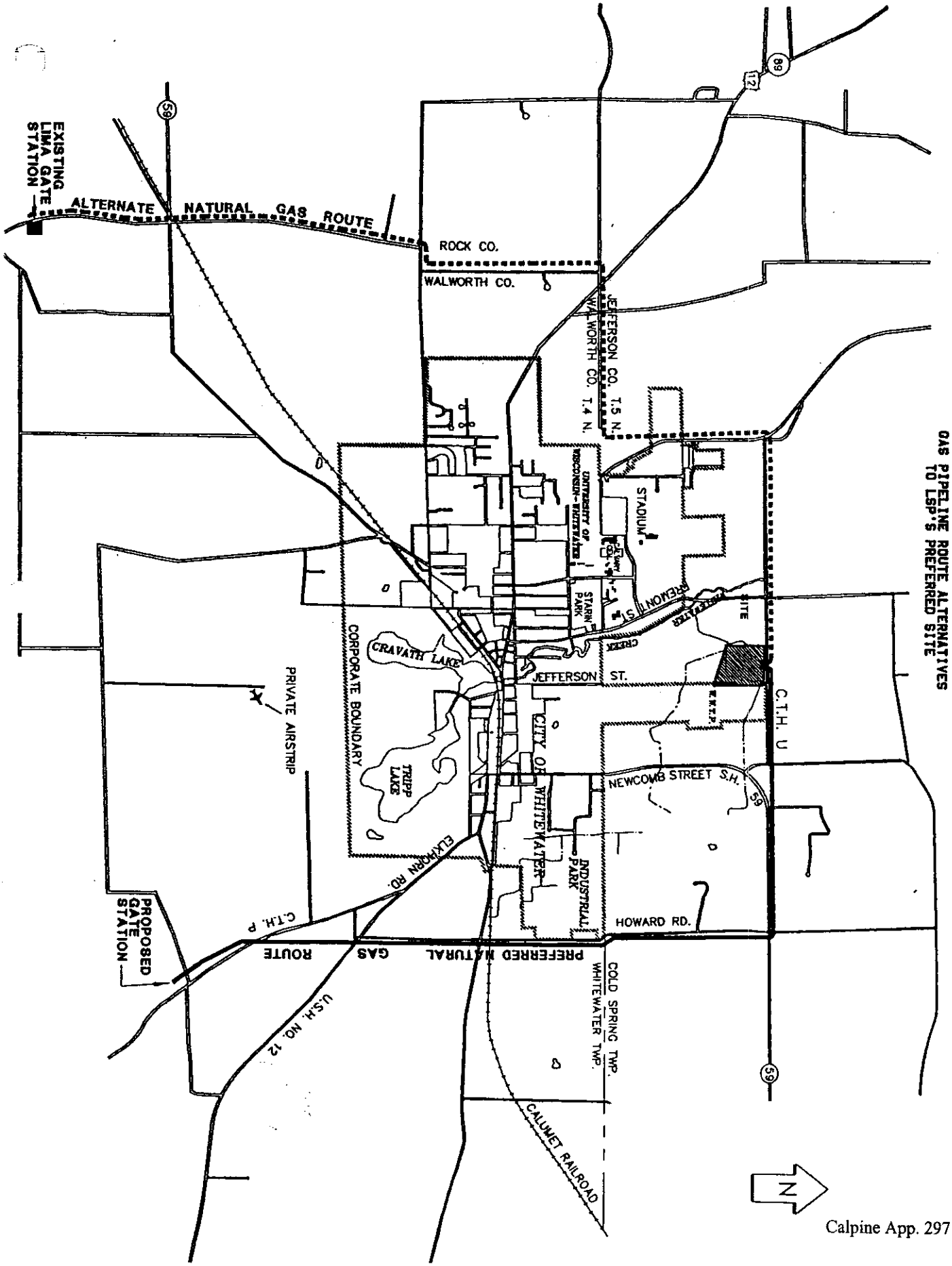
Steam Line Route


Fremont Road
WCF Site
Fremont Road Park
UW-Whitewater
Nature Preserve
Stadium Drive
University
Boiler House

Appendix D

Whitewater Cogeneration Facility

Natural Gas Pipeline Route


GAS PIPELINE ROUTE ALTERNATIVES
TO LSP'S PREFERRED SITE
EXISTING
LIMA GATE
STATION
ALTERNATE NATURAL GAS ROUTE
ROCK CO.
WALWORTH CO.
JEFFERSON CO. T.5 N.
WALWORTH CO. T.4 N.
STADIUM
UNIVERSITY OF WISCONSIN-WHITEWATER
STARIN PARK
FREMONT ST.
CREEK
SITE
CRAVATH LAKE
JEFFERSON ST.
CORPORATE BOUNDARY
PRIVATE AIRSTRIP
TRIPP LAKE
CITY OF WHITEWATER
NEWCOMB STREET S.H. 59
C.T.H. U
INDUSTRIAL PARK
ELKHORN RD.
HOWARD RD.
C.T.H. P
PROPOSED
GATE
STATION
PREFERRED NATURAL GAS ROUTE
U.S.H. NO. 12
COLD SPRING TWP.
WHITEWATER TWP.
CALUMET RAILROAD
59
89
12
N

DATE MAILED
OCT 10 1997

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of De Pere Energy LLC for Authority to Construct and Place in Operation a 255 MW Combined-Cycle Cogeneration Facility, Known as the De Pere Power Plant, Located in Brown County	9335-CE-100
Application of Wisconsin Public Service Corporation to Construct and Operate a 138 kV Electric Transmission Line and Substation to Provide Electric System Improvements, Located in Brown County	6690-CE-175
Application of Wisconsin Public Service Corporation to Construct and Operate a 138 kV Electric Transmission Line to Provide a Connection for the Proposed De Pere Power Plant, Located in Brown County	6690-CE-176

FINDINGS OF FACT, CONCLUSIONS OF LAW, CERTIFICATE AND ORDER

Background

In Stage One of the Two-Stage Certificate of Public Convenience and Necessity (CPCN) process, docket 6690-CE-156, the Public Service Commission of Wisconsin (Commission) evaluated alternatives to supply Wisconsin Public Service Corporation's (WPS) 1999 capacity needs. As a result of this process, the Commission initially selected the Rhinelander Energy Center as the overall least-cost alternative to meet WPS's capacity needs. On December 22, 1994, the Commission issued an order authorizing WPS to file a CPCN application for the Rhinelander Energy Center and to proceed with Stage Two of the CPCN process. The order also directed that if the WPS-Rhinelander Energy Center project failed to go forward, then the Polsky Energy Corporation would be authorized to apply for a CPCN for its

De Pere Energy Center Project. After the Rhinelander project, the Commission found that the Polsky De Pere Energy Center project was the overall least-cost alternative.

On July 21, 1995, WPS and Rhinelander Paper Company issued a joint press release. The release stated that, following an in-depth financial analysis and a lengthy negotiation process, Rhinelander Paper Company decided it was not feasible to continue with the project and was terminating negotiations. Consequently, WPS canceled its plans to build the Rhinelander Energy Center. Because the Rhinelander Energy Center project could not proceed, the Commission directed WPS to begin negotiating a contract for purchasing the output of the De Pere Energy Center.

De Pere Energy, LLC, an affiliate of Polsky Energy (and referred to as "Polsky" in this order), filed an application with the Commission on April 3, 1996, which was supplemented on July 29, 1996, to construct the De Pere Energy Center (docket 9335-CE-100). The De Pere Energy Center is a natural gas-fired, combined-cycle cogeneration plant to be constructed in two phases. Phase 1 is a simple cycle combustion turbine facility with a capacity of 180 megawatts (MW) and is to be in operation by 1999. Phase 2 will convert the facility into a combined-cycle cogeneration plant that will supply electricity to WPS and steam to the Nicolet Paper Company. Upon completion of Phase 2, the De Pere Energy Center will have an installed capacity of 255 MW. Polsky requested a CPCN order that permits acceleration of Phase 2 construction to be in operation as early as year 2000.

WPS will purchase the electricity produced by the De Pere Energy Center and distribute it to its customers, pursuant to the Power Purchase Agreement between De Pere Energy, LLC and WPS dated November 8, 1995, and approved by Commission order on January 12, 1996.

On September 27, 1996, WPS filed two CPCN applications to build a 138 kilovolt (kV) transmission line to provide a connection for the De Pere Energy Center (docket 6690-CE-176) and to build a 138 kV transmission line and substation to provide system improvements to the De Pere area (docket 6690-CE-175).

Because of the interrelationship between the Polsky generating facility and the WPS transmission system facilities, the three applications were considered together.

The Commission, with the assistance of the Wisconsin Department of Natural Resources (DNR), prepared a draft Environmental Impact Statement (EIS) and a final EIS for the combined dockets. The documents were issued and circulated in April 1997 and June 1997, respectively.

On June 26, 1997, Polsky filed a Motion to Clarify the Notice of Hearing and to Preclude Parties from Proposing Alternative Sources of Supply. After receiving responses to the motion, the Commission granted the motion for clarification in a letter order dated July 11, 1997. In the order, the Commission stated that "parties are precluded from offering testimony relating to alternative projects or alternative sources of supply, including purchased power options, and from offering testimony relating to the cost of such alternatives." In light of the ruling, Polsky filed motions to strike certain WPS prefiled testimony.

Pursuant to the Commission's Notice of Public Hearing issued on June 12, 1997, public hearings were held on the proposed projects before Examiner John Crosetto at the Holiday Inn in

Ashwaubenon at 9:00 a.m. and 7:00 p.m. on July 22 and 23, 1997, and at 9:00 a.m. on July 24, 1997. Persons certified as full parties are listed in Appendix A. Other persons who appeared and testified are listed in the Commission's files.

At the hearing, the parties stipulated to permit the receipt of all testimony and exhibits without prejudicing any party's right to seek a Commission ruling regarding the striking of testimony pursuant to the Commission's July 11, 1997, order.

Application of De Pere Energy, LLC is granted subject to conditions.

Applications of Wisconsin Public Service Corporation are granted subject to conditions.

FINDINGS OF FACT

THE COMMISSION FINDS:

(Docket 9335-CE-100)

Motion to Strike

Section 196.491(3)(d), Stats., sets forth the issues that are to be considered at Stage Two of the Two-Stage CPCN process.

Introduction of evidence related to the least-cost alternative source of power is not relevant at Stage Two of the Two-Stage CPCN process because these alternatives are the focus of Stage One. Addressing such issues undermines the purpose of the Two-Stage process by discouraging competitive bidding. By duplicating prior proceedings, including these issues also unnecessarily increases the length and expense of CPCN proceedings, which wastes the time and resources of both the Commission and the parties.

The Commission's July 11, 1997, order could have been implemented and certain portions of WPS's prefiled testimony and related testimony of other parties could have been stricken as requested by Polsky.

For procedural reasons, the parties reached a stipulation which allowed for admission of the potentially stricken testimony at the public hearing. Consequently, the record contains extensive cross-examination regarding these issues. This contested material in the record does not hamper the decision-making process and needs not be stricken at this time. Therefore, the Commission has considered all of the testimony and evidence, including the evidence that may otherwise have been stricken.

Need for the Project

A generation facility was approved for planning purposes, and the need for approximately 100 MW of additional generating capacity on the WPS system, 50 MW in 1995 and 50 MW in 1997, was identified and approved in the Commission's Advance Plan 6 (AP-6) order of September 15, 1992, in docket 05-EP-6. Additional generating capacity was also identified as needed on a statewide basis before the year 2000.

On September 24, 1993, WPS filed a CPCN in docket 6690-CE-156, to construct a 122 MW facility in Rhinelander to meet the need for additional generating capacity on its system. On November 29, 1993, WPS issued a Request for Proposals as required under Commission procedures, to solicit competing bids to meet the need for additional generating capacity as identified in its CPCN application.

On December 21, 1994, the Commission issued its order in docket 6690-CE-156, authorizing WPS to proceed with licensing its Rhinelander project, and authorizing Polsky Energy to file a CPCN for its De Pere project if the Rhinelander project did not meet the milestones specified in its bid. On August 4, 1995, WPS sent a letter to the Commission stating that because of a negotiating impasse, WPS was unable to proceed with the Rhinelander project. As the lowest overall cost alternative identified in the Stage One decision, Polsky was permitted to proceed with its CPCN application.

A facility was further approved for planning purposes in Advance Plan 7 (AP-7), which found a need on the WPS system for approximately 116 MW of additional generating capacity in 1998 and 141 MW in 2001. The Commission issued its AP-7 order on December 19, 1995, in docket 05-EP-7.

On January 12, 1996, the Commission conditionally approved a purchased power agreement between WPS and Polsky to meet the need for new capacity found in AP-6 and AP-7.

As shown in this proceeding, the average growth rate in peak firm demands on the WPS system has been nearly double the growth rate contained in the plan submitted by WPS and approved by the Commission in AP-7. Despite this fact, WPS attempted to argue in this case that the Polsky project was not needed based on its new load projections. The evidence submitted by WPS on this issue was not persuasive. The long-term growth rate for WPS applied by Commission staff is a realistic projection of future growth.

The projections of interruptible load on the WPS system presented by Commission staff are reasonable in light of the most current information regarding the leveling of WPS

interruptible nominations for 1998. The higher projections of interruptible load presented by WPS are unreasonable because they are inconsistent with recent trends in the WPS interruptible programs and would result in a percentage of interruptible load that is extreme compared to other utilities around the country. If the leveling of interruptible load that WPS will experience in 1998 continues, WPS's forecasts of interruptible load would be 140 MW too high by 2001.

WPS is a low cost provider of electricity in the Midwest region and can be expected to be a successful competitor in the competitive wholesale market and potentially competitive retail markets. The WPS forecast of the effects of competition on wholesale and retail loads is extreme in its pessimism regarding WPS's ability to successfully compete to retain and attract loads.

The forecast of capacity need and reserve margins presented in the final EIS is reasonable. The addition of the De Pere Energy Center would keep reserve margins within the Commission's approved range through 2006.

The Pulliam 3 and Pulliam 4 generating units are old, expensive to operate, coal-fired units on the WPS system and are potentially unreliable alternatives to the long-term supply needs of WPS. In addition, the uncertainties regarding the Kewaunee Nuclear Power Plant introduce a risk element in determining the long-term supply status of WPS.

The WPS proposal to use a strategy of short-term purchases represents neither a more reliable nor a lower cost option to the Polsky project. The WPS projections of capacity availability and prices are too speculative to compare to the signed purchased power contract negotiated between WPS and Polsky. WPS has a need on its system for the Polsky project to satisfy the reasonable needs of the public for adequate electric service.

WPS suggested that the 25-year purchased power agreement it entered into with Polsky may lead to stranded costs in the future, given the uncertainty inherent with potential industry restructuring. WPS will have the opportunity in the future to request recovery of stranded costs and the Commission will provide an opportunity for recovery for those costs that are verifiable and that cannot be mitigated.

Description of the Proposed Facility

To meet the need for additional supply capacity, Polsky will construct and place in operation a 255 MW combined-cycle cogeneration plant. The facility will utilize three major systems: a combustion turbine generator, a waste heat recovery steam generator, and a steam turbine generator.

During Phase 1 of the project, Polsky will install one 180 MW combustion turbine generator. During Phase 2 of the project, Polsky will add a 75 MW steam turbine generator.

During Phase 1, the facility will operate an average of approximately 750 hours per year, or about 9 percent of the time. During Phase 2, the facility will operate an average of 5,000 hours per year, or about 57 percent of the time.

During Phase 1, the facility will be a peaking unit on WPS's system. During Phase 2, the facility will be an intermediate load unit on WPS's system.

Upon completion of Phase 2 of the project, the facility is planned to supply steam to the Nicolet Paper Company for heating and process uses. The 600-foot long steam line will include a double pipe system to allow steam delivery and condensate return.

The principal fuel to be burned in the combustion turbine will be natural gas. The backup fuel will be fuel oil. To provide the required natural gas supply to the Nicolet site, a 3,800-foot long pipeline, 10.75 inches in diameter, will be installed running from an existing 16 inch pipeline owned and operated by ANR Pipeline Company.

Accelerating Phase 2

The output from Phase 2 of the De Pere Energy Center project is committed under contract to WPS beginning in 2004.

Phase 2 of the project could be completed as early as the year 2000. Early completion of Phase 2 would create environmental benefits because the steam produced by the gas-fired De Pere Energy Center would replace existing coal-fired steam production at the paper mill at an earlier date.

The 75 MW of incremental capacity between Phase 1 and Phase 2 over the four-year period between the years 2000 and 2004 constitutes a minor part of the De Pere Energy Center overall generating capacity. As a result, it is not excessive for operation of a merchant plant, as described in the Commission's April 12, 1997, order in docket 05-BE-103.

No risk to WPS or to ratepayers in the state is created by early completion of Phase 2 because there is no obligation to purchase the incremental output from Phase 2 before 2004.

Acceleration of Phase 2 would enhance Wisconsin's competitive generation market and would provide additional resources on the transmission-constrained eastern portion of

Wisconsin's power grid. The acceleration of Phase 2 will not materially affect the impacts analysis in the final EIS.

Polsky may accelerate Phase 2 at its own discretion and at its own risk.

Site

Two potential sites have been proposed for the De Pere Energy Center, both of which are located in the city of De Pere, Brown County, Wisconsin. The Nicolet site is located on the property of Nicolet Paper Company, north of Main Street, east of Sixth Street and southwest of the Fox River. The Ashland Avenue site is a vacant parcel of approximately seven acres located between Ashland Avenue and Ashwaubenon Creek, south of Parkview Road.

Either site would be an appropriate location for the De Pere Energy Center. Both sites meet all zoning requirements and will not interfere with land use or development in the area. Neither site will divert land from agricultural use.

The Nicolet site is now used as a parking lot. The site is next to a long-existing industrial facility, the Nicolet Paper Company. The Nicolet Paper Company has up to 68 foot tall buildings and four taller facilities, including two stacks, 150 and 210 feet high. The De Pere Energy Center, when both phases are completed, will have up to 50 foot tall buildings and several taller facilities, including one stack, 125 feet high. Adjacent land uses are a library and commercial area along Main Avenue and a residential area along Sixth Street and the Fox River.

The Nicolet Paper Company, adjacent to the Nicolet site, will be the steam host for the De Pere Energy Center. Therefore, the steam line will be significantly shorter at the Nicolet site.

The Ashland Avenue site is preferred by the city of De Pere. The site has grass, weeds and some brush growing on it. Trees growing on the floodplain of Ashwaubenon Creek are 30 to 50 feet tall. A residential area is west of the creek and there is a bar and grill on the northeast corner of the site. If the Ashland Avenue site were chosen, the city of De Pere would have the opportunity to develop a non-potable water system which would reduce strain on water resources in the area. The gas line to serve the Ashland Avenue site would also be shorter than a line to the Nicolet site. Because steam lines are more expensive than gas lines, building the facility on the Ashland Avenue site would significantly increase total pipeline costs, from about $400,000 to about $3,600,000.

The Nicolet site is selected as the best site overall.

The Nicolet site is a reasonable location and its selection is in the public interest because of aesthetics and because of a significantly shorter steam line necessary at the Nicolet site. Visually, the facility and its stacks will fit in better with the surrounding structures at the Nicolet site than at the Ashland Avenue site. No structure in the vicinity of the Ashland Avenue site would approach the size or height of the proposed De Pere Energy Center.

In conjunction with the Nicolet site, modified gas pipeline route 1 (Figure C, Exhibit 19, modified by Exhibit 3) is reasonable and its selection is in the public interest. The route avoids significant use of Fort Howard Avenue, which was rebuilt in spring and early summer of 1997. This route uses road right-of-way and would cross the old city landfill east of Sixth Street. This route is preferred by Polsky and the city of De Pere. Modified route 1 for the natural gas pipeline is on the east side of Business USH 41 to Eighth Street, along Eighth Street to Elm Street, east on

Elm Street, across the railroad tracks to Fort Howard Avenue, along Fort Howard Avenue to Birch Street, along Birch Street to behind (east of) North Sixth Street, then across property owned by Nicolet Paper Company to the Nicolet site. It is reasonable for Polsky to consult and work with the city of De Pere and affected property owners from whom right-of-way easements are required when completing the details of routing and when deciding on the actual physical placement of the gas pipeline within the approved general route corridor. This shall be done prior to construction to minimize impacts.

The steam pipeline route associated with the Nicolet site is above ground, entirely on Nicolet Paper Company property.

Environmental Impacts

The De Pere Energy Center, constructed and operated as approved and required in this order, can meet all applicable environmental protection requirements and will not have undue adverse impacts on the human and natural environments.

No power plant construction is in wetlands; some pipeline construction could affect wet ditches along Business USH 41. Purple loosestrife (Lythrum salicaria) occurs in these ditches. Construction in wet areas can carry purple loosestrife from one area to another that is not infested. Cleaning equipment after leaving an infested area reasonably controls the spread of this invasive weed.

Construction of pipelines and the power plant can cause soil erosion and blowing dust if proper control measures are not used. Reasonable control measures include: use of silt screens;

staking straw bales across ditches; removing excess soil from the construction site as soon as practicable; using straw bales, or silt fences near any piles of soil; using mulch to protect slopes during construction and mulch, riprap, seeding or sod to protect slopes after construction; using appropriate sprinkling to reduce dust; and replacing street or sidewalk material with the same kind of material removed (e.g., replace concrete with concrete).

Areas where pipeline construction occurs can be restored to conditions that existed before construction if subsoil and topsoil are put back in the correct order, previously grassed areas are seeded or sod put down, and retaining walls, sidewalks, driveways, and streets are rebuilt.

Operation of the facility will emit nitrogen oxides, carbon monoxide, carbon dioxide, and volatile organic compounds from fuel combustion. When fuel oil is used, sulfur dioxide will also be emitted. No current DNR air quality standards will be violated when operating the facility on either natural gas or fuel oil.

The final EIS prepared for this project (Exhibit 19) is a detailed statement that fully complies with s. 1.11, Stats. The final EIS accurately describes the environmental effects of those portions of the project for which Commission review is required.

In Phases 1 and 2, the De Pere Energy Center will provide environmental benefits without having any significant adverse impact on the environment.

In Phases 1 and 2, the De Pere Energy Center will not have an undue adverse effect on the air quality or the quality of surface and ground waters. The De Pere Energy Center will not produce solid waste from combustion. The facility may produce minimal solid waste from unrecyclable packaging material and supplies, but this does not create an undue adverse effect on

the environment. In Phases 1 and 2, the De Pere Energy Center will be able to meet emission limits and will not cause or exacerbate a violation of an air quality standard or ambient air increment.

In order to ensure the facilities are in place for the summer of 1999, it is reasonable for this order to be effective on the day following the date of mailing.

(Dockets 6690-CE-175/6690-CE-176)

Need for the Project

WPS is an electric public utility as defined in s. 196.01, Stats., engaged in the generation, transmission, distribution, and sale of electric energy to approximately 310,000 electric customers in northeastern and north-central parts of Wisconsin and adjacent parts of Upper Peninsula of Michigan. WPS owns and operates an extensive network of electric generating stations, transmission lines, and substations in its service area. The WPS transmission system consists primarily of 69, 115, 138, 161, and 345 kV lines. It has direct connections with Northern States Power Company, Wisconsin Power and Light Company, Wisconsin Electric Power Company, and Upper Peninsula Power Company.

These two applications address some of the needs of the existing and future electric system of WPS in the Brown County area.

Electric loads in the western side of De Pere, the Village of Ashwaubenon, the Towns of Hobart and Lawrence, and southwestern Green Bay, all referred to as the West De Pere and Glory Road area, are served by the Mason, Liberty, Red Maple, Oak Street, and Ashland

69-24.9 kV distribution substations. These substations are served by a number of 69 kV transmission lines. These transmission lines and associated substations are part of the Green Bay area transmission system.

Electric load has been growing in the West De Pere and Glory Road area and is expected to exceed the capability of the existing transmission and distribution systems under certain contingencies in 2001. It is estimated that the peak electric load in the West De Pere and Glory Road area will reach 149.3 MW in 2001. To serve customers in this area adequately and reliably, the average load per distribution feeder in this area should not exceed 18 MW. Absent improvements, average loading on each of the feeders to the distribution system in this area would be 18.7 MW in 2001.

The proposed power plant in the De Pere area would generate between 180 to 255 MW of electric power for sale to WPS; this power plant requires a transmission outlet. Connecting the De Pere Energy Center to the existing 69 kV system will cause the transmission lines in this area to overload without any outage. The proposed generation power output is too large to be directly interconnected to the existing 69 kV transmission system.

To address these problems, WPS is proposing: 1) to rebuild its existing Lost Dauphin-Red Maple 69 kV line as a 138 kV, single-pole, double-circuit transmission line and modify the existing substations to accommodate the 138 kV line terminals; 2) to construct a new 138-24.9 kV Glory Road Substation and associated 138 kV, double-circuit, single-pole transmission line from the proposed Glory Road Substation to tap the existing Ashland to Oak 69 kV line known as K-115; and 3) to construct a new 138 kV, double-circuit, single-pole

transmission line between the proposed power plant site and WPS's existing Red Maple Substation.

Presently, part of the Green Bay area transmission system operates at 69 kV and part of it operates at 138 kV. To achieve greater capacity, the future plan for this area is to convert all the 69 kV facilities to operate at 138 kV. As part of the long-range plan, the major substations in the De Pere area will be served by 138 kV lines, with a source at one end being the Pulliam Substation and a source at the other end being the Lost Dauphin Substation.

The need for improving the electric system in the area with a new substation and with 138 kV transmission lines was not contested at the hearing.

Transmission and distribution facility improvements are needed to provide adequate and reliable electric service to existing and future customers in this area. The capacity of the transmission and distribution systems needs to be increased. The Commission finds that the Glory Road Substation is necessary to satisfy the public's reasonable need for an adequate supply of electricity and the substation, as designed by WPS and in the location WPS has proposed, is in the public interest.

The Commission also finds that rebuilding the Lost Dauphin-Red Maple transmission line as a 138 kV line, constructing a 138 kV transmission line from the proposed Glory Road Substation to the existing Ashland to Oak Substation line, and constructing a 138 kV transmission line between the proposed De Pere Energy Center and the Red Maple Substation are necessary to satisfy the reasonable needs of the public for an adequate supply of electric energy.

Proposed Facilities and Routes

The proposed transmission and distribution reinforcement project consists of the following:

1) Replacing the existing 69 kV transmission line between the Lost Dauphin and Red Maple Substations, both to meet increased demand for electricity in this area and to connect the proposed power plant to WPS's 138 kV transmission system. The new overhead line would be approximately 3 miles long and would be constructed as a 138 kV, single-pole, double-circuit, overhead transmission line using essentially the existing right-of-way along the Fox Valley and Western Railroad corridor. The new poles would be located on the west side of the tracks adjacent to the existing line. The existing 69 kV line on the east side of the tracks would remain in service until the next reinforcement project is completed and will eventually be removed. The Lost Dauphin and Red Maple Substations would be modified to accommodate the new 138 kV line terminals.

2) Constructing a new 138-24.9 kV Glory Road Substation and associated transmission and distribution lines to provide adequate and reliable electric service to the existing and future customers in this area. The Glory Road Substation would be located on approximately 3 acres of a 9-acre tract of land located east of USH 41, south of Glory Road, north of Business USH 41, and west of Ashwaubenon Creek. The transformer at the proposed Glory Road Substation will have a dual-rated high side for operation at 138 kV or 69 kV. The WPS proposal also includes the construction of up to

approximately 0.5 mile of a new double-circuit, single-pole 138 kV transmission line, initially operated at 69 kV, to exit southward and eastward from the proposed Glory Road Substation to WPS's existing 69 kV transmission line between the Oak Street and Ashland Substations (referred to as the K-115 Tap).

3) Constructing a new 138 kV, double-circuit, single-pole transmission line between the proposed De Pere Energy Center site and WPS's existing Red Maple Substation using the Frontage Road option, USH 41 corridor, and the Fox River option, referred to in Exhibit 38 as Route 3. The transmission line would be on double-circuit structures and initially one circuit would be installed. The existing distribution line along the USH 41 would be underbuilt. The 138 kV transmission line from the proposed Glory Road Substation could be connected to one side of this transmission structure. The proposed lines are designed to be a single wood or tubular steel pole, double-circuit, 138 kV transmission line using 795 MCM ACSR conductors, supported by horizontal post insulators. The height of the poles would be between 70 and 120 feet and the spacing between poles would vary between 350 and 650 feet.

System Alternatives

Several system alternatives to the proposed project were considered and evaluated. They included: 1) rebuilding or reconductoring the existing 69 kV lines at 69 kV; 2) building a Lost Dauphin-Red Maple-De Pere Energy Center 138 kV line; 3) building a Liberty-De Pere Energy Center 138 kV line; and 4) building a Pulliam-De Pere Energy Center 138 kV line. The

Commission finds that these alternatives alone are less reliable and not compatible to the long-term plans of the Brown County area.

Route Alternatives

To compare all the route alternatives, WPS identified a total of 20 "routes." The potentially different location "segments" totaled 44. Many of the 20 potential routes provided viable options to connect the Red Maple Substation to the De Pere Energy Center. To connect the proposed Glory Road Substation to the existing K-115 line, WPS offered three route alternatives.

Two of the 20 routes are options for constructing the Lost Dauphin-Red Maple line. The two alternatives are for the east and west sides of the Fox Valley and Western Railroad tracks. WPS has proposed using the west side. The Commission finds that construction on either side of the railroad tracks would be reasonable.

The three alternatives to connect the proposed Glory Road Substation to the existing K-115 line leave the substation to the north, east, or south. The northern route extends 0.3 mile, to Glory Road and eastward to Ashland Avenue and K-115. The eastern route extends 0.3 mile, more directly eastward across Ashwaubenon Creek and then north to Glory Road, Ashland Avenue, and K-115. The southern route extends 0.5 mile, south across the creek and Business USH 41 and eastward to Ashland Avenue and K-115. If there is a new 138-kV line built along Business USH 41, the southern route will extend only 0.2 mile to join it as a second circuit to the K-115 Tap.

WPS's preferred route is the southern route, and the Commission find this route to be reasonable regardless of whether there is a new 138 kV line along Business USH 41.

The two primary route alternatives to connect the existing Red Maple Substation with the De Pere Energy Center are: 1) The Highway 41 Route, which runs from the Red Maple Substation via either a frontage road or Lawrence Drive to USH 41, up USH 41, then to the De Pere Energy Center by either running underground along Main Avenue, or continuing up Business USH 41, and 2) The Railroad Route, which would essentially follow the Fox Valley and Western Railroad corridor. Either route could potentially be built overhead or underground. An underground line would be constructed as a 138-kV, single-circuit, high-pressure, gas-filled, pipe-type transmission line.

The city of De Pere signed a Development Agreement with Polsky under which Polsky has agreed to contribute up to $2.2 million to cover the cost difference between an overhead and an underground electric transmission line from WPS's Red Maple Substation to the De Pere Energy Center site.[1] At the hearing, the City Administrator, Mayor, and Council members testified that the city could work with WPS to lower the cost difference or to seek additional funding if the Development Agreement's $2.2 million cap was exceeded because of environmental challenges.

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[1] This commitment is not contingent on the site selected for the De Pere Energy Center. However, the commitment is subject to several contingencies: that the De Pere Energy Center application be approved, that the transmission line be constructed underground, and that financing for construction of the De Pere Energy Center is obtained. See Exhibit 2, Development Agreement, par. I. D., page 3.

WPS is not opposed to constructing the line underground if someone other than WPS and its ratepayers pays the additional cost of the underground construction. Also, WPS is not opposed to constructing the transmission line overhead along the Railroad Route.

The Commission finds it reasonable to select the Railroad Route as the preferred route for constructing the transmission line from the De Pere Energy Center to the Red Maple Substation. The utility should have flexibility to work with the city on minor routing changes to avoid wetland and the Better Brite Superfund site if that is necessary. The Development Agreement between the city of De Pere and Polsky is a unique factor in this case. Because of the willingness of third parties to pay the incremental cost of constructing an underground route, the Commission finds that it is also reasonable to require WPS to construct an underground transmission line along the northern segment of the Railroad Route, from the De Pere Energy Center to Scheuring Road (County F). This northern segment represents 55.5 percent of the total mileage of the Railroad Route.

The Polsky contribution towards underground construction under the Development Agreement shall be used to pay the difference between the actual cost of constructing the underground line and the estimated cost of building an overhead line along the Highway 41-Lawrence Drive route. The record indicates that the estimated total cost of this overhead option is $2,980,201.

If the estimated cost for this overhead route is divided between the northern segment and southern segment based on mileage, 55.5 percent of the estimated total cost would be $1,654,012. This is the base figure which should be subtracted from the actual cost of

underground construction to determine the incremental cost of the underground construction for the northern segment. The incremental cost figure will determine the amount of the $2.2 million contribution available for funding underground construction on the southern segment. If the incremental costs of undergrounding the northern segment of the route is greater than $2.2 million, WPS ratepayers will fund the differential for the northern segment. Chairman Parrino dissents with regard to ratepayers contributing to the incremental costs for underground construction.

If the contribution contracted for under the Development Agreement is sufficient to pay the incremental cost of constructing an underground line in the remaining southern segment of the Railroad Route, or if a third party (or parties) agree(s) to cover any additional cost of undergrounding the southern segment, from Scheuring Road to the Red Maple Substation, it is reasonable for WPS to also construct that segment underground.

Because the Polsky contribution under the Development Agreement is contingent on Polsky obtaining financing for constructing the De Pere Energy Center, any person shall have 30 days from the closing date for Polsky's financing to inform WPS in writing whether that person will be willing to make up any additional costs for undergrounding the southern segment from Scheuring Road to the Red Maple Substation. If sufficient commitments are not obtained, it is reasonable for WPS to construct this portion of the Railroad Route as an overhead line.

As with the northern segment, the actual cost of underground construction shall be compared to the estimated cost of overhead construction along the Highway 41-Lawrence Drive option. The southern segment of that route represents 44.5 percent of the estimated total cost for

that route, or $1,326,189. Payment for actual construction costs in excess of this figure shall be provided by Polsky pursuant to the Development Agreement or by third parties.

Because of the significant contribution WPS will receive toward the cost of underground construction, it is reasonable for WPS to cooperate during this project with the city of De Pere, Polsky, and with any other third party who agrees to contribute to the cost of underground construction. WPS shall make its cost and expense records on the Railroad Route construction project available for inspection at all times to these parties. Any disagreement about costs or expenses associated with this line may be communicated to the Commission in writing by any party who agrees to contribute to the cost of underground construction.

Advance Plan Compliance

The Commission is aware of the need to improve area supply capacity and reliability. WPS and the Commission staff identified the need to address transmission reinforcement in the Green Bay area, including the probable conversion of existing 69 kV transmission lines to 138 kV transmission lines, in AP-6 and AP-7 reviews. This project is one of the several individual projects that are documented in Section IV of the Northeast Area Transmission Study (Technical Support Document Number D23p), which the Commission reviewed and approved in AP-7.

Public Concerns

Numerous interested members of the public attended the hearing, and several presented testimony in favor of or opposed to one of the two primary alternative routes between the De Pere Energy Center and the Red Maple Substation. Those that testified, whether favoring or opposing a route, spoke strongly in favor of underground construction. Many testifying as public witnesses were elected city or town officials.

Environmental Review

The transmission and substation projects, constructed and operated as approved, can meet all applicable environmental protection requirements and will not have undue adverse impacts on the human and natural environments. It is impossible to build transmission lines without creating some impact on the area. It is important, however, to minimize or avoid impacts where possible while at the same time providing adequate and reliable electrical service.

Environmental Impact Statement. The final EIS (Exhibit 19), prepared in part for these projects, is a detailed document that fully complies with s. 1.11, Stats. The final EIS accurately describes the environmental effects of those portions of the project for which Commission transmission and substation construction review is required. The consideration of environmental factors that is required under s. 196.491(3)(d)3 and 4, Stats., has been completed.

The transmission and substation construction projects are Type II actions under ch. PSC 4.10(2), Wis. Adm. Code. The proposed and alternative facilities have been reviewed by the Commission for environmental impact. The projects are considered integral to the

De Pere Energy Center proposal, and have been considered in detail as an important part of the final EIS that is required for the proposed power plant project.

Orderly Land Use and Development. The city of De Pere has insisted on conformation with the Park's Design Standards established for its West Business Park, between Red Maple, Scheuring Road, USH 41, and the Fox Valley and Western Railroad. Existing business park occupants have complied with the Park's Design Standards. An overhead transmission line would not comply with those standards and may create some instability in the Park if new residents cannot be found or if existing residents leave. There appears to be no other potential adverse impact on land use or normal development in De Pere. There appears to be no potential adverse effect from any proposed route for the Village of Ashwaubenon. In the Town of Lawrence, the landowner who owns the parcel across the road from the Lost Dauphin Substation is concerned that the new line across his property to the railway would make development on his land impossible. However, three lines are already located on his land at this place.

Glory Road Natural Area. At the site of the proposed Glory Road Substation, protection of Ashwaubenon Creek and its associated floodplain would be in the public interest. This floodplain and woodlands around the creek near the site are valued by the neighboring residents and the current owners of the parcel for the wildlife they support. WPS has suggested in its application that it would maintain the floodplain as a natural area. Maintenance of the natural area would be appropriate and in the public interest.

Property Damage, Safety, and Inconvenience. There is concern about safety and inconveniences to landowners and families along the approved routes between the Red Maple Substation, the proposed Glory Road Substation, and the proposed De Pere Energy Center. It would be reasonable for WPS to repair or compensate landowners for any property damage. For a line constructed underground, concerns include the potential for dust, danger, and inconveniences that could result from trench construction.

Magnetic Fields. One of the most dominant environmental concerns about the proposed transmission projects, shared by the city of De Pere and its citizens, involves electric and magnetic fields (EMF) associated with the new facilities. The current to be carried, and thus the EMF to be created, by the proposed Lost Dauphin-Red Maple and Red Maple-De Pere Energy Center 138 kV lines would be relatively high when the power plant operates.

There is still some question in the scientific community as to whether or not exposure to EMF affects human health. As it monitors the results of the ongoing medical research on the potential effects of EMF, the Commission has ordered utilities to reduce EMF exposure and to use low-EMF structures when constructing transmission lines. However, issues of cost, worker safety, reliability, and other extenuating circumstances need to be considered as well. It is reasonable to use low-EMF design structures in areas where people are regularly exposed to power line EMF and where an actual reduction to at least 1 mG (milligauss) in magnetic fields can be realized, especially where residences are within those fields. Considering all the factors to

be considered, however, it may not always be reasonable to select the structure that creates the lowest EMF possible.

Between the Lost Dauphin and Red Maple Substations, the distance between the proposed transmission structures and most existing homes would allow for the diminishment of EMF to reasonable ambient levels. Persons wanting to build new homes closer than 300 feet from the line may be exposed to EMF levels above 1 mG as a result of the line.

Between the Red Maple Substation and the De Pere Energy Center switchyard, the change in EMF expected would differ depending on the route selected and the type of construction. Along the Highway 41 Route options, EMF would decline to 1 mG within 300 feet of a new overhead line. About 50 homes could see an increase in EMF exposure as a result of such a line. Along the Railroad Route, EMF would decline to 1 mG within 200 feet of a new overhead line. About 100 homes along this route could see an increase in EMF exposure as a result of such a line. However, if the line is built on the Railroad Route as an underground line in a pipe, EMF would drop to less than 1 mG within 25 feet. Only two homes, both north of Scheuring Road, might see a small increase in exposure in that case. It is reasonable to select the underground option for the Railroad Route if the factors of cost, worker safety, and reliability, as well as the specific environmental effects of underground installations, are also considered and accounted for.

The transmission lines on low-EMF structures connecting the proposed Glory Road Substation with the existing Oak-Ashland 69 kV line would create EMF that drops to 1 mG between 100 and 150 feet of the line with the first circuit and between 100 and 200 feet of the

line after two circuits are installed, around 2009. Two homes each along the northern and southern routes out of the Glory Road Substation could see EMF increases. No homes along the eastern route would be expected to see an increase.

Wetlands. Protection of wetland structures and communities along the approved transmission routes can be accomplished by spanning them with an overhead line and preventing vehicles from entering them. If the wetlands must be entered for construction or maintenance, it is preferred that the work be done in frozen winter conditions to minimize damage to the plants and soil structure.

For underground line construction, work in frozen winter conditions may preserve the wetland communities and soil structure. However, trench construction in frozen winter conditions may increase the cost of construction significantly. Construction in nonfrozen conditions could be conducted if appropriate care is taken to preserve and replace the soil or soil horizons above the line so that water flow can resume and so that recolonization by wetland plants and other species after construction can be encouraged. This method also may increase costs. The best treatment for the 400 foot open wetland along the Railroad Route may be to avoid that wetland by detouring around it, boring under it, or bringing the transmission out of the ground and spanning it as an overhead line. Boring is a reasonable approach. Spanning it as an overhead line would be in conflict with the reason for making the line underground in the first place. To detour would require some flexibility for WPS in routing the line and the cooperation

of the city of De Pere. It is reasonable to grant WPS the necessary local routing flexibility to work with the city of De Pere to mitigate wetland impacts.

Spread of purple loosestrife (Lythrum salicaria), which has infested areas near the project, must be controlled. This species has the ability to transform any wetland it invades by crowding out other plant species without offering comparable habitat to the wetland wildlife and other organisms that depended on the previous plant community. Controlling spread of purple loosestrife into a wetland can be attained by making sure the construction or repair equipment is free of loosestrife seeds before entering the wetland and by surveying the wetland for five additional growing seasons, removing any discovered loosestrife plants before they flower and set seed. It is in the public interest for WPS, when working in or near the wetlands along the transmission routes, to reduce the chance of introducing new purple loosestrife populations into those wetlands.

Species of Concern. The protection of two butterfly species, the Dion Skipper (Euphyes dion) and Two-spotted Skipper (Euphyes bimacula), is of state special concern, and in the public interest. It is reasonable for WPS to protect these species by minimizing soil-disturbing activities for any line constructed along the railroad, doing construction in the winter in habitat areas, and maintaining a prairie habitat along the line right-of-way as part of its maintenance program for keeping tree and shrub species out of the right-of-way. If the species or their habitat were found along the Railroad Route between Red Maple Substation and the De Pere Energy Center, it

would be reasonable for WPS to consult not only the DNR Bureau of Endangered Resources but also the city of De Pere about mitigation or avoidance.

Archeological Sites. Three state-listed archeological sites exist in the project area. Under s. 44.40, Stats., the Commission must determine if its decisions on this project will have an adverse effect on these sites or any others that are discovered during construction and report this information to the State Historical Society of Wisconsin (SHSW). It is reasonable for WPS to obtain this information for the Commission and to try to reach an agreement with the SHSW to reduce or avoid impacts.

Contaminated Sites. There are two Superfund sites associated with the former Better Brite plating company that may extend into soils under the railway. If they do, it is possible that construction along the Railroad Route could come in contact with contaminated soils or groundwater. If during trench construction, yellow or orange-colored soil or groundwater are encountered, chromium contamination is probably present, and WPS must dispose of the disturbed soil or water according to the requirements of the DNR, which has responsibility for mitigating these Superfund sites. Construction might need to stop at that location to allow DNR decisions to be made about disposal, appropriate personnel protection, and sampling of the area ahead of the trench to determine the extent of the contamination. Because contamination may be encountered during construction, it is reasonable to grant WPS the necessary local routing flexibility to work with the city of De Pere to avoid or minimize contact with contamination at

the Superfund sites by detouring around them or spanning them with an overhead line. The Commission understands that far more contaminated soils may be encountered by trench construction for an underground line than by augers for poles for an overhead line.

Estimated Cost

Lost Dauphin-Red Maple 138 kV Line & Glory Road Substation (6690-CE-175). The estimated cost of replacing the existing 69 kV line between the Lost Dauphin and the Red Maple Substations, with a single-pole, double-circuit, 138 kV transmission line including substation equipment to accommodate the 138 kV terminals, is $1.4 million. The estimated cost of the Glory Road Substation and associated 138 kV transmission line from the Glory Road Substation to the K-115 Tap is $1.1 million. The total project cost for the project in docket 6690-CE-175 is estimated to be approximately $2.5 million.

The entire cost of the approved project in docket 6690-CE-175 will be paid by WPS. No third party will contribute toward the cost of this project. WPS intends to finance the project from funds generated internally or from short-term borrowed funds which would eventually be replaced by the sales of new securities.

Construction is scheduled to start as soon as the application is approved by the Commission. The reconstruction of the Lost Dauphin-Red Maple 138 kV transmission line is scheduled to be completed by October 1998. The new Glory Road Substation and associated 138 kV transmission line are scheduled to be completed by 2001.

Red Maple Substation-De Pere Energy Center Site at Nicolet Paper (6690-CE-176). The total estimated cost of the approved project in docket 6690-CE-176 is $4.7 million, including $4.2 million for the underground transmission line from the Red Maple Substation to the De Pere Energy Center at Nicolet Paper and $0.5 million for substation work.

Polsky will reimburse WPS approximately $3.1 million for the construction of the Red Maple-De Pere Energy Center transmission line. Polsky will then begin to recover this $3.1 million from WPS through a capacity charge paid over the contract period for the purchased power agreement. If WPS makes any part of the connection facilities part of its network transmission system, it will need to pay Polsky the portion that remains to be paid on those facilities.

Polsky has also agreed to contribute $2.2 million toward the undergrounding of the transmission line between the Red Maple Substation and the De Pere Energy Center. This contribution may not be recovered through a capacity charge in the purchased power agreement.

Construction is scheduled to start as soon as the application is approved by the Commission and completed by February 1999.

In order to ensure the facilities necessary to connect the De Pere Energy Center to the system are in place for the summer of 1999, it is reasonable for this order to be effective on the day following the date of mailing.

ULTIMATE FINDINGS OF FACT

THE COMMISSION FINDS THAT:

(Docket 9335-CE-100)

1. The De Pere Energy Center, as described in the Findings of Fact and approved in this order, is necessary to satisfy the reasonable needs of the public for an adequate supply of electric energy.

2. The De Pere Energy Center is in substantial compliance with the most recent Advance Plan.

3. Acceleration of the construction of Phase 2 will be beneficial in addressing the need for energy, will not materially affect the analysis of impacts in the final EIS and complies with the Commission's merchant plant decision in docket 05-BE-103.

4. The design and location of the De Pere Energy Center and associated pipelines are in the public interest based on analysis of alternative sources of supply (as determined in Stage One of the Two-Stage CPCN process and in this order), alternative locations, alternative routes, individual hardships, engineering, economics, safety, reliability, and environmental factors.

5. The construction and operation of the De Pere Energy Center, as discussed in the Findings of Fact and as described in the application, will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water, and recreational use.

6. The De Pere Energy Center and associated pipelines will not unreasonably interfere with the orderly land use and development plans for the area.

7. The general public interest and public convenience and necessity require that Polsky purchase, construct, install, and place in operation a natural gas-fired, combined-cycle cogeneration plant to be constructed in the city of De Pere, Brown County in two phases: with Phase 1 consisting of a simple cycle combustion turbine with a capacity of 180 MW, and Phase 2 consisting of a 255 MW combined-cycle cogeneration plant, and associated steam and condensate lines.

8. The approved location of the De Pere Energy Center is the Nicolet site in the city of De Pere, Brown County, as described in the Findings of Fact.

9. The approved route of the natural gas pipeline is Modified Route 1, as described in the Findings of Fact.

10. The DNR issued the required pre-certification air permit on September 9, 1997. No other pre-certification permits are required.

11. The Commission will provide an opportunity to recover verifiable stranded costs that cannot be mitigated and that may result from the purchased power agreement.

(Dockets 6690-CE-175 \ 6690-CE-176)

1. WPS is a public utility engaged in rendering electric utility service in the state of Wisconsin, pursuant to s. 196.01, Stats., and is an electric utility as defined in s. 196.491(1)(d), Stats.

2. The proposed De Pere Energy Center, which would generate between 180 to 255 MW of electric power for sale to WPS, requires a transmission outlet.

3. The present and future electrical demand and generation require all of the following: 1) rebuilding of the existing Lost Dauphin-Red Maple 69 kV line as a 138 kV, single-pole, double-circuit transmission line and modifying the existing substations to accommodate the 138 kV line terminals; 2) constructing a new 138-24.9 kV Glory Road Substation and associated 138 kV, double-circuit, single-pole transmission line from the new Glory Road Substation to the existing Ashland-Oak 69 kV line; and 3) constructing a new 138 kV transmission line between the De Pere Energy Center and WPS's existing Red Maple Substation.

4. New transmission and distribution facilities are needed to provide adequate and reliable electric service to the existing and future customers in West De Pere and Glory Road area.

5. WPS's proposed facilities are in substantial compliance with the most recent Advance Plan.

6. The proposed reconstruction of the existing transmission line between the Lost Dauphin and the Red Maple Substations as a single-pole, double-circuit, 138 kV transmission line using essentially the existing right-of-way along the Fox Valley and Western Railroad corridor adjacent to the existing line, will adequately address the present needs of the WPS's electrical system as well as provide flexibility to meet the future needs for support of the transmission system network in the Brown County area. The existing 69 kV line would remain in service until the next reinforcement project is completed and will eventually be removed.

7. There are no reasonable route alternatives between Lost Dauphin and Red Maple Substations to the upgrade of the existing overhead line. Locating the new line along the west side of the railroad tracks would require little or no additional right-of-way.

8. A new 138-24.9 kV substation, known as the Glory Road Substation, and associated transmission and distribution lines, are needed to provide adequate and reliable electric service to the existing and future customers in the Brown County area.

9. There are three viable route options to connect the substation with the existing system. The southern route, as described in the Findings of Fact, is reasonable and would create the least environmental impact.

10. Construction of a new 138 kV transmission line between Red Maple Substation and the De Pere Energy Center is necessary to satisfy the reasonable needs of the public for an adequate supply of electrical energy.

11. Because of the existence of the Development Agreement entered into by Polsky and the city of De Pere, it is reasonable to require WPS to construct an underground transmission line along the Railroad Route between the De Pere Energy Center and Scheuring Road. The underground line shall be a 138 kV single-circuit, high-pressure, gas-filled, pipe-type transmission line.

12. It is reasonable for WPS to build the line as an overhead line between the Red Maple Substation and the Scheuring Road intersection, the southern segment of the Railroad Route, if sufficient funding from persons other than ratepayers is not available. However, if any person commits to paying any incremental cost of construction above the amount committed

under the Development Agreement, after accounting for underground costs along the northern segment, or if it is expected that the amount in the Development Agreement will be sufficient to fund the incremental underground costs for both segments, WPS shall also construct this segment a 138 kV, single-circuit, high-pressure, gas-filled, pipe-type underground line.

13. To facilitate construction of the transmission line along the southern segment Railroad Route, it is necessary for a third party or parties to commit to funding the incremental cost of an underground line no later than 30 days after the closing date for Polsky's financing. The incremental cost of underground construction is the difference between the actual cost of underground construction along the Railroad Route and the estimated cost of constructing an overhead line along the Highway 41-Lawrence Drive route.

14. Alternative plans, designs, and routes for various portions of the facilities have been considered, but no other reasonable alternatives to the proposed project exist which could provide adequate support in a more reliable, timely, cost-effective, and environmentally acceptable manner.

15. Construction, operation, and maintenance of the proposed facilities will not have undue adverse impacts on environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, aesthetics of land and water, and recreational use. The proposed facilities as approved will not have a significant effect on the human environment.

16. The conditions specified in this order are in the public interest after considering individual hardships, engineering, economic, safety, reliability, and environmental factors.

17. It is in the public interest for WPS to be required to consult and work with the DNR, the Wisconsin Department of Transportation (DOT), the SHSW, the Fox Valley and Western Railroad, the city of De Pere, the Village of Ashwaubenon, the Town of Lawrence, and the directly affected landowners and families to reasonably limit, avoid, or mitigate such adverse construction impacts as soil erosion, wetland disturbance, damage to property, or safety concerns.

18. WPS's proposed facilities, as approved in this order, will not unreasonably interfere with the orderly land use and development of the area.

19. It is reasonable for WPS to maintain a natural area in the floodplain area of its Glory Road Substation land purchase along Ashwaubenon Creek.

20. It is in the public interest for WPS to restore and grade any property damaged by trucks or equipment use on the project.

21. For underground construction along the Railroad Route, it is in the public interest for WPS to take reasonable measures to protect nearby families, businesses, and traffic from dust, dangers, and inconveniences that could result from trench construction.

22. Representative measurements of magnetic fields, along the route and substation sites before and after the construction of the proposed facilities, will reasonably add to the Commission database on magnetic fields for utility facilities.

23. It is reasonable and in the public interest for WPS to use low-EMF design structures for all overhead transmission lines authorized in this order that are north of the Red Maple Substation.

24. It is in the public interest for WPS to take appropriate measures to prevent its construction activities from increasing the spread of purple loosestrife in wetlands.

25. For underground construction along the Railroad Route, it is in the public interest for WPS to avoid the 400 foot wetland north of Scheuring Road or to construct the line in such a way as to preserve the wetland's water flow and drainage and to encourage the return of its vegetation and other species after construction.

26. It is in the public interest for WPS to protect and maintain, as much as is reasonable, the prairie habitat of the two butterfly species of state concern, the Dion Skipper and the Two-spotted Skipper.

27. If an archeological site is encountered during construction, it is in the public interest for WPS to stop construction immediately, to notify both the Commission and the SHSW, and to pursue mitigation of potential adverse impacts on the site in consultation with the SHSW.

28. For underground construction along the Railroad Route, it is in the public interest for WPS to stop construction if evidence of chromium contamination is encountered during trench construction near the Better Brite Superfund sites. In this situation, WPS is required to consult with the DNR and with the railroad company to dispose of the contaminated materials and implement appropriate personnel protection and waste management procedures. Sampling ahead of the trench may be appropriate.

29. For underground construction along the Railroad Route, it is reasonable for WPS to have flexibility in routing the line or in bringing the underground line overhead to avoid

damaging the wetland or to avoid encountering contaminated water or soils associated with the Better Brite Superfund sites. It is in the public interest that this flexibility be limited to very local changes and for WPS to consult with the city of De Pere on any route detours or overhead construction that it would make to mitigate environmental concerns.

30. The construction and operation of the proposed facilities at the estimated cost will not impair the efficiency of the WPS's service, will not provide facilities unreasonably in excess of probable future requirements and, when placed in operation, will not add to the cost of service without proportionately increasing the value or available quantity thereof.

31. The general public interest and public convenience and necessity require that WPS do the following: 1) rebuild the existing Lost Dauphin-Red Maple 69 kV line as a 138 kV single-pole, double-circuit transmission line and modify the existing substations to accommodate the 138 kV line terminals; 2) construct a new 138-24.9 kV Glory Road Substation and associated 138 kV transmission line from the new Glory Road Substation to the existing Ashland-Oak 69 kV line; and 3) construct a new 138 kV transmission line between the De Pere Energy Center site and WPS's existing Red Maple Substation.

CONCLUSION OF LAW

THE COMMISSION CONCLUDES:

(Docket 9335-CE-100)

It has jurisdiction under ss. 1.11, 196.395, 196.491, Stats., and ch. PSC 111, Wis. Adm. Code, to issue a certificate authorizing De Pere Energy, LLC to purchase, construct, install, and

place in operation the facilities described in the Findings of Fact, subject to such conditions as are necessary to meet the requirements of these statutes and rules, and that such a certificate should be issued.

(Dockets 6690-CE-175 \ 6690-CE-176)

The Commission has jurisdiction under ss. 1.11, 196.395, 196.49 and 196.491, Stats., and chs. PSC 111 and 112, Wis. Adm. Code, to issue a certificate authorizing WPS, as an electric public utility: 1) to rebuild the existing Lost Dauphin-Red Maple 69 kV line as a 138 kV single-pole, double-circuit transmission line and modify the existing substations to accommodate the 138 kV line terminals; 2) to construct a new 138-24.9 kV Glory Road Substation and associated 138 kV single-pole double-circuit, transmission line from the new Glory Road Substation to the existing Ashland-Oak 69 kV line; and 3) to construct a new 138 kV transmission line between the De Pere Energy Center and WPS's existing Red Maple Substation, subject to such conditions as are necessary to meet the requirements of these statutes and rules, and that such a certificate should be issued.

CERTIFICATE

THE COMMISSION CERTIFIES THAT:

(Docket 9335-CE-100)

De Pere Energy, LLC may purchase, construct, install, and place in operation a natural gas-fired combined-cycle cogeneration plant, in two phases, with Phase 1 consisting of a simple

cycle combustion turbine with a capacity of 180 MW and Phase 2 consisting of a 255 MW combined-cycle cogeneration plant, and associated steam and condensate lines, in the city of De Pere, Brown County. De Pere Energy, LLC is granted a Certificate of Public Convenience and Necessity to proceed with construction, subject to the conditions in this order.

(Dockets 6690-CE-175 \ 6690-CE-176)

WPS, as an electric public utility, may: 1) rebuild the existing Lost Dauphin-Red Maple 69 kV line as a 138 kV single-pole, double-circuit transmission line and modify the existing substations to accommodate the 138 kV line terminals; 2) construct a new 138-24.9 kV Glory Road Substation and associated 138 kV single-pole double-circuit, transmission line from the new Glory Road Substation to the existing Ashland-Oak 69 kV line; and 3) construct a new 138 kV transmission line between the De Pere Energy Center and WPS' s existing Red Maple Substation. WPS is granted a certificate authorizing it to proceed with construction, subject to the condition that it notify this Commission before making any substantial changes in the design, size, cost, or location of the proposed facilities, and subject to the conditions in this order.

ORDER

THE COMMISSION THEREFORE ORDERS THAT:

(Docket 9335-CE-100)

1. This order shall be effective on the day following the date of mailing to De Pere Energy, LLC.

2. The certificate is valid only if the construction is started on Phase 1 within one year of the date in this order.

3. The approved location of the proposed De Pere Energy Center is the Nicolet site in the city of De Pere, Brown County, as described in the Findings of Fact.

4. De Pere Energy, LLC may accelerate construction of Phase 2 of the De Pere Energy Center at its discretion and at its own risk.

5. Upon completion of each phase of the project, De Pere Energy, LLC shall notify the Commission of the date the generating plant is placed in service and the date the steam line is placed in service.

6. The approved route of the natural gas pipeline is Modified Route 1, as described in the Findings of Fact.

7. In areas where purple loosestrife is identified, De Pere Energy, LLC shall ensure that all construction equipment is cleaned after construction, but before leaving the site.

8. De Pere Energy, LLC shall consult and work with the city of De Pere and affected property owners from whom right-of-way easements are required when completing the details of

routing and when deciding on the actual physical placement of the gas pipeline within the approved general route corridor. This shall be done prior to construction to minimize impacts.

9. De Pere Energy, LLC shall consult and work with the DNR, the city of De Pere, and affected property owners to reasonably limit, avoid, or mitigate such adverse construction impacts as soil compaction, soil erosion, and wetland disturbance, and shall implement the conditions, guidelines, and techniques prescribed by the DNR.

10. De Pere Energy, LLC shall submit quarterly progress reports to the Commission, summarizing the status of construction, the status of environmental control activities, and the overall percent of physical completion. Environmental reporting shall include a summary of consultations with DNR and other agencies associated with the issuance of the permits. The reports shall list dates, names, and results of each contact and the company's progress in implementing prescribed environmental prevention or control measures. The first report is due for the quarter ending December 31, 1997.

11. Jurisdiction is retained.

(Dockets 6690-CE-175 \ 6690-CE-176)

1. This order shall be effective on the day following the date of mailing to WPS.

2. The certificate is valid only if the construction is started within one year of the date of this order.

3. The facilities to be constructed for this project are described in the Findings of Fact. The project includes:

a) Rebuilding the existing Lost Dauphin-Red Maple 69 kV line as an overhead 138 kV single-pole, double-circuit transmission line, using essentially the existing right-of-way along the Fox Valley and Western Railroad corridor adjacent to the existing line, and modifying the existing substations to accommodate the 138 kV line terminals. The existing 69 kV line would remain in service until the next reinforcement project is completed and will eventually be removed.

b) Constructing a new 138-24.9 kV Glory Road Substation and associated overhead 138 kV single-pole double-circuit, transmission line from the new Glory Road Substation to the existing Ashland-Oak 69 kV line, using the southern route. (Route 18B in Exhibit 37)

c) Constructing a new 138 kV single-circuit transmission line between the De Pere Energy Center and WPS's existing Red Maple Substation. The northern segment of this line shall be constructed as an underground high-pressure, gas-filled, pipe-type transmission line between the De Pere Energy Center and Scheuring Road. The incremental cost of underground construction compared to 55.5 percent of the estimated cost of overhead construction along the Highway 41-Lawrence Drive Route, as described in the Findings of Fact, shall be paid for under the Development Agreement between the city of De Pere and Polsky.

4. WPS shall build that segment of the Railroad Route line from Scheuring Road to the Red Maple Substation as an underground line if the difference between the actual cost of the underground line and the proportional estimated cost of an overhead line along the

Highway 41-Lawrence Drive Route is covered by Polsky, the city of De Pere, or any other person other than WPS ratepayers. A third party or parties shall commit to funding the incremental cost of underground construction within 30 days after the closing date for Polsky's financing.

5. When constructing the approved underground transmission line, WPS may exercise the routing or overhead/underground flexibility it needs to avoid the 400 foot wetland north of Scheuring Road and the contamination associated with the Better Brite Superfund sites, on the condition that all routing or overhead detours are made in consultation with the city of De Pere. WPS or the city of De Pere shall communicate their agreements to the Commission in writing.

6. WPS shall work with the DNR, the DOT, the SHSW, the Fox Valley and Western Railroad, the city of De Pere, the Village of Ashwaubenon, and the Town of Lawrence to address any concerns that may arise as construction or maintenance of the project proceeds. These concerns may be communicated in writing to the Commission by any of the listed persons.

7. Regarding the city of De Pere's West Business Park south of Scheuring Road, WPS shall conform to the Park's Design Standards only where feasible for WPS, constructing the line underground only where the costs beyond those of overhead construction would be borne by the landowners, the city, or some other entity besides the utility and its ratepayers.

8. WPS shall maintain the floodplain along Ashwaubenon Creek as a natural area when constructing the Glory Road Substation.

9. WPS shall do the following:

a. work with landowners from whom right-of-way easements are required when determining reasonably acceptable line routing and actual physical structure placement, prior to construction, to minimize impacts.

b. reasonably restore and grade, to original condition or better, any property adversely affected by trucks or equipment used for the project.

c. inform landowners from whom an easement is sought of their rights and obligations under s. 182.017, Stats., before commencing easement negotiations.

d. notify property owners 24 hours before entering their property. Notice may be given by personal contact, telephone, or letter.

e. take reasonable action to remedy problems of any business or property owner along the approved route that are directly attributable to the installation, operation, maintenance, or repair of the new facilities.

10. For underground construction along the Railroad Route, WPS shall take all reasonable measures to protect nearby families, businesses, and traffic from dust, dangers, and inconveniences that could result from trench construction.

11. WPS shall take representative measurements of the magnetic fields along the approved routes between the Lost Dauphin Substation, Red Maple Substation, Glory Road Substation and De Pere Energy Center switchyard, before and after the authorized facilities are built, and shall provide this information to the Commission.

12. WPS shall protect waterways and wetlands, including Ashwaubenon Creek and its tributaries, the Fox River, and the wetlands located along the approved overhead or underground route, from damage as follows:

a. Poles may not be placed on or near the banks of rivers, streams, or creeks. WPS shall employ erosion control methods to prevent excavated soil from entering these waterways, and WPS shall construct any waterway crossing in accordance with DNR recommendations.

b. WPS shall construct overhead lines to be located in wetlands when the ground is frozen, if possible, to avoid damage to wetland soils, hydrology, and vegetation. WPS shall make a reasonable effort to avoid the 400 foot long wetland along the Fox Valley and Western Railroad, in consultation with the city of De Pere, when constructing the underground transmission line along the Railroad Route. Concerns of the city of De Pere regarding this work shall be communicated in writing to the Commission by either the city of De Pere or by WPS. If the wetland cannot be avoided by underground construction, WPS shall perform construction in that wetland in such a way as to preserve the drainage and water flow and to encourage the wetland vegetation and other species to return after construction is completed.

c. WPS shall, in wetlands or within 50 feet of open water, limit herbicide use to stem or stump treatment of tall-growing shrubs or trees whose maximum height would conflict with overhead line clearance requirements or which are considered large enough to allow their root systems to interfere with proper operation of an underground line.

d. To the extent practicable, WPS shall place any overhead transmission poles so that the transmission line spans wetlands.

e. WPS shall ensure that all construction equipment is clean of purple loosestrife before beginning work on the project. WPS shall inspect portions of the approved route that pass through wetlands for the presence of purple loosestrife prior to beginning construction. In areas where purple loosestrife is identified, all construction equipment shall be cleaned after completing construction, but before leaving the site. All portions of the route passing through previously uninfested areas of wetlands shall be inspected for the presence of loosestrife for five growing seasons following construction. New infestations of the plant shall be removed using methods recommended by the DNR.

13. WPS shall minimize soil-disturbing activities during construction along the approved route, including frozen winter construction where appropriate, to protect the habitat vegetation for the two special concern butterfly species, the Dion Skipper and the Two-spotted Skipper. WPS shall also maintain the prairie habitat along the transmission line corridor, south of Scheuring Road along the Railroad Route, as part of its right-of-way maintenance program.

14. If any archeological artifacts are encountered during construction of the transmission line or substation, construction shall stop at the subject location and the site shall be investigated promptly. WPS shall report any accidental archeological discoveries during construction to both the SHSW and the Commission, and proceed based on consultation with the SHSW.

15. If the portion of the transmission line along the Railroad Route between Red Maple Road and Scheuring Road is constructed as an overhead line, then construction in this portion of the line shall be done in consultation with the city of De Pere and the local residents and landowners.

16. If chromium-contaminated soil is encountered during underground line construction near the Better Brite Superfund sites, WPS shall stop construction in order to consult with the DNR and implement appropriate personnel protection and waste management procedures before continuing. WPS shall report any resulting additional construction costs in writing to the Commission. Concerns about the construction from the city of De Pere, the DNR, or local residents shall be communicated in a letter to the Commission by either the city of De Pere, the DNR, or WPS.

17. Upon completion of the project, WPS shall notify the Commission when the facilities are placed in service and report the actual cost segregated by plant account comparable to the cost breakdown of Appendix B of the applications. For those accounts or categories where actual costs deviate significantly from those authorized, the final cost report shall itemize and explain the reasons for such deviations.

18. For the portion of the line constructed as an underground line along the Railroad Route, WPS shall make its cost and expense records on this portion of the project available for inspection at all times to the city of De Pere and to any other person who agrees to contribute to the cost of underground construction. Any disagreement about costs or expenses associated with

this line may be communicated in writing to the Commission by any party who agrees to contribute to the cost of underground construction.

19. WPS shall inform the Commission before proceeding with any substantial changes in the design size, cost, or location of the facilities approved in this order.

20. WPS shall submit quarterly construction progress reports to the Commission indicating the project's major milestones, the extent of physical completion to date, and expenditures to date, with the first report due for the quarter ending December 31, 1997.

21. Jurisdiction is retained.

Dated at Madison, Wisconsin, October 9, 1997

By the Commission:

Lynda L. Dorr
Secretary to the Commission

LLD:JJL:mem:G:\ORDER\PENDING\9335-CE-100, 6690-CE-175, 6690-CE-176

See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in s. 227.53, Stats. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in s. 227.01(3), Stats., a person aggrieved by the order has the further right to file one petition for rehearing as provided in s. 227.49, Stats. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with s. 227.48(2), Stats., and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 4/22/91

APPENDIX A
(CONTESTED)

In order to comply with s. 227.47, Stats., the following parties who appeared before the agency are considered parties for purposes of review under s. 227.53, Stats.

Public Service Commission of Wisconsin (Not a party but must be served)
610 N. Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

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WISCONSIN PUBLIC SERVICE CORPORATION
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150 East Gilman Street
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ANR PIPELINE COMPANY
by
Mr. William H. Malcolm
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Detroit, MI 48243-1902

CITIZENS' UTILITY BOARD
by
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WISCONSIN INDUSTRIAL ENERGY GROUP (WIEG)
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by
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VILLAGE OF ASHWAUBENON
by
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Mr. Joseph P. Wright, Attorney
Stafford, Rosenbaum, Rieser & Hansen
3 South Pinckney Street, Suite 1000
P.O. Box 1784
Madison, WI 53701-1784

CITY OF DE PERE
by
Mr. Kevin M. Brunner
City Administrator
335 South Broadway
De Pere, WI 54115

Date Mailed
November 22, 2000

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Badger Generating Company, LLC for a Certificate of Public Convenience and Necessity for a Large Electric Power Generating Facility and Associated High Voltage Transmission Interconnection Facilities in Southeastern Wisconsin

9340-CE-100

FINDINGS OF FACT, CONCLUSIONS OF LAW, CERTIFICATE, AND ORDER

Introduction

On December 28, 1999, Badger Generating Company LLC (Badger Gen), a subsidiary of PG&E Corporation, filed an application with the Commission pursuant to Wis. Stat. § 196.491 for a Certificate of Public Convenience and Necessity (CPCN). Badger Gen is seeking authority to construct and operate an electric power generating facility and a high-voltage electric transmission interconnection. The generating facility would be a combined cycle plant, fueled by natural gas, with about 1,050 megawatts (MW) of capacity.

On January 27, 2000, the Commission determined that the application was complete. Under Wis. Stat. § 196.491(3)(g)1, the Commission must take final action on this CPCN application no later than 180 days after it finds that the application is complete. Because Badger Gen is seeking approval to construct a combined cycle facility at a new site, Wis. Admin. Code § PSC 4.10(1) specifies that the Commission must prepare an Environmental Impact Statement (EIS) on the project. Being unable to complete a draft and final EIS, hold hearings, and issue an order within 180 days, the Commission exercised its right to petition Dane County Circuit Court for an additional 180 days within which to conclude its review. Dane County Circuit Judge

David Flanagan granted this petition, allowing the Commission to continue its review of Badger Gen's CPCN application up to January 22, 2001.

On July 27, 2000, the Commission held hearings on the project before Administrative Law Judge Jeffry Patzke at the Holiday Inn Express-Harborside in the city of Kenosha, Wisconsin. The parties agreed to file no briefs, but did respond to Commission staff's September 19, 2000, Briefing Memorandum.

Persons certified as full parties are listed in Appendix A. Other persons who appeared and testified are listed in the Commission's files.

The application is GRANTED, subject to conditions.

Findings of Fact

1. Badger Gen is proposing to construct a merchant plant, as defined in Wis. Stat. § 196.491(1)(w). The Commission determined its application to be complete on January 27, 2000.

2. The generating facility approved in this order is in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors. The 345,000 volt (345 kV) transmission line approved in this order is in the public interest after considering alternative routes, individual hardships, engineering, economic,[1] safety, reliability, and environmental factors. Other alternatives brought forth in the record are not in the public interest.

[1] State law declares that engineering and economics are not relevant factors if the Commission is considering whether to issue a CPCN for a wholesale merchant plant. When the Commission examines a CPCN application for a high-voltage transmission line, however, it must consider these two issues regardless of who is proposing to construct the line. *See* Wis. Stat. § 196.491(3)(d)3.

3. The Pleasant Prairie site is in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors. Other alternatives brought forth in the record are not in the public interest.

4. A stipulated agreement between Badger Gen and the village of Pleasant Prairie addresses several local issues, including necessary water and sewer improvements and noise limitations, and indicates the village's support of the project at the Pleasant Prairie site if the agreement is incorporated in its entirety into the Commission order. Except as discussed below regarding Paragraph 24 of the Stipulation, incorporating the agreement into this order is reasonable.

5. The East Route for the connecting transmission line is reasonable after considering alternative routes, individual hardships, engineering, economics, safety, reliability, and environmental factors. Care is necessary to prevent adverse impacts to wetlands, to protect historical and archeological sites, and to prevent bird collisions with above-ground components of the transmission line.

6. An interconnection agreement between Badger Gen and either Wisconsin Electric Power Company (WEPCO) or the American Transmission Company (ATCo) is necessary and has yet to be made.

7. The facilities approved in this order will not have undue adverse impact on other environmental values.

8. The facilities approved in this order will not unreasonably interfere with the orderly land and development plans for the area involved.

9. The facilities approved in this order will not have a material adverse impact on competition in the relevant wholesale electric service market.

10. Badger Gen has received the Wisconsin Department of Natural Resources' (DNR's) permits and approvals required for constructing and operating its facility.

11. Badger Gen's proposed 345 kV transmission line will provide usage, service, or reliability benefits to Wisconsin wholesale and retail customers, and its benefits are reasonable in relation to its cost.

12. The conditions specified in this order are in the public interest after considering individual hardships, safety, reliability, and environmental factors.

13. The EIS accurately describes the environmental effects of this project and complies with Wis. Stat. § 1.11(2)(c).

14. The public convenience and necessity require completion of this project.

Conclusions of Law

1. Badger Gen will be a merchant plant, as defined in Wis. Stat. § 196.491(1)(w).

2. The Commission has jurisdiction under Wis. Stat. §§ 1.11, 196.025, 196.395, and 196.491 to issue a certificate authorizing Badger Gen to install and place in operation the generation and transmission facilities at the site and route described in the Findings of Fact, and to impose the conditions specified in this Order.

Opinion

If approved, the Badger Gen generating facility will be the first wholesale merchant plant built in Wisconsin, for the purpose of providing electricity wholesale without any known preexisting power purchase agreement with an electric utility. The plant will not provide retail electric service in Wisconsin.

Badger Gen proposes to build its facility in either of two locations: the village of Pleasant Prairie, Kenosha County, or the village of Sturtevant, Racine County. The village of Pleasant Prairie has indicated that it prefers to have the project built within its corporate limits and has signed a detailed stipulated agreement with Badger Gen (Exhibit 19), in support of the project's location in that village. The Stipulation addresses numerous municipal concerns and itemizes the water and sewer improvements necessary to operate the plant. The village has conditioned its support for the project on the agreement's incorporation into the Commission Order in its entirety. Officers of the village of Sturtevant have also testified in favor of locating the project within its corporate limits. Badger Gen has not signed a similar stipulation with the village of Sturtevant, although such an agreement would likely be necessary to address local concerns and those of local sewer and water utilities.

A natural gas pipeline to either site is proposed to be constructed by ANR Pipeline Company (ANR) from the source of the Racine Lateral in the town of Burlington, Racine County. Badger Gen proposes to build a 345 kV electric transmission connection, connecting either site to the same point in WEPCO's existing electric transmission system south of the Pleasant Prairie site. Since the Sturtevant site is further north than the Pleasant Prairie site, a connecting transmission line to Sturtevant would be longer than a line to Pleasant Prairie.

Description of the Proposed Facility

Badger Gen will construct and place in operation a natural gas-fired, combined cycle, electric generation plant consisting of four individual units for a total capacity of approximately 1,050 MW. Each of the four units will be located in a separate building and will be capable of operating independently. Each unit will include a combustion turbine, a heat recovery steam generator, steam turbines, and an electric generator. Badger Gen anticipates installing ABB GT-24 single-shaft generator units. The exhaust stacks will be 120 feet in height. The proposed cooling towers will consist of two banks of eight towers, located on the northern and southern sides of the plant site. The plant will have an expected life of 40 years.

To supply natural gas to the facility, ANR is expected to build and operate a new compression station and a 20-inch diameter pipeline that would be 20 to 24 miles long. As of the date the record closed in these proceedings, Badger Gen had not yet negotiated a gas transportation agreement with ANR. Badger Gen has proposed two preliminary route alternatives to each power plant site; ultimate approval of a gas pipeline route is under the jurisdiction of the Federal Energy Regulatory Commission (FERC). ANR will file the construction application for this pipeline with FERC. Natural gas will be the only fuel used to produce the electricity at the plant. The DNR has approved no back-up fuel, such as diesel oil. The DNR's Air Pollution Control Construction Permit, issued on September 20, 2000, does not limit the hours that the plant may burn natural gas.

Step-up transformers will be installed in a new substation on the plant property. They will be connected by means of a new 345 kV radial transmission line, to an existing 345 kV WEPCO electric transmission line that extends between the WEPCO Arcadian Substation near

Waukesha and Commonwealth Edison's Zion Substation in Zion, Illinois. From the Pleasant Prairie site, the new line will head south and be installed underground, for approximately 2.5 miles. If the Sturtevant site were chosen, this interconnection would be built underground for approximately one to two miles in the village, then strung overhead for eleven miles on one side of the existing structures of the WEPCO Racine-Pleasant Prairie transmission line, and finally installed underground again for approximately 2.5 miles south from the vicinity of the Pleasant Prairie Power Plant. The connection for either site would be radial, but with six conductors to handle the energy output of the plant and extra conduits capable of handling a second circuit at a later date.

Badger Gen and WEPCO have yet to reach a transmission interconnection agreement for this project.[2] Such an agreement will cover the proper allocation of interconnection and system improvement costs between the two companies. WEPCO has conducted two studies of the impact on the transmission system that could result from interconnecting the Badger Gen plant with WEPCO's 345 kV Zion-Arcadian line. Its steady-state analysis describes two significant potential problems. In a double-contingency situation with the Badger Gen units on line, this analysis finds that one of WEPCO's existing 138 kV transmission lines could overload. WEPCO estimates that upgrading this line to alleviate the problem would cost approximately $5.8 million. In some conditions, operating the Badger Gen units could also lead to low-voltage problems in southeastern Wisconsin. WEPCO suggests that installing capacitors at some area substations could prevent this situation, at an estimated cost of $3.7 million. The degree to which Badger Gen is driving the need for these improvements, and the amount of associated

[2] Because WEPCO has announced its intention to transfer its assets to ATCo, Badger Gen may ultimately sign its interconnection agreement with ATCo.

costs that Badger Gen should bear, remain the subject of ongoing discussions between Badger Gen and WEPCO.

The plant will consume up to 7 million gallons of water per day and discharge up to 2 million gallons of wastewater per day. Municipal utility improvements will be necessary to provide this level of service. Badger Gen's Stipulation with the village of Pleasant Prairie sets out the additions to the Pleasant Prairie utility plant that are necessary to serve Badger Gen's proposed plant and the contributions Badger Gen will make toward these improvements.

The generating plant will be capable of being operated in either base load or intermediate load mode. Actual operation will depend on market conditions and the market price for natural gas. Badger Gen has scheduled 25 months to complete construction and intends to start supplying electricity from the plant on the wholesale market in 2003.

Statutory Energy Priorities

Wis. Stat. § 1.12 (4) establishes energy priorities for Wisconsin. The statute provides as follows:

> **1.12(4)** PRIORITIES. In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed.
>
> 1. Natural gas.
> 2. Oil or coal with a sulphur content of less than 1 percent.
> 3. All other carbon-based fuels.

In addition, Wis. Stat. § 196.025 declares that the Commission must implement these priorities in its energy-related decisions, to the extent "cost-effective, technically feasible and environmentally sound."

Were this a project proposed by a public utility, the Commission would need to examine the alternatives of demand-side management (DSM) and renewable resources to determine if they meet the statutory tests for priority. This docket concerns a merchant plant, however, and state law exempts such projects from this examination. Under Wis. Stat. §196.491(3)(d)2, an applicant for a wholesale merchant plant need not show that the project would satisfy reasonable needs of the public for electricity. In addition, Wis. Stat. § 196.491(3)(d)3 specifies that the Commission "may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant."

These statutes make comparing DSM to the proposed power plant a meaningless exercise. Because of the statutory exclusions, the Commission lacks information to compare the cost of equivalent DSM to the cost of energy that Badger Gen would produce. Neither does the Commission have data about the plant's energy output or capacity, or about when Badger Gen would supply electricity. Without this information, the type, amount, and cost of DSM that could replace the merchant plant cannot be determined. Wis. Stat. § 196.491(3)(d)3 also precludes considering renewable resources as an alternative source of supply, and the lack of cost information about Badger Gen prevents any analysis of whether renewable resources would be more cost-effective than this project.

Badger Gen Generating Facility

Effects on Wholesale Competition

Under Wis. Stat. § 196.491(3)(d)7, the Commission may not issue a CPCN unless it can find, "The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market." The relevant market for this project is the Wisconsin Upper Michigan System (WUMS). The record examines this project's impact on WUMS, using the analysis that the U.S. Department of Justice and Federal Trade Commission have prescribed in their *1992 Horizontal Merger Guidelines* (revised April 8, 1997). The record shows that an adverse effect on competition is unlikely because Badger Gen would be adding a new competitor to WUMS. For this reason, the facility is likely to alleviate constraints in Wisconsin's transmission system and to improve the competitive market.

Generating Facility Site Alternatives

Badger Gen proposed two site alternatives for the Commission to consider.[3] One site, a portion of the Kevek farm, is about 95 acres of cropland in portions of the northwest and southwest quarters of Section 16, Township 1 North, Range 22 East within the village of Pleasant Prairie in Kenosha County. The other site, a portion of the Renaissance Business Park, is about 95 acres of industrial park land in the central portion of the western half of Section 21, Township 3 North, Range 22 East within the village of Sturtevant in Racine County.

[3] In addition to its two proposed sites, Badger Gen considered six other sites in Racine and Kenosha Counties. The record describes Badger Gen's site selection and screening criteria and its process of narrowing the list of sites, and shows that Badger Gen's method of selecting the Pleasant Prairie and Sturtevant sites is reasonable.

A member of the public recommended a third site, the Clausen Farm. This site is about 110 acres of farmland and wetland south of CTH ML in the northern half of Section 33, Township 1 North, Range 22 East in the village of Pleasant Prairie.

Pleasant Prairie Site. The Pleasant Prairie site is located along CTH H immediately west across the railroad tracks from the WEPCO Pleasant Prairie Power Plant. It lies at the north end of the LakeView Corporate Park and is currently part of the Kevek farm headquartered across CTH H to the west. The village of Pleasant Prairie recently rezoned the land to heavy manufacturing. It is bordered on the north by a small county cemetery and farmland and on the south by the Lakeview Technical Academy. To the west are three homes across CTH H, and to the east lies WEPCO's coal-fired Pleasant Prairie Power Plant. The Prairie Springs Park lies to the southwest across CTH H. The project would occupy about 35 acres. In the southern portion of the property are a forested corridor and drainage ditch to nearby Jerome Creek, which feeds the Des Plaines River to the west (part of the Mississippi River watershed).

The gas pipeline route to supply the plant extends generally from the north, connecting to the existing ANR pipeline system. The ANR lateral, which originates in the town of Burlington to the west, would need to be upgraded with an additional 20-inch pipeline parallel to the existing pipe.

The electric transmission line route connecting the plant to the existing WEPCO electric transmission system is a radial 345 kV underground line about 2.5 miles long, connecting to the WEPCO Zion-Arcadian 345 kV line directly to the south. Badger Gen proposed two routes, one mainly along CTH H and the other mainly along the Canadian Pacific railway.

Badger Gen negotiated its necessary water and sewer connections with the village of Pleasant Prairie water utility and sewer department. Although the direct water connection to the plant is a 5,500-foot water main 16 inches in diameter along CTH H, numerous other water utility upgrades are also needed to support the water supply system from the Kenosha Water Utility. An existing sewer line is on site, but the village will need an additional line and other sewer system upgrades to serve the plant. Plant effluent will ultimately be treated by the Kenosha sewer department.

Sturtevant Site. The Sturtevant site is the southern portion of the Renaissance Business Park on the northwest side of the village. The land is already zoned as an industrial district. It is bordered on the north by a book printing factory and on the east and south by Canadian Pacific railroad corridors. On the west, the site borders the Business Park water tower and West Road. The project occupies just less than 35 acres. Most of the site was already cleared and graded for development in 1999. A wooded area in the southern end of the site is connected to an herbaceous, non-navigable drainage way that eventually leads to the south branch of the Waxdale tributary of the Pike River, which flows into Lake Michigan.

The gas pipeline route to serve the site would run generally from the south, connecting to the existing ANR lateral that originates in the town of Burlington to the west. The lateral would need to be upgraded with an additional 20-inch pipeline parallel to the existing pipe.

Badger Gen would need to negotiate water and sewer connections with the village of Sturtevant and city of Racine water utility and sewer department. Its water would be supplied through new water mains totaling approximately 39,750 feet, plus some existing mains from the Racine Water Utility Treatment Plant on Lake Michigan. A new booster station and other

upgrades would likely be needed. The wastewater at the site would be collected into the system located within the Renaissance Business Park and transported to the Racine Wastewater Treatment Plant. Upgrades to the Racine or Sturtevant systems may be necessary.

The radial 345 kV electric transmission line route for the Sturtevant site would connect the plant to the same point on the WEPCO Zion-Arcadian 345 kV line as the connection for the Pleasant Prairie site, in the southern part of the village of Pleasant Prairie. In the alternative, the plant could be connected to the existing WEPCO Racine Substation by one of two shorter underground routes, but the record indicates that this connection could cause thermal overloads or dynamic instability problems. As described above, a route about 15 miles long would be needed from the Sturtevant site to the Zion-Arcadian line.

The Sturtevant site would require adding 11 miles of overhead transmission line to an existing transmission corridor, and would also require installing an underground line that is twice as long as the underground line necessary to serve the Pleasant Prairie site. The longer transmission line to Sturtevant would be more expensive and would entail more environmental impact than the interconnection to the Pleasant Prairie site. This additional length would also mean that a plant at the Sturtevant site would be more prone to service interruption from transmission faults.

Victor Clausen Farm Site. The Clausen farm is located on the south side of CTH ML at the southern boundary of the LakeView Business Park in the village of Pleasant Prairie. Mr. Thomas Pitts testified about some of its characteristics. The farm would probably require rezoning. It is bordered on the north by CTH ML and the LakeView Park and on the south by the Illinois border. On the east is the Canadian Pacific Railroad corridor, and on the west is more

farmland and a 40-acre Pleasant Prairie Sanitary Sewer District property. The 35-acre project could be built on a 40-acre piece on the north end. The southern 70 acres, which include some wetlands, could be given to the village or a nature conservancy as a park or natural area.

The electric transmission line route connecting the plant with the existing WEPCO electric transmission system would be entirely on the Clausen site. A loop could be created from the existing Zion-Arcadian line, which crosses the farm. Water, sewer, and natural gas connections would need to be addressed. A small sewer plant is on the property immediately to the west. The water supply upgrades, and at least some of the sewer upgrades, required for the Pleasant Prairie site may also be required for this site. To use this site, Badger Gen would need to negotiate a natural gas supply arrangement with either ANR or Natural Gas Pipeline of America.

The record does not include enough detail about the Clausen site to perform a complete analysis of its attributes.

Environmental Impacts of Each Site

Badger Gen's proposed sites are on land already zoned for industrial use. The Sturtevant Site is cleared and graded as part of an existing Business Park. The Pleasant Prairie site is cropland. In both cases, very little vegetation needs to be removed and no threatened or endangered species need to be disturbed for construction. Surveys of the two sites have revealed no significant or undisturbed archeological or historic resources. The transmission, natural gas, water, and sewer routes have not been surveyed, but adjustments can be made if archeological materials are present.

Neither of Badger Gen's proposed sites has surface waters, but both have drainage ways and wetlands in their southern portions. In each case, the company can build on the site uplands, install detention ponds, and control runoff so that the existing drainage ways and wetlands are not affected. Groundwater will not be affected because facilities will be installed to capture potential contaminants, and wastewater will otherwise be deposited into the local sanitary sewer system. The water supply will be provided by the village utility and not by local groundwater or surface waters. Badger Gen's project includes no high-capacity wells. As a result, the impacts from the water supply and wastewater disposal will be limited to construction impacts in the village rights-of-way for the new mains, booster stations, and other facilities that will be needed.

None of Badger Gen's proposed sites would unreasonably interfere with orderly land use or local development plans. The Pleasant Prairie site is on newly zoned industrial land at the north end of a large business park. The Sturtevant site is within a business park created to accommodate industrial facilities. Badger Gen has not negotiated an agreement with the village of Sturtevant or with the sewer department and water utility regarding necessary improvements for that site. At Pleasant Prairie, on the other hand, the village and the company have reached a Stipulation that satisfies municipal concerns. This agreement includes all the items the village will require in order to keep the proposed plant from unreasonably interfering with orderly village land use or development plans.

One portion of the Stipulation is problematic. This agreement includes the following paragraph:

> 24. Any disputes between Badger and the Village with respect to whether the application of any Village ordinance precludes or inhibits the installation or utilization of the Badger Facility in the terms of Subsection 196.491(3)(i) of the

> Wisconsin Statutes shall be determined based, in part, on the conditions set forth in this stipulation. ...

(Exhibit 19, page 14; emphasis added.) Being an arbiter "in the first instance" is not a role mandated for the Commission by Wis. Stat. § 196.491(3)(i), and the Commission prefers not to undertake such a duty in all cases. It is therefore reasonable to strike the phrase "in the first instance" from the Stipulation, when incorporating it into this order.

Residential neighbors of both sites have expressed concerns about air quality and visual and noise effects of the plant. The company has developed noise design goals that meet the ordinance requirements of both villages and has indicated that it will achieve those goals if ordered. Measurements taken and evaluated as part of the application and review processes can serve as baselines for measured increases in noise during plant operation. Any visual impacts will be mitigated by the agreement with the village in Pleasant Prairie. Air quality impacts are addressed in DNR's air pollution control construction permit. DNR's Water Pollution Discharge Elimination System permit will control potential water quality impacts during construction.

The proposed plant sites are in an area of the state presently classified as severe non-attainment for ozone, and operation of the facility will emit nitrogen oxides, carbon monoxide, carbon dioxide, ammonia, formaldehyde, and particulate material. DNR has conducted a Prevention of Significant Deterioration Review at the Pleasant Prairie site for particulates, nitrogen oxides, carbon monoxide, and sulfur dioxide, as well as a New Source Review for volatile organic compounds. The plant's formaldehyde emissions will be at a level that requires Badger Gen to use maximum available control technology. The DNR has examined these air quality impacts and has issued its final permit approval in a September 20, 2000, Air Pollution Control Construction Permit (#99-RV-143).

Selection of Pleasant Prairie Site

Overall, the record does not reveal any significant environmental concerns for this project at either the Pleasant Prairie or the Sturtevant sites. The plant will have no undue adverse impacts on the human or natural environments. As described above, however, the Sturtevant site is environmentally inferior to the Pleasant Prairie site because of its longer transmission line. In light of the fact that the Pleasant Prairie site is a reasonable location for this project, but the Sturtevant site's more lengthy transmission line would have adverse economic, environmental, and reliability impacts, approving the Pleasant Prairie site is in the public interest. The Badger Gen facility, constructed and operated as specified in this order at the Pleasant Prairie site, can meet all applicable environmental protection requirements. The record does not support selection of the Clausen site.

Pleasant Prairie Transmission Line

Benefits of a 345 kV Transmission Line

Operation of the facility will require a new 345 kV transmission connection. The Commission may not issue a CPCN for a transmission line of this size unless it finds that "the high-voltage transmission line provides usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state and the benefits of the high-voltage transmission line are reasonable in relation to the cost of the high-voltage transmission line." *See* Wis. Stat. § 196.491(3)(d)3t. Because Badger Gen's proposed transmission line is part of its power plant project, this line will offer Wisconsin's electric utilities an opportunity to benefit from a new, local source of power. As described above, this can increase the reliability and

competitiveness of Wisconsin's electric market, to the advantage of both wholesale and retail customers in the state.

Badger Gen is proposing a single-circuit, radial transmission line to its plant, which offers less reliability than a double-circuit, networked interconnection. To secure the benefits that Badger Gen's new power plant will offer to state electric customers, it is reasonable to require that Badger Gen design its switchyard and transmission circuit to allow for a second interconnection in the future. This will enable the plant to become part of a networked transmission system at a future date.

Environmental Impacts of Each Route

Badger Gen has proposed two routes to connect the Pleasant Prairie site to WEPCO's Zion-Arcadian line, both underground. The East Route and the West Route are each about 2.5 miles long. The East Route would overlap existing road right-of-way, but the West Route would cross approximately three acres of wetland and floodplain. The East Route is compatible with area land uses, but the West Route could create some conflicts with land use and development plans. Most of the West Route is next to the Canadian Pacific railroad tracks; if this route were located on the west side of the tracks, it would be crossing areas zoned for conservancy and parks, as well as an environmental corridor that is considered Class 1 wildlife habitat. Using the east side of the railroad tracks would principally cross land that is zoned for agriculture and manufacturing, but would also pass through some residential areas.

From the Pleasant Prairie site, the East Route would have less environmental impact than the West Route. The East Route would also be more consistent with land use and development plans for the area involved.

Care will be needed during construction to avoid adversely affecting the biological and hydrological functions of area wetlands. Soil disturbance may lead to changes in vegetative communities and to the encroachment of invasive weeds, such as purple loosestrife. Because it is possible that cleaning may miss some plant seeds or parts, requiring annual post-construction inspections of wetlands in the transmission right-of-way is a reasonable means of locating and removing any new infestations. On the risers and other above-ground components of the transmission line, installing bird protection devices is a reasonable means of avoiding bird electrocutions. To reduce the likelihood of unnecessary construction impacts in the event this project were to be canceled, it is also reasonable to require that Badger Gen reach a transmission interconnection agreement before it commences construction of the transmission line.

No route will present aesthetic concerns or concerns about electromagnetic fields. Being principally underground, most of the line will be invisible after construction. The design of the line has been submitted with conductor phases arranged to minimize electromagnetic fields.

By law, the Commission must cooperate with the State Historical Society of Wisconsin (SHSW) to protect historical and archeological sites that may be affected by a project under the Commission's review. *See* Wis. Stat. §§ 44.39, 44.40, and 157.70. No known sites exist along the transmission route, but the SHSW has requested that Badger Gen employ a qualified archeologist to conduct field surveys before construction, where the rights-of-way for transmission have not previously been disturbed. Requiring such surveys is a reasonable means of protecting these sites. If a historical or archeological site is discovered during construction, it is also reasonable to require that Badger Gen stop construction at that location and contact the SHSW to avoid harming the site.

Pleasant Prairie Gas, Water, and Sewer Lines

A new natural gas connection to the Pleasant Prairie site is not expected to have undue adverse impact on environmental values. The anticipated routes for this lateral pipeline, whose construction is regulated by FERC, pass through farmlands and wetlands and some smaller areas of residential and commercial development. Most of each route will share corridor with an existing pipeline; a few small wooded parcels may be affected by the additional 25 feet of right-of-way that would be cleared.

The routes for water and sewer lines will principally be determined at the local level, although construction authorization from the Commission may be necessary for Badger Gen's water connection under Wis. Stat. § 196.49. Construction of these water and sewer facilities could adversely impact wetlands, in the same manner as construction of Badger Gen's underground transmission line. It is therefore reasonable to require that this construction comply with DNR recommendations, to minimize adverse impacts to wetland biological or hydrological functions, and that Badger Gen perform similar annual post-construction inspections of these routes to locate and remove new purple loosestrife infestations. For the same reason, it is reasonable to require that Badger Gen employ a qualified archeologist to survey the water and sewer rights-of-way associated with this project for the presence of historical or archeological sites.

Certificate

Badger Gen may commence construction of the natural gas-fueled, combined cycle, electric generating plant described in this order, in the village of Pleasant Prairie, Kenosha

County, Wisconsin. It may also commence construction of the 345 kV electric transmission line connection with the WEPCO Zion-Arcadian 345 kV line via the East Route, as described in this order.

Order

1. The approved location for the 1,050 MW Badger Gen combined cycle plant is the Pleasant Prairie site in Kenosha County, in the Kevek farm field west of the existing WEPCO Pleasant Prairie Power Plant. Badger Gen shall construct the project in conformance with the design specified in its application, and subject to the conditions specified in this order.

2. The approved route for Badger Gen's connecting 345 kV transmission line is the East Route, as described in its application and the EIS. Badger Gen shall construct the transmission line in conformance with the design specified in its application, and subject to the conditions specified in this order.

3. Badger Gen may not commence construction, as defined in Wis. Stat. § 196.491(1)(b), of the transmission line until it reaches a transmission interconnection agreement with WEPCO or ATCo. Badger Gen shall provide the Commission with a copy of this agreement when it is obtained.

4. Badger Gen shall design its switchyard and transmission circuit in a manner that can accommodate a second circuit in the future, so the plant can become part of the networked transmission system.

5. Badger Gen shall adhere to the Stipulation with the village of Pleasant Prairie entered into the record as Exhibit 19, with the following exceptions:

a. In paragraph 24 of the Stipulation, the phrase "in the first instance by the PSC" is not incorporated into this order.

b. Exhibit A of the Stipulation, the "Retail Water Service Agreement," includes on pages 21 to 23 a description of the rate application that the Village Parties will file with the Commission. The Commission interprets these provisions as specifying the terms of a rate filing agreed upon by the Village Parties and Badger Gen, but they do not bind the Commission to approve the rate application.

6. Badger Gen shall provide the Commission with copies of all final executed agreements related to the construction, operation, or ownership of the project when they are obtained.

7. Within three months of the date when the project is fully operational, Badger Gen shall repeat the existing noise environment measurements that it took before project approval. Post-construction, Badger Gen shall measure the maximum noise generated at the site (i.e. all units on), and measure the noise at the site with all units off. Badger Gen shall report its findings to the Commission, using the same format as its pre-approval noise studies.

8. Badger Gen shall employ a qualified archeologist, as defined in Wis. Stat. § 157.70(1)(i), to survey undisturbed portions of the approved routes for the transmission, water, and sewer facilities. The qualified archeologist shall survey the portions of these routes that have not already had soil disturbance to a depth of four feet, in a manner that conforms with the recommendations of the SHSW. Badger Gen shall work with the village of Pleasant Prairie to accomplish this and shall provide copies of the survey to the SHSW and to the Commission. If archeological materials or human remains are found during the construction of the plant, electric transmission line, or water or sewer facilities, Badger Gen shall stop construction immediately and notify the SHSW and Commission for further direction. Badger Gen shall follow the SHSW's direction to mitigate adverse impacts to any discovered historical or archeological sites.

9. Badger Gen shall comply with DNR recommendations to minimize adverse impacts to wetland biological or hydrological functions along the transmission line route.

10. Construction of the water and sewer connections shall comply with DNR recommendations to minimize adverse impacts to wetland biological or hydrological functions along the rights-of-way.

11. Badger Gen shall inspect the routes of the transmission line and of the water and sewer connections for the presence of purple loosestrife, prior to the commencement of construction. Following construction, Badger Gen shall inspect these rights-of-way in wetland areas for three growing seasons, to identify new infestations of purple loosestrife. If Badger Gen identifies any new infestations, it shall annually remove the plants for a period of five growing seasons. Inspections and plant removal shall occur prior to seed dispersal. Removal shall be in accordance with methods recommended by the DNR. Badger Gen shall provide the Commission with written documentation of its inspection and removal activities, describing the results of such activities and the dates on which they took place. Badger Gen shall submit this documentation to the Commission within 90 days after completing its annual inspections and plant removals.

12. Badger Gen shall install bird protection devices on the risers and other above-ground components of its transmission line.

13. Badger Gen shall submit quarterly progress reports to the Commission that summarize the status of construction, the status of environmental control activities, and the overall percent of physical completion. Badger Gen shall include a summary of its consultations with the DNR and other agencies concerning the issuance of permits. The reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed

environmental protection or control standards. The reports shall also include similar status reports for the natural gas pipeline construction by ANR. The first report is due for the quarter ending March 31, 2001. The reports shall be filed within 31 days after the end of each quarter.

14. Badger Gen is not authorized to construct any natural gas line facilities connecting to the Pleasant Prairie site without an amendment to this Order.

15. Badger Gen shall inform the Commission of any substantial design modifications in the approved facilities.

16. If Badger Gen does not complete construction of the proposed facilities within five years, this CPCN becomes invalid.

17. Jurisdiction is retained.

Dated at Madison, Wisconsin, _____

By the Commission:

_____

Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

Docket 9340-CE-100

APPENDIX A
(CONTESTED)

In order to comply with Wis. Stat. § 227.47, the following parties who appeared before the agency are considered parties for purposes of review under Wis. Stat. § 227.53.

Public Service Commission of Wisconsin
(Not a party but must be served)
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P.O. Box 7854
Madison, WI 53707-7854

BADGER GENERATING COMPANY
by
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P.O. Box 1497
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WISCONSIN ELECTRIC POWER COMPANY
by
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231 West Michigan Street, P346
Milwaukee, WI 53201-2046

VILLAGE OF PLEASANT PRAIRIE
by
Mr. James H. Baxter III, Attorney
Quarles & Brady LLC
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497

Date Mailed
October 17, 2001

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

In the Matter of Wisconsin Electric Power Company's Request for Declaratory Ruling Approving a Proposed Plan to Increase Generation in Wisconsin	6630-DR-104
Application of Wisconsin Energy Corporation for Approval to Acquire the Stock of WICOR, In9	9401-YO-100 9402-YO-101

FINAL DECISION

Background

This is a declaratory ruling pursuant to a Power the Future-2 (PTF-2) petition dated February 23, 2001, filed under Wis. Stat. § 227.41(1), by Wisconsin Electric Power Company (WEPCO). The Commission initiated this docket by Notice of Proceeding dated March 6, 2001. On May 8, 2001, the Commission issued an order for hearing in this docket and an order for reopening the Final Decision, dated March 15, 2000, in dockets 9401-YO-100 and 9402-YO-101, *Application of Wisconsin Energy Corporation for Approval to Acquire the Stock of WICOR, Inc.* (Merger Order). On May 10, 2001, the Commission issued an order consolidating the reopening of the Merger Order into this declaratory ruling docket. A prehearing conference was held on May 15, 2001, before Administrative Law Judge David Whitcomb.

On June 19 and 20, 2001, a hearing was conducted before Judge Whitcomb to consider the following six determinations WEPCO requested the Commission to make as referenced in the March 6, 2001, Notice of Proceeding. In its initial brief WEPCO indicated that it is no longer seeking a ruling on issue number 5.

1. It is prudent for WEPCO to proceed with the development of PTF-2, including the new regulatory mechanism described [in the Petition] whereby new generation will be constructed and owned by a non-utility affiliate and leased to WEPCO.

2. It is prudent for WEPCO to agree to reimburse the affiliated non-utility generation company for pre-certification expenses which the generation company prudently incurs in construction of new generation facilities under PTF-2, to separately account for such expenses, and to report periodically to the Commission regarding the level of such expenses and the schedule for further expenditures.

3. When the PTF-2 facilities are operational, it is reasonable for WEPCO to include such pre-certification expenses in the lease payments to the new generation affiliate.

4. In the event that it is prudent for the company to terminate PTF-2 due to a material change in the plan or the company's relevant circumstances, WEPCO may amortize over a period of time determined by the Commission and recover in rates pre-certification expenses paid to the affiliated non-utility generation company, to the extent the level of such pre-certification expenditures is reasonable.

5. Following issuance of a Certificate of Authority or a Certificate of Public Convenience and Necessity (CPCN), it is reasonable for WEPCO to earn a current return on construction work in progress (CWIP) with respect to PTF-2 generation facilities.

6. All prudent expenditures by WEPCO in implementing PTF-2 fall within the reliability "carve-out" contained in the Commission's order approving the merger of WICOR and Wisconsin Energy Corporation (WEC).

The parties for purposes of review under Wis. Stat. § 227.47 are listed in Appendix A to this order.

Findings of Fact

"PTF-2" means the following:

WEC will organize a subsidiary (the "Generation Affiliate") for the sole purpose of financing, constructing and owning new electric generation facilities and certain improvements to existing electric generation facilities owned and operated by WEPCO, in order to provide up to 1,000 MW of additional natural gas-fired and 1,800 MW of additional coal-fired capacity (the "Leased Generation Facilities").

The Generation Affiliate and WEPCO will enter into one or more contracts or arrangements (the "Leased Generation Contracts"), pursuant to Wis. Stat. §§ 196.52(9), 196.795(5)(k)1 and 196.795(5)(k)3, as created by 2001 Wisconsin Act 16, §§ 3008mc, 3001g and 3011jc (the "Leased Generation Law"). Under the Leased Generation Contracts, the Generation Affiliate will lease the Leased Generation Facilities and associated real property to WEPCO for operation by WEPCO.

The Leased Generation Facilities will be constructed on existing sites in Oak Creek and Port Washington, Wisconsin, which are owned by WEPCO but will be transferred to the Generation Affiliate pursuant to the Leased Generation Law.

The capital structure of the Generation Affiliate for purposes of determining the lease payments will be 58 percent equity and 42 percent debt. WEC will hold a minimum of 80 percent of the equity of the Generation Affiliate. Other entities, including Madison Gas and Electric Company (MGE), cooperatives, and perhaps others, may hold the remaining 20 percent of the equity.

Prior to the issuance of the CPCNs for the Leased Generation Facilities, WEC or the Generation Affiliate will expend an amount (estimated at the time of hearing at $57 million) for equipment, services and other items (the "pre-CPCN expenditures"). The $57 million amount includes a current return on CWIP (i.e., the carrying costs). WEPCO, in its brief, withdrew its request for a current return on CWIP. Appendix B shows the estimated amount of pre-CPCN expenditures WEPCO originally requested to recover and the changes WEPCO made to those amounts during this proceeding. These expenditures could be greater, due to the passage of time up to the issuance of this Final Decision. WEPCO will obligate itself to reimburse the Generation Affiliate for the pre-CPCN expenditures.

Opinion

In its PTF-2 proposal, WEPCO has put forth a potentially innovative way to meet Wisconsin's continuing electric reliability needs. At this time, WEPCO seeks a limited declaratory ruling that it is reasonable and prudent to proceed with its PTF-2 proposal. The Commission concurs. Although the issues in the present docket concern future generation policy in the state, the decisions necessary in this proceeding need not expand to encompass such a broad reach. Rather, the current proceeding and sought-after declaratory ruling is simply a matter of keeping another electric restructuring option open in Wisconsin. This view had substantial support in the record. Such disparate groups as MGE, Customers First! Coalition, Wisconsin Public Power Inc., and Wisconsin Industrial Energy Group joined WEPCO in advocating in their briefs that the PTF-2 approach should be allowed to proceed. In addition, the Wisconsin legislature and Governor McCallum via 2001 Wisconsin Act 16 approved the

necessary changes in state statutes that are prerequisites for the fruition of PTF-2. These developments have not gone unnoticed by the Commission.

While the Commission concurs that it is reasonable for WEPCO to proceed with its PTF-2 proposal, it should be understood that the Commission has not approved the specific projects that are part of the PTF-2 proposal. The Commission at this time grants only limited approval for WEPCO to proceed with PTF-2. The scope of the Commission's prudence determination in this proceeding is narrow. That is, the sought after pre-CPCN expenditures will still be subject to audit and scrutiny. WEPCO maintains the burden of showing in the relevant future CPCN proceedings that the PTF-2 projects are needed and cost effective. To do so, WEPCO will need to show a thorough, complete, and accurate evaluation of alternatives. The Commission limits WEPCO's request to the items outlined in Appendix B and caps the potential rate recovery of expenditures at the amounts identified in Appendix B, subject to the condition above allowing for changes due to the passage of time from the hearing up to the issuance of this order. Moreover, should WEPCO abandon its PTF-2 proposal at a later date and seek rate recovery of its pre-CPCN expenditures, WEPCO will have to show, using a public interest standard, that it was prudent and reasonable to do so.

In this proceeding some parties indicated under the docket 05-EI-112 Order[1] (the "112 Order") that WEPCO must conduct a formal Request for Proposal (RFP) process, seeking or soliciting competitive bids. The Commission disagrees. The 112 Order does not compel, nor do

[1] *See* docket 05-EI-112 Findings of Fact, Conclusions of Law and Order, dated December 23, 1993, modified by, Order to Rescind, dated July 10, 2000, and amended by Amended Order to Rescind, dated September 12, 2000, in *Investigation on the Commission's Own Motion Into Barriers to Contracts Between Electric Utilities and Non-utility Co-generators and Certain Related Policy Issues;* and docket 05-BE-103, dated April 11, 1997, *Investigation on the Commission's Own Motion Into Current Procedures for Authorizing New Generation Facilities (the Advance Plan and the Certificate of Public Convenience and Necessity) to Determine Appropriate Changes Required During the Transition to a Restructured Industry.*

Wisconsin statutes require, competitive bidding. The Commission has not directed WEPCO, at this time, how to perform its evaluation. Under the 112 Order, as modified, WEPCO may select an evaluation method other than bidding. The Commission encourages creative approaches to the procurement of electric supply; however, WEPCO still has the burden to demonstrate need and cost effectiveness in future CPCN proceedings for the PTF-2 power plants.

Under 1999 Wisconsin Act 204, independent power producers may construct wholesale merchant power plants without any formal economic need review by the Commission. This was not the case when the initial 112 Order was issued. In Wisconsin, the primary focus is presently on electric system reliability. There is no legislation implementing retail competition in Wisconsin. In contrast, in those states where retail competition has been implemented, some legislatures have formally required competitive bidding. Restructuring uncertainties continue to exist in this state, but maintaining reliability is of key importance to this Commission. The PTF-2 approach is a reasonable method to continue to explore at this time.

Finally, the Commission believes it is necessary to amend the Merger Order because the nature and size of the reliability-oriented expenditures of the PTF-2 proposal were not foreseen at the time of that order.

For the above reasons, and subject to the discussion above, it is prudent and reasonable for WEPCO to proceed with its PTF-2 proposal.

Declaratory Ruling

1. PTF-2 complies with the Leased Generation Law.

2. The pre-CPCN expenditures in Appendix B are reasonable, both as to type and general magnitude subject to the conditions and limitations discussed throughout this order.[2] Thus, it is prudent for WEPCO to incur an obligation to reimburse WEC or the Generation Affiliate for the pre-CPCN expenditures.

3. If the Commission approves the Leased Generation Contracts and the leases of the Leased Generation Facilities, issues the necessary CPCNs, and grants other approvals as may be required, WEPCO may include specific pre-CPCN expenditures, to the extent they are reasonable, and not of the type normally excluded for ratemaking purposes, in the lease payments to the Generation Affiliate.

4. If the Commission does not approve the Leased Generation Contracts or the leases of the Leased Generation Facilities, or does not issue the necessary CPCNs, or does not grant other approvals as may be required, WEPCO may seek rate recovery for changes in its revenue requirement due to its obligation to reimburse WEC or the Generation Affiliate for the pre-CPCN expenditures, to the extent they are reasonable and not of the type normally excluded for ratemaking purposes.

5. At such times as WEPCO may apply to the Commission for full recovery of the pre-CPCN expenditures (either through the leases of the Leased Generation Facilities or otherwise), the Commission may review the facts and circumstances as they have transpired

[2] These are: that the pre-CPCN expenditures will face audit and scrutiny; that the pre-CPCN expenditures are limited as to the type and magnitude listed in Appendix B; that WEPCO maintains the burden of showing that the PTF-2 projects are needed and cost effective; that abandonment of PTF-2 must meet a public interest standard; that pre-CPCN expenditures recovered are reasonable and not of the type normally excluded for rate making purposes; and the method of evaluating generation alternatives is adequate.

since the issuance of this Final Decision and may consider those facts and circumstances in determining whether to allow recovery in rates.

6. The Commission makes no determinations regarding the Leased Generation Contracts, the leases for the Leased Generation Facilities, CPCNs, and any other matter requiring the Commission's approval. In particular, and except as provided in paragraph 7 below, the Commission makes no determination in this proceeding whether WEPCO's method of selecting PTF-2 over other generation alternatives complies with Wis. Stat. § 196.491 and the 112 Order.

7. The 112 Order does not require competitive bidding or any other particular means of satisfying the requirements of Wis. Stat. § 196.491, with respect to cost.

8. If anything purchased with funds comprising the pre-CPCN expenditures is not needed for PTF-2, WEPCO shall attempt to recoup those funds through sales to third parties or otherwise.

9. The Five-Year Rate Restriction Period contained in the Merger Order, as amended in this Final Decision, does not apply to the pre-CPCN expenditures that are capital expenditures.

Dated at Madison, Wisconsin, _____

By the Commission:

_____

Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights
Attachments: Dissenting Opinion of Commissioner Joseph P. Mettner
Concurring Opinion of Commissioner Robert Garvin

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

APPENDIX A
(CONTESTED)

In order to comply with Wis. Stat. § 227.47, the following parties who appeared before the agency are considered parties for purposes of review under Wis. Stat. § 227.53.

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(Not a party but must be served)
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Docket 6630-DR-104

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Docket 6630-DR-104

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Estimated Pre-CPCN Expenditures for Power the Future

Dollars in Thousands	2000 TOTAL	2001 TOTAL	2002 TOTAL	GRAND TOTAL	EVISIONS HEARING		REVISED GRAND TOTAL	REVISIONS IN INITIAL BRIEF		REVISED TOTAL
Preliminary Engineering, Permitting, and Regulatory Proceedings (excluding WE labor charged to WEC)										
Common to all PTF units	$ 177	$ 1,480	$ 750	$ 2,407	$ 2,700	Note 1	$ 5,107			$ 5,107
VOC Emission Offsets	966	1,120	944	3,030			3,030			3,030
Port Washington CC	-	1,110	165	1,275			1,275			1,275
Oak Creek Coal	-	2,060	990	3,050			3,050			3,050
Port Washington - New CC										
Engineering and minor equipment and contract cos	-	1,200	1,480	2,680			2,680			2,680
Major Equipment	-	16,000	2,700	18,700			18,700			18,700
Oak Creek - New Coal										
Engineering and minor equipment and contract cos	-	360	3,300	3,660			3,660			3,660
Major Equipment	-	-	13,000	13,000			13,000			13,000
WE Labor charged to WEC	112	1,525	1,305	2,942			2,942			2,942
Carrying Costs	-	1,113	1,739	2,852	970	Note 2	3,822	(3,822)	Note 3	-
TOTAL	$ 1,255	$ 25,968	$ 26,373	$ 53,596	$ 3,670		$ 57,266			$ 53,444

Note 1 - At hearing, WEPCO added $2.7 million to include cost of public information effort inadvertently not included in original estimate.

Note 2 - At hearing, WEPCO added $2.55 million to correct an error and subtracted $1.58 million to eliminate carrying costs on non-capital pre-CPCN expenditures.

Note 3 - WEPCO withdrew its request for a current return on CWIP in its initial brief for this proceeding. The Ruling, therefore, is not applicable to rate recovery of this amount.

COMMISSIONER JOSEPH P. METTNER
DISSENTING OPINION
6630-DR-104
OCTOBER 16, 2001

I must respectfully dissent from certain elements of the Commission majority's declaratory ruling where those rulings clearly exceed the scope of the applicant's original request, are otherwise not permitted by Wisconsin's Utility Holding Company Act, or are inconsistent with the Leased Generation Law.

In a March 6, 2001 hearing held before the Commission's Administrative Law Judge, the scope of the applicant's declaratory ruling request was limited to the consideration of six separate issues, subsequently narrowed to five issues following the applicant's withdrawal of that portion of its request pertaining to current return on construction work in progress. It is therefore surprising that the Commission's Final Decision makes as its first declaration the finding, "PTF-2 *complies with* the Leased Generation Law." See, slip op. at 6 (emphasis added). The issue of PTF-2 and its compliance with the Leased Generation Law is not set forth in the remaining five issues that are the proper subject of this case, and is not implied in any way by their disposition.

Nowhere has the Commission been asked to make the foregoing finding, and the majority has not explained its choice to do so in its Decision. It would be a very difficult explanation to conjure, given that no leased generation contract has been placed before the Commission for approval in this case record pursuant to s. 196.52(3), Stats., which purports in any way to implement new ss. 196.52(9) and 196.795(5)(k)3. of the Leased Generation Law. Even the applicant will be left to ponder the meaning – and value – of this first declaratory ruling.

The second declaratory ruling indicates the Commission's determination that "it is prudent for WEPCO to incur an obligation to reimburse WEC or the Generation Affiliate for the pre-CPCN expenditures." The Commission's own staff has advised specifically in this case that such a determination "is tantamount to Commission authorization of rate recovery for the expenditures at issue." See, PSCW Staff Briefing Memorandum, April 21, 2001 at p. 10. This advice is based upon a reasonable reading of the normative holding of the Wisconsin Supreme Court in *Wisconsin Public Service Corp. v. Public Service Commission*, 109 Wis.2d 256 (1982), in particular:

"Where expenditures are prudent, investors should be able to anticipate that all such costs will eventually be recovered from ratepayers." Id at 261.

The majority adds to the difficulty of predetermining rate recovery in its fourth declaratory ruling by holding out the probability of ratepayer reimbursement of pre-CPCN expenses even if the associated PTF-2 leased generation contract is never executed and approved, and the necessary CPCN is never issued. In other words, in addition to assuring the ratepayers' financial guarantee

of pre-CPCN expenses well in advance of the approval of a necessary lease contract, and the issuance of any necessary construction certificates, the majority holds out substantial likelihood that ratepayers will fund these expenses even in the absence of any ultimate benefit inuring to ratepayers from a completed project.

This substantial assurance of ratepayer-conscripted support for affiliate construction (even in the potential absence of that construction) stands in clear violation of s. 196.795(5)(f), Stats., which provides, "No nonutility activity of any holding company or nonutility affiliate may be subsidized materially by the consumers of any public utility affiliate with which the holding company or nonutility affiliate is in the holding company system." In spite of the majority's seeming indication of interest in this issue during the Commission's discussion of the record in this case, their Final Decision does not cite, and thus makes no attempt to distinguish the statutory prohibition against cross subsidies.

The majority may contend that there is safety in its reservation of a later review of "facts and circumstances" subsequent to this decision but prior to some later ratemaking determination and that this should somehow reassure ratepayers. This zone of caution will weigh little against the strength of a prudence determination, however, especially those as broadly stated as are the declaratory rulings issued today.

Perhaps most disconcerting, however, is the majority's posture of obeisance toward "the necessary changes in state statutes that are the prerequisites for the fruition of PTF-2," while giving more limited regard to the place which those statutory changes hold in the larger fabric of laws that must be administered by the Commission. The proper time and proper place for consideration of financial factors and property transfers subject to inclusion or imputation in any leased generation contract, potentially including capitalized pre-CPCN expenditures, is during or after the Commission's review and disposition of the contract and its terms.

This is clearly set forth in the Leased Generation Law's provisions. For example, decisions concerning the proper inclusion in a utility's retail revenue requirement any retail jurisdictional portion of leased generation payments and *of all other costs prudently incurred with respect to operation, maintenance or improvement of a generating facility subject to such a contract* is left to a time after a public utility has entered into a Commission approved lease. See, 196.52(9)(d), Stats., s. 3008mc, 2001 Wisconsin Act 16. Along similar lines, appropriately approved transfers of land and appurtenances from a utility to an affiliate under a leased generation agreement are clearly contemplated to take place after commission approval of a leased generation contract. See, s. 196.795(5)(k)3., Stats., s. 3011jc, 2001 Wisconsin Act 16.

While the legislature was quite thorough in its crafting of the latter amendment to Wisconsin's Utility Holding Company Act, it chose not to disturb the cross-subsidy proscriptions of 196.795(5)(f), Stats. The canons of statutory construction require this commission to interpret the entire system of laws, of which the holding company and affiliated interest provisions are part, in a way that harmonizes parts with the whole, and gives effect and meaning to each individual statute. See, e.g., *Gorman v. Wausau Insurance Cos.* 175 Wis.2d 320 (Ct. App. 1993).

For the foregoing reasons, I respectfully dissent from the majority's decision concerning the indicated declaratory rulings.

_____

Joseph P. Mettner
Commissioner

CONCURRING OPINION
COMMISSIONER ROBERT GARVIN
DOCKET 6630-DR-104

I agree with the result reached in the majority opinion, but write separately to respond to some of the issues that Commissioner Mettner discussed in his dissent and raised during our discussion of record in this matter.

Background

The "Power the Future" project that forms the basis for the present petition has been the subject of considerable debate among policymakers in our state since Wisconsin Electric Power Company (hereafter referred to as "WEPCO" or "petitioners") originally announced their PTF-1 project almost one year ago. In their revised plan, called "PTF-2," the petitioners seek a threshold determination that is prudent for the company to proceed with the development of a new financing mechanism (Leased Generation Contract) set forth in their PTF-2 proposal. In addition to seeking limited approval to proceed with PTF-2, WEPCO seeks a determination in this proceeding that it may recover certain pre-certification expenses it will incur in developing this project.

One party, in its brief, stated that in this proceeding "WEPCO is not asking for Commission approval of that paradigm now; it is merely asking whether the Commission is open to the idea of considering that paradigm—that option—in a subsequent proceeding. If the answer is no, the Commission should say so now." Another party similarly takes the view that the authorization sought by WEPCO in this proceeding is "narrow" in that it limited to the issue of the recovery of certain precertification expenses.

Other parties, merchant plants and certain holding companies in our state, on the other hand, argued that this determination is much broader than the confines of WEPCO's petition. In its reply brief, one party asserted that "Wisconsin is at a crossroads with respect to the direction

it will take to meet its future energy needs." I agree with that proposition and would further concur with their legal argument that this proposal flies in the face of current law if the provisions in 2001 Wisconsin Act 16, relating to leased generation contracts, §§3008mc, j and jc, (hereafter referred to as the "Leased Generation Law"), had not become current law. In the absence of any express statutory authority, this Commission would have been asked to make a huge legal leap regarding the prudence or reasonableness determination on this new financing mechanism. It would have not just suggested—but required a very liberal construction of existing state law by this Commission.

Legislative Intent

Before responding to some of the concerns raised by Commissioner Mettner during our September 6th discussion of this proceeding and in his Dissent, it is necessary to first discuss some of the legislative history surrounding the Leased Generation Law that was enacted into law this past summer, as well as the applicable legal standards that should guide our discussion in a manner that is consistent with the Legislature's intent.

The aim of all statutory interpretation is to determine the intent of the Legislature. When ascertaining that intent, we first look to the language of the statute. If the statute unambiguously sets forth the legislative intent, we must apply its plain meaning. If the language of the statute is ambiguous, only then must we resort to judicial construction of it to ascertain and carry out the Legislature's intent. *Moran v. Wisconsin Department of Administration*, 230 Wis.2d 101,103, 113; 603 N.W.2d 234 (Ct. App. 1999).

Sections of the statutes relating to the same subject matter must be considered *in pari materia* and must be construed together and harmonized if possible. *Brunette v. Bierke* 271 Wis. 190, 72 N.W.2d 702 (1955). More specifically, legislative history cannot be used to create an ambiguity in otherwise plain statutory language. *See Johnson v. County of Crawford*, 195 Wis.

2d 374, 383, 536 N.W.2d 170 (Ct. App 1995). However, we may look to legislative history to "re-enforce and demonstrate that a statute plain on its face, when viewed historically, is indeed unambiguous." *Kerkvliet v. Kerkvliet*, 166 Wis. 2d 930, 939, 480 N.W. 823, 826 (Ct. App. 1992); *State v. Martin*, 162 Wis. 2d 883, 897 n.5, 470 N.W.2d 900, 905 n.5 (1991).

In my view, the Leased Generation Law is neither ambiguous nor is the Legislature's intent at all unclear. While I believe there is ample legislative history to support our reading of the Leased Generation Law, as set forth in the Final Decision, it is useful to consider the creation of the Leased Generation Law in the context of other legislative actions and in the context of this Commission's prior orders, to demonstrate the legislature's interest in having our agency consider leased generation contracts as a means of developing new capacity, over other available means.

On August 30, 2001, Governor McCallum signed into law (2001 Wisconsin Act 16) the provisions of enrolled Senate Bill 55 that included the following provisions that are relevant to our consideration of this petition[1]

- The creation of a new financing/regulatory option, subject to PSC approval, which would permit a utility to enter into a contract or arrangement or set of contracts or arrangements (a "leased generation contract") under which an affiliated interest of the same utility may construct or improve an electric generating facility and lease that facility back to the utility to operate. §196.52(9)(a) 3.

[1] References are to the relevant statutory sections created by Act 16.

- Requires that any real estate owned by the utility that is transferred or sold to a non-utility affiliate be transferred at book value (with some ability to transfer the land back if the construction that is subject to a lease generation contract has not been completed. §196.795(5)(K)1; §196.52 (9)(a) 6,7.
- Imposes a variety of conditions on our agency if we approve such a generation lease contract, including options to extend the contract; a lease term of 20 years for gas-fired generation and 25 years for coal-fired generation; and provides full rate recovery in retail rates for that portion of any payments, including operation and maintenance, under the leased generation contract that our agency allocates to the public utility's retail electric service. §196.52(9) (A) 9, 10.
- Permits other investor-owned utilities, coops and munis to acquire an interests in any of the generating facilities that are constructed pursuant to a leased generation contract. §196.52(9)(g).
- Excludes from the definition of a "wholesale merchant plant" any electric generating facility or an improvement to an existing generation facility that is subject to a leased generation contract. §196.85(1m)(a).

In addition, there were a variety of new laws passed in each of the past three legislative sessions that also bear on our final decision. The Wisconsin Legislature's efforts to restructure the electric industry in our state mirrors the careful and incremental approach that many low-costs states have taken in this regulatory field.

In 1997, Governor Thompson signed into law Act 204, which required: (1) all the transmission owning utilities in our state to join an independent system operator by a date certain; (2) clarified the legal status of wholesale merchant plants; and (3) streamlined the

regulatory process at our agency to require our agency to approve, deny, or modify power plant applications within 180 days, or seek circuit court approval for a six-month extension.[2]

Last session's budget bill, 1999 Act 9, brought even more changes. 1999 Act 9 amended Chapter 196 to allow: (1) utility holding companies to asset cap relief in exchange for their agreement to transfer their facilities to the American Transmission Company (ATC). The ATC has begun its operation and is in the process of phasing in transmission rates for their wholesale customers; (2) our agency to order utilities to make investments, if necessary, to maintain reliable electric service.

Finally, in this year's budget, the Legislature not only passed provisions relating to a Leased Generation Law, but also: (1) provided a tax break for wholesale merchant plant owners by reducing the gross receipts applicable to their facilities in half in order to incent them to construct in Wisconsin); and (2) added a "built it" or "lose it" provision that required public utility recipients of CPCN to either begin construction of new facilities within one years of issuance or risk having the CPCN declared void.

The Commission was actively involved in the statutory changes, described above, over the past three legislative sessions. In addition, the Commission conducted its own investigation,[3] as part of its efforts to foster a robust competitive marketplace for electricity in Wisconsin from roughly 1994-1997. As reserve margins plummeted in the mid-1990s, however, our Governor

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[2] In addition, Act 204 contained a non-statutory provision that required three investor-owned utilities to complete their outstanding Request for Proposals for new generation. The Commission subsequently approved applications to construct three gas-fired facilities under an expedited 90-day period: Application of RockGen Energy LLC (Polsky Energy Corporation) for Authority to Construct and Place in Operation a Simple-Cycle Combustion Turbine Generating Facility, Known as the RockGen Energy Center, to be Located in Dane or Rock County, 9335-CE-101; Application of Madison Gas and Electric Company for Authority to Construct and Place in Operation an 83 MW Combustion Turbine Electric Generating Facility to be Located in Marinette County, Wisconsin, 3270-CE-121; and Application of SEI Wisconsin, LLC, for Authority to Construct and Place in Operation a Combustion Turbine Electric Generating Facility, Known as the SEI Wisconsin Electric Generating Facility to be Located in Wisconsin, 9338-CE-100.

[3] Investigation on the Commission's Own Motion Into The Probable Costs and Benefits of Changing Electric Utility Company Structure and Regulations, 05-EI-114.

and the Legislature began to focus their attention less on restructuring and more on ensuring reliability in Wisconsin. Currently, there is no legislation that has been either introduced or considered to compel regulators to open utility markets to retail choice this legislative session. While I share the concern expressed by WPS Resources in its brief regarding the future direction of our state's energy policy, Wisconsin has reached a point where the restructuring process has not just stalled, but where our Legislature passed a new law that permits utility property to be transferred to a non-utility affiliate at book value as a part of new generation lease contract that WEPCO has proposed as they plan their future capacity needs. These provisions, when considered together, reflect the uncertainty policymakers have in Wisconsin about restructuring the electric industry and the reality we face as regulators in that we cannot simply "order" competition.

This new policy direction, as expressed in 2001 Wisconsin Act 16 in favor of reliability suggests three things to me as I tried to harmonize the Leased Generation Law with the laws passed since 1997. First, the Legislature would like our agency to consider new financing mechanisms for generation that both maintains our utility's relevance in planning for their future capacity needs and relies less on traditional financing of new construction through the issuance of corporate utility debt and equity. This type of financing is becoming rare. We have witnessed this change not only in Wisconsin, but also across the country as companies try to come up with financing solutions to meet a particular asset's and that company's capital needs in this new environment. It is important to continually explore new financing alternatives, as structures are constantly being created or enhanced. This is exactly what our legislature did in passing this new provision.

Secondly, it is clear from the Legislature's creation of the leased generation concept that the likelihood of a robust retail marketplace, with the exception of possibly large industrial customers, is unlikely in the near future.[4] Unlike Pennsylvania, California, Connecticut, and New Jersey, Wisconsin has not established a date certain for utilities open up their service territories to retail choice. In fact, the adoption of this new financing mechanism makes this policy goal, at least in the form of a legislative mandate, virtually impossible in the short-term.

The Leased Generation Law was not an arcane provision that somehow emerged during the recently completed biennial budget process. On the contrary, energy policy has been and remains one of the most heavily lobbied issues before the Legislature and this current session has been no different. The provisions which were later enacted into law in the Leased Generation Law were the subject of a separate hearing on this proposal in the Senate. In addition, the Joint Finance Committee endorsed this proposal by a unanimous (16-0) vote.

Thirdly, it is very telling that the vast majority of wholesale customers, cooperatives, and principal utilities across the state actively support this idea. The briefs submitted in this proceeding and the staff briefing memorandum paid very little attention to WEPCO's wholesale customers' interest in keeping this option available to help meet their future capacity needs. It is important to remember that this new financing mechanism permits investment by mid-sized companies and for future purchase power cost by others entities.. In other words, the role of wholesale customers is directly relevant in our decision to grant the relief sought by the petitioners in this ruling.

[4] I remain confident, however, that future policy goal of bringing retail choice to consumers may be feasible once the ATC has fully phased in its transmission rates and a regional transmission organization is operating in the Midwest.

05-EI-112 Order

It is equally important to consider the present petition in the context of prior Commission orders, principally this Commission's order in the 05-EI-112 decision, December 28,1993, and its subsequent decision to rescind the Commission's previous ruling on July 11, 2001.

Unlike other states, in Wisconsin there is no statutory mandate that compels a competitive bidding process for any generation in our state. There is not now nor has there ever been an administrative rule promulgated by our agency that directs any utility with an obligation to serve customers in our state to conduct a competitive bidding process for new generation in Wisconsin. I am aware of a few states, as set forth in the briefs of the Midwest Independent Power Suppliers Coordination Group (MIPSCG) that have compelled such a process.[5]

As I thought about the applicability of the Commission's order in the 112 proceeding, I factored in a number of questions in my analysis:

- For example, if the Commission is to breath life into its Order to Rescind, should it not consider a new financial mechanism to construct generation in Wisconsin?
- Did the Commission not state is its Order to Rescind the 2-stage bidding process "created inappropriate regulatory barriers to the installation of needed electric generation…in Wisconsin…"?
- Did the Commission not state in its Order to Rescind that it eliminated compulsory bidding in order to "grant utilities broader discretion to devise appropriate methods of assessing their options for maintaining adequate generation capacity."?

[5] Each of those states referenced in MIPSCG brief, with the exception of Georgia, have a clear legislative mandate to open their markets to retail choice.

- Did the Commission not state in its Order to Rescind that if another method is selected other than competitive bidding, that method will be subject to our approval on a case-by-case basis?

If the words in the Commission's Order to Rescind are to have any common sense or plain meaning, the Commission must conclude that any utility, including the applicants may select a formal competitive bidding process or another method and that is what we have today—another method that will be actively considered in a future application case.

I am reluctant to get tied into a confusing and often contradictory history of this order or to try to harmonize this order with the provision of the Leased Generation Law.. History again is instructive here because much of the 112 order was premised on the notion of jump-starting wholesale competition in a generation market, which did not include merchant plants. More importantly, this order was issued during a time when regulators set up all of the procedures that might enable these entrants to offer generation proposals to meet a statutorily required "need." In fact, the resulting process created in the original 1993 order sparked a major policy debate over whether new entrants should be allowed into the generation market without having to demonstrate a "need."

That policy debate ended with 1997 Act 204. Today, there is no need for a project developer to demonstrate "need." On the contrary, this requirement was expressly eliminated by the legislature for merchant plants in Wis. Stat. §196 .491 (3)(d)2, stats. Indeed, the theory underlying merchant plant development is that new developers will make huge capital investments made solely at their shareholders' risk and without any ratepayer guarantees.[6]

[6] Merchant plant developers have submitted four applications that are currently pending before our agency. See Docket No 05-05-CE-115, Application of Mid-American; 9342-CE-100, Application of Midwest Power; 05-CE-116, Application of Mirant; and 9343-CE-100, Application of Calpine.

I recognize, and it is important to emphasize, that the Commission is often faced with silence in the legislative history, particularly with regard to policy matters like the Leased Generation Law. However, when the legislative intent is not explicitly stated in the drafting files, we do not simply decline to apply a common sense or practical interpretation of the law. This is exactly what the final decision attempts to do.

It is significant, however, the policymakers ultimately responsibility for setting energy policy in Wisconsin--this Legislature and our Governor--just enacted the Leased Generation Law that runs directly counter to the original tenets of 112 order, which required regulators to direct a mandatory bidding process for new generation in our state. As I mentioned before, this new law specifically permits, but does not require, our agency to consider a leased generation contract between a utility and a non-utility affiliate. The fact that this proposal is neither a merchant plant proposal or a traditional utility-build proposal is not a fatal flaw. It simply reflects a different way to get at the policy goal we all share—which is to maintain our state's long tradition of low cost, safe, and reliable electricity and our diverse fuel supply.

Finally, the Legislature is presumed to be aware of the courts' construction of a statute and the Legislature's failure to change the law indicates agreement with the courts' construction. *State v. Newman*, 179 Wis. 2d 687, 508 N.W.2d 54 (Ct. App. 1993). By analogy, the Legislature's failure to alter or clarify state policy on the development of electric capacity is indicative of agreement, or at least acquiescence, in the rulings of this Commission. See also *Department of Revenue v. Exxon Corp.* 90 Wis. 2d 700, 281 N.W.2d 94 (1979)

For these reasons, it is imperative that the Commission clarify once and for all that neither current law nor any order of the Commission requires a mandatory bidding process for the construction of new generation in Wisconsin.

Compliance with Leased Generation Law

The Dissent finds it "surprising" that the Final Decision concludes that the petition complies with the provisions of the Leased Generation Law. This conclusion should surprise no one, however, since the very purpose of a declaratory ruling is to consider an assumed set of facts and apply the law to it. A declaratory ruling is a statutory remedy for the determination of a controversy where an interested party is in doubt as to his or her legal rights. This principle is codified in Wis. Stat. §227.41 (1), which states, in part, that "Any agency may...issue a declaratory ruling with respect to the applicability to any person, property or *state of facts* of any rule or statute enforced by it...."

Under the present state of facts, the Final Decision represents our legal judgment that the lease generation concept, as proposed in PTF-2, -meets the requirement of the Leased Generation Law. Without this threshold determination, the Commission would never even consider the other issues set forth in the Petition, including the recoverability of certain pre-certification expenses if the proposed PTF-2 project is terminated due to a material change in the plan. For these reasons, the Final Decision should not leave anyone to ponder its meaning because the Final Decision is not on the merits of the PTF proposal. To the contrary, it is a preliminary decision that this petition, based on a certain state of facts, complies with the recently enacted Leased Generation Law.

Improper Subsidization

During the Commission's discussion of this docket, Commissioner Mettner expressed concern that PTF-2 could be deemed a violation of Wis. Stat. § 196.795(5)(f). This section of the Public Utility Holding Companies Law (PUHCL), provides (in part): "No nonutility activity of any holding company or nonutility affiliate may be subsidized materially by the consumers of

any public utility affiliate with which the holding company or nonutility affiliate is in the holding company system."

I simply do not share Commissioner Mettner's concern that this provision may preclude granting the declaratory ruling WEPCO seeks. Commissioner Mettner has not specifically identified any particular aspect of PTF-2 as possibly constituting as subsidy, contrary to sub. (5)(f). The Leased Generation Law contemplated every material aspect of PTF-2, and there is no question but that PTF-2 is the very reason the legislature enacted the Leased Generation Law. Thus, to whatever extent PTF-2, generally, would otherwise have arguably implicated § 196.795(5)(f), or any other provision of the PUHCL, the Leased Generation Law resolves any concerns.

Statutes that are parts of a comprehensive statutory and regulatory scheme must be construed and applied together. *See State v. Baldwin,* 212 Wis. 2d 245, 569 N.W. 2d 37 (Ct. App. 1997). In my view, the dissent creates an ambiguity where none exists. Most of the provisions of the Leased Generation Law are amendments to Wis. Stat. § 196.52. Two other provisions of the law are amendments to § 196.795(5) of the PUHCL, the very section of concern to Commissioner Mettner.[7] The legislature clearly sought to remove PTF-2, and projects like it, from the restrictions the PUHCL would have placed upon it, just as it sought to remove such projects from the restrictions of the affiliated interests statute, § 196.52.[8]

With the exception of land and equipment transfers at book value (which without sections 3011g and jc would probably have constituted material subsidies) no element of PTF-2 seems to resemble a subsidy. In fact, the express codification of these transfers represents a "subsidy"

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[7] Section 3011g amended § 196.795(5)(k)1, to exempt certain land and equipment and related facilities from the requirement to transfer real property from a public utility affiliate to a nonutility affiliate at public sale or through competitive bidding. Section 3011jc created § 196.795(5)(k) 3, to expressly permit the transfer of certain land and equipment and related facilities at book value, in order to implement a Leased Generation Contract.

[8] As already stated, such transactions would specifically have been illegal under sub. (5)(k) 1.

expressly endorsed by the legislature. It has not been alleged that the generation company will be receiving value for any goods or services not rendered fairly and squarely to WEPCO.. The legislature clearly contemplated the creation of nonutility affiliates for the very purpose of facilitating the acquisition of electric generating capacity by public utility affiliates. To question PTF-2 as creating improper material subsidies would be to read the Leased Generation Law out of the affiliated interests statute and the holding company law.[9]

Even if the Commission could conceive of an aspect of PTF-2, which could be viewed, as an illegal subsidy, the declaratory ruling in this case clearly retains all of the Commission's authority over the terms and conditions of the PTF-2 leases and other affiliated interest agreements.

Prudent v. Reasonable

Commissioner Mettner suggested during our September 6th discussion that the Commission consider declaring the proposed activities toward completion of PTF-2 as "reasonable," rather than "prudent." While he apparently believes that "reasonable" would bind the commission to award recovery in rates less certainly than "prudent," the distinction is illusory. If there is a distinction between these words, it is a meaningless one in this regulatory context. The words are used virtually interchangeably. *See Totsky v. Riteway Bus Service,* 233 Wi. 2d 371, 607 N.W. 2d 637 (2000).

In *Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n,* 109 Wis. 2d 256, 325 N.W. 2d 867 (1982), the court ruled that the commission must allow recovery of "prudent" precertification expenses. The court defined "prudent" as "marked by wisdom or judiciousness,

[9] Commissioner Mettner is concerned about PTF-2 not resulting in approved Leased Generation Contracts. Under those circumstances, there still would be no improper subsidy. By declaring that it is prudent for Wisconsin Electric to pursue PTF-2, the Commission is determining that reimbursing the generation affiliate for the "Precertification Expenses" is prudent. It is implicit in this determination that Wisconsin Electric will be receiving fair value for the equipment and other assets acquired by the generation company. Perhaps more to the point, the Leased Generation Law itself recognizes the validity of these types of transactions by providing for the recovery in rates of the public utility's lease payments.

provident, or frugal." The court used the word as opposite in meaning with "improvident," which it defined as "lacking foresight, negligent, or thriftless." The court concluded: " For purposes of this decision, expenditures found to be "prudently made" are not "improvident."

"Reasonable" has been defined as follows:

> 1 a : being in accordance with reason <a *reasonable* theory> b : not extreme or excessive <*reasonable* requests> c : MODERATE, FAIR <a *reasonable* chance> <a *reasonable* price> d : INEXPENSIVE
> 2 a : having the faculty of reason b : possessing sound judgment.

Merriam-Webster's Collegiate Dictionary. It is difficult to imagine a situation in which expenses found to have been reasonably incurred would not be found to have been prudently incurred for purposes of rate recovery. Moreover, the Final Decision includes conditions that address my concerns regarding partial or full recovery of pre-CPCN costs.

Recovery of Pre-certification Expenses

I agree that our decision today provides substantial assurance to the petitioners regarding the future recovery of these expenses in the event either our agency denies the expected CPCN application or the applicants terminate their project. That point is obvious and the petitioners—both at hearing and in its briefs—could not have been clearer in asserting that such a finding was a prerequisite for developing this project further. Moreover, the Supreme Court's decision in *Wisconsin Public Service Corp. v. Public Service Comm'n*, 109 Wis. 256, 325 N.W.2d 867 (1982) clearly allows the recovery of prudent pre-certification expenses. The dissent, however, either overlooks or ignores the language in the Final Decision that imposes conditions and limitations on the recovery of pre-certification expenses sought in this proceeding.. See, slip op. at 7. Our decision today appropriately reserves for a later day the issue of whether the petitioners should receive full recovery of their pre-certification expenses. It is necessary to emphasize once

again that our decision today is a threshold determination, it is not a decision on the merits of any the projects of PTF-2 that will be subject to review under the CPCN process.

Conclusion

WEPCO's request fully comports with the relevant provisions of the Leased Generation Law, which create the very financing mechanism proposed in this petition. In addition, the petition is consistent with the very purpose of a declaratory ruling, which requires our agency to apply the facts set forth in the petition to a rule, order, or statute under our jurisdiction.

I fully recognize that a determination today on whether the PTF-2 proposal is prudent is a rate-controlling step in a future rate case. *Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n* is right on point and makes clear that a pre-determination of prudence in this proceeding is tantamount to commission authorization of rate recovery in a future case. The question we must decide today is whether this Commission should deny a proposal that comports with recently enacted law and conclude that such a proposal is imprudent and unreasonable on its face? The answer is no. In exercising our discretion, current law simply does not require at this stage of this proceeding that we be satisfied that this proposal offered by the petitioners be the perfect proposal that has carefully evaluated every utility-build option or competitively bid option to provide the capacity identified in PTF-2. The law requires us to determine whether this proposal is prudent and reasonable. I have concluded that it is prudent and reasonable for WEPCO to further proceed with the development of this new proposal and I would grant the relief requested in the petition.

_____

Robert M. Garvin
Commissioner

Upon payment of the sum of $1,429.41 from DMB Community Bank to Inland Real Estate LB I LLC, DMB Community Bank shall be dismissed from this action and released from further liability.

Dated this _____ day of _____, 2004.

BY THE COURT:

_____

The Honorable Sarah B. O'Brien
Circuit Court Judge

Date Mailed
March 22, 2002

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Joint Application of Mirant Portage County LLC and American Transmission Company LLC for a Certificate of Public Convenience and Necessity for Construction of a Large Electric Generating Facility and Associated High Voltage Transmission, and Water Facilities Located in Portage County

05-CE-116

FINDINGS OF FACT, CONCLUSIONS OF LAW, CERTIFICATE, AND ORDER

Introduction

On May 4, 2001, Mirant Portage County, LLC, (Mirant) a wholesale merchant power plant developer, and American Transmission Company, LLC, (ATC), an electric transmission company, filed a joint application to the Commission for a Certificate of Public Convenience and Necessity (CPCN) under Wis. Stat. § 196.491(3) and Wis. Admin. Code ch. PSC 111, to construct and operate a large generating facility and associated high voltage transmission and water facilities in the town of Plover, Portage County. The generating facility would include a combined cycle plant, fueled by natural gas, with about 590 megawatts (MW) of capacity. Depending on the site, the facility could include about 340 MW of additional simple-cycle generation, for a total of about 930 MW.

Amendments to the application were later filed on August 17, 2001, and September 10, 21, and 27, 2001. On October 4, 2001, the Commission determined that the application was complete. Under Wis. Stat. § 196.491(3)(g)1, the Commission must take final action on this CPCN application no later than 180 days after it finds the application complete. Given this time

requirement, the Commission's order must be issued by April 2, 2002, unless a time extension is obtained from Dane County Circuit Court.

On February 18, 2002, the Commission held hearings on the project before Administrative Law Judge David Whitcomb at the Elizabeth Inn and Conference Center in Plover, Wisconsin. On February 28, 2002, Mirant filed a brief regarding the commencement of construction of the proposed facility. On March 5, 2002, ATC filed a brief addressing commencement of constructing transmission facilities associated with the proposed power plant.

Persons certified as full parties are listed in Appendix A. Other persons who appeared and testified are listed in the Commission's files.

This application is GRANTED, subject to conditions.

Findings of Fact

1. Mirant is proposing to construct a merchant plant, as defined in Wis. Stat. § 196.491(1)(w). ATC is proposing to construct associated high voltage transmission facilities for the merchant plant. The Commission determined its joint application to be complete on October 4, 2001.

2. It is impossible to assess whether energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. §§ 1.12 and 196.025 or their combination would be cost effective alternatives to this project.

3. The generating facility approved in this order is reasonable and in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors. The 345,000 volt (345 kV) transmission line approved in this order is

reasonable and in the public interest after considering alternative routes, individual hardships, engineering, economic,[1] safety, reliability, and environmental factors.

4. Construction, operation, and maintenance of the proposed facilities, as described herein, will not have undue adverse impacts on environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formation, aesthetics of land and water, and recreational use.

5. It is in the public interest for Mirant to move forward with construction of the proposed power plant in a timely manner and to complete the project by a predictable date so that the Commission can predict potential impact of the state's electric system.

6. The Hayes site is in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors.

7. Portage County, the town of Plover, and Mirant are in the process of creating a three-way development agreement that would cover numerous local issues, including necessary water and sewer improvements and noise limitations, and that indicates the town and county support of the project at the Hayes Avenue site.

8. It is reasonable for Mirant to continue to work with the riparian landowner immediately downriver from the water pipeline entry of the Wisconsin River in an attempt to resolve concerns about the intake discharge facilities.

9. Interconnect Option B for the connecting transmission line is reasonable after considering alternative routes, individual hardships, engineering, economics, safety, reliability,

[1] State law declares that engineering and economics are not relevant factors if the Commission is considering whether to issue a CPCN for a wholesale merchant plant. When the Commission examines a CPCN application for a high-voltage transmission line, however, it must consider these two issues regardless of who is proposing to construct the line. *See* Wis. Stat. § 196.491(3)(d)3.

and environmental factors. Care is necessary to prevent erosion of soil by wind, to avoid adverse impacts to farm operations such as field operations or irrigation systems, and to work with the DNR to protect the sand prairie near STH 54 and the Karner blue butterfly.

10. It is in the public interest for Mirant and ATC to study a combined 345 kV/ 115 kV electric transmission interconnection alternative as it may have system advantages over the proposed 345 kV-only interconnection.

11. It is reasonable to require ATC to work with landowners along the transmission right-of-way to minimize landowner hardships.

12. The facilities approved in this order will not have undue adverse impact on other environmental values.

13. The facilities approved in this order will not unreasonably interfere with the orderly land use and development plans for the area involved.

14. It is in the public interest and in accordance with Wis. Stat. § 44.40 for the Commission to consider and attempt to avoid potential adverse impacts to archeological resources, human remains, and historic properties.

15. The facilities approved in this order will not have a material adverse impact on competition in the relevant wholesale electric service market.

16. Mirant has received the Wisconsin Department of Natural Resources (DNR) air pollution control construction permit required for constructing and operating the proposed facility. DNR water discharge and intake related permits are pending.

17. ATC's proposed 345 kV transmission line will provide usage, service, or reliability benefits to Wisconsin wholesale and retail customers, and its benefits are reasonable in relation to its cost.

18. It is reasonable and necessary to require the applicants to work with the Wisconsin Department of Natural Resources Bureau of Endangered Resources (DNR-BER) and the Wisconsin Department of Transportation (DOT) in the construction of the project, in order to minimize adverse impacts of the project.

19. The conditions specified in this order are in the public interest after considering individual hardships, safety, reliability, and environmental factors.

20. The EIS accurately describes the environmental effects of this project and complies with Wis. Stat. § 1.11(2)(c).

21. The public convenience and necessity require completion of this project.

Conclusions of Law

1. Mirant's Portage County power plant will be a merchant plant, as defined in Wis. Stat. § 196.491(1)(w).

2. The Commission has jurisdiction under Wis. Stat. §§ 1.11, 196.025, 196.395, and 196.491 to issue a certificate authorizing Mirant and ATC to install and place in operation the generation, transmission, and water facilities at the site and route described in the Findings of Fact, and to impose the conditions specified in this order.

Opinion

Mirant proposes to build its facility on either of two locations, both on the south side of STH 54, west of the village of Plover, in Portage County. The site along Hayes Avenue is entirely within the town of Plover. The site near Grant Avenue also includes about three acres of village land. Portage County and the town of Plover have indicated that they prefer to have the project built at the Hayes Avenue site, entirely within the town's corporate limits, and are expecting to sign a three-way development agreement with the applicant. The agreement addresses numerous town and county concerns. Officials of the town of Plover and of Portage County testified in favor of locating the project at the Hayes Avenue site. Mirant has not signed a similar stipulation with the county, the town, or the village of Plover for the Grant Avenue site, although such an agreement would likely be necessary to address local concerns.

Description of the Proposed Facility

Mirant would construct and place in operation a natural gas-fired, combined-cycle, electric generation plant consisting of two combustion turbines, two heat recovery steam generators with supplemental duct firing and one steam turbine for a capacity of 590 MW. In addition, if located at the Hayes site, four peaking units of 85 MW each would be installed for a total capacity of 930 MW. A one-million gallon diesel oil storage facility would supply backup fuel. Cooling towers would be utilized to condense flow from the steam turbine. Blowdown from the cooling tower would discharge back to the Wisconsin River. The plant would have an expected life of 30 years.

To supply natural gas to the facility, ANR Pipeline Company (ANR) is expected to build and operate a new 20-inch diameter pipeline that would be about 12.5 miles long. As of the date

the record closed in these proceedings, Mirant had not yet negotiated a gas transportation agreement with ANR. Mirant has proposed a preliminary route alternative to each power plant site. Ultimate approval of a gas pipeline route is under the jurisdiction of the Federal Energy Regulatory Commission (FERC). ANR will need to comply with the FERC application and approval requirements for the gas pipeline. Natural gas will be the only fuel for the combined-cycle portion of the plant. The DNR has approved diesel oil as a backup fuel for the peaking units.

Step-up transformers will be installed in a new substation on the plant property. ATC's existing 345 kV Rocky Run-North Appleton electric transmission line would be looped into the new ATC switching station on the plant site. Interconnection to the Grant site would require only modification of two existing spans. As proposed, the interconnection to the Hayes site would require construction of new 345 kV transmission line. Three interconnection options for this new transmission line have been identified. All three interconnection options would employ double-circuit structures on the south side of the existing Rocky Run-Coyne 115 kV line for the first ¼ mile east of the Hayes site. Interconnect Option A continues with double-circuit structures along the south side of this line, and then the south side of the railroad corridor immediately south of State Trunk Highway 54 (STH 54) to the intersection with the existing 345 kV line. Interconnect Option B turns south after the first ¼ mile and would use new double-circuit structures parallel to the existing Whiting Avenue-Plover-Coyne 115 kV line to the 345 kV line intersection. Interconnect Option C routes the circuit to Rocky Run along the route of Option A and the circuit to North Appleton along the route of Option B, and employs primarily single-circuit 345 kV construction.

The transmission interconnection agreement between Mirant and ATC specifies that Mirant will arrange for construction of interconnection facilities and that, when the Mirant plant begins commercial operation, Mirant will transfer the interconnection facilities defined as transmission facilities to ATC. ATC will then reimburse Mirant for the cost of the facilities, along with a carrying charge.

ATC conducted studies to assess the impact on the transmission system that could result from interconnecting the Mirant plant with ATC's 345 kV Rocky Run-North Appleton line. ATC's interconnection study showed that a number of upgrades will likely be required to allow operation of the proposed plant. Most significantly, installation of a new 345/115 kV transformer will likely be required in the Plover area at an estimated cost of $4.5 million. The ATC study also recommends that the Rocky Run-North Appleton line be upgraded, by replacing terminal equipment and raising approximately 30 spans, so as to increase the line's rating from 679 MVA to more than 930 MVA. The cost of this upgrade is estimated at $1.9 million. In order to ensure that the proposed plant does not cause dynamic stability problems on the system, any simple-cycle units must be equipped with appropriately tuned power system stabilizers.

The plant would consume up to 7.2 million gallons of water per day and discharge up to 2 million gallons per day. The Wisconsin River is the source of water. A high-capacity well would be installed at the Hayes site primarily to supply process water for the peaking units when they run on oil.

The generating plant is to be capable of either base load or intermediate load operation. Actual operation will depend on market conditions and the market price for natural gas. Mirant

has provided a schedule of approximately 18 months to complete construction. However, at the public hearing in Plover Mirant testified that construction of the project has been placed on hold.

Statutory Energy Priorities

Wis. Stat. § 1.12 (4) establishes energy priorities for Wisconsin. The statute provides as follows:

> **1.12(4)** PRIORITIES. In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed.
> 1. Natural gas.
> 2. Oil or coal with a sulphur content of less than 1 percent.
> 3. All other carbon-based fuels.

In addition, Wis. Stat. § 196.025 declares that the Commission must implement these priorities in its energy-related decisions, to the extent "cost-effective, technically feasible and environmentally sound."

Were this a project proposed by a public utility, the Commission would need to examine the alternatives of demand-side management (DSM) and renewable resources to determine if they meet the statutory tests for priority. This docket concerns a merchant plant, however, and state law exempts such projects from this examination. Under Wis. Stat. §196.491(3)(d)2, an applicant for a wholesale merchant plant need not show that the project would satisfy reasonable needs of the public for electricity. In addition, Wis. Stat. § 196.491(3)(d)3 specifies that the Commission "may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant."

Mirant Generating Facility

Effects on Wholesale Competition

Under Wis. Stat. § 196.491(3)(d)7, the Commission may not issue a CPCN unless it can find that "The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market." The relevant market for this project is the Wisconsin Upper Michigan System (WUMS). The record examines this project's impact on WUMS, using the analysis that the U.S. Department of Justice and Federal Trade Commission have prescribed in their 1992 Horizontal Merger Guidelines (revised April 8, 1997). The record shows that an adverse effect on competition is unlikely because the Mirant Portage County power plant project would essentially act as a new entrant. This is because the other Mirant project located in the WUMS area is the Neenah facility, and that power plant is under the dispatch control of Wisconsin Electric Power Company via a long-term purchase power agreement. Consequently, the Portage County project would be adding a new competitor to WUMS, and thereby likely improving the competitive market.

Generating Facility Site Alternatives

Mirant proposed two site alternatives for the Commission to consider.[2] One site, along Hayes Avenue across from the existing Basic American Foods plant, is about 54 acres of cropland in the western ½ of the southeastern ¼ of Section 25 of Township 23 North, Range 7 East (T23N-R7E) in the town of Plover in Portage County. The other site, across STH 54 from

[2] In addition to its two proposed sites, Mirant considered several other sites across the state, including several in Portage County. The EIS describes Mirant's site selection and screening criteria. It also describes Mirant's first location choice in the village of Plover, which was dropped when rejected by the village board. The descriptions in the EIS and in Mirant's application show that Mirant's method of selecting the Hayes Avenue and Grant Avenue sites is reasonable.

Grant Avenue and enveloping an existing trucking firm on three sides, is about 32 acres of cropland, fallow fields, and woods in the northeastern ¼ of the northeastern ¼ of Section 29 of T23N-R8E. This site is located mostly in the town of Plover, with three acres that are part of the village of Plover, again in Portage County. Additional small areas for construction laydown could be needed at each site.

Hayes Avenue Site The Hayes Avenue site is located near the intersection of Hayes Avenue and STH 54, immediately south of the Wisconsin Central Limited (WCL) railroad tracks that run along the highway. It is currently an operating potato farm field. The town of Plover recently rezoned the land to industrial. It is bordered on the north by a residence and the railway, on the east and south by farm fields, and on the west by the Basic American Foods plant. The project would occupy most of the parcel.

The existing 345 kV Rocky Run-North Appleton transmission line would be looped into the new power plant switchyard. This existing line is approximately two miles east-northeast of the Hayes site. The three options for locating the new transmission connection are as described.

Mirant has applied for dredging, water diversion, and water permits from the DNR. About 0.9 miles of pipeline, two 24-inch intake pipes and one 10-inch discharge pipe, would be built to connect the plant with a new intake-discharge structure installed in the Wisconsin River. The intake-discharge structure would be installed just downriver from the confluence of Halladay Creek. The associated pump building would be installed in the floodplain on land owned by the operator of a private campground.

Grant Avenue Site The Grant Avenue site is at the western boundary of the village of Plover along STH 54. It is a 32-acre site composed of a western 29-acre parcel in the town of

Plover and an adjoining three-acre parcel located in the village of Plover. The land is zoned for mixed use/transitional agriculture in its town portion and light manufacturing in its village portion. Mirant has not applied for rezoning, special use permits, or a site plan review for this site. The site is bordered on the north by STH 54, on the west by a planned extension of Grant Avenue and the trucking firm, on the south by farm fields, and on the east by the backyards of homes fronting on Evergreen Drive in the village. The project would occupy most of the site.

Mirant would need to build a water intake and discharge pipeline, an intake-discharge structure in the Wisconsin River, and a pump building, all similar to that proposed for the plant at the Hayes Avenue site. The intake and discharge facility would be installed in the Wisconsin River north of the site, in the southern channel of the river.

The existing 345 kV Rocky Run-North Appleton transmission line crosses the site. This existing line would be looped into the new power plant switchyard.

Environmental Impacts of Each Site, Its Water Connection and Natural Gas Connection

Mirant's proposed Hayes site is on land already zoned for industrial use, but the Grant site has not been put through any zoning change requests. Both sites are mostly cropland. In both cases, very little vegetation needs to be removed. At both sites, care must be taken to minimize soil erosion by wind and to protect the existing sand prairie community and the habitat of the federally endangered Karner blue butterfly. The water pipelines for each would require care for the same species and consultation with the DNR-BER as the facilities are installed across the railroad and STH 54. Because there is habitat for the endangered butterfly along STH 54, the Department of Transportation has testified that it wishes to be consulted regarding any construction in the railroad or STH 54 rights-of-way.

By law, the Commission must cooperate with the Wisconsin Historical Society (WHS) to protect historical and archeological sites that may be affected by a project under the Commission's review. See Wis. Stat. §§ 44.39, 44.40, and 157.70. Surveys of the two sites and their connecting facilities by a qualified archaeologist have revealed no significant or undisturbed archeological or historic resources. However, the WHS has warned that construction may encounter heretofore unknown archeological resources and has set directions to follow if they are found, particularly if there are burials involved under Wis. Stat. § 157.70.

Mirant's proposed sites and potential additional laydown areas do not have surface waters, drainage ways, or wetlands. In each case, the company can install detention ponds and control runoff so that the existing drainage ways and wetlands of the surrounding area are not affected. Groundwater would not be affected because facilities would be installed to capture potential contaminants, and wastewater would otherwise be deposited into the Wisconsin River under a DNR Water Pollution Discharge Elimination System (WPDES) permit. A high-capacity well at the Hayes site is subject to a DNR permit and would not cause an adverse drawndown effect on nearby wells or on wetlands toward the river. The river water consumption, subject to DNR diversion approval, is not expected to affect the current ecological, industrial, or recreational use of the river at either site. However, concerns were expressed by a riparian landowner, whose use of his property could be adversely affected by the presence and operation of the intake-discharge structure in the river off his shoreline, and by the pump building, which is proposed to be located about 50 feet from his property. These facilities are being designed in compliance with a permit from the DNR under Wis. Stat. ch. 30, and a change in that permit would be necessary for any requested changes in design. The WPDES permit will control

potential water quality impacts during construction at either site, and could be modified if the discharge point is relocated.

A new natural gas connection to either plant site is not expected to have undue adverse impact on environmental values. The preliminary route for the gas pipeline, whose construction is regulated by FERC, passes primarily through farmland and some smaller areas of residential and commercial development. About half of the preliminary gas pipeline route is adjacent to existing natural gas pipelines.

Neither of Mirant's proposed sites would unreasonably interfere with orderly land use or local development plans. However, Mirant is not negotiating a multi-party agreement for the Grant site with the village of Plover, town of Plover, and Portage County. Nor has it applied for or received required permits for a plant at that site from the DNR or local agencies. In contrast, at the Hayes site, the town, county, and company are expected to reach an agreement that satisfies local concerns. This agreement includes items the town will require in order to keep the proposed plant from unreasonably interfering with orderly land use or development plans.

Residential neighbors of the Grant site have expressed concerns in the hearing record about air quality and visual and noise effects of the plant. Air quality impacts are addressed for the Hayes site in DNR's air pollution control construction permit. Impacts to air quality from the plant at the Grant site would be expected to be very similar, but without the impacts due to the peaking units. If the Grant site were selected, an application for a similar permit for that site would be necessary. Visual impacts at the Grant site would probably need to be mitigated in an agreement with the village. The company has developed noise design goals that meet the ordinance requirements of the town and the village at either site and has indicated that it will

achieve those goals if ordered. Measurements taken and evaluated as part of the application and review processes at either site can serve as baselines for measured increases in noise during plant operation. Post-construction measurements can be made conditions of this order, regardless of the site selected. However, several residents and the town board chair testified that the Grant Avenue site is much less desirable because of the proximity of a large number of residences.

Several members of the public, including some representing local chapters of environmental advocacy organizations, objected to the plant at either site because of their perception of the potential for adverse water and air quality impacts to central Wisconsin.

The proposed plant sites are both in an area of the state presently classified as in attainment for critical pollutants under the federal Clean Air Act. Operation of the facility would emit nitrogen oxides, carbon monoxide, carbon dioxide, ammonia, formaldehyde, and particulate material. The DNR has conducted a Prevention of Significant Deterioration Review at the Hayes Avenue site for particulates, nitrogen oxides, carbon monoxide, and sulfur dioxide, as well as a New Source Review for volatile organic compounds. The plant would use the current Best Available Control Technology to address nitrogen oxides, carbon monoxide, carbon dioxide, and particulates. The plant's formaldehyde emissions would be at a level that requires Mirant to use Maximum Achievable Control Technology for that pollutant. The DNR has examined these air quality controls and impacts and has issued its final permit approval in a March 11, 2002, Air Pollution Control Construction Permit (#01-RV-039). The permit limits air emissions from both the combined-cycle portion and the peaking portion of the project. This construction permit expires in 36 months.

Selection of Hayes Avenue Site

Overall, the record does not reveal significant environmental concerns for this project at either the Hayes Avenue or the Grant Avenue sites. The plant would have no undue adverse impacts on the human or natural environments. As described above, however, the Grant Avenue site is generally less desirable than the Hayes Avenue site because of its closer proximity to a larger number of residences. The Grant Avenue site is less desirable from the applicant's point of view as well, mainly because there is no room at that site to install the proposed peaking units. In light of the fact that the Hayes Avenue site is a reasonable location for this project, and that the Grant Avenue site's proximity to residences could have adverse neighborhood impacts, approving the plant at the Hayes Avenue site is in the public interest. The Mirant facility constructed and operated as specified in this order at the Hayes Avenue site can meet all applicable environmental protection requirements.

Transmission Line

Benefits of a 345 kV Transmission Line

Operation of the proposed power plant will require a new 345 kV transmission interconnection. The Commission may not issue a CPCN for a transmission line of this size unless it finds that "the high-voltage transmission line provides usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state and the benefits of the high-voltage transmission line are reasonable in relation to the cost of the high-voltage transmission line." See Wis. Stat. § 196.491(3) (d) 3t. Because the proposed transmission line is part of Mirant's power plant project, this line will offer Wisconsin's electric utilities an opportunity to benefit from a new, local source of power. As described above, this

can increase the reliability and competitiveness of Wisconsin's electric market, to the advantage of both wholesale and retail customers in the state.

Mirant and ATC are proposing to interconnect all generating units to the 345 kV transmission system. This is the interconnection configuration requested by Mirant and the only configuration studied in detail by ATC. ATC's interconnection study indicates that this is a feasible configuration.

However, the final EIS indicates that this would likely be more expensive than a combined 115/345 kV interconnection, and that much of this cost difference would likely be borne by Wisconsin ratepayers. While a combined 115/345 kV interconnection appears to have certain advantages, a detailed ATC interconnection study is required to confirm its viability. However, such a study will take time. Nevertheless, it is appropriate for ATC to study 115/ 345 kV interconnection alternatives. In the meantime, it is reasonable to allow the applicants to proceed with the proposed interconnection approach. The Commission may revisit the question of whether some units should be interconnected at 115 kV after reviewing the completed study.

Environmental Impacts of Each Interconnection Option

Environmental impacts of the interconnection to a plant approved at the Grant Avenue site would be few. Except for impacts to the field south of the site, all environmental impacts from construction of that line would be included in the general construction impacts on the site itself. Local residents already look at the existing lines.

For each of the three options proposed to connect the Hayes site, clearing to bare soil should be kept to a minimum because there is the potential for wind erosion of the exposed sandy soils. However, the options differ with respect to other potential natural resource impacts.

For instance, Option A would require clearing about 2.3 acres of woodland, while Option B would require clearing about 3.6 acres. Option C, which is partly a combination of the A and B routes, would require the most woodland clearing at about 9.38 acres. There is potential under Options A and C for adverse impact to the sand prairie community and the Karner blue butterfly. These two options could extend through about 9,800 feet of prairie. The potential for impact can be reduced through consultation with the DNR BER and the DOT District 4 as well as by scheduling construction to minimize activity in the sand prairie from May through August, the season of greatest activity of the Karner blue butterfly. None of the three interconnect options would impact water resources. Visual impacts, while a concern expressed by a member of the public at the project hearing, would vary depending on the viewers' attitudes and whether the viewers were in their homes, in places of business, or driving cars on STH 54 or the smaller town roads.

With local permitting, the new line would fit into the local zoning plan. It would not interfere with any general land use plans for the area. However, there is the potential for it to interfere with individual land use, particularly farm use. ATC stated in the hearing record that it will work with farm operators to minimize adverse impacts to fields and field operations, especially pivot irrigation. There is also the potential for new structures to affect plowing and other tractor operations, increasing the time and difficulty of field work and increasing the potential for field accidents. Options B and C would cross farm fields and require Mirant to coordinate with affected farm operators in planning structure placement and travel for construction equipment.

No route presents a concern about electromagnetic fields, because each route is principally located in open fields or along the railroad in areas where there are no homes or other buildings. The design of the line as proposed has conductor phases arranged to minimize electromagnetic fields.

No known historic properties exist along the transmission route. However, if a historical or archeological site is discovered during construction of the project, WHS has requested that the Commission require Mirant to stop construction at that location and contact the WHS to avoid harming the site.

In terms of environmental impact, each option has concerns. However, Option C combines the impacts of the other two options as it combines their routes and structure arrangements. It is also more expensive. Option A would have the potential for impact to the sand prairie and Karner blue butterfly, whose protection is in the public interest. Option B would involve the need to coordinate with farm operators, but otherwise would create the least impact.

Certificate

Mirant may commence construction of the 930 MW natural gas-fueled, combined cycle, electric generating plant described in this order, in the town of Plover, Portage County, Wisconsin. ATC may also commence construction of the 345 kV electric transmission line connections, as described in this order.

Order

1. The approved location for the Mirant 590 MW combined cycle plant and associated 340 MW combustion turbine plant is the Hayes Avenue site in Portage County as described. Mirant shall construct the project in conformance with the design specified in its application, and subject to the conditions specified in this order.

2. The approved route for the connecting 345 kV transmission line is Interconnect Option B, as described in its application and the EIS. Mirant and ATC shall construct the transmission line in conformance with the design specified in its application, and subject to the conditions specified in this order.

3. Mirant and ATC shall perform a study of a combined 345/115 kV electric transmission interconnection alternative. This study shall be submitted to the Commission within six months from the date of this order.

4. ATC shall inform any property owners from whom right-of-way easements are required of their rights and obligations pursuant to Wis. Stat. § 182.017.

5. ATC shall work with landowners from whom right-of-way easements are required to locate transmission poles, guy wires, structures, or appurtenances in locations that are reasonably acceptable to the landowners.

6. ATC shall reasonably restore and grade, to its original condition or better, any property adversely affected by trucks or equipment used for the project. Property restoration shall include restoration of the city streets affected during construction.

7. ATC shall take reasonable action to remedy any operational problems of any business or property owners along the approved route, which are directly attributable to the operation of the new facilities.

8. ATC shall provide each landowner with a minimum of 24 hours prior notice before entering the landowners property, except in emergencies. Prior notice is not needed in writing; it may consist of a personal contact or telephone call.

9. Mirant shall adhere to the three-way development agreement made with Portage County and the town of Plover and shall provide a copy of the final signed agreement to the Commission upon finalization.

10. Mirant shall provide the Commission with copies of all final executed agreements related to the construction, operation, or ownership of the project when they are obtained.

11. Within three months of the date when the project is fully operational, Mirant shall repeat the noise measurements that it took before project approval. Post-construction, Mirant shall measure the maximum noise generated at the site (i.e. all units on), and measure the noise at the site with all units off. Mirant shall report its findings to the Commission, using the same format as its pre-approval noise studies.

12. Mirant shall not begin construction on the project until the appropriate DNR water diversion, discharge, and facility dredging permits have been obtained from the DNR and documentation to that effect has been given to the Commission. Mirant shall document compliance with DNR recommendations to minimize adverse impacts to the sand prairie community, the Karner blue butterfly, the wood turtle, and other protected species identified in construction areas.

13. Mirant shall take measures necessary to minimize dust blowing off the site during project construction.

14. Mirant shall work with the landowner along the Wisconsin River opposite the proposed intake-discharge point to try to satisfy his concerns. Documentation of the resolution of those concerns shall be made to the Commission before construction of those water facilities is begun.

15. Mirant shall consult with the DOT District 4 before beginning construction of the water lines related to the railroad and STH 54 and shall document to the Commission the results of that consultation, particularly with regard to the protection of the sand prairie and the Karner blue butterfly.

16. If archeological materials or human remains are found during the construction of the plant, electric transmission line, or water facilities, Mirant shall stop construction immediately and notify the WHS and Commission for further direction. Mirant shall follow the WHS's directives to mitigate adverse impacts to any discovered archeological sites.

17. If easements or purchases of land are made on neighboring farm fields in addition to the proposed project site, Mirant shall work with the landowners to minimize wind erosion, compaction, and related impacts to farm operations. It shall also take whatever measures are necessary to protect the sand prairie and Karner blue butterfly along the railroad if the parcel is adjacent to it. It shall also notify the WHS per Order Condition 16 if remains are found.

18. During construction of the transmission interconnection, documentation shall be provided to the Commission on (1) measures taken to prevent soil erosion by wind during construction, (2) cooperation with farm operators on structure placement and construction

equipment access, (3) compliance with DNR recommendations to protect and preserve the sand prairie and Karner blue butterfly, and (4) contact with and direction from the WHS in the event that archeological artifacts or human remains are encountered.

19. Documentation shall be provided to the Commission of all work with individuals who develop concerns about noise or interference with radio or television reception and the resolution of those concerns.

20. Mirant shall submit quarterly progress reports to the Commission that summarize the status of construction, the status of environmental control activities, and the overall percent of physical completion. Mirant shall include a summary of its consultations with the DNR and other agencies concerning the issuance of permits. The reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed environmental protection or control standards. The reports shall also include similar status reports for the natural gas pipeline construction by ANR. The first report is due for the quarter ending June 30, 2002. The reports shall be filed within 31 days after the end of each quarter.

21. Mirant is not authorized to construct any natural gas line facilities outside the boundaries of the Hayes site without an amendment to this order.

22. Mirant shall inform the Commission of any substantial design modifications in the approved facilities.

23. Mirant shall complete construction of the proposed facilities within 3 years, but may request up to an 18-month extension from the Commission.

24. Mirant shall notify the Commission, in writing, within 24 hours of any decision by Mirant, of a decision not to proceed or to cancel this project or to enter into any partnership or other arrangement with any outside entity with respect to this project..

25. Jurisdiction is retained.

Dated at Madison, Wisconsin, _____.

By the Commission:

_____

Lynda L. Dorr
Secretary to the Commission

LLD:TKK:bap:g:\order\pending\05-CE-116 Final.doc

See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

APPENDIX A

In order to comply with s. 227.47, Stats., the following parties who appeared before the agency are considered parties for purposes of review under s. 227.53, Stats.

Public Service Commission of Wisconsin
(Not a party but must be served)
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P.O. Box 7854
Madison, WI 53707-7854

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DEPARTMENT OF NATURAL RESOURCES
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MR. THOMAS HABEL
3830 Brett's Drive
Plover, WI 54467

Date Mailed
December 20, 2002

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Alliant Energy Resources, Inc. for Approval to Purchase, Own, and Operate the Existing 309 MW Natural Gas-Fired Merchant Power Plant Located in Neenah, Wisconsin — 9349-EB-100

FINAL DECISION

Introduction

On July 12, 2002, an unregulated public utility affiliate of Wisconsin Power and Light Company (WP&L) named Alliant Energy Resources, Inc. (AER), entered into a purchase and sale agreement with Mirant Wisconsin Investments, Inc. (Mirant), to purchase 100 percent of the membership interests in Mirant Neenah, LLC (Mirant-Neenah), and thereby acquire ownership of the 309 MW wholesale merchant power plant comprised of 2 combustion turbines located in Neenah, Wisconsin. WP&L is an investor-owned electric, natural gas, and water public utility as defined in Wis. Stat. § 196.01(5)(a) and provides electric and natural gas service in southern and south central Wisconsin and water service to the cities of Beloit and Ripon. Both AER and WP&L are subsidiaries of Alliant Energy Corporation (AEC).

The Commission authorized construction of the Mirant-Neenah plant by Certificate of Public Convenience and Necessity issued in February 1999 in docket 9338-CE-100, and the plant was placed into commercial operation in May 2000.

On August 8, 2002, AER filed an application with the Commission for authority under Wis. Stat. § 196.491 to acquire the Mirant-Neenah plant.

On September 24, 2002, the Commission issued a notice of investigation in this docket. In that notice, the Commission solicited requests for hearing under Wis. Stat. § 227.42(1) and Wis. Admin. Code § PSC 100.14(2)(a), and requests for intervention under Wis. Admin. Code § PSC 2.21(2). In addition, the Commission requested comments on the application.

No requests for hearing were received. Requests for intervention in the docket were received from the Customer's First! Coalition (Customers First!), Dairyland Power Cooperative (Dairyland), the Municipal Electric Utilities of Wisconsin (MEUW), and Mirant/Mirant-Neenah. Wisconsin Electric Power Company (WEPCO) filed a request to be on the courtesy copy list. Comments on the docket were received from the Customer's First!, the MEUW, and Mirant/Mirant-Neenah. The applicant also filed reply comments.

The applicant then filed a market power screen analysis as a supplement to its application.

In subsequent filings, Customer First! withdrew its comments and reservation of right to a hearing but not its motion to intervene, and MEUW filed a response to the applicant's supplement to its application.

The application is GRANTED, subject to conditions.

Findings of Fact

1. Both AER and WP&L are subsidiaries of AEC.

2. WP&L is an investor-owned electric, natural gas, and water public utility as defined in Wis. Stat. § 196.01(5)(a) and provides electric and natural gas service in southern and south central Wisconsin and water service to the cities of Beloit and Ripon.

3. The Commission authorized construction of the Mirant-Neenah plant by Certificate of Public Convenience and Necessity issued in February 1999 in docket 9338-CE-100, and the plant was placed into commercial operation in May 2000.

4. No person requested a hearing within 10 days of the issuance of the Notice of Investigation as required under Wis. Admin. Code § PSC 100.14(2)(a) and by the notice itself.

5. The participation of Mirant and Mirant-Neenah is necessary to promote the proper disposition of the issues to be resolved under Wis. Admin. Code § PSC 2.21(2), because they are parties to the purchase and sale agreement and their participation has not and will not impede the timely progress of this case.

6. The participation of MEUW and Customers First! is necessary under Wis. Admin. Code § PSC 2.21(2), because their filings have already promoted the proper disposition of this case, without impeding its timely completion.

7. Dairyland's interest is speculative and therefore does not meet the test for permissive intervention under Wis. Admin. Code § PSC 2.21(2).

8. Mirant-Neenah holds a single long-term power purchase agreement (PPA) with WEPCO, which is on file with the Federal Energy Regulatory Commission (FERC). Under the PPA, WEPCO dispatches Mirant-Neenah and purchases the entire output of the plant. The PPA will remain in effect after the transfer of the plant assets to AER, and until at least June 2008.

9. WP&L has transferred control of its transmission assets to ATC, and consequently meets the first criterion for approval of this transaction as required by Wis. Stat. § 196.491(3m)(a)1.

10. The market power screen analysis filed by the applicant is complete.

11. AER's market power screen analysis shows that AER's ownership of Mirant-Neenah plant will not have a substantial anticompetitive effect on electricity markets for any classes of customers, as required by Wis. Stat. § 196.491(3m)(a)2.

12. The transfer of the Mirant-Neenah plant to AER is in the public interest.

13. This is a Type III action under Wis. Admin. Code § PSC 4.10 (3). No unusual circumstances suggesting the likelihood of significant environmental consequences have come to the Commission's attention. Neither an environmental impact statement under Wis. Stat. § 1.11 nor an environmental assessment is required.

14. Determining whether energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. §§ 1.12 and 196.025 or their combination would be cost-effective alternatives to purchase of the Mirant-Neenah plant is not possible because the applicant is not required to submit information about the purchase price.

Conclusions of Law

1. Both AER and WP&L are subsidiaries of Alliant Energy Corporation (AEC).

2. The Commission has the authority under Wis. Stat. §§ 1.11, 1.12, 196.02, 196.025, 196.395, 196.40 and 196.491 and Wis. Admin. Code ch. PSC 2, 4, and 100 to issue a certificate and order authorizing AER to acquire Mirant-Neenah from Mirant, subject to the conditions of this order.

Opinion

Intervention

Intervention is of right only in a "proceeding," which is "a contested case or other docket which includes a hearing." Wis. Admin. Code § PSC 2.02(13); *see also* Wis. Admin. Code § PSC 2.21(2). However, this case was noticed as an investigation, which would be a docket without a hearing unless one was requested. No person requested a hearing within the Commission's specified ten days. Wis. Admin. Code § PSC 2.21(2) allows for permissive intervention in a docket but only

> [i]f the person's participation likely will promote the proper disposition of the issues to be determined in the . . . docket and if the person's participation will not impede the timely completion of the . . . docket.

WEPCO merely requested to be on the courtesy copy list, so its request does not meet the threshold necessary to be an intervenor.

Mirant and Mirant-Neenah filed a joint motion to intervene. Their comments support AER's application. Mirant, which owns the membership interests of Mirant-Neenah, and Mirant-Neenah are parties to the purchase and sale agreement under which AER intends to purchase the Mirant-Neenah facility. As parties to that agreement, their participation is necessary to promote the proper disposition of the issues to be resolved, and their participation has not and will not impede the timely progress of this case.

Three other persons also filed motions to intervene. MEUW states that its members purchase power and energy in the wholesale market, including purchases from WEPCO and WP&L, or obtain electric power by ownership of facilities. A number of its members are also members of Wisconsin Public Power, Inc. In its comments, MEUW raises three points:

(1) AER's application is incomplete for lack of a market power screen analysis as required under Wis. Admin. Code §§ PSC 100.14 and 100.15, despite AER's allegation otherwise in its application; (2) As a result of the proposed transaction, under certain circumstances, AER would be able to exercise a right of first refusal (ROFR) under a PPA supplement between WEPCO and Mirant-Neenah, which would entitle AER to buy back the power and energy generated at the Mirant-Neenah facility and sell that power and energy at market based rates—rather than at the cost based rates which WEPCO would have been restricted to selling into the marketplace; and (3) The Commission should condition the transfer upon a further review of competitive issues, whenever the existing PPA expires in either 2008 or 2013.

In its motion to intervene, Customers First! states that its interest is to ensure that the requirement of a market power screen analysis in Wisconsin law is satisfied and that the transaction will not have an anticompetitive effect. In its comments, Customers First! addresses the need for a market power screen analysis (and reserves its right to request a hearing if the Commission does not require the analysis), the problems associated with AER's ROFR, and the need for the Commission to reserve its right to impose mitigation measures and remedies following the expiration of the PPA.

In its motion to intervene, Dairyland states that its interest is as a participant in the wholesale electricity market and as a potential customer purchasing capacity and energy produced by the Mirant-Neenah facility. Dairyland did not file any comments.

The applicant filed reply comments in which it committed to waive the ROFR. Due to the PPA and the waiver, AER indicated that it would be unable to sell any power or energy from Mirant-Neenah. As a result of the comments filed in this docket, AER also prepared a market

power screen analysis per Wis. Admin. Code § PSC 100.15. That market power screen analysis was filed with the Commission on December 6, 2002.

In subsequent filings, Customer First! withdrew its comments and reservation of right to a hearing but not its motion to intervene, and MEUW filed a response to the applicant's supplement to its application. Both are satisfied with AER's market power screen analysis and waiver of the ROFR, although MEUW requests an order point addressing the waiver as a condition of approval. MEUW still requests that the Commission address any change in control of the output which might occur at the expiration of the PPA.

The filings of MEUW and Customers First! did prompt AER to file a market power screen analysis and commitment to waive its ROFR, so their requests for intervention with comments have already promoted the proper disposition of this case without impeding its timely completion. MEUW and Customers First! have therefore satisfied the test for permissive intervention under Wis. Admin. Code § PSC 2.21(2).

Because the entire output of the facility is committed to WEPCO until either 2008 or 2013, Dairyland's interest, as stated, is speculative and therefore does not meet the test for permissive intervention.

Application for Commission Approval

For the Commission to approve AER's application, Wis. Stat. § 196.491(3m) requires that (1) WP&L has transferred control of its transmission system to an independent system operator or divested itself of such transmission facilities to an independent transmission owner, and (2) AER's ownership of the Mirant-Neenah facility will not have a substantial anticompetitive effect on electricity markets for any classes of customers. On December 23, 2000, the Commission authorized WP&L to become a member in the American Transmission

Company (ATC) by its order in docket 137-NC-100. That transaction was completed on December 31, 2000, and WP&L has transferred its transmission facilities to ATC. Consequently, ATC has met the first criterion as required by Wis. Stat. § 196.491(3m)(a)1.

The second criterion as required by Wis. Stat. § 196.491(3m)(a)2. is that AER's ownership, control, or operation will not have a substantial anticompetitive effect on electricity markets. To satisfy that requirement, AER must abide by Wis. Admin. Code ch. PSC 100, which requires that AER submit a market power screen analysis to the Commission demonstrating that AER will not have, or be able to exercise, market power as a result of the proposed transaction.

A unique set of circumstances rules out the possibility that AER's ownership of the Mirant-Neenah wholesale merchant power plant will create substantial anticompetitive effects on Wisconsin electricity markets. Those circumstances are that the full electrical output of the plant and control of dispatch are under contract to WEPCO through 2008; WEPCO also has an option to extend that contract through 2013. In addition, AER has waived its ROFR, which would have allowed AER in certain situations to buy back the power and energy generated at the Mirant-Neenah facility and sell that power and energy at market based rates, even though WEPCO would have been restricted to selling into the market place at cost based rates. This means that, under Wis. Admin. Code § PSC 100.15(c), AER could not be a potential supplier of electricity into competitive markets in Wisconsin because all the output is under dedicated contract to WEPCO and WEPCO's control. AER would, by definition, have no ability to sell electrical products from the Mirant-Neenah plant. On December 5, 2002, AER submitted a market power screen analysis per Wis. Admin. Code § PSC 100.15 showing this situation. In fact, the submitted market power screen analysis shows that the change in the calculated

Herfindahl-Hirschman Index (HHI) is zero, which qualifies as a horizontal market power safe harbor approval condition under Wis. Admin. Code § PSC 100.13(1)(b)1.

As part of its concerns, MEUW has indicated that the Commission does not know the status of the market in 2008 when the contract expires, whether the contract will be extended by WEPCO, or whether the control of this capacity by AER (or some successor-in-interest) at that time would raise market power issues. MEUW believes that the Commission should condition approval of the transaction by requiring AER to make an additional market power filing at such time as there is a change in the contractual sale of the output of the facility. The Commission believes this is not necessary and is outside its discretion. This is because the PPA with WEPCO expires in 2008, and—while under Wis. Admin. Code PSC 100.15(1)(e) the market power analysis is to be forward-looking—the rule restricts the analysis to a five-year period which, given the date of this order, is also 2008.

Order

1. Any hearing regarding this transaction is waived.

2. The motions to intervene of Mirant, Mirant-Neenah, MEUW and Customers First! are granted.

3. Dairyland's motion to intervene is denied.

4. AER's application to purchase and place into service the Mirant-Neenah plant, as described in this application, is granted.

5. This authorization is valid only if the purchase of Mirant-Neenah is consummated within one year of the date of this final decision.

6. This authorization is valid as long as AER waives its right of first refusal under the PPA between WEPCO and Mirant-Neenah.

7. AER shall inform the Commission of the effective date of the transfer of the Mirant-Neenah plant within 30 days of the effective date of the transfer.

8. This order is effective on the date of mailing.

9. The Commission retains jurisdiction.

Dated at Madison, Wisconsin, _____

By the Commission:

_____
Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

Date Mailed
October 9, 2003

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Madison Gas and Electric Company for a Certificate of Public Convenience and Necessity for Construction of a Large Electric Generating Facility and Associated High Voltage Transmission and Natural Gas Interconnection Facilities Located in Dane County	05-CE-121
Application of Madison Gas and Electric Company for Approval of Affiliated Interest Agreements Associated With the Proposed West Campus Cogeneration Facility	3270-AE-102

FINAL DECISION

Introduction

This is the final decision regarding Madison Gas and Electric Company's (MGE's) proposal to construct a new generating plant, which it has named the West Campus Cogeneration Facility (WCCF). MGE; MGE Power LLC (MGE Power), a non-utility affiliate; and MGE Energy, Inc. (MGE Energy), a holding company, filed their application with the Public Service Commission (Commission) for a Certificate of Public Convenience and Necessity (CPCN) on June 14, 2002. This new electric generating plant will be a cogeneration facility located on the campus of the University of Wisconsin-Madison (UW). The purposes of the project are to provide electric power for MGE and to provide steam and chilled water to the UW. The UW uses steam and chilled water for heating and air-conditioning on the UW campus. The facility will have a net electrical output of 150 megawatts (MW). It will also be capable of providing 500,000 pounds per hour of steam and 20,000 tons of chilled water capacity.

The facility will be fueled primarily by natural gas with ultra-low sulfur distillate fuel serving as the backup fuel. To deliver natural gas to the facility, MGE will extend its existing high-pressure natural gas distribution facilities located adjacent to the WCCF site.

The proposed facility will be connected to the electric transmission system at the existing Walnut Street Substation via three 550-foot 69 kV transmission lines. In order to accommodate connection of the new lines to the Walnut Street Substation, some alterations to the substation will be needed. Regardless of the construction and operation of the WCCF, a second, East Campus-Walnut Street 69 kV underground cable line will be installed. The second transmission line from East Campus is already needed for local transmission system reliability reasons. However, this new line is also needed to support dispatch of the WCCF output.

MGE proposed that the project be owned and operated under Wisconsin's Leased Generation Law, Wis. Stat. § 196.52(9). To allow the project to be owned and operated under the Leased Generation Law, MGE Energy, a holding company, was formed. MGE is a subsidiary of MGE Energy. The UW will lease to MGE Power, a non-utility affiliate, the land on which the WCCF will be built. The electric generation assets will be owned by MGE Power and leased to MGE. Steam and chilled water assets will be owned by the state of Wisconsin for the benefit of the UW. MGE will operate the facility. MGE introduced a proposed Ground Lease, Ground Sublease, Facility Lease and Backup and Station Service (B&SS) Agreement. The applicants have requested approval of the ground Sublease and Facility Lease, which are affiliated interest agreements under Wis. Stat. § 196.52 in this docket.

On October 21, 2002, the Commission determined MGE's CPCN application to be complete. The Commission held public hearings in these dockets before Administrative Law Judge David Whitcomb from July 15 to 17, 2003, at which the technical witnesses of parties and Commission staff were examined. In addition, the Commission held a hearing on July 21, 2003, seeking the testimony of interested members of the public. The parties then submitted briefs to the Commission. At an open meeting on September 18, 2003, the Commission considered this matter.

Persons who appeared and testified are listed in the Commission's files.

These applications are GRANTED, subject to conditions.

Findings of Fact

1. Energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. §§ 1.12 and 196.025, or their combination, are not cost-effective alternatives to the project proposed in this docket.

2. Through the year 2010, MGE's retail electric demand is forecast to grow about 2.75 percent per year while electric energy is forecast to grow about 1.96 percent per year. These are reasonable forecast growth rates and form a basis for MGE obtaining new electric generating supply resources.

3. MGE's generation alternative evaluation method using proxy costs is reasonable since the Commission approved similar purchase power costs in recent rate cases for MGE.

4. MGE forecasts natural gas price to be $3.50 per million British thermal units (mmBtu) in 2002 dollars, escalating at an annual rate of 4.0 percent per year. This is a reasonable natural gas forecast for planning purposes.

5. The WCCF satisfies the reasonable needs of the public for an adequate supply of electric energy.

6. The WCCF as described in the final Environmental Impact Statement (EIS) is reasonable and in the public interest after considering alternative sources of supply, alternative locations, individual hardships, engineering, economic, safety, reliability, and environmental factors.

7. The WCCF as described in the final EIS will not provide facilities unreasonably in excess of probable future requirements and will not increase the cost of service without proportionately increasing the value or available quantity and quality of service. The WCCF site and the MGE-preferred layout, on Walnut Street between the Walnut Street Greenhouses and the Walnut Street Heating Plant on the campus of the UW, are in the public interest after considering alternative locations, individual hardships, engineering, economic, safety, reliability, and environmental factors.

8. The WCCF site and its alternative configurations are in the public interest pursuant to Wis. Stat. § 196.491(3)(a)3. and 4., and are the best effort at developing alternative sites pursuant to Wis. Admin. Code § PSC 111.53(1) and § PSC 111.53(2)(b)1., after considering the WCCF's qualification as a cogeneration plant, the steam host's existing industrial plant, and available potential sites at the steam host's existing industrial plant.

9. WCCF construction and operation as described herein will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formation, the aesthetics of land and water, and recreational use.

10. The WCCF will not have undue adverse impact on other environmental values, particularly if it complies with the water loss approval, Wisconsin Pollution Discharge Elimination System (WPDES) permit, and air pollution permit from the Wisconsin Department of Natural Resources (DNR).

11. The WCCF will not unreasonably interfere with orderly land use and development plans for the area involved.

12. It is in the public interest for the Commission to deny MGE's signed agreement with the city and signed environmental and neighborhood Memoranda of Understanding (MOUs) because they include special payments, requirements beyond the scope of the proposed project, and the need for the Commission to act as enforcer.

13. It is in the public interest and in accordance with Wis. Stat. § 44.40 for the Commission to consider and attempt to avoid potential adverse impacts to archeological resources, human remains, and listed historic properties.

14. MGE has received the DNR air pollution control construction permit required for constructing the proposed facility. DNR water loss approvals and water discharge-related permits are issued or pending to be issued. It is in the public interest to condition project construction and operation on the documentation ensuring that these permits and approvals are obtained and that MGE has complied to DNR's satisfaction.

15. Dewatering concerns expressed during the briefing process of the CPCN review are addressed by DNR and Madison Metropolitan Sewerage District (MMSD) permitting.

16. It is in the public interest for MGE to continue to follow the Commission's noise measurement protocol requirements. MGE shall measure sound levels after the plant is

operating, as required by the Commission's noise measurement protocol. The sound level measurements shall be submitted to the Commission.

17. The conditions specified in this order are in the public interest after considering individual hardships, safety, reliability, and environmental factors.

18. The final EIS accurately describes the environmental effects of this project and complies with Wis. Stat. § 1.11(2)(c).

19. The addition of the WCCF to MGE's electric supply portfolio would not have a material adverse impact on competition in the relevant wholesale electric service market because MGE is a small player with only 6 percent market share in the Wisconsin Upper Michigan System (WUMS).

20. A leased generation contract is a reasonable means of financing the WCCF.

21. Using the leased generation approach in conjunction with the approved fixed financial terms provides the requisite degree of investor certainty to ensure project construction.

22. Using the leased generation approach is reasonable for mixed-use, multi-party projects like WCCF.

23. For certain classes of customers, the leased generation financing approach provides intergenerational equity.

24. The overall cost to ratepayers of WCCF is reasonable under the leased generation approach provided the facility lease uses the approved financial terms.

25. The leases proposed in this docket, as modified by this Final Decision, are reasonable and in the public interest.

26. It is reasonable for the cost of long-term debt in the facility lease to be based upon a cost of debt index determined 180 days prior to anticipated commercial operation of WCCF and reflecting MGE's credit rating for senior securities. It is also reasonable for MGE to lock in a portion of long-term debt costs to take advantage of favorable low interest rates.

27. An initial term of 30 years for the facility lease is reasonable.

28. It is reasonable that renewal rent in the facility lease be only 50 percent of original rent during a first renewal period. It is reasonable that renewal rent in the facility lease would only be 15 percent of original rent in any subsequent renewals after the first renewal period.

29. It is reasonable that commercial delay damages under the facility lease be $25,000 per day for on-peak periods and $12,000 for off-peak periods.

30. In order to protect ratepayers, it is reasonable that appropriate restrictions be placed on the transfer or assignment of the WCCF facility or associated facility leases to third parties.

31. It is reasonable that appropriate hold harmless provisions apply to protect ratepayers from increased costs associated with credit quality degradation arising from a transfer or assignment of the WCCF facility. It is reasonable to exempt any purchase or sale of the WCCF plant to the State of Wisconsin or the UW from such hold harmless restrictions.

32. The method for allocating costs in the B&SS Agreement and the Operation and Maintenance (O&M) Agreement for station service for the electric energy used in the electric chillers is reasonable.

33. The provision in the B&SS Agreement between MGE and the UW that provides that in the event of a widespread outage of the transmission system, MGE will isolate the UW

Campus from the transmission system and use the WCCF to serve the UW Campus before utilizing the WCCF to restore service to the remainder of the transmission system is not reasonable.

34. The provision in the B&SS Agreement between MGE and the UW that provides that MGE will seek to exempt the UW Campus from being subject to rolling blackouts is not reasonable.

35. It is reasonable to require MGE to work with the Commission staff to develop a mechanism to monitor the variable costs allocated to MGE under the O&M Agreement in order to determine the amount of uneconomic dispatch costs that are incurred by MGE.

36. It is reasonable for the Commission to retain jurisdiction over the variable cost allocations between steam and electric production in the O&M Agreement in the event it is necessary to revise these allocations in the future if electric ratepayers are harmed by the level of uneconomic dispatch costs incurred by MGE.

Conclusions of Law

The Commission has jurisdiction under Wis. Stat. §§ 1.11, 1.12, 196.02, 196.125, 196.395, 196.49, 196.491, 196.52, and 196.795 to issue certificates authorizing MGE to construct and place into operation the generation facilities at the site as described below, and to impose the conditions specified in the Final Decision.

Opinion

This proceeding involves the application by a public utility in Wisconsin to construct a large-scale generating facility through an affiliated entity. The proposed arrangement between

the public utility and non-utility affiliate has been described as "leased generation" and is codified into Wisconsin law, Wis. Stat. § 196.52(9)(a)3. ("Leased Generation Law").

The Leased Generation Law permits load serving entities to acquire generating resources through an affiliated entity subject to the approval of this Commission. Pursuant to the Lease Generation Law, a non-utility entity, MGE Construct, LLC, would construct the facility. MGE Power West Campus, LLC (West Campus), and the state of Wisconsin would co-own the facility. The affiliate electric utility, MGE, would operate the facility. The applicant seeks approval for construction authority to build this generation facility and approval of the related leases between MGE and MGE Power.

In these consolidated dockets, the Commission has attempted to balance responsibility under this new law with other obligations under the power plant siting law, Wis. Stat. § 196.491, as well as responsibilities under the affiliated interest statute, Wis. Stat. § 196.52, and its obligation to the consuming public.

In the Commission's consideration of this application, the Commission considered its longstanding resource policy priorities set forth in the power plant siting law – reliability, low cost, and environmental sensitivity. While each of these priorities is important individually, they are interrelated and the Commission considered each policy priority in the context of this proceeding.

Project Description

The proposed WCCF would be a natural gas-fired, combined-cycle power facility to provide electric power to MGE, and steam and chilled water to the UW. The WCCF consists of two combustion turbines (CTs), two heat recovery steam generators (HRSGs), duct-firing, and a

single steam turbine, for a nominal facility rating of 150 MW. Output with no duct firing, chiller operation, or steam delivery is designed at 115 MW. Maximum output would be up to 169 MW and would occur in winter. The steam turbine output would depend on the steam needs of the UW. When providing steam to the UW, the WCCF would have a thermal efficiency greater than a combined-cycle without cogeneration. Overall efficiencies of up to 70 percent are expected. The overall efficiency of the WCCF without cogeneration would be expected to be between 40 and 50 percent. The plant would have an expected life of 30 to 40 years.

Natural gas from MGE's existing 12-inch supply line would be used to fuel the WCCF. MGE would extend this existing line by 800 feet to bring natural gas to the project site. The new natural gas line would be underground and located in the right of way (ROW) of existing streets. The design pressure on the supply system is 400 pounds per square inch (psi) with a typical working pressure of 225 psi to 350 psi. A compressor would be installed on the plant site to boost the pressure to 695 psi. Ultra-low-sulfur (ULS) distillate fuel oil would serve as the back-up fuel for the facility. The ULS distillate fuel oil would be stored on-site in a 495,000 gallon tank. This would provide three days of maximum fuel flow to the combustion turbines if natural gas supplies are interrupted.

American Transmission Company (ATC) has filed for a Certificate of Authority (CA) to perform necessary modifications (docket 137-CE-109) to its existing transmission system to accommodate the power generated at the WCCF. ATC would install 3 new 69 kV generation step-up transformers at the Walnut Street Substation. Additionally, a second, East Campus-Walnut Street 69 kV underground cable would be installed. While this second transmission line

would support dispatch of the WCCF, it is already needed for local transmission system reliability reasons.

Up to 2.29 million gallons per day (MGD) of water would be required by the WCCF. Water would be withdrawn from a combination of groundwater and surface water. The surface water would be withdrawn from Lake Mendota through an existing water intake structure owned by the UW, and conveyed through a new pipe constructed between the WCCF and an existing water pipe lying along Lakeshore Path. Surface water would be used as cooling tower makeup water and would account for about 1.98 MGD of the peak usage. The remaining water would be groundwater supplied by the Madison Water Utility and used for facility uses such as fire protection, personnel use, steam makeup, and NO_x injection.

Statutory Energy Priorities

A threshold this Commission must decide is whether or not there is enough energy efficiency or renewable resources to cancel or delay the construction approval sought in this proceeding. State law provides guidance to the Commission in carrying out the state's energy policy. These obligations are set forth in Wis. Stat. § 1.12.

Wis. Stat. § 1.12(4) establishes energy priorities for Wisconsin. The statute provides as follows:

> **1.12(4)** PRIORITIES. In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed.
>
> 1. Natural gas.
> 2. Oil or coal with a sulfur content of less than 1 percent.
> 3. All other carbon-based fuels.

In addition, Wis. Stat. § 196.025 declares that the Commission must implement these priorities in its energy related decisions, to the extent "cost-effective, technically feasible and environmentally sound."

MGE's forecast of future demand and energy needs already includes some level of energy efficiency because MGE uses an econometric model that relies upon historical electric energy usage data. MGE's forecasting method implies that future impacts of energy efficiency will be similar to the historical impacts. For this reason, in their testimony on energy efficiency potential both MGE and Commission staff attempted to estimate the amount of potential energy efficiency savings above that already included in the forecast.

Both MGE and Commission staff's analyses indicate that there is little potential for additional energy efficiency above that already included in the MGE's forecast. There are shortcomings in the analyses that result in the likelihood that the energy efficiency potential identified is underestimated. Although the magnitude of this underestimation is not known, the record demonstrates that there is not sufficient energy efficiency available in the timeframe needed to meet MGE's expected capacity shortfall.

In addition to energy efficiency, the Commission considered whether MGE's expected capacity shortfall could be met or offset by renewable resources. The state energy priorities express a preference for generating facilities that use renewable fuels. The Commission, in carrying out that state's energy policy, shares this goal in our efforts to reduce emissions of pollutants from other fuel sources.

The record developed on renewable energy in this proceeding focused on wind resources. The evidence demonstrates that wind resources are increasingly becoming more cost-effective

when compared with traditional fossil fuel sources. Commission staff's electric generation expansion analysis system (EGEAS) runs show that wind is an economic generation option, showing up to 150 MW of Class 4 wind being selected regardless of the presence of the WCCF. The capacity factors achievable by wind regimes close to the MGE service territory was the subject of some debate. RENEW Wisconsin (RENEW) stated that the new technology of wind turbines can yield capacity factors ranging from the upper 20's to lower 30's of percent with Class 3 wind sites. Commission staff assumed a capacity factor of 24.5 percent for Class 3 wind sites and 32.4 percent for Class 4 wind sites.

Both RENEW and Citizens' Utility Board (CUB) argue that, although adding wind resources in lieu of WCCF may not be appropriate, MGE should be required to acquire additional wind capacity. RENEW proposed that MGE be required to acquire 70 to 100 MW of wind by January 1, 2005. CUB stated that MGE should acquire 75 MW of wind by 2011. Both RENEW and CUB contend these additional wind resources are needed as a physical hedge against rising natural gas prices.

Although there are additional wind resources available, the Commission finds that wind resources are neither technically feasible nor cost-effective options to displace the need for a project the size and scope presented in this application. Further, it is not appropriate to make any decision on the addition of wind generation in this CPCN docket. However, the Commission encourages all parties and Commission staff to meet to discuss the renewable portfolio standards and how best to meet them.

Peak Demand and Energy Forecast

MGE projects a growth in retail electric demand from 720 MW in 2002 to 895 MW in 2010, or about 2.75 percent per year. Electric energy is expected to grow from 3,311 gigawatt hours (GWh) in 2002 to 3,866 GWh in 2010, or about 1.96 percent per year. For the period 1992 to 2001, MGE's peak demand and energy grew annually 4.4 percent and 3.2 percent, respectively. Although Commission staff submitted an alternative forecast for peak and energy, the applicant's forecast was not challenged by any party or by Commission staff. From this perspective and taking into consideration the strong growth associated with the 1990s economic expansion, MGE's forecast growth rates for the 2002 to 2010 period, which are lower than the growth rates of the 1990s, are reasonable and form a strong basis for MGE obtaining new electric generating supply resources such as the WCCF.

Natural Gas Fuel Forecast

In its modeling, MGE used a natural gas price forecast of $3.50 per mmBtu in 2002 dollars with an escalation of 4.0 percent per year. Analysis in the final EIS indicates that this natural gas price forecast is reasonable.

Horizontal Market Power

Wis. Stat. § 196.491(3)(d)7. requires the Commission to discern whether the addition of the WCCF to MGE's electric supply portfolio would have a material adverse impact on competition in the relevant wholesale electric service market. The Commission believes it would not. MGE is a small player in the relevant WUMS market with only 6 percent market share. In addition, capacity and energy prices will be regulated by the Commission under the approved terms and conditions of the facility lease.

Supply Alternatives

The EGEAS analyses contained in the record show that the WCCF is a "least-cost" generation option. The difference between the cost of EGEAS runs with the WCCF and those without the WCCF for the base case runs (except for the lower peak and energy forecast scenario) were not materially different. For the high fuel cost scenario runs, the WCCF was not economic. For all of the low fuel cost scenarios and base fuel costs with CO_2 monetization scenarios, plans with the WCCF were either superior to or virtually tied with plans without the WCCF.

The base fuel cost for natural gas was $3.50 per mmBtu in 2002, with an escalation rate of 4.0 percent annually. The high fuel cost for natural gas was $6.00 per mmBtu in 2002, with an annual escalation of 4.0 percent. Based on recent futures prices from the New York Merchantile Exchange (NYMEX) for natural gas, it would appear that the applicant's base price forecast would be more likely to be accurate than the high price forecast.

The Commission cited additional financial and non-financial benefits of the WCCF as follows:

- Greater fuel efficiency use by operating at least part of the time in a cogeneration mode which should reduce emissions and mitigate price pressure for natural gas usage;
- Allowing one plant to be constructed to meet MGE's and UW's needs rather than two, potentially mitigating siting concerns for a second unit;
- Allowing the unit to be sited with an existing facility without the need for a potentially extensive new transmission interconnection through residential or environmentally sensitive areas; and
- Improving reliability for MGE's customers by decreasing the dependence of MGE supply on transmission from more distant locations.

Project Site

The site of the WCCF is a parcel on the east side of Walnut Street on the UW Campus, between the existing Walnut Street Heating Plant on the south and the Walnut Street Greenhouses on the north. Its current use is as a UW agricultural experimentation and demonstration field. Willow Creek flows northward adjacent to the existing substation and just east of the power plant site, discharging into Lake Mendota. The existing Walnut Street Heating Plant is just to the south of the site, and the underground natural gas line, electric transmission line, and water and steam lines are all adjacent to the site near the heating plant. The natural gas line does not meet the threshold to require a separate CA from the Commission. A separate CA for the transmission interconnection has been applied for in docket 137-CE-109. Construction of a water supply pipeline along the Lake Mendota shore and across Willow Creek requires permits from DNR before construction.

MGE proposed two configurations on that site for the new WCCF. The alternate configuration is one that was rejected earlier because it shaded the adjacent Walnut Street Greenhouses to the north. However, mitigation of the shading allowed it to be considered as an alternate configuration.

Siting the WCCF

MGE proposed one site for the WCCF, with two alternative configurations. The one offered site does not comply with Wis. Admin. Code § PSC 111.53(1)(e), which requires the applicant to file comparable information on two sites for a power plant project. An exception, however, exists under § PSC 111.53(2)(b)1. if the proposed facility is a qualifying cogeneration

facility under federal law 18 CFR § 292.205 and none of the needed infrastructure improvements would constitute a major action significantly affecting the quality of the human environment under Wis. Stat. § 1.11(2)(c). The WCCF qualifies as a cogeneration facility. Thus, MGE is allowed to file information on two sites "that are both located at the steam host's existing industrial plant..." (Wis. Admin. Code § PSC 111.53(2)(b)1.) The UW is the steam host, so the UW Campus would qualify as the "steam host's existing industrial plant." Important steam, electrical, and water piping corridors are laid throughout the campus. The UW testified that the proposed site had been identified early as the appropriate location for a project like this one, and that it is literally the only site on campus available for the WCCF. Other sites without buildings already on them on the campus, that would be large enough, are either protected wetlands or necessary green space. The proposed Walnut Street parcel was seriously considered in the UW-Madison's 1996 Master Plan and happens to be not only big enough with no natural areas or necessary green space that need protection, but also the only place where the required infrastructures (fuel supply, western campus steam lines, major water and sewer lines) are close together. The parcel is logical, responsible, and commensurate with the existing infrastructure. Therefore, the two configurations proposed by MGE for that parcel represent a best effort at providing two sites at the steam host's existing industrial plant and so are in compliance with Wis. Admin. Code § ch. PSC 111.

Compliance with the Wisconsin Environmental Policy Act (WEPA)

The proposed facilities were reviewed by the Commission for environmental impact. The WCCF decision was a Type I action under Wis. Admin. Code § PSC 4.10(1). Draft and final EISs were prepared as necessary under Wis. Stat. § 1.11. The final EIS and subsequent

public hearing complied with the Commission's requirements under Wis. Stat. § 1.11 and Wis. Admin. Code § PSC 4.30. The final EIS also served as a monitor of progress towards compliance with DNR requirements under Wis. Admin. Code § NR 150.22, so that, with hearings as appropriate, the various DNR air and water permits could be issued.

While the final EIS reasonably examined the siting process and alternatives to the project, the Wisconsin Department of Administration (DOA) did not prepare an EIS or an environmental assessment (EA) for the WCCF, even though it would normally do so. Instead, the DOA had deferred WEPA compliance to the Commission's CPCN review. Friends of Responsible Energy (FORE), a party to the case, has stated that a joint PSC-DNR-DOA EIS might have been more appropriate, under Wis. Admin. Code § PSC 4.60, and that, if the Commission had reached a different conclusion about (1) the alternative sites concerned, and (2) whether the WCCF qualified as a cogeneration facility, it would have determined that an additional site was required or that information about other, different scales or technologies were needed. Wis. Stat. § 1.11 says that, for "major actions significantly affecting the quality of the human environment," all agencies shall – "to the fullest extent possible" – include the environmental impact of the proposed action, including "[a]lternatives to the proposed action." Wis. Admin. Code § 4.30(3)(c) calls for "[a]n evaluation of the reasonable alternatives to the proposed action and significant environmental consequences of the alternatives…" Certain alternatives of scale and technology were discussed in UW forums outside the Commission's CPCN process. FORE has suggested that, with the DOA as a joint EIS preparer, the other alternatives of scale and technology would have been considered in more detail within the CPCN process. To bring the DOA analysis, and thus these other alternatives, into the case, FORE has suggested that the

Commission refer the case to the DOA for further review under its own WEPA rule (Wis. Admin. Code ch. ADM 60). MGE has suggested, in turn, that the Commission need not refer the case to the DOA because the Commission already has examined alternatives that are feasible or reasonable for the WCCF project according to the National Environmental Policy Act of 1969 (42 USC §§ 4321-4370b), federal counterpart of the WEPA. The Commission has examined the WCCF proposal as it is described in the application materials from the utility, MGE and, as agreed to by the co-owner (UW, with the DOA), and has not seen reason to extend its review to scales or technologies beyond those that have been deemed reasonable or feasible in its own CPCN application review, the results of which are described in the final EIS.

Environmental Impacts

Air emissions would increase in the WCCF area as a result of the proposed project. For the categories of emissions for which there would be an increase, air quality would decline, but not enough to violate state emission standards. Air permits have been issued by DNR in September 2003 (Permit number 02-RV-098).

The WCCF water use would result in a water loss averaging over two million gallons per day (MGD) from the Lake Mendota/Yahara River waters. The lake water and groundwater are closely linked in the area, so the water loss would include both surface and ground water sources. A water loss approval under Wis. Admin. Code ch. 142 is being issued. This water loss approval includes required mitigation measures that are the result of much debate among a variety of stakeholders coordinated by DNR and Dane County. The water loss would be mitigated in times of low Yahara River flow by pumping groundwater through an existing Madison Water Utility

(MWU) well directly into the Yahara system by Lake Waubesa. Water pumped from the aquifer for this purpose at this point would be replaced through a series of recharge infiltration projects at several sites in the area of Lake Mendota, including the Hill Farms State Office Building area, Wexford Park, Rennebohm Park, and the UW Arboretum. The DNR water loss approval will require that this mitigation work is completed in time to perform its functions.

If water is encountered during construction, the plant will be authorized to discharge any groundwater from construction either to the MMSD, if permitted, or under the terms and conditions of a WPDES permit. Wastewater from the plant during operation is expected to be discharged to the MMSD system, which, in turn, discharges treated effluent through a pipeline and viaduct system to Badfish Creek several miles south of the city of Madison. Dewatering concerns expressed during the briefing process for this case are thus addressed.

No endangered or threatened species or communities are expected to be affected by construction of the WCCF or its auxiliary connection facilities. An archeological site listed with the Wisconsin Historical Society (WHS) lies along the proposed route for the water supply pipeline from Lake Mendota, but MGE can be directed by the WHS on how to avoid this historic property. It would be appropriate to ensure this compliance with the WHS as Commission compliance with its obligations under Wis. Stat. § 44.40.

In its application, MGE provided the Commission with data describing the ambient sound levels in the area of the project, in accordance with the Commission's "Measurement Protocol for Sound and Vibration Assessment of Proposed and Existing Electric Power Plants." This protocol requires that an applicant repeat these measurements after the project is completed. It is reasonable to require that MGE perform these measurements after the WCCF facility is fully

operational and study the sound and vibration levels when all units are running at full capacity and when all units are off, and that MGE report these post-construction measurements to the Commission as quickly as practicable. The noise measurements required by the MGE MOU with the Regent Neighborhood Association (RNA) (see discussion below on MOUs) are not necessary for protection of the local public.

In its application, MGE also provided the Commission with data and modeling results describing how the plumes from the WCCF cooling towers would behave, including estimates of where and how much time during the course of a year the plumes would touch ground and create local fog conditions. Local on-ground icing conditions are not expected to occur.

Required Permits from DNR

The Commission must determine that DNR has or can issue all preconstruction permits and approvals identified in its listing in response to the Engineering Plan, pursuant to Wis. Stat. § 196.491(3)(e). Several permits from DNR would be required to construct and operate the WCCF. MGE would need to secure:

- Air pollution control permits;
- Permits under Wis. Stat. ch. 30 for a proposed stormwater outfall in Willow Creek and a water supply pipeline along the Lakeshore Path of the UW Campus;
- A water withdrawal registration and water loss approval under Wis. Stat. § 281.35 and Wis. Admin. Code ch. NR 142;
- A WPDES permit for water pollution mitigation facilities and stormwater; and,
- A Stormwater Management Plan, Erosion Control Plan for land-disturbing activities, a Stormwater permit, and a Stormwater pollution prevention plan.

Of these, the air pollution permits are required by DNR before project construction may proceed, and the water permits are required by DNR before construction begins on those portions of the

project that would provide, use, or discharge the water. All of the above permits are now issued or have no known obstacles to issuance. However, it would be appropriate for the Commission to ensure that they are issued and that compliance is documented.

Agreements and Memoranda of Understanding

MGE negotiated an agreement with the city of Madison, and MOUs with a group of environmental organizations and the RNA. Two of these contracts (the city agreement and "environmental" MOU) require Commission approval to become valid. The UW, as a co-owner of the WCCF, has signed on to the environmental and RNA MOUs. Approval of the agreement and MOUs is an important issue in the community surrounding the proposed WCCF site. MGE has indicated that environmental impacts from the WCCF would be controlled or mitigated through DNR and other agency permits for construction and operation, and further through the agreement and MOUs.

The city of Madison has declined to develop a conditional use permit on the grounds that the Commission process would supersede it. It has instead negotiated an agreement with MGE to attempt to mitigate local concerns about the proposed power plant. These concerns include air emissions offsets, noise, water use and other items. Without Commission approval of the agreement, the city will not be able to hold MGE to the commitments it has made unless the Commission includes them in its CPCN order. Some of the commitments in the agreement are above and beyond obligations MGE would have if the Commission simply granted the CPCN. These include support of a local air monitoring station not required in the DNR air permit, a program to reduce emissions from city buses, a task force to promote the use of ultra-low sulfur natural gas in the city, a payment to the city to cover costs of entering into the agreement, and

other items. This agreement could be made without including a requirement for Commission approval. For these reasons, and in order to avoid placing the Commission in the position of enforcer, it would be in the public interest to deny the requested approval of the agreement.

The "environmental MOU," signed with CUB, Sierra Club, and other organizations, includes several items that describe work that MGE and the UW or DOA would do to ameliorate impacts to air and water, or to implement energy conservation or renewable energy practices. It is reasonable for the Commission to approve or deny approval of the MOU, or to incorporate chosen items from the MOU into the CPCN order. All parties that spoke on the issue acknowledge that this MOU presents a "reasonable and fair" mitigation approach, but no procedure for enforcement is specified, and the MOU requires Commission approval. The signatories will not be able to hold MGE to the commitments it has made unless the Commission actually approves the MOU or incorporates it into its CPCN order. However, these commitments include: support of off-site "offsets" (50 percent in the campus area) of WCCF emissions of nitrogen oxides, sulfur oxides, and particulate matter not otherwise required by the DNR air permits; use of ultra-low sulfur fuel in any MGE Madison facilities when petroleum distillate back-up fuel is needed; plans for use of such fuel, not necessarily matching DNR air permit requirements, at the WCCF and at the UW's existing Charter Street and Walnut Street plants; support of a task force to promote the use of ultra-low sulfur fuel; support of a local air monitoring station not required by the DNR air permit; and support of development of a local hydrogeologic model, among other things. The hydrogeologic model support and air emissions controls are already addressed by DNR air and water permits, although hydrologic model support would be reasonable and in the public interest in light of the WCCF's expected water use and the

mitigation work to be required by DNR water loss approval. For these reasons, and because the Commission would be placed in the position of enforcer of a private contract, it is in the public interest to deny the request for approval of the MOU.

The RNA MOU includes a requirement that the Commission incorporate it as part of the CPCN order so it can be enforceable through Commission processes. It is reasonable for the Commission to approve or deny approval of the MOU, or to incorporate chosen items from the MOU into the CPCN order. However, the MOU's only enforcement mechanism appears to be a complaint process dependent on consensus that does not guarantee an outcome in and of itself. All parties concerned about this MOU have indicated that they desire the Commission being the next step in arbitrating complaints that fail to get resolution through the contract's complaint process. The Commission acknowledges this but feels it is not appropriate. The MOU also includes several requirements for the owners and operators of the WCCF addressing noise and air emissions beyond the requirements of the DNR air permit and the Commission's noise measurement protocol. These include: a zero net impact of air emissions in the area of the WCCF; agreements about noise and vibration measurements, standards, and enforcement unique to this MOU and beyond the Commission's noise measurement protocol requirements; a requirement to work with all units of government and other businesses on air quality in the metropolitan area; and an application of the MOU provisions to the UW's existing Charter Street and Walnut Street plants as well. For these reasons, it is in the public interest to deny the requested approval of this MOU and refuse to be put into the position of arbiter of this local contract.

Chairperson Bridge dissents on the matter of denying approval of the agreement and the MOUs.

Generation Alternatives from Independent Power Producers

In expansion plan computer modeling and its cost analysis, MGE used proxy costs for generation alternatives from independent power producers (IPPs). Such proxy costs were based on recent contracts it had signed with IPPs. MGE conducted no competitive bidding per se. MGE believes use of such proxy costs and its market price insight is acceptable and reasonable at this time. The Commission finds the use of proxy costs can, under certain circumstances, allow for meaningful comparison of potential generation alternatives. For instance, the proxy costs MGE used for potential generation alternatives from IPPs were found reasonable when the Commission approved similar purchase power costs in recent rate cases for MGE. In this proceeding, no IPPs contested the lack of competitive bidding. For the above reasons, the Commission finds that the generation alternative evaluation method utilized by MGE was a reasonable one. Under all circumstances, MGE will continue to carry the burden demonstrating that any selected generation resources are reasonable and cost-effective for ratepayers.

Lease Generation Contract Versus Rate-Based Financing

In this proceeding, there are two viable financing options for WCCF. The first is lease financing. The alternative is to use historical rate base methods in which the WCCF's construction cost is put in rate base and then depreciated. Each of the financing methods has advantages and disadvantages.

Both MGE and CUB indicate a strong preference to use lease financing. MGE prefers to use lease financing because a facility lease allows important financial terms to be set for the life

of the project, creating a degree of financial certainty for investors. This translates into a higher probability of the WCCF being constructed, reaching commercial operation, and providing customers needed electrical generation. MGE also indicates that the lease approach is advisable for mixed-use, multi-party projects like WCCF. According to MGE, the proposed leasing approach helps protect its ratepayers from potential liabilities associated with co-owned plants, especially when the co-owner is a public entity. MGE indicates that leasing also avoids difficult problems related to depreciation and taxes. MGE states that the use of a limited liability company structure in conjunction with a facility lease also protects electric ratepayers from other potential liabilities such as those associated with environmental mitigation. The last point in favor of leasing highlighted by CUB is that lease financing provides intergenerational equity for certain customer classes. This is because, under the leasing concept, current ratepayers would pay somewhat less for the WCCF in the early years than they would under conventional rate making methods.

The alternative to lease financing would be the conventional rate base approach for the WCCF. The chief advantage of the conventional rate base method is that, holding all financial parameters constant, rate base financing can be less expensive to ratepayers on a present value basis. MGE did not dispute that ratemaking can be less expensive on a present value basis, but MGE indicated that significant emphasis should be placed on beneficial qualitative aspects of the lease approach, including intergenerational equity as pointed out by CUB. Another advantage of the rate base approach is that the Commission has considerable experience both legally and in practice with the method.

In reviewing the evidence, the Commission is persuaded that the lease generation method

is the appropriate financing method to use for the WCCF. The Commission finds that the fixed financial terms available with the lease method provide the requisite degree of investor certainty to ensure project construction at a time when maintaining and improving electric system reliability is paramount. In addition, the financial terms that the Commission has approved for the facility lease comport well with the risk-adjusted cost to ratepayers available under conventional rate based financing. The Commission also concurs with MGE that the lease approach is advisable for mixed-use, multi-party projects like WCCF. That the Commission has selected lease financing for WCCF does not mean that it is abandoning the use of rate base financing techniques. The Commission will continue to examine financing issues on a case-by-case basis.

Review of the Proposed Leases

The WCCF Ground Sublease and Facility Lease are affiliated interest agreements under Wis. Stat. § 196.52(9), and together with the Ground Lease, are a leased generation contract under Wis. Stat. § 196.52(9). The language and organization of the leases proposed by MGE were based on the leases approved in docket 05-AE-118 for the Port Washington Generating Station.

In general, the Commission finds that these leases are reasonable, but some changes to the Facility Lease are needed, to balance risk and responsibility properly between the parties to this contract. Language changes which the Applicants have agreed to make are included in Attachment A of this Final Decision, and other modifications are discussed below.

Because a leased generation contract is an affiliated interest transaction, under Wis. Stat. § 196.52(3)(a), the Commission may approve such a contract "only if it shall clearly appear and

be established upon investigation that it is reasonable and consistent with the public interest." This law grants the Commission continuing supervisory control over the terms and conditions of most affiliated interest contracts or arrangements, which means it can modify such agreements as needed to protect the public interest. Wis. Stat. § 196.52(9)(e), however, limits the Commission's control over a leased generation contract unless the contract itself grants the Commission this authority, or unless the Commission specifically reserves continuing supervisory control in its order approving the contract. Therefore, the Commission's jurisdiction over these WCCF leases will be limited by the terms of the leases themselves and by this Final Decision.

Fixed Financial Terms

The Commission finds it reasonable to set the following financial terms of the Facility Lease:

1. Costs

For the entire project capital costs of $178,513,286 were anticipated. MGE proposed to fix its share of the cost of the project at $109,716,203 with no escalation. This cost includes a general contractor fee of 6.25 percent. This cost also includes $2,927,465 for environmental and community impact mitigation. Of this amount, $2,127,465 is related to water mitigation measures. These water mitigation measures consist of a hydrologic study, pumping well water into the Yahara River during low flow periods, and providing locations for enhanced recharge to groundwater aquifers. An additional $800,000 is directly tied to the MOUs and includes expenditures for volatile organic compounds (VOC) emission reduction, low-sulfur fuel for Madison Metro buses, air monitoring, participation in regulatory proceedings, and a renewable

energy installation. The Commission rejected these items, so the appropriate amount to reflect in the Facility Lease is $108,916,203. This amount reflects the costs for the water mitigation measures but does not reflect the $800,000 for additional mitigation measures. Because water mitigation measures will be a condition of the water loss withdrawal permit, these costs are appropriate for recovery from ratepayers. The remaining mitigation measures go beyond what is required to obtain a CPCN and therefore their costs should not be borne by ratepayers.

2. Rate on Equity

The starting point when making the determination as to the appropriate return on equity is an assessment of financial market expectations. The market sends somewhat muted signals as to the level of return that investors expect to earn over the long term if they are to be compensated fully for the risk of investing in projects such as the WCCF. Those signals can be interpreted via the use of financial models, such as the discounted cash flow (DCF) model, among others.

Despite the fact that there is no perfect financial market proxy for the WCCF, this record contains a panoply of model estimates that enables the Commission to determine a reasonable range within which the investors' required return for this particular project would likely fall. The record in this proceeding suggests that the investors' required return on the project likely lies in the range of 10 to 13 percent.

While the model results provide guidance to the Commission, they do not produce the final result. The return on equity decision has always been, and will likely always be, based in large part on the informed judgment of the Commission. In addition to the financial model analysis, there are several important factors that must be considered in determining the appropriate return on equity for the WCCF project. One is recent Commission return on equity

decisions in proceedings involving similar utility-type investments. Another is the unique aspects of the generation lease arrangement. A third is the need to maintain financial stability.

Recent returns on equity authorized by this Commission for major energy utilities and their affiliates have been in the range of 12.0 to 12.7 percent. It is important to note, however, that those decisions are snapshots of determinations that were made in keeping with a gradual lowering of returns on equity to bring them more in line with current financial market conditions. There is record evidence that investor required returns have declined in the past several years relative to historical levels and the Commission has begun in recent times to lower returns accordingly.

The fact that the return authorized in this proceeding will be fixed for the entire 30-year life of the lease is also an important consideration in this regard. This eliminates the risk that future Commissions will adjust the return, which is an important component of the leased generation statute. This aspect of the lease is not captured in analysis of the required returns for utility stocks or independent power producer stocks because neither of those types of companies can avail themselves of such leases. This factor therefore must be considered outside of the model analyses. The lower risk associated with the fixed-return nature of the long-term lease puts downward pressure on the return on equity that is necessary to attract investors for the project.

On the other hand, this Commission has a tradition of maintaining financially strong utilities and of making moderate rather than extreme changes to key financial parameters, such as the return on equity. Setting the return on equity at a level that is dramatically lower than the

recently authorized returns may send a negative signal to the financial community that in the end may make it more difficult to raise capital at reasonable terms when such capital is needed.

Ultimately, the determination of the appropriate return on equity involves a balancing of consumer and investor interests. An authorized return that is too high will allow the utility to have ready access to capital, but it would unfairly burden consumers with excessive charges for utility service. Conversely, an authorized return that is too low will produce utility rates that are favorable to the consumer, but such a return may make investing in the utility holding company unattractive to outside investors.

In analyzing all the evidence on this matter it is reasonable to set the return on equity at 12.1 percent. This return, which is 80 basis points lower than the Applicant requested, acknowledges that investor required returns have declined relative to historic levels. This considers consumer interests. From the investors' perspective, a 12.1 percent return provides a premium of 600 to 700 basis points over the long-term Treasury bond yield, which should permit MGE Energy to raise capital for this project without difficulty. The Commission notes that MGE Energy is one of the most highly-regarded utility investment opportunities, as is manifested by its stock market value that is twice its book value. It should have no difficulty attracting investment capital at this authorized return level.

Chairperson Bridge dissents as to the level of the return on equity.

3. Long-Term Debt Cost

The approved facility lease requires the use of a long-term debt cost. Under the facility lease, the cost of long-term debt is to be based upon a cost of debt index determined 180 days prior to anticipated commercial operation of WCCF and reflecting MGE's credit rating for senior

securities. MGE also wants to retain the flexibility to lock in a portion of the debt costs now to take advantage of the present low interest rate environment. The cost of debt was an uncontested issue in this case, and the Commission finds the requested approach to be reasonable.

4. Capital Structure

The assumed capital structure for the lease should reflect traditional financing practices for utility-type investments. A capital structure with 53 percent equity and 47 percent debt would be consistent with the capital structures approved by the Commission in recent proceedings. This capital structure is reasonable for the lease.

5. Lease Term and Renewal Rent

This issue was uncontested. MGE proposes that the initial term of the facility lease be 30 years. Wis. Stat. § 196.52(9)(b)9. requires that the term of a leased generation contract for a natural gas-fired generating plant must be 20 years or more. In addition, MGE proposes that renewal rent in the facility lease be 50 percent of original rent during the first renewal period, but that rent would only be 15 percent of original rent in any subsequent renewals. The Commission finds these terms to be reasonable.

6. Commercial Delay Damages

MGE originally proposed that commercial delay damages under the facility lease be $15,000 per day. CUB proposed commercial delay damages of $25,000 per day for on-peak periods and $12,000 for off-peak periods. At hearing, MGE indicated it would accept $25,000 per day for on-peak periods and $12,000 for off-peak periods. The Commission finds these agreed-to delay damages to be reasonable.

7. Transfer and Hold Harmless Restrictions

Due to the long-term nature of the facility lease, MGE's credit quality could be degraded by any transfer\sale broadly defined of WCCF to a third party. This could adversely affect ratepayers. In the WEPCO Port Washington CPCN case, WEPCO and customer groups negotiated restrictions on the transfer or assignment of the Port Washington facilities or associated facility leases and, to protect WEPCO's credit quality from degradation, a "hold harmless" lease provision. In that proceeding, the Commission approved and accepted the results of such negotiations. Due to potential adverse ratepayer impacts, the Commission finds that similar transfer and hold harmless restrictions as adopted in the Port Washington CPCN case should apply to WCCF and MGE. Specifically, within 90 days of this Final Decision, MGE shall submit for Commission approval appropriate transfer and hold harmless restrictions paralleling those found in Schedule 3 of Exhibit 71 of this proceeding. At hearing, MGE indicated it was not opposed to such treatment, but that any such restrictions should exempt any purchase or sale of the plant to the state of Wisconsin or the UW. The Commission finds this a reasonable exemption to its guidance on this issue.

8. Damage Amounts

The Facility Lease provides that if the Lease Effective Date is not achieved due to a failure of MGE, the lessor can terminate the lease and sell the generating plant to MGE. As part of the purchase price, the utility would be required to pay a "Damages Amount" that constitutes 60 months of lost return on capital. It is reasonable to eliminate this payment due to the less than arms' length nature of the transaction. The Facility Lease shall be modified to remove the

definition of Damages Amount from Schedule 1.1, and from any place it is referenced in the body of the Facility Lease.

Other Terms and Conditions

In addition to the financial terms specified above, the Commission makes the following findings:

1. Conforming Leases

This Final Decision makes modifications to the Facility Lease proposed by MGE. It is reasonable to require that MGE rewrite the Facility Lease, making the changes specified herein (including all changes listed in Attachment A) and any further cross-reference or other corrections to the documents that are required to conform the leases to this Final Decision. It is reasonable to require that MGE return these final documents to the Commission for review and approval, with the revisions highlighted, no later than 45 days after the date this Final Decision is signed.

2. Statutory Compliance

A leased generation contract must meet 11 separate conditions under Wis. Stat. § 196.52(9)(b), as well as requirements for land and property transfers under Wis. Stat. § 196.795(5)(k)3. The proposed leases for the WCCF, as modified by this Final Decision, comply with these statutory requirements. Pursuant to Wis. Stat. § 196.52(9)(f), the Commission shall maintain jurisdiction to ensure that the construction of the WCCF facility is completed as provided in the leased generation contract.

The Commission retains continuing supervisory control only over the terms and conditions specified in this Order and in the Facility Lease and Ground Sublease. This is

reasonable and in the public interest, to balance properly the parties' risks and responsibilities, and to protect MGE's ratepayers. In addition, any future changes to these leases, whether mutually agreed upon or otherwise, and any transfer or assignment of a lease or of the WCCF facility, must first receive Commission approval.

Backup and Station Service Agreement

There are two provisions in the B&SS Agreement relating to the reliability of the electricity provided to the UW Campus by MGE. One provision would require MGE to serve the UW Campus during a widespread system outage by electrically isolating the UW Campus and the WCCF from the rest of the grid and providing electricity to the UW Campus directly from the WCCF. This provision is contained in Paragraph 2 "Backup Service/Power Restoration" of the B&SS Agreement. The second provision requires MGE to seek permission from the Commission to exempt the UW Campus from having its service interrupted should it be necessary for MGE to impose rolling blackouts on the MGE system. This provision is contained in Paragraph 3 "Rolling Blackouts" of the B&SS Agreement.

The Commission recognizes that the desire of the UW for a reliable source of electric supply was an integral aspect of the planning for this project. However, the Commission is concerned that these provisions provide a higher level of reliability for the UW Campus than for MGE's other customers and, as a result, these provisions could be considered to be unduly preferential.

If a widespread system outage should occur in Wisconsin, all of the distribution utilities, generating plants, ATC and the Midwest ISO (MISO) will have to coordinate their actions in

order to restore the electric system. The restoration of the system will be accomplished in accordance with the provisions of a System Restoration Plan under the direction of ATC with regional oversight from MISO. However, it is impossible to predict exactly the sequence in which service to different areas would be restored, because it is impossible to predict which transmission lines and generating plants would be affected by such an outage.

The restoration of the system following a widespread blackout requires that the startup of generating plants be coordinated with service to matching amounts of load. However, the System Restoration provision in the B&SS Agreement establishes a higher priority of service for the UW campus than for MGE's other customers. In addition, the Commission is concerned that the imposition of such an *a priori* constraint on the order in which the regional electrical system is restored could hinder the restoration of service to other customers and the remainder of the electric system.

The Commission is not opposed to the use of the blackstart capability of the WCCF to restore service to MGE's system, including the UW Campus and the remainder of the grid. However, the WCCF must be used as part of a System Restoration Plan developed under the auspices of ATC and approved by MISO, or any successor regional reliability coordinator.

MGE and the UW have requested that the UW be allowed to nominate a level of "Essential Minimum Load" on the UW Campus and that this load be exempted from being interrupted should MGE be required to implement rolling blackouts on its system. MGE has thousands of customers. These customers include hospitals and private research facilities that may also desire the higher level of reliability such an exemption would provide to the UW. MGE also provides electric service to other facilities that provide essential public services such

as police and fire stations, telecommunications facilities, and water and sewer utilities. It is not possible for the Commission to determine from the evidence on the record the amount and character of Essential Minimum Load that might be nominated by the UW, what other sensitive loads that other MGE customers have, and how the requested exemption for the UW would affect these loads and MGE's other customers.

For these reasons, it is not reasonable for the Commission to approve this provision in the B&SS Agreement. If MGE wishes to exempt sensitive loads on the UW Campus from being subjected to be interrupted rolling blackouts, it must submit a detailed plan to the Commission that identifies how all sensitive loads on the MGE system would be treated during rolling blackouts. This plan must include details on the specific facilities and loads on the UW Campus that would be included in the plan.

Cost Sharing

The WCCF will provide electricity to MGE and its customers, and steam and chilled water to the UW. West Campus and the UW would be co-owners of the facility. A cost sharing agreement was negotiated between these two entities that allocates all the electrical and most of the thermal system costs to MGE. The cost sharing agreement allocates costs associated with chilled water, steam, and a portion of the thermal systems to the UW. The resultant 55.56 percent allocation of facility costs to MGE is appropriate.

When MGE uses the WCCF to produce chilled water or steam for the UW, the WCCF will also generate associated electricity that must be taken by MGE for its electric system. Under the terms of the O&M Agreement, MGE is obligated to take and to pay the associated variable costs for this electricity. This is not a problem for MGE as long as the cost of this

electricity is less than the cost of electricity from MGE's other sources of supply. However, there may be occasions when the costs of this electricity exceeds the costs of MGE's other sources of supply. The costs that are incurred during such a situation are known as uneconomic dispatch costs or redispatch costs.

MGE believes that these redispatch costs must be viewed in light of the potential benefits of the WCCF, such as reduced emissions and lower electrical losses. However, the Commission is concerned that redispatch costs present a risk to MGE and its ratepayers due to the long term of the contracts between MGE and the UW, and that, under the O&M Agreement, MGE bears all of the risk and responsibility for these costs.

It is reasonable to require MGE to work with the Commission staff to develop a mechanism to monitor any redispatch costs that MGE incurs as a result of the WCCF. In addition, it would be pointless to develop a mechanism to monitor these redispatch costs unless the Commission has the ability to protect MGE's electric ratepayers in the future should the level of these costs result in an unreasonable burden. Therefore, the Commission will retain jurisdiction over the variable cost allocations in the O&M Agreement.

Order

WCCF Generating Plant

1. MGE may construct the WCCF on the location described herein. The approved plant configuration is the layout identified in the final EIS and this Order as the MGE-preferred configuration. MGE shall construct the project in conformance with the design and construction schedule specified in its application and subject to the conditions specified in this Final Decision.

2. MGE shall commence construction of the WCCF within 12 months after receiving all necessary federal, state and local permits and approvals.

3. MGE shall conduct any appropriate archeological surveys, in consultation with the WHS, in order to avoid WHS-listed historic properties along the water supply pipeline route. Archeologist reports and reports of any mitigation work undertaken shall be delivered to both the WHS and the Commission.

4. Within three months of the date when the WCCF is fully operational, MGE shall repeat the noise measurements that it took as part of its CPCN application, measuring the maximum noise generated at the site with all units on and measuring the noise at the site with all units off. MGE shall report its findings to the Commission, using the same format as its pre-approval noise studies.

5. MGE shall provide documentation to the Commission of all work with individuals who raise concerns about noise, fogging and icing, or other environmental or health concerns, and of the resolution of those concerns.

6. Commission approval of the city agreement and the MOUs is hereby denied. However, MGE shall participate in the hydrogeological model work articulated in the environmental MOU.

7. MGE shall submit quarterly progress reports to the Commission that summarize the status of construction, the status of environmental control activities, and the overall percent of physical completion. Each report shall include a summary of consultations with DNR and other agencies concerning the issuance of permits and approvals. The reports shall list dates,

names, the results of each contact, and the company's progress in implementing prescribed environmental protection or control standards. MGE's first report is due for the quarter ending December 2003. The reports shall be filed within 31 days after the end of each quarter and shall continue until the certificate holder's project is fully operational.

Leased Generation Contracts

8. The Facility Lease for WCCF shall use a fixed construction cost of $108,916,203 without a GDP escalator clause. This amount includes $200,000 for a hydrologic study and $1,927,465 for water mitigation measures.

9. The return on equity shall be set at 12.1 percent.

10. The capital lease shall reflect a capital structure 53 percent equity and 47 percent debt.

11. Neither MGE nor any of its affiliates may securitize the lease payment stream under the Facility Lease without the Commission's prior review and approval.

12. Within 90 days of this Final Decision, MGE shall submit for Commission approval appropriate hold harmless restrictions paralleling those approved in the WEPCO Port Washington CPCN docket as described in Schedule 3 of Exhibit 71 of this proceeding.

13. The Facility Lease must include the approved financial parameters to ensure Commission approval of WCCF lease rent in future MGE rate cases.

14. MGE shall treat each Facility Lease, Ground Lease, and Ground Sublease approved in this docket as operating leases for ratemaking purposes. In future rate cases, MGE may not seek a higher authorized return on equity for its rate-based assets, or any other capital

structure adjustments, related to credit quality degradation resulting from a lease's classification as a capital, operating, or true tax lease.

15. No future changes may be made to a Facility Lease, Ground Lease, or Ground Sublease approved in this docket, whether mutually agreed upon or otherwise, without first receiving the Commission's review and approval. No interest in any of these leases or agreements or in the WCCF facility may be transferred or assigned, without first receiving the Commission's review and approval.

16. MGE shall work with Commission staff to develop a tracking mechanism, and appropriate accounting practices, that prevent a double collection of costs from ratepayers through utility rates and lease payments.

17. MGE shall revise the Facility Lease, reflecting each of the lease modifications approved in this Final Decision. Within 45 days after the date this Final Decision is signed, MGE shall submit these revised leases to the Commission for its review and approval, with the revisions highlighted.

18. All books and records underlying any transaction made pursuant to a Facility Lease, Ground Lease, and Ground Sublease shall be made available to the Commission upon request.

19. The Commission retains limited continuing jurisdiction over those terms and conditions expressly set forth in each lease approved by the Commission and set forth in this Final Decision.

Backup and Station Service Agreement

20. The provision in the B&SS Agreement between MGE and the UW that would require MGE to serve the UW Campus during a widespread system outage by electrically isolating the UW Campus and the WCCF from the rest of the grid and serving the UW Campus directly from the WCCF is not approved.

21. MGE may not exempt the UW Campus from having its electric service interrupted during rolling blackouts under the terms proposed in the B&SS Agreement.

22. The method for allocating costs in the B&SS Agreement and the O&M Agreement for station service for the electric energy used in the electric chillers is approved.

23. MGE shall work with the Commission staff to develop a mechanism to monitor the variable costs of plant operations that are allocated to MGE for the electric output of the plant.

24. The Commission retains jurisdiction over the allocations of variable costs in the O&M Agreement.

General Requirements

25. MGE shall notify the Commission within five working days of the date when it commences construction. MGE shall notify the Commission, in writing, within 24 hours of any decision not to proceed with any of the approved project or to enter into any partnership or other arrangement with another entity with respect to the project.

26. Upon completion of construction, the certificate holder shall file with the Commission a complete report of the final costs segregated by plant account and shall explain any variances between the authorized and actual costs.

27. This Final Decision takes effect on the day after it is mailed. The CPCN for the WCCF takes effect when DNR issues all permits and approvals that it identified, pursuant to Wis. Stat. § 196.491(3)(a)3.a., as being required prior to construction of the facility.

Dated at Madison, Wisconsin, _____

By the Commission:

_____

Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

ATTACHMENT A

The Applicants have agreed to make the following changes to the Facility Lease:

(1) The definition of "Purchase Price" needs to be modified to add a new clause (b), which is required to replace the calculation of AFUDC[1] with a calculation of return on capital. The new definition would read as follows:

> "Purchase Price" shall be equal to the sum of the following as of the Lessor Termination Date or Lessee Termination Date, as applicable: (a) the Construction Costs incurred by or on behalf of the Lessor through the Lessor Termination Date or Lessee Termination Date, as applicable, but not more than the Approved Amount; (b) the aggregate amount of outstanding return on Capital with respect to such Construction Costs; and (c) the Monthly Management Fee for each month from the Commercial Operation Date through the month in which occurs the Lessor Termination Date or Lessee Termination Date, as applicable.

(2) In Section 22.7, substitute the term "Financing Documents" for "Security Documents" in the two places that "Security Documents: appears, since "Security Documents" is not defined in Schedule 1.1.

(3) Delete from the definition of GAAP everything after the phrase "from time to time," with the result that it will now read: "GAAP shall mean, with respect to any Person, generally accepted accounting principles in the United States as in effect from time to time."

(4) Modify the definition of Interconnection Agreement to add a reference to the PSC docket number, as well as to provide for its modification from time to time. The definition will now read: "Interconnection Agreement shall mean that certain Interconnection Agreement, dated as of November 21, 2002, between Lessee and American Transmission Company, LLC, Docket No. 137-CE-109, as

[1] Allowance for funds used during construction.

amended from time to time."

(5) Modify the definition of Late Term Improvements to read as follows:

Late Term Improvements shall mean any Improvement constructed pursuant to Section 8.3 of the Facility Lease, as well as: (i) any Improvement constructed subsequent to any such Improvement during the Base Term, if the Lease Term has been extended by the first Renewal Term; (ii) any Improvement constructed subsequent to any such Improvement during the first Renewal Term, if the Lease Term has been extended by the Second Renewal Term; and (iii) any Improvement constructed subsequent to any such Improvement during the second Renewal Term, if the Lease Term has been extended by the third Renewal Term.

COMMISSIONER ROBERT GARVIN
DISSENTING OPINION
Docket 6690-CE-187
October 7, 2004

The majority opinion adopts a new interpretation of the Energy Priorities Law, Wis. Stat. §1.12, in this proceeding that invites considerable uncertainty for future applicants seeking a Certificate of Public Convenience and Necessity (CPCN). In previous CPCN proceedings[4], the Commission has attempted to harmonize the directives of the Energy Priorities Law with those of the Power Plant Siting Law, Wis. Stat. § 196.491(3) by applying a practical legal standard that requires the Commission to decide whether or not there is enough energy conservation, renewable resources, or other cleaner-burning fuels to "cancel or delay" the need demonstrated in proceeding.

The evidence presented in this case demonstrates that energy conservation, renewable resources, or other energy priorities listed in the Energy Priorities Law (Wis. Stat. § 1.12), or their combination, are not cost-effective or technically feasible alternatives that could totally displace the Weston 4 project. Nevertheless, the majority has ordered the applicants, as a condition for approving the CPCN, to submit a plan to capture a minimum of 32 MW of additional cost-effective energy efficiency by the end of 2008 (Order Point 5 at p. 35) I respectfully dissent from this particular finding and order and the accompanying discussion in the Final Decision.

My concern is that the inclusion of an order point which directs the applicants to submit a plan to fund an additional 32 MW in this proceeding creates significant uncertainty as to the manner in which this Commission intends to apply the Energy Priorities Law in future

[4] Dockets 05-CE-117 and 05-CE-130.

proceedings. I also believe that this legal interpretation is inconsistent with the Commission's previously stated understanding of the Energy Priorities Law, which requires the utilization of alternatives only when they could totally displace the proposed project. Moreover, the majority's decision may be interpreted as a significant departure from the Commission's decisions in prior CPCN cases in its application of the Energy Priorities Law that could add not just uncertainty but significantly higher costs to ratepayers. Under the majority's reasoning, I cannot determine what cost or legal constraints would prevent a future Commission from imposing whatever requirement it finds reasonable in order to carry out its broadly stated goal of "maximizing the overall use of preferred options" in interpreting these laws.

In the Power the Future CPCN proceeding (dockets 05-CE-117 and 05-CE-130) , the Commission directed the applicant to file a similar plan to achieve energy efficiency based on their voluntary agreement to spend $20 million over the next decade to support energy efficiency activities. Those proceeding are distinguishable from the present case because the applicant in this proceeding has not agreed to make such an investment as a condition of CPCN approval. In our previous decision, the Commission did not require the capture of energy efficiencies beyond what the applicants were proposing to achieve based on the interpretation of the Energy Priorities Law that the law does not require such efforts unless they would displace the need for the applicant's proposal.

This order point also contradicts the Commission's new policy determination set forth in the recently issued Strategic Energy Assessment (SEA Report) that endorses a different forum than a CPCN proceeding for the Commission to consider whether to authorize a load serving entity to make additional energy efficiency investments under Wis. Stat. § 196.37 (3). By ordering the applicant to submit a plan to capture an additional 32 MW as part of the Weston 4

project application, the majority has contradicted its own recommendations in the SEA Report not to continue to try to deal with the Energy Priorities Law on a CPCN case-by-case basis. The SEA Report states that the "Commission will explore different methods for implementing the Energy Priorities Law that would lead to more effective, overall statewide implementation rather than the current case-by-case consideration." SEA Report at p. 149. This commitment was in accordance with the Commission's unanimous conclusion in the same SEA report that "there appears to be a developing consensus that energy efficiency and renewable resource considerations as outlined in the state's Energy Priorities Law may be better considered in a separate proceeding outside of specific CPCN applications." SEA Report at p. 130.

Finally, the majority's determination also conflicts with the recent report of the Governor's Energy Efficiency and Renewables Task Force, which recommends a separate Commission proceeding to set energy efficiency targets and funding levels, in lieu of trying to do so in individual CPCN dockets. (Report of the Governor's Task Force on Energy Efficiency Renewables, September 2004, p. 20.)

For these reasons, I respectfully dissent from the majority's position.

_____

Robert M. Garvin
Commissioner

CHAIRPERSON BURNEATTA BRIDGE
DISSENTING OPINION
Dockets 05-CE-121/3270-AE-102
November 21, 2003

The Commission has framed its decision with respect to the Wisconsin Energy Priorities Law to require that, in order to be selected and implemented, any given block of conservation or renewable resources must be of sufficient magnitude to entirely displace the need for the construction project at hand (Final Decision, p. 13). I disagree.

The Energy Priorities Law, Wis. Stat. § 1.12(4), and the parallel requirements that bind the Public Service Commission, Wis. Stat. § 196.025, set out a list of options that are to be considered in priority order when the Commission makes decisions that relate to meeting Wisconsin's energy needs. The options, in descending order, begin first with energy conservation and efficiency, move second to renewable resources, and then continue on to specify several preferred fuel types. In my view, the plain language of the two statutes requires the Commission to maximize the overall use of the preferred options to the extent possible. This is consistent with the obvious objective of the law, which is to deploy the more environmentally preferable options first when meeting Wisconsin's need for energy.

By requiring that conservation measures or the use of renewable resources must entirely displace the need for several hundred megawatts of new construction, the Commission has set the threshold so high as to virtually ensure that these options will not be seriously explored or implemented at all in these cases. As a practical matter, the use of conservation and renewable resources is foregone indefinitely because the timing and magnitude of the savings do not coincide perfectly with the need for additional generation capacity. Further, it denies the opportunity for any incremental gains in achieving the highest two priorities specified in the law.

Dockets 05-CE-121/3270-AE-102

I read the Energy Priorities Law to require that conservation and renewable resources be considered and implemented in whatever increments are "cost effective, technically feasible, and environmentally sound." I therefore respectfully dissent on this issue.

Burneatta Bridge
Chairperson

BB:DJG:sp:K:\bb\general\bb co-gen dissent 11-21-03

STATE OF WISCONSIN
SUPREME COURT

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OF WISCONSIN

Clean Wisconsin, Inc. p/k/a Wisconsin's
Environmental Decade Institute, Inc.,
SC Johnson & Son, Inc. and Calpine Corporation
Petitioners-Respondents-Cross-
Appellants-Cross-Respondents,
Town of Caledonia,
Petitioner-Cross-Respondent,

v.

Public Service Commission of Wisconsin and
Wisconsin Department of Natural Resources,
Respondents-Co-Appellants-
Cross-Respondents,
Wisconsin Electric Power Company, W.E.
Power, LLC and Wisconsin Energy Corporation,
Interested Parties-Appellants-
Cross-Respondents,
Dairyland Power Cooperative,
Interested Party-Cross-Respondent,
Madison Gas & Electric Company and
Wisconsin Public Power, Inc.,
Interested Parties-Co-Appellants-
Cross-Respondents,
City of Oak Creek,
Interested Party-Respondent-
Cross-Respondent
Robert H. Owen, Jr.,
Interested Party-Respondent-
Cross-Respondent

Appeal No. 04-3179

Circuit Court Case Nos.
03-CV-003478, 03-CV-003731,
04-CV-00133, 04-CV-00149,
04-CV-00530, 04-CV-00533

(Caption continued on following pages)

BRIEF OF INTERESTED PARTIES-CO-APPELLANTS-CROSS-RESPONDENTS WISCONSIN PUBLIC POWER, INC. AND MADISON GAS AND ELECTRIC COMPANY

APPEAL FROM A FINAL
ORDER OF THE CIRCUIT COURT
FOR DANE COUNTY, THE
HONORABLE DAVID FLANAGAN
PRESIDING

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0204051336

Calpine Corporation,
Petitioner,
v.
Public Service Commission of Wisconsin, and
Wisconsin Department of Natural Resources,
Respondents,
Wisconsin Electric Power Company, Wisconsin
Energy Corporation, W.E. Power, LLC, Dairyland
Power Cooperative, Madison Gas & Electric Company,
Robert H. Owen, Jr., and City of Oak Creek,
Interested Parties.

Clean Wisconsin, Inc. p/k/a Wisconsin's
Environmental Decade Institute, Inc. and SC
Johnson & Son, Inc.,
Petitioners,
v.
Wisconsin Department of Natural Resources,
Respondent,
Wisconsin Public Power, Inc., City of Oak
Creek, Dairyland Power Cooperative, Madison
Gas & Electric Company, Wisconsin Electric
Power Company, Wisconsin Energy Corporation
and W.E. Power, LLC,
Interested Parties.

Calpine Corporation,
Petitioner,
v.
Wisconsin Department of Natural Resources,
Respondent,
City of Oak Creek, Dairyland Power
Cooperative, Madison Gas & Electric Company,
Wisconsin Public Power, Wisconsin Electric Power
Company, Wisconsin Energy Corporation
and W.E. Power, LLC,
Interested Parties.

City of Oak Creek,
Petitioner,

v.

Public Service Commission of Wisconsin,
Respondent.

Town of Caledonia,
Petitioner,

v.

Public Service Commission of Wisconsin,
Respondent,

Wisconsin Electric Power Company,
Wisconsin Energy Corporation, W.E. Power, LLC,
Dairyland Power Cooperative, Madison Gas &
Electric Company, Robert H. Owen, Jr., and
Wisconsin Public Power, Inc.,
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February 4, 2005

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3 Charles H. Koch, Jr., *Admin. L. & Prac.*
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March 2002 40

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Wisconsin Public Power, Inc. ("WPPI") and Madison Gas and Electric Company ("MGE") concur with the Statement of Issues appearing in the brief filed by Co-Appellants-Cross-Respondents Wisconsin Electric Power Company, W.E. Power, LLC, and Wisconsin Energy Corporation (collectively, "We Energies").

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to this court's order dated January 5, 2005, oral argument has been scheduled for March 30, 2005, at 1:30 p.m.

WPPI and MGE support publication of the court's decision for the reasons stated in the brief filed by We Energies.

STATEMENT OF THE CASE

WPPI and MGE concur in the Statement of the Case appearing in the brief filed by We Energies.

ARGUMENT

I. INTRODUCTION.

WPPI and MGE urge the court to affirm the final decision of the Public Service Commission of Wisconsin ("Commission" or "PSC") approving a Certificate of Public Convenience and Necessity ("CPCN") for the construction of two electric generating plants known as the Elm Road Generating Station ("ERGS"). WPPI and MGE rely in part on the brief of We Energies, which addresses the full range of issues raised by We Energies' appeal as well as the appeals of WPPI and MGE. Rather than burden the court by repeating We Energies' arguments, WPPI and MGE adopt those arguments.

This brief focuses on four points. Sections II and III provide important background. Section II explains the roles of WPPI and MGE in meeting the electric needs of many

Wisconsin energy consumers. Section III concerns Wisconsin's need for low-cost, reliable baseload electric generation, and the importance of ERGS in meeting that need. Section IV describes the PSC's role in approving ERGS. That role necessarily involves the PSC in limited policymaking as it applies its broad expertise to determine what is "in the public interest." Section V addresses, from a general perspective, how the PSC applied its expertise and why this court should give great weight deference to such expertise.

II. WPPI AND MGE SERVE NEARLY 300,000 ELECTRIC CUSTOMERS THROUGHOUT WISCONSIN.

WPPI, a municipal electric company formed pursuant to Wis. Stat. § 66.0825, is the wholesale power supplier to its thirty-nine member owners.[1] These member municipalities own

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[1] WPPI's members are the cities and villages of Algoma, Black River Falls, Boscobel, Brodhead, Cedarburg, Columbus, Cuba City, Eagle River, Florence, Hartford, Hustisford, Jefferson, Juneau, Kaukauna,

and operate electric distribution systems, and sell electricity purchased at wholesale from WPPI to over 145,000 retail customers throughout Wisconsin under rates, terms and conditions regulated by the Commission.

WPPI has an interest in the outcome of this appeal, both as a long-term wholesale electric customer of Wisconsin Electric Power Company (WEPCO) and as a potential owner of an undivided interest in each of the ERGS units. As a long-term customer of WEPCO, WPPI supports the ERGS project—a baseload coal project—as good for WPPI members and the state. From an ownership perspective, WPPI has options to participate as an 8.33% (approximately 50 MW) owner in each

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Lake Mills, Lodi, Menasha, Muscoda, New Glarus, New Holstein, New London, New Richmond, Oconomowoc, Oconto Falls, Plymouth, Prairie du Sac, Reedsburg, Richland Center, River Falls, Slinger, Stoughton, Sturgeon Bay, Sun Prairie, Two Rivers, Waterloo, Waunakee, Waupun, Westby and Whitehall, Wisconsin.

of the proposed ERGS units. (R. 18-PSC 150, p. 31.)[2] Subject to required board approval, WPPI intends to exercise its options, and has included the ERGS units in its power supply plans.

MGE is a public utility engaged in the generation and distribution of electricity to approximately 132,000 customers in Dane County. MGE also holds options to own 8.33%, or approximately 50 MW, of each of the two ERGS units. (R. 18-PSC 150, p. 31.) Subject to final board of directors' approval, MGE plans to exercise its options in the ERGS plants as a means of meeting a part of its customers' growing needs. MGE thus has an interest in this appeal as a potential part-owner of the ERGS plants.

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[2] Citations in the form R. __-PSC __ refer to the Document Number in this court (R. __) and the PSC Record Item number (PSC __), both as shown on the Index of Record.

III. NOT ONLY WEPCO'S CUSTOMERS, BUT ALSO WPPI'S AND MGE'S CUSTOMERS HAVE A NEED FOR ERGS.

WEPCO's customers need ERGS. In its final decision, the Commission found that "WEPCO's demand forecast demonstrates a need for new baseload generation within the next decade." (R. 18-PSC 150, p. 5.) The trial court affirmed the Commission's conclusion that WEPCO needs more generation capacity both to replace aging facilities and to meet increasing demand. (R. 84, pp. 25-26.)

Baseload generating plants, as the name implies, are the backbone of the state's electric generating capacity. They meet the bulk of the state's electric needs by operating (to the maximum extent possible) 24 hours a day, 7 days a week. (R. 18-PSC 157, p. 536.) Typically, they are large facilities (over 500 MW), with high capital costs. Offsetting these high capital costs are stable, relatively low fuel costs, *e.g.*, coal or

nuclear. (R. 18-PSC 157, p. 537.) Because of their low fuel costs and near-continuous operation, baseload units produce electricity at a significantly lower operating cost per unit of output than "intermediate" units or "peaking" units. Intermediate or peaking units often operate sporadically or at less than full capacity, as they are ramped up or down to meet fluctuations in demand above the base, ongoing electric demand. (R. 18-PSC 157, pp. 536-37.) As compared to baseload units, intermediate or peaking units usually are smaller, less capital intensive, and have higher fuel costs, *e.g.*, natural gas. (*Id.*)

As this case demonstrates, a baseload plant has a long lead-time, including about three years for regulatory approvals (R. 18-PSC 157, p. 745), followed by about four years for construction. (R. 18-PSC 157, p. 536-37.) No new baseload

plants have been built in Wisconsin since 1985. (R. 18-PSC 119, p. 67.)

Customers served by WPPI and MGE need ERGS. The ERGS project has particular significance for WPPI and MGE because of their size. Both entities are relatively small compared to WEPCO and the other investor-owned utilities in eastern Wisconsin (Wisconsin Public Service Corporation and Wisconsin Power and Light Company). WPPI and MGE cannot, as a practical matter, construct on their own large, baseload plants like the two 615 MW coal-fired ERGS plants. WPPI and MGE seldom have an opportunity like the one ERGS presents: a chance to share in the economies of scale associated with large, baseload generating plants in order to meet their public utility obligation to serve customers at the lowest reasonable cost. To do so, each should add baseload coal

resources to their electric generating portfolios. ERGS is the only such project currently available to WPPI and MGE.

The Commission has approved both WPPI's and MGE's participation as part-owners of the ERGS plants. On July 12, 2004, the PSC issued a certificate of authority ("CA") approving WPPI's participation as part owner of the ERGS plants. (Dockets 6685-CE-106 and 107, Order dated July 12, 2004 and amended July 29, 2004) ("WPPI CA"). Earlier, on June 25, 2004, the Commission issued a certificate of authority approving MGE's participation as part owner of the two ERGS plants. (Dockets 3270-CE-124 and 125, Order dated June 25, 2004 and amended July 16, 2004) ("MGE CA").

In approving the CA's for WPPI and MGE, the Commission specifically found as follows with respect to their participation as part owners in the proposed ERGS facilities:

- The proposed facilities are necessary to provide adequate and reliable present and future service. (WPPI CA, p. 2; MGE CA, p. 2.)

- The proposed facilities are necessary for WPPI (MGE) to meet capacity and energy sale obligations to its members/customers. (*Id.*)

- Alternative plans, designs, and routes for the proposed facilities have been considered but no other reasonable alternatives to the proposed project appear feasible and would provide adequate support in a more reliable, timely, cost-effective, and environmentally acceptable manner. (WPPI CA, p. 2; MGE CA, pp. 2-3.)

- Neither energy conservation, renewable resources, nor other energy priorities listed in Wis. Stat. §§ 1.12 and 196.025 would be a cost-effective alternative to this project. (WPPI CA, p. 2; MGE CA, p. 3.)

- When this project is placed in operation, the addition to WPPI's (MGE's) cost of service associated with the project will be proportionate to the increase in value or available quantity of WPPI's (MGE's) service. (*Id.*)

- The general public interest and public convenience and necessity require the completion

of the proposed project. (WPPI CA, p. 3; MGE CA, p. 3.)

- No unusual circumstances suggesting the likelihood of significant environmental consequences are associated with the project. An Environmental Impact Statement for the ERGS units was prepared by the Commission in docket 05-CE-130. (*Id.*)

In the MGE CA order, the Commission also noted that PSC staff's analysis agreed with MGE that ownership of undivided shares in the two ERGS units with in-service dates of 2009 and 2010 "represents the least-cost plan for meeting MGE's future needs." (MGE CA, p. 4.) There is no legal challenge to the WPPI or MGE CA orders, nor to their findings that the customers served by WPPI and MGE need additional electric supply and that ERGS best meets those needs.

WPPI and MGE submit that the record shows a need for new baseload coal capacity to serve Wisconsin generally, and

WEPCO specifically. (R. 18-PSC 157, pp. 536-37; R. 18-PSC 119, pp. 63-81.) WPPI and MGE also have such a need, and it can best be met by ERGS.

IV. BEFORE APPROVING ERGS, THE PSC CONDUCTED A THOROUGH PUBLIC PROCESS AND A COMPREHENSIVE EVALUATION AND ANALYSIS OF COMPLEX ENERGY ISSUES.

Before it approved the ERGS proposal, the Commission conducted a thorough public process, extensive evidentiary hearings, and a comprehensive evaluation and analysis of numerous and complex issues involving the state's energy policy.

The process followed in this case enabled the PSC to give full consideration to community and environmental concerns. Once it found the application complete, the PSC used virtually all of the maximum statutory period of 360 days to process the application, conduct hearings, and reach a decision. Wis. Stat.

§ 196.491(3)(g). The PSC and DNR prepared a detailed draft environmental impact statement and evaluated numerous public comments. Ultimately, they prepared a final EIS comprising some 880 pages. (R. 18-PSC 119.) The agencies followed all statutory procedures and full timelines pertaining to an EIS. The trial court affirmed the adequacy of the EIS. (R. 84, pp. 45-46.)

The PSC conducted a pubic hearing process that gave to all participants the rights of discovery and an opportunity to review the applicants' complete pre-filed case in advance of hearings. The technical hearings lasted eleven days and were followed by an additional three days of public testimony. Those hearings produced a record consisting of roughly 6,000 pages of testimony and 302 exhibits. (R. 18-PSC 157-60; R. 38.) Each party had an opportunity to file initial and reply briefs.

While the sheer volume of the record is impressive, more imposing is the technical and complex nature of the information that the PSC needed to evaluate before making its decision. More than 68 witnesses testified in the technical hearings on diverse topics. (R.18-PSC 157; 159.) For example, on the subjects of energy priorities and fuel diversity, the Commission reviewed information on the following subjects, among others:

- renewable resources, including wind energy and its availability and cost in Wisconsin (*see, e.g.,* R. 18-PSC 157, pp. 736, 743, 746-48, 3781-86; R. 18-PSC 119, pp. 89-97, 106-08).

- conservation: how much additional energy savings is available, achievable, and cost-effective through conservation (*see, e.g.,* R. 18-PSC 157, pp. 988-1057; 3750-3767; R. 18-PSC 119, pp. 84-89).

- natural gas supply: plans for new gas wells, the potential for another pipeline from Alaska, the prospects for shipping liquified natural gas from other countries, and projections of future prices, price volatility, and deliverability issues for

natural gas (*see, e.g.*, R. 18-PSC 157, pp. 875-97, 917-81; R. 18-PSC 119, pp. 98-102, 116-25, 127-28).

- coal: availability and price projections (*see, e.g.*, R. 18-PSC 119, pp. 50, 98, 115-16, 126-27).

- oil and low sulfur coal: environmental and permitting issues (*see, e.g.*, R. 18-PSC 157, pp. 581, 744, 1199-1200).

- Integrated Gasification Combined Cycle (IGCC) technology: cost and availability. (*see, e.g.*, R. 18-PSC 157, pp. 1087-95, 4517-37, 4701-09; R. 18-PSC 119, pp. 49, 151-60).

In reaching a final decision on ERGS, the PSC relied not only on the testimony and exhibits of expert witnesses sponsored by various parties. It also received independent testimony from eleven members of its own staff and four members of DNR staff, all of whom are experts in their own right in the fields of economics, engineering, environmental sciences, or other relevant disciplines.

The point of detailing the depth and complexity of the record is to emphasize that the Commission, in deciding whether the ERGS project is in the public interest, had to do more than just understand highly technical information. It had to synthesize and evaluate that information to reach an informed judgment that balances many competing interests affected by the state energy policy. In other words, the PSC was applying deeply based expertise and judgment to reach a decision that involves limited policymaking within the bounds set by the legislature.

There is perhaps no more clear cut example of policy-based decisionmaking by an agency than the PSC deciding under the CPCN statute, Wis. Stat. § 196.491, whether to approve construction of a large electric generating facility or a high-voltage transmission line. One of the statutory criteria is

whether the design and location of the proposed facility is "in the public interest" considering a variety of factors, including "alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors." Wis. Stat. § 196.491(3)(d)3. The United States Supreme Court has found that "the 'public interest' standard calls for an inherently policy-based decision best left in the hands of an agency." *United States v. Bean*, 537 U.S. 71, 77 (2002). In this brief, when we say the PSC is engaged in "policymaking" in deciding whether to issue a CPCN, we mean simply that the legislature has delegated to the PSC the authority to make CPCN decisions "in the public interest." The broad public interest standard necessarily requires that the PSC make policy-based judgments.

In carrying out its responsibilities under the CPCN statute, the PSC was implementing a regulatory scheme that is highly technical and complex. PSC decisions within that regulatory scheme involve reconciling competing policies—*e.g.*, environmental concerns and the need for a timely, adequate and reliable supply of electricity at reasonable prices. The Commission recognized its policymaking role:

> The Commission must consider the extent to which a proposal may cause individual hardships, as well as concerns about its engineering, economics, safety, reliability, environmental impacts, interference with local land use plans, and impact on wholesale competition. The Commission is required to balance all of these competing elements, which frequently lead to different directions; no single primary factor is the measure of a CPCN project. Thus, the Commission is responsible for harmonizing the Energy Priorities Law and the Power Plant Siting Law, in order to determine what is in the public interest.

(R. 18-PSC 150, pp. 15-16.)

Where the agency order under review involves, in significant part, delegated policy decisions, as does the PSC's order in this case, a court should be especially careful to avoid substituting its judgment for that of the agency.

Everyone, even the trial court, recognizes the propriety of judicial deference when the subject matter is highly technical and the agency has technical expertise. Thus, the trial court deferred to the PSC on subjects like projections of WEPCO's future electric needs (R. 84, pp. 25-26) and whether the PSC's data inputs were reasonable for the EGEAS computer modeling that evaluates optimal ways to meet future electric needs. (R. 84, pp. 26-27.) This deference to agency actions is nothing new. The point that the trial court apparently missed, however, is that in processing a CPCN application and deciding what is in the public interest, the PSC acts as a quasi-judicial,

quasi-legislative body. *See Calumet Serv. Co. v. City of Chilton*, 148 Wis. 334, 363-64, 135 N.W. 131 (1912). As such, it has been charged by the legislature with evaluating competing policy considerations within defined bounds. Those policy considerations quite properly influence the PSC's decisions, including its interpretation and harmonization of applicable statutes and rules.

In the leading treatise *Administrative Law and Practice*, author Charles H. Koch, Jr. explains why limited policymaking is the province of agencies acting on delegated authority, and not the province of the courts:

> The most basic justification for very limited review of agency policymaking is that Congress intends the agency not the courts to carry forward the policymaking function begun by the legislation.... As has often been observed, in our complicated society the legislative branch cannot perform all or perhaps even a major part of this function. Thus agencies are often given major policymaking

> functions. The courts must allow an agency freedom in making policy judgments.

3 Charles H. Koch, Jr., *Admin. L. & Prac.* § 12.31[3] (2d ed. 2005) (footnotes omitted).

The treatise goes on to explain:

> Policymaking requires substantial and deeply based expertise. Expertise represents the acquisition of superior knowledge and experience that often makes the agency superior in finding the general facts that go into policymaking. More important here, however, is the superior ability of experts to synthesize information into a judgment.... It is the generation of this expert judgment that supports [agency] dominance over policymaking issues. It is the major reason why the legislature assigns the task to the agency and why courts should meticulously avoid circumventing that choice. When this broader perspective is important, the agency rather than the court should have a strongly dominant role.

Id. (footnotes omitted).

Delegated policymaking by an agency includes the discretionary authority to resolve any ambiguities and to fill in gaps in legislation in the course of carrying out agency

responsibilities that involve policy considerations. In other words, there is often a policy component to an agency's construction of a statute or rule, and where there is, courts should defer to the agency. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), the Supreme Court said:

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

(Footnotes omitted.)

The high court further said:

> In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing

> interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.

Id. at 865 (footnotes omitted).

As demonstrated in Section V below, the trial court erred in construing certain CPCN-related rules and statutes because the court failed to appreciate how the Commission's expertise (including the kind of experience and expertise involved in making policy choices) properly informs the Commission's construction of those rules and statutes.

V. THE TRIAL COURT ERRED IN FAILING TO GIVE ADEQUATE DEFERENCE TO THE COMMISSION'S EXPERTISE ON MATTERS INVOLVING THE STATE'S ENERGY POLICY. THE RESULTING DECISION THREATENS THE ENTIRE APPROVAL PROCESS FOR MAJOR IMPROVEMENTS TO THE STATE'S ELECTRIC INFRASTRUCTURE.

WPPI and MGE find the trial court decision very troubling on one level because it threatens to deprive customers

of the ERGS option—the option that the PSC found to be the most reliable, timely, cost-effective, and environmentally acceptable for meeting customers' needs. On another level, the decision is even more troubling because, unless promptly reversed, it threatens to jeopardize the entire process by which the PSC authorizes construction projects needed to serve the electric customers.

The trial court failed to give adequate deference to the Commission's application of its own rule, Wis. Admin. Code § PSC 111.53, on when a CPCN application shall be deemed complete. On each of the three completeness-related issues (environmental permitting, alternate sites, and transmission agreements), the trial court should have given great weight deference to the Commission's construction. Wisconsin recognizes that great weight deference to an agency's

construction is appropriate where the agency is utilizing its expertise and where the agency has substantial experience in administering the rule or statute being construed. *Citizens' Util. Bd. v. PSC*, 211 Wis. 2d 537, 551, 565 N.W.2d 554 (Ct. App. 1997). WPPI and MGE simply ask the court to recognize two things: First, the PSC has vast experience in the field of utility regulation generally (*City of Saint Francis v. Pub. Serv. Comm'n*, 270 Wis. 91, 98, 70 N.W.2d 221 (1955)) and in processing CPCN applications specifically (*Responsible Use of Rural & Agric. Land (RURAL) v. Pub. Serv. Comm'n*, 2000 WI 129, ¶¶ 23-24, 239 Wis. 2d 660, 619 N.W.2d 888). Second, administering the CPCN process necessarily involves the PSC in using a special kind of expertise: making judgments, based on the Commission's broad experience in the energy field, that balance conflicting interests. According great weight deference

to the PSC's interpretations does not mean the court has no role. Rather, it means that the court should not overturn the PSC's interpretation unless it is "irrational." *Beloit Education Ass'n v. WERC*, 73 Wis. 2d 43, 67, 242 N.W.2d 231 (1976).

Here, the trial court not only failed to accord great weight deference to the PSC's construction of completeness requirements, but accorded it no deference at all. This was because the court concluded that the language at issue was not ambiguous, supposedly placing the court in as good a position as the PSC to understand its true meaning. Thus, for example, the court found no ambiguity in the phrase "alternative locations," as that phrase was used in Wis. Stat. § 196.491(3)(d)3. (R. 84, p. 14.) To the court, the absence of ambiguity meant there was "no need to look to other sources for assistance." *Id.* Similarly, the court found the requirement in

PSC 111.53(1)(f)1 relating to other regulatory approvals to be "plain and unambiguous" (*id.* at 19), rendering the PSC's interpretation erroneous and presumably entitled to no weight. The same was true of the requirement in Wis. Admin. Code PSC 111.53(1)(e)1 relating to what information about transmission facilities must appear in a CPCN application. In the court's view, that requirement was "clear and unambiguous." *Id.* at 21.

Rather than relying on a "plain meaning" approach, the trial court should have recognized that context is important to meaning, and the Commission better understands the context. In *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 61, 271 Wis. 2d 633, 681 N.W.2d 110, this court recently said:

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears.

> Therefore, the statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

Id., ¶ 46. *See State v. Cole*, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700 (court must ascertain the legislative intent from the language of the statute in relation to its context, history, scope and objective intended to be accomplished, including the consequences of alternative interpretations).

As has been aptly noted, "the distinction between 'plain' and 'ambiguous' is in the eye of the beholder." *Kalal*, 2004 WI 58, ¶ 63 *(Abrahamson, C.J., concurring) (citing Juneau County v. Courthouse Employees, Local 1312*, 221 Wis. 2d 630, 642 n.8, 585 N.W.2d 587 (1998)). Here, rather than deferring to the judgment of the PSC—a "beholder" that had the expertise necessary to properly interpret and apply the statutory

scheme—the trial court took a simplistic and uninformed view of the words on the page. That view ignored the context, scope, and objectives of the statutes and rules, and thus unwittingly produced absurd and unreasonable results. The PSC, on the other hand, applied its considerable expertise in reading the statutes and rules in context, as a whole, and harmonized them in a sensible way.

The PSC, with its vast experience and understanding of the electric industry, will understand better than a court what information the Commission needs to process an application. The PSC will better understand what kind of information practically and realistically should be required at the commencement of Commission proceedings. The PSC will better understand the real-world interplay between the CPCN approval process and the DNR's environmental permitting

process. The PSC's broad-based understanding of such issues is a kind of expertise that goes beyond mere technical competence.

The PSC will also have a better understanding than a court of the public's opportunity to participate in CPCN proceedings. For example, any member of the public has an opportunity to review the applicant's pre-filed testimony and exhibits far in advance of the hearings and to conduct extensive discovery. The Commission's pervasive knowledge of the entire CPCN process enables it to make an informed judgment about how to construe its own rules relating to a completeness determination. In its informed judgment, the PSC concluded that the purpose of the completeness determination is to ensure that the *Commission* has sufficient information to start the review process and complete it within 360 days. The purpose is

not, as the trial court incorrectly assumed, to ensure that the *public* has, on day one (even before discovery), all detailed information that may be developed and considered at hearings and before a final decision is made.

Perhaps the most striking example of how the trial court decision stymies the whole PSC approval process is the court's construction of the permitting aspect of the Commission's completeness rule. The trial court ruled that the Commission may not deem a CPCN application complete (and thus may not even begin the CPCN process) until the applicant has actually *obtained* the other regulatory approvals required for construction and operation of the proposed facility. (R. 84 at 19.) Indeed, since a CPCN application must include information on at least two proposed sites, and since whatever needs to be filed in regard to regulatory approvals must be filed for each proposed

site, the trial court's ruling would actually require in-hand regulatory approvals for two or more proposed plants before the CPCN process could commence. If doable at all, this way of proceeding would put an unbearable strain on other regulatory agencies, like the DNR, and would add significantly to cost and lead-time.

As a practical matter, the DNR must permit the project that is actually to be built and operated, not other, hypothetical projects that will not be built. The purpose of the CPCN proceeding is for the PSC to determine what is the appropriate project to be built and operated. Conducting DNR permit proceedings for alternative projects proposed by an applicant like WEPCO would be a waste of time for everyone, including the DNR. At least one of the proposed projects will never become a real project that requires permits. The other proposal

also may never be a real project, because the PSC has discretion to grant the CPCN application, deny the application, or grant the application with modifications. The difference between the project initially proposed and the one ultimately approved (in terms of size, design, and other factors critical to environmental permitting) depends upon the PSC order, which in turn depends upon the record made by participants in the CPCN process. The CPCN order specifies the real project that needs permits.

In this case, for example, one of the contested issues was whether the project should utilize super-critical coal technology, as proposed by WEPCO, or whether it should use coal gasification. The latter involves significantly different technology, different environmental impacts, and hence very different DNR permitting considerations. (R. 18-PSC 119, pp. 139-60.) Similarly, there was an issue on whether the

plants' cooling system should be based on water intake from Lake Michigan or on cooling towers. Again, these are two different technologies with significantly different environmental impacts, and thus different DNR permitting considerations. (R. 18-PSC 119, pp. 236-57; 455-57; 460; 462; 465-66.)

The regulatory regime, as created by the trial court's construction of the PSC's completeness rule, is unworkable in the real world. At best, at least half of the time and money expended for advance approvals would be wasted because the best an applicant can do is secure approval to proceed at one of the proposed sites. In short, the trial court's construction of the PSC rule on completeness leads to absurd consequences and should have been rejected by the court for that reason alone.

The trial court also failed to give adequate deference to the PSC on the alternate site issue. Applying its extensive

regulatory experience in site selection, the PSC has developed a practical test to determine whether proposed sites are genuine alternatives: the alternative sites must each be feasible locations and they must be sufficiently distinct to offer different packages of costs and benefits. (R. 18-PSC 150, p. 45.) The PSC will have a better understanding than a court of when two proposed sites for a generation facility offer genuine alternatives to consider when the PSC makes its public interest determination. The PSC will better understand how much information it needs about alternate locations in order to evaluate them in the public interest calculus. In making its judgments, the PSC will be well-informed about how plentiful or scarce bona fide alternate locations may be, considering access to transmission, access to cooling water, proximity to rail lines (in the case of coal),

acceptance by local citizens and officials, and a host of other factors.

The PSC, thus, will understand better than a court that a genuine second site located one-half mile from the first (as applicants proposed here) may present a more meaningful alternative location than many geographically more distant sites. That is true even though more distant, but unworkable, sites might satisfy the trial court's less-informed test for what qualifies as a second site under the PSC's rule.

The trial court failed to appreciate that the Commission, in construing the alternate site requirement, was applying its broad based expertise, its policy-related experience, in the electric energy arena. When, as here, the PSC applies such expertise in construing statutes and rules relating to the CPCN

process, the court should accord great weight deference to the PSC's construction.

Similarly, in construing that portion of the PSC's completeness rule that pertains to transmission information, the Commission will understand better what it needs to process a CPCN application. The trial court's view that it is necessary to have final, executed transmission agreements for each alternate proposal is simply unrealistic. The Commission's judgment that it is sufficient to have extensive information about transmission upgrades, costs, agreements, and system impacts is an informed one. The Commission's judgment is based on broad experience with transmission company practices relating to the timing of studying, planning, contracting for, and constructing proposed new transmission facilities.

Likewise, implementing the Energy Priorities Law, Wis. Stat. §§ 1.12 and 196.025, in the context of a CPCN case, involves PSC expertise. In enacting the Energy Priorities Law, the legislature expressly stated that agencies have "substantial discretionary authority" in energy-related decisions. 1993 Wisconsin Act 414, Prefatory Note. In the same Note, the Legislative Council committee stated that "compliance with the directive that agencies follow the priority list" should be determined based on "an overall pattern of decisions made by each agency...." *Id.* From its better vantage point, the PSC will understand how its entire pattern of decisions, over many cases, implements the Energy Priorities Law. The trial court has only a myopic view of one decision.

Further evidence that the PSC's decision to issue a CPCN for construction of ERGS is imbued with policy considerations

is apparent when one recognizes that the Commission's decision depends not just on adjudicative facts, but also on "general" or "legislative" facts, such as the state's need for fuel diversity in its mix of generating plants. The Koch treatise recognizes that agency decisions based on general facts are inherently policy-based, and hence entitled to substantial judicial deference:

> Judicial restraint in the face of findings of general fact results from several factors. The agencies generally have or develop expertise as to all general facts that are relevant to their functions. Often this expertise is more experience than actual knowledge. But the agency nonetheless has had broader experience with a wide range of general facts and hence is often capable of making a more sophisticated decision as to general facts.
>
> The dominance of the agency may also depend on its special competence at evaluating the correctness of findings of general facts.... Judges often seize on the most obvious answer but a sophisticated decisionmaker sees the full complexity of the question. If the court abuses its position, it adds inaccuracy. A reviewing court then must be tolerant of the administrative conclusion if the program

> is to have the sophistication envisioned by the delegation to the agency in the first place.

3 Charles H. Koch, Jr., *Admin. L. & 6Prac.* § 12.24[2] (2d ed. 2005).

Applying the Energy Priorities Law in a CPCN case is a complex endeavor. Before alternative solutions may be prioritized, the Commission must first identify the public's need with specificity, and then determine which alternatives adequately and truly meet that need. Clearly, the Commission has an obligation under Wis. Stat. § 196.025 to implement the priorities established in Wis. Stat. § 1.12 "to the extent cost-effective and technically feasible." Just as clearly, the Commission has other concurrent obligations, including a requirement in the CPCN statute that a utility-proposed facility "satisfy the reasonable needs of the public for an adequate supply of electric energy." Wis. Stat. § 196.491(3)(d)2.

Determining the "reasonable needs of the public" and deciding what constitutes an "adequate supply of electric energy" require that the Commission evaluate many factors. The public's need, for example, is not a generic concept. The need may be for peaking capacity, intermediate capacity, or baseload capacity. (R. 18-PSC 157, p. 536-37.) The best cost-effective and technically feasible solution will vary according to what need must be met, and under what timeline. (*Id.*) Similarly, an adequate supply of electric energy cannot be gauged simply by numbers of megawatts. Wisconsin needs some plants to run "round the clock" and others that can start and stop when electric usage changes. Cost and reliability are important considerations, particularly in today's economic environment, and fuel type and technology have a major impact on cost and reliability.

Properly construed and applied, the Energy Priorities Law serves to rank those options that the Commission has concluded are cost effective, technically feasible, and will, in fact, meet the public's need for an adequate supply of electric energy. The priorities law does not, in itself, decide what the needs are or determine what sources of supply are cost effective, technically feasible and will adequately meet those needs. It is the PSC that must deal with the practicalities of what sources are feasible, affordable, and available on a timely basis. It is the PSC and entities like WEPCO, WPPI and MGE that will be held accountable if the power supply is not adequate to meet the public's need.

Fuel diversity bears directly on the determination of what sources will constitute an adequate supply to meet the public's need. The importance of fuel diversity (and the consequences

of too little diversity) is better understood by the PSC than by a court. Several factors point to coal as the first choice for new baseload capacity, including the price volatility of gas, and the undesirability (for reliability and price volatility reasons) of relying exclusively on gas to fuel all recent vintage plants. (R. 18-PSC 157, pp. 539-41; R. 18-PSC 119, pp. 80-89.) There have been no major coal plant additions in Wisconsin for nearly twenty years. *Energy Information Administration, Inventory of Electric Utility Power Plants in the United States 2000*, March 2002. In that time, approximately 8225 MW of new gas-fired capacity have been built or authorized. (*Id.*; R. 18-PSC 119, pp. 69-70.) In upcoming years, a significant portion of Wisconsin's aging coal capacity will be due for retirement. The fuel diversity consideration raises the policy question whether all our new eggs should be in one basket. It was "the

Commission's policy judgment that while natural gas-fired generating facilities may be better suited for peak and intermediate load generation, coal-fired generation provides the most practical means to serve WEPCO's needs for baseload capacity." (R. 18-PSC 150, p. 21.) The Commission is uniquely qualified to make this policy judgment.

In summary, the Commission's interpretation of the statutes and rules that govern the CPCN approval process is linked to complex choices on the subject of state energy policy—choices the legislature directed the Commission to make. The trial court failed to recognize that the Commission is applying a special form of expertise in that process, and thus failed to give great deference to the Commission's decisions. This court should avoid that same mistake.

CONCLUSION

This court reviews the Commission's CPCN order directly. For the reasons stated herein and in the We Energies and PSC briefs, the court should affirm the Commission's order.

Dated: February 4, 2005.

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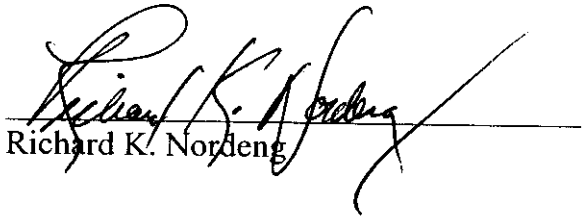
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,015 words.

Dated: February 4, 2005.



Richard K. Nordeng

STATE OF WISCONSIN
SUPREME COURT

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CLERK OF SUPREME COURT
OF WISCONSIN

Clean Wisconsin, Inc. p/k/a Wisconsin's
Environmental Decade Institute, Inc.,
SC Johnson & Son, Inc. and Calpine Corporation
Petitioners-Respondents-Cross-
Appellants-Cross-Respondents,
Town of Caledonia,
Petitioner-Cross-Respondent,
v.
Public Service Commission of Wisconsin and
Wisconsin Department of Natural Resources,
Respondents-Co-Appellants-
Cross-Respondents,
Wisconsin Electric Power Company, W.E.
Power, LLC and Wisconsin Energy Corporation,
Interested Parties-Appellants-
Cross-Respondents,
Dairyland Power Cooperative,
Interested Party-Cross-Respondent,
Madison Gas & Electric Company and
Wisconsin Public Power, Inc.,
Interested Parties-Co-Appellants-
Cross-Respondents,
City of Oak Creek,
Interested Party-Respondent-
Cross-Respondent
Robert H. Owen, Jr.,
Interested Party-Respondent-
Cross-Respondent

Appeal No. 04-3179

Circuit Court Case Nos.
03-CV-003478, 03-CV-003731,
04-CV-00133, 04-CV-00149,
04-CV-00530, 04-CV-00533

(Caption continued on following pages)

APPENDIX OF
INTERESTED PARTIES-CO-APPELLANTS-CROSS-RESPONDENTS
WISCONSIN PUBLIC POWER, INC.
AND MADISON GAS AND ELECTRIC COMPANY

APPEAL FROM A FINAL
ORDER OF THE CIRCUIT COURT
FOR DANE COUNTY, THE
HONORABLE DAVID FLANAGAN
PRESIDING

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0204051353

Calpine Corporation,
Petitioner,

v.

Public Service Commission of Wisconsin, and
Wisconsin Department of Natural Resources,
Respondents,
Wisconsin Electric Power Company, Wisconsin
Energy Corporation, W.E. Power, LLC, Dairyland
Power Cooperative, Madison Gas & Electric Company,
Robert H. Owen, Jr., and City of Oak Creek,
Interested Parties.

Clean Wisconsin, Inc. p/k/a Wisconsin's
Environmental Decade Institute, Inc. and SC
Johnson & Son, Inc.,
Petitioners,

v.

Wisconsin Department of Natural Resources,
Respondent,
Wisconsin Public Power, Inc., City of Oak
Creek, Dairyland Power Cooperative, Madison
Gas & Electric Company, Wisconsin Electric
Power Company, Wisconsin Energy Corporation
and W.E. Power, LLC,
Interested Parties.

Calpine Corporation,
Petitioner,

v.

Wisconsin Department of Natural Resources,
Respondent,
City of Oak Creek, Dairyland Power
Cooperative, Madison Gas & Electric Company,
Wisconsin Public Power, Wisconsin Electric Power
Company, Wisconsin Energy Corporation
and W.E. Power, LLC,
Interested Parties.

City of Oak Creek,
Petitioner,
v.
Public Service Commission of Wisconsin,
Respondent.

Town of Caledonia,
Petitioner,
v.
Public Service Commission of Wisconsin,
Respondent,

Wisconsin Electric Power Company,
Wisconsin Energy Corporation, W.E. Power, LLC,
Dairyland Power Cooperative, Madison Gas &
Electric Company, Robert H. Owen, Jr., and
Wisconsin Public Power, Inc.,
Interested Parties.

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February 4, 2005

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18-150	November 10, 2003 PSC Final Decision	00101-165
18-76	April 18, 2003 PSC Order Denying Petition to Review Interim Determination	00166-171
84	November 29, 2004 Order Upon Judicial Review of Public Service Commission Order	00172-225
	December 14, 2004 Petition of the PSC and the WDNR for Bypass and Expedited Consideration of this Appeal, including Affidavit of Robert D. Norcross	00226-258
17	Record List of Respondents PSC and WDNR, filed 01/30/04	00259-271

Date Mailed
November 10, 2003

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Wisconsin Electric Power Company; Wisconsin Energy Corporation; and W.E. Power, LLC; for a Certificate of Public Convenience and Necessity for Construction of Three Large Electric Generation Facilities, the Elm Road Generating Station, and Associated High Voltage Transmission Interconnection Facilities to be Located in Milwaukee and Racine Counties	05-CE-130
Application for Approval of Affiliated Interest Agreements Between Wisconsin Electric Power Company and Elm Road Generating Station	05-AE-118

Introduction

This is the final decision regarding Part II of the proposal filed by Wisconsin Energy Corporation (WEC) and several of its subsidiaries to construct new electric generating plants, which the applicants have named Power the Future (PTF). The Commission received the initial application for the approvals needed to build PTF on January 31, 2002.

In its original form, the PTF application proposed to construct a total of five new generating plants: two natural gas-fired units at Port Washington, to replace the existing coal-fired plants there, and three new coal-fired units added to the existing Oak Creek Power Plant (OCPP) site. The application also includes other components, in addition to the proposals to construct new generating stations. It commits WEC to further reduce environmental emissions by upgrading its existing fleet of generating plants, to work in a collaborative group for the purpose of reaching a target of 5 percent of energy derived from renewable resources by

the year 2012, to pursue carbon dioxide mitigation projects that are energy-focused and Wisconsin-focused, and to increase its existing investment in energy conservation.[1]

The Commission separated WEC's request for authority to construct new natural gas-fired units at Port Washington, known as the Port Washington Generating Station (PWGS), from its request to construct new coal-fired units at Oak Creek. On December 19, 2002, the Commission issued a Certificate of Public Convenience and Necessity (CPCN), approving Part I of PTF by granting authority to construct PWGS; on February 27, 2003, the Commission issued a subsequent order reopening and amending its initial decision.

WEC is proposing to finance each of these new generating units using leased generation contracts. Leased generation is governed by a law the Wisconsin Legislature enacted as part of 2001 Wis. Act 16, which took effect on September 1, 2001. Leased generation contracts are affiliated interest transactions and are regulated under Wis. Stat. § 196.52(9). WEC offered proposed leases for each generating unit, consisting of a Facility Lease, a Ground Lease and a Ground Sublease, and the Commission approved leased generation contracts to finance Part I of PTF. The leased generation contracts now being offered for Part II are based upon these approved contracts.

On November 15, 2002, the Commission issued a determination that WEC's CPCN application for Part II of the PTF project was complete. This triggered the 180-day period under

[1] Subject to regulatory review and provision for cost recovery, the PTF application commits WEC to spending $1.3 billion over ten years to reduce emissions from its existing units, $6 million annually for ten years on the pursuit of additional renewable resources, $10 million over five years on carbon dioxide mitigation projects, and $20 million over ten years for additional energy conservation activities. (PTF Application, pp. 4-5, 10-11; Vol. 1 Enclosure 1, pp. 2 and 11.)

which the Commission is required to conduct its review of this CPCN application regarding Part II of PTF. The Commission extended this period to 360 days by petitioning the Dane County Circuit Court for additional review and received the necessary order, pursuant to Wis. Stat. § 196.491(3)(g)1, on April 29, 2003. During this period Commission staff prepared an Environmental Impact Statement (EIS) for this project in collaboration with staff of the Wisconsin Department of Natural Resources (DNR), which was subsequently introduced into the record at hearing.

Part II of PTF is comprised of two Super Critical Pulverized Coal units (SCPC 1 and SCPC 2), each sized at 615 megawatts (MW), which WEC proposes to place in service in the years 2008 and 2009, and an Integrated Gasification Combined Cycle (IGCC) unit, sized at 600 MW and projected to be on-line in the year 2011.[2] Bituminous coal would be the principal fuel for each of the three units. WEC describes these three units as its Elm Road Generating Station (ERGS). Calpine Corporation and LS Power, Inc., both independent power producers (IPPs), entered the case in opposition to the ERGS project, arguing that independent power sources could meet the current energy and capacity needs of Wisconsin Electric Power Company (WEPCO) more economically than this leased generation project that WEC has proposed. S.C. Johnson & Son, Inc. also entered as a party in opposition; it alleges that ERGS is not the least-cost alternative for reliable electric service and is not in the public interest. All parties to the docket are listed in Appendix A.

[2] Both Wisconsin Public Power, Incorporated (WPPI) and Madison Gas & Electric Company (MGE) have options to acquire ownership interests of 50 MW in SCPC 1 and in SCPC 2. If these options are exercised, the capacity available to WEPCO from each SCPC unit would be 515 MW.

The Commission held 11 days of hearings before Administrative Law Judge David Whitcomb, commencing August 25, 2003, and continuing through September 12, 2003. At these hearings, witnesses with technical and professional expertise testified on behalf of the parties, Commission staff and DNR staff. In addition, in the cities of Oak Creek and Racine, Wisconsin, the Commission held three more days of hearings for the public on September 17 to 19, 2003. All those who appeared and testified are listed in the Commission's files. The parties then submitted briefs to the Commission. At its open meeting on October 29, 2003, the Commission considered this matter in oral deliberations.

This Final Decision approves the PTF application in part, denies it in part, and modifies it. The Final Decision APPROVES that portion of the PTF application regarding construction of two SCPC units at the North Site—CUP alternative, subject to conditions, but DENIES that portion regarding construction of the IGCC unit. The Commission APPROVES the construction of the first SCPC unit with an in-service date of 2009, and the second SCPC unit with an in-service date of 2010, rather than the dates of 2008 and 2009 that the applicants had proposed. The Commission APPROVES WEC's use of leased generation contracts, as modified by this Final Decision, to procure coal-fired generation through non-utility affiliates for its electric utility, WEPCO.

Findings of Fact

1. Energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. §§ 1.12 and 196.025, or their combination, are not cost-effective or technically feasible alternatives to the projects proposed in this docket.

2. TheWEPCO's demand forecast demonstrates a need for new baseload generation within the next decade.

3. Part II of PTF, consisting of the two SCPC units and WEC's other commitments to secure additional energy conservation and renewable resources, satisfies the reasonable needs of the public for an adequate supply of electric energy.

4. The public convenience and necessity require WEC to construct the two SCPC units, subject to the conditions specified in this final decision.

5. The two SCPC units are reasonable and in the public interest after considering alternative sources of supply, individual hardships, engineering, economic, safety, reliability, and environmental factors. The IGCC unit does not meet this standard.

6. The North Site—CUP alternative is in the public interest after considering alternative locations, individual hardships, engineering, economic, safety, reliability, and environmental factors.

7. The two SCPC units will not have undue adverse impact on other environmental values.

8. The two SCPC units will not unreasonably interfere with orderly land use and development plans for the area involved.

9. The two SCPC units will not have a material adverse impact on competition in the Wisconsin Upper Michigan System (WUMS) wholesale electric service market.

10. Leased generation contracts are a reasonable means of financing the two SCPC units.

11. The leases proposed in this docket, as modified by this Final Decision, are reasonable and in the public interest.

12. The conditions attached to the CPCN for the two SCPC units, as described in this Final Decision, are reasonable.

13. Requiring that ERGS-SCPC 1 LLC commence construction of SCPC 1 within 12 months after it receives all necessary government permits and approvals is reasonable, so the generating plant will satisfy the reasonable needs of the public for electric energy in a timely manner. Requiring that the applicants file an updated demand and energy forecast and updated EGEAS modeling[3] before commencing construction on SCPC 2 is reasonable.

Conclusions of Law

The Commission has jurisdiction under Wis. Stat. §§ 1.11, 1.12, 196.02, 196.025, 196.395, 196.40, 196.49, 196.491, 196.52, and 196.795 to issue certificates authorizing W.E. Power LLC, through its subsidiaries ERGS-SCPC 1 LLC and ERGS-SCPC 2 LLC, to construct and place in operation two 615 MW SCPC electric generating units at the site described below, and to impose the conditions specified in this Final Decision.

Opinion

This proceeding involves the second half of WEC's proposal to meet forecasted electric demand of its electric utility, WEPCO, by constructing large-scale coal-fired generating facilities

[3] "EGEAS" is the Electric Generation Expansion Analysis System, a complex interactive computer model developed by the Electric Power Research Institute. Over the past decade, the Commission has consistently used and required utilities to use EGEAS to evaluate electric generation expansion plans for cost-effectiveness and optimality.

through an affiliated entity. The proposed baseload[4] generation facilities, if the applicants receive all regulatory approvals, would represent the largest energy project ever constructed in Wisconsin. Wisconsin's Leased Generation Law, Wis. Stat. § 196.52(9), permits load-serving entities to lease generating resources from an affiliated entity, subject to the approval of the Commission. As with Part I, the Commission has consolidated WEC's application for construction authority with its application for Commission approval of the proposed leases as affiliated interest transactions. In these consolidated dockets the Commission has balanced its responsibilities under the Leased Generation Law, as well as its other obligations under the power plant siting law and the affiliated interest statute, with its paramount obligation to the consuming public.

Project Description

WEC has created separate limited liability corporations for the purpose of constructing and owning the generating units that comprise ERGS. WEC also created W.E. Power LLC, a non-utility affiliate within the WEC holding company that would have majority ownership of these limited liability corporations.

ERGS-SCPC 1 LLC and ERGS-SCPC 2 LLC would build the two SCPC units, for operation as baseload facilities. The design would also allow for cycling, to accommodate load changes required by the electrical system demand. SCPC technology involves heating water to a temperature and pressure that exceeds its critical point, which is 705 degrees Fahrenheit at a pressure above 3,200 pounds per square inch absolute. The steam then exits the steam generator

[4] A utility's "baseload" energy demand is driven by high load factor customer needs, i.e., electric uses such as commercial lighting, refrigeration, and industrial loads that run constantly. Generally, electric generating plants that are cost-effective when running at least 70 percent of the time are considered "baseload" units.

and moves to the high-pressure turbine, to which an electric generator is attached. Pulverized coal and combustion air mix together, flowing to the coal nozzles at the various furnace elevations. The hot combustion products heat the water to supercritical conditions in the steam generator, then move through the selective catalytic reduction system, preheater, fabric filter, induced draft fans, flue gas desulfurization system, and stack. The higher temperatures and pressures achieved in a supercritical steam generator increase the energy content of the fluid delivered to the turbines, which improves efficiency, as would the use of cold Lake Michigan water in the condenser. In general, the SCPC units would convert approximately 38 to 39 percent of their fuel's heat content into electricity. Greater plant efficiency means less fuel burned per unit of electrical output. The expected life of the SCPC plants is 40 to 45 years.

The proposed IGCC unit would use a process that breaks down coal into its basic constituents and obtains a synthetic gas (syngas) for use in two combustion turbines. The gas conditioning process enables the separation of any pollutants from the syngas prior to its use as fuel. If the quality of the syngas is not adequate for use in the combustion turbines, it would be ignited in a stack, with a resulting flare approximately 80 feet high. During normal startups, syngas would also be flared for a few hours.

An IGCC facility would employ industrial frame, advanced technology combustion turbines. Hot exhaust gases from the combustion turbines would also be used to produce steam, which would be expanded in a steam turbine to drive an electric generator and produce electricity. An IGCC plant would operate for the majority of the year as a baseload facility, with an expected life span of 40 years.

Trains deliver coal to the existing OCPP units and would also be used to deliver coal to the new units. The existing on-site rail facilities are over 35 years old, and their continued use for both OCPP and ERGS would exacerbate off-site impacts. The rail unloading facilities lack a complete rail loop, which increases the number of movements needed to get a train into and out of the rail yard and increases the time required to unload a train. Existing track allows room for only one coal train to park on-site, so that if one train is present when another arrives, the second must wait off-site. The applicants propose to modernize the rail unloading facilities by adding track to create an on-site rail loop, adding another rail spur, installing a new rail car positioner (indexer) and dumper, moving the location of repair-in-place track, and making other needed changes. The new rail facilities would allow two full and two empty trains to park on WEPCO's property and would shorten the current unloading time of approximately 16 hours to five or six hours. The proposed rail system improvements would also mitigate the off-site effects associated with existing and future coal delivery.

WEC proposes to construct a once-through cooling system for ERGS, with an intake structure resting on the bed of Lake Michigan and a transport system to move the lake water from the intake structure to the generating units on shore. The intake structure would consist of four timber cribs, located about 9,000 feet from shore and 45 feet below the water surface. Water would be drawn into the cribs at a velocity of about one foot per second. Each crib would be connected via a 14-foot diameter pipe to the water transport system, with the water traveling through a 32-foot diameter tunnel located about 200 feet below the bed of Lake Michigan to the shoreline, where it would be pumped upward and through screening facilities before entering the plant. Water use for each SCPC unit would be about 700 million gallons per day. The

cumulative water use for the existing OCPP Units 5-8 and the two new SCPC units would be about 2.56 billion gallons of water per day.

For its water discharge structure, WEC proposes to build a seal well with concrete retaining walls and a rock-lined dredged channel. The channel, which would control erosion and reduce the velocity of the discharged water, would be approximately 200 feet wide and extend approximately 750 feet into the lake. To create the discharge channel, about 10,000 to 15,000 cubic yards of material would need to be dredged from the bed of Lake Michigan. The proposed discharge structure for the North Site-CUP alternative would be located north of the existing coal dock.

The new generating units of ERGS would require step-up unit transformers adjacent to the buildings that house the generators. Electric generators produce power at approximately 20 kV, which is then raised to 345 kV so it can be moved efficiently over the transmission network. The American Transmission Company (ATC) has conducted several studies to determine the cost of interconnecting ERGS to the transmission system and the cost of upgrading the transmission system so it can transmit power from ERGS. It completed a partial transmission restudy of ERGS on July 25, 2003, estimating the transmission costs associated with installing SCPC 1 and SCPC 2 at $65.5 million and $100.5 million, respectively. Determining transmission system requirements for ERGS, though, depends upon the amount of forecasted generation in southeast Wisconsin and northern Illinois. Recently, several proposed generating units in the area have dropped from ATC's queue and will not be operating in the same time frame as the ERGS units. This will require ATC to restudy the interconnection needs, to minimize the amount of transmission facilities installed and recalculate the costs involved. This

analysis is quite complex, depends upon the site chosen, and requires several months of sequential computer model runs.

ATC's preliminary Facility Study Report indicated that the construction of SCPC 1 would require changes in the 345 kV, 230 kV, and 138 kV substations, while the construction of SCPC 2 would require further upgrades to the existing transmission lines and substations in the area. Some of the possible line and associated substation work includes Oak Creek–Brookdale 345 kV, Brookdale–Granville 345 kV, Oak Creek-St. Martins #2 138 kV, Butler-Tamarack 138 kV, and Bluemound-Butler 138 kV; most of this transmission work would be on existing rights-of-way.

The applicants proposed four site alternatives, all located on the OCPP property. The existing north OCPP building, which originally housed OCPP Units 1-4, is now empty and serves only to support the existing coal handling facilities. WEC intends to dismantle and dispose of this building. The remaining OCPP Units 5-8 would continue to operate in the south OCPP building, though Units 5 and 6 may be retired as part of the PTF plans.

Three of the sites were originally proposed in the CPCN application; these have been designated the North Site, the South Site, and the South Site—Exp. The North Site is in the city of Oak Creek in Milwaukee County at the east end of Elm Road, north of the existing OCPP units. The South Site would place the generating units on a portion of the OCPP property south of existing Units 5-8, in the town of Caledonia in Racine County. The South Site—Exp is a variation on the South Site, placing the SCPC units in the same location but with the IGCC facility on a federal/state-owned shooting range (land that WEC would need to purchase).

In May 2003, the applicants and the city of Oak Creek negotiated a Conditional Use Permit (CUP), making some changes to the original North Site. The North Site—CUP alternative would move the coal handling facilities and coal storage piles south about 1,500 feet, to a location inside the existing OCPP rail loop. This would require relocation of the existing 138/345 kV substations, which are currently within that rail loop. These substations could be separated and relocated on site to avoid the new rail and coal facilities, connect the new SCPC units at 345 kV, and facilitate transmission ROW exits to the west.

Delivery of coal to the plant site could block vehicles for significant periods of time at the Seven Mile Road and Six Mile Road crossings of the Union Pacific rail line. To eliminate this impact the applicants would pay for road improvements to separate or eliminate at-grade rail crossings at these roads. In addition, the town of Caledonia is concerned about lengthy blockages of vehicular traffic at Four Mile Road, due to existing train deliveries to OCPP. The applicants maintain that their improvements to on-site rail facilities should eliminate this problem, allowing trains to cross Four Mile Road at speed. It is reasonable to require that the applicants monitor the effect of train deliveries on vehicular traffic at this road, and address valid concerns the town may have about road blockage. Any changes at the rail crossings ultimately require the approval of the Office of the Commissioner of Railroads, which also has the authority to determine the nature of the changes. Local government and the Union Pacific Railroad would own any new roads, tunnels, bridges, or other elements of approved crossing changes.

Reasonable Needs of the Public; Forecasting Capacity and Energy Demand

An important threshold determination the Commission must decide is whether or not there is a need for the generation facilities proposed by WEC and its subsidiaries. Wisconsin's

Power Plant Siting Law requires that a proposed facility satisfy "the reasonable needs of the public for an adequate supply of electric energy" in order to receive a CPCN. Wis. Stat. § 196.491(3)(d)2. To justify the need and timing of the three units that comprise ERGS, WEC submitted WEPCO's forecast of growth in electric demand and energy over the next ten years and then provided optimal expansion plan results from the EGEAS computer model.

WEPCO forecasts that, between 2003 and 2012, total electric demand (including reserves and new wholesale sales) will grow 1,995 MW or 2.8 percent annually. Excluding new wholesale sales, the rate of retail electric demand growth would be 2.5 percent annually. Total electric energy for the same period is expected to grow 2.5 percent annually. These growth rates also incorporate WEPCO's existing energy efficiency and demand-side management (DSM) efforts, and assume that similar efforts will continue into the future. When used in the EGEAS model, these forecasts demonstrate a need for new baseload supply resources.

The Commission is not persuaded by the argument raised by certain parties concerning the reasonableness of WEPCO's capacity and energy needs. S.C. Johnson criticizes the demand and energy forecasts as too high and argues that they improperly include wholesale requirements load for WPPI and Municipal Electric Utilities of Wisconsin (MEUW), which WEPCO is not obligated to supply. The forecast growth rates are consistent with WEPCO's historical growth patterns and those adopted in the Port Washington order.[5] WEPCO's total demand has been growing 2.5 percent per year since 1997. In addition, WEPCO has a long-standing relationship supplying electric energy and power to wholesale municipal customers and this relationship will

[5] Final Decision, *Application of Wisconsin Electric Power Company; Wisconsin Energy Corporation; and W.E. Power, LLC; for a Certificate of Public Convenience and Necessity for Construction of Two Large Electric Generation Facilities the Port Washington Generating Station, and Associated High Voltage Transmission and Natural Gas Interconnection Facilities to be Located in Ozaukee County,* PSCW docket 05-CE-117.

continue. Commission staff reviewed WEPCO's forecasts in the EIS and considered them reasonable; the Commission agrees. For these reasons, the Commission concludes that WEPCO's demand forecast is reasonable.

Statutory Energy Priorities

Another important legal and policy issue this Commission must decide is whether or not there is enough energy conservation, renewable resources, or a cleaner burning fuel to cancel or delay the construction approvals sought for the SCPC units in this proceeding. State law provides guidance to the Commission in carrying out the state's energy policy. Our obligations are set forth in Wis. Stat. § 1.12.

Wis. Stat. § 1.12(4) establishes energy priorities for Wisconsin. The statute provides as follows:

> **1.12(4)** PRIORITIES. In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed.
> 1. Natural gas.
> 2. Oil or coal with a sulphur content of less than 1 percent.
> 3. All other carbon-based fuels.

In addition, Wis. Stat. § 196.025 declares that the Commission must implement these priorities in its energy-related decisions, to the extent "cost-effective, technically feasible and environmentally sound."

Several parties have suggested that the Commission, in construction cases involving a lower priority fuel source like coal, is obligated to select a higher priority fuel source

(e.g. natural gas) in order to fulfill its obligations under the Energy Priorities Law. S.C. Johnson asserts that it is not enough that ERGS be close in price to other higher priority options and that the applicants in the present proceeding must prove a "compelling reason" not to abide by the energy priorities described in Energy Priorities Law. Under this reasoning, the Commission would be obligated to select a higher priority fuel option unless the applicants have demonstrated that the proposed units at ERGS will be provided at a substantially lower cost than available higher energy priorities.

This Energy Priorities Law, however, is not a mandate to state agencies that must be mechanically applied to achieve a specific outcome. In the Prefatory Note to 1993 Wis. Act 414, which enacted this law, the Legislature declares that it "does not want to create inflexible mandates or deprive decision makers of the discretion needed to respond appropriately to the circumstances surrounding energy-related decisions." The Legislature explains that this law uses "a combination of directives and encouragement, while reserving substantial discretionary authority to the decision maker." Such discretion must be applied in this case, to harmonize the directives of the Energy Priorities Law with those of the Power Plant Siting Law. The statutory framework for analyzing whether approving a CPCN project would be in the public interest involves a number of factors, beyond those specified in the Energy Priorities Law. The Commission must consider the extent to which a proposal may cause individual hardships, as well as concerns about its engineering, economics, safety, reliability, environmental impacts, interference with local land use plans, and impact upon wholesale competition. The Commission is required to balance all of these competing elements, which frequently lead in different directions; no single primary factor is the measure of a CPCN project. Thus, the Commission is

responsible for harmonizing the Energy Priorities Law and the Power Plant Siting Law, in order to determine what is in the public interest.

WEPCO's forecast of future demand and energy needs already includes some level of energy efficiency, because WEPCO uses an econometric method that relies upon historical electric energy usage data. Incorporated in its historical usage data is the net impact of energy efficiency and the increased use of energy efficiency programs. While it is not possible to quantify how much energy efficiency is included in WEPCO's forecast, it assumes that the future impacts of energy efficiency will be similar to historical impacts. For this reason, in their testimony on energy efficiency potential, both the applicants and Commission staff attempted to estimate the amount of potential energy efficiency savings above that already included in the forecast, i.e., the "achievable potential."

The applicants' energy efficiency analysis consists of three scenarios, which reflect differing assumptions about the rate at which consumers will adopt energy efficiency measures based on the level of program intervention. The applicants' analysis suggests an achievable potential in 2008 for the Minimally Aggressive, Moderately Aggressive, and Highly Aggressive Scenarios of 23, 55, and 79 MW, respectively. The corresponding achievable potentials identified in 2016, the final year of the applicants' analysis, are 119, 172, and 186 MW. The applicants' energy efficiency witnesses testified that they are confident that, by 2008, over 50 MW of cost-effective energy efficiency will be achievable in WEPCO's service territory.

Commission staff also conducted an energy efficiency analysis. Commission staff calculated achievable energy efficiency potential in 2007, 2009, and 2011 of about 200, 400, and 600 MW, respectively. These are the upper bound of the range of estimates provided. The

estimates of energy efficiency potential provided by both the applicants and Commission staff have shortcomings related to the unknown amount of energy efficiency already included in WEPCO's forecast, restrictions on the measures included in the analysis, and the limited availability of current data on energy efficiency measures.

In the Commission's Port Washington order, the Commission highlighted the difficulty in attempting to substitute energy efficiency for needed intermediate load facilities. The Commission stated:

> The Commission lacks sufficient evidence on energy in this case on energy efficiency to make the judgment that energy efficiency gains—which will ultimately be in the hands of consumers and businesses—are either of a sufficient quantity or are demonstrably achievable such that they may serve as a substitute for traditional generation in a cost-effective way. The Commission's concern is that there is no way to dictate this type of behavior to consumers that it is both technically feasible and practically feasible to alleviate the need demonstrated in this proceeding. The testimony of the various parties indicates that it is not possible to evaluate all possible technologies and programs in order to ascertain their realizable potential as well as their accuracy.

The same reasoning is equally applicable in the present proceeding. The applicants' and Commission staff's estimates of achievable energy efficiency do not demonstrate that energy efficiency could reliably or cost-effectively serve to substitute, or postpone, the SCPC units. On the other hand, the record demonstrates that a moderate level of intervention in the energy efficiency market would produce at least 55 MW of cost-effective and technically feasible energy efficiency in WEPCO's service territory by 2008. As part of the PTF proposal, WEPCO has committed to spending $20 million over the next ten years to support energy efficiency activities. A key component to WEPCO's efforts is to work with other parties to support building code reforms that increase the energy efficiency of buildings. It is appropriate for WEPCO to implement energy efficiency programs to capture, at a minimum, this additional

55 MW of cost-effective energy efficiency by 2008 as identified by its consultants. Based on the consultants' estimate of a cost of about $60 million to capture this 55 MW, an additional commitment of dollars may be needed to capture this savings. Although WEPCO is now in a rate freeze, it can commence these energy efficiency programs without delay by using its conservation escrow. The associated expenditures will then be held for recovery in the utility's next rate proceeding. It is therefore reasonable for WEPCO to submit a plan to the Commission, by March 1, 2004, for capturing at least 55 MW of additional energy efficiency.

(Chairperson Bridge dissents and would capture at least 100 MW of additional energy efficiency.)

After energy conservation, the state Energy Priorities Law favors renewable resources. The two forms of renewable generation most likely to be cost-effective during the forecast period are wind and biomass combustion, both of which were reviewed in the record.

As part of the PTF proposal, WEPCO has committed to a goal of obtaining 5 percent of its energy from renewable resources by 2011. This is more than twice the renewable portfolio standard set forth under Wis. Stat. § 196.378, which requires that at least 2.2 percent of each electric provider's retail energy must be from renewable resources by this date. WEC has also declared its intent to spend up to $6 million per year for ten years on emerging technologies and activities, to encourage the development of renewable resources.

WEPCO has taken steps to meet its 5 percent goal by issuing two requests for proposals (RFPs). The first RFP was issued on December 18, 2002, for up to 200 MW of wind power capacity. In July 2003, the utility selected and signed power purchase agreements with three wind power projects having a total capacity of 214 MW. WEPCO issued the second RFP on

August 14, 2003, for 25 MW of biomass. The biomass proposals must be submitted to the utility by November 26, 2003.

The Commission does not believe that renewable resources are either cost-effective or technically feasible to meet WEPCO's baseload needs. The EGEAS model runs in the record select large quantities of wind during the forecast period, but these runs rely upon an assumption that much of these wind resources can be sited in Lake Michigan, a new location for wind turbines that has never previously been used. Furthermore, these runs assume that the existing federal production tax credit for wind energy will remain in effect indefinitely. This federal production tax credit allows a wind facility owner to take a 1.8 cent/kWh tax credit for a period of ten years, but is now available only to projects that go online by December 31, 2003.

Whether Congress will extend this credit again, and for how long, are unknown. It would not be prudent to rely upon a wind production tax credit, which may or may not continue to exist, to meet WEPCO's major baseload needs. Furthermore, the EGEAS runs do not show that significant quantities of biomass would be cost-effective during the forecast period. For these reasons, the Commission finds that renewable resources are not cost-effective, technically feasible alternatives.

(Chairperson Bridge dissents, and would direct WEPCO to implement its plan to install 200 MW of new wind resources by 2005 and 50 MW by 2011.)

The Commission also considered whether gas-fired generation is a cost-effective or technically feasible alternative that could replace the need for new baseload generating facilities. No gas-fired, baseload facilities were presented as either a cost-effective or technically feasible alternative in this record.

A critical part of the Commission's ultimate preference for coal-fired generation over gas-fired generation rests heavily on the discretion accorded to the Commission under the Energy Priorities Law and the Power Plant Siting Law. More significantly, the crux of this case is really about the appropriate timing to construct new baseload generation. A fundamental policy choice presented in this case is whether the Commission believes that WEPCO needs to take steps now to address needs for new baseload facilities over the next decade. The Commission believes that the applicants should take those steps now to ensure these facilities are in service in 2009 and 2010.

The quantitative evidence presented in this proceeding supports the construction of new baseload generation to address WEPCO's needs. Almost every EGEAS run shows the need for new baseload generation over the next decade.[6] Commission staff did conduct an "integrated alternative" EGEAS analysis that examines the feasibility of combining renewable resources with natural gas, while also reflecting a more aggressive energy efficiency approach. This modeling run includes all of the energy priority generation alternatives, while also reducing WEPCO's base demand forecast in 2011 by 600 MW in order to incorporate Commission staff's energy efficiency potential estimate. Even this integrated alternative run shows that an SCPC unit is needed during the forecasting period.

These EGEAS runs demonstrate that the energy priority resources, alone or in combination, cannot replace the need for new baseload, coal-fired units to serve WEPCO. EGEAS also shows the extent to which these resources can delay the need for additional

[6] The only EGEAS model runs that do not confirm a need for additional baseload capacity by 2012 or sooner are conditioned upon either a permanent federal tax credit for wind or upon the taxation of carbon dioxide emissions. The former is unlikely, given the amount of wind that would be produced as a result of an unlimited tax credit, and the record is too speculative to reach conclusions regarding the latter.

baseload units, and the Commission has considered this evidence in order to reach its conclusion that the first SCPC unit should be placed in service in 2009, rather than 2008 as proposed by WEC.

(Chairperson Bridge dissents and would authorize in service dates of 2010 and 2012 for SCPC 1 and 2.)

There are qualitative factors set forth in Wis. Stat. § 196.491(3)(d) that also support the Commission's conclusion that new coal-fired generation is in the public interest and that ERGS is the most cost-effective and technically feasible way to address WEPCO's baseload needs. The Commission's decision to approve SCPC 1 and 2 balances its obligations under the Energy Priorities Law and the Power Plant Siting Law. It also reflects the Commision's policy judgment that while natural gas-fired generating facilities may be better suited for peak and intermediate load generation, coal-fired generation provides the most practical means to serve WEPCO's needs for baseload capacity. The evidence in this proceeding demonstrates the advantages of using cleaner burning coal technologies like SCPC as a baseload resource over gas-fired generation.

The need for new baseload generation is the critical factor that distinguishes this decision from the Port Washington order. The Port Washington order addressed WEPCO's need for new intermediate capacity. The Commission has not approved construction of any new baseload, coal-fired generation in Wisconsin since 1980. The evidence presented reflects the fact that WEPCO's existing fleet of baseload plants is aging. WEPCO's aging baseload resources may be asked to maintain or even increase their historical production as older facilities are retired over the next decade and transmission constraints within WUMS continue to limit the ability of

Wisconsin load-serving entities to import electricity. In fact, in Phase I of PTF the Commission approved the retirement of 320 MW of existing baseload, coal-fired generation at Port Washington. The record in this docket demonstrates that WEPCO needs more baseload capacity.

The Commission believes it is in the public interest to have more reliable baseload generation in place sooner rather than later as a matter of public policy. Concerns over electric reliability are paramount today and the Commission concurs with the policy arguments raised by the applicants, transmission-dependent utilities and consumer groups that it is better to err on the side of planning for more baseload needs sooner rather than later. Based on a number of qualitative and quantitative factors, the Commission believes that coal-fired generation provides the most cost-effective, prudent and practical means of meeting WEPCO's baseload capacity needs over the next decade.

The Commission also considered qualitative environmental factors in concluding that the construction of SCPC 1 and 2 is in the public interest under the Energy Priorities Law and the Power Plant Siting Law. The applicants' proposed units utilize the best available control technology (BACT) that are designed to substantially reduce the amount of emissions from WEPCO's existing fleet of baseload, intermediate and peaking units. The applicants will install BACT for several emissions, including SO_2, NO_X and PM_{10}. Taken together with the applicants' other regulatory consent decrees and voluntary emissions reductions agreements that were presented in this record, the evidence also demonstrates that total air emissions will decrease substantially from current levels after the completion of all PTF projects.

Finally, the Legislature stated that compliance with its Energy Priorities Law is based upon "the overall pattern of decisions made by each agency." Since the enactment of that law in 1994, the Commission has authorized the construction of over 6,900 MW of natural gas-fired generation and 20 MW of wind-fired generation that have addressed peaking and intermediate capacity needs. The total mix of energy sources that the Commission has approved over this time period shows a pattern of decisions for baseload, intermediate and peaking generating facilities that complies with the state's energy policy.

Reasonable Needs of the Public; EGEAS Modeling Results

As in other Commission decisions over the past decade, including Part I of PTF, this docket relies extensively upon computer expansion plan modeling of the electric system to identify cost-effective means of meeting a utility's future electric demand. Both Commission staff and the applicants relied on the EGEAS model in this proceeding as the primary tool to consider optimal resource options on a quantative basis for WEPCO's future electric demand. The EGEAS model is a quantitative tool requiring three forms of inputs: data about the utility's existing generating system; economic and engineering data for proposed new generating units; and a variety of base forecasts for demand and fuel prices. The existing unit data reflect the operational characteristics of the utility's current generating fleet. New unit data, in this docket, concern the ERGS facilities, Calpine's projects, wind and biomass renewable resources, and generic gas-fired combustion turbines and combined-cycle units. The EGEAS model then uses these data to calculate the overall system cost of adding different new units to the electric system, ultimately producing an optimal expansion plan for a minimum period of 30 years.

WEC submitted the results of its EGEAS runs and introduced them into the record. Commission staff then conducted its own independent review of this submission, examining the reasonableness of the company's data inputs and preparing its own EGEAS model runs. The results of this work appear in the EIS and in other evidence that Commission staff introduced in the record. Commission staff concluded that the forecasts WEC submitted with respect to base demand, energy, and fuel were not unreasonable. Commission staff also built into its EGEAS model the Commission's approval of the 545 MW, natural gas-fired Port Washington facilities in 2005 and 2008, as well as WEPCO's commitment to procure up to 250 MW of wind resources by 2012.

After considering the quantifiable evidence presented in the EGEAS runs, the key question in this docket is not whether additional coal-fired baseload generation should be approved, but when it should be installed. The principal difference among the various EGEAS runs concerns the proper timing of such an addition. Almost every sensitivity run of the EGEAS model, including runs that integrate more energy conservation and lower demand and energy growth, demonstrate a need for additional baseload capacity by 2012. Even those runs that support the use of additional gas-fired generation in the next few years also point to a baseload coal capacity need for WEPCO.

Commission staff performed one EGEAS model run using inputs it considered reasonable within a central range of estimates, which it described as its "base case," and modeled ten other EGEAS scenarios. These ten additional runs used different data inputs regarding factors such as WEPCO's demand forecast or the cost of fuel, in order to demonstrate the sensitivity of the model to changes in input assumptions and to depict the results when different

forecasting assumptions are used. Under Commission staff's modeling approach, the base EGEAS runs pick the SCPC units in 2011 and 2013. WEC argues, based upon both its EGEAS runs and its qualitative concerns, that the proper timing should be 2008 and 2009 for these units.

The EGEAS model is an engineering tool that depends upon a great deal of numerical data inputs, assumptions, and forecast uncertainty. Although its results are complex estimates, EGEAS is a useful tool—albeit one important quantitative tool —for the Commission to use in deciding the timing of the proposed generating facilities. Power supply planning is not a science. Determining what resource options will ensure low cost, reliability and environmental sensitivity for the consuming public requires the exercise of judgment and consideration of a wide variety of qualitative factors. The complexity of the assumptions built into this docket's EGEAS runs make it reasonable to select an outcome that is within the range of years proposed by Commission staff's and WEC's results. Given the requirement that it must maintain a reliable electric system, the Commission finds it prudent to construct these units slightly sooner, rather than later. For these reasons the Commission approves a timeline that places SCPC 1 in service in 2009 and places SCPC 2 in service in 2010.

Some parties suggest that the Commission should focus its attention in this docket solely upon the utility's near-term needs, arguing that looking more than five years into the future is too speculative. Baseload projects, however, can take five years to construct after all permits are received, and the process of preparing the project applications and receiving the required state and federal permits may add years to this timeline, especially if litigation follows. For this reason alone, when a utility's baseload needs are under consideration a more appropriate

forecasting period would be approximately ten years. The EGEAS runs show that new baseload SCPC units are cost-effective within this time period.

With respect to the proposed IGCC unit, EGEAS demonstrates that the proposed IGCC unit is never cost-effective and must be denied. The EGEAS model does not select an IGCC unit in any of its optimal runs. When the EGEAS model is forced to take an IGCC unit in 2011, the expansion plan becomes $349 million more expensive in present value terms. The EGEAS model strongly dismisses the IGCC unit as non-economic because of its higher construction cost. An IGCC would cost $1,579/kW to build, as compared to the lower construction cost of an SCPC unit ($1,400 to $1,440/kW). The guaranteed heat rate for the IGCC units, 9,500 Btu/kWh, is also inferior to the guaranteed 8,850 Btu/kWh heat rate for the SCPC units. IGCC technology, while promising, is still expensive and requires more maturation. For these reasons, the application to construct the IGCC unit is denied.

S.C. Johnson criticizes a number of modeling inputs, alleging that WEC is using improper engineering and fuel data for existing WEPCO units, an improper common systems cost allocation to the OCPP units, a demand and energy forecast that is too high, an improper addition of 200 MW of demand obligations for WPPI and MEUW, overly favorable engineering assumptions for the proposed SCPC units, and an improper early retirement of certain OCPP and Presque Isle units, while it is also ignoring the likely availability of additional energy efficiency efforts that would reduce the growth in electric demand. Commission staff evaluated these concerns, revised some of its assumptions, and prepared an EGEAS run to demonstrate how these changes would affect the optimal expansion plan. Because it includes additional energy efficiency to control electric demand, in addition to generation options, Commission staff

described this run as an "integrated alternative" that integrates the energy priorities described in Wis. Stat. §§ 1.12(4) and 196.025. For example, this EGEAS run includes lower forecast demand and energy growth rates of 1.8 to 2.1 percent per year, instead of the 2.5 to 2.9 percent per year growth rates in the base forecast. In addition, a total of 600 MW of demand is stripped away from the WEPCO base electric demand forecast, in 200 MW increments every two years through 2011, to reflect a more aggressive approach to energy conservation. This integrated alternative also includes a less favorable 4 percent forced outage rate for the SCPC units.

Even with the revised input assumptions of this integrated alternative, the EGEAS model results are not significantly different. EGEAS still selects an SCPC unit, by the year 2012. In addition, the record would not support such an aggressive estimate of cost-effective energy conservation, nor does the Commission agree that the 200 MW of demand for the WPPI and MEUW should be excluded. These are continuing power sales arrangements; for WPPI, the relationship with WEPCO has spanned decades. S.C. Johnson's concern that WEC has improperly allocated common system costs to OCPP Units 5 and 6 (which WEC is proposing to retire early) does have merit, but Commission staff also identified that such an allocation would underestimate the actual costs of the SCPC units and modified its EGEAS cost figures accordingly.

Effect on Wholesale Competition

Under Wis. Stat. § 196.491(3)(d)7., the Commission may issue a CPCN for a proposed facility only if it "will not have a material adverse impact on competition in the relevant wholesale electric service market." Such a determination requires an analysis of market power, which is the ability of a firm to charge prices for its product above what a competitive market

would allow. Since WEPCO has turned over operational control of its transmission system to ATC, the analysis need only focus on horizontal market power issues associated with the construction and operation of ERGS. Vertical market power issues associated with the combined operation of proposed facilities and the transmission system do not need review, given the existence of the Midwest Independent System Operator and its control over the ATC transmission system. The relevant wholesale electric service market is the area designated by the WUMS because this region is an electric "island system," a limited market due to transmission constraints in which a large electric generating firm can obtain leverage over the prices paid for electricity.

Capacity and energy from ERGS will be provided to WEPCO via the Facility Lease, at rates this Commission regulates through its review of the lease's economic terms and conditions. This regulation prevents any material adverse impact on competition in WUMS. As the market power study conducted for the Commission in 2000 by Tabors, Caramanis and Associates found, fixed price contracts (such as the proposed Facility Lease) mitigate market power. In addition, the Federal Energy Regulatory Commission only allows WEPCO to sell in WUMS at cost-based rates. For these reasons, the Commission finds that approval of ERGS will not create material adverse impacts on competition.

Calpine and LS Power, however, express concern that approval of ERGS would have a material adverse impact on competition by preventing the development of a competitive wholesale generation sector and hindering further electric industry restructuring in Wisconsin. However, WEPCO plans to continue contracting for power with independent power producers. Furthermore, a stand-alone generation company such as W.E. Power LLC could more easily be

divested by WEC than generating assets that are held within WEPCO, should a future legislature split generating plant assets away from utilities. For these reasons, the Commission does not concur that ERGS would materially harm competition.

Competing IPP Proposals

LS Power argues that WEC should have conducted an RFP for the capacity represented by ERGS. The Commission does not agree. In an earlier ruling on the applicants' request for a declaratory ruling on Part I of PTF, the Commission expressly declined the opportunity to mandate a formal RFP process.[7] No statute, rule or order of this Commission requires such a process, even when purchasing from an affiliate. WEC has already used competition in its selection of an engineering vendor for this project, Bechtel Corporation.

The company also indicates that it will continue to use competitively bid contracts and subcontracts for various aspects of ERGS. Such competition will directly benefit ratepayers. At hearing, Commission staff indicated that the major component of ERGS not facing a market test per se was with respect to project financing. However, the Commission's selection of competitive financing terms can substitute for such a test. The Commission has broad experience in setting such financing terms in rate proceedings and other recent construction cases. The record, particularly as established in the affiliated interest docket, contains ample evidence on what the appropriate financing terms and conditions should be.

In Part I of PTF, the Commission compared WEC's PWGS project against several bids filed by IPPs. In this proceeding, one IPP filed a competing bid for Commission consideration.

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[7] *In the Matter of Wisconsin Electric Power Company's Request for Declaratory Ruling Approving a Proposed Plan to Increase Generation in Wisconsin*, Docket 6630-DR-104 (October 17, 2001).

On its own volition and as an alternative to the ERGS project, Calpine submitted a proposal to the Commission on February 19, 2003, offering to develop a 523 MW combined-cycle natural-gas-fired power plant in the town of Fond du Lac, Fond du Lac County, with similar additional 500 MW units located elsewhere in the state.[8] In addition, on June 20, 2003, Calpine updated its February 2003 proposal by including 260 MW of combined-cycle, natural gas-fired capacity from Calpine's recent purchase of the Fox Energy Center located in the town of Kaukauna. Construction on that project commenced in October 2003.[9] The Fox Energy Center is rated at 510 MW, with 250 MW of that capacity already under contract to Wisconsin Public Service Corporation. Calpine also submitted to the Commission a sample power purchase agreement, identifying and bidding relevant economic and engineering terms and conditions.[10]

Calpine's projects are natural gas-fired, combined-cycle units. Ordinarily, such units are considered intermediate load generating stations, with capacity factors up to 50 percent. Almost without exception, though, the EGEAS model runs in this record show that WEPCO needs additional baseload capacity within the next decade, in which generating stations must operate between 70 and 90 percent capacity factors. This is also the need for which the applicants have proposed the construction of ERGS.

Over a shorter forecasting period, WEPCO may need additional gas-fired, intermediate or peaking units. For example, some EGEAS runs identify a $57 million cost reduction if a 523 MW, combined-cycle Calpine plant is included in 2006 or 2007. Yet the EGEAS models demonstrate that approving such units would not replace the need for additional coal-fired,

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[8] In docket 9343-CE-100, the Commission issued a CPCN for Calpine's Fond du Lac Energy project on May 5, 2003.

[9] In docket 05-CE-115, the Commission issued a CPCN for the Fox Energy Center on November 7, 2002.

baseload generation. In addition, relying upon natural gas to meet WEPCO's baseload needs as well as its intermediate and peaking requirements would raise the risk of not properly diversifying the utility's fuel mix. Calpine may be an appropriate, cost-effective resource to meet intermediate load needs of WEPCO. However, this docket is focused upon the utility's baseload requirements and it is not necessary simultaneously to determine what intermediate facilities may be appropriate for WEPCO in the interim.

WPPI and MGE Ownership Options

Both WPPI and MGE have options to obtain 50 MW of ownership interests in each of the SCPC units. Historically, WPPI has met some of its baseload requirements through system power purchases from WEPCO, and MGE has acquired baseload capacity through joint ownership of power plants. As a result, the EGEAS model assumes that WEPCO only takes 515 MW from each of these 615 MW units. A decision by WPPI and MGE not to exercise their options would have significant financial consequences to WEPCO's ratepayers. For example, if the WPPI and MGE options are not exercised, WEC's modeling runs show total system costs increasing by approximately $80 million. The record indicates that WPPI and MGE do intend to acquire ownership, so the Commission finds it reasonable to authorize construction of the SCPC units at 615 MW. If WPPI or MGE fails to do so within nine months after the date when the Facility Lease becomes final, however, WEC must return to the Commission and provide a plan that eliminates the risk of WEPCO ratepayers acquiring and paying for too much capacity. One

[10] Calpine filed its power purchase agreement as a confidential document, due to the trade secret nature of its terms and conditions.

means of protecting ratepayers that WEC can consider is the sale of these ownership shares to another entity.

Cost of Construction; Approved Amounts

In approving construction of the SCPC units for 2009 and 2010, the Commission must ascertain the appropriate costs to be placed into each Facility Lease as the "Approved Amount." ERGS includes common facilities that would serve 1,800 MW of new coal-fired capacity as well as 1,200 MW of existing coal-fired capacity from OCPP, i.e., a 3,000 MW "campus" at this site. Although the Commission has rejected the IGCC unit, it finds that a 3,000 MW coal campus remains an appropriate size, because it affords future planning flexibility to WEC. The additional cost of sizing common systems at 3,000 MW, instead of 2,400 MW, is approximately $20 million, which is a modest amount to pay in order to provide additional planning flexibility.

(Chairperson Bridge dissents, and would size the common systems at 2,400 MW.)

The record does not describe the cost of constructing these units, with common facilities to serve 3,000 MW, in 2009 and 2010. It does, however, show the following cost structure under assumed construction dates of 2008 and 2009:

	Generating Unit and SCPC Common Systems	Site Common Costs Shared with OCPP	Inflation	Approved Amount
SCPC Unit 1	$922,140,000	$375,190,000	$129,344,000	$1,426,674,000
SCPC Unit 2	$623,470,000	$ 22,730,000	$ 77,932,000	$ 724,132,000
			Total:	$2,150,806,000

The right-hand column reflects values in year-of-occurrence dollars, meaning that a level of expected inflation is included. Since the Commission has moved the dates of construction back one year, the values in this table must be adjusted by one more year of inflation. Within 45 days after the date this Final Decision is signed, the applicants are instructed to submit to the Commission, for its approval, corrections to the above table to incorporate this adjustment. The EGEAS model uses a 1.87 percent general annual inflation rate during the 2008-2010 timeframe. The applicants shall use no more than 1.87 percent as the annual inflation rate when making this adjustment.

If the Commission approves this submitted correction, the amounts shown therein shall become the Approved Amounts to be used in each Facility Lease. Because these figures are in year-of-occurrence dollars, W.E. Power LLC assumes the risk that inflation will cause actual construction costs to exceed the Approved Amounts by more than the cost overrun collar that is discussed below.

In their Facility Leases the applicants propose that actual construction costs be allowed to exceed the Approved Amounts by up to 10 percent, if the Commission determines that the excess cost is prudent. The applicants describe this as a 10 percent cost "collar" and indicate that W.E. Power LLC incurs the risk of larger cost overruns. The cost estimates in this record, however, are based upon engineering estimates at a point in time when only 5 percent of the actual engineering has been completed. To protect ratepayers from the risk that these estimates are too high, the Commission finds it reasonable to reduce the allowable margin of prudently incurred cost overruns by imposing a smaller, 5 percent cost collar. Parties representing certain customer groups also recommended that the Commission only allow costs meeting the definition

of "Force Majeure," "Excused Event," or "Event of Loss" under a Facility Lease be billed to WEPCO if the Commission determines that such costs are prudently incurred. The Commission agrees that this revision to the Facility Lease is necessary to protect ratepayers. Finally, the Commission agrees with the recommendation of these parties that the Approved Amount recoverable through the Facility Lease may not exceed the unit's actual construction cost. The applicants concurred with this latter recommendation.

Financing Mechanism

Background

In its resource planning, WEC considered both utility-owned, rate-based generation, procurement from wholesale merchant plant suppliers, and leased generation financing. After reviewing these alternatives, WEC decided to pursue leased generation financing to fulfill WEPCO's supply needs.

One of the reasons a lease option needs to be pursued, according to WEC, is that WEPCO will not be allowed sufficient return on a traditional rate base investment to compensate investors for the risks associated with the plant. Although the rate-based option is clearly one feasible alternative based on the evidence presented in this case, the Commission concludes that leased generation financing is in the public interest and is a reasonable method to finance SCPC 1 and 2.

The lease approach presents an innovative opportunity for procuring capacity and, as modified by this Final Decision, the terms of the leases WEC has offered are reasonable. The plant owner acts as a passive investor and the utility, which will operate and maintain the plant, remains a regulated entity under the Commission's jurisdiction. This can provide ratepayers

with protections similar to those afforded under a rate-based paradigm. Moreover, the changes the Commission has made to the lease arrangement, as discussed in this Final Decision, provide further protection to ratepayers.

In addition, recent legislative changes in Wisconsin have fundamentally altered the regulatory landscape for utilities, their customers and regulators. Public utilities have an obligation to serve their customers and in this proceeding, the Commission needs to give WEPCO some flexibility in transacting for energy to meet those needs in a manner that results in low and stable rates for consumers. One of the means to fulfill the Commission's mandate to ensure just and reasonable rates and reliable service includes leased generation financing. The Commission finds that the inter-affiliate leased generation proposal is the most reasonable choice for this ERGS facility and provides certainty that consumers will have these needed baseload facilities in 2009 and 2010.

Review of the proposed leases

The PTF leases are affiliated interest agreements under Wis. Stat. § 196.52(9). WEC proposes financing and operating each ERGS unit with a Facility Lease, a Ground Lease, and a Ground Sublease. Taken together, these leases constitute a leased generation contract. The ERGS leases filed in this case are based upon the final leases approved in docket 05-AE-118 for PWGS.

In general, the Commission finds that the Ground Lease, Ground Sublease, and Facility Lease are reasonable, but some changes to the Facility Lease are needed to balance risk and responsibility properly between the parties to this contract. These modifications are discussed in this Final Decision.

Because a leased generation contract is an affiliated interest transaction, under Wis. Stat. § 196.52(3)(a) the Commission may approve such a contract "only if it shall clearly appear and be established upon investigation that it is reasonable and consistent with the public interest." This law grants the Commission continuing supervisory control over the terms and conditions of most affiliated interest contracts or arrangements, which means it can modify such agreements as needed to protect the public interest. Wis. Stat. § 196.52(9)(e), however, limits the Commission of this control over a leased generation contract unless the contract itself grants the Commission this authority, or unless the Commission specifically reserves continuing supervisory control in its order approving the contract. Therefore, the Commission's jurisdiction over these PTF leases will be limited by the terms of the leases themselves and by this Final Decision.

Financial terms

The Commission finds it reasonable to set the following financial terms of the Facility Lease:

1. Return on equity

To attract investment capital of the size and scope needed to construct the SCPC units, the Commission must include a return in the lease payments at a level that compensates investors for the risks they take by providing that capital. The record in this proceeding contains a wide range of estimates of what that return level should be. It is very difficult to determine precisely what return investors require, especially when the estimates of that return as developed by well-respected finance experts vary by hundreds of basis points. Given this difficulty, selecting the final return on equity figure involves as much art as science.

The applicants initially requested a return on equity of 12.9 percent. After a series of negotiations with representatives of customer groups took place, the applicants agreed to lower the requested return on equity to 12.7 percent.[11] This is the same return on equity the Commission authorized for PWGS. Others suggested that the compromise return was too high and that the SCPC units could be financed at a lower return on equity. While it is conceivable that the projects could be financed at a return on equity that is slightly lower than the negotiated figure, given the critical need for the SCPC capacity it is prudent to set the return on equity at a level sufficient to ensure that those units will be constructed rather than selecting a level that contains some risk that units could not be financed at reasonable terms for the applicants. The applicants were able to secure financing for the PWGS units at a 12.7 percent return on equity. The Commission therefore finds it reasonable to set this the return on equity at 12.7 percent in this proceeding as well.

(Chairperson Bridge dissents, as shown in the attached opinion.)

The dissent proposes to include in this order a condition requiring the Commission to revisit this provision of the lease, and others, after the conclusion of the first five years of the Facility Lease. The inclusion of this provision would introduce an unacceptable level of financial uncertainty into the lease. One of the principal advantages of affiliated lease generation financing terms is the certainty they provide ratepayers and the applicants over the next three decades to ensure that low-cost, reliable baseload generation is constructed in Wisconsin.

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[11] The customer groups that negotiated and supported these lease provisions were the Wisconsin Industrial Energy Group, the Citizens' Utility Board, and the Customers First! Coalition (AARP-Wisconsin, Dairyland Power Cooperative, IBEW Locals 2150 and 2304, League of Wisconsin Municipalities, MGE, MEUW, National Federation of Independent Business-Wisconsin, RENEW Wisconsin, Wisconsin Alliance of Cities, Wisconsin Community Action Program Association, Wisconsin Electric Cooperative Association, Wisconsin Federation of Cooperatives, Wisconsin Merchants Federation, WPPI, Wisconsin Retired Educators' Association, and Wisconsin Towns Association).

2. Cost of long-term debt

The cost of long-term debt was an uncontested issue in this docket. As part of the Facility Lease rent calculation, a long-term debt cost is required. The Commission finds it reasonable to use the same computation method that it approved for the PWGS leases. That method requires that the long-term debt cost be determined within 180 days prior to the Facility Lease effective date and that the interest rate reflect an appropriate cost of long-term debt index from Moody's Investors Services for WEC's senior unsecured debt securities. The method also includes an appropriate refinancing or call option.

3. Capital structure

In its decision approving PWGS, the Commission found that a reasonable capital structure to be used in estimating the lease payments was 53 percent common equity and 47 percent long-term debt. In this proceeding the applicants initially requested a capital structure with 58 percent common equity and 42 percent long-term debt. The applicants maintain that, because ERGS would be coal-fired, the project needs a higher common equity ratio than the natural-gas-fired PWGS units. They contend that coal-fired units are inherently more risky than are natural-gas-fired units. A higher common equity ratio reduces the volatility associated with the earnings stream and thus mitigates the higher risk of the project to some extent. After negotiations with representatives of certain customer groups, the applicants agreed to reduce the common equity portion of the capital structure to 55 percent and to increase the long-term debt component to 45 percent.

The Commission finds that a 55 percent common equity, 45 percent long-term debt mix is a reasonable capital structure for the coal-fired SCPC units. This reflects three major risk

factors that cause coal-fired units to be more risky than natural-gas-fired units: (1) coal-fired units are more expensive to construct; (2) coal-fired units take longer to construct; and (3) coal-fired units need larger amounts of ongoing capital investment to maintain the facilities. These risk factors are large enough to require some additional equity in the capital structure, beyond the level that would be appropriate for natural-gas-fired units.

(Chairperson Bridge dissents, as shown in the attached opinion.)

4. Initial lease term

The initial term of the Facility Lease is 30 years. No party disagreed with this length of term, and the Commission finds it reasonable.

5. Rent reduction in first five years

At hearing, the applicants and parties representing certain customer groups supported a 5 percent rent reduction during the first five years of the respective Facility Leases, accompanied by an undefined present value true-up mechanism. The 5 percent rent reduction would be applied to the base rent calculation using the annuity approach, as found in the Facility Lease. After the five-year rent reduction period ends, some type of rent adder to that base annuity rent calculation would be required to maintain the original present value.

The Commission finds that this rent reduction approach is reasonable and will assist in reducing rate shock, but the record does not contain any potential present value true-up mechanism. WEPCO is therefore required to work with Commission staff to prepare, for Commission approval, an appropriate present value true-up mechanism.

(Commissioner Garvin dissents, concerning this rent reduction during the first five years.)

6. Renewal rent terms

The Facility Lease, as proposed, grants WEPCO the right to renew the lease upon its expiration at lower rates. For the first renewal period, the lease payments are reduced to 50 percent of the original payments. For subsequent lease extensions, assuming such extensions can be made,[12] the lease payments drop to 15 percent of the original rent. Parties representing certain customer groups recommended that a more appropriate allocation of risk would decrease the lease payments for the first renewal period to 25 percent of the original payments. The Commission agrees. Such a reduction would provide additional ratepayer protection in terms of overall cost-effectiveness and is therefore reasonable.

7. Damages amount

The Facility Lease, as proposed, provides that if the Lease Effective Date is not achieved due to a failure of WEPCO, the Lessor can terminate the lease and sell the generating plant to WEPCO. As part of the purchase price, the utility would be required to pay a "Damages Amount" that constitutes 60 months of lost return on capital. In order to protect ratepayers, this provision must be eliminated.

(Commissioner Garvin dissents, concerning the elimination of "Damages Amount" from the Facility Lease.)

8. Securitization of lease payments

The stream of rent payments that WEPCO will be making to W.E. Power LLC and its subsidiaries could be "securitized" by the Lessor, i.e., sold for a lump sum that could either be

used as a financing vehicle for other generation improvements or be passed up to the holding company as a special dividend. As the Commission determined in its PWGS order, any such securitization may only occur with the Commission's prior review and approval in order to ensure that securitization will not harm the utility or its ratepayers.

9. WEPCO credit quality degradation

In the PWGS Facility Lease, the Commission mandated certain restrictions regarding the transfer or assignment of the PWGS plant or Facility Lease and, to protect WEPCO's credit quality from degradation, required the inclusion of a "hold harmless" lease provision. This hold harmless provision would apply if a national rating agency downgrades the utility's debt as a result of the transfer or assignment, or if the utility is required to issue equity to avoid such a downgrading of debt. A copy of this "hold harmless" provision, approved for the PWGS leases, was introduced into this docket as part of Ex. 22. As with the PWGS Facility Leases, the Commission finds these terms reasonable and requires that they be included in the ERGS Facility Leases.

Other terms and conditions

1. General changes

The applicants agreed to make the following changes to the Facility Lease:

a. Modify the definition of "Loss Proceeds" in Schedule 1.1 to delete the phrase "pursuant to any insurance policies maintained pursuant to the Facility Lease."
b. Add the phrase "The Project's cost shall not exceed the Approved Amount" to the Development Protocol in Schedule 3.1(a), to conform the ERGS lease to the approved PWGS lease.

[12] In order to be considered a "true" lease for tax purposes, ERGS cannot be leased to WEPCO for more than 80 percent of its useful life. The Facility Lease provides that the length of any renewal period will be 80 percent of the then-estimated useful life of ERGS, as determined by an independent evaluator.

c. Delete Section 9.4 dealing with the Delegation of Operation and Maintenance to one or more agents.

d. Change subsection (a) of the definition of Approved Amount in Schedule 1.1 to read "(a) the specific amount determined to be reasonable in the CPCN Approval, plus."

2. Force Majeure, excused events and events of loss

As discussed above, all construction costs defined as Force Majeure, an Excused Event, or an Event of Loss must have prior Commission approval before being recovered from WEPCO.

3. Guaranteed heat rate; cooling towers

As part of its application, W.E. Power LLC is guaranteeing a heat rate of 8,850 Btu/kWh for the SCPC units. This heat rate assumes once-through cooling; a design that the applicants contend will be approved and successfully installed. This is an important fixed term in the Facility Lease because if the applicants are unable to install once-through cooling, the heat rate may degrade significantly. As a result, W.E. Power LLC and WEPCO may only propose to change this guaranteed heat rate in the Facility Lease if they offer equivalent, offsetting ratepayer benefits and savings.

4. Engineering, Procurement and Construction contract

To ensure that WEPCO ratepayers secure the benefits of all the protections that W.E. Power LLC gains through its Engineering, Procurement and Construction (EPC) contract with Bechtel Corporation, the following Facility Lease terms shall be modified to incorporate any terms found in the EPC contract that are more beneficial to ratepayers than those currently included in the Facility Lease:

a. Commercial Operation Test and Scheduled Commercial Operation Date Damages.

b. Guaranteed Performance Level tests (including heat rate and net electrical output).

c. Duration of construction, in months from the Decommissioning Completion Date to the Scheduled Commercial Operation Date and the Required Commercial Operation Date.

d. Dates on which the Construction Milestones are scheduled to occur.

e. Test Fuel and Test Power Procedures to the extent such procedures are addressed in the EPC contract.

5. Conforming leases

This Final Decision makes modifications to the PTF leases proposed by WEC. It is reasonable to require that WEC rewrite these leases for SCPC 1 and SCPC 2, making the changes specified herein. It is also reasonable to require that WEC return these final documents to the Commission for review and approval, with the revisions highlighted, no later than 45 days after the date this Final Decision is signed.

6. Statutory compliance

A leased generation contract must meet eleven separate conditions under Wis. Stat. § 196.52(9)(b), as well as requirements for land and property transfers under Wis. Stat. § 196.795(5)(k)3. The proposed leases for SCPC 1, as modified by this Final Decision, comply with these statutory requirements. The Commission also approves the modifications WEC proposes to convert these documents into a leased generation contract for SCPC 2. Pursuant to Wis. Stat. § 196.52(9)(f), the Commission shall maintain jurisdiction to ensure that the construction of ERGS is completed as provided in the leased generation contracts.

The Commission retains continuing supervisory control only over the terms and conditions specified in this Order and in each Facility Lease, Ground Lease, and Ground Sublease. This is reasonable and in the public interest, to balance properly the parties' risks and responsibilities, and to protect WEPCO's ratepayers. In addition, any future changes to these leases, whether mutually agreed upon or otherwise, and any transfer or assignment of a lease or of the ERGS facility, must first receive Commission approval.

Site Location

Wis. Stat. § 196.491(3)(d)3. requires that the Commission consider "alternate locations" before determining whether the location of a new project is in the public interest. In addition, Wis. Admin. Code § PSC 111.53(1)(e) requires that a CPCN application for a new generating plant contain "[a]t least two proposed sites for the proposed facility, including a description of the siting process and a list of the factors considered in choosing the alternatives." The Commission's rules further specify certain site-related information that must be provided for each proposed power plant site. Wis. Admin. Code § PSC 111.53(1)(f).

S.C. Johnson alleges that the four ERGS site alternatives, all located at OCPP, are simply different plant configurations on the same parcel of land and therefore do not satisfy the Commission's statutory and rule requirements. On January 14, 2003, S.C. Johnson and Wisconsin's Environmental Decade (now known as Clean Wisconsin) originally raised this issue by filing a petition with the Commission requesting that it reconsider a determination that WEC's CPCN application was complete. The petitioners alleged that the application failed to include information on at least two proposed sites. On April 17, 2003, the Commission issued an order denying this petition. The petitioners appealed, but Dane County Circuit Judge Moria

Krueger ruled that this order is a "preliminary, interlocutory decision that is not immediately reviewable under Wis. Stat. ch. 227, but is reviewable in an action for judicial review of the final decision." *Clean Wisconsin, Inc. and S.C. Johnson & Son, Inc. v. Wisconsin Public Service Commission*, Case No. 03-CV-1480 (Dane County Circuit Court: Final Order, July 8, 2003).

The completion of hearings and development of a record in this docket provide no new information that would be sufficient to cause the Commission to change its conclusions regarding the four site alternatives for ERGS. S.C. Johnson and Clean Wisconsin, among others, continue to maintain that site alternatives must be geographically distinct and that these site alternatives do not demonstrate real differences. As the Commission declared in its April 17, 2003, order, though, the fact that alternate sites may be geographically close together does not automatically render them unreasonable alternatives. The Commission has accepted CPCN applications for numerous other projects where the alternate sites have been close together, or even adjacent to each other. The Commission determines whether proposed site alternatives are reasonable by applying two standards: the site alternatives must each be feasible locations and they must be sufficiently distinct to offer different packages of costs and benefits. With the benefit of a fully developed record on these site alternatives, the Commission reaffirms its April 17, 2003, decision.

S.C. Johnson and Clean Wisconsin now raise a slightly different argument about the sufficiency of the site alternatives, involving their interpretation of Commission rules. They contend that these rules only allow the use of site alternatives that are all located at a single facility in two specific situations. S.C. Johnson and Clean Wisconsin refer to Wis. Admin. Code § PSC 111.53(2)(b), which states:

> **PSC 111.53(2)(b)1.** An application for a cogeneration facility may meet the requirement under sub. (1)(e) by filing information on 2 sites that are both located at the steam host's existing industrial plant, if the cogeneration facility will be a qualifying facility under 18 CFR 292.205 and none of the needed infrastructure improvements would constitute a major action significantly affecting the quality of the human environment under s. 1.11(2)(c), Stats.
>
> **2.** An application for repowering an existing generating facility may meet the requirement under sub. (1)(e) by filing information on 2 sites that are both located at the existing generating facility site, if none of the needed infrastructure improvements would constitute a major action significantly affecting the quality of the human environment under s. 1.11(2)(c), Stats.

These parties conclude that these must be the only conditions where alternate sites at the same general location are permissible, since they are the only exceptions to the "alternative sites" requirements specified in the Commission's rules.

This interpretation, however, mischaracterizes the exceptions. A "cogeneration" project is designed to use waste heat from an electric generating plant, heat that would otherwise be lost up the smokestack, in an industrial process such as paper making or food processing. Wis. Admin. Code § PSC 111.53(2)(b)1. recognizes that in order to achieve this increase in energy efficiency the electric generating unit must be combined with an existing industrial plant, which can only occur by locating the generating unit at the industrial plant site. The same is true when a utility proposes to "repower" a generating plant by removing and replacing the existing units. Wis. Admin. Code § PSC 111.53(2)(b)2. recognizes that the only location for such a project is at the existing electric site. These two exceptions therefore are driven by the first standard of the Commission's requirements for proposed site alternatives—that every alternative must be a feasible location. There are no other feasible locations for cogeneration and repowering projects, and these two exceptions codify that finding.

S.C. Johnson and Clean Wisconsin have improperly interpreted Wis. Admin. Code § PSC 111.53(2)(b). These two exceptions are not the entire universe of situations where the Commission will accept site alternatives that are located in close proximity. In other situations the Commission applies its general rule, examining proposed alternatives to ensure that they are each feasible sites and each provide different packages of costs and benefits, so that the Commission is presented with a real choice. The site alternatives for ERGS do provide such a choice.

The record demonstrates that any of the four sites proposed would meet the standards established under Wis. Stat. § 196.491 and could be selected for construction of ERGS. The North Sites, however, are principally located within the city of Oak Creek and that city, unlike the neighboring town of Caledonia where the South Sites are found, has clearly expressed its willingness to accept this project. Furthermore, the North Site—CUP alternative involves substantial compromise and agreement between the city and the applicants regarding the proper means of mitigating municipal concerns, such as noise, traffic and air emissions. The city of Oak Creek, which has already hosted a power plant for 50 years, favors use of the North Site—CUP alternative and locating ERGS within its municipal boundaries will ensure that the city is in a stronger position to enforce mitigation measures that protect its citizens from undue impact. The city has rezoned this site as being suitable for manufacturing and is both willing and able to provide potable water and sewage service to the site. The Commission finds these to be determining factors in choosing among the four alternatives, and selects the North Site—CUP alternative as the proper location for ERGS.

This site alternative moves the coal pile and coal handling facilities inside the existing OCPP rail loop, which means that a 138/345 kV substation already found in that area must be relocated. At the time of the technical hearing, the possible sites for this substation and the cost of relocation were not clearly defined, though one alternative would split this facility into two substations and place the 345 kV substation southeast of the rail loop, in a wooded wetland designated by the Southeast Wisconsin Regional Planning Commission as an Isolated Natural Resource Area. This location would have unnecessary environmental impacts and would require relocation of the federal/state shooting range, but the applicants have indicated that other locations for the substation are available and are willing to investigate better sites. It is reasonable to require that the applicants work with ATC, DNR, and the neighboring communities to find a suitable location for these substations, minimizing both the adverse environmental effects and the cost of relocation.

Although the two SCPC units would be placed within the city of Oak Creek, even with the selection of the North Site—CUP alternative some of the plant-related facilities will be constructed in the town of Caledonia: new access roads; railroad improvements; possibly the 345 kV substation. The record demonstrates that the town of Caledonia will also experience a variety of environmental and socioeconomic effects because of the construction of ERGS. These effects may include changes in local air quality, noise levels, traffic patterns, and traffic volume, among others. The applicants have committed to working with all neighboring communities to mitigate valid concerns, including the town of Caledonia, and it is reasonable to require that they do so.

Mitigation Payments

In a Development Agreement reached with the city of Oak Creek, WEC agreed to make annual mitigation payments to the city of $1.5 million for SCPC 1 and $750,000 for SCPC 2. In Part I of PTF, the Commission granted an annual mitigation payment of $500,000 to the city of Port Washington, though it reserved the right to review this approval if the state of Wisconsin's shared revenue program was revised and payments to municipalities increased.

The enactment of 2003 Wis. Act 31 on July 15, 2003, has significantly altered the state's shared revenue program. Prior to Act 31, compensation dollars to municipalities and counties were based on a power plant's net book value and declined over time, as the plant depreciated. The maximum payment to a municipality or county under this prior formula is $750,000 per year. This is the amount the city of Oak Creek currently receives for the existing OCPP. In contrast, payments under the new shared revenue program are based on a plant's megawatt capacity multiplied by $2,000 and do not decline over time. The new shared revenue program will pay municipalities double and triple what they would have received under the former program. Cities or villages with power plants that begin operation after December 31, 2003, will annually receive two-thirds of the plant's MW capacity multiplied by $2,000, while the host county will annually receive one-third of the MW capacity multiplied by $2,000.[13] Additional incentive shared revenue payments are also distributed to both the municipality and the county if the unit is non-nuclear and built on or adjacent to an existing or former plant site or on a brownfield site, if the unit is a baseload plant, if the unit derives energy from an alternative energy source, or if the unit is a cogeneration plant. A municipality can receive multiple incentive payments. Under this new law, the city of Oak Creek will also receive annual incentive payments in the amount of $1,200 multiplied by the plant's megawatt capacity.

This new shared revenue program commences the annual payments when a generating unit becomes operational. Shared revenue payments to the city of Oak Creek will be $1.6 million for the first SCPC unit and increase to $3.2 million for the second unit. These payments will be added to the shared revenue payments that the city is currently receiving for the existing OCPP.

Under Act 31, the annual state shared revenue payments to the city of Oak Creek when ERGS is completed will exceed the amount the city is requesting in the form of mitigation payments from WEPCO ratepayers. Thus, mitigation payments are not required while compensating shared revenue dollars for ERGS are forthcoming. The shared revenue payments, however, will not begin until 2009 when SCPC 1 is first scheduled to be in service, and the city has introduced evidence that it will begin incurring costs as soon as construction commences. For this reason, the Commission finds it appropriate to authorize annual mitigation payments, as described in the Development Agreement, for the period from the commencement of construction of SCPC 1 until the year when SCPC 2 enters service, which is scheduled for 2010. The shared revenue payments for ERGS that commence in 2009, however, will partially offset the city's costs and it is appropriate to reduce the annual mitigation payment by the amount of shared revenue that the city receives for ERGS. When ERGS is fully in service, the shared revenue payments will fully replace any mitigation payment under the Development Agreement, so any further mitigation payment cannot be billed to WEPCO. If, however, state shared revenue payments decrease during the course of the 30-year Facility Lease and are no longer sufficient to offset fully the mitigation payment that would have been paid under the Development

[13] The two-third/one-third relationship is reversed if the power plant is built in a town rather than a city or village.

Agreement, the Commission finds it reasonable for W.E. Power LLC to make a partial mitigation payment to the city that equals the remaining portion.

(Commissioner Garvin dissents, concerning the decision to award mitigation payments.)

DNR Permits

Before construction may proceed, a project site selected by the Commission must receive a corresponding air pollution control construction permit from DNR. WEC submitted four permit applications to DNR, one for each site alternative. Before it can issue a CPCN for a project, the Commission must make a number of determinations, including a finding that the project is in the public interest when considering environmental factors. However, if DNR declares that a project will meet the agency's air pollution requirements under Wis. Stat. ch. 285, the Commission loses its authority under Wis. Stat. §§ 196.491(3)(d)3. and 4. to determine that a project would have undue adverse air pollution impacts. DNR issued preliminary determinations that both the North Site and the North Site—CUP alternative should meet applicable criteria for permit approval under Wis. Stat. § 285.63 on October 6 and 9, 2003, and scheduled public hearings on these permit applications on October 28, 2003. DNR also declared that WEC's permit applications for the South Site and South Site—Exp are complete, but it has not yet issued preliminary determinations regarding whether they meet the criteria for permit approval.

The combustion of coal involves the release of numerous air pollutants. During the Commission hearings, health concerns relating to these pollutants were expressed both by expert witnesses testifying on behalf of the parties and by members of the public, particularly regarding the potential health impacts of mercury and particulate matter less than 2.5 microns in diameter

($PM_{2.5}$). Some parties urge the Commission to quantify the monetary cost of these adverse health effects as an additional cost of ERGS that was not included in the EGEAS model inputs.

Mercury emissions are regulated under DNR air pollution control construction permits. DNR considers mercury to be a hazardous pollutant, requiring the use of maximum achievable control technology to meet the emission limits set by permit. DNR's air pollution permits, though, do not yet address $PM_{2.5}$. This is because the U.S. Environmental Protection Agency (EPA) has set National Ambient Air Quality Standards for $PM_{2.5}$ emissions over a 24-hour episode and annually, but has not yet instituted a program for determining non-attainment areas and thus has not taken steps yet to reduce emissions. DNR currently intends to submit a State Implementation Plan to the EPA regarding $PM_{2.5}$ in 2005. S.C. Johnson and other parties requested that the Commission consider the health impacts caused by $PM_{2.5}$ emissions from ERGS and offered evidence regarding the monetary cost of these impacts. WEC introduced contrary evidence on these subjects.

The evidence in the record regarding the externalized health costs associated with air emissions will be valuable to DNR as it examines its air permit applications for ERGS, but the Commission does not have special expertise to render an independent judgment on this topic. To do so would require the Commission to pick appropriate methods for modeling emission dispersion, determine if a causal relationship exists between emissions and adverse health impacts, decide whether a threshold level exists below which no impacts occur, and establish how to translate any identified impacts into dollars. These are primarily the functions of the EPA and DNR, and these agencies have not yet spoken. Any conclusions the Commission might

reach would likely be rendered a nullity by the ultimate decisions of the EPA and DNR. In this docket, the Commission is willing to defer to these decisions of the EPA and DNR.

DNR must also issue a number of water-related permits and approvals before construction may commence. These include: permits for grading work for the generating facilities and for the railroad improvements; the approvals for dredging and for use of lakebed and shoreline structures to construct breakwater and harbor facilities; the approval for use of lakebed to install the cooling water intake and discharge structures; and the water quality certification needed for wetland fill. As of the date the record closed, DNR has deemed the joint state/federal application for water regulatory permits and approvals for ERGS to be incomplete. Five parties to this docket jointly filed with DNR a request for a contested case hearing on WEC's application for water regulatory permits and approvals, which DNR granted on October 6, 2003. A hearing date will not be set until DNR determines that the application is complete.

Section 316(b) of the federal Clean Water Act and Wis. Stat. § 283.31(6) require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impacts. In December 2001, the EPA published final regulations defining the federal requirements that apply to the construction of "new" facilities and, in April 2002, proposed regulations regarding "existing" facilities. On January 28, 2003, DNR determined that ERGS could be treated as an existing facility. Under this designation ERGS could utilize once-through cooling, as OCPP does now, if the applicants can demonstrate that the intake structure represents Best Technology Available for controlling impingement and entrainment of aquatic organisms.

If the EPA overrules DNR's preliminary decision about whether ERGS is a modification to an existing facility under Section 316(b) of the Clean Water Act, the applicants may not be able to build their proposed once-through cooling system for ERGS. Instead, ERGS would need to be redesigned to utilize cooling towers. The cooling towers would be new features in the plant layout, costing approximately $100 million per SCPC unit. Changes in the cooling efficiency could also change emissions and the environmental impact of the SCPC units, requiring alterations in air pollution control equipment. Because of these substantial effects that would result, if cooling towers are required the applicants must submit a redesigned or relocated plant to the Commission for approval.

DNR has not yet granted its approval for water withdrawal and water loss under Wis. Stat. §§ 281.35 and 281.41. The applicants must provide an accurate water balance for the ERGS facilities in order for DNR to complete its review. A Wisconsin Pollutant Discharge Elimination System (WPDES) permit for discharges related to stormwater during construction and an amendment of the existing OCPP stormwater pollution prevention plan are needed prior to beginning construction. These have not been issued, due to an incomplete application. Finally, DNR has not yet authorized modifications to the existing WPDES permit related to the new cooling water intake structure. The documentation submitted by the applicants, demonstrating that the new intake will meet Best Technology Available standards, is currently being reviewed by the DNR and EPA.

DNR's Bureau of Endangered Resources has indicated that incidental take permits for threatened or endangered species will not be required for the ERGS project. Based on completed surveys, it is unlikely that any rare animal species would be adversely affected by construction of

ERGS. Although it is anticipated that numerous state-endangered blue-stemmed goldenrod plants (*Solidago caesia)* and some yellow gentian (*Gentiana alba*), a state-threatened species, will be destroyed during construction, these plants are not protected on private property and a DNR permit is not required.

Adequacy of EIS

Wis. Stat. § 1.11(2) requires the Commission to prepare a detailed EIS for any "major action" it is considering that would significantly affect the quality of the human environment. The Commission has adopted rules that categorize the types of actions it undertakes, for purposes of complying with this statute. Wis. Admin. Code § PSC 4.10(1) and Table 1, item f., provide that a proposal to construct "an electric generation facility fueled by coal" is a major action, and an EIS is required. As a result, Commission staff collaborated with DNR staff to prepare an extensive EIS about ERGS, including holding scoping sessions in the Oak Creek community at which members of the public could learn about the project and could relate particular concerns about its environmental impacts to Commission and DNR staff. The Commission and DNR released a draft EIS dated April 21, 2003, 450 pages long, plus a second volume of 34 figures, which it distributed broadly to interested persons. The agencies encouraged people to respond with concerns and criticisms during a 45-day comment period, and held meetings with the public in the project area to receive these comments.

Following the comment period, Commission and DNR staff prepared a final EIS that took into consideration the comments received as well as new information collected. The final EIS substantially expanded the draft EIS, adding more figures to Volume 2 as well as a 300-page

Volume 3, which identifies and responds to the comments received. In all, the EIS now totals approximately 900 pages.

Several parties argue that the EIS's discussion of the environmental impacts of ERGS is inadequate. After hearing these concerns and reviewing the detailed record prepared in this case, much of which concerns environmental impacts, the Commission finds that this EIS properly discusses the significant aspects of probable environmental consequences. In those areas where the likely environmental consequences associated with ERGS are unknown, the EIS identifies these uncertainties. ERGS also remains under continuing regulatory review by DNR, the state's primary regulator for most purposes of environmental protection. During its review of numerous permit applications, DNR can respond to remaining areas of uncertainty. The Commission recognizes DNR's continuing regulatory oversight of this project and, by the conditions imposed in this order, defers to DNR's permitting decisions that will mitigate environmental impacts.

For these reasons, the Commission finds that the draft and final EIS comply with the requirements of Wis. Stat. § 1.11 and Wis. Admin. Code ch. PSC 4.

Certificate of Public Convenience and Necessity

W.E. Power LLC, through its subsidiaries ERGS-SCPC 1 LLC and ERGS-SCPC 2 LLC, may commence construction of two 615 MW SCPC electric generating units, as described in WEC's project application and modified by this Final Decision, at an estimated cost of $1,426,674,000 for SCPC 1 and $724,132,000 for SCPC 2 (year-of-occurrence dollars), plus any adjustment that is approved by this Commission for one year of additional inflation.

Order

ERGS Generating Plants

1. W.E. Power LLC and its subsidiaries may construct SCPC 1 and SCPC 2 at the North Site—CUP alternative. The in-service date for SCPC 1 shall be May 1, 2009; the in-service date for SCPC 2 shall be May 1, 2010. W.E. Power LLC and its subsidiaries shall construct these units in conformance with the design specified in the ERGS application, in conformance with the construction schedule specified in the application (as delayed one year by this Final Decision), and subject to the conditions specified in this Final Decision. Although the application to construct an IGCC unit is denied, W.E. Power LLC and its subsidiaries may construct common facilities with the SCPC units to accommodate up to 3,000 MW of generation at this site.

2. W.E. Power LLC and its subsidiaries shall commence construction of SCPC 1 within 12 months after receiving all necessary federal, state, and local permits and approvals. Before commencing construction of SCPC 2, the applicants shall file an updated demand and energy forecast and updated EGEAS computer modeling with the Commission.

3. Within three months of the date when SCPC 2 is fully operational, W.E. Power LLC shall repeat the noise measurements that were taken before project approval, shall measure the maximum noise generated at the site with all units on, and shall measure the noise at the site with all units off. W.E. Power LLC shall report its findings to the Commission, using the same format as its pre-approval noise studies.

4. W.E. Power LLC shall provide documentation to the Commission of all work with individuals who raise concerns about noise or interference with radio or television reception, and of the resolution of those concerns.

5. The applicants shall work with neighboring communities to mitigate valid concerns and impacts.

6. The applicants shall seek the approval of the Office of the Commissioner of Railroads to separate or eliminate the existing at-grade Union Pacific rail crossings at Seven Mile Road and Six Mile Road. The applicants shall also monitor the effect of train deliveries on road blockages at Four Mile Road crossing, following their construction of the new on-site rail facilities, and shall work with the town of Caledonia to address legitimate concerns it may have at this location.

7. The applicants shall work with ATC, DNR, and neighboring communities to minimize the cost and the environmental impact of moving and reconfiguring the 138 kV and 345 kV substations. The applicants shall inform the Commission of the results of this work, documenting the estimated cost involved, the new proposed layout of the substations, and the associated transmission line interconnection routes and routes for exiting from the plant site.

8. If the EPA or DNR determine that once-through cooling is not permittable, WEC shall submit a revised project application for the Commission's approval that redesigns or relocates ERGS, as needed.

Leased Generation Contracts

9. The Facility Lease for SCPC 1 shall use a construction cost of $1,426,674,000 as the Approved Amount and the Facility Lease for SCPC 2 shall use a construction cost of

$724,132,000 as the Approved Amount, but the applicants can alter these amounts by submitting to the Commission for its review and approval revised construction costs that include one year of additional inflation at an annual inflation rate of no more than 1.87 percent. Any such submission shall be provided to the Commission no later than 45 days after the date this Final Decision is signed.

10. W.E. Power LLC and its subsidiaries may only recover construction costs from WEPCO that exceed the amounts approved in this Final Decision if the Commission makes a prior determination, before billing, that the excess cost is prudently incurred. W.E. Power LLC and its subsidiaries may not recover from WEPCO more than 105 percent of the construction costs approved in this Final Decision, except that costs qualifying as Force Majeure, an Excused Event, or an Event of Loss under the definitions of the Facility Lease are not included in this calculation. W.E. Power LLC and its subsidiaries may only recover from WEPCO a cost that qualifies as Force Majeure, an Excused Event, or an Event of Loss if the Commission makes a prior determination, before the cost is billed, that it is prudently incurred. If the actual cost of constructing an ERGS unit is less than the Approved Amount defined in the Facility Lease, the Approved Amount shall be reduced to equal the actual cost.

11. Neither WEC nor any of its affiliates may securitize the lease payment stream under the Facility Lease without the Commission's prior review and approval.

12. WEPCO shall treat each Facility Lease, Ground Lease, and Ground Sublease approved in this docket as operating leases for ratemaking purposes. In future rate cases, WEPCO may not seek a higher authorized return on equity for its rate-based assets, or any other

capital structure adjustments, related to credit quality degradation resulting from a lease's classification as a capital, operating, or true tax lease.

13. WEPCO shall work with Commission staff to develop a tracking mechanism, and appropriate accounting practices, that prevent a double collection of costs from ratepayers through utility rates and lease payments.

14. WEPCO shall work with Commission staff to develop an appropriate present value true-up mechanism for Commission approval, to balance the 5 percent rent reduction in the first five years of each Facility Lease.

15. WEC shall revise the Facility Lease, Ground Lease, and Ground Sublease for SCPC 1 and SCPC 2, reflecting each of the lease modifications approved in this Final Decision. Within 45 days after the date this Final Decision is signed, WEC shall submit these revised leases to the Commission for its review and approval, with the revisions highlighted.

16. No future changes may be made to a Facility Lease, Ground Lease, or Ground Sublease, approved in this docket, whether mutually agreed upon or otherwise, without first receiving the Commission's review and approval. No interest in any of these leases or agreements or in the ERGS facility may be transferred or assigned, without first receiving the Commission's review and approval.

17. All books and records underlying any transaction made pursuant to a Facility Lease, Ground Lease, or Ground Sublease shall be provided to the Commission upon request.

18. The Commission retains limited continuing jurisdiction over those terms and conditions expressly set forth in each lease approved by the Commission and set forth in this Final Decision.

General Requirements

19. WEPCO shall submit a plan to the Commission by March 1, 2004, for capturing a minimum of 55 MW of additional cost-effective energy conservation by 2008.

20. W.E. Power LLC and its subsidiaries shall notify the Commission within five working days of the date when construction commences on each unit. W.E. Power LLC and its subsidiaries shall notify the Commission, in writing, within 24 hours of any decision not to proceed with any of the approved projects or to enter into any partnership or other arrangement with another entity with respect to the project.

21. W.E. Power LLC and its subsidiaries shall submit quarterly progress reports to the Commission that summarize the status of construction, the status of land acquisition, the status of environmental control activities, and the overall percent of physical completion for each unit. Each report shall include a summary of consultations with DNR and other agencies concerning the issuance of permits. The reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed environmental protection or control standards. The first report for SCPC 1 is due for the quarter ending December 2003; the first report for SCPC 2 is due for the quarter ending December 2004. The reports shall be filed within 31 days after the end of each quarter and shall continue until the certificate holder's project is fully operational.

22. W.E. Power LLC and its subsidiaries shall each provide the Commission with copies of all final executed agreements related to the construction, operation, or ownership of the project when they are obtained, including the final EPC contract with Bechtel Corporation.

23. W.E. Power LLC and its subsidiaries shall promptly inform the Commission of any substantial scope or design modifications in the approved facilities.

24. If WPPI or MGE fails to exercise its purchase option within nine months after the date when a Facility Lease becomes final, within the next 45 days WEC shall provide the Commission with a plan that eliminates the risk of WEPCO ratepayers acquiring and paying for too much capacity. One means of protecting ratepayers that WEC can consider is the sale of these ownership shares to another entity.

25. For each SCPC unit, upon completion of construction W.E. Power LLC and its subsidiaries shall file with the Commission a complete report of the final costs segregated by plant account and shall explain any variances between the authorized and actual costs.

26. This Final Decision takes effect on the day after it is mailed. The CPCN for the ERGS facility only takes effect when the DNR issues all permits and approvals that it identified, pursuant to Wis. Stat. § 196.491(3)(a)3.a., as being required prior to construction of the facility.

(A separate dissent from Chairperson Bridge follows.)

Dated at Madison, Wisconsin, November 10, 2003

By the Commission:

Lynda L. Dorr

Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Attachment

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

CHAIRPERSON BURNEATTA BRIDGE
DISSENTING OPINION

In this decision the Commission has authorized construction of the largest electric generation project in Wisconsin history. The $2.15 billion price tag used today will undoubtedly grow substantially by the time all related costs are included and construction is completed. This cost will be borne by families and businesses in southeastern Wisconsin. The promised benefit to them should be the assurance of reliable base load generation for the next 35 or 40 years.

The Commission has determined that W.E. Power, LLC is entitled to a return on equity of 12.7 percent, based on a capital structure of 55 percent common equity and 45 percent long-term debt. I believe that this return on equity is extraordinarily high when compared to historic rates and is not in step with current capital markets. Because I believe that the return the Commission has authorized is more generous than necessary to attract investors and will unduly burden future ratepayers, I respectfully dissent.

These lease provisions extend for 30 years. Factoring in the lease terms the Commission has already approved for the Port Washington plant, the result is that a major component of residential, commercial, and industrial customer rates will be locked in for almost two-thirds of W.E. Power, LLC's net investment in electric and gas facilities through the year 2040. Under the financing package approved by the Commission, W.E. Power, LLC's customers will be obligated to pay at least $233 million annually over that period of time.

I proposed that the return on equity be set at 12.1 percent, based on a capital structure of 53 percent common equity. I consider this rate of return and equity structure to be much more in line with current financial markets and with recent actions taken by other state commissions.

Under my proposal, ratepayers would pay approximately $100 million less over the term of the lease on a present value basis.

I also proposed that the Commission reserve the right to review these terms at the end of 5 years, when the total costs of the project are more certain. At that time, the Commission would have available much more accurate information about actual costs and would be in a much better position to evaluate an appropriate financial structure. In view of the size of the project, the enormous cost, and the attendant uncertainties of a venture of this magnitude, I believe that this approach would be a sound exercise of our responsibility to protect the people who will pay the bills.

Burneatta Bridge
Chairperson

BB:DJG:sp:G:\PTF-ELM\bb ptf dissent 11-10-03

DATE MAILED

APR 1 8 2003

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Wisconsin Electric Power Company; Wisconsin Energy Corporation; and W.E. Power, LLC; for a Certificate of Public Convenience and Necessity for Construction of Three Large Electric Generation Facilities, the Elm Road Generating Station, and Associated High Voltage Transmission Interconnection Facilities to be Located in Milwaukee and Racine Counties

05-CE-130

ORDER DENYING PETITION TO REVIEW INTERIM DETERMINATION

At its open meeting on March 20, 2003, the Commission considered a petition from S.C. Johnson & Son, Inc., and Wisconsin's Environmental Decade. In this docket Wisconsin Energy Corporation (WEC) is seeking authority to construct three new coal-fired generating facilities as part of its "Power The Future" program, known as the Elm Road Generating Station. The petitioners ask the Commission to reconsider its determination that WEC's Certificate of Public Convenience and Necessity (CPCN) application is complete.

On November 15, 2002, the Electric Division stated its findings that the CPCN application is complete. This determination was made under Wis. Stat. § 196.491(3)(a)2, and it triggered the statutory review cycle that directs the Commission to render a decision regarding the application in no more than 180 days (360 days, if Dane County Circuit Court grants an extension for good cause).

The petitioners allege that WEC's application does not meet the Commission's requirements under Wis. Admin. Code § PSC 111.53(1)(e), which requires an applicant to describe "at least two proposed sites for the proposed facility." The petitioners contend that

WEC's three alternate sites, all located on the grounds of WEC's existing Oak Creek Generating Plant, are functionally identical. They seek a rescission of the Commission's completeness determination and a declaration by the Commission that WEC must propose at least one site at a new location, other than Oak Creek.

Because a completeness determination is an interlocutory decision, the petitioners cannot request a rehearing under Wis. Stat. §§ 196.39(2) and 227.49. The latter statute specifies that only a person aggrieved by a final order can seek a rehearing. Instead, the petitioners must rely upon the Commission's authority to reopen a case at its own discretion under Wis. Stat. § 96.39(1). This statute declares, "The commission at any time, upon notice to the public utility and after opportunity to be heard, may rescind, alter or amend any order fixing rates, tolls charges or schedules, or any other order made by the commission, and may reopen any case following the issuance of an order in the case, for any reason."

Both state and federal law provide guidance as to what constitutes an acceptable "alternative." Wisconsin's Environmental Policy Act (Wis. Stat. § 1.11(2)(e)) requires state agencies to study, develop, and describe in an Environmental Impact Statement "appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Ultimately, the rule of reason guides the range of alternatives that an agency must examine. *Milwaukee Brewers v. DHSS*, 130 Wis. 2d 56, 73, 387 N.W.2d 245 (1986); *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997). As the Wisconsin Supreme Court declared in *Wis. Environmental Decade v. Public Service Commission*, 79 Wis. 2d 161, 175, 255 N.W.2d

917 (1977), "The range of alternatives that must be considered need not include those . . . which are not reasonably related to the purposes of the proposed agency action."

The Commission's standard for reviewing site alternatives in a CPCN application is based upon both the rule of reason and the principle that alternatives must serve the public purpose underlying the issuance of a CPCN. The Commission first reviews a CPCN application to determine that each proposed site is "reasonable," i.e. is a feasible location for the project that would not directly conflict with any of the criteria for granting a CPCN expressed in Wis. Stat. § 196.491(3). In addition, the Commission's practice is to require that the sites are sufficiently distinct to offer different packages of costs and benefits, and thus present the Commission with a choice.

The fact that alternate sites may be geographically close to each other does not render them unreasonable. The Commission has accepted CPCN applications for several projects where the alternate sites were close together or even adjacent to each other. Instead, the Commission looks at the characteristics of the sites in their entirety. The alternate sites requirement of Wis. Admin. Code § PSC 111.53(1)(e) is also distinct from the requirement that a CPCN application describe alternate forms of engineering, which is found in Wis. Admin. Code § PSC 111.53(1)(d). Paragraph (d) requires the applicant to provide information about alternate sources of supply—in particular, demand-side management and resources with a higher ranking under the energy priorities laws, Wis. Stat. §§ 1.12 and 196.025. While par. (e) does require that two or more sites be discussed in the application, it does not demand that at least one site be designed for an alternate source of supply. Paragraph (e) allows an applicant to propose sites that are all designed to use the applicant's preferred fuel.

Because of the complexity of a coal-fired electric generating plant, which requires a great deal of infrastructure in the form of transmission facilities, coal handling equipment, rail or ship transportation for coal and other materials, and means of supplying large quantities of water, very few sites for such a project are actually feasible. These infrastructure requirements place a premium on existing brownfield locations, where generating plants are already in place and facilities can be shared. As a result, the range of site alternatives tends to be smaller and the packages of costs and benefits that the site alternatives offer may be more similar than for other types of projects.

At least two of the three sites WEC has included in its CPCN application meet the Commission's standards. The petitioners allege that 11 or more different characteristics of these sites are functionally identical, but this situation is difficult to avoid when searching for locations to install a new coal-fired plant where generation already exists. The similarities highlight the fact that each site alternative is relying on existing infrastructure at a brownfield generating site, and the Commission has encouraged the use of such locations because they tend to make electric generation projects less expensive and less environmentally damaging. The Commission also notes two significant distinctions among the sites WEC is proposing. The primary site is located in the city of Oak Creek, Milwaukee County, while the alternate sites are found in the town of Caledonia, Racine County. In addition, construction at the primary site would require WEC to cut and fill 10 million cubic yards of earth, while at Alternate Site A it would only need to move 7.3 million cubic yards.

The site alternatives WEC is proposing are "different enough" to meet the Commission's requirements in Wis. Admin. Code § PSC 111.53(1)(e). The Commission will therefore not

reopen its determination that the CPCN application is complete. The Commission further notes that, at hearings on this project, the petitioners will have the opportunity to challenge directly whether any of the proposed sites is in the public interest.

The Petition for Review of Interim Determination is DENIED.

Dated at Madison, Wisconsin, April 17, 2003

By the Commission:

Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

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This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Clean Wisconsin, Inc. et. al.,

Petitioners

vs. Case No. 03 CV 3478

Wisconsin Public Service
Commission and Department
of Natural Resources,

Respondents

ORDER UPON JUDICIAL REVIEW OF PUBLIC
SERVICE COMMISSION ORDER

Application of Wisconsin Electric Power Company; Wisconsin Energy Corporation; and W.E., Power, LLC; for a Certificate of Public Convenience and Necessity for Construction of Three Large Electric Generating Facilities, the Elm Road Generating Station, and Associated High Voltage Transmission Interconnection Facilities to be Located in Milwaukee and Racine Counties.

Public Service Commission Docket No. 05-CE-130

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I. Statement of the Case

This proceeding arises from a Final Decision and Order of the Public Service Commission (PSC), rendered November 10, 2003, (Order). In the Order, the PSC issues a Certificate of Public Convenience and Necessity (CPCN) for the construction of two large coal-fired electric power plants by the Wisconsin Energy Corporation (WEC). The two unit facility is known as the Elm Road Generating Station (ERGS) and is to be located on the shore of Lake Michigan at an existing Oak Creek Power Plant (OCPP) owned by Wisconsin Electric power Company (WEPCO). Each of the two new plants is to be a Super Critical Pulverized Coal unit (SCPC 1 and SCPC 2) and each is to be capable of producing 615 megawatts (MW) of electric power. WEC had sought authorization to build a third new coal-fired facility, that being a 600 MW Integrated Gasification Combined Cycle (IGCC) unit but the PSC, in the Order, declined to authorize construction of the third unit. The projected cost of the two new authorized units is 2.15 billion dollars and apparently will be the largest, most expensive generating facility ever constructed in Wisconsin.

The PSC Order resolves what has been designated as second and final part of a WEC proposal initially submitted to the PSC January 31, 2002 and known as Power the Future (PTF).. The original combined proposal was a plan to construct five new power generating facilities, two natural gas-fired units at Port Washington and three new coal-fired units at the existing Oak Creek Power plant (OCPP) site. The Port Washington plants were approved[1] and, thereafter, the PSC undertook consideration of the remaining three proposed new facilities at the Oak Creek site. The new Oak Creek facilities, known

[1] Final Decision, Application of Wisconsin Electric Power Company, Wisconsin Energy Corporation and W.E. Power, LLC, PSCW docket 05-CE-117.

also as the Elm Road Generating Station (ERGS) thus became phase II of the PTF proposal.

This Circuit Court action is a consolidation of five separate petitions[2] for judicial review pursuant to sec. 227.52, Wis. Stats. in the Circuit Court of Dane County; Clean Wisconsin, Inc. and S.C. Johnson & Sons, Inc. v. Wisconsin Public Service Commission and Wisconsin Department of Natural Resources, 03 CV 3478; Clean Wisconsin, Inc. and S.C. Johnson & Sons, Inc. v. Wisconsin Department of Natural Resources, 03 CV 133; Calpine Corporation v. Public Service Commission of Wisconsin, Case no. 04 CV 149; Calpine Corporation v. Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources, Case no. 04 CV 3731; City of Oak Creek v. Public Service Commission of Wisconsin, Case no. 04 CV 533. By order of March 11, 2004, the foregoing separate cases were consolidated into Case no. 03 CV 3478.

The record of the proceedings before the PSC is extensive. Hearings were held on nineteen days and the record contains some 5,945 pages of testimony transcript, of which 302 pages have been designated as confidential pursuant to secs. 134.90 and 196.14, Wis. Stats.

The record begins with a three volume application filed January 31, 2002 by WEC and includes twenty six volumes of testimony, correspondence and exhibits. The record contains a draft Environmental Impact Statement (EIS), issued April, 2003 and a final EIS, issued July, 2003, R. 77 and R. 119, respectively.

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[2] Initially there was a sixth case which was part of the consolidated proceeding, Town of Caledonia v. Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources, Dane County Case no. 04 CV 533. This case was filed in the Circuit Court of Racine County as Case no. 03 CV 2084 and venue was thereafter transferred to the Circuit Court of Dane County. The parties thereafter submitted a stipulation seeking dismissal and, by order of September 2, 2004, this matter was dismissed.

II. Standard of Review

The PSC Order is the product of extensive consideration of complex engineering, economic and environmental matters. Wisconsin must provide adequate electric power for the future and that requires careful, thoughtful planning for facilities needed many years down the road. Generation facilities cannot be built quickly. The planning must consider extremely complex technical, financial and environmental considerations. The PSC is charged by the legislature with oversight of state utilities and possesses both expertise and long experience in that role. In this particular proceeding, involving what is described as the largest utility construction proposal in the history of the state, the PSC has shared regulatory responsibility, as to environmental aspects of the proposal, with the Wisconsin Department of Natural Resources (DNR). This truly is an area where a specialized agency is likely to be far more qualified than any court to analyze the extraordinary volume of relevant factual information. Thus the role of the Circuit Court, in an action which seeks judicial review of an agency Order, should properly be limited. The overarching structure for this great administrative responsibility, however, is a framework of legal principle and while the discretion assigned to the Commission is very great, that discretion must work within the tangible, visible limits of the applicable law.

Section 227.52, Wis. Stats., authorizes a Circuit Court to review a Order of the PSC in this matter and sets forth statutory guidance for court review.

> 2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.
>
> (3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's

exercise of delegated discretion.

(4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(7) If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

9) The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.

Section 227.57, Wis. Stats.,

Certainly the PSC Order reflects determinations of fact reached by the PSC as well as interpretations of law. The petitioners challenge factual determinations reached by the PSC and in undertaking judicial review as to such matters, the court is required to,

> accept findings of the agency if they can be supported by substantial evidence. Section 227.20(6), Stats. Substantial evidence does not mean the preponderance of evidence, but rather whether reasonable minds could reach the same conclusion reached by the agency.
>
> Citizens' Utility Board. v. Public Service Commission, 211 Wis.2d 537, 565 N.W.2d 554 (Ct App. 1997)

As to legal interpretations adopted by the PSC the court must determine, in each instance, the proper level of deference which should be given to the PSC interpretation. All parties recognize that the court should employ one of three levels of deference which may be regarded as a continuum; great weight, due deference and de novo review. If the court accords great weight deference, the court largely defers to the determination adopted by the agency.

> Great weight deference is afforded to an agency's decision under the following circumstances: (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute."
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> Brauneis v. State, 236 Wis.2d 27, 612 N.W.2d 635, citing Harnischfeger Corp v. LIRC, 196 Wis.2d 650, 660, 539 N.W.2d 98 (1995)

Moreover, the court is obligated to regard an agency's interpretation of its own administrative regulation as controlling unless that interpretation is "inconsistent with the language of the regulation or clearly erroneous." Pfeiffer v. Board of Regents, 110

Wis.2d 146, 155, 328 N.W.2d 279 (1983), quoting Beal v. First Federal S. & L. Ass'n. 90 Wis. 2d 171, 183, 279 N.W.2d 693 (1979).

At the other end of the spectrum lies de novo review in which the court begins anew to determine independently what should be the proper legal interpretation. De novo review is the appropriate standard when the court is presented with a circumstance in which the agency's interpretation conflicts with the plain meaning of the statute.

> A court does not, however, give deference to an agency's interpretation of a statute when the court concludes that the agency's interpretation directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis.
>
> State ex rel. Parker v. Sullivan, 184 Wis.2d 668, 669, 517 N.W.2d 449 (1994), see also, Lisney v. LIRC, 171 Wis.2d 499, 506, 493 N.W.2d 14, (1992)

De novo review is also proper "where there is no evidence that the agency used any special knowledge or expertise, the issue is clearly one of first impression, or the agency's position on an issue has been inconsistent." RURAL v. PSC, 239 Wis.2d 660, 679, 619 N.W.2d 888 (2000)

The middle of the road approach is for the court to give what is termed due weight to the agency's legal interpretation, a level of deference that is appropriate when the agency is acting within its jurisdictional area but with regard to a particular matter that is unusual or novel.

> Due weight deference, the middle ground between great weight deference and *de novo* review, is warranted where an agency has some experience in the area, but has not developed any particular expertise in interpreting and applying the statute at hand that positions the agency more favorably to interpret that statute than a reviewing court.
>
> RURAL v. PSC, supra, 239 Wis.2d at 678, 679

And finally, it must be noted that the burden is upon the petitioners to demonstrate a proper and adequate basis to modify, vacate or remand the Order of the Commission, Shoreline Park Preservation, Inc. v. DOA, 195 Wis.2d 750, 761, 537 N.W.2d 388 (Ct. App. 1995).

The challenges posed by the petitioners may usefully be placed in two groups. The petitioners argue that the Commission's proceeding began based upon an application for CPCN approval which was incomplete and thus legally insufficient. The petitioners also find fault with various aspects of the Order which resulted. This judicial review will discuss first the issues relating to the application and thereafter will consider the Commission's Order.

III. WEC Application for CPCN Approval

WEC is required to obtain from the PSC, prior to beginning construction of the proposed ERGS, a certification that the proposed new facilities that public convenience and necessity require the project (CPCN), sec, 196.49(3)(b); sec. 196.491(3)(a), Wis. Stats. The process of obtaining certification begins with an application in a form prescribed by the Commission, sec. 196.49(2), Wis. Stats. and Wis. Admin. Code. Section 196.491, Wis. Stats. creates a process whereby the PSC has a limited time to consider an application for authorization to construct a new electric generating facility. The procedure includes, at critical points, default provisions which provide to the applicant a favorable determination, if the Commission fails to act within statutorily determined periods.

The first step in the process is a determination by the PSC as to whether the application for a CPCN is complete. The Commission must review the application and

advise the applicant as to whether it is complete, within 30 days. The applicable statute provides,

> The commission shall determine whether an application filed under subd. 1. is complete and, no later than 30 days after the application is filed, notify the applicant about the determination. If the commission determines that the application is incomplete, the notice shall state the reason for the determination. An applicant may supplement and refile an application that the commission has determined to be incomplete. There is no limit on the number of times that an applicant may refile an application under this subdivision. If the commission fails to determine whether an application is complete within 30 days after the application is filed, the application shall be considered to be complete.
>
> Section 196.491(3)(a)(2), Wis. Stats.

Section 196.491(3)(g), Wis. Stats. provides that the PSC must take final action within 180 days from the point that the application is complete. The 180 day time limit can be extended one time, upon approval by a circuit court, by an additional 180 days. Thus, from the date that an application is complete, the PSC has no more than 360 days to take final action. If the Commission fails to do so the application is deemed approved.

The determination that the application is complete is a crucial element in this process. At that point, the statutory deadline for determination is fixed. 360 days appears to be a substantial period of time until consideration is given to the size, cost and complexity of the current proposal as well as the opportunity for public participation that the Commission must provide.

There is a compelling logic to the statutory process which is all the more apparent in this case where extraordinary factual complexity and the need for timely resolution confront the finite resources of a regulatory agency. It is significant and appropriate that the key date in the process, the starting gun as it may be envisioned, is in the hand of the party most interested in the application, the applicant utility. WEC

presumably has the best access to the information that must be assembled to produce a complete application. The applicant utility has the direct, immediate concern and is likely possesses the resources necessary to assemble the required information.

Petitioners now assert that the PSC improperly determined that the WEC application was complete and seek an order vacating the PSC Order upon that basis. The arguments that the application was incomplete evolve essentially to three primary assertions;

1. The application did not present at least two proposed sites as required by sec. 196.491(3)(d)3, Wis. Stats. and Wis. Admin. Code, sec. 111.53(1)(e).

2. The application did not contain the regulatory approvals required by Wis. Admin. Code, sec. 111.53(1)(f) 1.

3. The application did not contain the information about needed new transmission line facilities as required by Wis. Admin. Code, sec. 111.53(1)(f) 4.

A. Alternative Location/Site Requirement

The WEC application offers three proposed configurations of the three proposed new generating plants. The Final EIS describes a 1000 acre parcel owned by WEPCO and states the proposal is one for three new units, "all constructed on or adjacent to a site containing WEPCO's existing Oak Creek Power Plant (OCPP)." Ex. 274, Vol. 1, Final EIS, p. xvii. In the course of the proceeding, a fourth configuration, known as "North CUP", evolved and eventually was the choice of the PSC. This too is located within the 1000 acre parcel.[3]

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[3] At an earlier point, petitioners Clean Wisconsin and Johnson sought reconsideration of the determination that the multiple OCPP configurations were sufficiently separate sites. On April 17, 2003, the PSC issued an order denying the request for reconsideration and the petitioners sought review in the circuit court. The court ruled that the April 17, 2003 order was a

Wisconsin law directs the PSC to consider "alternative locations" for a proposed new power plant facility,

> Except as provided under par. (e) and s. 196.493, the commission shall approve an application filed under par. (a)1. for a certificate of public convenience and necessity only if the commission determines all of the following:
> ...
> 3. The design and location or route is in the public interest considering ... alternative locations...
>
> Sec. 196.491(3)(d), Wis. Stats. , in part.

Moreover, the Commission has adopted a rule which requires the applicant to identify "[a]t least two proposed sites" in order for an application to be deemed complete.

> (1) Contents of a CPCN application. Except as provided in sub. (2), a CPCN application for a large electric generating facility is not complete until the applicant has filed all of the following information with the commission:
> ...
>
> > (e) At least two proposed sites for the proposed facility, including a description of the siting process and a list of the factors considered in choosing the alternatives.
>
> Wis. Admin. Code, sec. 111.53, in part.

Finally, the Commission has also adopted a provision which provides that in specific circumstances, there is to be no requirement that an alternate location be identified and described in the application.

> 1. An application for a cogeneration facility may meet the requirement under sub. (1) e) by filing information on 2 sites that are both located at the steam host's existing industrial plant, if the cogeneration facility will be a qualifying facility under 18 CFR 292.205 and none of the needed infrastructure improvements would constitute a major action significantly affecting the quality of the human environment under s. 1.11 (2) (c), Stats.
>
> 2. An application for repowering an existing generating facility may meet the requirement under sub. (1) (e) by filing information on 2 sites that are both

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preliminary decision not subject to judicial review prior to the issuance of a final decision, Clean Wisconsin, Inc. and S.C. Johnson & Son, Inc. v. Wisconsin Public Service Commission, Case No. 03-CV-1480, Dane County Circuit Court, Order, July 8, 2003.

> located at the existing generating facility site, if none of the needed infrastructure improvements would constitute a major action significantly affecting the quality of the human environment under s. 1.11 (2) (c), Stats.
>
> Wis. Admin. Code, sec. 111.53(2)(b), in part.

The Order of the PSC acknowledges the requirement that alternative locations/sites must be considered and interprets that requirement as follows,

> the fact alternate sites may be geographically close together does not automatically render them unreasonable alternatives ... The Commission determines that whether proposed site alternatives are reasonable by applying two standards: the site alternatives must each be feasible locations and they must be sufficiently distinct to offer different packages of costs and benefits
>
> PSC Order, page 45

The Commission reads the statute and the rule to require only that the alternative sites be feasible locations which offer alternative costs and benefits. The present application presents three configurations each of which used the 1000 acre parcel, to some degree, in a different manner. Apparently, none of the three submitted alternatives used precisely the same portion of the parcel. But, using the commission's interpretation of the alternative locations/sites requirement, each of the three WEC alternatives could use precisely the exact same land so long as they were each feasible and involved different costs and benefits. Thus the PSC's interpretation of the law permits elimination of the core requirement, the presentation of at least two different locations.

This formulation is one of law and the question becomes one of determining first the degree of deference owed by the court to the PSC as to this determination. Interpretation of the alternative site provisions of sec. 196.491(3)(d), Wis. Stats. and Wis. Admin. Code sec. 111.53, are matters squarely within the jurisdiction of the PSC. It may be that the agency has called upon a degree of expertise in rendering this

interpretation but it does not appear that the interpretation is a matter of long standing. Nor does it appear that the interpretation will provide uniformity of interpretation.[4]

There is no ambiguity as to what is meant by "alternative locations" in sec. 196.491(3)(d)3, Wis. Stats. Similarly, there is no ambiguity as to what is meant by "[a]t least two proposed sites " in Wis. Admin. Code sec. PSC 111.53(1)(e). The statute and the rule require that not less than two distinct locations be submitted as proposed alternate sites. There is no ambiguity and therefore no need to look to other sources for assistance. If there was ambiguity, however, two other related rules adopted by the PSC make clear the intent of Wis. Admin. Code sec. PSC 111.53(1)(e). The PSC, by adopting Wis. Admin. Code secs. PSC 111.53(2)(b)1 and 111.53(2)(b)2 expressly provides for two specific situations where the logic of the alternate proposed sites rule is declared inapplicable. Those two exceptional situations arise when a utility may seeks to undertake a substantial renovation of an existing generation plant or seeks to build a co-generation facility to capture the energy otherwise wasted in steam produced by some other industrial process. In either instance, the proposal is by definition site-specific. In such situations, the Commission has acknowledged that the two site requirement cannot be applied, Wis. Admin. Code, secs. 111.53(2)(b) 2 and 3. If alternate configurations of the same parcel is a sufficient demonstration of alternatives, then these two specific exceptions are needless surplusage. The more reasonable interpretation is that the exceptions are necessary because Wis. Admin. Code sec. PSC

[4] The decision approving a CPCN as to the Fond du Lac Energy Center includes a consideration of two separate, distinct proposed locations for the new facility, Application of Fond du Lac Energy Center, LLC, Final Decision, May 5, 2003, pp. 6-8, Docket 9343-CE-100, as does the decision in approving the Joint Application of Fox Energy Company, LLC and American Transmission Company, LLC, Final Decision, November 8, 2002, pp. 7, 8, Docket 05-CE-115.

111.53(1)(e) is intended to mean precisely what is clearly says, the applicant must propose at least two distinct, alternative sites for a new plant.

In argument submitted to this court, the PSC suggests that the alternate location requirement should be viewed as a "rule of reason" based upon a requirement in the Wisconsin Environmental Policy Act that state agencies consider "alternatives to the proposed action", sec. 1.11(2)(c)3, Wis. Stats. and caselaw interpreting that statute, together with a parallel provision within the National Environmental Policy Act, 42 U.S.C. sec. 4332 (1970), Wis. Environmental Decade v. Public Service Commission, 79 Wis.2d 161, 175, 255 N.W. 2d 917 (1977). The WEPA requirement is intended to offer general guidance to an extremely wide range of government actions. It is a broad, statement of an approach to be taken generally. By contrast, the statute and rule applicable here speak directly to the number of "proposed sites" or "alternative locations" that must be identified. The express requirement is that more than one must be included in the application and neither the WEPA nor the NEPA are intended to offer guidance of such specificity.

In the alternative, if the court accepts the interpretation offered in the PSC Order, there remains a question as to whether the three alternatives submitted in the WEC application actually meet the test stated, whether the record reflects sufficient evidence upon which the PSC could reasonably conclude that the sites really offer distinct costs and benefits. A fair review of the record reflects the clear picture that there is no significant distinction between the costs and benefits offered by each of the three alternatives. These are not alternative sites or locations; They simply are three

different configurations or utilizations of a single site which means that the application does not meet the legal minimum for consideration by the PSC.

The interpretation of sec, 196.491(3)(d)3, Wis. Stats. and Wis. Admin. Code sec. PSC 111.53(1)(e) is clearly erroneous. It is error for the PSC to deem the WEC application complete on November 15, 2002 because the application failed to include at least two alternative sites as required by applicable rule. The Order based upon that application is hereby vacated and the matter is remanded to the Commission to permit the applicant to submit an application which does comply with sec. 196.491(3)(d)3, Wis. Stats., and Wis. Admin. Code sec. PSC 111.53(1)(e).

B. Regulatory Approvals

The Commission requires that an application for CPCN must demonstrate that regulatory approvals, other than that of the PSC, have been obtained.

> (1) Contents of a CPCN application. Except as provided in sub. (2), a CPCN application for a large electric generating facility is not complete until the applicant has filed all of the following information with the commission:
> ...
> (f) Site-related information for each proposed power plant site, including all of the following:
>
> 1. The regulatory approvals required for construction and operation of the facility.

Wis. Admin. Code, sec. 111.53, in part.

The WEC initial application was filed in January, 2002. WEC thereafter filed a series of four supplements to the application, the fourth on October 23, 2002. On November 15, 2002, PSC Electric Division Administrator Robert Norcross rendered a

determination that the WEC application was complete.[5] That determination was expressly based, however, upon the applicant's commitment to provide further data related to wetlands issues, subsurface sampling as well as aquatic, benthic and lake bottom information. Specifically, the Norcross correspondence stated,

> While the application is determined to be complete at this time, our determination is, in part, based on WE Energies' commitment to supply additional information related to items 6, 7, and 18 of the Commission's October 7, 2002, incompleteness letter. Substantial amounts of information relating to items 6, and 7 have been provided and will allow our review of the wetland delineations to begin. based upon the information contained in Supplement 4 and conversations with WE Energies staff, it is my understanding that the remaining information relative to items 6 and 7, consisting of final wetlands report from the Southeast Regional Planning Commission, will be available in approximately two weeks. In addition, the information relative to the subsurface drilling, sampling and resting survey, the wave/environmental climate date survey and the aquatic/benthic environmental and lake bottom characterization survey in item 18 will be available on the time line set out as answer 5-SUP-021 of Supplement 4.
>
> Norcross correspondence, November 15, 2002, in part.

There is no dispute that the application was deemed complete by Administrator Norcross despite the lack of certain environmental information which was to be submitted later. The Norcross letter speaks in terms of missing information rather than missing regulatory approvals but the PSC Order makes clear that all regulatory approvals still had not been obtained 360 days after the Norcross letter, as of the November 10, 2003 issuance of the Order.

> DNR must also issue a number of water-related permits and approvals before construction may commence. These include: permits for grading work for the generating facilities and for the railroad improvements; the approvals for dredging and for use of lakebed and shoreline structures to construct breakwater and harbor facilities; the approval for use of lakebed to install the cooling water intake and discharge structures; and the water quality certification needed for wetland

[5] The November 15, 2002 correspondence of Administrator Norcross is attached as Exhibit A to the April 30, 2004 brief of Clean Wisconsin/Johnson. This document, the authenticity of which is not challenged by any party, does not appear otherwise to be within the record.

> fill. As of the date the record closed, DNR has deemed the joint state/federal application for water regulatory permits and approvals for ERGS to be incomplete.
>
> Order, at page 53

With regard to air pollution, the legislature has expressly committed such matters to the DNR, sec. 196.491(3)(d) 3, Wis. Stats., but water-related approvals are to be part of the application. Specifically, the applicant is required to provide an engineering plan to the DNR not less than 60 days before the PSC application is submitted which then triggers an obligation by the DNR to list, within 30 days, the permits that will be required, sec. 196.491(3)(a) 3.a, Wis. Stats. This begins a time-limited application and approval process before the DNR, sec. 196.491(3)(a) 3. b., Wis. stats., which is similar to but shorter than that applicable before the PSC under sec. 196.491(3)(g), Wis. Stats. The coordination between the DNR application process and CPCN process before the PSC, particularly the requirement that the DNR process precede that of the PSC is readily apparent in the explicit requirement that the CPCN not issue until all required regulatory permits have issued.

> The commission may not issue a certificate of public convenience and necessity under this subsection until the department has issued all permits and approvals identified in the listing specified in par. (a)3.a. that are required prior to construction.
>
> Section 196.491(3)(g), Wis. Stats., in part.

Here the plain language of the applicable rule states that an application, in order

to be deemed complete, must include the regulatory approvals necessary for construction and operation of the proposed new facility, Wis. Admin. Code, sec. 111.53(1)(f) 1. The requirement of the administrative rule is plain and unambiguous. [6] The application does not contain the required regulatory approvals and thus to deem it complete is an action undertaken in violation of an applicable administrative regulation.

It is error for the PSC to deem the WEC application complete on November 15, 2002 because the application fails to include the regulatory approvals required by Wis. Admin. Code, sec. 111.53(1)(f)1. The Order based upon that application is hereby vacated and the matter is remanded to the Commission to permit the applicant to submit an application which does comply with Wis. Admin. Code sec. PSC 111.53(1)(f)1.

C. Transmission Line Agreements

The third primary area of objection to the completeness of the application is the question of transmission line facilities. The applicable administrative rule provides,

> Contents of a CPCN application. Except as provided in sub. (2), a CPCN application for a large electric generating facility is not complete until the applicant has filed all of the following information with the commission:
>
> ...
>
> (f) Site-related information for each proposed power plant site, including all of the following:
>
> ...
>
> 4. Any required transmission line construction, agreements for use of the transmission system to deliver plant power, transmission losses, and effects on system reliability. If a certificate of authority under s. 196.49, Stats., is required to construct the transmission line, the location of termini, length in miles, and voltage for each transmission line.

[6] There is an obvious logic to this requirement. It is clear that the legislature has decreed that the PSC bats last, sec. 196.491(3)(g), Wis. Stats., and that the PSC has a limited period of time within which to consider an application. It follows therefore that the Commission should have before it a truly complete application before it undertakes its significant responsibility.

Wis. Admin Code, PSC, section 111.53(1), in part.

There are other administrative rules which appear to have application as well. A complete application is required to include,

> The estimated capital cost of the generating facility *and all related facilities*, broken down by major plant accounts. All cost escalation factors used in the estimate shall be identified.
>
> Wis. Admin. Code, sec. 111.53,(1)(c) 1, in part, emphasis added.

There is no dispute that the application did not contain agreements for the use of transmission lines for the 1230 MW of new power to be produced by the two proposed plants which were approved, nor does the record appear to contain the much of the other information required by Wis. Admin. Code, sec. 111.53(1)(f) 4.[7] The Commission offered an estimate of $166 million, Order, p. 10.[8] Potentially, construction of the required transmission facilities will require a CPCN from the PSC, Sec. 196.49, Wis. Stats.,Wis. Admin. Code, sec. 111.53(1)(f) 9,[9] which will in turn require a careful consideration of the technical, environmental and economic facts by the PSC, Wis. Admin. Code, sec. 111.55.

In argument, the PSC suggests that recent reorganization of the state utilities, involving the transfer of transmission lines to an entity known as the American Transmission Company (ATC) makes it difficult to obtain the information required by the

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[7] As will be discussed below, the Commission notes that the available transmission data is preliminary and contingent, for resolution at a later time, Order, p. 10, 11.

[8] The total estimate in the Final EIS is $266,216,753 but of that amount, $102,164,662, apparently is allocated for operation of the third, IGCC unit, as to which the PSC did not give approval which would produce an estimate of $164,052,091, Final EIS Vol 1, pp. 15, 126-132.

[9] Hearing transcript, Circuit Court, October 8, 2004, p. 62, ll. 2-7.

applicable rule.[10] The study of the need for transmission facilities does appear to be an on-going process, [11] however, and other recent orders do include transmission facility information.[12]

This is a matter of consequence. The substantial power to be produced is of no use without adequate facilities to transmit it for distribution. A related and necessary facility, required for the use of the power, with an estimated cost equal of $166 million, 7.5% of the cost of the largest utility construction project in the history of the state, appears to be one of the "related facilities" to be considered in the approval process, Wis. Admin. Code sec. PSC 111.53(1)(c)1. In any event, there is no dispute that the applicable Administrative rule requires that agreements for the use of transmission facilities be part of a complete application but that no such agreements are included in the WEC application. The requirement is both clear and unambiguous and it has not been complied with.

It is error for the PSC to deem the WEC application complete on November 15, 2002 because the application fails to include the transmission line agreements required by Wis. Admin. Code, sec. 111.53(1)(f)4. The Order based upon that application is hereby vacated and the matter is remanded to the Commission to permit the applicant

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[10] Hearing transcript, Circuit Court, October 8, 2004, p. 63, l. 1 to p. 64, l. 6.

[11] The Final EIS refers to a 10 year assessment update and interconnections studies relating to the ERGS project prepared by ATC, Final EIS, V. 1, p. 128, R. 119.

[12] Joint Application of Fox Energy Company LLC and American Transmission Company LLC, Final Decision, pp, 10-18, PSC Docket 05-CE-115; Application of Fond du Lac Energy Center, Final Decision, pp. 3, 7 & 8, PSC Docket 9343-CE-100.

to submit an application which does comply with Wis. Admin. Code sec. PSC 111.53(1)(f)4.

D. Identity of Contingent Owners

Petitioner Robert Owen submits that the WEC application was incomplete because it did not identify properly the contingent interests held by Wisconsin Public Power, Inc. (WPPI) and Madison Gas & Electric (MGE). WPPI is a wholesale supplier of power to thirty-seven Wisconsin communities and MGE is a utility located in Dane County. Both WPPI and MGE hold options each to purchase a 50 MW ownership interest in the proposed new facility and the Commission's Order contemplated both the probability that the options would be exercised as well as the possibility that they would not, Order, pp. 31, 32. With regard to the identity of utility owners, the applicable administrative regulation provides,

> Contents of a CPCN application. Except as provided in sub. (2), a CPCN application for a large electric generating facility is not complete until the applicant has filed all of the following information with the commission:
>
> (a) The operating characteristics of the proposed facility, including all of the following:
>
> ...
>
> 4. The names and addresses of owners and investors and the percent of ownership.

Wis. Admin Code, Sec. PSC 111.53(1), in part.

The PSC has interprets the above rule not to require the listing of the type of potential ownership interest, an option to become an owner, which were held by WPPI and MGE at the point that the application was filed. The question posed initially is the level of deference that this court should give to the interpretation adopted by the Commission.

This appears to be a question squarely within the Commission's jurisdiction and one which has been adopted by the Commission in the past. The interpretation adopted by the Commission is not in conflict with the plain meaning of the regulation and will promote uniformity of interpretation. Therefore the court believes great deference should be given to the Commission's interpretation, Pfeiffer v. Board of Regents, supra. The court concludes the Commission acted properly in its treatment of the ownership option interests of WPPI and MGE.

E. Completeness of the Application as of November 15, 2002

The PSC argues that it may properly deem an application substantially complete notwithstanding failure to include every item required by statute or rule. This is, however, a novel interpretation of the law by the Commission[13] and should properly be given no more than due deference, RURAL v. PSC, supra 239 Wis.2d at 679.

The petitoners question the wisdom of embarking upon this complex approval process without the required information but the question now presented is limited to whether the PSC holds the authority to forego the benefit of rules created to assure to the Commission that sufficient information is available in a timely manner to render a decision upon an application. If the PSC is intended to be the exclusive beneficiary of the information required to be included in an application, it might be possible for the Commission, in effect, to waive the right to receive the information in question. The consideration of CPCN is, however, very much a public process. The public is entitled

[13] Hearing transcript, Circuit Court, October 8, 2004, p. 17, L. 4-25

to participate in the process and full participation requires access to a full record of information, the first and perhaps the most critical element of which is a complete application. The PSC therefore must assure that the application be complete, not simply so it has before it all necessary information but also to provide to the public an opportunity to examine the basis for the proposed construction.

The requirements set forth in administrative law defining a complete application serve an important public purpose. The application pending on November 15, 2002, fails to identify at least two alternative locations, fails to include all required regulatory approvals and fails to set forth transmission line agreements. The November 15, 2002 determination by administrator Norcross is that the application was complete and the Commission's April 17, 2003 Order affirms that determination. Both determinations are in violation of the plain meaning of the applicable regulation and are therefore entitled to no deference, State ex rel. Parker v. Sullivan, supra, 184 Wis.2d at p. 669. It is the ruling of this court, as a matter of law, that the application is not complete within the meaning of sec. 196.491(3)(d), Wis. Stats. The law, sec. 196.491(3)(e), Wis. Stats., gives to the PSC only two choices when faced with the incomplete application, it can "reject the application or approve the application with such modifications as are necessary for an affirmative finding under" sec. 196.491(3)(d), Wis. Stats. The PSC chose a third course, however, and permitted the process to begin based upon an incomplete application. In doing so, the PSC acted in violation of the law and the Order which resulted from that procedure must therefore be vacated and the matter remanded to the PSC to do that which is required under sec. 196.491(3)(e), Wis. Stats. Specifically, the Commission must give the applicant an opportunity to submit an

application which meets the requirement of the Wis. Admin. Code secs. PSC 111.53(1)(e), 111.53(1)(f)1 and 111.53(1)(f)4.

IV. Commission's Order

A. Energy Need Projections

The touchstone of any petition for authorization to build a new generating facility is the obvious question of whether there will be a need for the power that will be produced. The WEC has included within its application, forecasts of growing demand over the period 2003 through 2012. Petitioners CW/Johnson and Robert Owen question the projections of need submitted by WEC and Mr. Owen, particularly, asserts that appropriate investment in alternative power sources could reduce the requirements asserted by the applicant. The PSC, in its order, concludes that the proposed plants would not be needed as quickly as WEC suggested and further directs that there be an increased reliance upon alternative sources. The PSC, however, does accept the fundamental position that more generation capacity will be needed both to replace aging facilities and to respond to increasing demand. This is a determination involving both fact and law, a determination squarely within the jurisdiction and expertise committed to the PSC. This clearly is an area as to which the court should properly accord great deference to the legal interpretation of the PSC and also an equivalent deference as to the fact determinations that were made. The criticism and suggestions offered by the petitioners as to projected need are plausible and reasonable. That, however, is not the test and for the court to intrude upon the PSC's determination of future need. That which the petitioners urge would be an improper interference with the agency's exercise

of its expertise and discretion as contemplated and protected by sec. 227.57(6), Wis. Stats. The court therefore affirms the Order of the Commission in this respect.

B. EGEAS Computer Model

The applicant, the PSC and the petitioners, in varying degree, all rely upon a computer program known as the Electric Generation Expansion Analysis System (EGEAS). The operator of the program introduces assumptions as to future power need together with estimates of construction cost, maintenance expense, fuel cost and fuel availability. The program is designed to calculate what are thought to be optimal plans to meet the needs defined. No party suggests that it is error for the PSC to rely, at least in part, upon the EGEAS model and indeed, the program appears to be simply a device that is able to describe and compare alternative future construction scenarios through consideration of a wide range of variables. All parties appear to acknowledge that the product of the AGEAS model can be no more valuable, accurate or complete than the assumed facts that are introduced into the program. As with the projection of future power need, the question of whether the data relied upon by the AGEAS model is reasonable or not, appears to be every bit as much within the PSC's area of responsibility and expertise. The petitioners offer reasonable critiques and suggestions but the test is whether the petitioners have shown that the choices made by the PSC, in selecting the data used in the various AGEAS reports, were unreasonable. That showing has not been made.

The petitioners suggest that the assumptions upon which AGEAS studies are based were inaccurate, improper or incomplete but no petitioner suggests that it was an error of law for the Commission to use the AGEAS program. In essence, the argument

is one of fact; the petitioners suggest that the factual basis for the AGEAS studies relied upon by the PSC began with erroneous assumptions. The question arguably evolves to whether or not the factual assumptions relied upon by the PSC, in utilizing the AGEAS program, are supported by substantial evidence, within the meaning of sec. 227.52(6), Wis. Stats. The burden to demonstrate the basis to vacate the Order is upon the petitioners, Shoreline Park Preservation, Inc. , supra, and it is the determination of the court that petitioners have not shown that the factual assumptions upon which the AGEAS studies were based to be lacking the support of substantial evidence, within the meaning of sec. 227.52(6), Wis. Stats.

C. Health Care Costs

The PSC Order does not attribute any health-related cost to the construction and operation of the two new facilities but instead suggests that the evidence offered as to health cost should be considered by the DNR as that agency considers air pollution permits applicable to the new facility, Order, p. 52.

Petitioners CW & Johnson submit that the record contains competent evidence that reflects that there will be a quantifiable economic impact, that is, a cost attributable to health care and disability caused by the proposed new facilities. The argument is that while there is dispute as to the magnitude of that cost, the Commission must determine there will be operating cost in some amount caused by a need for increased health care. The petitioners' argument flows to the assertion that the PSC does not hold the discretion simply to make no finding as to that cost; Cannot ignore it entirely.

Petitioners CW & Johnson argue that, as part of determining whether or not the PSC should approve a CPCN, the commission must include as an operational cost of

the project, the on-going health costs attributable to air emissions from the new facility. The petitioners assert that the PSC is not precluded from including the on-going economic impact upon health care caused by the operation of the new facilities and they go on to argue that it is reversible legal error to fail to include that as an element of project cost.[14]

The legislature has imposed upon the PSC an obligation to consider environmental issues by requiring that the Commission approve an application for CPCN only if it determines that the proposed facility "will not have an undue adverse impact on other environmental values, such as ... public health and welfare", sec. 196.491(3)(d)4, Wis. Stats., in part. Moreover, the legislature has limited that authority by providing that "[i]n its consideration of the environmental factors, the commission may not determine that the design and location or route is not in the public interest because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285," Sec. 196.491(3)(d)3, in part. The limitation in sec. 196.4191(3)(d) 3, Wis. Stats. is specific and is focused upon the power to approve an application for CPCN. The statute does not expressly preclude the PSC, however, from considering quantifiable health care cost as an operating expense.[15]

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[14] If the DNR had issued air pollution permits pursuant to Chapter 285, it might be arguable that sec. 196.491(3)(d) 3, Wis. Stats. implies an absence of PSC jurisdiction for any consideration of air pollution matters. The petitioners observe correctly, however, that no DNR permit has been issued.

[15] Should the Commission choose to do, however, that would lead to other issues. Typically, operational cost estimates are directed in large part to determining the sums that may be recovered by the utility from rate-payers. In the case of future health care costs to be incurred, the question arises as to how such anticipated costs are to be measured and to whom are they to be paid.

It may be that the PSC could choose to include within its projection of operational cost, presumably as part of the effort to select between various equipment options and alternative locations, the costs attributable to public health matters. That is something very different, however, from the claim that the PSC must, as a matter of law, determine a health care cost whenever a record contains competent evidence as to such costs. Within the statute in question, Sec. 196.491(3)(d) 4, Wis. Stats., the term "public health and welfare" is part of a larger list of factors that the commission is to consider, including "ecological balance, ... geological formations, esthetics of land and water and recreational use," If there is a legal duty to include whatever quantification may be available as to public health, would not that same duty also apply to "esthetics of land ... use"? It may be that certain of the listed concerns can be measured in cost but it appears equally true that other concerns may not be quantifiable. Unquantifiable does not mean unimportant. Another, more reasonable interpretation of Sec. 196.491(3)(d) 4, Wis. Stats., is that the legislature identified important categories of concern which should properly be considered, even if it may not be possible to assign a clear economic value.

The language of the statute does not require quantification but rather directs the PSC to look to the overall impact of a proposal. Moreover, the legislature has not said that no adverse impact may be allowed. Rather it requires the Commission to withhold approval if it determines there to be an "*undue* adverse impact on ... public health", sec. 196.491(4)(d), Wis. Stats., emphasis added. This requirement is one which affords to the Commission substantial discretion to determine whether or not a particular impact is too great or "undue". The Commission has permitted evidence as to such costs to be

presented, apparently has even provided funding to assist the petitioners to prepare and present such evidence.

The court concludes that sec. 196.491(3)(d), Wis. Stats. cannot be read to impose a clear obligation upon the commission to include within the project cost calculation, any amount attributable to health costs. Further, in the alternative, if the statute could be so interpreted, the interpretation adopted by the Commission is one to which great deference should properly be given by this court, Brauneis v. State, supra.

D. Transmission Facility Design, Location and Cost

The cost of additional facilities to permit the transmission of the power generated by the approved plants poses a somewhat different question than that of projected health care costs. The proposed facility cannot serve any purpose whatsoever until sufficient transmission lines are constructed to distribute the power generated. As noted above, no application is complete until it contains whatever agreements are necessary for access to the transmission facilities and, again as noted above, the estimate of cost for these facilities is set at $166 million.[16] This is a cost of a necessary, directly related physical facility. The Commission is prohibited from granting the CPCN until it determines that,

> the design ... is in the public interest considering ... engineering, economic... and environmental factors...
>
> Sec. 196.491(3)(d) 3, Wis. Stats.

[16] The available information, described by the Commission as incomplete, Order, pp. 10 & 11, includes a Generation Interconnection Study Report, dated December 21, 2001, prepared by the American Transmission Company is in the Record at R.1, Vol. 3, Appendix Y.

As to design. cost and location of transmission facilities, the Commission essentially elects not to address the issue. In the Order, the Commission candidly states that it does not have the required information,

> American Transmission Company (ATC) has conducted several studies to determine the cost of interconnecting ERGS to the transmission system and the cost of up grading the transmission system so it can transmit power from ERGS. It has completed a partial transmission restudy of ERGS on July 25, 2003, estimating the transmission costs associated with SCPS 1 and SCPC 2 at $65.5 million and $100.5 million, respectively. Determining transmission system requirements for ERGS, though, depends upon the amount of forecasted generation in southeast Wisconsin and northern Illinois ... This will require ATC to restudy interconnection needs to minimize the amount fo transmission facilities installed and recalculate the costs involved. The analysis is quite complex, depends upon the site chosen, and requires several months of sequential computer model runs.
>
> Order, p. 10-11

Given the lack of definitive information, the Commission is able only to provide as follows in the Order,

> The applicants shall work with the ATC, DNR and neighboring communities to minimize the cost and the environmental impact of moving and reconfiguring the 138 kV and 345 kV substations. The applicants shall inform the Commission of the results of this work, documenting the estimated cost involved the proposed layout of the substations, and the associated transmission line interconnection routes for exiting the plant site.
>
> Order, p. 58, para. 7

The Commission is prohibited from granting the CPCN until it determines that the design of the proposed facility is in the public interest, with particular attention to the engineering, economic and environmental facts, sec. 196.491(3)(d)3, Wis. Stats. The Order, however, grants the CPCN approval while expressly stating that the Commission does not know what the cost or design of the required transmission facilities will be. This determination to approve construction of the largest generating facility in state

history without also determining the cost, design and location of the transmission facilities appears to be unprecedented and is, at best, puzzling. This determination to go forward without the transmission information is, nonetheless, a decision that is within the area of concern assigned to the PSC and it may well be the product of the special expertise possessed by the Commission. The granting of CPCN approval without considering the question of transmission facilities, however, does not appear to be an interpretation of long standing, nor does it appear that this approach will provide uniformity and consistency. It certainly is true that sec. Sec. 196.491(3)(d) 3, Wis. Stats., does not expressly compel the inclusion of transmission facilities but this court concludes that the those facilities are so integral and necessary to the planned generation plant that the decision to grant approval without determining the design, cost and location of those facilities to be contrary to the legislature's intent, sec. 196.491(3)(d) 3, Wis. Stats. and "otherwise unreasonable or without rational basis" within the meaning of State ex. rel. Parker, supra. It is therefore the order of the court that the Order is hereby vacated and the matter remanded to the Commission for a determination as to the design, cost and location of transmission facilities needed to serve the proposed new plant.

E. Energy Priority Law

The PSC Order approves the construction of two 615 MW plants which will use high sulfur coal as the fuel source. The Order considers the contribution that renewable energy sources, wind generation and energy conservation could make to the future energy needs of the state. The PSC also considers a competing proposal,

submitted by Calpine, which would have provided power using equipment that uses natural gas as the fuel. The Commission determines the following as fact,

> Energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. Secs. 1.12 and 196.025, or their combination, are not cost-effective or technically feasible alternatives to the projects proposed in this docket.
>
> Finding of fact, no. 1, Order, p. 4

The petitioners argue that the PSC, in its process, fails to comply with the requirements of the Wisconsin Energy Priority Law, sec. 1.12, Wis. Stats. That statute provides,

> **(4) Priorities.** In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed:
> 1. Natural gas.
> 2. Oil or coal with a sulfur content of less than 1%.
> 3. All other carbon-based fuels.
>
> **(5) Meeting energy demands.** (a) In designing all new and replacement energy projects, a state agency or local governmental unit shall rely to the greatest extent feasible on energy efficiency improvements and renewable energy resources, if the energy efficiency improvements and renewable energy resources are cost-effective and technically feasible and do not have unacceptable environmental impacts.
>
> (b) To the greatest extent cost-effective and technically feasible, a state agency or local governmental unit shall design all new and replacement energy projects following the priorities listed in sub. (4).
>
> Sec. 1.12, Wis. Stats. in part.

Moreover, the foregoing fuel priority policy is reinforced in Chapter 196 where it is stated,

> To the extent cost-effective, technically feasible and environmentally sound, the commission shall implement the priorities under s. 1.12(4) in making all energy-

related decisions and orders, including advance plan, rate setting and rule-making orders.

Sec. 196.025(1), Wis. Stats.

The Order addresses the two top priorities, energy conservation and renewable energy, Order, pp. 16-19, but selects, for the great majority of the future power need, equipment which uses the lowest priority fuel, high sulfur coal.

The question of compliance with the Wisconsin Energy Priorities Law appears to resolve into two distinct issues; The selection of high-sulfur coal over natural gas as the primary energy source for baseload facilities and the lack of consideration of oil and low-sulfur coal as potential fuels.

1. Selection of High-Sulfur Coal over Natural Gas as the Primary Energy Source

The Order of the PSC bases the decision to use high-sulfur coal upon the need to provide what is termed, "baseload" power and a determination that high sulfur coal is substantially better suited to the production of baseload power than is the top priority fuel, natural gas, Order, pp. 19-22, and the petitioners argue that this is in violation of the Wisconsin Energy Priorities Act. . The term, "baseload" is not defined in the statutes, in the administrative regulations or in the Order of the PSC. In the argument submitted to this court, it has become apparent that the parties understand "baseload" to be a generating facility intended to provide power effectively on a constant basis, not less than 70% of the time, day in, day out. [17]

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[17] At hearing, the PSC indicated that the distinction is one of economics rather than technical capacity.

"What you need to recognize is the commission has never contested the fact that

The petitioner's objection is framed as a legal issue, whether the Order reflects PSC compliance with the obligations imposed by sec. 196.025(1), Wis. Stats. which requires the Commission to "implement" the fuel priorities of the Energy Priorities Law Wisconsin to the extent that it is "cost-effective, technically feasible and environmentally sound" to do so. The petitioners suggest that, as to each of the fuel sources listed, the Commission must require the applicant to begin with the highest priority fuel and rely upon that source unless it can be shown that the reliance is not cost effective, not technically feasible or not environmentally sound. The Commission asserts, in effect, that it need only consider or contemplate the priority concept without requiring an actual examination of each possibility.

The Energy Priorities Law lists four types of non-renewable fuels; natural gas, oil, low sulfur coal and everything else. The high sulfur coal that the applicant seeks to rely upon falls into the last and lowest priority. In the decision, the PSC repeatedly states that natural gas is not an appropriate fuel for a power plant intended to provide baseload power but does so without offering a clear factual basis. This appears to be in response to a competing proposal submitted by petitioner Calpine, the owner of a natural gas generating plant recently approved by the PSC to provide baseload power. Calpine submitted to the PSC, as a confidential exhibit pursuant to sec. 196.14, Wis.

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a gas plant is capable of running in baseload mode. It is not a question of whether or not the machinery is strong enough to run night and day. It is a question of whether the gas is available and at what price. And at this point the commission is worried that it would be over extending the use of gas because we are already using it for peakers, we are already using it for intermediate load plants. It is a slightly different question. When you go back are these plants capable of running at baseload? Yes, they are. We are not contesting that."

Hearing transcript, Circuit Court, October 4, 2004, p. 47, l. 19 to p. 48, l. 6

Stats., a proposal to provide the power needed by WEPCO, using natural gas-fired equipment located at Calpine's Fox Energy Center and Fond du Lac Energy Center, R-160, Exhibit 202(c); R-157, pp. 3366, 3367. Calpine argues that its proposal would have provided the power needed at less cost and through the use of a fuel determined to be a highest non-renewable fuel priority by sec. 1.12(4)(d), Wis. Stats.

The rationale for the Commission's preference for high-sulfur coal is not clear and appears to be more of an assumption than a determination of fact. Essentially, the Order simply states, repeatedly, that coal-fired equipment must be used because the need is for baseload power.

> The Commission also considered whether gas-fired generation is a cost-effective or technically feasible alternative that could *replace the need for new baseload generating facilities.*
>
> Order, p. 19, emphasis added

> A critical part of the Commission's ultimate preference for coal-fired generation over gas-fired generation rests heavily on the discretion accorded the Commission under the Energy Priorities Law and the Power Plant Siting Law. More significantly, the crux of this case is really about the appropriate timing to construct new baseload generation. A fundamental policy choice presented in this case is whether the Commission believes that WEPCO needs to take steps now to address needs for new baseload facilities over the next decade.
>
> Order, p. 20

> There are qualitative factors set forth in Wis. Stat. sec. 196.491(3)(d) that also support the Commission's conclusion that new coal-fired generation is in the public interest and that ERGS is the most cost-effective and technically feasible way to address WEPCO's baseload needs. The Commission's decision to approve SCPC 1 and 2 balances its obligations under the Energy Priorities Law and the Power Plant Siting Law.. . The evidence in this proceeding demonstrates the advantages of using cleaner burning coal technologies like SCPC as a baseload resource over gas-fired generation.
>
> Order, p. 21

The problem is that the "qualitative factors" alluded to above are not stated in the Order nor can they readily be inferred. The Commission candidly describes the preference for high-sulfur coal equipment as one which,

> reflects the *Commission's policy judgment* that while natural gas-fired generating facilities may be better suited for peak and intermediate load generation, coal-fired generation provides the most practical means to serve WEPCO's needs for baseload capacity
>
> Order, p. 21, emphasis added.

The above passage is revealing. The selection of the appropriate fuel is not a policy choice. The policy choice has been made by the legislature with the enactment of sec. 1.12, Wis. Stats. The role of the Commission is to implement that policy choice. What is required is a fair examination of fact in the context of the statutorily-enacted policy choice giving preference, where appropriate, to natural gas over high sulfur coal. There is to be a determination of fact as to whether natural gas or natural gas in combination with another fuel would produce power that is "cost-effective, technically feasible and environmentally sound", sec. 196.025, Wis. Stats.

No "policy" as to which fuel is always best for baseload operation has been identified. The Order itself says there has been no approval of "any new baseload, coal-fired generation in Wisconsin since 1980", Order, p. 21.[18]

It is not possible to escape the conclusion that sec. 196.025(1), Wis. Stats. imposes an obligation to make a determination as to each of the four fuel types. That is the plain, straightforward command of the statute. The argument is offered that the

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[18] Although the Order approving construction of the Calpine Fox Energy facility in Outagamie County finds that the gas-fired facility is capable of providing baseload power, Final Decision, p. 7, PSC Docket 05-CE-115 as did the Order approving construction of the Calpine Fond du Lac Energy facility, final decision, p. 5, PSC Docket 9343-CE-100.

PSC considered all priorities, but there is not a single word in the order to suggest that either oil or low sulfur coal[19] was ever, in any manner or degree, contemplated as a potential fuel.

The Commission Order looks to the prefatory note of the Energy Priorities Law to find language that suggests that an agency is to possess great flexibility in meeting the obligations created by the law. There is, however, no need to refer to secondary sources and it would be improper to do so when the language of the statute is as clear and plain as it now the case, City of Muskego, v. Godec, 167 Wis.2d 536, 545, 482 N.W.2d 79 (1992).

The Order further suggests that there is a need to harmonize the Energy Priorities Law and the Power Plant Siting Law but does not explain the need to do so. There is no obvious conflict between the two and each deals with an entirely separate question. The Commission, in argument, suggests the petitioners urge that there be two alternative locations identified for each of the priority list fuels. This claim attempts to mix together two entirely separate requirements. As noted above, the PSC must require the applicant to identify two separate proposed locations and there must be an examination as to feasibility of the various energy sources at each identified location. The minimum number of locations begins at two and does not increase.

The real world application of the Energies Priority Law by the Commission may well be complex and may require sophisticated technical and financial analysis but the intent of the law is extremely simple and clear. There is no ambiguity as to what the

[19] The court was advised during oral argument that the very substantial existing OCPP generating facility currently relies upon low sulfur coal. Hearing transcript, October 4, 2004, p. 20, l. 10.

legislature intended and, as a matter of law, there is no need nor any justification for looking to legislative history or other secondary materials to discern legislative intent. [20]

The PSC argues that it cannot be required to select a higher priority source which is not technically feasible or not cost-effective, Order, p. 15, and that is absolutely true. What is required by the statute as to non-renewable fuels, however, is precisely what the Commission actually did do in looking at renewable sources. As to both energy conservation and wind generation, the PSC carefully considered the extent to which it was feasible and cost-effective to rely upon each as a source of future power, Order, pp. 16-19. That is precisely what was required as to natural gas, oil and low sulfur coal.

Further, the Commission's determination that only high-sulfur coal may be considered as a fuel source to provide baseload power is not supported by facts identified with sufficient clarity in the Order.[21] It is the order of the court that the Order shall be remanded to the Commission to permit the Commission to offer further justification for the determination that only high-sulfur coal can be the fuel source for the proposed new facilities, Connecticut General Life Ins. Co. v. DILHR, 86 Wis.2d 393, 405, 273 N.W.2d 206 (1979).

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[20] Petitioner Clean Wisconsin seeks to buttress its statutory interpretation argument by reference to a transcript description of a public proceeding conducted October 29, 2003. Because, in the view of the court, the language of the Energies Priorities Law is plain and unambiguous, this court need not and does not base its determination as to the intent of the Energies Priorities Law upon any statement made at the October 29, 2003 proceeding.

[21] It may well be true, possibly self-evident, that if one starts with the premise that a demonstrated need for additional baseload capacity must be satisfied by new facilities located at the OCPP site, the logical choice would be additional coal-fired equipment given the existing coal-fired facilities at that location and potential for economies of scale. Sec. 196.491(3)(d)(3 and Wis. Admin. Code PSC sec. 111.53(1)(e), however, require that the analysis begin with not less than two realistic, alternative locations and that was done in this case.

It appears the Commission begins with a policy decision that the need for baseload power requires that the fuel must be high-sulfur coal. That may be a perfectly reasonable choice but the factual analysis to support that choice does not appear within the Order. The Order, in its determination as policy that only high-sulfur coal is an appropriate primary energy source, does not demonstrate compliance with the legislative mandate set forth at secs. 1.12 and 196.025, Wis. Stats. and must be remanded to the Commission for further proceedings. It is the order of the court that the Order shall be remanded to give to the Commission the opportunity to determine as fact, pursuant to sec. 196.025(1), Wis. Stats., the cost-effectiveness, technical feasibility and environmental impact of high sulfur coal in comparison to natural gas as a potential source for the future energy needs to be met.

2. Lack of Consideration of Oil and Low-Sulfur Coal as Potential Fuels

There is simply no basis whatsoever, for the court to infer that the Commission considered in any degree two of the higher priority fuels, oil and low sulfur coal. In rendering the Order without completing the required analysis, the Commission has acted upon an interpretation of law which is directly contrary to the plain meaning of sec. 196.025(4), Wis. Stats. and no deference to that interpretation is appropriate, State ex rel. Parker v. Sullivan, supra, 184 Wis.2d at p. 669. It is the order of the court that the Order shall be remanded to give to the Commission the opportunity to determine, as required by sec. 196.025(1), Wis. Stats., the cost-effectiveness, technical feasibility and environmental impact of oil and low-sulfur coal as potential sources for the future energy needs determined by the Commission to exist.

It is entirely possible that the required consideration will result in the conclusion that neither oil nor low sulfur coal would be both feasible, cost-effective or environmentally appropriate but the Order reflects no consideration, whatsoever, as to either. The Order is therefore vacated and the matter remanded to the Commission to undertake an examination, pursuant to sec. 196.025, Wis. Stats., as to whether either oil or low sulfur coal would be feasible, cost-effective and environmentally sound.

F. Approval of Expansion Capacity

The PSC concludes that CPCN is not demonstrated as to a third new generation facility that the applicant proposed to build, a 600 MW Integrated Gasification Combined Cycle (IGCC) unit and therefore the Order refuses authority to construct that unit, Order, p. 26. The Commission does, however, approve a total construction budget in a total amount which contemplated building "common systems" for 3000 MW capacity rather than the 2400 MW approved capacity at the OCPP site.[22] The Order indicates that this extra capacity would add an additional approved construction cost of "approximately 20 million", Order, p. 32.

The record reflects that the added capacity is in a cooling water structure which will extend from the site into Lake Michigan and also coal handling facilities.[23] The rationale offered is the possibility that there will be a future need to provide the full 3000 MW capacity and it will be far less expensive to include larger structures for that possibility as part of the current project. Further, the suggestion is offered that

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[22] The existing capacity at the OCPP site is 1200 MW. WEPCO sought CPCN authority to expand that site by an additional 1800 MW but the Commission only permitted expansion of an additional 1200 MW for a total site capacity of 2400 MW rather than the 3000 MW total capacity initially requested.

[23] R-157, Kenneth J. Detmer, Transcript, V. 14, pp. 4535 & 4640.

"approximately $20 million" is a negligible amount, "lost in the maze" in a $2.2 Billion dollar project. On the other hand, what is being done is that ratepayers are being assigned a construction cost for public utility facilities for which public convenience and necessity has not been determined, indeed has been expressly refused.

The argument offered in favor of enlarging the facility carries an immediate suggestion of prudent foresight and reasonableness. There is, however, another aspect of the problem. Preparation for yet another expansion of what is already the most expensive power plant in Wisconsin is very meaningful step toward selecting OCPP as the site for construction of future utility expansion. It does not completely control future site selection but it is likely to influence it. It does not preclude wholesale competition but, again, it is likely to confer advantage upon the owner of the OCPP facility.

The applicable statute is quite clear, there is to be no construction of any generating facility until there has been the issuance of a CPCN, sec. 196.491(3)(a) 1, Wis. Stats. There is no suggestion that the Commission has ever before interpreted its authority to include the power to permit partial construction of a facility for which CPCN has not been determined, let alone a facility as to which CPCN has been expressly denied by Commission order. It is clear that the PSC Order contemplates an extension of the Commission's authority in a manner which is directly contrary to the plain meaning of the applicable statute. This is an interpretation which should properly be reviewed on a de novo basis and, upon that review, it is the determination of the court that the Order, to the extent it approves ratepayer payment for construction

elements not necessary to operate a 2400 MW facility, is hereby vacated and the Order remanded for modification by the Commission to eliminate such approval.

G. Issuance of CPCN Prior to Obtaining Regulatory Approvals

The PSC issues the Order approving CPCN as to the construction of the two new 630 MW generating facilities while expressly acknowledging that necessary government permits had not been issued. The Order notes expressly that there were then water-related DNR permits which had not been issued, Order, p. 53, 54, and the following appears as a finding of fact,

> Requiring that ERGS-SCPC 1 LLC commence construction within 12 months after it receives all necessary government permits and approvals is reasonable, so the generating plant will satisfy the reasonable needs of the public for electric energy in a timely manner.
>
> Finding of Fact no. 15, in part, Order, p. 6

Wisconsin law provides,

> The commission may not issue a certificate of public convenience and necessity under this subsection until the department has issued all permits and approvals identified in the listing specified in par. (a)3.a. that are required prior to construction.
>
> Sec. 196.491(3)(e) Wis. Stats., in part.

The Commission's Order candidly describes the water-related permits that had not been issued as of the date of the Order.[24] Argument submitted by the PSC explains the administrative advantage of deferring to DNR wherein presumably superior expertise regarding water quality may be found. The Commission makes no attempt to respond to the problem posed by the express provisions of sec. 196.491(3)(d) 3. Wis.

[24] As noted earlier, air quality permits are treated entirely differently from water-related permits. The legislature has expressly decided that the PSC may not hold up issuance of CPCN based upon any concern that potential air pollution may not meet standards imposed by Chapter 285, enforced by the DNR, sec. 196.491(3)(d) 3, Wis. Stats.

Stats., above, and in argument suggests that what was done has been in this proceeding is a standard practice of the Commission.[25]

It is instructive to refer to the decision of RURAL v. PSC, 239 Wis.2d 660, 679, 619 N.W.2d 888 (2000), in which the court did consider a related matter. RURAL arose from a non-statutory legislative enactment, Section 96 of 1997 Wisconsin Act 204, which created a brief opportunity for particular utilities to seek CPCN approval as to a narrowly defined class of generation plants. Approval or rejection was to be determined by the PSC in a notably short, 90 day period. In the RURAL case, as in this one, the PSC issued a CPCN approval subject to a requirement that the applicant thereafter obtain DNR regulatory permits. An opponent to the application objected, arguing that the PSC could not issue a conditional CPCN. The PSC responded suggesting that the general authority of sec. 196.395, Wis. Stats.,[26] conferred the needed power to issue a conditional CPCN. The supreme court, in upholding the issuance of the conditional CPCN, noted that the Commission could do so because the CPCN was being approved pursuant to the non-statutory authority, not pursuant to the normal process set out in sec. 196.419, Wis. Stats.[27] The court suggested that if sec.

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[25] Hearing transcript, October 4, 2004, p. 34, ll. 3-13.

[26] Sec. 196.395, Wis. Stats., provides,

> The commission may issue an order calling for a test of actual results under requirements prescribed by the order, during which test period the commission may retain jurisdiction of the subject matter. The commission may issue conditional, temporary, emergency and supplemental orders. If an order is issued upon certain stated conditions, any party acting upon any part of the order shall be deemed to have accepted and waived all objections to any condition contained in the order.

[27] The CPCN in RURAL, supra, was issued pursuant to the authority of the non-statutory enactment, not pursuant to sec. 196.491, Wis. Stats.

196.491, Wis. Stats. had been the basis for the CPCN, then 196.491(3)(e), Wis. Stats., would control over sec. 196.395, Wis. Stats., and would not permit the Commission to issue a conditional CPCN.[28]

Here, the CPCN was issued pursuant to the authority given to the PSC by sec. 196.491, Wis. Stats. That statute plainly states that the Commission shall not do what is being done here, issue the CPCN before the regulatory permits have been obtained, sec. 196.491(3)(e), Wis. Stats. Potentially, this is a matter of substantial consequence. The Commission in its Order notes the possibility that the planned draw of 1.4 billion gallons of Lake Michigan water daily[29] is not approved, cost of the proposal will escalate by some $200 million and may even preclude project viability, Order, p. 54. The approval stated in the Order was issued in clear violation of sec. 196.491(3)(e), Wis. Stats. It is the Order of this court that the PSC Order is hereby vacated and the matter remanded to the Commission to permit the applicant to demonstrate that the required regulatory permits have been obtained.

H. Adequacy of the Final EIS

The Wisconsin Environmental Protection Act (WEPA) requires state agencies to take a "hard look" at the environmental consequences of a proposed new facility, Wis. Environmental Decade, v. PSC, 98 Wis.2d 682, 690, 298 N.W.2d 205 (Ct. App. 1980). The law provides that all state agencies shall include in every major action, a detailed statement, substantially following the guidelines of the National Environmental Protection Act, 42 U.S.C. sec. 4331 (NEPA), describing,

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[28] RURAL, 239 Wis.2d at p. 698-700, paras. 58-61.

[29] Order, p. 9; Final EIS, V. 1, p. 200, R. 119.

1. The environmental impact of the proposed action;
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented;
3. Alternatives to the proposed action;
4. The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;
5. Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; and
6. Such statement shall also contain details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages and disadvantages of the proposal.

Sec. 1.11(2)(c), Wis. Stats. in part.

Moreover, the PSC has adopted an administrative rule to assure compliance with WEPA, Wis. Admin. Code, sec. PSC 4.10(1).

Petitioners argue that the EIS prepared in this proceeding does not meet the standard of the law. The EIS in this matter is comprised of a 446 page draft document, R. 77, together with a significantly larger final document, R. 119. The criticism of the EIS document includes the suggestion that alternatives were not adequately examined and the absence of information about necessary transmission facilities. These are matters which arguably could be considered in an EIS but, as noted above, for purpose of this proceeding, both issues are resolved based upon statutes specifically applicable to the Commission's process. As to a lack of quantified health care costs, as well as potential impact upon natural resources, local communities and transportation, these are matters which are within the range of matters committed by the legislature to the Commission. The interpretations of law adopted by the Commission to the effect that the draft and final EIS documents represent an adequate examination of environmental issues are not shown to be legal error.

I. Least Cost Alternative.

Petitioner Calpine is a wholesale producer of electric power that seeks to provide to WEPCO, using its own generating facilities, the power that the WEPCO claims will be needed. Calpine argues that it can provide the needed power at less cost and suggests the PSC has committed legal error by not selecting their 'least cost' proposal. Calpine argues that Wisconsin law requires the commission to select whichever proposal can be shown to result in the lowest cost to consumers. Calpine looks to the following provision as authority for that concept,

> the commission shall approve an application ... for a certificate of public convenience and necessity only if the commission determines all of the following:
>
> > 3. The design and location ... is in the public interest considering *alternative sources of supply*, alternative locations or routes, individual hardships, engineering, *economic*, safety, reliability and environmental factors ..."
>
> Sec. 196.491(3)(d), Wis. Stats., in part, emphasis added.

Calpine looks to the term, "alternative sources of supply", in conjunction with the term, "economic", to find a clear legal duty, incumbent upon the commission, to select whatever alternative proposal offers the least cost of operation. Calpine looks also to a prior commission decision which does offer language describing the successful proposal as being the one which appeared to offer the needed power at the "least cost".[30]

Calpine's least cost argument goes well beyond the requirement that there be a fair comparison between fuel sources. Returning briefly to the requirements of the

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[30] Application of Wisconsin Public Service Corporation For Authority To Increase Electric Generating Capacity (Stage One, Competition Among Alternative Suppliers), Docket No. 6690-CE-156, December 22, 1994, p. 6;

Wisconsin Energy Priority Law, sec. 1.12(5)(a), Wis. Stats, requires that the Commission consider alternative energy sources with the requirement that a selected source meet three separate requirements; cost effectiveness, technical feasibility and no unacceptable environmental impact. The Calpine least cost theory would look only to cost effectiveness and ignore the remaining two criteria.

The Calpine least cost argument embraces a factual element; the suggestion that the AGEAS computer model actually selected natural gas as the preferred fuel or would have done so if proper data entry had been made. The comparisons of cost, timing, equipment and fuel presented to the Commission are very complex and do not offer an obvious alternative which may be readily identified as the least cost option. What is asserted as the least cost alternative appears to be a plan of using Calpine capacity, in combination with some future WEC facility expansion so as to defer significantly the date at which the WEC expansion will be needed, R.119, Final EIS, pp. 72 and 73.[31] As with the earlier discussion of criticism of the AGEAS program, however, the reality here is that the court does not possess any expertise, let alone that of the Commission regarding the proper use of the computation and comparison of the complex elements cost and timing. Suffice it to say that this is an area where great deference should be given to Commission.

As a question of law, the PSC is obligated to consider and to balance numerous elements of cost, environmental impact and technical feasibility. The Commission argues that the applicable law requires that it consider a myriad of factors, cost being a

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[31] Calpine refers also to the testimony of Commission employee Randal Pilo, who described a Calpine proposal as the lower cost alternative but appears to be based upon what is described as a "snapshot for one year', that being 2007, R.167, V. 18, transcript V. 11, p. 3900, l. 3.

primary factor but not an exclusive factor. This is clearly an area in which the PSC has been assigned significant jurisdiction and discretion by the legislature. Petitioner Calpine does not demonstrate that the Commission has acted contrary to applicable law.

J. Wholesale Power Competition.

Calpine asserts that in approving the WEC application to build the two SCPC plants, the Commission has failed to take into account the harm that will be visited upon competition in the wholesale power market. Wisconsin law requires that the Commission not issue approval until it has determined that,

> The proposed facility will not have a material adverse impact upon on competition in the relevant wholesale electric service market.
>
> Sec. 196.491(3)(d) 7, Wis. Stats.

The Commission did render the following determination of fact,

> The two SCPC units will not have a material adverse impact on competition in the Wisconsin Upper Michigan (WUMS) wholesale electric service market.
>
> Finding of Fact, no. 9, Order, p. 5

The determination of impact upon competition is a matter which has been committed by the legislature to the Commission. The petitioners express disagreement with the conclusions reached by the Commission but they do not demonstrate a basis upon which this court could properly do other than have give great deference to the determinations and interpretations of the Commission in this area.

K. City of Oak Creek Mitigation Payment Agreement

WEC and petitioner City of Oak Creek reached an agreement whereby WEC will pay to the city annual mitigation payments of $1.5 million for SCPC 1 and $750,000 for SCPC 2. The PSC Order reviews that agreement and considers as well a significant modification in the formula by which shared revenue payments form the state to the city are now to be computed. Prior to the enactment of 2003 Wis. Act 31, shared revenue was based upon the net book value of a power plant and thus the initial shared revenue amount derived upon the commencement of generation, capped at a maximum of $750,000 annually, declined thereafter as the net book value declined through depreciation. 2003 Wis. Act 31, enacted July 15, 2003, and applicable to plants that begin operation after December 31, 2003, provides that shared revenue is to be based upon MW capacity and other factors which may not decline with time. The PSC calculates that the new shared revenue formula will produce revenue to the city of $1.6 million for SCPC 1, an amount that will rise to $3.2 million when SCPC 2 begins operation. The PSC notes that the new shared revenue amounts, when paid to the city upon completion and operation of the new facilities, will exceed the payment called for by the agreement between the city and WEC and the Commission therefore includes a provision in the Order which requires that the payments called for by the agreement are to be offset by shared revenue payments made to the city. Thus the PSC order permits mitigation payments to the city pursuant to the agreement but provides that payments are to be reduced by shared revenue received which presumably will eliminate all payment pursuant to the agreement at a future point. The City of Oak Creek petitions the court seeking review of that portion of the Order.

The parties agree that the agreement between the City of Oak Creek and WEC was submitted to the PSC before June 10, 2003 and involves a "mitigation payment" within the meaning of sec. 196.20(7), Wis. Stats., as amended by 2003 Wisconsin Act 33. The parties further agree that the treatment of the agreement by the PSC is to be governed by section 196.20, Wis. Stats., as amended by 2003 Wisconsin Act 89, Section 33, effective December 18, 2003, which enacted the following provision,

> (7)(a) In this subsection, "mitigation payment" means, as approved by the commission, an unrestricted or recurring monetary payment to a local unit of government in which an electric generating facility is located to mitigate the impact of the electric generating facility on the local unit of government. "Mitigation payment" does not include payments made or in-kind contributions for restricted purposes to directly address health or safety impacts of the electric generating facility on the local unit of government.
>
> (b) Except as provided in par. (c), an electric public utility may not recover in rates any of the following:
>
> 1. The cost of mitigation payments paid by the utility.
>
> 2. The cost of mitigation payments paid by the owner or operator of an electric generating facility that the owner or operator recovers from the utility by selling electricity to the utility, by leasing the facility to the utility, or by any agreement between the owner or operator of the electric generating facility and the public utility.
>
> (c) The commission shall only approve a mitigation payment agreement that is received by the commission before June 10, 2003,
> and, if the commission finds the agreement to be reasonable, shall not subsequently modify the agreement.
>
> Sec. 196.20(7), Wis. Stats., as created by 2003 Wisconsin Act 89, Section 33.

The petitioner city reads subsection (c) above to give to the PSC only two choices, to approve or to reject a mitigation payment agreement as submitted. The city submits that what the PSC Order did was first to modify the agreement and thereafter to

approve the modified agreement. The city asserts that sec. 196.20(7)(c), Wis. Stats. expressly precludes that modification. The PSC, by contrast, submits that subsection (c), above permits the modification of a submitted agreement at the point of initial approval but precludes modification thereafter.

The language chosen by the legislature in this instance is uncommonly plain and direct. It deals with "a mitigation payment agreement that is received by the commission" and confers authority to do one of two things, approve or reject that agreement. The modified agreement is not the agreement that the Commission received. An administrative agency may exercise only such authority as has been expressly conferred or necessarily implied. Here the clarity of the legislation is such that it cannot be read to imply the power that the Commission seeks to exercise, the authority to modify "a mitigation payment that is received by the commission." The court concludes, as a matter of law pursuant to sec. 227.57(8), Wis. Stats, that the portion of the PSC Order which modifies the mitigation agreement to require that future shared revenue is an act beyond the jurisdiction of the PSC. The court orders that, upon remand, the PSC re-consider the mitigation agreement and either approve or reject the agreement as submitted.

V. Summary and Order

On November 15, 2002, the Public Service Commission determined that an application submitted by Wisconsin Energy Corporation to construct the largest power plant in the history of the state at the Oak Creek Power Plant site met the legal requirements to be a "complete" application thereby beginning starting a process before the Commission in which the application was required to be resolved within no more

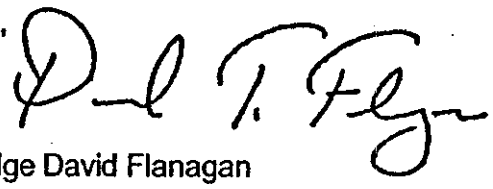
than 360 days. It is the conclusion of this court that the Wisconsin Energy Corporation application, as of November 15, 2002, does not meet the legal requirements in that it does not propose at least two alternative sites for the new plant, it does not present the required regulatory approvals and it does not include agreements for the use of the substantial transmission line facilities that inevitably must be constructed as an integral part of this project. It was therefore legal error to commence the approval process based upon that incomplete application and the resulting Order is hereby vacated and the matter remanded to the Commission to permit the applicant to submit a legally sufficient application.

On November 10, 2003, the Public Service Commission issued a Order modifying the proposed new Oak Creek facility and approving the application as modified. It is the conclusion of this court that the Order does not reflect adherence to the Wisconsin Energy Priorities Law nor does it include required cost and design information about substantial new power transmission lines that will be needed in order for the proposed new plant to operate. Moreover, the Order approves funding for construction intended to permit future expansion of the Oak Creek Power Plant site to accommodate new generation facilities that the Commission has determined there to be no present need to build and the approval order has been issued despite the fact that required regulatory approvals for the proposed new plants have not been obtained. For these reasons, the Order is hereby vacated and the matter remanded to the Commission for further proceedings consistent with the foregoing rulings.

Finally, the Order modified and thereafter approved an agreement whereby the City of Oak Creek agreed to accept from Wisconsin Energies Corporation, certain

annual payments to mitigate the cost to the city of the new facilities. It is the conclusion of the court that the applicable law required that the Commission either approve or reject the proposed agreement as submitted to the Commission. The modification of the agreement is therefore vacated and the matter is remanded to the Commission for further proceedings.

By the court this 29th day of November, 2004,



Judge David Flanagan

STATE OF WISCONSIN
SUPREME COURT

CLEAN WISCONSIN, INC.
p/k/a Wisconsin's Environmental
Decade Institute, Inc., SC JOHNSON &
SON, INC. and CALPINE CORPORATION
Petitioners-Respondents,

TOWN OF CALEDONIA,
Petitioner,
v.

Case No. 04-3179
Pending in Court of
Appeals, District IV

PUBLIC SERVICE COMMISSION
OF WISCONSIN,
Respondent-Co-Appellant,

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
Respondent,

WISCONSIN ELECTRIC POWER
COMPANY, W.E. POWER, LLC and
WISCONSIN ENERGY
CORPORATION
Interested Parties-Appellants,

DAIRYLAND POWER
COOPERATIVE, CITY OF OAK
CREEK, MADISON GAS &
ELECTRIC COMPANY AND
WISCONSIN PUBLIC POWER, INC.,
Interested Parties,

ROBERT H. OWEN,
Interested Party-Respondent.

CALPINE CORPORATION,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, and WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondents,

WISCONSIN ELECTRIC POWER COMPANY, WISCONSIN ENERGY CORPORATION, W.E. POWER, LLC, DAIRYLAND POWER COOPERATIVE, MADISON GAS & ELECTRIC COMPANY, ROBERT H. OWEN, JR., and CITY OF OAK CREEK,
Interested Parties.

CLEAN WISCONSIN, INC.
p/k/a Wisconsin's Environmental Decade Institute, Inc., and
SC JOHNSON & SON, INC.,
Petitioners,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent,

WISCONSIN PUBLIC POWER, INC., CITY OF OAK CREEK, DAIRYLAND

POWER COOPERATIVE, MADISON GAS & ELECTRIC COMPANY, WISCONSIN ELECTRIC POWER COMPANY, WISCONSIN ENERGY CORPORATION and W.E. POWER, LLC,
Interested Parties.

CALPINE CORPORATION,
Petitioner,
v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent;

CITY OF OAK CREEK, DAIRLYAND POWER COOPERATIVE, MADISON GAS & ELECTRIC COMPANY, WISCONSIN PUBLIC POWER, WISCONSIN ELECTRIC POWER COMPANY, WISCONSIN ENERGY CORPORATION and W.E. POWER, LLC,
Interested Parties.

CITY OF OAK CREEK,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
Respondent.

TOWN OF CALEDONIA,

Petitioner,

v.

PUBLIC SERVICE COMMISSION
OF WISCONSIN,
Respondent,

WISCONSIN ELECTRIC POWER
COMPANY, WISCONSIN ENERGY
CORPORATION, W.E. POWER LLC,
DAIRYLAND POWER
COOPERATIVE, MADISON GAS &
ELECTRIC COMPANY, ROBERT H.
OWEN, JR., and WISCONSIN PUBLIC
POWER, INC.,
Interested Parties.

PETITION OF THE PUBLIC SERVICE COMMISSION OF WISCONSIN AND THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES FOR BYPASS AND EXPEDITED CONSIDERATION OF THIS APPEAL

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Wisconsin Department of
Natural Resources

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The Public Service Commission of Wisconsin ("PSC") and the Wisconsin Department of Natural Resources ("DNR") (together, "the State") respectfully request that the Court take jurisdiction, pursuant to Wis. Stat. §§ 808.05(1) and (Rule) 809.60[1] of the appeal of the November 29, 2004, final order of Dane County Circuit Court Judge David Flanagan in Case No. 03-CV-3478. The circuit court decision vacated the PSC's determination to authorize Wisconsin Energy Corporation to construct two 615 Megawatt ("MW") electric generating plants in Oak Creek, Wisconsin, at the Elm Road site. Final Decision (Appendix "App." 101).

There is a clear and demonstrable need to hasten the ultimate appellate decision. Substantial public interests related to Wisconsin's future energy needs make it likely that this case eventually will come before this Court. Because delayed resolution could have considerable adverse financial effect upon every individual and business in this state and may impair the reliability of the electric service for more than 1 million customers, the State makes this extraordinary request.

[1] All references to the Wisconsin Statutes are to the 2003-04 text unless otherwise noted.

The circuit court's decision erroneously invalidated established PSC procedures for the approval of energy construction projects and creates considerable uncertainty for other important energy construction projects. The circuit court's decision, if applied to other proceedings, will protract and complicate the energy project approval process, contrary to the Legislature's recent efforts to streamline agency proceedings.

The prompt resolution of this controversy is critical. The PSC approved this project and others in order to meet documented energy needs later this decade. The circuit court affirmed this finding of need. Without the timely construction of these generation facilities and completion of other projects, future capability to meet expected needs is uncertain and related capital costs could increase significantly.[2]

LEGAL STANDARDS FOR THIS PETITION

The criteria for this petition are described in sec. 27.16 of the Wisconsin Supreme Court Internal Operating Procedures which provides in part as follows:

> A party may request the court to take jurisdiction of an appeal or other proceeding pending in the Court of Appeals by filing a petition to

[2] Respondents-Appellants submit an appendix in support of this petition. The appendix includes the Affidavit of Robert Norcross, Administrator, Gas and Energy Division, PSC. The affidavit includes a description of energy construction projects that have been completed or are pending with the PSC. (App. 254.)

> bypass pursuant to sec. (Rule) 809.60, Stats. A matter appropriate for bypass is usually one which meets one or more of the criteria for review, sec. (Rule) 809.62(1), Stats., and one the court feels it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues. At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.

This case meets the standards for review in Wis. Stat. § 809.62 in that a decision by the Court will help develop, clarify or harmonize the law; the questions presented are novel and their resolution will have statewide impact; and the questions presented are not factual in nature but rather are questions of law of the type that is likely to recur unless resolved by the Court.

The State recognizes that it is this Court's policy not to consider a bypass petition until reply briefs have been filed with the court of appeals. *Northside Bank v. Gentile,* 129 Wis. 2d 208, 214, 385 N.W.2d 133, 136 (1986). If this petition is denied pursuant to this policy, the State respectfully requests this Court take jurisdiction on its own motion under Wis. Stat. §§ 808.05(3) and (Rule) 809.61. The Court followed this approach in the most recent case involving siting of a power plant. *Responsible Use of Rural and Agr. Land (RURAL) v. Public Service Commission of Wisconsin*, 239 Wis. 2d 660, 664, n1, 619 N.W. 2d 888, 894 (2000).

STATEMENT OF THE CASE

This is an appeal from the November 29, 2004, final order of the circuit court for Dane County, the Honorable David Flanagan, presiding, in consolidated judicial review proceedings under Wis. Stat. § 227.52, *et seq.*, vacating the November 10, 2003, final decision of the PSC. The final decision authorized Wisconsin Energy Corporation to construct two 615 MW coal-fired baseload electric generating plants in Oak Creek at the Elm Road site.

The PSC's decision was the second decision regarding the "Power the Future" proposal of Wisconsin Energy Corporation. In the first decision, the PSC issued a certificate of public convenience and necessity ("CPCN") for the first phase of Power the Future: two 545 MW electric generating plants known as the Port Washington Generating Station.[3]

There were, originally, six separate circuit court challenges to the PSC's decision in this case. After one challenge was dismissed, the challengers consisted of Clean Wisconsin, Inc., S.C. Johnson & Son, Inc.,

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[3] *Application of Wisconsin Electric Power Company, Wisconsin Energy Corporation and W.E. Power, LLC for a Certificate of Public Convenience and Necessity for Construction of Two Large Electric Generation Facilities, the Port Washington Generating Station, and Associated High Voltage Transmission and Natural Gas Interconnection Facilities to be Located in Ozaukee County*, docket number 05-CE-117 (December 20, 2001); Order on Remand (March 4, 2004). (App.103.)

Calpine Corporation and the City of Oak Creek, Wisconsin. The named respondents were the PSC and the DNR. Wisconsin Energy Corporation and two of its affiliated entities (Wisconsin Electric Power Company and WE Power LLC), which were the applicants for the CPCN (collectively, "Wisconsin Energy") became parties.

The circuit court affirmed the PSC's determination that additional generation was necessary (App. 125-26) and rejected other substantive challenges, but vacated the CPCN because it ruled Wisconsin Energy's application was incomplete. (App. 124.) The circuit court held that the application was incomplete because it did not satisfy what the court believed was a requirement of the CPCN statute, Wis. Stat. § 196.491(3)(d)c and an associated rule, Wis. Admin. Code § PSC 111.53(1)(e), that two separate locations must be proposed for a new power plant. Moreover, the circuit court held that the application was incomplete because all regulatory permits had not been obtained, transmission agreements had not been executed, and certain environmental information had not been supplied. The circuit court also held that the PSC did not properly adhere to Wis. Stat. § 1.12(4) (App. 132-141), the "Wisconsin

Energy Priorities Law" and other provisions related to the CPCN proceeding. (App. 141-143.)

The PSC filed its Notice of Appeal on December 6, 2004. Wisconsin Energy filed its own Notice of Appeal the same date. The DNR filed its Notice of Appeal on December 14, 2004.

STATEMENT OF REASONS FOR DIRECT REVIEW AND EXPEDITED TREATMENT

I. PROLONGED DELAY WILL INHIBIT THE CAPABILITY OF WISCONSIN'S ENERGY SYSTEM TO MEET FUTURE DEMAND.

A. The Legislature, the PSC and the circuit court agreed that there is present need to construct future baseload generation facilities.

The circuit court affirmed the PSC's determination that that there is a compelling need for new baseload generation (power plants that are designed to run full time) capacity. (App. 126.) The circuit court recognized: "Wisconsin must provide adequate electric power for the future and that requires careful, thoughtful planning for facilities needed many years down the road. Generation facilities cannot be built quickly." (App. 105.) The circuit court also accepted the PSC's conclusion "that more generation capacity will be needed both to replace aging facilities and to respond to increasing demand." (App. 125.)

In its decision, the PSC stated that Wisconsin Energy had forecasted a need for new baseload generation within the next decade; that construction of the Elm Road Generation Station would satisfy a portion of that need; that there were no cost-effective or technically feasible alternatives to construction of the Elm Road Generating Station; that the public convenience and necessity required construction and operation of the Elm Road Generating Station; that construction of the Elm Road Generating Station was reasonable and in the public interest after considering alternative sources of supply, individual hardships, engineering, economic, safety, reliability, and environmental factors; and that construction of the Elm Road Generating Station would not have an undue adverse impact on other environmental values. (App. 159.)

Wisconsin Energy had forecasted:

> that, between 2003 and 2012, total electric demand (including reserves and new wholesale sales) will grow 1,995 MW or 2.8 percent annually. Excluding new wholesale sales, the rate of retail electric demand growth would be 2.5 percent annually. Total electric energy for the same period is expected to grow 2.5 percent annually.

(App. 167.) The PSC determined that "these forecasts demonstrate a need for new baseload supply resources" and "were reasonable." (App. 167-68.) The PSC concluded: "The PSC believes that the applicants should take

[steps to address the need for new baseload facilities] now to ensure these facilities are in service in 2009 and 2010." (App. 174.)

The PSC observed that it had "not approved construction of any new baseload, coal-fired generation in Wisconsin since 1980" and found that:

> WEPCO's existing fleet of baseload plants is aging. WEPCO's aging baseload resources may be asked to maintain or even increase their historical production as older facilities are retired over the next decade and transmission constraints . . . continue to limit the ability of Wisconsin load-serving entities to import electricity.

(App. 175-76.)

The PSC is required by Wis. Stat. § 196.491(2) to prepare a biennial strategic energy assessment which evaluates the adequacy and reliability of Wisconsin's current and future electrical supply. In September, 2004, the PSC issued its most recent Strategic Energy Assessment, *Energy 2010,* which found that:

> Total demand for electricity in Wisconsin reached 13,803 Megawatts (MW) in 2003, an all time record.
>
> . . . .
>
> Demand is expected to grow by about 375 MW per year or by the equivalent of about one major power plant every two years.
>
> . . . .
>
> For summer peak demand, Wisconsin does not have enough generation within the state to its reserve margin and must rely on transmission lines to meet the required reserve margin.

Energy 2010, Executive Summary. (App. 229-230.)

In order to permit Wisconsin Energy's Power the Future proposal to go forward, the Legislature amended several provisions of Wis. Stat. ch. 196 in 2001 Wisconsin Act 16. The Wisconsin Legislative Council discussed the amendments in an Information Memorandum. The Legislative Council stated:

> In recent years, there has been considerable concern about the adequacy of the electric power supply, in Wisconsin and across the county. The Legislature, the Public Service Commission (PSC) and the electric power industry have all taken steps to address these concerns and short-term power shortages so far have been avoided. However, no new base load power plants (large power plants that are designed to run full-time) have been built in Wisconsin since 1985, in spite of significant growth in demand for power since then. There is a general consensus that a substantial amount of new electric generation capacity, including base load facilities, must be built in the next 10 years to meet the projected demand for power.

(App. 245.)

In summary, consistent with legislative directives, the PSC, the agency responsible for ensuring the availability of reasonable and reliable energy service, determined that there is a present need to construct these generation facilities. The circuit court agreed, but its decision now blocks these efforts.

B. Expedited review in the Supreme Court is the only way to ensure that significant increased costs attributable to delay will be minimized.

None of the challengers to the Elm Road Generating Station sought a stay of the PSC's final decision or injunctive relief in the circuit court. While circuit court review proceedings were pending, Wisconsin Energy began preliminary construction efforts including finalizing contracts for the project. (App. 257, ¶9.) According to compliance filings with the PSC, contractual obligations require construction to begin before May 1, 2004. (App. 257, ¶9.) If construction does not begin before that date, the cost of completion of the Elm Road Generating Station is likely to be substantially increased. (App. 257, ¶9.) Wisconsin Energy would ask the PSC to pass those costs on to utility ratepayers. Since a public utility is entitled to recover all prudently incurred costs, *See, e.g., Wisconsin Public Service Corp. v. Public Service Com'n of Wisconsin,* 109 Wis. 2d 256, 325 N.W.2d 867 (1982), there is the potential for ratepayers to shoulder substantial additional costs attributed to delay should the project ultimately be approved by the Court.

There are no effective means to mitigate significant additional costs absent final appellate disposition. First, a stay of the circuit court decision

would not alleviate uncertainty regarding the CPCN's validity to permit construction to proceed. Second, the PSC is unable to comply with the circuit court's remand directions in a timely manner. Under the decision, the applicant must begin again with an application that includes another site on a different parcel, and all regulatory permits and transmission agreements for each site. Although the PSC has never required such information be included in an application (App. 254, ¶¶4,6), it would necessarily take considerably more time to satisfy the circuit court's requirements before further CPCN proceedings could begin. At a minimum, at least one year would be added to the process. (App. 254, ¶10.) There undoubtedly would be significant increased costs related to delayed construction.

Because of the need for new baseload generation capacity, it is imperative that the substantial legal issues presented by in this appeal be finally decided as soon as possible. The accelerated review by this Court is the only opportunity to obtain a meaningful review of the circuit court decision and avoid extraordinary costs related to delay. Because these issues merit the attention of this Court anyway, the delay inherent in court of appeals review should be avoided.

II. THE CIRCUIT COURT RULING THAT CPCN APPLICATIONS INCLUDE ALL REGULATORY PERMITS AND OTHER INFORMATION WILL CREATE CONSIDERABLE UNCERTAINTY UNTIL THERE IS A FINAL APPELLATE DISPOSITION.

The process of obtaining a CPCN starts with the filing of an application. Wis. Stat. § 196.491(3).[4] The PSC reviews the application, may ask for additional information, and then issues a determination that the application is complete. Wis. Stat. § 196.491(3)(a)2. If the PSC does not act within 30 days, the application is deemed complete. After that, the PSC has no more than 360 days to act on the application. If not, the application is deemed approved. The PSC has delegated completeness determinations to the administrator of the Energy and Natural Gas Division. (App. 255, ¶2.)

The circuit court's decision requires, as a matter of law, substantial information not only before the PSC can issue a CPCN, but before the PSC can even determine that a CPCN application is complete. (App. 116-119.) This ruling is contrary to the PSC's long-standing practice. For example, the PSC has never required that applications include all regulatory permits

[4] The text of Wis. Stat. § 196.491 (2001-02) is included in the appendix. (App. 269.) Wis. Admin. Code § PSC 111.51, *et. seq.*, prescribes the contents of an application. (App. 274.) The PSC provides additional information for applicants on its web site (http://psc.wi.gov/electric/cons_env/document/cpcn1101.pdf)/

necessary for construction. (App. 256, ¶4.) Depending upon the site, there may be numerous federal, state and local permits and approvals required for construction and operation.[5] Under the circuit court's decision, an applicant must go through the time consuming and expensive process of obtaining—or more likely, trying to obtain—all regulatory permits for *both alternative sites.*

The circuit court's interpretation is not supported by the language of the CPCN application rule, which only requires *information* regarding "[t]he regulatory approvals required for construction and operation of the facility." Wis. Admin. Code § PSC 111.51(1)(f)(intro) and 1. The PSC's web site provides additional details for CPCN applications. It clearly requires only information, not actual permits, be included with an application:

> 1.17. List of required federal, state, and local permits and approvals required and the status of each, including planned application date and contact name and telephone number for permitting agency.
>
> 1.18. Copies of correspondence to and from permitting agencies that relates to permit approval or compliance approval. Copies of any correspondence to or from local governments. This should continue after

[5] The affidavit of David R. Siebert, Director of the Office of Energy, Department of Natural Resources, describes the status of permits for this project and includes the department's preliminary identification of permits and approvals that may be necessary. (App. 264.)

> submittal of the CPCN application (refer to direction #3 on page 1 of this document).
>
> 1.19. Estimated schedule for permitting and construction. Include a timeline showing construction activities from beginning of construction to in-service including a breakdown by facility and major component. Discuss what the critical path items are.

http://psc.wi.gov/electric/cons_env/document/cpcn1101.pdf

This established interpretation by the PSC of its own rules is in accordance with Wis. Stat. § 196.49(3)(a)3.a. This statute requires a prospective CPCN applicant to provide the DNR at least 60 days before the filing of the CPCN application with a "listing of each departmental permit or approval which . . . *appears* to be required for the [project]." (Emphasis added.)

This determination of the circuit court is at odds with recent legislative action designed to streamline the approval process for power plant and high-voltage transmission lines. In the past session, the Legislature addressed the siting and review process of proposed energy utility facilities in the enactment of 2003 Wisconsin Act 89. Among Act 89's objectives was the coordination of PSC and DNR review and approval of facilities such as the power plants in this case. The measure expressly allowed certain DNR permits to be issued not more than 30 days *after* the PSC has issued its decision approving a CPCN. 2003 Wis. Act 89,

sec. 19; Wis. Stat. § 30.025(4)(2003). A Legislative Council Act Memorandum explains:

> 2003 Wisconsin Act 89 creates a process designed to coordinate, and thereby shorten, the review and approval by the Department of Natural Resources (DNR) and the Public Service Commission (PSC) of proposed energy utility facilities, such as electric power plants, electric transmission lines, and natural gas pipelines. The process relates to the DNR's issuance of ch. 30 and other navigable waters permits and the PSC's issuance of certificates of approval (CA) and certificates of public convenience and necessity (CPCN). Expedited procedures are created for certain approvals, and other modifications are made to improve the facility siting and review process.

(App. 252.)

The circuit court's interpretation also conflicts with long-standing PSC practice to issue conditional orders in accordance with Wis. Stat. § 196.395 where other regulatory permits may be needed for construction projects. In *Wisconsin Coal Bureau v. Public Service Commission,* 244 Wis. 435, 12 N.W. 743 (1944), petitioners sought to vacate a PSC order that authorized construction of a natural gas pipeline and related facilities. The challenge was based upon the claim that the Federal Power Commission had exclusive jurisdiction over the extension of such facilities. In rejecting the claim, this Court noted that the PSC had attached a condition "providing that it shall not be effective unless and until Natural Gas Pipe Line Company shall be properly authorized to furnish applicant with the desired supply of natural gas." *Wisconsin Coal,* 244 Wis. at 439.

The conditional terms used by the PSC and upheld by this Court more than sixty years ago are remarkably similar those terms used by the PSC in this order, but rejected by the circuit court.

Although the circuit court ruling is not precedent, persons challenging other projects will use this decision to seek delay of construction of other electric infrastructure in the state.[6] In view of the significant interests at stake, it is important that these issues be addressed and definitively resolved as soon as possible.

III. THE PSC NEEDS TO KNOW IF IT MUST MODIFY ITS PRACTICES AS SOON AS POSSIBLE SO THAT ERRORS ARE NOT COMMITTED IN OTHER PROCEEDINGS.

The outcome of this appeal will determine the validity of a number of practices of the PSC related to many other projects. The PSC has not required CPCN applications to propose distinct and specific parcels of land to meet the alternative "sites" requirement of the CPCN application rule (App. 255, ¶3); does not require applicants to obtain other regulatory approvals or to execute transmission agreements before determining that an

[6]On December 2, 2004, petitioners challenging the Arrowhead-Weston transmission project submitted this decision in the pending circuit court action. *Save Our Unique Lands, Inc., et al. v. Public Service Commission of Wisconsin,* Case No. 04-CV-138 (Dane County Circuit Court).

application is complete (App. 256, ¶ 4, 5); does not delay issuing a CPCN until the DNR issues all of its permits and approvals (although it does not permit construction of a certified facility to begin until all necessary DNR permits have been received); and does not mechanically apply the Energy Priorities Law or necessarily discuss and make a determination regarding each and every enumerated fuel source in every proceeding.

There are several CPCN projects at various stages of construction that may be subject to challenge based on the circuit court's decision in this case. If the PSC is misinterpreting the law as the circuit court has determined, it is imperative that that conclusion be finalized as soon as possible. Otherwise, errors will proliferate, jeopardizing other projects approved or under consideration. The direct review and expedited consideration by the Supreme Court will resolve the uncertainty around the practices of the PSC before reversible errors proliferate and needed electric reliability projects are delayed.

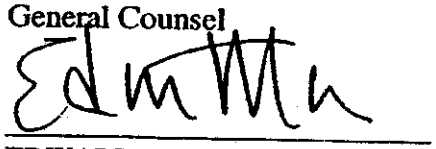
CONCLUSION

For the above-argued reasons, the Court should grant the petition for bypass and expedite its disposition of this appeal.

Dated this 14th day of December, 2004.

Respectfully submitted,

DAVID J. GILLES
General Counsel



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STATE OF WISCONSIN
SUPREME COURT

CLEAN WISCONSIN, INC.
p/k/a Wisconsin's Environmental
Decade Institute, Inc., SC JOHNSON &
SON, INC. and CALPINE CORPORATION
Petitioners-Respondents,

TOWN OF CALEDONIA,
Petitioner,
v.

Case No. 04-3179

PUBLIC SERVICE COMMISSION OF
WISCONSIN,
Respondent-Co-Appellant,

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
Respondent,

WISCONSIN ELECTRIC POWER
COMPANY, W.E. POWER, LLC and
WISCONSIN ENERGY
CORPORATION
Interested Parties-Appellants,

DAIRYLAND POWER
COOPERATIVE, CITY OF OAK
CREEK, MADISON GAS &
ELECTRIC COMPANY AND
WISCONSIN PUBLIC POWER, INC.,
Interested Parties,

ROBERT H. OWEN,
Interested Party-Respondent.

AFFIDAVIT OF ROBERT D. NORCROSS

STATE OF WISCONSIN)
) ss.
DANE COUNTY)

Robert D. Norcross, being first duly sworn on oath, states as follows:

1. I am the administrator of the Gas and Energy Division of the Public Service Commission of Wisconsin ("PSC"). I have been with the PSC since 1978. Since 2000 I have been the Electric Division's administrator and in 2004 was named administrator of the newly formed Gas and Energy Division.

2. The Gas and Energy Division reviews all applications for Certificates of Public Convenience and Necessity ("CPCNs"). As the Administrator of the Gas and Energy Division, I am responsible for issuing a written determination as to whether a CPCN application is complete. I have performed this function since 2000 and have signed approximately 40 completeness decisions (25 incomplete, 15 complete). I issued the PSC's determination that the CPCN application for the Elm Road Generating Station ("Elm Road") project was complete in a letter dated November 15, 2002. A copy of this completeness determination is attached to my Affidavit as Exhibit A.

3. I have reviewed the CPCN generating plant applications approved by the PSC over the past ten years, in order to determine the PSC's standards when evaluating whether CPCN applications comply with the requirement to include alternative sites. Based upon the determinations of completeness that I have issued for CPCN applications in the past four years, and upon the history of prior CPCN applications presented to the PSC, I conclude that it is not the PSC's practice to require that at least two distinct locations be submitted as proposed alternate sites. I have identified five CPCN applications in which the PSC accepted proposed alternate sites that were within one mile of each other, like the Elm Road project. Instead, it has been a long-standing practice of the PSC to focus upon whether the proposed alternate sites offer relevant, different characteristics for PSC consideration.

4. In my tenure as Administrator of the Gas and Energy Division, I have never required that a CPCN application must include signed permits of the Department of Natural Resources ("DNR") or other agencies before the PSC will deem the application complete. By information and belief it is also my understanding that no other Division Administrator ever imposed such a requirement. The PSC has published Guidelines for CPCN applicants, known as its "Information Requirements for Electric Generation Construction Projects Over 100 MW," which are available at its web site http://psc.wi.gov/electric/cons_env/reqpower.htm. The Guidelines, which describe the information that should be submitted with a CPCN application, only require that information about other permits must be provided, not that these permits must actually be issued and accompany the CPCN application. Items 1.17 and 1.18 of the Guidelines declare that the following information about permits should be part of the CPCN application:

> **1.17** List of required federal, state, and local permits and approvals required and the status of each, including planned application date and contact name and telephone number for permitting agency.
>
> **1.18** Copies of correspondence to and from permitting agencies that relates to permit approval or compliance approval. Copies of any correspondence to or from local governments. This should continue after submittal of the CPCN application (refer to direction #3 on page 1 of this document).

As these Guidelines demonstrate, it is not the PSC's practice to demand that completed permits from all other agencies be part of a CPCN application. Furthermore, the Legislature in creating 2003 Wisconsin Act 89 confirmed the PSC's process of determining that a CPCN application is complete before permits are received from the DNR, in its creation and amendment of Wis. Stat. §§ 30.025 and 30.206.

5. Wis. Admin. Code § PSC 111.53(1)(f)1. requires that a CPCN applicant provide "site-related information for each proposed power plant site, including . . . any required transmission line construction,

agreements for use of the transmission system to deliver plant power, transmission losses, and effects on system reliability." Prior to 2000 (the same year that I became Division Administrator), the PSC's rules did not require that a CPCN application include information about transmission agreements. As a result, I have been the only Administrator charged with the responsibility of implementing this provision of the Administrative Code.

6. In my tenure as Administrator of the Gas and Energy Division, I have never required that a CPCN application for a new generating plant must include signed transmission agreements before the Commission will deem the application complete. It has been the practice of the PSC to require that a CPCN application must include information about transmission agreements for the delivery of electric energy, but not that these agreements must be completed.

7. I have reviewed PSC records for information regarding CPCNs for past generation projects. In particular, I have summarized information about alternative sites and conditions regarding DNR permits. See attached Exhibit B.

8. There are numerous pending applications for CPCN authority for energy construction projects. Applicants routinely contact the PSC before a formal application is filed. Attached as Exhibit C is a summary of pending projects.

9. After the CPCN for the Elm Road project was issued, Wisconsin Energy Corporation began preliminary work related to the project, including finalizing contracts that required construction to begin on May 1, 2005. Based on the compliance filing made pursuant to the CPCN, it appears that significant additional costs may result if construction is not begun by May 1, 2005. The ratepayers of Wisconsin Electric Power Company may be responsible for these additional costs pursuant to leases approved for the project.

10. In the event an applicant were required to have all regulatory permits for each site to be a complete application for a generation project, I estimate that at least one year would be added to the process.

Dated this 14th day of December, 2004.

Robert D. Norcross

Subscribed and sworn to before me
this 14th day of December, 2004.

David A. Ludwig
Notary Public, State of Wisconsin
My commission is permanent.

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Public Service Commission of Wisconsin

Ave M. Bie, Chairperson
Joseph P. Mettner, Commissioner
Robert M. Garvin, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

November 15, 2002

Mr. Larry Salustro, General Counsel
Wisconsin Energy Corporation
231 West Michigan Street
P.O. Box 2949
Milwaukee, WI 53201

Re: Application of Wisconsin Electric Power Company; Wisconsin Energy Corporation; and W.E. Power, LLC; for a Certificate of Public Convenience and Necessity for Construction of Three Large Electric Generation Facilities, the Elm Road Generating Station, and Associated High Voltage Transmission Interconnection Facilities to be Located in Milwaukee and Racine Counties

05-CE-130

Dear Mr. Salustro:

On February 1, 2002, Wisconsin Energy Corporation (We Energies) filed an application with the Public Service Commission of Wisconsin (Commission or PSCW) for authority to construct three large electric generating facilities and associated high voltage transmission interconnection facilities in Milwaukee and Racine Counties. The application was filed pursuant to Wis. Stat. § 196.491(3) and Wis. Admin. Code § PSC 111.53, which require the Commission to determine if a Certificate of Public Convenience and Necessity (CPCN) should be granted, and for other approvals. Commission staff and Department of Natural Resources (DNR) staff reviewed the CPCN application for completeness purposes.

The Commission reviewed the original CPCN application for both the Port Washington and Elm Road generating stations, found the application to be incomplete, and issued a letter determining incompleteness on March 4, 2002. Subsequent to the March 4, 2002, letter there were notable changes to the structure of the CPCN application review process for the Power The Future (PTF) case. In an April 19, 2002, order from the Commission, the PTF case was split into two phases, with the Port Washington case being processed as the first phase and the Elm Road case as the second phase. On April 25, 2002, the Commission issued a completeness determination letter for the Port Washington CPCN application declaring it complete. At that time the Elm Road CPCN application was still considered incomplete. On June 3, 2002, WEC submitted an addendum (Supplement 2) to the Elm Road CPCN application and a new 30-day review process was initiated, with the application being declared incomplete on July 3, 2002.

EXHIBIT A

On September 6, 2002, WEC submitted an addendum (Supplement 3) to the Elm Road CPCN application and a new 30-day review process was initiated. The Commission issued a letter declaring the application incomplete on October 7, 2002. We Energies filed an addendum (Supplement 4) to the application on October 23, 2002. The Commission has reviewed We Energies' supplement to the application to construct the facilities described above as required by Wis. Stat. § 196.491(3)(a)2 and Wis. Admin. Code § PSC 111.53. The DNR also reviewed appropriate application materials for completeness purposes. Based on this review, the Commission determines that the application is complete and by this letter, notifies you of this determination as required by Wis. Stat. § 196.491(3)(a)2.

While the application is determined to be complete at this time, our determination is, in part, based on We Energies' commitment to supply additional information related to items 6, 7, and 18 of the Commission's October 7, 2002, incompleteness letter. Substantial amounts of information relative to items 6 and 7 have been provided, and will allow our review of the wetland delineations to begin. Based on the information contained in Supplement 4 and conversations with We Energies staff, it is my understanding that the remaining information relative to items 6 and 7, consisting of final wetland reports from the Southeast Regional Planning Commission, will be available in approximately two weeks. In addition, the information relative to the subsurface drilling, sampling and testing survey, the wave/environmental climate date survey and the aquatic/benthic environmental and lake bottom characterization survey in item 18 will be available on the time line set out as answer 5-SUP-021 of Supplement 4.

While I fully expect to receive the remaining information on the established time frames, failure by We Energies to submit the information in a timely manner will likely delay the CPCN process as this information is necessary in order to complete our review of the proposed project and issue a joint PSCW/DNR Environmental Impact Statement. Prior to receipt and review of the necessary information, it would be extremely difficult to schedule hearings. I would also note that I expect that in the near future the Commission will petition the circuit court for Dane County for a 180-day extension of time for taking final action on this application, and I understand that WEC will not oppose this petition.

Please be aware that application information that is considered adequate now may require further development later in the Commission's review process. This additional information would be required to complete the record from which the Commission will make its decision whether to approve the application under Wis. Stat. § 196.491(3)(d). Such additional information may relate to need, engineering, environmental, and other issues. When such issues arise, Commission staff will promptly issue a data request for the specific information needed. Your immediate response to data requests will avoid delaying the Commission's review of this project.

If you have questions, please contact the case coordinator Jeff Kitsembel, at (608) 266-9658 or jeff.kitsembel@psc.state.wi.us.

Sincerely,

Robert Norcross

Robert Norcross
Administrator
Electric Division

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cc: Jackie Reynolds, PSCW
Scot Cullen, PSCW
Lauren Hambrook, WDNR
Jeff Kitsembel, PSCW

Wisconsin Generation Construction CPCN Applications

Alternate Site Requirements

Developer/Plant	Docket	In Service Year	Size	Fuel	Status	Alternate Site Required	Alt Site Distance *	Order conditioned on obtaining DNR permits?
LS Power, CoGenTrix/ Whitewater Co-Gen	6630-CE-187	1997	227 MW	Gas	In Service	Alternate Projects	NA/ Alternative Projects	No
Polsky, Sky Gen/WPSC/ DePere Phase I CT	9335-CE-100	1999	179 MW	Gas	In Service	Yes	4600'	Yes
Southern Energy Inc./ Neenah CT	9338-CE-100	2000	300 MW	Gas	In Service	Yes	60 miles or 125 miles	Yes
Polsky, Sky Gen/ Rock Gen–Christiana CT's	9335-CE-101	2001	450 MW	Gas	In Service	Yes	10 miles	Yes
Calpine/ Riverside CC	9335-CE-103 or 9346-CE-100	2004	600 MW	Gas	In Service	Yes	1500'	Yes
MGE/ Walnut St – Madison CC	05-CE-121	2005	150 MW	Gas	Under Construction	No	NA/ cogeneration	Yes
WE Power, Port Wash CC's U1, U2	05-CE-117	2005/08	1090 MW	Gas	Under Construction	No	NA/ Repowering	Yes
Fox Energy/ Kaukauna	05-CE-115	2005	635 MW	Gas	Under Construction	Yes	5 miles	Yes
Power Ventures Group/ Sheboygan County CT	05-CE-131	2005	530 MW	Gas	Under Construction	Yes	4000'	Yes
Wis Public Service Corp/ Weston 4	6690-CE-187	2008	500 MW	Coal	Under Construction	Yes	3500'	Yes
Calpine/ Fond du Lac CC	9343-CE-103 or 9343-CE-100	On hold	532 MW	Gas	Approved	Yes	13000'	Yes
Rainy River/ Superior CT	05-CE-128	On hold	170 MW	Gas	Approved	Yes	3300'	Yes
Mirant fka SEI/ Plover CC + CT	05-CE-116	Cancelled	930 MW	Gas	Approved	Yes	10500'	Yes
PGE, Badger Gen/ Pleasant Prairie CC	9340-CE-100	Cancelled	1,050 MW	Gas	Approved	Yes	4 miles	No DNR Air & Water Permits issued prior to CPCN
WE Power/ Elm Road U1, U2	05-CE-130	2009/10	1230 MW	Coal	Approved	Yes	3500'	Yes

* Approximate distance between plant boilers

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EXHIBIT B

App. 262

Int.P.App. 00257

Pending And Expected
CPCN Transmission Projects *

Project Description	Docket Number	Filing Date	Application Status	Estimated Cost	Planned In-Service Date
ATC West Delavan to Darien 138 kV	137-CE-117	07/29/04	Decision pending	$5,000,000	06/02/05
ATC Wempleton to Paddock 345 kV	137-CE-132	10/26/04	Decision pending	$5,800,000	04/19/05
ATC North Beaver Dam to East Beaver Dam 138 kV		03/03/05		$800,000	01/19/06
ATC Venus to Metonga 115 kV		05/04/05		$5,400,000	01/22/07
ATC Forest Junction to Plymouth 138 kV double circuit		07/01/05		$3,500,000	01/31/07
ATC Jefferson to Stony Brook 138 kV		03/02/05		$15,000,000	03/05/07
ATC Femrite to Sprecher 138 kV		12/30/04		$21,300,000	05/02/07
ATC Canal to Dunn Road 138 kV		12/02/05		$6,900,000	06/04/07
ATC Cranberry to Conover 138 kV		03/03/05		$38,600,000	12/06/07
ATC North Madison to Waunakee 138 kV		09/19/05		$7,500,000	06/03/08
ATC Rubicon to Hustisford 138 kV		10/05/05		$10,200,000	06/03/08
ATC North Lake Geneva to White River 138 kV		07/05/06		$2,500,000	06/03/08
ATC West Delavan to Bristol 138 kV		05/11/06		$1,300,000	06/03/08
ATC SE Fitchburg to Montrose 138 kV		04/03/07		$10,100,000	06/01/09
ATC Rockdale to Bark River 345 kV		07/05/06		$59,500,000	06/02/09
ATC Gardner Park to Central WI 345 kV		03/03/05		$102,000,000	12/01/09
ATC Werner West to Morgan 345 kV		03/03/05		$70,500,000	12/01/09
ATC Rockdale to W. Middleton 345 kV		07/05/06		$50,500,000	06/02/11
ATC S. Lake Geneva to White River 138 kV		06/03/09		$30,000,000	06/01/12
			TOTAL	$446,400,000	

* Consultation with PSC and DNR staff expected to begin before 1/1/06

L:\stats\Testlen\pending and expected CPCN transmission projects

EXHIBIT C

App. 263

Int.P.App. 00258

TOWN OF CALEDONIA,

Petitioner,

Case No. 03-CV-2084

v.

Classification Code: 30607

WISCONSIN PUBLIC SERVICE
COMMISSION AND WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondents.

RECORD LIST OF RESPONDENTS
PUBLIC SERVICE COMMISSION OF WISCONSIN AND
WISCONSIN DEPARTMENT OF NATURAL RESOURCES

1. Cover letter to Lynda Dorr of the Public Service Commission by Larry Salustro of Wisconsin Energy Corporation with the Application of Wisconsin Energy Corporation Companies for Certificates of Public Convenience and Necessity and Other Related Authorizations and Approvals, dated January 31, 2002. (Volumes 1-3)

2. Cover letter to Richard Grigg, Gerald Abood and Wisconsin Electric Power Company by Freddi L. Greenburg of Midwest Independent Power Suppliers regarding a Trust Agreement, dated February 1, 2002.

3. Cover letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with Notice of Proceeding, Assessment of Costs and Prehearing Conference dated February 21, 2002.

4. *Confidential Material No. 19291 subsequently made public:* Archeological and cultural information about Elm Road site.

5. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Michael Vickerman of Renew Wisconsin and request for Full/Interested Party Intervention dated March 5, 2002.

6. Minutes and Informal Instructions of the Open Meeting of Wednesday, March 6, 2002.

7. Cover letter to David Whitcomb of the Public Service Commission of Wisconsin by Warren Day of Wisconsin Federation of Cooperatives requesting full party status, dated March 6, 2002.

8. Motion to Dismiss ERGS Application for Lack of Jurisdiction and Memorandum in support of Motion filed by Robert H. Owen, Jr., dated March 5, 2002.

9. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Catherine J. Furay with Midwest Independent Power Suppliers Inc.'s NFP for full party status, dated March 7, 2002.

10. Cover letter to Roman Draba of Wisconsin Electric Power Company by David C. Whitcomb of the Public Service Commission of Wisconsin with the confidentiality determination for Confidentiality Request No. 19270, dated April 5, 2002.

11. Cover letter to Jeffery Knitter of Wisconsin Electric Power Company by David C. Whitcomb of the Public Service Commission of Wisconsin with the confidentiality determination for Confidentiality Request Nos. 19997 and 20000, dated April 5, 2002.

12. Power The Future Supplement 1, dated April 5, 2003..

13. Cover letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with an Order issued by the Public Service Commission, dated April 11, 2002.

14. Cover letter to Douglas Wetgers of Wisconsin Electric Power Company by David C. Whitcomb of the Public Service Commission of Wisconsin with the confidentiality determination for Confidentiality Request No. 19268, dated April 15, 2002.

15. Cover letter to David Lee of Wisconsin Electric Power Company by David C. Whitcomb of the Public Service Commission of Wisconsin with the confidentiality determination for Confidentiality Request No. 19275, dated April 15, 2002.

16. Cover letter to David Lee of Wisconsin Electric Power Company by David C. Whitcomb of the Public Service Commission with the confidentiality determination for Confidentiality Request No. 19291, dated April 16, 2002.

17. Cover letter to Tim Jones of the Public Service Commission of Wisconsin by Roman A. Draba of WE Energies regarding changes to the original lease for Elm Road, dated April 17, 2002.

18. Public Service Commission Order dated April 19, 2002.

19. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin dated April 25, 2002, setting out the phases of the original Order dated April 19, 2002.

20. Cover letter to Timothy Berrigan of Mirant Americas Development, Inc. by David C. Whitcomb of the Public Service Commission of Wisconsin with the confidentiality determination for Confidentiality Request No. 23580, dated May 7, 2002.

21. Cover letter to Gregory Kelly of PG&E National Energy Group by David C. Whitcomb of the Public Service Commission of Wisconsin with the confidentiality determination for Confidentiality Request No. 19518, dated May 7, 2002.

22. Cover letter to Al Mihm of Wisconsin Electric Power Company by David C. Whitcomb of the Public Service Commission of Wisconsin with the confidentiality determination for Confidentiality Request No. 19294, dated May 9, 2002.

23. Final Tentative Service List, dated May 17, 2002.

24. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with the transcript of the May 6, 2002, second prehearing conference, dated May 21, 2002.

25. Cover letter to Peter Gardon by David C. Whitcomb of the Public Service Commission of Wisconsin with the confidentiality determination for Confidentiality Request No. 23037, dated May 21, 2002.

26. Cover letter to Service List by David Whitcomb of the Public Service Commission of Wisconsin with filing deadline for Replies to Exception, dated June 3, 2002.

27. Power The Future Supplement 2, dated June 3, 2003.

28. Cover letter to Gordon Grant of the Public Service Commission of Wisconsin by Michael A. Dodge along with the City of Oak Creek's application for intervenor compensation, dated June 6, 2002.

29. Cover letter to Timothy Jones of the Public Service Commission of Wisconsin by Mark A. Osten regarding deficiencies in the submittals of applications, dated June 20, 2002.

30. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Carl A. Sinderbrand and the Notice of Additional Appearance on behalf of S.C. Johnson & Son, Inc., dated June 20, 2002.

31. Cover letter to Mark Osten of RMT by Timothy Jones of the Public Service Commission of Wisconsin regarding RMT's review of the Certificate of Public Convenience and Necessity application, dated June 27, 2002.

32. Cover letter to Timothy Jones of the Public Service Commission of Wisconsin by Lauren Hambrook of the Department of Natural Resources regarding its review of the environmental aspects of the Wisconsin Electric Power the Future – Elm Road CPCN Application and June 3 Supplemental Submittal, dated June 27, 2002.

33. Cover letter to Lynda Dorr and Timothy Jones of the Public Service Commission of Wisconsin by Carl Sinderbrand with comments of S.C. Johnson & Son, Inc., with respect to completeness of CPCN application, dated July 1, 2002.

34. Cover letter to Larry Salustro of Wisconsin Energy Corporation by Robert Norcross of the Public Service Commission of Wisconsin finding application incomplete, dated July 3, 2002.

35. Cover letter to Carl Sinderbrand by Timothy Jones of the Public Service Commission of Wisconsin attaching the completeness determination letter, dated July 3, 2002.

36. Cover letter to Randy Vanaartsen of Wisconsin Electric Power Company by David C. Whitcomb of the Public Service Commission of Wisconsin with the confidentiality determination for Confidentiality Request No. 23715, dated July 18, 2002.

37. Cover letter to Randy Vanaartsen of Wisconsin Electric Power Company by David C. Whitcomb of the Public Service Commission of Wisconsin with the confidentiality determination for Confidentiality Request No. 23716, dated July 18, 2002.

38. Cover letter to Larry Salustro of Wisconsin Energy Corporation by Robert Norcross of the Public Service Commission of Wisconsin stating incompleteness of application, dated August 14, 2002.

39. Cover letter to Raj Vakharia of the Wisconsin Department of Natural Resources by Terry Coughlin of WE Energies with additional information for application, dated August 26, 2002.

40. Cover letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with a Public Service Commission Order, dated September 3, 2002.

41. Power the Future Supplement 3, dated September 6, 2002.

42. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by William H. Wilson, Jr. with Motion to Intervene on behalf of LS Power Associates, L.P., dated September 13, 2002.

43. Cover letter to Lynda Dorr and Timothy Jones of the Public Service Commission of Wisconsin by Carl Sinderbrand with S.C. Johnson & Son, Inc.'s comments on the completeness of the CPCN application as amended in Supplement 3, dated September 26, 2002.

44. Cover letter to Jeffery Kitsembel of the Public Service Commission of Wisconsin by Mark A. Osten and David F. Seitz of RMT with a list of deficiencies of the CPCN application, dated September 27, 2002.

45. Cover letter to Lynda Dorr and Timothy Jones of the Public Service Commission of Wisconsin by Frank Jablonski on behalf of the Town of Caledonia regarding matters for consideration for incompleteness, dated September 27, 2002.

46. Cover letter to Larry Salustro of Wisconsin Energy Corporation by Robert Norcross of the Public Service Commission of Wisconsin regarding completeness of application needed before hearing, dated October 7, 2002.

47. Power The Future Supplement 4, dated October 22, 2002.

48. Cover letter to Lynda Dorr and Jeffery Kitsembel of the Public Service Commission of Wisconsin by Carl Sinderbrand with S.C. Johnson & Son, Inc.'s comments on the completeness of the CPCN application as amended in Supplement 4, dated November 6, 2002.

49. Cover letter to Jeffery Kitsembel of the Public Service Commission of Wisconsin by Mark A. Osten and David F. Seitz of RMT on behalf of the City of Oak Creek with concerns about PTF's Supplement 4, dated November 27, 2002.

50. Cover letter to residents and land owners by Jeffrey Kitsembel of the Public Service Commission of Wisconsin describing the Elm Road Generating Station, dated January 13, 2003.

51. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Carl Sinderbrand with a Petition for Interim Determination, dated January 14, 2003.

52. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin setting deadline to respond to S.C. Johnson & Son, Inc.'s and Wisconsin's Environmental Decade requests to review completeness, dated January 22, 2003.

53. Oak Creek Power Plant and Proposed Elm Road Station's Cooling Water Intake and Lake Monitoring Study from WE Energies, dated February 2003.

54. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Dennis M. Grzezinski on behalf of the Sierra Club asking the Public Service Commission to determine application incomplete, dated February 7, 2003.

55. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Larry Martin with Applicants' Comments on Petition of S. C. Johnson & Son, Inc., and WI Environmental Decade, Inc. for Review of Interim Determination, dated February 11, 2003.

56. Cover letter to Lynda Dorr and David C. Whitcomb of the Public Service Commission of Wisconsin by Susan Greenfield, Chairman of Town of Caledonia Town Board supporting petition filed by S.C. Johnson and Son, Inc., dated February 11, 2003.

57. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Daniel P. Gustafson on behalf of MG&E with its comments on the Petition for Review of Interim Determination, dated February 12, 2003.

58. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Michael A. Dodge on behalf of the City of Oak Creek with its Response in Support of Petition for Review, dated February 12, 2003.

59. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Elizabeth Hartman of Wisconsin Public Power, Inc. with its comments on the Petition for Review

of Interim Determination filed by S.C. Johnson & Son, Inc. and Wisconsin's Environmental Decade, Inc., dated February 12, 2003.

60. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Carl A. Sinderbrand on behalf of S.C. Johnson & Son, Inc., with additional information pertinent to the Petition for Review of Interim Determination, dated February 14, 2003.

61. Cover letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with a Notice of Prehearing Conference, dated February 20, 2003.

62. Memo to the Commission from the Public Service Commission of Wisconsin Electric Division, dated February 21, 2003.

63. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Peter L. Gardon on behalf of Calpine Corporation with a request to remove the first two pages of their February 19, 2003, proposal as an alternative the coal plants in oak Creek identified by WEPCO as part of the PTF-2 proceeding to not be confidential material, dated February 24, 2003.

64. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Steve Bulik on behalf of the Citizens for Responsible Power with its request for intervenor compensation, dated February 26, 2003.

65. Cover letter to the Service List by Jeffrey Kitsembel of the Public Service Commission of Wisconsin with the Coastal Analysis, Sediment Transport and Regional Impacts – Elm Road Generating Station and the Cooling Water Intake and Lake Monitoring studies, dated February 27, 2003.

66. Cover letter to David C. Whitcomb of the Public Service Commission by Mark W. Luberda on Behalf of the Town of Caledonia stating it intends to remain a full party, dated March 3, 2003.

67. Cover letter to Larry Salustro of Wisconsin Energy Corporation by Robert Norcross of the Public Service Commission of Wisconsin stating incompleteness of the application of Wisconsin Energy Corporation, dated March 4, 2003.

68. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Steven J. Books asking to be a full party to identify issues at the March 7, 2003, Prehearing Conference, dated March 4, 2003.

69. Motion to Intervene of LS Power Associates by William H. Wilson, Jr., dated March 5, 2003.

70. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Craig Oliver, Sr., requesting full party status, dated March 11, 2003.

71. Cover letter to David C. Whitcomb of the Public Service Commission by David Poklinkoski of Local Union No. 2304 stating it is unable to participate fully, dated March 20, 2003.

72. Cover letter to Lynda Dorr and Gordon Grant of the Public Service Commission of Wisconsin by Eric Uram on behalf of Sierra Club's Southeast Gateway Group with its request for Intervenor Compensation, dated March 24, 2003

73. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Pamela McGillivray on behalf of Wisconsin Environmental Decade's with its Application for Intervenor Compensation, dated March 24, 2003.

74. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with transcripts of the March 7, 2003, Prehearing Conference and laying out a prefiling schedule for written testimony, dated April 11, 2003.

75. Memorandum to the Commission from the Public Service Commission of Wisconsin Electric Division regarding requests for Intervenor Compensation, dated April 16, 2003.

76. Cover letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with the Order Denying Petition to Review Interim Determination, dated April 17, 2003.

77. Draft Environmental Impact Statement, Elm Road Generating Station (Volumes 1 and 2) of the Public Service Commission of Wisconsin and the Wisconsin Department of Natural Resources, dated April 2003.

78. Minutes and Informal Instructions of the Open Meeting of May 1, 2003.

79. Cover letter to Craig Oliver, Sr. by David C. Whitcomb of the Public Service Commission of Wisconsin adding Craig Oliver, Sr., to the Service List, dated May 7, 2003.

80. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Pamela McGillivray with Clean Wisconsin's Motion for Reconsideration of the Commission's Decision Denying in Part Clean Wisconsin's Phase 2 Application for Intervenor Compensation, dated May 9, 2003.

81. Cover letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with the May 16, 2003, Order, dated May 15, 2003.

82. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by John Casey with Applicants' Objection to Scope of S.C. Johnson & Son, Inc.'s 2nd and 3rd set of Data Requests, dated June 4, 2003.

83. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Robert L. Kufrin of Oak Creek with a Development Agreement, dated June 4, 2003.

84. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with Administrative Law Judge's Scheduling Order, dated June 6, 2003.

85. Cover letter to Jeff Kitsembel of the Public Service Commission of Wisconsin by Robert Kufrin of Oak Creek with Comments on the Draft Environmental Impact Statement, dated June 10, 2003.

86. Cover letter to David C. Whitcomb of the Public Service Commission by Larry Martin with objections to Phase II, dated June 11, 2003.

87. Cover letter to Jeffery Kitsembel of the Public Service Commission of Wisconsin by Susan Greenfield of the Town of Caledonia with its comments on the Draft Environmental Impact Statement, dated June 11, 2003.

88. Cover letter to Jeffery Kitsembel of the Public Service Commission of Wisconsin from the Wisconsin Legislature with comments on the Draft Environmental Impact Statement, dated June 11, 2003.

89. Cover letter to Jeffery Kitsembel of the Public Service Commission of Wisconsin by James Childress of Gasification Technologies Council with comments on the Draft Environmental Impact Statement, dated June 11, 2003.

90. Cover letter to Raj Vakharia of the Wisconsin Department of Natural Resources by Terry Coughlin of WE Energies with an Air Quality Assessment, dated June 11, 2003.

91. Official Filing in response to Administrative Law Judge David Whitcomb's new Rescheduling Order by Dan L. Sanford of American Transmission Company stating no objections, dated June 12, 2003.

92. Official filing from Carl A. Sinderbrand on behalf of S.C. Johnson & Son, Inc. with no objections to rescheduling order, but an objection to location of the technical hearing location, dated June 12, 2003.

93. Cover letter to Jeffery Kitsembel of the Public Service Commission of Wisconsin of Christopher D. Young on behalf of ANR Pipeline with comments to correct a false impression in the Draft Environmental Impact Statement, dated June 12, 2003.

94. Comments of the Citizens' Utility Board on the Draft Environmental Impact Statement, submitted by George Edgar, dated June 12, 2003.

95. Cover letter to Jeffery Kitsembel of the Public Service Commission of Wisconsin by John Thompson on behalf of the Clean Air Task Force with comments on the Draft Environmental Impact Statement, dated June 12, 2003.

96. Comments of S.C. Johnson & Son, Inc. on the Draft Environmental Impact Statement for the Elm Road Generating Station, dated June 12, 2003.

97. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Michael Stuart on behalf of Wisconsin Public Power with comments on the Draft Environmental Impact Statement, dated June 13, 2003.

98. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Peter L. Gardon on behalf of Calpine Corporation with comments on the Draft Environmental Impact Statement, dated June 13, 2003.

99. Comments of David Jenkins of Wisconsin Electric Cooperative Association on the Draft Environmental Impact Statement, dated June 13, 2003.

100. Comments of the Lake Michigan Federation on the Draft Environmental Impact Statement, dated June 13, 2003.

101. Cover letter to Jeffery Kitsembel of the Public Service Commission of Wisconsin by R.A. Draba of WE Energies with comments on the Draft Environmental Impact Statement, dated June 13, 2003.

102. Cover letter to Jeffery Kitsembel of the Public Service Commission of Wisconsin by Pamela McGillivray on behalf of Clean Wisconsin with their comments on the Draft Environmental Impact Statement, dated June 13, 2003.

103. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with Rescheduling Order, dated June 17, 2003.

104. Memorandum to the Commission from the Public Service Commission of Wisconsin Electric Division with a suggested minute denying Citizen's for Responsible Power to reconsider portions of its decision petition, dated June 18, 2003.

105. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Peter L. Gardon on behalf of Calpine Corporation with certain correspondence, Confidential Revised Proposal, confidentiality request form and affidavit, dated June 20, 2003.

106. Cover Letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with the Final Order, dated June 27, 2003.

107. Cover letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with the Final Order, dated July 2, 2003.

108. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Robert Owen with a Notice of Motion to Dismiss (Strike) ERGS3 IGCC Portion of Elm Road Generating Station Application, dated July 3, 2003.

109. Cover letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with a Notice of Scheduling Conference, dated July 16, 2003.

110. Cover letter to the Public Service Commission of Wisconsin by Robert Owen with a Brief of Robert H. Owen, Jr. in Support of Motion to Dismiss (Strike) ERGS3 IGCC Portion of Elm Road Generating Station Application, dated July 17, 2003.

111. Cover letter to Lynda Dorr and Gordon Grant of the Public Service Commission of Wisconsin by Eric Uram on behalf of Sierra Club's Southeast Gateway Group with its request for Intervenor Compensation, dated July 24, 2003.

112. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Larry Martin on behalf of Wisconsin Energy Corporation, in response to Robert Owens's Motion, dated July 22, 2003.

113. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with a Rescheduling Order, dated July 23, 2003.

114. Public Service Commission of Wisconsin Notice of Hearing, dated July 25, 2003.

115. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Carl Sinderbrand with a Motion to Compel Response to Data Requests and for Expedited Response and Decision, dated July 29, 2003.

116. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Robert H. Owen, Jr., with a Motion to Dismiss (Strike) ERGS 1 and 2 Portions and Entirety of Elm Road Generating Station Application and Brief of Robert H. Owen, Jr., in Support of Motion to Dismiss ERGS Application, dated July 31, 2003.

117. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with an Order by the Commission, dated July 31, 2003.

118. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by John Casey with Applicants' responses to the S.C. Johnson data requests identified by Mr. Sinderbrand in the Motion to Compel, dated July 31, 2003.

119. Final Environmental Impact Statement, Elm Road Generating Station, Volumes 1 to 3, of the Public Service Commission of Wisconsin and the Wisconsin Department of Natural Resources. (NB: Introduced at Public Service Commission of Wisconsin hearings as Exhibit 274.)

120. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by John Casey in response to S.C. Johnson & Son, Inc.'s Motion to Compel, dated August 1, 2003.

121. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Larry Martin with Applicants' Response to Robert Owen's Motion to Dismiss, dated August 7, 2003.

122. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with the Order on the Motion to Dismiss, dated August 13, 2003.

123. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Larry Martin clarifying an Exhibit, dated August 18, 2003.

124. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by Larry Martin regarding availability of witnesses, dated August 19, 2003.

125. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with a Scheduling Order for Submission of Written Testimony by members of the Public, dated August 19, 2003.

126. Minutes and Informal Instructions of the Open Meeting of Wednesday, August 20, 2003.

127. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Tony Hemming of ChevronTexaco with a Motion for Leave to Intervene out of Time of ChevronTexaco Worldwide Power and Gasification, Inc., and the Direct Testimony of Alma I. Rodarte, PhD, on Behalf of ChevronTexaco Worldwide Power and Gasification, Inc. on the Draft Environmental Impact Statement, dated August 26, 2003.

128. Cover letter to David C. Whitcomb of the Public Service Commission of Wisconsin by David Ludwig of the Public Service Commission of Wisconsin with the Commission staff's response to the Motion of ChevronTexaco, dated August 29, 2003.

129. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by John Raihala with the Notice of Appearance on behalf of ChevronTexaco Worldwide Power and Gasification, Inc., dated August 29, 2003.

130. Cover letter to Heidi Hopkins of Wisconsin Department of Natural Resources by David M. Lee of WE Energies with proof of publications, dated September 5, 2003.

131. Order of the Administrative Law Judge ordering Transcript Volume 3 (pp. 839-860) and Volume 4 (pp. 861-872; 912-913), dated September 5, 2003.

132. Order of the Administrative Law Judge ordering Transcript Volume 6 (pp. 1381-1496) and Volume 8 (pp. 1890-1918) confidential, dated September 9, 2003.

133. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with the July 22, 2003, Scheduling Conference transcript, dated September 9, 2003.

134. Order of the Administrative Law Judge ordering Transcript Volume 11 (pp. 2803-2924; 3132; 3423-3465) confidential, dated September 11, 2003.

135. Order of the Administrative Law Judge ordering Transcript Volume 15 (pp. 4544-4571; 4653-4679) confidential, dated September 15, 2003.

136. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with the transcript of the September 12, 2003, hearing and setting out a briefing schedule, dated September 16, 2003.

137. Cover letter to the Public Service Commission of Wisconsin of June Ihlenfeldt requesting intervenorship, dated September 19, 2003.

138. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with Senator Stepp's August 26, 2003, letter to Chairperson Bridge, dated September 22, 2003.

139. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with the list of appearances from September 17 through 19, 2003, hearings, dated September 24, 2003.

140. Cover letter to the Service List by David C. Whitcomb of the Public Service Commission of Wisconsin with the September 11, 2003, letter from Edward J. Zore, President and Chief Executive Officer of Northwest Mutual to Chairperson Bridge, dated September 29, 2003.

141. Cover letter to June Ihlenfeldt by David C. Whitcomb of the Public Service Commission of Wisconsin responding to her September 19, 2003, letter, dated September 30, 2003.

142. Cover letter of Robert Owen in response to September 29, 2003, letter of David C. Whitcomb of the Public Service Commission of Wisconsin, dated October 3, 2003.

143. Cover letter of Pamela McGillivray with Clean Wisconsin's Supplemental Application for Intervenor Compensation for Phase II, dated October 6, 2003.

144. Cover letter of John A. Casey in response to Robert Owen's October 3, 2003, letter, dated October 7, 2003.

145. Cover letter of Steven Bulik on behalf of Citizens for Responsible Power requesting supplemental Intervenor Compensation funds, dated October 20, 2003.

146. Cover letter of June Ihlenfeldt withdrawing her petition, dated October 20, 2003.

147. Cover letter of David C. Whitcomb of the Public Service Commission of Wisconsin with inventory of Public Testimony, dated October 23, 2003.

148. Cover letter by Robert Owen with a Request to Supplement Truncated Wis. Stat. §§ 1.11 and 1.12 Analysis to Apply to All Prospective Co-owners of ERGS 1 and ERGS 2, dated November 6, 2003.

149 Minutes and Informal Instruction of the Open Meeting of November 10, 2003.

150 Public Service Commission of Wisconsin's Final Order, dated November 10, 2003.

151. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Larry J. Martin with his response to Mr. Owen's Request to Supplement Truncated Wis. Stat. §§ 1.11 and 1.12 Analyses to Apply to All Prospective Co-owners of ERGS 1 and ERGS 2, dated November 11, 2003.

152. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Elizabeth Hartman with her response to Mr. Owen's Request to Supplement Truncated Wis. Stat. §§ 1.11 and 1.12 Analyses to Apply to All Prospective Co-owners of ERGS 1 and ERGS 2, dated November 14, 2003.

153. Cover letter to Lynda Dorr of the Public Service Commission of Wisconsin by Daniel Gustafson with his response to Mr. Owen's Request to Supplement Truncated Wis. Stat. §§ 1.11 and 1.12 Analyses to Apply to All Prospective Co-owners of ERGS 1 and ERGS 2, dated November 17, 2003.

154. Cover letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with an Order, dated November 19, 2003.

155. Minutes and Informal Instructions of the Open Meeting of November 21, 2003.

156. Cover letter to the Service List by Lynda Dorr of the Public Service Commission of Wisconsin with an Order, dated December 1, 2003.

157. Public Transcripts, Volumes 1, 2, 4, 5, 7, 9, 10, 12-14, 16-21.

158. Public Exhibits 1 through 302. Not including any confidential filings and Final Environmental Impact Statement. The Final Environmental Impact Statement is listed separately as Record Item 117.

159. Confidential Transcripts, Volumes 3, 6, 8, 11, 15.

160. Confidential Exhibits Nos. 43, 91, 93, 94, 95, 97, 110, 111, 177, 201c, 202c, 267, 269, 270, 272.

151. Certifications concerning review of the record signed by Commissioner Bridge, Commissioner Bie and Commissioner Garvin.

STATE OF WISCONSIN
SUPREME COURT

Clean Wisconsin, Inc. p/k/a Wisconsin's
Environmental Decade Institute, Inc.,
S.C. Johnson & Son, Inc., and Calpine Corporation,
Petitioners–Respondents–
Cross-Appellants–Cross-Respondents,

Town of Caledonia,
Petitioner–Cross-Respondent,

v. Appeal No. 04-3179

Public Service Commission of
Wisconsin and Wisconsin Department of
Natural Resources,
Respondents–Co-Appellants–
Cross-Respondents,

Wisconsin Electric Power Company,
W.E. Power, LLC and Wisconsin Energy
Corporation,
Interested Parties–Appellants–
Cross-Respondents,

Dairyland Power Cooperative,
Interested Party–Cross-Respondent,

(Caption continued on following pages)

RESPONDENTS' BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONERS-RESPONDENTS-CROSS-APPELLANTS-CROSS-RESPONDENTS CLEAN WISCONSIN, INC. AND S.C. JOHNSON & SON, INC.

On Appeal From The Final Order Of The Circuit Court For Dane County, The Honorable David T. Flanagan III Presiding

Clean Wisconsin, Inc., p/k/a Wisconsin's Environmental Decade Institute, Inc., and S.C. Johnson & Son, Inc.,
Petitioners,

v.

Wisconsin Department of Natural Resources,
Respondent,

Wisconsin Public Power, Inc., City of Oak Creek, Dairyland Power Cooperative, Madison Gas & Electric Company, Wisconsin Electric Power Company, Wisconsin Energy Corporation and W.E. Power, LLC,
Interested Parties.

Calpine Corporation,
Petitioner,

v.

Wisconsin Department of Natural Resources,
Respondent,

City of Oak Creek, Dairyland Power Cooperative, Madison Gas & Electric Company, Wisconsin Public Power, Wisconsin Electric Power Company, Wisconsin Energy Corporation, and W.E. Power, LLC,
Interested Parties.

City of Oak Creek,
Petitioner,

v.

Public Service Commission of Wisconsin,
Respondent.

Madison Gas & Electric Company and
Wisconsin Public Power, Inc.,
Interested Parties–Co-Appellants–
Cross-Respondents,

City of Oak Creek,
Interested Party–Respondent–
Cross-Appellant

Robert H. Owen,
Interested Party–Respondent–
Cross-Respondent.

Calpine Corporation,
Petitioner,

v.

Public Service Commission of Wisconsin, and
Wisconsin Department of Natural Resources,
Respondents,

Wisconsin Electric Power Company, Wisconsin Energy Corporation, W.E. Power, LLC, Dairyland Power Cooperative, Madison Gas & Electric Company, Robert H. Owen, Jr., and City of Oak Creek,
Interested Parties.

Town of Caledonia,
Petitioner,

v.

Public Service Commission of Wisconsin,
Respondent,

Wisconsin Electric Power Company, Wisconsin Energy Corporation, W.E. Power, LLC, Dairyland Power Cooperative, Madison Gas & Electric Company, Robert H. Owen, Jr., and Wisconsin Public Power, Inc.,

Interested Parties.

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STATEMENT OF ISSUES

S.C Johnson & Son, Inc. ("SCJ") and Clean Wisconsin, Inc. ("CW") submit that there are four fundamental issues raised by appellants (other than the City of Oak Creek compensation issue):

1. Whether the Public Service Commission ("PSC") erred as a matter of law by issuing a Certificate of Public Convenience and Necessity ("CPCN") based on an incomplete application.

   Answered "yes" by the Circuit Court.

2. Whether PSC erred as a matter of law by issuing a CPCN prior to the Department of Natural Resources ("DNR") issuing approvals required prior to construction.

   Answered "yes" by the Circuit Court.

3. Whether PSC erred as a matter of law by issuing a CPCN for the lowest priority source of fuel under the State Energy Priorities Law under an erroneous interpretation of that law.

   Answered "yes" by the Circuit Court.

4. Whether PSC erred as a matter of law by approving construction of facilities at the Oak Creek Power Plant to support a third, presently unneeded and unapproved generating unit.

   Answered "yes" by the Circuit Court.

INTRODUCTION

Appellants ask this Court to affirm a PSC decision that is antithetical to the plain language and purpose of the operative law. They justify this result by mischaracterizing legal issues as factual, contorting the plain meaning of pertinent statutes and regulations, and cloaking PSC decisionmaking in an impenetrable shield of unbridled discretion to make policy that contradicts express statutory requirements. And they repeatedly refer to the size of the record, implying that a lengthy proceeding obviates legal and analytical deficiencies.

Appellants ask this Court to abdicate its independent judicial review function. Their arguments would redefine "alternative" to mean "the same;" "before" to mean "whenever;" and "required" to mean "discretionary." Their arguments would insulate from judicial scrutiny a power plant approval diametrically opposed to the legislative mandate: the lowest priority, most expensive, worst environmental and health option available.

ARGUMENT

I. STANDARD OF REVIEW

The issues before the Court in the agency/applicant appeal are legal issues: whether PSC violated State law and regulations by accepting and acting on an application that did not include required information for two sites; whether the Wisconsin Energy Corporation ("WEC") application was

incomplete because it did not include transmission-related, environmental and other required information; whether PSC violated State law by issuing a CPCN prior to DNR issuing required permits; and whether PSC violated the State Energy Priorities Law. As discussed below, the Court should accord PSC's positions little or no deference on these legal issues.

A court may accord one of three levels of deference to an agency's interpretation of a statute or regulation: great weight, due weight, or *de novo* review. RURAL v. PSC, 2000 WI 129 ¶ 21, 239 Wis.2d 660, 619 N.W.2d 888. *De novo* review applies when the issue is one of first impression, the agency's position is inconsistent with prior practice, or there is no evidence that the agency exercised any special knowledge. Id., ¶ 22. *De novo* review also applies to an agency's construction of a statute, which is purely a question of law, and in cases asserting that the agency has exceeded its statutory authority. Wisconsin Citizens Concerned for Cranes and Doves v. DNR, 2004 WI 40 ¶¶ 10, 13, 270 Wis.2d 318, 677 N.W.2d 612.

At the other extreme, a court gives great weight deference only when the agency satisfies four conditions: 1) it is legislatively charged with administering the statute; 2) its interpretation is long-standing; 3) it employed specialized knowledge or expertise in forming the interpretation; and 4) its interpretation will provide uniformity and consistency in the statute's application. RURAL, ¶ 23. PSC ignores this four-part test,

arguing that it should be accorded great weight deference on all issues simply because it has issued CPCNs for a number of years, even though the issues before this Court are novel. However, courts have applied that standard only if the specific agency interpretation at issue satisfies the four-part test. *See, e.g.*, State v. WERC, 122 Wis.2d 132, 138, 361 N.W.2d 660 (1985); Browne v. WERC, 169 Wis.2d 79, 99-100, 485 N.W.2d 376 (1992).

Due weight deference applies where "an agency has not developed any particular expertise in interpreting and applying the statute at hand that positions the agency more favorably to interpret the statute than the reviewing court." RURAL, ¶23. The court "'will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available.'" Id., ¶ 24 (citation omitted). In RURAL, the Court gave due weight, not great weight, to PSC's interpretation of the CPCN statute. Id.

Under any of the review standards, an agency's interpretation of a statute or regulation cannot be upheld if it is inconsistent with its plain meaning, is contrary to legislative intent, or is "otherwise unreasonable or without rational basis." State ex rel. Parker v. Sullivan, 184 Wis.2d 668, 699-700, 517 N.W.2d 449 (1994) (citation omitted).

PSC is not entitled to substantial deference here. PSC cites no evidence that the pertinent issues under the CPCN statute have been subject

to long-standing interpretations. The Energy Priorities Law, though applicable to PSC, is not uniquely applicable to PSC, and PSC cannot dictate the interpretation for all state agencies. There is no evidence in this record or reported case law that PSC has ever applied the relevant statutory language since its enactment in 1994; it has not asserted and cannot assert a "long standing" interpretation. Moreover, since the most recently approved coal plant was constructed in the mid-1980s (PSC-R.119 at 31), this statute has never been applied to a proposed facility at the bottom of the priority list.

The issues before the Court involve unambiguous statutory language. PSC's contrary legal positions are entitled to no deference. Additionally, PSC's novel, *ad hoc* interpretations here are unreasonable and inconsistent with the underlying intent of the law, and should not be accorded any weight.

II. PSC'S DECISION MUST BE VACATED BECAUSE THE CPCN APPLICATION LACKED LEGALLY REQUIRED AND ESSENTIAL INFORMATION

As the Circuit Court correctly held, PSC violated the CPCN statute and its own regulations when it deemed WEC's application to be complete despite the absence of legally required and essential information. The multiple defects in this case, including the failure to evaluate alternative sites, are profound and substantive. Alternatives analysis is the foundation of environmental and cost-benefit analysis and the "heart" of WEPA and

NEPA. *See* CW/SCJ Cross-Appeal Br. at 34. Courts have frequently vacated agency decisions for failure to undertake an adequate analysis of alternatives. Id.; *see also* Van Abbema v. Fornell, 807 F.2d 633, 642-43 (7th Cir.1986). It is through the evaluation and comparison of alternatives that one understands the range of available options, alternative costs and impacts, and potential mitigation and trade-offs within and among the various options.

The statutory public interest analysis is not an abstraction: it is a comparative analysis, considering the different impacts of different options. In the absence of adequate information, the decisionmaking process is fatally flawed, and PSC cannot exercise discretion. PSC's unlawful determination that WEC's flawed application was complete was legal error that invalidated the proceeding, since the information needed to evaluate ERGS and compare it to alternatives was never developed.

A. State Law Requires that a CPCN Application Include Information for at Least Two Proposed Sites

State law requires that a CPCN application include detailed, comparable information on at least two sites. To issue a CPCN, PSC must determine that:

> The design and location or route is in the public interest considering alternative sources of supply, *alternative locations* or routes, individual hardships, engineering, economic, safety, reliability and environmental factors. . . .

Wis. Stat. § 196.491(3)(d)3 (emphasis added). The Legislature specified that a determination of public convenience and necessity *must* include a review of at least more than a single proposed "location" for the facility.

PSC regulations are in accord:

> [A] CPCN application for a large electric generating facility is not complete until the applicant has filed *all* of the following information with the commission:
>
> * * * *
>
> (e) *At least two proposed sites* for the proposed facility, including a description of the siting process and a list of the factors considered in choosing the alternatives.
>
> (f) Site-related information *for each proposed power plant site*, including all of the following: . . . .

Sec. PSC 111.53(1), Wis. Adm. Code (emphasis added).

The regulation specifies that "for each proposed power plant site" the applicant must provide information in nine categories:

- Necessary regulatory approvals;
- Detailed construction schedule;
- Availability of transportation for fuel delivery;
- Required transmission line construction and agreements, and effects on system reliability;
- Required auxiliary facilities;
- Detailed information on natural resources at each site;
- Community-related information;
- Aesthetics; and
- If a new transmission line is needed, all the information required for a CPCN application for a new transmission line.

Sec. PSC 111.53(1)(f), Wis. Adm. Code.

PSC's decision to limit its review to one site is a legal determination subject to *de novo* review without deference for several reasons:

First, the plain language of the statute and rule unambiguously prohibit limiting review to one site, except in two inapplicable circumstances discussed below.

Second, resolution of this issue does not require any specialized knowledge or expertise.

Third, PSC's one-site alternative is a new interpretation of a relatively new regulation. The two-site rule was promulgated in 2000. PSC Br. at 17 n.5. According to PSC's motion for judicial notice, its first application of that rule was in March 2002, only a few months before PSC determined the ERGS application to be complete. The PSC decisions that pre-date the ERGS decision involved geographically distinct sites; ERGS was the first time that PSC considered multiple layouts at one site, with common facilities and overlapping footprints, to be two sites.

Even if the Court were to determine that *de novo* review does not apply, PSC's decision is indefensible because: a) it is not reasonable; and b) there is a more reasonable application of the two-site requirement.

B. WEC's Application Did Not Include Required Information on Two Proposed Sites

Appellants criticize the Circuit Court for concluding that the law requires "distinct" sites, although PSC uses that term to rationalize its decision. They argue that the Circuit Court substituted its judgment for PSC in how close sites may be. They also argue that PSC has previously approved applications presenting sites "close together." PSC. Br. at 17-18.

Appellants' rhetorical, "how-close-is-enough" question need not be answered. Nor must this Court substitute its judgment for that of PSC. WEC did *not* submit detailed, comparable information on two proposed sites. Unlike previous applications cited by PSC, WEC did not even offer alternative sites in close proximity. Instead, the application identified one location: the OCPP site. Within that site, WEC's application merely identified alternative configurations of some of the ERGS equipment. Each of those layouts overlaps the others and contains numerous identical features.

This conclusion is inescapable. The application identified construction of the new units adjacent to the north end of the existing units as the "proposed" or "primary" facility layout, and construction adjacent to the south end of the existing units as an "alternative." PSC-R.1, Executive Summary at 14.

The first sentence of the section on ERGS stated that WEC "proposes to develop two new 615 megawatt ... SCPC electric generating units at the site of the existing Oak Creek Power Plant." PSC-R.1, vol. 3, Enclosure 7. Ninety-nine pages of the 106-page Enclosure 7 focused on the proposed configuration at the OCPP site.

By contrast, the application devoted only seven pages to the "alternative" configuration. Id. at 100-06. The descriptions are cursory. The application provided virtually no information unique to this configuration because there is virtually no difference between the configurations. The application recognized identical impacts for fuel storage and delivery, cooling water supply, electrical connections to the transmission system, air quality, water consumption and quality, local infrastructure, historical and archeological resources, visual effects, and noise. WEC's application also included only one set of costs for the proposed project; *i.e.*, each layout had the same cost. PSC-R.1, vol.1, Enclosure 8.

The "alternative" presented in the application is, for all practical purposes, identical to the primary layout. They are so similar to each other that placement of much of the ERGS equipment – such as the water intake

structure, the 13-acre coal pile, coal delivery facilities, coal handling facilities, and the electrical switchyard facilities – never varies.[1]

All the configurations, including the so-called "North-CUP" configuration, would burden the same area with the same significant air pollution from the coal-fired units. They also would have the same adverse aquatic impacts on Lake Michigan, since each "alternative" would withdraw the same volume of water from an intake structure in the same location in the lake and discharge the same volume of chemically and thermally polluted water from the site.

Information in the EIS and elicited at hearing reinforces the inescapable conclusion that the alternative layouts are essentially identical to each other. *See* layout drawings, CW/SCJ-Ap.239-42. Each layout is on the existing OCPP site and uses the same intake water structure, docking and breakwater facilities, rail corridor, and street access. While the North-CUP option rearranged the ERGS substation and coal pile within the site, the three alternatives in WEC's application are identical to each other with respect to those features.

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[1] The "North-CUP" option – which WEC did not include in its application and was not considered in PSC's completeness determination – differs from the layouts presented in the application in minor respects: the coal pile, electrical switchyard facilities and transmission interconnections are moved south towards or into the Town of Caledonia. The power block in the "North-CUP" option is in the same place as the "primary site" presented in the CPCN application, as are the facilities adjacent to or in Lake Michigan.

The layout distinctions are also environmentally inconsequential. On those rare occasions in which the EIS discusses differences in site configurations, it identifies no significant differences in environmental impacts. PSC-R.119, vol.1 at 178, 217, 224. DNR's air pollution witness testified that the differences in emissions from the various layouts are insignificant. PSC-R.157 at 4373:6-13, 4374:12-19. While the EIS noted slightly different wetland losses, DNR's witness testified that these acreages are inaccurate, and the EIS did not identify any significant differences in wetland impacts among the layouts. PSC-R.157 at 4420; PSC-R.119 at 217.

WEC's testimony on the site selection process confirms that the proposed "alternatives" are merely modified equipment layouts at one site. To select a site, WEC relied upon a screening process from 1992 for a different project. PSC-R.157 at 1319. WEC selected the OCPP as the location for the proposed new units; when it applied to PSC, WEC did not consider what later became the alternative configurations. Id. at 1320-21. After selecting the OCPP as the proposed ERGS site, WEC created different configurations at the OCPP in an attempt to satisfy the two-site requirement. Id. at 1328-29.

This after-the-fact effort is borne out by the lack of meaningful differences among the alternatives. WEC's Mr. Mihm testified to numerous similarities among the alternative configurations, and that there

was no significant cost difference among the layouts. Id. 1330-35. WEC's Mr. Patulski testified that all of the alternative configurations are an expansion of the OCPP, and that from an operational and systems standpoint, there is no difference among them. Id. at 1816. WEC's Ms. Krause testified that there were no differences among the layouts for regulatory purposes. She testified that WEC considers each "alternative" to be an expansion of the existing OCPP for purposes of the Clean Water Act, Clean Air Act and other environmental laws. Id. at 1664-65.

Each "alternative" is essentially identical for the factors PSC must consider under sec. PSC 111.53(1)(f), Wis. Adm. Code. Neither WEC's application nor the EIS identified any differences in required regulatory approvals, construction schedule, fuel transportation, required transmission line construction, fuel and water storage, natural resources, or community-related information. The only remotely relevant layout difference among the sites was the change in the location of the coal piles for the North-CUP option, which WEC did not include in the application that PSC determined to be complete.

WEC's alternatives represent its after-the-fact attempt to satisfy the letter of the law while evading its substance. It satisfies neither.

In apparent recognition of this legal defect, PSC asserted in its CPCN decision that it considered the previously approved Fond du Lac facility. CW/SCJ-Ap.130. This *post hoc* rationalization is legally deficient

because: a) it is only half the capacity of ERGS, even as approved; b) it was not proposed in WEC's application; and c) WEC vehemently opposes that facility, which is sponsored by Calpine, one of its competitors.

C. PSC Offered No Legitimate Rationale for Ignoring the Alternative Sites Requirement

PSC's completeness determination must be evaluated based on the rationale that PSC articulated in its decision. Stas v. Milwaukee County Civil Service Comm, 75 Wis.2d 465, 473-75, 249 N.W.2d 764 (1977).

1. PSC's "Two-Sites-at-One-Site" Argument Is Legal Error

PSC reasoned that it could consider multiple layouts on the same property as different "sites." CW/SCJ-Ap.145-47. This rationale defies the meaning of the word. The term "site" is defined by statute to mean "the geographical location of a facility." Wis. Stat. § 16.11(2)(r). Wis. Stat. § 292.01(18) defines site in a geographical context to include any "approved facility." PSC quotes similar dictionary definitions and concedes that alternative sites require "distinct locations." PSC Br. at 10. Since the OCPP site layouts substantially overlap each other, they are not distinct geographical locations. Using statutory or common parlance, the EIS depictions conclusively demonstrate that WEC proposed only one site: the OCPP.

PSC's rationale also conflicts with sec. PSC 111.53(2)(b), Wis. Adm. Code. That rule defines two specific circumstances in which an

application may satisfy the two-site requirement at the same facility: (1) a co-generation facility at an existing industrial plant; and (2) the re-powering of an existing facility. Neither circumstance applies here.

PSC opined that the two exceptions to the alternative site requirement in sec. PSC 111.53(2)(b) "are not the entire universe of situations where the Commission will accept site alternatives that are located in close proximity." CW/SCJ-Ap.147.

PSC's novel interpretation defies basic canons of statutory interpretation. The regulation states that a CPCN application must include detailed information for "at least two proposed sites for the proposed facility . . . ." Sec. PSC 111.53(1)(e), Wis. Adm. Code. It then states that this requirement can be met at the applicant's existing facility in two specific circumstances. Sec. PSC 111.53(2)(b). The regulation's unmistakable meaning is that all other circumstances require the application to present alternative sites that are not each located at the same existing facility.

> Under the well established cannon of *expressio unius est exclusio alterius* (the expression of one thing excludes another), where the legislature specifically enumerates certain exceptions to a statute, we conclude, based on that rule, that the legislature intended to exclude any other exception.

State v. Delaney, 2003 WI 9 ¶ 22, 259 Wis.2d 77, 658 N.W.2d 416 (citation omitted).

PSC's argument would also render sec. PSC 111.53(2)(b) superfluous, contrary to rules of construction. Landis ex rel. Landis v. Physicians Ins. Co. of Wis., Inc., 2001 WI 86 ¶ 16, 245 Wis.2d 1, 628 N.W.2d 893. The identification of two specific exceptions to the two-site requirement would have no purpose or effect if layouts on the same site could be deemed alternatives for any electric generating facility.

PSC's argument is also illogical. The co-generation and re-powering exceptions to the two-site rule are inherently tied to a particular facility. There is no such constraint on new coal-fired power plants. WEC's last coal-fired power plant – Pleasant Prairie – was not built at an existing facility. The plain reading of the rule, canons of construction, and common sense dictate that PSC's decision was legal error.

2. WEC's Alternative Layouts Are Not "Close Together": They Are the Same Site with the Same Costs

PSC's motion to augment the record with other PSC decisions glosses over the distinction between sites "close together" and layouts on the same site. It is undisputed that the various configurations of the proposed ERGS are at the OCPP site, and that they were selected because they are all located at the OCPP. The rearrangement of equipment within each layout shares essentially the same footprint within that site. CW/SCJ-Ap.239-42. Whether an applicant can satisfy the two-site requirement with distinct sites in close proximity is, in this case, academic.

PSC has embellished the record with decisions from other cases that allegedly support its position. These decisions reveal that the ERGS decision was unprecedented when made but is now being used to avoid the two-site requirement for other projects:

1. The few decisions that pre-date the ERGS completeness determination all involve two sites on separate parcels, generally separated by ½ mile to several miles. Only after ERGS did PSC issue a CPCN following the "two-sites-on-one-site" theory, using ERGS as precedent.

2. Friends of Responsible Energy v. PSC concerned a co-generation plant, *i.e.*, a facility *exempt* from the two-site requirement. It is a circuit court decision of no precedential value that post-dates and relies upon PSC's ERGS determination as precedent.

PSC adopted the novel position that alternatives must only "provide different packages of costs and benefits ...." CW/SCJ-Ap.147. Each of these configurations, however, had *the same costs*. The WEC application, EIS, and EGEAS modeling all assign the same cost to ERGS regardless of configuration. Nor did PSC identify any "benefits" that distinguish the three layouts in the application. WEC's application does not even satisfy PSC's *ad hoc* criteria.

3. PSC's Stated Distinctions are Legally Irrelevant

PSC considered the "determining factors" to be the municipality that would host the project. CW/SCJ-Ap.147.[2] PSC observed that the north configurations are primarily within the City of Oak Creek, which had agreed to host the ERGS; the south configurations are primarily in the Town of Caledonia, which had not yet agreed to host the ERGS.[3] PSC also observed that Oak Creek preferred a particular layout – the North-CUP option developed after PSC's completeness determination – and had modified its zoning to accommodate that layout. Id.

The jurisdiction hosting "primary" portions of a proposed facility is not among the distinguishing criteria in sec. PSC 111.53(1)(f), Wis. Adm. Code.

To the extent that political boundaries are relevant, the layouts remain indistinct. Each layout includes ERGS equipment in both Oak Creek and Caledonia. CW/SCJ-Ap.239-42. The only local jurisdictional distinction among the configurations identified by PSC is whether the ERGS power block is within Oak Creek (north layouts) or Caledonia (south

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[2] PSC's April 17, 2003 decision, but not its final decision, also noted a modest difference in required soil excavation. CW/SCJ-R.Ap.249. PSC did not explain whether or why that would be significant; it plainly was not a significant distinction, as PSC approved the layout with *greater* excavation.

[3] Caledonia subsequently entered into a community impact agreement with WEC and agreed to dismiss its judicial review action. R.8 (04-CV-533).

layouts). Both communities would suffer air quality, noise, traffic, public safety services, aesthetic, and land use impacts under any of the OCPP site layouts. Indeed, PSC required the applicants to work with Caledonia and other neighboring communities to mitigate those anticipated impacts, even though it approved the North-CUP option placing the ERGS power block in Oak Creek. CW/SCJ-Ap.148. The happenstance that the OCPP site straddles the county line cannot justify treating this single site as two sites.

PSC also accepted WEC's restriction of sites to those that would accommodate three coal-fired units, and then concluded that it is reasonable to limit consideration to one site because it is difficult to find sites that would accommodate WEC's three-unit proposal. CW/SCJ-R.Ap.249. But PSC did not find the OCPP site to be the only possible location in the State for new coal-fired generation units, and it did not articulate that premise as a reason for its approval. PSC effectively delegated the choice of location, size, and fuel type to WEC, allowing WEC to limit PSC's evaluation to alternative layouts for three coal-fired units at the OCPP site.[4]

WEC's application, which presented overlapping layouts at the OCPP site as the "alternatives" to be considered, and PSC's determination

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[4] Federal courts have held that an applicant cannot narrowly define the project purpose to constrain the alternatives to be considered in a required alternatives analysis. *See, e.g.*, Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 666 (7th Cir.1997); Bersani v. Robichaud, 850 F.2d 36 (2nd Cir.1988).

that it was complete, violated the express language of the alternatives requirement. And it subverted the requirement's purpose by preventing PSC from making a reasoned choice among real alternatives.

D. PSC Erred by Determining that the Application Was Complete When It Acknowledged that the Application Was Incomplete

PSC's November 15, 2002, determination that WEC's application was complete expressly acknowledged that the application was incomplete. In PSC's own words, it was incomplete because of continuing deficiencies PSC had identified in its prior incompleteness determination:

> While the application is determined to be complete at this time, our determination is, in part, based on [WEC's] commitment to supply additional information related to items 6, 7 and 18 of the Commission's October 2, 2002 incompleteness letter [relating to wetlands, subsurface sampling and testing, and aquatic/benthic and environmental lake bottom characterization].
>
> While I fully expect to receive the remaining information on the established time frames, failure by [WEC] to submit the information in a timely manner will likely delay the CPCN process as this information is necessary in order to complete our review of the proposed project and issue a joint PSC/DNR Environmental Impact Statement. Prior to receipt and review of the necessary information it would be extremely difficult to schedule hearings.

CW/SCJ-R.Ap.244.

PSC pronounced completeness not because the application was complete, but because WEC promised to correct deficiencies in the application at some point in the future. This determination directly conflicts with PSC's statutory obligation under Wis. Stat. § 196.491(3)(a)1,

which provides that the application must include all required information. *See also* sec. PSC 111.53(1), Wis. Adm. Code.

As an inducement for WEC to promptly correct those deficiencies, PSC stated that failure to submit information "will likely delay the CPCN process. . . ." CW/SCJ-R.Ap.244. The process duration is statutorily prescribed, however, and PSC's failure to act within the statutory time frame constitutes approval. Wis. Stat. § 196.491(3)(g). PSC cannot delay the CPCN process once it deems the application to be complete. This is precisely why it is critically important for the application to be complete *before* PSC triggers the statutory review period.

Although PSC's initial completeness determination included specific deadlines for submitting required additional information, WEC failed to meet those deadlines. WEC still had not submitted complete and accurate wetlands data at the time of the hearing. PSC-R.157 at 4419-21. PSC ignored this deficiency in both its April 17, 2003 order and its CPCN decision. When PSC issued the CPCN, the application was *still* incomplete with respect to the deficiencies that PSC identified in its letter determining the application to be complete.

E. WEC's Application Did Not Include Required Information for Transmission Lines

Where, as here, high-voltage transmission lines are needed as part of the project, the CPCN application must include specified information,

including the information necessary for the CPCN for the associated transmission facilities. Secs. PSC 111.53(1)(f)9 and PSC 111.55, Wis. Adm. Code.

Appellants criticize the Circuit Court for reading the regulations as requiring transmission line interconnection agreements, design and cost. They argue that the rule only requires information "about" those items. PSC Br. at 10. Appellants misread the plain language of the regulation.

Sec. PSC 111.53(1)(f) requires that the applicant submit:

> Site-related information for each proposed power plant site, including all of the following:
>
> 1. The regulatory approvals required for construction and operation of the facility.
>
> 2. The construction schedule and timeline, showing construction activities and permitting expectations from the beginning of construction to the in-service date.
>
> 3. The availability of transportation for fuel delivery and requirements for gas pipeline construction. . . . .
>
> 4. Any required transmission line construction, agreements for use of the transmission system to deliver plant power, transmission losses and effects on system reliability. . . .
>
> * * * * *
>
> 9. If a CPCN is needed for construction of transmission lines as part of this application, the required information under s. PSC 111.55.

Contrary to appellants' argument, the rule does not require information "regarding" transmission line agreements for use. Transmission line agreements are among that information that is required. Appellants concede that such agreements were not submitted.

Appellants' arguments also ignore sec. PSC 111.53(1)(f)9, quoted above, which requires that the applicant submit all the information required for the companion transmission line CPCN. There is no dispute that high-voltage transmission lines will be required here (costing $164+ million), triggering the CPCN requirement. Wis. Stat. §§ 196.491(1)(e), 196.491(3)(a)1 (high-voltage transmission line is a "facility" requiring a CPCN). There is also no dispute that the application does not contain the information required for the CPCN for ERGS-related transmission lines. The application and EIS do not include, *e.g.*, design of the transmission lines, estimated magnetic field levels, substation design, construction schedules, accurate cost information, or any information on alternative routes. Sec. PSC 111.55, Wis. Adm. Code. For this reason alone, the CPCN application was incomplete and inadequate.

F. PSC's Failure to Require a Complete Application Prejudiced the Public and Undermined the Process and Result

WEC argues that this Court should turn a blind eye to PSC's erroneous completeness determination because completeness is a "preliminary, procedural step," and any error is harmless because there is no evidence that the final decision is not in the public interest. WEC Br. at 14, 23-24.

WEC did not previously raise this argument, and it should not be considered on appeal. State v. Outagamie County Bd. of Adjustment, 2001 WI 78 ¶ 55, 244 Wis.2d 613, 628 N.W.2d 376 (2001).

PSC's violation of the statute is a serious substantive error, not a mere technicality. Unless the applicant submits the required information on at least two sites, PSC cannot fulfill its statutory directive to evaluate "alternative locations" and environmental, economic and other factors.

PSC and DNR understood the significance of the application's deficiencies. The absence of wetlands and aquatic impacts information was sufficiently important that PSC attempted (ineffectively) to make its completeness determination conditional on receipt of that information. The agencies began their EIS by stating that they could not perform analyses of water-related impacts "due to insufficient information and the press of time . . . ." CW/SCJ-Ap.225. DNR's wetland witness testified that WEC's inadequate and inconsistent wetlands information precluded her from determining whether any of that information was accurate. PSC-R.157 at 4419-21. WEC's failure to satisfy its statutory and regulatory obligation to provide accurate, required information on two proposed sites resulted in tangible prejudice, depriving the public and agencies of the opportunity to evaluate and compare impacts of ERGS with any alternative site, or to impose mitigative measures to reduce impacts.

The absence of required information does not mean that the project is in the public interest: it precludes the analysis necessary to make that determination. The absence of required information is inherently prejudicial, because it deprives the agency and public of the basis for comparing alternatives or legislatively mandated factors, and it affords a reviewing court and the public no opportunity to determine whether the agency acted rationally when considering available choices.

Review of the final decision encompasses all interlocutory decisions as well. *See, e.g.*, Friends of the Earth v. PSC, 78 Wis.2d 388, 410-11, 254 N.W.2d 299 (1977); Pasch v. Wis. Dept. of Revenue, 58 Wis.2d 346, 357, 206 N.W.2d 157 (1973). Additionally, it is undisputed that PSC "reaffirmed" its earlier decision in the CPCN. CW/SCJ-Ap.144-45.

The inadequacy of the application is not a mere procedural defect; it is reversible legal error. Wis. Stat. § 227.57(5) and (8) compel that the CPCN be vacated and remanded due to, *inter alia*, PSC's violation of the CPCN statute that precluded the statutorily required alternatives analysis.

Appellants over-rely on RURAL. That decision does not displace the requirement that PSC comply with the CPCN statute. The majority, in holding that PSC's expedited EIS process was non-prejudicial error, noted that the petitioners had only raised that procedural issue, not "concrete defects." RURAL, ¶ 48. Even so, the dissenters observed that "PSC's failure to follow the legislatively mandated procedures casts doubt on its

ultimate result, and this doubt cannot be glossed over with the phrase 'harmless error.'" Id., ¶ 105. In this case, there can be no doubt that the errors are both substantive and harmful.

III. PSC VIOLATED STATE LAW BY ISSUING THE CPCN BEFORE DNR HAD ACTED ON REQUIRED PERMITS

The Circuit Court ruled that PSC erred by issuing the CPCN before DNR issued permits required for construction. There is no dispute that PSC issued its final decision on the CPCN before DNR had issued *any* required permits or approvals. Moreover, the violation is significant. As discussed below, DNR limited its legally required alternatives analysis premised on PSC's prior approval of ERGS. The absence of required environmental information unnecessarily and unlawfully limited the scope of the EIS. And neither of the agencies ever considered the substantial adverse health effects of ERGS.

To escape the obvious conclusion that it violated the law, PSC raises a novel argument for the first time in this Court: if PSC issues the CPCN conditioned on DNR issuing required permits, PSC does not "issue" the CPCN until the conditions are satisfied.

A. PSC Violated Wis. Stat. § 196.491(3)(e)

Wis. Stat. § 196.491(3)(e) states in pertinent part:

> The commission may not issue a certificate of public convenience and necessity . . . until the department has issued all permits and approvals identified in the listing specified in par. (a)3.a. that are required prior to construction.

In this matter, the following are undisputed:

1. Prior to submittal of WEC's CPCN application, DNR had provided WEC with a list of DNR permits and approvals that were required prior to construction. These included, *inter alia*, a navigable waters permit under Wis. Stat. ch. 30 and an air pollution control permit under Wis. Stat. ch. 285.

2. PSC issued the CPCN on November 10, 2003.

3. At the time that PSC issued the CPCN, DNR had not issued permits required for construction, including both the navigable waters and air pollution control permit.

These undisputed facts are dispositive. There is no need or opportunity for agency interpretation or deference; the requirement and the violation are unambiguous and undisputed. If PSC previously deviated from this practice, its prior practice violated State law.

B. PSC Was Unable to Fulfill Its Duties Because WEC Did Not Timely Submit DNR-Required Application Information

The CPCN statute requires that a CPCN applicant submit all permit applications required by DNR prior to filing the CPCN application. Wis. Stat. §§ 196.491(3)(a)3.a and b contemplates the following sequence:

Day -60:	submit engineering plan to DNR
Day -30:	DNR list of required permits
Day -10:	submit DNR permit applications
Day 1:	submit CPCN application
Day 20:	DNR completeness determination
Day 30:	PSC completeness determination

Day 140: DNR action on permits (120 days after DNR completeness)

Day 210: PSC action on CPCN (180 days after PSC completeness, subject to 180-day extension).

There is no dispute that appellants did not follow this schedule. WEC had not submitted a complete air pollution control permit application even by the date the agencies issued the EIS. DNR was unable to certify the application to be complete until it had evaluated additional application information that WEC submitted to DNR in April, June, and July 2003. PSC-R.119 at 134; PSC-R.157 at 4389. WEC still had not submitted a complete water permit application on August 8, 2003, when DNR served its pre-filed direct testimony in this proceeding. PSC-R.157 at 4398:8-12.

The statute requires that DNR make its completeness determination first, *i.e.*, PSC knows if the DNR permit applications are complete before it must decide whether to deem the environmental and other information in the CPCN application to be complete. PSC's dilemma of running out of time under the CPCN statute before DNR issued permits flows from WEC's persistent failure to submit complete DNR applications and PSC's failure to require them as a condition of completeness.

PSC recognized the importance of complete DNR applications in the CPCN process in this case. In its several *incompleteness* determinations in this matter, PSC consistently advised WEC that DNR-required information was still missing. PSC-R.34, 38, 46. The two items that PSC identified in

its November 15, 2002 completeness determination related to DNR permits for wetlands and the cooling water intake structure. CW/SCJ-R.Ap.244. PSC's failure to hold WEC to the submittals that PSC itself had determined to be essential for a complete CPCN application was patently arbitrary and capricious.

C. Appellants' New Contention that PSC Did Not "Issue" the CPCN Should Not be Considered and Makes No Sense

To avoid the obvious conclusion that PSC violated the CPCN statute, appellants now ask the Court to adopt a novel interpretation. They argue that the statute differentiates between "approve" and "issue," and that PSC's issuance of the CPCN decision cannot be equated with issuance of the CPCN. Under this theory, PSC still has not issued the CPCN because DNR has not issued all permits required for construction. This argument should not be considered, as it was not raised before the Circuit Court; nor was it a reason articulated by PSC in its decision. Outagamie County, 2001 WI 78 ¶ 55. It also makes no sense.

Appellants' argument is sophistry. The statute plainly contemplates only one CPCN decision by the agency, and PSC clearly and expressly made this its "final decision." CW/SCJ-Ap.101. It is labeled a CPCN. CW/SCJ-Ap.156. PSC did not state that the CPCN would "issue" after WEC obtained DNR permits, only that it would "take effect" after DNR issues required approvals. CW/SCJ-Ap.162. *See also* Wis. Stat.

§ 196.491(3c) (construction must commence within one year after PSC "issues" the CPCN and every other federal and state approval "has been issued").

This Court in RURAL recognized that PSC's CPCN decision "issues" the CPCN. RURAL, ¶¶ 16, 58. Appellants' newly fabricated argument defies the plain language and obvious intent of the statute.

D. PSC's Conduct Is Inconsistent With Legislative History

The legislative history, though not necessary to resolve this issue, also demonstrates legislative intent to require DNR permits before the CPCN, and to preclude the agencies from side-stepping that requirement.

Wis. Stat. § 196.491(3)(a)3.a, created by 1997 Act 204 (May 11, 1998), addresses DNR-required permits and approvals:

> Within 30 days after a person provides an engineering plan, the department shall provide the person with a listing of each department permit or approval which, on the basis of the information contained in the engineering plan, appears to be required for the construction or operation of the facility.

Prior to May 1998, Wis. Stat. § 196.491(2m) (1995-96) provided in pertinent part:

> The department shall, in consultation with the commission, also designate which permits and approvals, or portions thereof, must be obtained prior to the issuance of the certificate of public convenience and necessity. Such designation shall be based on a finding by the department that the granting or denial of the same could significantly affect overall facility design or location. At any time prior to the issuance of the certificate of public convenience and necessity, the department may, in consultation with the commission, waive the necessity of obtaining any such permit or approval in advance of such certificate.

The 1998 statutory amendment is significant in two respects. First, it eliminated the qualification that DNR permits are required before construction only if they "could significantly affect overall facility design or location." The requirement now applies to all DNR-issued permits needed to commence construction.

Second, the Legislature eliminated the authority of DNR, in consultation with PSC, to waive the requirement to obtain DNR permits before CPCN approval. This is significant because: a) PSC has no discretion to issue a CPCN without prior issuance of required DNR permits; and b) PSC's historical practice until mid-1998, under different authority, is irrelevant. The Legislature expressly precluded what PSC did in this case.

A different provision in the statute recognizes that PSC may issue a CPCN before issuance of non-DNR permits required for construction. Wis. Stat. § 196.491(3c)(a)2. For example, WEC must obtain a permit from the U.S. Army Corps of Engineers before construction, due to navigable waters and wetlands impacts. 33 U.S.C. § 1344. CW/SCJ have not challenged the CPCN because WEC has not yet obtained that permit. The distinctions in statutory language reinforce the intent of § 196.491(3)(e), that DNR permits required for construction must be issued before PSC can issue a CPCN.

E. This Court Has Previously Directed PSC to Comply with Wis. Stat. § 196.491(3)(e)

This Court has previously directed PSC to comply with this section. In RURAL, the Court held that PSC could issue a CPCN conditioned upon subsequently obtaining DNR permits because of the unique, expedited (90-day) schedule in 1997 Act 204, §96. But it admonished PSC to comply with this requirement when acting under the 180-day timeline applicable to ERGS:

> Where the PSC has before it an application to process according to the longer timeline in Wis. Stat. § 196.491(3), the PSC should, and could, comply with subdivision (e).

RURAL, ¶ 59. Here, WEC had 360 days to obtain DNR permits after PSC's completeness determination because PSC obtained a court-approved extension.

PSC argues that it could not comply here because DNR had not yet acted on WEC's permit applications. PSC ignores the reason DNR could not act: WEC had not submitted complete DNR applications, a fact known to PSC at the time it made its erroneous completeness determination. PSC did not insist that WEC complete its DNR applications, even though it had required that information as part of incompleteness and then completeness determinations. Indeed, WEC and the agencies privately met and planned a strategy whereby DNR would not act until PSC had acted. WE-App.259. WEC, PSC and DNR created their own dilemma, not because of any statutory conflict, but because they disregarded the law.

F. The Public Has Been Prejudiced by PSC's Statutory Violation

Appellants again argue that PSC's violation was harmless error. They note that DNR has in fact issued two of the permits required for construction (acknowledging, by silence, that it still has not issued all permits required for construction). Since appellants raise the issue of a purported lack of prejudice for the first time on appeal, it should not be considered by the Court. There has been no opportunity to present relevant information before PSC or the Circuit Court. But even the record now before the Court illustrates that CW/SCJ and the public have been prejudiced by appellants' unlawful conduct.

DNR was required to prepare a practicable alternatives analysis ("PAA") considering alternatives to the proposal. Under sec. NR 103.08(3)(b), Wis. Adm. Code, DNR was required to consider "[p]racticable alternatives to the proposal which will avoid and minimize adverse impacts to wetlands ...." Under sec. NR 103.08(4)(a)1, DNR may approve a project only if it finds that "[n]o practicable alternative exists which would avoid adverse impacts to wetlands."

DNR did not complete a PAA, as it would for an ordinary permit application. Instead, it agreed with WEC to wait until PSC issued the CPCN, and then limit its review to the PSC-approved layout. WE-App.259, 299. DNR also acknowledged that it did not analyze impact

avoidance or secondary impacts, as required under the rule. CW/SCJ-R.Ap.253-57. Front-loading the PSC approval, in violation of the statute, resulted in issuance of the wetlands permit without the required PAA.

Additionally, PSC/DNR were unable to provide the public with required information in the EIS. They advised readers that the EIS did not include evaluations of, *inter alia*, air modeling, wetlands and mitigation, because WEC failed to submit timely, sufficient information. CW/SCJ-Ap.225-26.

PSC also unlawfully avoided consideration of health impacts. PSC refused to consider health impacts by presuming that the health analysis prepared by the Harvard School of Public Health witnesses would be "useful to DNR" in its air permit proceeding. CW/SCJ-Ap.152. DNR, however, refused to consider health-related impacts or costs, on the grounds that such information is irrelevant to air permit proceedings, and because PSC had pre-selected SCPC units at the OCPP. CW/SCJ-R.Ap.260-61. As a result of PSC's legal error, neither agency evaluated the evidence of the more than one thousand premature deaths and thousands of asthma attacks and other illness incidents from ERGS' air pollution.

Appellants' argument that agencies can violate State law – even when they are on notice (per RURAL) that their conduct is unlawful – and then elude review is poor policy and dangerous precedent. Agencies could routinely decline to follow the law, as long as their final decisions

rationalized their violations as having no substantive impact on the outcome.

The fact that DNR subsequently issued air and one of the required water permits[5] does not mean that there was no harm in violating the statute. By reversing the order of approvals, the public was deprived of the comparative environmental analyses required by State law. Appellants' singular focus on one site, one technology, and one plan resulted in this lowest priority, highest cost project.

IV. THE CPCN VIOLATES THE ENERGY PRIORITIES LAW

PSC's principal brief on appeal devotes less than three pages to its argument that the Circuit Court erred in holding that PSC violated the Energy Priorities Law. PSC makes no reference to its interpretation of the statute, presenting the issue as simply whether there is substantial evidence in the record to support a finding that higher-priority alternatives are not cost-effective or technically feasible. As discussed below, PSC erroneously interpreted the statute to avoid its application. The substantial evidence test is therefore irrelevant. Moreover, the evidence shows that natural gas generation is cheaper than the PSC-approved ERGS.

PSC's decision to approve the coal-based ERGS proposal was not based on application of the Energy Priorities Law but on commissioners'

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[5] Those DNR-issued permits are the subject of judicial review proceedings.

preferences that are antithetical to that law. This was legal error and requires that the CPCN be vacated and reversed.

A. The Energy Priorities Law Unambiguously Requires that ERGS Be Rejected Unless There Is No Higher Priority, Technically Feasible, Cost-Effective Alternative: PSC's Contrary Interpretation of the Statute Was Legal Error

The Energy Priorities Law, enacted in 1994, establishes priorities for meeting Wisconsin's energy needs. The Legislature's priorities are not optional or hortatory.

Wis. Stat. § 1.12(4) states:

> PRIORITIES. In meeting energy demands, the policy of the state is that, *to the extent cost-effective and technically feasible*, options be considered based on the following priorities, in the order listed:
>
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed:
> 1. Natural gas.
> 2. Oil or coal with a sulphur content of less than 1%.
> 3. All other carbon-based fuels.

(Emphasis added.) Wis. Stat. § 196.025(1) states:

> To the extent cost-effective, technically feasible and environmentally sound, the commission *shall implement* the priorities under s. 1.12(4) in making *all* energy-related decisions and orders....

(Emphasis added.)

ERGS would be fueled by high sulfur coal, the lowest priority. The plain language of the statute establishes that ERGS cannot be approved unless higher priority options would not be "cost-effective and technically feasible" to meet the energy demand it would serve. PSC alluded to this

application of the law but expressly rejected it. *See* CW/SCJ-Ap.115. This was legal error requiring that PSC's decision be vacated and reversed.

According to PSC, ERGS can be approved even if higher-priority alternatives are the same cost or even less costly than high sulfur coal:

> S.C. Johnson asserts that it is not enough that ERGS be close in price to other higher priority options .... Under this reasoning, the Commission would be obligated to select a higher priority fuel option unless the applicants have demonstrated that the proposed units at ERGS will be provided at a substantially lower cost than available higher priority priorities.
>
> This Energy Priorities Law, however, is not a mandate to state agencies that must be mechanically applied to achieve a specific outcome. . . .

CW/SCJ-Ap.115. In this and other language in its decision, PSC rejected the very idea of being bound to accept higher priority alternatives that are technically feasible and cost-effective.

Contrary to PSC's conclusion, the Energy Priorities Law is a mandate to state agencies and must be applied whenever PSC considers a proposed new facility. The Legislature has specifically directed PSC to implement that law in "all energy-related decisions and orders." Wis. Stat. § 196.025(1).

PSC mischaracterized the effect of applying the statute as requiring a "specific outcome" in all cases. CW/SCJ-Ap.115. The statute does not direct a specific technology or result for all situations. Rather, a project must comply with the Energy Priorities Law or be rejected. ERGS could have been lawfully approved only if the record established that higher

priority options were not "cost-effective, technically feasible and environmentally sound." But PSC asserted that it had discretion to approve ERGS even if it was more costly than higher priority, feasible, less polluting alternatives.

The Commissioners decided to approve ERGS at their October 29, 2003 meeting, twelve days before they issued the CPCN. The Commissioners' deliberations at this meeting provide insight into their decision not to comply with the Energy Priorities Law.

Chairman Bridge stated that she did not "feel constrained to choose gas in any scenario in which it is the least expensive." R.29, Exh.B at 16:23-25. In other words, even when gas is technically feasible, approvable and cheaper than coal-fired generation, the Energy Priorities Law would not "constrain" PSC to approve gas in lieu of coal. Under this view, the statute is effectively rendered meaningless. Chairman Bridge's stated rationale for her position is "the need to have a balance of fuels . . . to assure reliability over time" and her own predilection of which priorities are in consumers' "best interests." Id. at 17:4-9

The Energy Priorities Law does not call for a "balance" among conservation, renewables, gas and coal. It prohibits coal projects whenever it is cost-effective and technically feasible to use conservation, renewables

or gas. Chairman Bridge's decision to follow her own policy predilections rather than the statute was legal error.[6]

Commissioner Bie made plain her disdain for the Energy Priorities Law, stating, in effect, that the statute should not be taken seriously because "there are no penalties or other mechanism to compel any party to comply with the priority list in making these energy related decisions." Id. at 20:15-18. PSC was duty bound to follow the law, regardless of whether the statute contains a penalty for non-compliance. Commissioner Bie also argued that the Energy Priorities Law is defective because "it doesn't create any standards for determining the extent to which the priority list is actually used in making such decisions." Id. at 20:17-20. This critique of the statute is clearly wrong: it applies to "all" new facilities "to the extent cost-effective and technically feasible."

Commissioner Bie then stated that she did not think that "the legislature wanted the priorities as literal." Id. at 24:20-21. This statement is both speculative and antithetical to rules of statutory construction. A statute's literal meaning must be followed absent an ambiguity that would require interpretation. Teague v. Bad River Band, 2000 WI 79 ¶ 17,

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[6] Moreover, ERGS cannot be justified as being needed to maintain "balance" in WEPCO's energy supply options. Natural gas accounts for only 3.3% of WEPCO's electricity production. PSC-R.119 at 30. Coal, by contrast, accounts for 68.7% of its electricity production, with nuclear accounting for virtually all the rest. Id. PSC's "balance" argument is factually as well as legally erroneous.

236 Wis.2d 384, 612 N.W.2d 709. Commissioner Bie did not identify any ambiguity in the statutory language that would warrant a non-literal interpretation.

Commissioner Garvin stated his legally erroneous view that "the energy priorities themselves are directory and not mandatory as a matter of law." R.29, Exh.B at 28:18-20. He also talked about "policy preferences" for coal that run afoul of Legislative policy disfavoring coal. Id. at 29:8.

PSC approved the ERGS without explaining why it would not be cost-effective or technically feasible to rely on an expansion that put greater emphasis on natural gas and other higher-priority alternatives. This was a fundamental legal error, not an oversight. Had PSC applied the law correctly, it could not have approved ERGS. WEC never demonstrated that higher priority options, including conservation, wind and natural gas, or a combination of these resources, were not cost-effective or technically feasible.[7] In the absence of such a demonstration, PSC's approval of new coal units was legal error.

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[7] Neither PSC nor WEC used EGEAS to estimate the cost of replacing *all* of the SCPC units' generation with natural gas or other higher priority alternatives. *See* CW/SCJ Cross-Appeal Br. at 23-24. Even if it would not be cost-effective to replace all of ERGS' generating capacity with higher priority alternatives, PSC was still required to implement the higher priority alternatives "to the extent cost-effective and technically feasible." Wis. Stat. § 1.12(4). Its failure to do so was legal error.

B. PSC Erroneously Interpreted the Law as Requiring It to "Harmonize" the Requirements of the Energy Priorities Law and the CPCN Statute

1. There is No Disharmony Between the Energy Priorities Law and CPCN Statute

PSC did not identify any ambiguity in the Energy Priorities Law that requires interpretation. Instead, PSC ignored the plain meaning of the statute using unjustifiable techniques.

PSC first asserted a need to "harmonize" the Energy Priorities Law and CPCN statute. CW/SCJ-Ap.115-16. However, PSC failed to identify any conflict between the two statutes that would require it to act in derogation of their plain meaning. Interpretation to balance or reconcile two statutes is only necessary if they are inconsistent, *i.e.*, complying with one statute precludes compliance with the other. In the absence of a conflict, there is no basis to depart from the rule that a statute must be applied according to its plain meaning. Teague, 2000 WI 79 ¶ 17.

The CPCN statute does not conflict with the Energy Priorities Law. The CPCN statute requires an applicant to submit an application to PSC that contains complete information about the project, including alternatives, and requires PSC to hold hearings. It further directs PSC not to issue a CPCN unless it makes certain affirmative findings, including findings necessary to conclude that the project is in the "public interest."

PSC correctly observed that it must consider a variety of factors under the CPCN statute, including safety, reliability, and environmental impacts. CW/SCJ-Ap.115. PSC does not explain how any of these factors conflicts with the Energy Priorities Law, or how compliance with the Energy Priorities Law would preclude compliance with the CPCN statute. On the contrary, PSC can consider all of these factors within the confines of the statutorily mandated energy priorities. This is exactly what is required by Wis. Stat. § 196.025(1), which directs PSC to implement those priorities in "all" its decisions.

Additionally, a court or agency, faced with an inconsistency between two statutes, should "'when possible, . . . construe [the] statutes . . . in a manner as to harmonize [inconsistent statutory] provisions *in order to give each full force and effect.*'" Ahrens v. Town of Fulton, 2002 WI 29 ¶ 28, 251 Wis.2d 135, 641 N.W.2d 423 (citation omitted, emphasis added). If there were an inconsistency between the Energy Priorities Law and CPCN statute, PSC must construe them "to give each full force and effect." This would mean requiring WEC to satisfy: (i) the Energy Priorities Law's requirement that higher priority alternatives be implemented to the extent cost effective and technically feasible; and (ii) each of the CPCN statute's additional requirements.

2. PSC Did Not Identify Any Factual Basis for Suggesting Disharmony Between the Energy Priorities Law and the CPCN Statute, and No Such Basis Exists in the Record

PSC made no finding that higher priority alternatives under the Energy Priorities Law were un-approvable under the CPCN statute; nor would there be any basis for such a contention in the record.

PSC's EGEAS modeling showed that under all circumstances, available, higher priority options, including natural gas generation, were cheaper than coal-fired generation using WEC's cost information. *See, e.g.*, PSC-R.157, Exh. 273; PSC-R.119, Appendix B.

One of the alternatives to a portion of the ERGS' capacity is the 523 MW gas-fired Fond du Lac Energy Center. PSC-R.157, Exh. 273. In addition to being a higher priority than ERGS, the facility is less costly. Id. And it has already received a CPCN. By approving ERGS in lieu of directing WEC to purchase electricity from the Fond du Lac facility, PSC approved an expansion plan that substituted coal-fired generation for a higher priority, technically feasible, cost-effective, and environmentally sound alternative.[8] As a result, WEC will replace the electricity that could be generated by a cost-effective and technically feasible gas-fired facility with coal-based generation. This is clear legal error.

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[8] As the Circuit Court correctly observed, there is no question that natural gas fired-plants are technically feasible. PSC's counsel conceded this point in the proceedings below. CW/SCJ-Ap.203 n.17.

A second EGEAS run prepared by PSC staff showed the effect of adding even more gas-fired generation to serve the needs of WEC's customers. This EGEAS run shows that an expansion plan that would involve building two gas-fired plants – the 523 MW Fond du Lac facility and 260 MW Fox Energy Center – would cost less than WEC's plan that front loads construction of SCPC units. PSC-R.157, Exh. 273. By approving ERGS, PSC erred by substituting coal-based generation for this cost-effective, technically feasible, higher priority alternative.

3. PSC's Creation of a "Baseload" Criterion is Unsupported by the Law or the Record

PSC's decision introduces a novel concept under the Energy Priorities Law: PSC can exclude consideration of higher priority, technically feasible, cost-effective alternatives because they do not satisfy PSC's ideas about the fuel best suited for "baseload" needs. The statute, however, does not allow PSC to pass over higher priority alternatives by exempting baseload plants from statutory priorities that apply to "*all* energy-related decisions and orders."

PSC has concluded in this proceeding that natural gas, even if cost-effective and technically feasible, cannot be used to serve baseload needs. CW/SCJ-Ap.130-31. This sweeping conclusion defeats the statutory priorities. PSC has essentially rewritten the statute to read that the only priority when it determines that there is a need for baseload capacity is the

lowest legislative priority (coal), *i.e.*, the legislative priorities do not apply to baseload capacity.

PSC's decision is also inconsistent with the record. PSC has expressly approved the gas-fired Fond du Lac and Fox Energy facilities for baseload generation. CW/SCJ-Ap.206 n.18.

PSC's EGEAS modeling supports the use of natural gas for cost-effective baseload generation. The expansion plans incorporating either or both gas-fired Calpine facilities were *less* costly than the coal-based expansion plan incorporating ERGS. PSC-R.119, Appendix B. Even using WEC's cost data that favor ERGS, PSC modeling shows that displacing the higher priority natural gas alternative with coal *increases* cost.

The CPCN and Energy Priorities statutes are compatible without any need for harmonizing or balancing one against the other. PSC identified no evidence and made no finding that there is any disharmony between the statutes in this matter. Instead, PSC ignored the Energy Priorities Law altogether on the theory that PSC need not implement its mandates. PSC erred as a matter of law in approving ERGS without any factual findings

that would support its conclusion that higher priority alternatives were not cost-effective or technically feasible.[9]

C. PSC Erroneously Relied on Selective References to the Legislative Prefatory Note to Defeat the Plain Meaning of the Statute

PSC improperly justified disregarding the plain meaning of the Energy Priorities Law by relying on selective portions of the statute's Prefatory Note.

A statute's Prefatory Note is not part of the statute itself; it is merely legislative history. City of Racine v. Waste Facility Siting Board, 216 Wis.2d 616, 623, 575 N.W.2d 712 (1998). Courts may look to the legislative history of a statute only when the statutory language is ambiguous. Teague, ¶17. In Teague, the Court explained that the goal of statutory interpretation is to discern and give effect to the intent of the Legislature. One must "first look for that intent in the plain language of the statute." Id. Where a statute is unambiguous, courts "cannot look beyond the language of the statute to determine its meaning." Id. *See also* Wisconsin Citizens Concerned for Cranes and Doves, ¶ 8 ("plain meaning of a statute takes precedence over all extrinsic sources . . . including agency interpretations").

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[9] Although denominated as a finding of fact, the statement at page 4 of the CPCN that higher priority alternatives are not cost-effective or technically feasible is a legal conclusion that tracks the statutory language, not a factual finding. *See* CW/SCJ Cross-Appeal Br. at 10 (citing cases).

PSC did not identify any ambiguity in the Energy Priorities Law. The statute supplies a clear standard for the limited exception to its mandate – that a higher priority alternative is not "cost-effective and technically feasible." Wis. Stat. § 1.12(4). PSC's reliance on legislative history was legal error.

Even if one were to consider legislative history, PSC relied on a limited, inapplicable reference that cannot be read in isolation from the more pertinent discussion in the Prefatory Note. PSC asserted that the Prefatory Note indicates that the agencies have "discretion" whether to follow the priorities. CW/SCJ-Ap.115. However, the Note's reference to discretion relates to the requirement that local governments and state agencies follow the priorities to meet "their own energy needs." CW/SCJ-R.Ap.262. Moreover, this discretion lies in the cost-effectiveness/technical feasibility determination, not in the acceptance of a lower priority alternative where higher priority alternatives are shown to be cost-effective and technically feasible:

> For example, in designing the energy-related aspects of a new building, an agency would be required to include energy conservation measures and renewable energy systems that are cost-effective and technically feasible. However, the agency would have discretion to determine whether measures and systems are cost-effective and technically feasible.

Id. The Prefatory Note states that "the bill *directs* ... the public service commission (PSC) to implement the priorities ... in making energy-related decisions and orders." Id. (emphasis added); CW/SCJ-R.Ap.265 ("Directs

PSC to implement the priorities . . . in making *all* energy-related decisions") (emphasis added).

There is nothing in the statute's legislative history that gives PSC discretion to deviate from the priorities in issuing a CPCN. The Legislature has specifically directed that PSC "shall implement" those priorities in its decisions. Wis. Stat. § 196.025(1). Nor is there any legislative history that would allow PSC to approve a low-priority alternative ahead of cost-effective, technically feasible, higher-priority alternatives. PSC not only erred in relying on legislative history; its interpretation of the statute is incorrect based on that legislative history.

V. PSC UNLAWFULLY PREDETERMINED THE LOCATION FOR ADDITIONAL, UNNEEDED COAL-FIRED UNITS

In addition to approving two SCPC units, PSC approved construction of support facilities for a third coal-fired unit. These so-called "common facilities" include coal handling and storage facilities, transmission interconnections, and the cooling water intake and discharge system. PSC made this decision even though it concluded that a third unit was not necessary and should not be approved at this time. CW/SCJ-Ap.125-26, 157 ¶ 1. Rather, PSC concluded that the OCPP site should be a "campus" hosting 3,000 MW of coal-fired generation. PSC therefore

authorized WEC to spend an additional $20-78 million[10] for capital improvements that would uniquely benefit an unneeded coal-fired unit. PSC-R.160, Exh.91.

PSC's decision is unlawful for two reasons. First, PSC's approval of expenditures for presently unneeded capacity (the novel "campus" concept) violates both the letter and intent of Wis. Stat. §§ 196.491(3)(d)2 and 3. By pre-selecting OCPP for a future coal unit, PSC has precluded meaningful consideration of alternative locations when additional capacity is necessary. PSC authorized WEC to construct facilities for a new unit at OCPP without considering the environmental, social and other cost consequences of the OCPP site versus alternative locations. PSC has effectively predetermined that additional coal units at this location are in the public interest, without considering alternative sites, at the same time that it explicitly determined that another coal unit is not in the public interest.

PSC's decision to authorize substantial expenditures for a third coal unit biases any future analysis against alternatives to coal. When PSC next evaluates technologies and fuel sources to meet new projected demand, the cost of a coal plant at OCPP will be artificially reduced by the $20-78

---

[10] Late in the hearing, WEC offered an alternative calculation of the incremental cost of facilities for a third unit: approximately $20 million. WEC did not document this new calculation or explain its deviation from its Exhibit 91, which estimated the incremental cost at $59-78 million.

million that will have already been spent to prepare the OCPP site for a new unit. While WEC could theoretically consider other sites, the existence of infrastructure would necessarily bias the evaluation to OCPP, practically as well as financially. This bias would allow WEC and PSC to contravene both Wis. Stat. §§ 196.491(3)(d)2 and 3 and the priorities under Wis. Stat. § 1.12(4).

As a hypothetical illustration, if there is projected demand in 2015 for an additional 600 MW of electric generating capacity for WEC's customers, WEC will have to conduct, *inter alia*, cost analyses of alternatives to meet that demand, including higher priority conservation, renewable resources, and natural gas. As in this case, a new coal unit at OCPP will likely cost $50+ million more than higher priority options. If WEC has already incurred $20-78 million of those coal-related costs, the coal alternative may appear to be less costly than higher priority options, even though it is in fact more costly. And PSC would be hard-pressed to require an alternative to another unit at OCPP, conceding that ratepayers bore an unnecessary expenditure for which WEC earned a hefty return.

PSC's decision to pre-approve an expenditure and support facilities for future capacity is virtually unprecedented. PSC's counsel conceded at oral argument before the Circuit Court that this was "unlike the previous cases." R.89 at 46. PSC now asks this Court to take judicial notice of a single instance – Pleasant Prairie in 1977 – in which PSC authorized

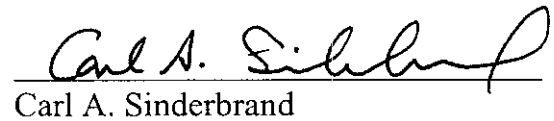
construction of common facilities to support a future unit. This surely is not a consistent, historical practice warranting deference, and it substantially predates the Energy Priorities Law and the current version of the CPCN statute. Moreover, it reinforces the obvious, that construction of facilities for an unapproved unit creates a fait accompli: PSC later approved a second coal unit at Pleasant Prairie.

CONCLUSION

Clean Wisconsin and S.C. Johnson respectfully request that the Court reverse and vacate the CPCN.

Dated this 23rd day of February, 2005.

WICKWIRE GAVIN, P.C.



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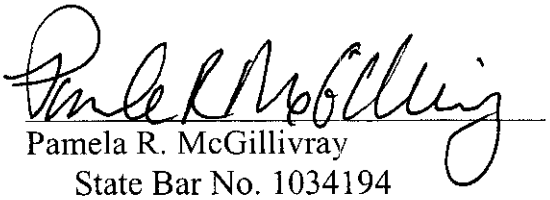

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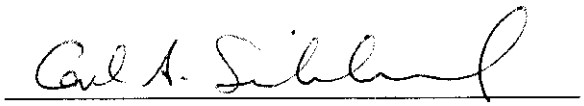
CERTIFICATION

I certify that this Respondents' Brief of Petitioners-Respondents-Cross-Appellants-Cross-Respondents, Clean Wisconsin, Inc. and S.C. Johnson & Son, Inc., conforms to the rules contained in Wis. Stat. §§ 809.19(8) and 809.62(4) , for respondent's response using a proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum 60 characters per full line of body text. The length of the brief is 10,969 words.

Dated this 23rd day of February, 2005.

WICKWIRE GAVIN, P.C.



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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

Title	Record No.	Pages
Letter, Norcross to Salustro (November 15, 2002)	R. 18 (03-CV-3478), PSC-R. 51, Exh. A	243-245
PSC Order Denying Petition to Review Interim Determination (April 17, 2003)	R. 18, (03-CV-3478), PSC-R. 76	246-251
Selected pages of testimony, *In the Matter of the Waterway and Wetland Alterations Relating to the Wisconsin Electric Power Company Oak Creek Power Plant Expansion*, DNR case Nos. 3-SE-01-41-0005-0019 & 1456MW (August 24, 2004)		252-257
Selected pages, DNR response to comments on draft air pollution control permit for Elm Road Generating Station (January 13, 2004)		258-261
Prefatory Note to 1993 Wisconsin Act 414		262-265

Public Service Commission of Wisconsin

Ave M. Bie, Chairperson
Joseph P. Mettner, Commissioner
Robert M. Garvin, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

November 15, 2002

Mr. Larry Salustro, General Counsel
Wisconsin Energy Corporation
231 West Michigan Street
P.O. Box 2949
Milwaukee, WI 53201

Re: Application of Wisconsin Electric Power Company; Wisconsin Energy Corporation; and W.E. Power, LLC; for a Certificate of Public Convenience and Necessity for Construction of Three Large Electric Generation Facilities, the Elm Road Generating Station, and Associated High Voltage Transmission Interconnection Facilities to be Located in Milwaukee and Racine Counties

05-CE-130

Dear Mr. Salustro:

On February 1, 2002, Wisconsin Energy Corporation (We Energies) filed an application with the Public Service Commission of Wisconsin (Commission or PSCW) for authority to construct three large electric generating facilities and associated high voltage transmission interconnection facilities in Milwaukee and Racine Counties. The application was filed pursuant to Wis. Stat. § 196.491(3) and Wis. Admin. Code § PSC 111.53, which require the Commission to determine if a Certificate of Public Convenience and Necessity (CPCN) should be granted, and for other approvals. Commission staff and Department of Natural Resources (DNR) staff reviewed the CPCN application for completeness purposes.

The Commission reviewed the original CPCN application for both the Port Washington and Elm Road generating stations, found the application to be incomplete, and issued a letter determining incompleteness on March 4, 2002. Subsequent to the March 4, 2002, letter there were notable changes to the structure of the CPCN application review process for the Power The Future (PTF) case. In an April 19, 2002, order from the Commission, the PTF case was split into two phases, with the Port Washington case being processed as the first phase and the Elm Road case as the second phase. On April 25, 2002, the Commission issued a completeness determination letter for the Port Washington CPCN application declaring it complete. At that time the Elm Road CPCN application was still considered incomplete. On June 3, 2002, WEC submitted an addendum (Supplement 2) to the Elm Road CPCN application and a new 30-day review process was initiated, with the application being declared incomplete on July 3, 2002.

Telephone (608) 266-5481 Fax: (608) 266-3957 TTY: (608) 267-1479

On September 6, 2002, WEC submitted an addendum (Supplement 3) to the Elm Road CPCN application and a new 30-day review process was initiated. The Commission issued a letter declaring the application incomplete on October 7, 2002. We Energies filed an addendum (Supplement 4) to the application on October 23, 2002. The Commission has reviewed We Energies' supplement to the application to construct the facilities described above as required by Wis. Stat. § 196.491(3)(a)2 and Wis. Admin. Code § PSC 111.53. The DNR also reviewed appropriate application materials for completeness purposes. Based on this review, the Commission determines that the application is complete and by this letter, notifies you of this determination as required by Wis. Stat. § 196.491(3)(a)2.

While the application is determined to be complete at this time, our determination is, in part, based on We Energies' commitment to supply additional information related to items 6, 7, and 18 of the Commission's October 7, 2002, incompleteness letter. Substantial amounts of information relative to items 6 and 7 have been provided, and will allow our review of the wetland delineations to begin. Based on the information contained in Supplement 4 and conversations with We Energies staff, it is my understanding that the remaining information relative to items 6 and 7, consisting of final wetland reports from the Southeast Regional Planning Commission, will be available in approximately two weeks. In addition, the information relative to the subsurface drilling, sampling and testing survey, the wave/environmental climate date survey and the aquatic/benthic environmental and lake bottom characterization survey in item 18 will be available on the time line set out as answer 5-SUP-021 of Supplement 4.

While I fully expect to receive the remaining information on the established time frames, failure by We Energies to submit the information in a timely manner will likely delay the CPCN process as this information is necessary in order to complete our review of the proposed project and issue a joint PSCW/DNR Environmental Impact Statement. Prior to receipt and review of the necessary information, it would be extremely difficult to schedule hearings. I would also note that I expect that in the near future the Commission will petition the circuit court for Dane County for a 180-day extension of time for taking final action on this application, and I understand that WEC will not oppose this petition.

Please be aware that application information that is considered adequate now may require further development later in the Commission's review process. This additional information would be required to complete the record from which the Commission will make its decision whether to approve the application under Wis. Stat. § 196.491(3)(d). Such additional information may relate to need, engineering, environmental, and other issues. When such issues arise, Commission staff will promptly issue a data request for the specific information needed. Your immediate response to data requests will avoid delaying the Commission's review of this project.

If you have questions, please contact the case coordinator Jeff Kitsembel, at (608) 266-9658 or jeff.kitsembel@psc.state.wi.us.

Sincerely,

Robert Norcross

Robert Norcross
Administrator
Electric Division

RN:JAK:g:\ptf\letters\salustro ERGS completeness 11-14-2002.doc

cc: Jackie Reynolds, PSCW
Scot Cullen, PSCW
Lauren Hambrook, WDNR
Jeff Kitsembel, PSCW

DATE MAILED

APR 1 8 2003

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Wisconsin Electric Power Company; Wisconsin Energy Corporation; and W.E. Power, LLC; for a Certificate of Public Convenience and Necessity for Construction of Three Large Electric Generation Facilities, the Elm Road Generating Station, and Associated High Voltage Transmission Interconnection Facilities to be Located in Milwaukee and Racine Counties

05-CE-130

ORDER DENYING PETITION TO REVIEW INTERIM DETERMINATION

At its open meeting on March 20, 2003, the Commission considered a petition from S.C. Johnson & Son, Inc., and Wisconsin's Environmental Decade. In this docket Wisconsin Energy Corporation (WEC) is seeking authority to construct three new coal-fired generating facilities as part of its "Power The Future" program, known as the Elm Road Generating Station. The petitioners ask the Commission to reconsider its determination that WEC's Certificate of Public Convenience and Necessity (CPCN) application is complete.

On November 15, 2002, the Electric Division stated its findings that the CPCN application is complete. This determination was made under Wis. Stat. § 196.491(3)(a)2, and it triggered the statutory review cycle that directs the Commission to render a decision regarding the application in no more than 180 days (360 days, if Dane County Circuit Court grants an extension for good cause).

The petitioners allege that WEC's application does not meet the Commission's requirements under Wis. Admin. Code § PSC 111.53(1)(e), which requires an applicant to describe "at least two proposed sites for the proposed facility." The petitioners contend that

WEC's three alternate sites, all located on the grounds of WEC's existing Oak Creek Generating Plant, are functionally identical. They seek a rescission of the Commission's completeness determination and a declaration by the Commission that WEC must propose at least one site at a new location, other than Oak Creek.

Because a completeness determination is an interlocutory decision, the petitioners cannot request a rehearing under Wis. Stat. §§ 196.39(2) and 227.49. The latter statute specifies that only a person aggrieved by a final order can seek a rehearing. Instead, the petitioners must rely upon the Commission's authority to reopen a case at its own discretion under Wis. Stat. § 96.39(1). This statute declares, "The commission at any time, upon notice to the public utility and after opportunity to be heard, may rescind, alter or amend any order fixing rates, tolls charges or schedules, or any other order made by the commission, and may reopen any case following the issuance of an order in the case, for any reason."

Both state and federal law provide guidance as to what constitutes an acceptable "alternative." Wisconsin's Environmental Policy Act (Wis. Stat. § 1.11(2)(e)) requires state agencies to study, develop, and describe in an Environmental Impact Statement "appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Ultimately, the rule of reason guides the range of alternatives that an agency must examine. *Milwaukee Brewers v. DHSS*, 130 Wis. 2d 56, 73, 387 N.W.2d 245 (1986); *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997). As the Wisconsin Supreme Court declared in *Wis. Environmental Decade v. Public Service Commission*, 79 Wis. 2d 161, 175, 255 N.W.2d

917 (1977), "The range of alternatives that must be considered need not include those . . . which are not reasonably related to the purposes of the proposed agency action."

The Commission's standard for reviewing site alternatives in a CPCN application is based upon both the rule of reason and the principle that alternatives must serve the public purpose underlying the issuance of a CPCN. The Commission first reviews a CPCN application to determine that each proposed site is "reasonable," i.e. is a feasible location for the project that would not directly conflict with any of the criteria for granting a CPCN expressed in Wis. Stat. § 196.491(3). In addition, the Commission's practice is to require that the sites are sufficiently distinct to offer different packages of costs and benefits, and thus present the Commission with a choice.

The fact that alternate sites may be geographically close to each other does not render them unreasonable. The Commission has accepted CPCN applications for several projects where the alternate sites were close together or even adjacent to each other. Instead, the Commission looks at the characteristics of the sites in their entirety. The alternate sites requirement of Wis. Admin. Code § PSC 111.53(1)(e) is also distinct from the requirement that a CPCN application describe alternate forms of engineering, which is found in Wis. Admin. Code § PSC 111.53(1)(d). Paragraph (d) requires the applicant to provide information about alternate sources of supply—in particular, demand-side management and resources with a higher ranking under the energy priorities laws, Wis. Stat. §§ 1.12 and 196.025. While par. (e) does require that two or more sites be discussed in the application, it does not demand that at least one site be designed for an alternate source of supply. Paragraph (e) allows an applicant to propose sites that are all designed to use the applicant's preferred fuel.

Because of the complexity of a coal-fired electric generating plant, which requires a great deal of infrastructure in the form of transmission facilities, coal handling equipment, rail or ship transportation for coal and other materials, and means of supplying large quantities of water, very few sites for such a project are actually feasible. These infrastructure requirements place a premium on existing brownfield locations, where generating plants are already in place and facilities can be shared. As a result, the range of site alternatives tends to be smaller and the packages of costs and benefits that the site alternatives offer may be more similar than for other types of projects.

At least two of the three sites WEC has included in its CPCN application meet the Commission's standards. The petitioners allege that 11 or more different characteristics of these sites are functionally identical, but this situation is difficult to avoid when searching for locations to install a new coal-fired plant where generation already exists. The similarities highlight the fact that each site alternative is relying on existing infrastructure at a brownfield generating site, and the Commission has encouraged the use of such locations because they tend to make electric generation projects less expensive and less environmentally damaging. The Commission also notes two significant distinctions among the sites WEC is proposing. The primary site is located in the city of Oak Creek, Milwaukee County, while the alternate sites are found in the town of Caledonia, Racine County. In addition, construction at the primary site would require WEC to cut and fill 10 million cubic yards of earth, while at Alternate Site A it would only need to move 7.3 million cubic yards.

The site alternatives WEC is proposing are "different enough" to meet the Commission's requirements in Wis. Admin. Code § PSC 111.53(1)(e). The Commission will therefore not

reopen its determination that the CPCN application is complete. The Commission further notes that, at hearings on this project, the petitioners will have the opportunity to challenge directly whether any of the proposed sites is in the public interest.

The Petition for Review of Interim Determination is DENIED.

Dated at Madison, Wisconsin, April 17, 2003

By the Commission:

Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

COPY

1 BEFORE THE
STATE OF WISCONSIN
2 DIVISION OF HEARINGS AND APPEALS

3
In the Matter of the Waterway and)
4 Wetland Alterations Relating to the) Case Nos.:
Wisconsin Electric Power Company) 3-SE-01-41-0005-0019
5 Oak Creek Power Plant Expansion,) & 1456MW
Called the Elm Road Generating)
6 Station)

7

8

9 ADMINISTRATIVE LAW JUDGE JEFFREY D. BOLDT, PRESIDING

10 TRANSCRIPT OF PROCEEDINGS

11 VOLUME 2

12

13

14

15 Reported By:

16 VICKY L. ST. GEORGE, RPR, RMR,
JOHN T. SCHINDHELM, RPR, RMR
17 Schindhelm-Peppey Reporting
(414) 271-0566

18

19

20

21 HEARING HELD: TRANSCRIPT PAGES:

22 August 24, 2004 390-658

23 Municipal Courthouse

24 Oak Creek, Wisconsin

25 8:30 a.m.

1 little bit different than an examination or ganging
2 up on a witness. Fair point. Let's go ahead.
3 MR. POPLAWSKI: They're free to gang up on
4 me at any time, Your Honor.
5 THE WITNESS: I'm sorry, could you restate
6 that question just one more time.
7 (Record read.)
8 THE WITNESS: Our agreement was that after
9 the CPCN decision that we would limit the scope of
10 the alternatives analysis to whatever site was
11 approved by the Public Service Commission. So --
12 BY MR. POPLAWSKI:
13 Q. So your analysis had been so limited since then,
14 correct?
15 A. Yes.
16 Q. And so if -- that has foreclosed -- that decision has
17 foreclosed the consideration of alternative locations
18 for the siting of two coal fired power plants
19 correct? You have no longer been able to analyze
20 that in your practicable alternatives analysis.
21 A. For anything outside of the footprint of the approved
22 site, yes.
23 Q. So you haven't been available to analyze avoidance
24 anymore, you're only looking at minimization; is that
25 correct?

1 A. Yes.
2 Q. Isn't it true that one of the other things that the
3 department has to consider under 103.08 is secondary
4 impact?
5 A. Yes.
6 Q. And will there be secondary impacts from the filling
7 of the wetlands and -- from the filling of the
8 wetlands in this project?
9 A. Yes.
10 Q. And secondary impacts are actually, with regard to
11 the construction of the project, outside the wetlands
12 areas, right?
13 A. Outside of the direct area of the wetlands that are
14 filled or impacted, yes.
15 Q. Has there been any quantification of either the
16 quantity of wetlands that will be impacted by
17 secondary impacts or how the wetlands impact quality
18 will be impacted? And you can take that in two parts
19 if it's easier.
20 A. We do not have an actual number quantifying the
21 acreage of secondary wetland impacts or wetlands
22 impacted by other measures by those secondary
23 impacts. And we haven't really analyzed -- we don't
24 have a good analysis of what degree of those
25 secondary impacts will occur.

However, having Wisconsin Electric follow the appropriate regulations in terms of erosion control conditions and if they follow the permit application, we believe that we can reduce or minimize those secondary impacts to the extent practicable.

Q. But the answer is there is no quantification of the anticipated secondary impacts as we sit here?

A. No.

Q. Either as to quality or acreage impacted?

A. No.

Q. And I believe you've already indicated this, but if you were required to look at the Caledonia site today, you don't have enough information to do a complete practicable alternatives analysis with regard to the Caledonia site; isn't that correct?

A. No.

Q. And you don't have enough information as we sit here today to even determine whether Caledonia is a practicable alternative; isn't that correct?

A. Yes.

Q. And in that case they really haven't offered to you a practicable alternative, they have only offered you one site; isn't that correct?

A. Following a CPCN decision, we looked at their

1 alternatives within that north site CUP footprint.
2 But we did not review any offsite alternatives or --
3 Q. Right, but that's strictly a minimization issue. In
4 other words, an avoidance issue -- or not an
5 avoidance issue, but just a minimization issue,
6 correct?
7 In other words, you're accepting only that
8 site as practicable, correct, under your agreement?
9 Only the CPCN --
10 MR. HAMMER: Objection, Your Honor, I
11 believe that is argumentative rather than a question
12 as to what the witness believes in terms of
13 minimization as opposed to whether it's a
14 practicable alternative. I believe she testified
15 that she looked at alternatives on the property
16 within the footprint.
17 ALJ BOLDT: Overruled. I think it's fair
18 cross.
19 BY MR. POPLAWSKI:
20 Q. You're not comparing right now two alternatives,
21 you're looking at minimization with regard to one
22 alternative; isn't that correct?
23 A. That is correct.
24 Q. And isn't it also true at the time of the Public
25 Service Commission hearing, you had not completed a

1 practicable alternatives analysis?
2 A. We had a preliminary practicable alternative
3 submitted, but we had not completed our review.
4 MR. POPLAWSKI: Your Honor, I'd like to
5 offer Exhibit 213.
6 ALJ BOLDT: Any objection?
7 MS. BOCHERT: Is it 213?
8 MR. POPLAWSKI: Yes, 213.
9 MS. BOCHERT: No objection.
10 ALJ BOLDT: 213 is received.
11 (Exhibit 213 received.)
12 MR. POPLAWSKI: Nothing further, Your
13 Honor.
14 ALJ BOLDT: Mr. Grzezinski, we'll pass the
15 mic down to him.
16 CROSS-EXAMINATION
17 BY MR. GRZEZINSKI:
18 Q. Dennis Grzezinski representing the Sierra Club. I
19 have only one question left after Mr. Poplawski has
20 covered the ground.
21 Ms. Hopkins, would you defer to Doctor
22 Reed regarding the functional values of the various
23 wetlands that are to be affected by this project?
24 A. Yes.
25 MR. GRZEZINSKI: Nothing further. Thank

Attachments to January 13, 2004 Vakharia Memorandum
Recommending Issuance of Permits

1. Hearing Appearance Forms for Public Hearing on Air Permit

2. Summary of Issues Raised at Public Hearing

3. Copies of Selected Comments Received by DNR During Public Comment Period (excludes postcards)
   A. City of Oak Creek (RMT)
   B. Citizens for Responsible Power / Clean Wisconsin, Clean Air Task Force
   C. Sierra Club
   D. S.C. Johnson & Son, Inc.
   E. United States Environmental Protection Agency
   F. Rick Burt
   G. Wisconsin Public Service Corporation

4. DNR Responses to Comments of Selected Parties
   A. City of Oak Creek (RMT)
   B. Citizens for Responsible Power / Clean Wisconsin, Clean Air Task Force
   C. Sierra Club
   D. S.C. Johnson & Son, Inc.
   E. United States Environmental Protection Agency
   F. Rick Burt
   G. Wisconsin Public Service Corporation

5. Comments of WEC on Draft Permit and DNR Response to WEC's Comments

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Comments on the Construction and Operating Permit Applications for the ERGS – North Site (01-RV-158) and the ERGS – North Site With Accommodations (03-RV-166) submitted by S.C. Johnson.

Comment 1: The ERGS would contravene the PM2.5 NAAQS.

Response: Although EPA promulgated a NAAQS for PM2.5 in 1997, substantial litigation over the standard, has delayed EPA's and the states' implementation of the PM2.5 standard. EPA has yet to promulgate rules or guidance on the implementation of the PM2.5 standards. EPA is expected to finalize designation of PM 2.5 nonattainment areas in late 2004 and is expected to promulgate guidance documents on implementation of the standard sometime in 2004.

Because of these delays, Wisconsin has not yet adopted the PM2.5 standard into Wisconsin's rules. For this reason and in the absence of federal guidance on implementation of the PM2.5 standard, DNR has not specifically required air permit applicants (including WE Energies) to consider PM2.5 as part of its air permit application and DNR has not considered PM2.5 in the reviewing air permit applications.

Comment 2: WEC's air dispersion modeling is flawed because it ignores the reduced plume rise from the pollution control equipment planned for the existing Oak Creek power plant units.

Response: The Department's air quality dispersion modeling analysis for NAAQS did include the existing OCPP units 5-8. The Department's understanding is that the EPA Consent Decree requires the existing units at OCPP to be retired or controlled for SO2 and NOx by 2013. The Department is not aware of any formal decisions by Wisconsin Electric regarding retirements of units or the selection of various control technologies. If Wisconsin Electric decides in the future to install pollution controls on the units, then Wisconsin Electric will need to get a construction permit for the retrofits and demonstrate that the ambient impacts meet the NAAQS and PSD increment requirements at that time.

Comment 3: WEC's air dispersion modeling is flawed because it does not include emissions from the coal trains.

Response: Emissions from locomotive are considered secondary emissions. These emissions are not under the control of Wisconsin Electric and cannot be accounted for in the air permit. It is also difficult to quantify these emissions due to the varying idle time.

EPA requires that secondary emissions, when they are well quantified, be considered in an air quality modeling analysis, unless the secondary emissions are from mobile sources that are regulated under Title II of the Clean Air Act Locomotive sources are regulated under Title II at 40 CFR Part 92. For all these reasons the coal trains were not included in the ERGS air quality dispersion modeling analysis.

Comment 4: The ERGS would cause "air pollution" (as defined in s. NR 400.02(16)) because its emissions would be "injurious to human health".

Response: The Department analyzes air permit applications to determine whether the project subject to the permit application will comply with statutory permit approval criteria. The commentor has identified the "creates air pollution" portion of the general emission limits found in DNR's administrative rules for most air pollutants (e.g., particulate, nitrogen oxides, etc.). While those general emission limits provide DNR authority to impose constraints on air emission sources which are not subject to a categorical emission limitation for a specific pollutant, the DNR does not apply the "cause air pollution" criteria in those circumstances where a categorical emission limit is applicable to

the emission source for specific pollutants. In those circumstances (such as the current WE Energies' project), if the emission source can comply with categorical emission limits for the pollutant, no separate inquiry is made as to whether the source will "cause air pollution with respect to that pollutant.

The categorical emission limits are generally established to prevent the applicable sources from causing air pollution.

Comment 5: ERGS would result in significant mortality, morbidity and related human health costs.

Response: The commentor's justification for this comment is based on studies related to the projected impacts of PM2.5. Those studies are not directly relevant to the criteria for permit approvability under Wisconsin law. The nature of the studies conducted are more conducive to the process associated with the establishment of ambient air quality standards.

Moreover, for the reasons noted in the previous 2 responses, the DNR does not require an analysis of PM2.5 for permit approvability and does not require or apply the type of health impact analyses which the commentor's witnesses testified about in the CPCN proceeding.

Comment 6: Testimony is highly credible because of witnesses' qualifications and peer reviewed methodology.

Analysis relied upon EPA-approved modeling methodologies

S-R matrix analysis provides an independent basis for externality estimates that validates conclusions.

Reliance of American Cancer Society cohort study to derive mortality estimates was reasonable and should be accepted.

Reliance on other concentration-response functions from the peer-reviewed scientific literature for estimating morbidity endpoints was also reasonable.
Testimony properly focused on the ERGS-related changes in ambient MP2.5 levels rather than the emission decreases associated with the proposed EPA-WEPCO consent decree.

Testimony used an EPA-sanctioned, reasonable methodology to monetize ERGS mortality and morbidity impacts.

Testimony's externality cost estimates are reasonable central estimates that must be considered in deciding whether the ERGS should be approved.

Response: The DNR did not assess whether commentor's witnesses in the CPCN proceeding relied on EPA-approved modeling methodologies.

Comment 7 and Comment 8: The benefits of the ERGS do not "significantly outweigh" the environmental and social costs it would impose, as required by s. NR 408.08(2). The environmental and social cost of the ERGS are substantial and outweigh the purported benefits of the project.

Response:

There are alternatives that would offer more protection to the environment than the proposed project without unduly curtailing its non environmental benefits.

The potential and real adverse environmental effects of the ERGS have not been avoided to the maximum extent possible.

Response:

Through its analysis of alternative sites, sizes, production process and environmental control techniques, the applicant has demonstrated that the benefits of the proposed source significantly outweigh the environmental and social costs related to the construction of this source at this location. The Department relied on the demonstration that the proposed project would meet all applicable air quality standards and emission limits, would apply the requisite control technology to meet BACT or LAER emission limits, and other permit approval criteria. In addition, the Department relied on determination made by the Public Service Commission on the public necessity for the project to address energy needs in Wisconsin.

Comment 9: WEPCO has failed to demonstrate that all of its facilities are in compliance (or on a schedule to come into compliance) with federal and state air regulations, as required by s. NR 408.08(1).

Response: The applicant has indicated in its permit application and supplemental information that all major stationary sources it owns or operates are in compliance or are on a schedule for compliance with all applicable emission limits and emission standards under the federal clean air act. Based on the information available to the Department, this permit approval criteria has been met.

The permit review engineer contacted Department air compliance engineers responsible for inspecting and monitoring WE Energies' major stationary sources. The DNR compliance engineers indicated that the major sources owned or operated by WE Energies were in compliance with applicable emission limits and standards. They had no evidence of noncompliance.

The Department is aware that U.S. EPA has reached a settlement agreement with WEPCO resolving U.S.EPA's allegation of violation of New Source Review and PSD requirements at facilities owned or operated by WE Energies. The matter is the subject of a consent decree between WE Energies and U.S. EPA and U.S. DOJ, which has been lodged with the U.S. District Court for Eastern Wisconsin. While WE Energies has denied the alleged violations, the consent order places the utility on a schedule for installing emission control systems on various emission sources owned by the utility, to address the alleged violations. Although the Court has not entered the consent decree (and various environmental organizations have requested that the court not enter the consent decree), the prosecuting agency and the federal prosecutor have agreed to the proposed compliance schedule in the consent order.

Comment 10: The proposed VOC emission rate for the IGCC unit is too high.

Response: The BACT/LAER analysis for the IGCC unit is based on the current state of technology, the best engineering judgment of the performance of similar units and current expected economics, energy and other impacts. If construction of the IGCC unit does not begin within 18 months of the permit issuance, then Wisconsin Electric is required to undergo a reevaluation of BACT/LAER in the future,

STATE OF WISCONSIN

1993 Assembly Bill 701

Date of enactment:
Date of publication*:

1993 Wisconsin Act

AN ACT *to repeal* 101.08, 101.19 (1) (k), 101.655, 145.02 (5) and 145.25; *to renumber* 236.292; *to renumber and amend* 1.12, 700.41 (2) (c) and 700.41 (4); *to amend* 1.12 (title), 13.101 (4), 13.48 (2) (h) 2. a., 16.75 (1m), 16.847 (8) (a) and (b) 1 to 3 and (9) (b), 20.505 (5) (q), 66.031 (intro.), 66.032 (title) and (1) (f) (intro.) and 1 and (i), 66.032 (3) (a) and (b) 1, (5) (b), (6) (a) and (b), (9) (title) and (a) (intro.) and (12) (a), 66.033, 101.02 (15) (j), 101.63 (1), 101.73 (1), 236.13 (2) (d), 700.41 (title) and (1) and 700.41 (3); and *to create* 1.12 (1), 1.12 (3) to (5), 13.48 (2) (k), 14.165, 16.75 (10), 16.847 (9) (c) and (d), 16.95 (13) to (15), 26.36, 60.61 (2) (i), 66.032 (1) (m), 93.46 (1) (d), 100.26 (8), 100.46, 196.025, 236.292 (2), 700.41 (2) (c) 1. b., 700.41 (2) (h), 700.41 (4) (b) and 844.22 of the statutes, *relating to* state energy policy, energy use by state and local governmental facilities, regulation of energy consuming products, governor's energy awards, local land use restrictions regarding wind and solar energy systems, granting rule-making authority and providing a penalty.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

PREFATORY NOTE: This bill was recommended by the legislative council's special committee on energy resources. The special committee was directed by the legislative council to study state laws, policies and programs to encourage the maximum development and use of energy conservation and indigenous, sustainable energy resources, in order to minimize the amount of nonsustainable energy purchased from out-of-state sources and to enhance economic development and employment in this state.

State efforts to increase the efficiency with which energy is used and to stimulate the development of renewable energy resources are based on a number of concerns. These include the need to secure adequate future supplies of energy, to reduce the environmental effects of energy systems powered by carbon-based and nuclear fuels, to reduce the costs to consumers of the construction of energy generation and transmission systems and to reduce the flow of capital out of Wisconsin for the purchase of energy.

In this bill, the special committee recommends several general policy statements with regard to how energy is generated and used in Wisconsin. Principal among these is the creation of a priority list of options that, to the extent cost-effective and technically feasible, is to be considered in meeting all energy demands. In creating the priority list, the special committee is attempting to influence the energy-related decisions of all energy users, generators and regulatory bodies. The special committee seeks to achieve more efficient use of energy and a greater reliance on renewable energy resources throughout the state. At the same time, the special committee does not want to create inflexible mandates or deprive decision makers of the discretion needed to respond appropriately to the circumstances surrounding energy-related decisions. Consequently, the bill attempts to ensure implementation of the priority list through a combination of directives and encouragement, while reserving substantial discretionary authority to the decision maker.

The bill directs state agencies and local governmental units to meet their own energy needs through energy efficiency improvements and renewable energy resources and by following the priority list, to the extent that these options are cost-effective and technically feasible. The bill does not direct any other person who makes energy-related decisions to follow the priority list. However, expression of the priority list as the policy of this state, without a statutory directive, is intended to encourage businesses, manufacturers and other private energy users, as well as public utilities and other energy generators, to follow the priority list. In addition, the bill directs the department of administration (DOA) and the public service commission (PSC) to implement the priorities in designing and implementing energy programs and in making energy-related decisions and orders.

By using the phrase, "to the extent cost-effective and technically feasible", the bill provides a large element of discretion to state agencies and local governmental units in following the priority list to meet their own energy needs. For example, in designing the energy-related aspects of a new building, an agency would be required to include energy conservation measures and renewable energy systems that are cost-effective and technically feasible. However, the agency would have discretion to determine whether measures and systems are cost-effective and technically feasible.

Also, the bill creates no penalties or other mechanism to compel any party to comply with the priority list in making energy-related decisions, nor does it create any standards for determining the extent to which the priority list is actually used in making such decisions. Rather, compliance with the directive that agencies follow the priority list will be reflected in the overall pattern of decisions made by each agency, such as the total set of energy-related aspects of a new building's

* Section 991.11, WISCONSIN STATUTES 1991-92: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

design, the total mix of energy sources called for in a PSC-ordered advance plan for electric utilities or the long-term pattern of an agency's purchasing decisions. Similarly, the success of implementing the priority list will be reflected in the overall pattern of energy generation and use, across the state and through time.

The bill also establishes state goals related to energy efficiency, the development of renewable energy resources and the expansion of forest resources. It requires regular reports to the legislature regarding progress made in meeting the energy efficiency and afforestation goals.

In this bill, the special committee also recommends several statutory changes to existing programs to refine the programs and keep them in compliance with current federal law. Specifically, the bill does all of the following:

1. Promotes the use of lighting designs that utilize natural daylight in state building projects and cogeneration technologies and renewable fuels in state owned or operated steam generating facilities.

2. Authorizes the governor to issue awards for energy conservation activities and renewable energy systems.

3. Directs DOA to develop written materials describing the development and use of life cycle cost estimates.

4. Creates a state purchasing preference for fuel and energy systems and equipment produced in this state.

5. Modifies the state facilities energy efficiency program as follows:

a. Specifies conditions regarding the repayment of loans to state agencies under the program.

b. Requires equal distribution of saved utility expenses between the general fund, the energy efficiency fund under current s. 25.90 and the agency.

c. Limits maintenance projects funded from the energy efficiency fund to the maintenance of projects with an energy efficiency benefit.

d. Directs DOA to determine the amount of utility expenses saved by an energy efficiency project.

e. Specifies the procedure for approving an agency's use of saved utility expenses.

f. Directs DOA to disseminate information regarding the cost and effectiveness of energy efficiency projects.

g. Creates a pilot program for the intensive monitoring of energy use by state facilities.

6. Directs the department of agriculture, trade and consumer protection (DATCP) to include the development of industrial and commercial products, including alternative fuels, from crops under the agricultural diversification program.

7. Authorizes DATCP to adopt and enforce rules regarding the sale and installation of energy consuming products regulated under federal law if the rules are identical to federal law.

8. Repeals several statutes relating to the efficiency of certain energy consuming products, which have been superseded by federal law.

9. Makes various changes to statutes regarding local land use restrictions to ensure the uniform treatment of wind and solar energy systems by these statutes.

SECTION 1. 1.12 (title) of the statutes is amended to read:

1.12 (title) State energy policy.

SECTION 2. 1.12 of the statutes is renumbered 1.12 (2) and amended to read:

1.12 (2) (title) CONSERVATION POLICY. ~~All agencies of the state~~ A state agency or local governmental unit ~~shall, to the fullest extent possible,~~ investigate and consider the maximum conservation of energy resources as an important factor when making any major decision ~~which~~ that would significantly affect energy usage.

SECTION 3. 1.12 (1) of the statutes is created to read:

1.12 (1) DEFINITIONS. In this section:

(a) "Local governmental unit" has the meaning given in s. 19.42 (7u).

NOTE: Section 19.42 (7u) defines a "local governmental unit" as a political subdivision of this state, a special purpose district in this state, an instrumentality or corporation of such a political subdivision or special purpose district, a combination or subunit of any of the foregoing or an instrumentality of the state and any of the foregoing.

(b) "State agency" means an office, department, agency, institution of higher education, the legislature, a legislative service agency, the courts, a judicial branch agency, an association, society or other body in state government which is created or authorized to be created by the constitution or by law, for which appropriations are made by law.

SECTION 4. 1.12 (3) to (5) of the statutes are created to read:

1.12 (3) GOALS. (a) *Energy efficiency.* It is the goal of the state to reduce the ratio of energy consumption to economic activity in the state.

(b) *Renewable energy resources.* It is the goal of the state that, to the extent that it is cost-effective and technically feasible, all new installed capacity for electric generation in the state be based on renewable energy resources, including hydroelectric, wood, wind, solar, refuse, agricultural and biomass energy resources.

(c) *Afforestation.* It is the goal of the state to ensure a future supply of wood fuel and reduce atmospheric carbon dioxide by increasing the forested areas of the state.

(4) PRIORITIES. In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:

(a) Energy conservation and efficiency.

(b) Noncombustible renewable energy resources.

(c) Combustible renewable energy resources.

(d) Nonrenewable combustible energy resources, in the order listed:

1. Natural gas.

2. Oil or coal with a sulphur content of less than 1%.

3. All other carbon-based fuels.

(5) MEETING ENERGY DEMANDS. (a) In designing all new and replacement energy projects, a state agency or local governmental unit shall rely to the greatest extent feasible on energy efficiency improvements and renewable energy resources, if the energy efficiency improvements and renewable energy resources are cost-effective and technically feasible and do not have unacceptable environmental impacts.

(b) To the greatest extent cost-effective and technically feasible, a state agency or local governmental unit shall design all new and replacement energy projects following the priorities listed in sub. (4).

NOTE: Subsection 1.12 (3) establishes goals to increase the energy efficiency of the state economy, increase reliance on renewable energy resources for electric generation and increase the forested areas of the state.

Subsection 1.12 (4) establishes a priority list of options for meeting energy demands. The list does not include the option of nuclear energy.

Subsection 1.12 (5) directs state agencies and local governmental units to meet energy demands, to the extent cost-effective and technically feasible, by relying on energy efficiency and on renewable energy sources and by following the priorities created by this draft.

SECTION 5. 13.101 (4) of the statutes is amended to read:

13.101 (4) The committee may transfer between appropriations and programs if the committee finds that unnecessary duplication of functions can be eliminated, more efficient and effective methods for performing programs will result or legislative intent will be more effectively carried out because of such transfer, if legislative intent will not be changed as the result of such transfer and the purposes for which the transfer is requested have been authorized or directed by the legislature, or to implement s. 16.847 (8) (b) 3. The authority to transfer between appropriations includes the authority to transfer between 2 fiscal years of the same biennium, between 2 appropriations of the same agency and between an appropriation of one agency and an appropriation of a different agency. No transfer between appropriations or programs may be made to offset deficiencies arising from the lack of adequate expenditure controls by a department, board, institution, commission or agency. The authority to transfer between appropriations shall not include the authority to transfer from sum sufficient appropriations as defined under s. 20.001 (3) (d) to other types of appropriations.

NOTE: Authorizes the legislature's joint committee on finance to transfer funds representing utility expenses saved as a result of energy efficiency projects funded under s. 16.847 between appropriations for purposes specified by the affected agency. Section 16.847 authorizes DOA to make loans to state agencies for energy efficiency projects and authorizes the agencies to retain a portion of the cost savings for their general program operations. This provision specifies the procedure for approving the agency's use of those funds.

SECTION 6. 13.48 (2) (h) 2. a. of the statutes is amended to read:

13.48 (2) (h) 2. a. Provide maximum practical use of passive solar energy system design elements, including daylight lighting designs.

NOTE: Adds lighting designs that utilize natural daylight to the list of renewable energy system design elements that the building commission must consider prior to authorizing any new state building, addition or major renovation.

SECTION 7. 13.48 (2) (k) of the statutes is created to read:

13.48 (2) (k) 1. In designing the construction or renovation of central steam generating facilities, the building commission shall employ a design for the cogeneration of steam and electricity unless the building commission determines that such a design is not cost-effective and technically feasible. The building commission may not release funds for the construction of a new central steam generating facility unless the requirements of this subdivision have been satisfied.

2. To the greatest extent cost-effective and technically feasible, the building commission shall ensure that state owned or operated steam generating facilities are designed to allow the use of biomass fuels and refuse-derived fuels.

NOTE: Directs the building commission to design state-owned steam generating facilities for cogeneration of steam and electricity, using biomass and refuse-derived fuels, to the extent cost-effective and technically feasible.

SECTION 8. 14.165 of the statutes is created to read:

14.165 Governor's energy awards. (1) AWARDS. The governor may issue awards to recognize outstanding accomplishments or efforts related to energy conservation or renewable energy systems. Awards may be made for all of the following:

(a) Public and private sector activities.

(b) New building design, building renovation or upgrading and maintaining existing equipment.

(c) Demand-side management programs.

(d) Contributions by engineers, architects and other professionals.

(e) Industrial applications.

(2) RECOMMENDATIONS. The department of administration, department of development and public service commission shall make recommendations to the governor for awards under sub. (1).

NOTE: Authorizes the governor to issue awards for energy conservation activities and renewable energy systems. The awards are intended to provide an incentive for further accomplishments and efforts, and to allow others to be made aware of and benefit from the accomplishments and efforts of the award recipients.

SECTION 9. 16.75 (1m) of the statutes is amended to read:

16.75 (1m) The department shall award each order or contract for materials, supplies or equipment on the basis of life cycle cost estimates, whenever such action is appropriate. Each authority shall award each order or contract for materials, supplies or equipment on the basis of life cycle cost estimates, whenever such action is appropriate. The terms, conditions and evaluation criteria to be applied shall be incorporated in the solicitation of bids or proposals. The life cycle cost formula may include, but is not limited to, the applicable costs of energy efficiency, acquisition and conversion, money, transportation, warehousing and distribution, training, operation and maintenance and disposition or resale. The department shall prepare documents containing technical

SECTION 28. 101.63 (1) of the statutes is amended to read:

101.63 (1) Adopt rules which establish standards for the construction and inspection of one- and 2-family dwellings and components thereof. Where feasible, the standards used shall be those nationally recognized and shall apply to the dwelling and to its electrical, heating, ventilating, air conditioning and other systems, including plumbing, as defined in s. 145.01 (10). No set of rules may be adopted which has not taken into account the conservation of energy in construction and maintenance of dwellings and the costs of specific code provisions to home buyers in relationship to the benefits derived from the provisions. ~~No standard under this subchapter may increase the maximum energy use, as defined in s. 101.08 (1) (f), allowed for a fluorescent lamp ballast, as defined in s. 101.08 (1) (g), under s. 101.08 (2) or decrease the minimum energy efficiency required for a fluorescent lamp ballast, as defined in s. 101.08 (1) (g), under s. 101.08 (2).~~

NOTE: See the NOTE following the repeal of s. 101.08 regarding fluorescent lamp ballast standards.

SECTION 29. 101.655 of the statutes is repealed.

NOTE: Repeals the statute that prohibits pilot lights on new gas appliances and requires DILHR to promulgate rules for intermittent ignition devices. The state regulation of intermittent ignition devices has been preempted by the national appliance energy conservation act of 1987 and regulations promulgated by the U.S. department of energy in 10 CFR 430.

SECTION 30. 101.73 (1) of the statutes is amended to read:

101.73 (1) Adopt rules which establish standards for the use of building materials, methods and equipment in the manufacture and installation of manufactured buildings for use as dwellings or dwelling units. Where feasible, the standards used shall be those nationally recognized and shall apply to the dwelling and to its electrical, heating, ventilating, air conditioning and other systems. Such rules shall take into account the conservation of energy in construction and maintenance of dwellings and the costs to home buyers of specific code provisions in relation to the benefits derived therefrom. ~~No standard under this subchapter may increase the maximum energy use, as defined in s. 101.08 (1) (f), allowed for a fluorescent lamp ballast, as defined in s. 101.08 (1) (g), under s. 101.08 (2) or decrease the minimum energy efficiency required for a fluorescent lamp ballast, as defined in s. 101.08 (1) (g), under s. 101.08 (2).~~

NOTE: See the NOTE following the repeal of s. 101.08 regarding fluorescent lamp ballast standards.

SECTION 31. 145.02 (5) of the statutes is repealed.

NOTE: See the NOTE following the repeal of s. 145.25 regarding plumbing fixture standards.

SECTION 32. 145.25 of the statutes is repealed.

NOTE: Repeals the statute that prohibits the retail sale or installation of plumbing fixtures that have flow rates in excess of designated amounts. The state regulation of plumbing fixtures has generally been preempted by the energy policy act of 1992 [P.L. 102-486, sec. 123], although states may retain more stringent preexisting standards under certain limited circumstances. The current statutory requirement for self-closing faucets is more stringent and could be retained but is repealed by this bill in order to achieve consistency with nationwide standards.

SECTION 33. 196.025 of the statutes is created to read:

196.025 Duties of the commission. To the extent cost-effective, technically feasible and environmentally sound, the commission shall implement the priorities under s. 1.12 (4) in making all energy-related decisions and orders, including advance plan, rate setting and rule-making orders.

NOTE: Directs PSC to implement the priorities for meeting energy demands, created by this bill, in making all energy-related decisions and orders.

SECTION 34. 236.13 (2) (d) of the statutes is amended to read:

236.13 (2) (d) As a further condition of approval, any county, town, city or village may require the dedication of easements by the subdivider for the purpose of assuring the unobstructed flow of solar <u>or wind</u> energy across adjacent lots in the subdivision.

NOTE: Under current s. 236.13 (2) (d), when approving a subdivision plat, a municipal government may require the subdivider to dedicate easements to ensure the unobstructed flow of solar energy across adjacent lots. This SECTION expands the scope of the statute to apply to wind energy as well.

SECTION 35. 236.292 of the statutes is renumbered 236.292 (1).

SECTION 36. 236.292 (2) of the statutes is created to read:

236.292 (2) All restrictions on platted land that prevent or unduly restrict the construction and operation of solar energy systems, as defined in s. 13.48 (2) (h) 1. g., or a wind energy system, as defined in s. 66.032 (1) (m), are void.

NOTE: Prohibits private land use controls, such as deed restrictions, covenants or easements, that prevent or unduly restrict the construction and operation of solar or wind energy systems. The initial applicability provision at the end of this bill makes the prohibition on such restrictions applicable retroactively to restrictions on private land created before the effective date of this legislation.

This provision is based on a comparable provision in current s. 236.292 that is applicable to restrictions on platted land that interfere with the development of the Ice Age Trail. In *Wielebski v. Ice Age Park and Trail Foundation*, an unpublished court of appeals' decision (No. 92-0242), the court of appeals held that s. 236.292 was retroactive and that retroactive application of the statute did not constitute an unconstitutional impairment of contract.

SECTION 37. 700.41 (title) and (1) of the statutes are amended to read:

700.41 (title) Solar and wind access. (1) PURPOSE. The purpose of this section is to promote the use of solar <u>and wind</u> energy by allowing an owner of an active or passive solar energy system <u>or a wind energy system</u> to receive compensation for an obstruction of solar energy by a structure outside a neighbor's building envelope as defined by zoning restrictions in effect

STATE OF WISCONSIN
SUPREME COURT

CLEAN WISCONSIN, INC.
p/k/a Wisconsin's Environmental
Decade Institute, Inc., SC JOHNSON &
SON, INC. and CALPINE CORPORATION,
Petitioners-Respondents-Cross-
Appellants-Cross-Respondents,

TOWN OF CALEDONIA,
Petitioner-Cross-Respondent,
v.

Case No. 04-3179

PUBLIC SERVICE COMMISSION OF
WISCONSIN and WISCONSIN
DEPARTMENT OF NATURAL
RESOURCES,
Respondents-Co-Appellants-Cross-
Respondents,

Circuit Court Case Nos.
03CV3478, 03CV3731
04CV0133, 04CV0149
04CV0530, 04CV0533

WISCONSIN ELECTRIC POWER
COMPANY, W.E. POWER, LLC and
WISCONSIN ENERGY CORPORATION,
Interested Parties-Appellants-Cross-
Respondents,

(Caption continued on following pages)

APPEAL FROM A DECISION OF THE CIRCUIT COURT OF DANE
COUNTY, THE HONORABLE DAVID FLANAGAN, PRESIDING

BRIEF AND APPENDIX OF RESPONDENTS-CO-APPELLANTS-CROSS RESPONDENTS WISCONSIN PUBLIC SERVICE COMMISSION AND WISCONSIN DEPARTMENT OF NATURAL RESOURCES IN RESPONSE TO BRIEFS OF CALPINE CORPORATION, CITY OF OAK CREEK AND CLEAN WISCONSIN, INC., AND S.C. JOHNSON & SON, INC.

DAIRYLAND POWER COOPERATIVE,
Interested-Party-Cross-Respondent,

MADISON GAS & ELECTRIC COMPANY AND WISCONSIN PUBLIC POWER, INC.,
Interested Parties-Co-Appellants-Cross-Respondents,

CITY OF OAK CREEK,
Interested Party-Respondent-Cross-Appellant,

ROBERT H. OWEN,
Interested Party-Respondent-Cross-Respondent.

CALPINE CORPORATION,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, and WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondents,

WISCONSIN ELECTRIC POWER COMPANY, WISCONSIN ENERGY CORPORATION, W.E. POWER, LLC, DAIRYLAND POWER COOPERATIVE, MADISON GAS & ELECTRIC COMPANY, ROBERT H. OWEN, JR., and CITY OF OAK CREEK,
Interested Parties.

CLEAN WISCONSIN, INC.
p/k/a Wisconsin's Environmental Decade Institute, Inc., and
SC JOHNSON & SON, INC.,
Petitioners,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent,

WISCONSIN PUBLIC POWER, INC., CITY OF OAK CREEK, DAIRYLAND POWER COOPERATIVE, MADISON GAS & ELECTRIC COMPANY, WISCONSIN ELECTRIC POWER COMPANY, WISCONSIN ENERGY CORPORATION and W.E. POWER, LLC,
Interested Parties.

CALPINE CORPORATION,
Petitioner,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent,

CITY OF OAK CREEK, DAIRLYAND POWER COOPERATIVE, MADISON GAS & ELECTRIC COMPANY, WISCONSIN PUBLIC POWER, WISCONSIN ELECTRIC POWER COMPANY, WISCONSIN ENERGY CORPORATION and W.E. POWER, LLC,
Interested Parties.

CITY OF OAK CREEK,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
Respondent.

TOWN OF CALEDONIA,
Petitioner,
v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
Respondent,

WISCONSIN ELECTRIC POWER COMPANY, WISCONSIN ENERGY CORPORATION, W.E. POWER, LLC, DAIRYLAND POWER COOPERATIVE, MADISON GAS & ELECTRIC COMPANY, ROBERT H. OWEN, JR., and WISCONSIN PUBLIC POWER, INC.,
Interested Parties.

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ISSUES PRESENTED

1. Did the PSC properly determine that ERGS is "in the public interest," by making the statutorily-required findings, by considering all significant economic factors, by relying on complete and accurate data and by fully explaining its rationale for relying on its analysis?

   Answered by the Circuit Court: Yes.

2. Did the PSC correctly determine that ERGS will not have a material adverse impact on competition in the relevant wholesale electric service market because WEPCO does not control transmission, because the PSC regulates WEPCO's rates and because WEPCO is not permitted to sell wholesale power at market rates?

   Answered by the Circuit Court: Yes.

3. Did the PSC correctly determine that ERGS will not have "undue adverse impact on other environmental values" after considering evidence related to water intake structures, thermal discharge limits and wetlands?

   Answered by the Circuit Court: Yes.

4. Did the PSC and the DNR correctly determine that the FEIS was fully adequate because it analyzed, among a multitude of other things, the cost-effectiveness of alternative generation technologies, the health effects of emissions and the availability of mitigation measures?

   Answered by the Circuit Court: Yes.

5. Did the PSC improperly limit payments the City of Oak Creek is to receive to mitigate the adverse impacts of ERGS by the amount of payments the city will receive under the shared revenue formula?

Answered by the Circuit Court: Yes.

INTRODUCTION

Calpine Corporation ("Calpine"), S.C. Johnson & Son, Inc. and Clean Wisconsin, Inc. (together "SCJ/CW") opposed the Application. The City of Oak Creek ("Oak Creek") supported the Application on the condition that the city receives all of the payments provided for in the Development Agreement. Together, these cross-appellants raise a variety of issues decided by the Circuit Court in favor of the State, none of which merit invalidating the CPCN.

As argued in the State's Brief in support of its appeal, the PSC properly exercised the policy-making responsibilities delegated to it by the Legislature when the Commission determined, after almost two years of work, that ERGS was in the public interest considering a multitude of highly technical and fact-intensive issues. Nothing the cross-appellants argue alter the reality, which is that the PSC thoroughly and correctly weighed the evidence offered by the parties, developed its own independent data and expert opinions and thoroughly assessed the environmental impact of ERGS in the FEIS.

The record in this case establishes that:

- The PSC correctly interpreted the CPCN statute and followed its prior decisions in determining that the design and location of ERGS is in the public interest considering "economic" factors. The CPCN statute does not require the PSC to select the "least cost" alternative regardless of other factors;

- The PSC correctly determined that ERGS will not have a material adverse impact on

competition in the relevant wholesale electric service market because any market power which WEC would otherwise possess is mitigated;

- The PSC correctly determined that ERGS will not have an undue adverse impact on environmental values, correctly deferring to the DNR on air pollution impacts and water resource issues.

- The FEIS fully complied with the Wisconsin Environmental Policy Act ("WEPA") and, in fact, exceeded WEPA's requirements in the breadth and depth of the document's analysis of ERGS and proffered alternatives to ERGS.

- The PSC properly limited the amount of mitigation payments to Oak Creek it would require ratepayers to subsidize.

ARGUMENT

I. THE PSC PROPERLY DETERMINED THAT ERGS IS "IN THE PUBLIC INTEREST," BY MAKING THE STATUTORILY-REQUIRED FINDINGS, BY CONSIDERING ALL SIGNIFICANT ECONOMIC FACTORS, BY RELYING ON COMPLETE AND ACCURATE DATA AND BY FULLY EXPLAINING ITS RATIONALE FOR RELYING ON ITS ANALYSIS.

It is easy to lose the forest for the trees—especially when the challengers to PTF direct the Court's attention to nothing but the trees (if not to the branches of the trees)—and ignore the general, policy-laden, quasi-legislative standards for judging a CPCN application. Under the statute, the PSC considers whether the design and location of a power plant is in the public interest considering a myriad of general values, including "economic" and "environmental" factors. Wis. Stat. § 196.491(3)(d)3. As the PSC stated in the Final Decision:

> The Commission is required to balance all of these competing elements, which frequently lead in different directions; no single primary factor is the measure of a CPCN project.

(State's App. 115).

A. The PSC made all required findings of fact.

SCJ/CW contend that the PSC failed to make specific findings of fact to support its determination that ERGS is in the public interest. The contention is incorrect. The Final Decision contains thirteen separate findings in a section entitled "Findings of Fact." (State's App. 104-106.) This complies with the statutory requirement that an agency provide: "a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence." Wis. Stat. § 227.47(1). Moreover, the 50-page "Opinion" section of the Final Decision properly contains scores of additional, specific findings of fact. *See Hochgurtel v. San Felippo*, 78 Wis. 2d 70, 86, 253 N.W.2d 526 (1977). ("Facts which are stated in the trial court's memorandum decision will be accorded the same weight as if contained in formal findings.")

B. The PSC correctly modeled the costs of meeting WEPCO's needed electric generating capacity.

EGEAS is the PSC's "primary tool to consider optimal resource options on a quantitative basis for [a utility's] future electric demand." (State's App. 123.) However, it is by no means the only tool:

> Power supply planning is not a science. Determining what resource options will ensure low cost, reliability and environmental sensitivity for the consuming public requires the exercise of judgment and consideration of a wide variety of qualitative factors.

(State's App. 125).

Nothing in the CPCN statute requires computer modeling (through EGEAS or otherwise) or, for that matter, the monetization of externalities related to a project, as implicitly contended by SCJ/CW. Neither the statute nor the PSC's prior decisions (which are numerous and of long-standing) allow the Commission to authorize the selection of a power supply alternative based solely on cost, to the exclusion of other enumerated values. But, even as far as "economic" factors—to use the correct statutory term—and the use of EGEAS goes, the PSC properly modeled WEPCO's capacity needs.

1. The PSC properly did not include alleged health-related costs of air pollution in its EGEAS model runs because the PSC has no jurisdiction over air pollution impacts.

The CPCN statute generally requires the PSC to consider environmental factors in determining whether or not the design and location of a proposed power plant is in the public interest. When it comes to the impact of air pollution, however, the Legislature has directed the PSC to defer to the DNR. Wis. Stat. § 196.491(3)(d)3 provides: "In its consideration of environmental factors, the commission may not determine that the design and location or route is not in the public interest because of the impact of air pollution if the proposed facility will meet the requirements of [Wis. Stat.] ch. 285."

In its Final Decision the PSC acknowledged that it lacks jurisdiction to consider the impacts of air pollution. (State's App. 151.) The Commission also candidly admitted its lack of expertise—obviously recognized by the Legislature when it delegated this environmental issue to the DNR. (State's App. 151-52.)[1]

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[1] The Final Decision stated:

> The evidence in the record regarding the externalized health costs associated with air emissions will be

Because the PSC lacks authority to reject a power plant as not in the public interest due to the impacts of air pollution, it was not error for the PSC to not discuss the evidence of the alleged (but hotly-disputed) issue of health-related costs of air emissions from ERGS.

2. The PSC properly considered the cost of community impact payments outside of EGEAS.

The record contains evidence of the cost of community mitigation payments. The FEIS devotes more than 100 pages to the subject of community impacts and in particular showed that selection of the Calpine project would save ratepayers approximately $5 million, by delaying payments to Oak Creek for two years. (R. 18, Record Item 119/Vol. 15: 74.) The Commission dealt with theses costs outside of the EGEAS model. (State's App. 148-151.) Since no law requires the PSC to model every conceivable item of cost, this was entirely appropriate.

SCJ/CW, at p. 22 of their Brief, fault the PSC for not modeling costs to the Town of Caledonia to mitigate impacts upon that community. In the Final Decision, however, the PSC ordered: "The applicants shall work with neighboring communities to mitigate valid concerns and impacts." (State's App. 158.) As a consequence, the Town of Caledonia and WEC negotiated a mitigation agreement, which is now before the PSC in a separate docket. *Joint Application of Wisconsin Electric Power Company and Wisconsin*

> valuable to DNR as it examines its air permit applications for ERGS, but the Commission does not have special expertise to render an independent judgment on this topic. To do so would require the Commission to pick appropriate methods for modeling emission dispersion, determine if a causal relationship exists below which no impacts occur, and establish how to translate any identified impacts into dollars. These are primarily the functions of the EPA and DNR. And these agencies have not yet spoken.

(State's App. 152).

Gas Company, both d/b/a WE Energies, for Wisconsin Electric Power Company to Increase Its Electric and Steam Rates and for Wisconsin Gas Company to Increase Its Natural Gas Rates, 05-UR-101.

The possible rate impacts of payments to Caledonia will be fully considered in a contested case hearing in this docket. SCJ/CW did not participate in the proceeding. Caledonia was satisfied with the PSC's approach to this issue; it voluntarily dismissed its Petition for Judicial Review of the Final Decision in the instant case. (State's App. 175.)

Since there were no identified costs of mitigating impacts upon Caledonia at the time of the Final Decision and since the PSC is dealing with the issue now, there is no basis for vacating the CPCN on grounds related to this issue.

3. PSC staff correctly modeled alternate sources of supply.

SCJ/CW criticize the PSC for allegedly not modeling alternative sources of supply. (SCJ/CW Br. at pp. 23-25.) The accusation is without any basis at all. The FEIS fully discusses the various EGEAS runs (conducted by the Applicants and staff alike). (R. 18, Record Item 119/Vol. 15:66-76.)

Staff ran the model assuming wind power, natural gas, biomass and conservation assumptions. Staff also conducted what was called "the Alternative SCJ Blended EGEAS Analysis," also referred to as the "Integrated Alternative." (R. 18, Record Item 157/Vol. 20:3903-3904). This analysis responded to SCJ/CW's criticisms of the EGEAS runs.

4. The PSC correctly considered transmission upgrades.

It is clear from the FEIS that the PSC considered transmission improvements in connection with its EGEAS analyses. (R. 18, Record Item 119/Vol. 15:74-75.) The known costs of these improvements were also fully discussed

in the testimony. (R. 18, Record Item 157/Vol. 20:3106-07, 3118-19, 3136-37, 3305-05, 3372, 3919-20.)

5. The PSC correctly considered costs attributed to existing OCPP units.

The Applicants spread common site costs over the existing Oak Creek Power Plant ("OCPP") units. Common site costs were allocated based on keeping OCPP units 5 and 6 in operation along with common system costs for three new ERGS units. The result was a $1,400/kW input into EGEAS for each SCPC unit. Using an updated cost estimate and assuming that only two units were built and that the campus is designed for only two units resulted in a reallocation of common costs and a cost estimate of $1,435/kW for each SCPC unit. (R. 18, Record Item 157/Vol. 17:758, 1203-1206, 1830-1838.)

Commission staff allocated costs for input into EGEAS modeling based on the retirement of OCPP units 5 and 6. Building common facilities for a generating campus that is sited for 2,400 MW was deemed reasonable, as some generation would be needed to replace units 5 and 6, should they be retired. (R. 18, Record Item 157/Vol. 20: 4523, 4535, 4647.)

SCJ/CW argue, at p. 28 of their Brief, that the PSC did not account for inconsistencies in its model runs. The sur-surrebuttal of staff engineer Ken Detmer fully addressed the issue. (R. 18, Record Item 157/Vol. 20:4533-4537.)

C. The CPCN statute does not require the PSC to select the "least cost" alternative to the project proposed.

Calpine argues that the CPCN statute and the PSC's prior decisions require the Commission to select from alternatives proffered a proposal which presents the "least cost" to ratepayers. Calpine misreads the statute and misstates the PSC's prior decisions. Properly construed, these authorities support the PSC's decision to select ERGS.

1. The statute does not even mention cost.

Under the CPCN statute, the PSC may not approve an application unless the Commission determines that the design and location of the proposed facility is in the public interest considering many factors, among them "economics." Wis. Stat. § 196.491(3)(d)3. Had the Legislature intended the Commission to select the "least cost" alternative, the statute would state just that. Instead, economics—a broader term than "cost"—is just one of many public interest factors the Commission must consider in judging an application.

2. The Commission's prior decisions are in accord with this construction of the statute.

Calpine states, at pp. 15-16 of its Brief,: "Under the PSC's integrated planning and CPCN principles, the least cost overall choice is the option the utility will be authorized to pursue." The Brief cites to several decisions, ***none*** of which support this statement.

In *Investigation on the Commission's own Motion into Barriers to Contracts Between Electric Utilities and Nonutility Cogenerators and Certain Related Policy Issues*, Docket No. 05-EI-112 (December 28, 1993) (the "112 Order"), (Calpine's Appendix ("Calp. App.") 187-238), the PSC concluded that "it [was] necessary to create a method of choosing among competing applicants" for electric generating facilities in part "to determine which of the competitors would increase a utility's electric system costs the least." (Calp. App. 203.) The PSC set up a "bidding mechanism to solicit and evaluate competitive applications." The PSC also established a "two-stage process," under which the Commission first would determine which alternative supplier, *e.g.*, a public utility or an independent power producer, would be allowed to apply for a CPCN; and second would evaluate the proposal for compliance with the other statutory requirements. (Calp. App. 205.) The winner in stage one would be the "lowest overall cost alternative the utility has available, considering engineering, economic, health, safety,

reliability, efficiency and environmental factors." (Calp. App. 205.)

Thus, by its terms, the 112 Order did not require the Commission to select at stage one the "least cost" alternative; only the alternative with the lowest overall cost considering several other factors, including health, safety, reliability, efficiency and the environment.

Calpine states, at p. 16 of its Brief, that the 112 Order "acknowledged that [determining least cost provider] required state-of-the-art modeling of the electric system." (Calp. Br. at 16.) Calpine thus would have the Court believe that the PSC selected the winning proposal based on the results of the modeling. The 112 Order did state: "This kind of system modeling is an important element in bid evaluation." (Calp. App. 204.) But cost—determined by more than model runs—was only one factor in selection.

Even if the 112 Order stated what Calpine attributes to it, the two-stage CPCN process was eliminated in the PSC's order to rescind the 112 Order, issued in 2000. (State's Supplemental Appendix ("State's Supp. App.") at 101-103.)

Calpine relies on *Application of Wisconsin Electric Power Company for Authority to Construct and Place in Operation a Nominal 210 MW Combined-Cycle Cogeneration Facility, Known as the Kimberly Cogeneration Facility, With Associated Transmission Facilities, Located in Outagamie County*, Docket No. 6630-CE-187 (November 5, 1993) ("Repap Order"). (Calp. App. 133-175.) Calpine states, at p. 17 of its Brief, that the PSC used the EGEAS model in this docket and that the model "showed the lowest system costs for a system containing the LS Power Whitewater proposal." The model was not EGEAS; it was the "IRP Workstation computer model." (Calp. App. 144.) Moreover, the IRP Workstation results were only "preliminary model results," which had to be adjusted on the basis of other "cost factors." (Calp. App. 146.)

Evaluation of "dollar costs" required "both the staff's modeled system expansion cost evaluation and the cost factors which could not be modeled using IRP Workstation."

(Calp. App. 152.) The selection of this proposal was based "on an overall cost basis, including lifetime system capital and operating costs as well as dollar costs exogenous to the system expansion model . . . ." (Calp. App. 152.)

In *Application of Wisconsin Public Service Corporation for Authority to Increase Electric Generating Capacity (Stage One, Competition Among Alternative Suppliers),* Docket 6690-CE-156 (December 22, 1994), the PSC stated that the first stage of the two-stage CPCN process (established in the 112 Order):

> includes the use of a computer model to help determine which of the competing supply proposals should be included in a least-cost system supply plan. Other non-modeled cost factors are also evaluated, as well as non-cost factors (referred to as intangible factors).

(Calp. App. 242.) Thus, Calpine is mistaken when it states, at p. 17 of its Brief, that the PSC "selected the WPS Rhinelander Project because it presented the least cost option for WPS ratepayers."

The PSC did find "that, on an overall cost basis . . . the WPS Rhinelander Project bid is the least-cost option for WPS ratepayers." (Calp. App. 244.) But, "[t]he Commission chose the [project] based on a balanced consideration of the cost and intangible factors of all the bids." (Calp. App. 243.) Even as to cost, the PSC clearly considered more than modeling results, *i.e.*, "cost factors which could not be explicitly modeled by means of . . . system expansion models." (Calp. App. 243.)

Calpine relies on the PSC's selection of the De Pere Project, which presented the second-lowest overall costs, to support its position. (Calp. Br. at 18.) The PSC's selection of De Pere was based, not only on cost, but "its potential cogeneration benefits and timing flexibility and other intangible considerations." (Calp. App. 250.) Again, like the Rhinelander Project, even as to costs De Pere had the second-lowest "long-term overall costs, including intangible factors." (Calp. App. 251.) Calpine argues, at p. 18 of its Brief, that the "PSC has continued to use the EGEAS model to identify

least cost generation plans." Calpine cites *Application of Madison Gas and Electric Company for a Certificate of Public Convenience and Necessity for Construction of a Large Electric Generating Facility and Associated High Voltage Transmission and Natural Gas Interconnection Facilities Located in Dane County,* Docket No. 05-CE-121 (October 9, 2003).

Here, the PSC stated that EGEAS showed the facility as "a 'least-cost' generation option." (Calp. App. 462.) The Commission did not select the project solely on the basis of that finding, however. The Commission made all of findings of fact required under the statute and discussed "additional financial and non-financial benefits," including fuel efficiency, use of an existing site, and reduced dependence on the transmission system. (Calp. App. 450-453, 462.)

Calpine states, at p. 18 of its Brief: "Yet, despite its prior insistence that the least cost proposal is the proposal that is in the public interest and is the one that should be selected, the PSC in [the instant case] took a different path . . . ." As the foregoing discussion demonstrates, the PSC has *never* insisted that "least cost" is the sole criterion for judging a CPCN application.

3. The PSC correctly considered and rejected the Calpine proposal as a substitute for ERGS.

Calpine misrepresents the basis of the PSC's decision to reject its proposal and then argues that, according to the misrepresented standard—least cost—the Calpine project should have been selected. Calpine is wrong in this regard as well.

Calpine would have the Court believe that PSC staff uncritically accepted WEC's EGEAS runs. The company states, at p. 8 of its Brief, that staff "primarily relied upon assumptions provided by WEC." The assertion is untrue; staff "conducted its own independent review of [the results of WEC's EGEAS runs], examining the reasonableness of the company's data inputs and preparing its own EGEAS model

runs." (Final Decision at 24.) In particular, "Commission staff performed one EGEAS model run using inputs it considered reasonable within a central range of estimates, which it described as it 'base case,' and modeled ten other EGEAS scenarios." (State's App. 124.)

Staff based its capital cost parameter on the decision in the Port Washington phase of PTF; the retirement of Presque Isle units 1-4 and Oak Creek 5 and 6 at the end of 2012; the retirement of other coal plants at age 60; the relicensing of Point Beach Nuclear Power Plant units 1 and 2; and a Wind Tax Credit at $18 per MWh for 2002. (R. 18, Record Item 119/Vol. 15:66-67.)

Staff also applied its own estimated impact on Demand Side Management ("DSM") programs and Energy Information Administration growth factors to the peak and energy forecasted at 2011 for the period through 2031 "[a]s an alternative to WEPCO's higher forecast of demand and energy . . . ." (R. 18, Record Item 119/Vol. 15:67.)

In addition to using the Applicants' forecasts for coal and gas for its price sensitivity runs, staff used a 10 percent cost overrun on new coal units as a sensitivity to reflect the company's new pricing proposal. (R. 18, Record Item 119/Vol. 15:67.) Staff also modeled Calpine's proposal for 523 MW as a potential substitute for ERGS and did a sensitivity analysis of a subsequent 260 MW proposal. (R. 18, Record Item 119/Vol. 15: 67.)

The PSC's final decision found: "No gas-fired, baseload facilities were presented as either a cost-effective or technically feasible alternative in this record." (State's App. 119.)

In addition to cost, the PSC cited "qualitative factors" to support its conclusion that "ERGS is the most cost-effective and technically feasible way to address WEPCO's baseload needs." (State's App. 121.) "Based on a number of qualitative and quantitative factors, the Commission believes that coal-fired generation provides the most cost-effective, prudent and practical means of meeting WEPCO's baseload capacity needs over the next decade." (State's App. 122.)

Cost simply was not the determinant for the selection of ERGS. The PSC stated:

> After considering the quantifiable evidence presented in the EFEAS runs, the key question . . . is not whether additional coal-fired baseload generation should be approved, but when it should be installed. The principal difference among the various EGEAS runs concerns the proper timing of such an addition

(State's App. 124.)

The record contains overwhelming evidence to support the PSC's selection of coal over gas as a fuel source.[2] The FEIS stated:

> Natural gas is a high-energy-content, premium fuel. These desirable features are offset, however, by the high cost on natural gas on a Btu-adjusted basis, and also by the extreme volatility of natural gas prices.
>
> ...Natural gas costs have, on average, been 128 percent higher than coal costs over [the period 93-02]. If more recent data are examined, the difference in cost is even more dramatic. . . . [I] recent times, natural gas prices were 237 percent higher than coal prices."
>
> ... The standard deviation of the annual natural gas price changes over the past 10 years is 24 percent. This contrasts with the standard deviation of annual changes in coal prices of only 2 percent.
>
> ...[R]eal natural gas prices are essentially unpredictable for planning purposes.
>
> ...Statistical forecasts of real coal prices have much higher prediction intervals.

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[2] The Final Decision stated: "Power supply planning is not a science. Determining what resource options will ensure low cost, reliability and environmental sensitivity for the consuming public requires the exercise of judgment and consideration of a wide variety of qualitative factors." (State's App. 125.)

(R. 18, Record Item 119/Vol. 15:62-63.) In addition, the FEIS drew "two important qualitative conclusions:"

- It is reasonable to assume as a base case that natural gas will continue to be significantly more expensive than coal over the generation planning horizon.

- The risk of incurring very high fuel prices is much greater for natural gas than it is for coal.

(R. 18, Record Item 119/Vol. 15:63.)

Supply of natural gas was also a serious concern in the record. The FEIS stated:

> that under certain circumstances natural gas might not be avail to electric generators. This is almost a certainty if the generator relies on interruptible interstate transmission capacity to ship its natural gas from the production area in the southern U.S. to Wisconsin.

(R. 18, Record Item 119/Vol. 15:86.) The FEIS also noted: "[I]f large-scale natural-gas-fired generators are to be built in Wisconsin, substantial expansion of the interstate pipeline system serving the state may be necessary." (R. 18, Record Item 119/Vol. 15:87.) The FEIS added: "Gas-only plants would have no alternative but to cease operations if the flow of natural gas is interrupted." (R. 18, Record Item 119/Vol. 15:88.)

Whatever the modeled cost advantages of the Calpine proposal, the overwhelming evidence dictated not selecting natural gas as a fuel source for WEPCO's needed baseload generating capacity.

II. THE PSC CORRECTLY DETERMINED THAT ERGS WILL NOT HAVE A MATERIAL ADVERSE IMPACT ON COMPETITION IN THE RELEVANT WHOLESALE ELECTRIC SERVICE MARKET BECAUSE WEPCO DOES NOT CONTROL TRANSMISSION, BECAUSE THE PSC REGULATES WEPCO'S RATES AND BECAUSE WEPCO IS NOT PERMITTED TO SELL WHOLESALE POWER AT MARKET RATES.

Calpine contends that the Final Decision reinforced WEC's market power and undermined competition in the wholesale electric market. Like the contention that the PSC selects power plant proposals solely on the basis of cost, this contention misrepresents prior PSC decisions. Those decisions demonstrate that the PSC correctly interprets the CPCN statute with respect to competition in general and that the Commission correctly concluded in this case that ERGS will not have a material adverse impact on competition in the relevant wholesale electric service market. Wis. Stat. § 196.491(3)(d)7.

Calpine states that the PSC's BadgerGen Order, *Application of Badger Generating Company, LLC for a Certificate of Public Convenience and Necessity for a Large Electric Power Generating Facility and Associated High Voltage Transmission Interconnection Facilities in Southeastern Wisconsin,* Docket No. 9340-CE-100 "emphasiz[ed]" the need for additional wholesale competitors. (Calp. Br. at 24.) This overstates the Commission's decision.

The PSC concluded: "The record shows that an adverse effect on competition is unlikely because BadgerGen would be adding a new competitor to [the Wisconsin Upper Michigan System]. For this reason, the facility is likely to alleviate constraints in Wisconsin's transmission system and to improve the competitive market." (Calp. App. 361.) Increasing competition was the reason for concluding that BadgerGen would not have an adverse impact on competition. Improving competition is not the statutory

standard nor the standard articulated as a general rule in the BadgerGen Order.

Calpine similarly overstates the PSC's decisions in the Mirant case,[3] and the Fond du Lac case.[4] In the Mirant case, the PSC made the same case-specific findings it made in BadgerGen. (Calp. App. 420.) In the Fond du Lac Order, the PSC was not exactly "extolling the virtues of new competitors" when it simply stated: "The record shows that an adverse effect on competition is unlikely because, even with the addition of the Fond du Lac Energy Center, Calpine will remain a relatively small operator of power plants in Wisconsin." (Calp. App. 67.)

The PSC made a similar finding of fact in the Riverside Order,[5] relied upon by Calpine at p. 24 of its Brief. Even more recently, the PSC demonstrated that "focus upon entry of competitors" is not the Commission's approach to determining the issue of material adverse effect. In the Weston 4 Order,[6] the Commission found:

> The addition of the Weston 4 facility . . . will not have a material adverse impact on competition in the relevant

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[3] *Joint Application of Mirant Portage County LLC and American Transmission Company LLC for a Certificate of Public Convenience and Necessity for Construction of a Large Electric Generating Facility and Associated High Voltage Transmission, and Water Facilities Located in Portage County,* Docket No. 05-CE-116 (March 22, 2002) (Cal. App. 411-436.).

[4] *Application of Fond du Lac Energy Center, LLC, a Calpine Subsidiary, for a Certificate of Public Convenience and Necessity to Construct and Place in Operation a Large Electric Power Generating Facility in Fond du Lac County, Wisconsin,* Docket No. 9343-CE-100 (May 5, 2003).

[5] *Application of Rock River Energy LLC (an Affiliate of Calpine Corporation) for a Certificate of Public Convenience an d Necessity to Construct and Operate a 650 MW Natural Gas-Fired, Combined-Cycle Electric Power Plant, Known as the Riverside Energy Center, in the Town of Beloit, Rock County, Wisconsin,* Docket No. 9346-CE-100 (September 24, 2002). (Calp. App. 109-132.)

[6] *Application of Wisconsin Public Service Corporation for a Certificate of Public Convenience and Necessity for Construction of a Large Electric Generating Plant with Associated Facilities, Known as Weston Unit 4, at its Existing Weston Generating Station Located in Marathon County,* Docket No. 6690-CE-187 (Oct. 7, 2004), 2004 WL 2590577 (Wis.P.S.C.)*1.

> wholesale electric service market . . . because the output will be sold to native load customers at prices, terms and conditions regulated by the Commission.

2004 WL 2590577 *3. In the PSC's Port Washington Order (phase 1 of PTF), the Commission stated:

> Capacity and energy from the PWGS facility will be provided to WEPCO via the Facility Lease, at rates this Commission regulates through its review of the lease's economic terms and conditions. This regulation prevents any material adverse impact on competition in WUMS.

Re W.E. Power, LLC, 2002 WL 32067560 *12 (Wis.P.S.C.) (December 20, 2002). This was the same basis for the PSC's finding of no adverse impact on wholesale competition in the instant case. (State's App. 128.)

Calpine asserts, at p. 25 of its Brief, that it is "beyond dispute that WEC has the ability to exercise market power in the state." What is beyond dispute is that WEC does not have that ability. In the Port Washington Order, the PSC stated:

> As the market power study conducted for the Commission in 2000. . .found, fixed price contracts such as the proposed Facility Lease, mitigate market power. In addition, the Federal Energy Regulatory Commission only allows WEPCO to sell in WUMS at cost-based rates. Wisconsin Public Service Corporation, MWIPS and several IPPs are also concerned that approval of the PWGS facility could have a material adverse impact on competition by preventing the development of a competitive wholesale generation sector and hindering further electric industry restructuring in Wisconsin. However, WEPCO plans to continue contracting for power with IPPs, obtaining up to 1,000 MW of capacity from these providers. Furthermore, a stand-alone generation company such as W.E. Power LLC could more easily be divested by WEC than generating assets that are held within WEPCO, should a future legislature split the generating plant assets away from utilities. For these reasons, the Commission finds that approval of the PWGS project will not create material adverse impacts on competition.

Id. at *12.

Calpine, at p. 26 of its Brief, quotes a PSC staff witness as stating a concern that "the 1,800 MW scale of the complete ERGS project could thwart wholesale market power development . . . ." The quotation is accurate as far as it goes. The remainder of the sentence, however, reads: "which the Commission may want to address with a prospective competitive bidding requirement or by requiring WEPCO to maintain a certain level of purchases from independent power producers." (R. 18, Record Item 157/Vol. 20:3898). In the Final Decision the PSC found: "WEPCO plans to continue contracting for power with independent power producers." (State's App. 128.), This satisfied the concern expressed by staff.

Calpine, at p. 28 of its Brief, criticizes the market power study (the "Tabors report"), relied upon by the PSC, for not discussing contracts between affiliated entities (such as the affiliates of WEC promoting PTF). The Tabors report could not have discussed such arrangements, however, because the Leased Generation Law had not yet been enacted. That law is an exception to the requirement of Wis. Stat. § 196.52(3) for PSC approval of affiliated interest transactions—the "special scrutiny" mentioned by Calpine (at p. 28 of its Brief). Sub. (9) of the statute contains specific standards for approving leased generation contracts, standards indisputably met in the instant case.

Calpine, at p. 29 of its Brief, faults the PSC for not ordering WEC to perform a "market screen analysis and [for ignoring] the affiliate nature of the transaction." Wis. Admin. Code § PSC 100.15(1) generally requires submission of a market screen analysis but only for requests to approve contracts between a public utility and a wholesale merchant plant affiliate. Wis. Admin. Code § PSC 100.11. Moreover, a market screen analysis is not required even then if an applicant "proposes mitigation remedies which effectively mitigate any substantial anti-competitive effect on electricity markets . . . ." Wis. Admin. Code § PSC 100.15(2). These are characteristics of the lease arrangements present in PTF.

In summary, the PSC has not required proof of increased competition in order to satisfy the standard of no material adverse impact on wholesale competition.

Moreover, the facts of this case establish that any market power WEC theoretically might otherwise possess is fully mitigated by the Commission's retail rate setting authority and other characteristics of PTF

III. THE PSC CORRECTLY DETERMINED THAT ERGS WILL NOT HAVE "UNDUE ADVERSE IMPACT ON OTHER ENVIRONMENTAL VALUES" AFTER CONSIDERING EVIDENCE RELATED TO WATER INTAKE STRUCTURES, THERMAL DISCHARGE LIMITS AND WETLANDS

Calpine contends that the PSC failed to properly examine whether ERGS will have undue adverse impacts on certain "other" environmental values. The company also contends that the PSC "inappropriately departed" from past interpretations of the CPCN statute by not requiring the same information from the Applicants as it allegedly required of Calpine in other proceedings. (Calp. Br. at 30-31.) The Court should reject these contentions.

A. Water intake structures.

An issue at hearing was whether water intake structures complied with state and federal statutes and regulations. Under those laws, DNR determined that ERGS could be treated as an existing facility and so utilize "once-through cooling" if that represented Best Technology Available ("BTA") for controlling impingement and entrainment of aquatic organisms. (State's App. 153.) This constituted substantial evidence upon which the PSC could rely in determining that ERGS was in the public interest considering this water issue.[7]

[7] Calpine contends, at p. 35 of its Brief, citing the FEIS at 208, that WEC "acknowledges that to meet BTA the intake must be designed for an intake velocity of" less than 1.0 feet/second. The FEIS does not say what Calpine contends its says. Neither did WEC admit (in the FEIS or anywhere else), as alleged by Calpine at p. 35 of its Brief, that ERGS would not comply with "the intake velocity standard."

Calpine relies on the testimony of David Jude. Dr. Jude testified that the location of the cooling water intake structure offshore would have "profound negative impacts . . . ." (R. 18, Record Item 157/Vol. 20:3550.) Subsequently, however, he testified that the "necessary data" to assess the impacts of the structure did not exist. (R. 18, Record Item 157/Vol. 20:3552.)[8] In addition, he agreed that: "The actual number of aquatic life that is impinged or entrained will depend at least in part on the ultimate location of the intake and the design of the structure . . . ." (R. 18, Record Item 157/Vol. 20:3560.) Dr. Jude also agreed that "at least a number of" studies had concluded "that the impacts are inconsequential to the aquatic life in Lake Michigan." (R. 18, Record Item 157/Vol. 20:3563.)

Other evidence supports the PSC's approval of ERGS with once-through cooling technology. Kristine Krause testified that studies conducted over 20 years showed: "while there are some number of fish and larvae entrained and impinged, this activity has taken place for many years without apparent impact on major fish populations." (R. 18, Record Item 157/Vol. 17:1517.) She also testified: "In fact, our initial year of larval fish surveys for this project indicated that entrainment of fish eggs and larvae would be reduced by greater than 90% if the intake were to be sited on the bottom in 40 feet of water as opposed to its current on-shore channel location." (R. 18, Record Item 157/Vol. 17:1516.) Dr. Jude agreed with that conclusion. (R. 18, Record Item 157/Vol. 20:3559.)

PSC Order point 8 provides: "If the EPA or DNR determine that once-through cooling is not permittable, WEC shall submit a revised project application for the Commission's approval that redesigns or relocates ERGS, as needed." (State's App. 158.) Thus, even if once-through cooling were later deemed inappropriate, relief is available at the Commission.

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[8] Dr. Jude testified that two of the types of studies he was referring to took 9 and 5 years and were concluded only after the power plants were authorized and operating. (R. 18, Record Item 157/Vol. 20:3569-3571.)

B. Thermal plume.

Calpine, at p. 36 of its Brief, complains: "WEC could not state at the hearing whether its discharge can comply with the maximum plume size." Calpine cites to pp. 1550-51 of the transcript. There, however, Kristine Krause testified that it was the Applicants' intention to comply with whatever thermal discharge limits were required and that there did not then exist a final rule.[9] Ms. Krause also testified that "thermal discharge effects are not expected to be significant." (R. 18, Record Item 157/Vol. 17:1534.) Finally, Ms. Krause testified: "It should be noted that studies of the existing thermal plumes for both Oak Creek power plant and Point Beach nuclear plant, which are many square miles in size, have shown that the effects on the aquatic life in these shallow, near-shore areas of the lake are nearly undetectable." (R. 18, Record Item 157/Vol. 17:1542.)

C. Wetlands mitigation.

Calpine's discusses, at p. 37 of its Brief, the DNR's standards under the water quality certification process of Wis. Admin. Code chs. NR 103 and 299,contends that there is no analysis in the record of avoidance or minimization of wetlands filled, and refers to this set of circumstances as "admitted violations." Calpine misrepresents the record.

Ms. Krause testified that the Applicants had developed a "conceptual wetlands mitigation plan." (R. 18, Record Item 157/Vol. 17:1526). The final plan would depend on the site selected. The Applicants fully committed to conforming with state and federal requirements. (R. 18, Record Item 157/Vol. 17:1527.)

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[9]Calpine states, at p. 36 of its Brief, that discharges would not comply with "a recognized environmental standard." Calpine cites to pp. 218 and 219 of the FEIS. Those pages reveal, however, that standards were merely "proposed;" that averaging periods had not yet been established; and that the proposed regulations allowed "other scientifically defensible methods of calculating effluent limitations. . . . " (R. 18, Record Item 119/Vol. 15: 218-219.)

As with the once-through cooling and thermal discharge issues, the wetlands mitigation aspects of the ERGS project are fully supported by substantial evidence in the record.

IV. THE PSC AND THE DNR CORRECTLY DETERMINED THAT THE FEIS WAS FULLY ADEQUATE BECAUSE IT ANALYZED, AMONG A MULTITUDE OF OTHER THINGS, THE COST-EFFECTIVENESS OF ALTERNATIVE GENERATION TECHNOLOGIES, THE HEALTH EFFECTS OF EMISSIONS AND THE AVAILABILITY OF MITIGATION MEASURES.

Both Calpine and SCJ/CW unfairly criticize the adequacy of the State's massive FEIS.

> The purpose of an EIS is to enable an agency to take a hard look at the environmental consequences of its proposed action. The duty of an agency to prepare an EIS does not require it to engage in remote and speculative analysis. Instead, the statute must be construed in the light of reason.

Milwaukee Brewers Baseball Club v. DHSS, 130 Wis. 2d 56, 72, 387 N.W.2d 245 (1986) (internal quotation marks and citations omitted).

The State looked as hard as it could have and as hard as the law requires. First, the State prepared a draft EIS, consisting of almost 500 pages. Second, the State considered approximately 400 pages of public comments on the draft. Finally, the State—through the efforts of almost 40 employees—prepared the 3-volume, almost 900 page FEIS.

A. Staff and the PSC Commissioners Addressed Alleged Inadequacies in the EIS.

The law does not require that an EIS be perfect. *See Environmental Defense Fund, Inc. v. Costle*, 439 F. Supp.

980, 991 (E.D.N.Y. 1977)(discussing the federal National Energy Policy Act, "NEPA"). This EIS is no exception.

For example, the Applicants themselves pointed out an error which PSC staff corrected: Staff witness Michael Ritsema testified:

> I address some of the errors with respect to the Commission staff EGEAS modeling put forth by Mr. Knitter. I also incorporate updated information with respect to the super-critical pulverized coal units (SCPC) and provide the results of Commission staff's Revised Base Case. In addition, I describe an additional scenario that combines certain assumptions favored by WEPCO and the parties and I present the results of applying these assumptions to the EGEAS model.

(R. 18, Record Item 157/Vol. 20:4706.) Mr. Ritsema prepared Exhibit 273 to show the results of his revised EGEAS runs. None of the results were deemed material. (State's Supp. App. 104-110.)

More generally, the Commission addressed the cross-appellants challenges but concluded:

> After hearing these concerns and reviewing the detailed record prepared in this case, much of which concerns environmental impacts, the Commission finds that this EIS properly discusses the significant aspects of probable environmental consequences. In those areas where the likely environmental consequences associated with ERGS are unknown, the EIS identifies these uncertainties.

(State's App. 156.)

B. The FEIS appropriately addresses the cost-effectiveness of lower emitting alternatives.

SCJ/CW, at pp. 37-40 of their Brief, cast a challenge to the adequacy of the FEIS's discussion of the availability and cost-effectiveness of lower-emitting alternatives in terms of EGEAS. As argued above, the EGEAS runs were completely proper. In addition, the FEIS goes well beyond EGEAS

modeling in its comprehensive and detailed discussion of alternatives. (R. 18 Record item 119/Vol. 15:47-78.)

C. The FEIS appropriately addresses impacts related to water.

Contrary to Calpine's and SCJ/CW's contentions, the FEIS fully analyzed water resource impacts, specifically once-through cooling. (R. 18, Record item 119/Vol. 15:203-208). WEPA did not require consideration of cooling towers or dry cooling as alternatives to once-through cooling. Volume 3 of the FEIS responded to comments regarding these technologies:

> Once through cooling water and closed-cycle cooling are commonly used alternatives. WEPCO has proposed to use once-through cooling for ERGS. The Clean Water Act does not prohibit the use of once-through cooling water nor does it compel anyone to use closed-cycle cooling. DNR does not have the authority to require ire closed-cycle cooling for this project.

(R. 18, Record Item 119/Vol. 15:604). This was a fully correct and adequate treatment of the issue.

The FEIS also discussed mitigation with respect to the water intake structure, noting that environmental regulations mandate minimization of environmental impacts and that this would be accomplished through the water discharge permit process. (R. 18, Record Item 119/Vol. 15:204.)

D. The FEIS appropriately addresses site alternatives.

SCJ/CW recast their contention that the PSC failed to adequately consider alternative sites for ERGS (see State's initial Brief at pp. 16-21) as an objection to the FEIS's consideration of alternative "sites." Without here begging the question of what a "site" is, the State points out that the FEIS fully discussed alternatives to ERGS, including physical locations. *See, e.g.*, (R. 18, Record Item 119/Vol. 15:391-

407) (discussing the site ultimately selected by the PSC for ERGS).

E. The FEIS appropriately addresses other mitigation issues

SCJ/CW argue that the FEIS's coverage of methods to mitigate environmental impacts is inadequate. Wis. Admin. Code §§ NR 150.22(2)(e) and PSC 4.30(3)(b)3 require an EIS to evaluate means of mitigation. Under WEPA and NEPA an EIS must discuss what steps could be taken to mitigate adverse environmental consequences, but these laws do not require a formal, complete mitigation plan. "[I]t would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989).

SCJ/CW challenge the FEIS's analysis of mitigation methods for impacts upon Lake Michigan and upon wetlands. The DNR issues "chapter 30" permits for utility activities upon lake beds and along shorelines, which are regulated under Wis. Stat. § 30.21. It also has permitting authority for water withdrawal and water loss under Wis. Stat. §§ 281.35 and 281.41, while it regulates wetland fill through the conditions it attaches to permits under Wis. Admin. Code chs. NR 103 and 299. It is in these permit applications, as DNR becomes familiar with a project, that mitigation methods properly take shape.

CPCN projects are dynamic, because the applicants must routinely respond to ideas and criticisms offered by affected municipalities, landowners, environmental groups, and regulatory agencies. While an EIS is being prepared a CPCN project may change significantly. This means that not everything about a project can be covered in the EIS. For example, a wetland mitigation plan cannot be completed until after the Commission approves a project site; therefore, it cannot be included in the project's EIS. (R. 18, Record Item

119/Vol. 15:217, R. 18, Record Item 157/Vol. 17:1527, 1546-47.)

F. The FEIS appropriately responded to public comments.

SCJ/CW contend, at p. 49 of their Brief, that the FEIS is defective on the grounds that it "ignores most of the more significant comments" received on the draft EIS ("DEIS"). The contention should be rejected.

The State received almost 300 written comments on the DEIS. (R. 18, Record Item 119/Vol. 15:571.) Volume 3 of the FEIS, prepared in response to those comments and is over pages 300 long. (R. 18, Record Item 119/Vol. 15:571-882). The Introduction to Volume 3 explains how these comments triggered additional analyses on particular issues and modifications to the DEIS. (R. 18, Record Item 119/Vol. 15:571.) Forty-three pages of Volume 3 are devoted to lengthy analyses of the principal concerns raised:

> The staffs of the PSC and DNR have given careful consideration to all of the comments received and have attempted to reflect as many of the comments as possible in the text of the final EIS as well as this volume. We appreciate all of the time, effort, and careful thought on the part of all the commenters who read the draft EIS and provided the input that was so valuable in producing the final EIS.

(R. 18, Record Item 119/Vol. 15:572.)

G. The FEIS adequately addressed cumulative effects.

Wis. Admin. Code §§ NR 150.22(2)(a)2. and PSC 4.30(3)(b)1. require an EIS to consider how a proposed project may have cumulative environmental effects when combined with related actions or other local activities, if these effects can be reasonably anticipated and would compound a proposed project's impacts. The FEIS addresses cumulative impacts in a number of important areas.

DNR's regulation of air pollutants is, at its core, an analysis of cumulative impacts. Under the Clean Air Act, the EPA must set National Ambient Air Quality Standards ("NAAQS") for air pollutants that could adversely affect human health or welfare. It has set both primary standards, to protect public health, and secondary standards to protect public welfare and the environment, for six specific pollutants. The EPA and DNR then monitor existing air quality throughout Wisconsin and identify the levels of these pollutants at specific locations. Any location that fails to meet one or more of the NAAQS is named a "nonattainment area." In such an area, an applicant for an air permit must pass DNR's "New Source Review" standards for the air pollutants that exceed the NAAQS. This applies to emissions of volatile organic compounds from ERGS, because the Oak Creek area fails to meet the NAAQS limit for ozone. (R. 18, Record Item 119/Vol. 15:145-47.)

Since ERGS would be located in this nonattainment area, under Wis. Admin. Code ch. NR 408 it must use control technology to control volatile organic compounds at the lowest achievable emission rate. The New Source Review standards for nonattainment areas begin with an analysis of existing pollutant levels and include an evaluation of the proposed project's air impacts. It is definitely a cumulative impact analysis.

Federal and state laws also address the cumulative impacts in areas where the existing levels of regulated air pollutants do not exceed the NAAQS. These regulations, which apply to ERGS, establish the maximum allowable increments of additional air pollution that a new project can emit. 40 C.F.R. Part 52 and Wis. Admin. Code §§ NR 405.08 to 405.13. The purpose of these rules, known as "Prevention of Significant Deterioration" standards, is to ensure that areas currently in attainment remain so. In other words, this too is a form of regulation based upon an examination of cumulative impacts. (R. 18, Record Item 119/Vol. 15:147.)

The FEIS addresses cumulative impacts by explaining these regulations. Furthermore, it shows WEC's estimate of annual emissions, prevention of significant deterioration thresholds, and net emission changes at each of the three sites

that WEC proposed in its application. (R. 18, Record Item 119/Vol. 15:162-178.)

The FEIS also addresses cumulative water impacts. For example, on pages 196-97, it describes existing water use at the OCPP, which it then compares (on page 202) with the cumulative water use after ERGS would be built. It describes a study of the OCPP's impact upon fish eggs and larvae and summarizes the first year of an ongoing study to estimate the abundance of fish eggs and larvae in the vicinity of the existing plant's water intake structure and of the proposed new intake structure. Part of the purpose of this ongoing study is to estimate the impact of the new intake structure upon fish, in order to determine its proper location in relation to the existing plant's intake structure. (R. 18, Record Item 119/Vol. 15:190, 193, 206-08.)

Finally, the FEIS describes the cumulative environmental impacts of habitat fragmentation. It states that habitat blocks on the OCPP have been divided in the past but still have adequate acreage to provide habitat for both generalist and specialist wildlife species. It warns that "continued fragmentation of these habitat blocks will affect their ability to support certain specialist wildlife species." It explains how area-sensitive wildlife such as forest interior birds need large blocks of consistent habitat. (R. 18, Record Item 119/Vol. 15:253.) It describes the "stopover sites" that birds need along the shoreline of Lake Michigan. (R. 18, Record Item 119/Vol. 15: 259-262.) The FEIS also looks at impacts upon threatened and endangered species, which is always a consideration of cumulative impacts. (R. 18, Record Item 119/Vol. 15:262-264.)

In summary, Calpine and SCJ/CW unfairly fault the FEIS for not taking a "hard look." Reasonably considered, the FEIS was a comprehensive and fair discussion of the environmental impacts of ERGS.

V. THE PSC PROPERLY LIMITED THE AMOUNT OF PAYMENTS TO BE MADE TO OAK CREEK TO MITIGATE THE ADVERSE EFFECTS OF ERGS

Oak Creek maintains that the PSC unreasonably limited ratepayer responsibility for mitigation payments by failing to approve the Development Agreement, (State's App. 236), in its entirety. The city also asserts this action was contrary to Wis. Stat. § 196.20(7), a statute that became effective more than a month after the PSC's decision. Oak Creek contends that this statute "prevents the PSC from tinkering with the payments from WE in any manner." (Oak Creek Brief ("Oak Creek Br.") at 22.) Oak Creek does not attempt to support the circuit court's decision, but requests this Court to "reverse the PSC decision and restore the mitigation payments to the City in full as a matter of law . . ." (Oak Creek Br. at 47)

The Court should reject Oak Creek's arguments because the PSC appropriately exercised its discretion and not violate Wis. Stat. § 196.20(7), a law of limited application to these proceedings.

A. The PSC considered ERGS's Adverse local Effects, and provided limited payments recoverable from ratepayers

Prior to the enactment of Wis. Stat. § 196.20(7), no statute or administrative rule required mitigation payments to host municipalities as a condition for a CPCN.[10] Under Wis. Stat. § 196.491(3)(d) the PSC may not grant a CPCN *unless* it determines that the facility is in the public interest "considering . . . alternative locations . . . individual hardships, . . . safety. . . and that the proposed facility will not

[10] The PSC approved mitigation payments to the City of Port Washington as part of the first phase of PTF. On occasion independent power producers have contracted to make payments to host municipalities, but these payments are not included in rates. (R.18 Record Item 167 vol 18: 3417-3420).

unreasonably interfere with the orderly land use and development plans for the area involved."

In this proceeding the PSC took account of local effects when approving ERGS. While Oak Creek may not like the result, the record and decision show that the PSC properly exercised its discretion.

It is undisputed that the record contains evidence of adverse local impacts of ERGS. Likewise, it cannot be reasonably disputed that the PSC considered this evidence. In selecting the North Site-CUP site, the PSC expressly referenced these likely impacts and WEC's and Oak Creek's mitigation efforts:

> [T] the North Site—CUP alternative involves substantial compromise and agreement between the city and the applicants regarding the proper means of mitigating municipal concerns, such as noise, traffic and air emissions. The city of Oak Creek, which has already hosted a power plant for 50 years, favors use of the North Site—CUP alternative and locating ERGS within its municipal boundaries will ensure that the city is in a stronger position to enforce mitigation measures that protect its citizens from undue impact. The city has rezoned this site as being suitable for manufacturing and is both willing and able to provide potable water and sewage service to the site. The Commission finds these to be determining factors in choosing among the four alternatives, and selects the North Site—CUP alternative as the proper location for ERGS.

(State's App. 147.)

Oak Creek complains that the Final Decision was unreasonable because instead of analyzing evidence of the cost of adverse effects, "the PSC merely determined that such payments were not 'required'" (Oak Creek Br. at 33.) This argument misses the point. No elaboration was required because the PSC accepted Oak Creek's evidence.

The PSC also noted the potential effects of recent legislative efforts that significantly increased state aid for municipal hosts for new generation. 2003 Wisconsin Act 31. Based on the record, the PSC determined that these payments

would approximate payments contemplated in the Development Agreement. (R. 18, Record Item 157/Vol. 20:3985.) As a consequence, additional ratepayer subsidy was not required. (State's App. 149-150.) Oak Creek does not explain why this analysis is unreasonable.

The PSC's decision demonstrates consideration of these issues and a reasoned approach that addressed local concerns.

B. Contrary to Oak Creek's argument, Wis. Stat. § 196.20(7) does not require approval of the Development Agreement in its entirety.

Oak Creek erroneously claims that Wis. Stat. § 196.20(7) "eliminated the authority of the PSC to examine the reasonableness of payments related to 'health and safety impacts.'" (Oak Creek Br. at 36.) According to the city, by excluding "health and safety" impacts from the definition of mitigation payments, "the Legislature ensured that communities . . . do not disproportionately suffer the 'health and safety impacts' naturally associated with the siting of a power plant." (Oak Creek Br. at 30.)

Oak Creek's argument is not supported by a fair reading of the statute which provides in its entirety as follows:

> In this subsection, "mitigation payment" means, as approved by the commission, an unrestricted or recurring monetary payment to a local unit of government in which an electric generating facility is located to mitigate the impact of the electric generating facility on the local unit of government. "Mitigation payment" does not include payments made or in-kind contributions for restricted purposes to directly address health or safety impacts of the electric generating facility on the local unit of government.
>
> (b) Except as provided in par. (c), an electric public utility may not recover in rates any of the following:
>
> 1. The cost of mitigation payments paid by the utility.

> 2. The cost of mitigation payments paid by the owner or operator of an electric generating facility that the owner or operator recovers from the utility by selling electricity to the utility, by leasing the facility to the utility, or by any agreement between the owner or operator of the electric generating facility and the public utility.
>
> (c) The commission shall only approve a mitigation payment agreement that is received by the commission before June 10, 2003, and, if the commission finds the agreement to be reasonable, shall not subsequently modify the agreement.

The unambiguous purpose of the statue is to prohibit the recovery of "mitigation payments" from ratepayers. After the effective date of this measure the PSC no longer may include "mitigation payments" in rates. The city's contrary argument is based on the statute's two limited exceptions.

Oak Creek contends that the exclusion of payments for "health and safety" from the definition of "mitigation payments" precludes examination of the reasonableness of any purported "health and safety" payment under Wis. Stat. § 196.37. (Oak Creek Br. at 31.) The only legal analysis supporting this conclusion is the city's observation that the new measure "governs because it is more specific." (Oak Creek Br. at 32).

The city's argument based on the exclusion of "health and safety" from "mitigation payments" fails for several reasons: First, the statutory terms simply do not state or imply that the Commission's authority regarding ratemaking is curtailed. Second, there is no evidence in the legislative history that suggests ratemaking responsibility is limited by this measure. Third, the city offers no cogent legal analysis to support its interpretation. While it concedes that "[p]rior to the adoption of subsection (7), the PSC had the general authority to determine whether it is reasonable to pass the costs of all mitigation-type payments on to ratepayers" (Oak Creek Br. at 31), the city does not explain how (7) conflicts with rate-making authority. Finally, the city makes no attempt to harmonize the conflict it perceives between (7) and other provisions of Wis. Stat. ch. 196 consistent with the cardinal rule that "[i]n construing statutes that are seemingly in conflict, it is [the court's] duty to attempt to harmonize

them, if it is possible, in a way which will give each full force and effect." *Milwaukee v. Kilgore,* 193 Wis. 2d 168, 184, 532 N.W.2d 690 (1995).

The city also maintains that the Final Decision conflicts with the exception in subsection (c) for "agreements received before June 10, 2003." The city argues that the PSC "violates the law because the PSC retained authority to modify the payments from WE." (Oak Creek Br. at 40-42.)

The city's argument (and the circuit court decision)[11] fail to take into account the PSC's authority to make conditional approvals under Wis. Stat. § 196.395. The law is "that the power to approve necessarily implies the power to grant conditional approval." *City of Appleton v. Transportation Comm'n of Wisconsin,* 116 Wis. 2d 352, 358, 342 N.W.2d 68 (Ct. App. 1983). In this case, the PSC conditionally approved specific terms for recovery of mitigation payments from ratepayers. The terms are fixed by the Final Decision. The fact that the *amount to be recovered* may vary depending upon future shared revenue formulations does not require future modification of the order and does not violate the statute's provision that the PSC "shall not subsequently modify the agreement."

C. Wis. Stat. § 196.20(7) should not be applied retroactively.

Oak Creek observes that the PSC did not object to the retroactive application of Wis. Stat. § 196.20(7) before the circuit court (Oak Creek Br. at 29), but argues that legal principles support this statute's retroactive application to a decision made more than a month before its effective date. (Oak Creek Br. at 27-28.) While the State recognizes that "'[o]rdinarily this court will not consider assignments of error. . . which have not been presented to the trial court' but 'such rule is one of administration and not of power. . .'" *Discher v. Industrial Commission,* 10 Wis. 2d 637, 645, 103 N.W.2d 519, 523 (1960) (citation omitted). The State

[11] The State's initial Brief describes the Circuit Court's erroneous interpretation of Wis. Stat. § 196.20(7).

respectfully requests that the Court consider this issue because it involves a question of law, has been addressed in the parties' briefs and implicates public interests. *Id.* at *645.*

Generally, legislation is presumed to be prospective unless the statutory language clearly reveals by express language or necessary implication an intent that it apply retroactively. *Chappy v. LIRC,* 136 Wis. 2d 172, 180, 401 N.W.2d 568 (1987). Even in the absence of clear intent, a statute will be given retroactive effect if it is procedural or remedial—that is, if it intends to confirm rights already existing providing vested rights are not disturbed. *Boggs v. Morden,* 117 Wis. 2d 773, 775, 345 N.W.2d 490 (1984). Under these standards, this statute should not be given retroactive effect.

The Legislature did not expressly provide for the retroactive application of the statute. Oak Creek asserts, however, that "when a statute by its language or implication shows the Legislature intended retroactive application, the statute applies retroactively." (Oak Creek Br. at 27.) The city interprets the exception for agreements submitted before June 10, 2003, to necessarily imply retroactive treatment and relies upon *State v. Chrysler Outboard Corp.,* 219 Wis. 2d. 130, 162, 580 N.W.2d 203 (1998). (Oak Creek Br. at 27-28.)

While the statute exempts a mitigation payment agreement filed before June 10, 2003, from the blanket prohibition against ratepayer funding, it does not necessarily imply that the statute must be applied in decisions before its effective date. The city's Brief does not explain how the PSC was obligated to take into account statutory terms that were not in effect at the time of the decision.

The city incorrectly relies on *Chrysler*. There, the issue was whether Wis. Stat. § 144.76(3) (1977) applied to a hazardous substance spill that occurred before the law's effective date. The Court concluded that the Legislature's use of the phrase "restore the environment to the extent practicable" necessarily implied intent to address past conduct. *State v. Chrysler*, 219 Wis. 2d. at 163. The Court noted that any other interpretation would produce an absurd

result and frustrate the remedial purpose of the law. *Id.* at 163-164.

Unlike the statute in *Chrysler*, Wis. Stat. § 196.20(7) is not a remedial or procedural statute. The provision establishes a substantive standard to be applied in ratemaking proceedings. It does not confirm preexisting rights or merely revise procedures. Instead, the statute prospectively limits the PSC's discretion when setting rates. Unlike the laws considered in *Chrysler*, the retroactive application urged by the city creates the absurd result of setting standards for a prior PSC decision that occurred before the law was passed.

As argued in the State's initial Brief, the PSC correctly limited the amount of ratepayer subsidy of ERGS. The Legislature's modification of the shared revenue formula will make up the difference between the amounts provided in the Development Agreement and what the PSC approved in its Final Decision.

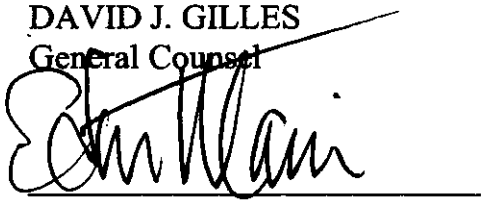
CONCLUSION

For the foregoing reasons, the State asks the Court to affirm the decision of the circuit court with respect to the challenges brought in the cross-appeals.

Dated this 24th day of February, 2005.

Respectfully submitted,

DAVID J. GILLES
General Counsel



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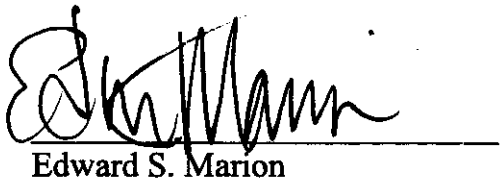
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,372 words.

Dated this 24th day of February, 2005.



Edward S. Marion
Assistant General Counsel

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STATE'S SUPPLEMENTAL APPENDIX

PSC Order to Rescind (July 11, 2000) 101-103

Expansion Plan for Combination of
Calpine and Fox Proposals
(R. 18, Record Item 158/Vol. 23:Ex. 273) 104-110

DATE MAILED
JUL 1 1 2000

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation on the Commission's Own Motion Into Barriers to Contracts Between Electric Utilities and Nonutility Cogenerators and Certain Related Policy Issues	05-EI-112
Investigation on the Commission's Own Motion Into Current Procedures for Authorizing New Generation Facilities (the Advance Plan and the Certificate of Public Convenience and Necessity) to Determine Appropriate Changes Required During the Transition to a Restructured Industry	05-BE-103

ORDER TO RESCIND

Background

On December 14, 1999, the Commission issued its Order to Reopen and Notice of Proceeding, Investigation, and Assessment of Costs in docket 05-EI-112. The Commission did so to consider whether the 1993 final order, establishing a two-stage CPCN process for installing new electric generation, was causing inappropriate regulatory barriers to the installation of needed electric generating plants in Wisconsin. On December 28, 1999, Commission staff sent a letter to all parties in this docket seeking comments on whether to alter, amend, or rescind the two-stage CPCN process. On January 20, 2000, 10 organizations provided their comments on ways to reform the two-stage CPCN process.[1] On May 18, 2000, the Commission determined that the mandatory two-stage CPCN process has created inappropriate regulatory barriers to the

[1] These organizations were: Alliant - Wisconsin Power and Light Company, Dairyland Power Cooperative, Madison Gas and Electric Company, Municipal Electric Utilities of Wisconsin, Northern States Power Company, PG&E Corporation, SEI Wisconsin LLC, SkyGen Energy LLC, Wisconsin Electric Power Company, and WPS Resources Corporation.

installation of needed electric generation in Wisconsin. In light of the passage of 1997 Wisconsin Act 204, construction of new generating capacity by independent power producers has become more simple, and the Commission is currently reviewing at least one such application.

As a result, the two-stage CPCN competitive bidding process need not continue to be compulsory. The Commission therefore modifies Order Point 6 of its original 1993 decision, as shown below, and Order Point 11 of its succeeding decision in docket 05-BE-103, to grant utilities broader discretion to devise appropriate methods of assessing their options for maintaining adequate generating capacity.

CONCLUSION OF LAW

The Commission has authority under Wis. Stat. § 196.39 to issue the following order, amending its prior orders in these dockets.

ORDER

1. Order Point 6 of the Commission decision issued in docket 05-EI-112 on December 23, 1993, is rescinded and recreated to read:

> 6. When determining whether to submit a CPCN application for a large electric generating facility, Wisconsin Public Service Corporation, Wisconsin Electric Power Company, Wisconsin Power and Light Company, Madison Gas and Electric Company, and Northern States Power Company may choose to use the two-stage CPCN competitive bidding process or another method of evaluating alternative proposals, subject to Commission approval on a case-by-case basis.

2. Order Point 11 of the Commission decision issued in docket 05-BE-103 on April 8, 1997, is rescinded and recreated to read:

> 11. When determining whether to submit a CPCN application for a large electric generating facility, Wisconsin Public Service Corporation, Wisconsin Electric Power Company, Wisconsin Power and Light Company, Madison Gas and Electric Company, and Northern States Power Company may choose to use the two-stage CPCN competitive bidding process described in Appendix E or another method of evaluating alternative proposals, subject to Commission approval on a case-by-case basis.

3. The effective date of this order shall take effect 10 days after the date of signing, unless any party in docket 05-EI-112 or 05-BE-103 submits comments on the order.

4. Jurisdiction is retained.

Dated at Madison, Wisconsin, July 10, 2000

By the Commission:

Lynda L. Dorr

Lynda L. Dorr
Secretary to the Commission

LLD:RAP:mem:g:\order\pending\05-EI-112 Order.doc

See attached Notice of Appeal Rights

Docket 05-CE-130
Exhibit ___ (MAR-1)
Schedule 1

Expansion Plan for the Combination of Calpine and Fox proposals

Proposal	Unit Description	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	Totals
Staff Base--	150 MW CT								150		300	150	300	150	150			150	150		150	300		150						2100
Calpine & Fox	WEP 545 MW CC		545			545																			545					1635
	100 MW Biomass																												200	200
$19,166.6 MM	Calpine 523				523																									523
	Fox 280				280																									280
	WEP 515 MW Coal									515	515					515				515			515		515	515	515		515	4635
	WEP 500 MW IGCC																													0
	Totals	0	545	0	783	545	0	0	150	515	815	150	300	150	150	515	0	150	150	515	150	300	515	150	1060	515	515	0	715	9353

Ex. 273

State's Supp. App.

Docket 05-CE-130
Exhibit ___ (MAR-1)
Schedule 2

EGEAS Results for All Staff Base Runs (in $000,000)

	Net Present Value	Differences from Optimal
Optimal	19,073.7	0.0
Calpine	19,080.7	7.0
ERGS w/o IGCC	19,176.3	102.6
Fox	19,093.1	19.4
Calpine & Fox	19,166.6	92.9
ERGS with IGCC	19,423.4	349.7

Docket 05-CE-130
Exhibit ___ (MAR-1)
Schedule 3

Updated EGEAS Model Runs

	EGEAS Model Results ($000,000)				Differences from ERGS-no IGCC		
	Optimal without Calpine	Calpine	ERGS-no IGCC		Optimal without Calpine	Calpine	ERGS-no IGCC
Revised Staff Base	20,036.8	20,000.8	20,085.1		(48.3)	(84.3)	-
SC Johnson Blended	17,479.5	17,544.1	17,715.1		(235.6)	(171.0)	-

Note: As in the other EGEAS model runs, "Optimal without Calpine" means the EGEAS model is allowed to choose the optimal date to add new generating units. It could pick any of WEC's SCPC or IGCC units, but could not pick a Calpine combined-cycle unit. "Calpine" means the EGEAS model has the same choices, but the Calpine 523 MW combined-cycle unit must be picked in either 2006 or 2007. "ERGS-no IGCC" means WEC's two 515 MW SCPC units are forced, in years 2008 and 2009, and no Calpine unit is available for selectionby EGEAS.

Docket 05-CE-130
Exhibit ___ (MAR-1)
Schedule 4

Summary of Expansion Plans

Proposal	Unit Description	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	Totals
Revised Staff Base																														
Optimal	150 MW CT																													
	WEP 545 MW CC		545		545	545	450			300	600	150	150			300	150	300	150		300	300				150	150			3450
$20,036.8 MM	100 MW Biomass																													1635
	WEP 515 MW Coal																													
	WEP 500 MW IGCC								515		515			515						515			515	515			100		100	200
	Totals	0	545	0	545	545	450	0	515	300	1115	150	150	515	0	300	150	300	150	515	300	300	515	515	0	665	250	515	515	9920
Calpine	150 MW CT																													
	WEP 545 MW CC		545			545	450	150		150	600	150	300	150			150	300	150		300	300		545		150	150			3450
$20,000.8 MM	100 MW Biomass																													1635
	Calpine 523				523																						100		100	200
	WEP 515 MW Coal								515		515				515					515			515		-523					0
	WEP 500 MW IGCC																								515	515		515	515	4635
	Totals	0	545	0	523	545	450	150	515	150	1115	150	300	150	515	0	150	300	150	515	300	300	515	545	-8	665	250	515	515	9920
ERGS w/o IGCC	150 MW CT																													
	WEP 545 MW CC		545			545			450	300	600	150	150	300	150			300	150		300	300				150	150			3450
$20,085.1 MM	100 MW Biomass										545																			1635
	WEP 515 MW Coal																										100		100	200
	WEP 500 MW IGCC					515	515									515				515			515	515		515		515	515	4635
	Totals	0	545	0	0	1060	515	0	450	300	1145	150	150	300	150	515	0	300	150	515	300	300	515	515	0	665	250	515	515	9920

Proposal	Unit Description	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	Totals
SCJ Blended																														
Optimal	150 MW CT																													
	WEP 545 MW CC		545		300		300		150	300		150	150	150	150							150		150					150	2100
$17,479.5 MM	100 MW Biomass					545					545																			1635
	WEP 515 MW Coal																													
	WEP 500 MW IGCC										515					515				515			515		515	515			515	3605
	Totals	0	545	0	300	545	300	0	150	300	1060	150	150	150	150	515	0	0	0	515	0	150	515	150	515	515	0	0	665	7340
Calpine	150 MW CT																													
	WEP 545 MW CC		545			545			150	450			300		150	150	150	300				150		150					150	2100
$17,544.1 MM	100 MW Biomass										545																			1635
	Calpine 523				523																									
	WEP 515 MW Coal										515														-523					0
	WEP 500 MW IGCC																			515			515		1030	515			515	3605
	Totals	0	545	0	523	545	0	0	150	450	1060	0	300	0	150	150	150	300	0	515	0	150	515	150	507	515	0	0	665	7340
ERGS w/o IGCC	150 MW CT																													
	WEP 545 MW CC		545			545					1050	150	150	150	150							150		150					150	2100
$17,715.1 MM	100 MW Biomass															545														1635
	WEP 515 MW Coal																													
	WEP 500 MW IGCC					515	515													515			515		515	515			515	3605
	Totals	0	545	0	0	1060	515	0	0	0	1050	150	150	150	150	545	0	0	0	515	0	150	515	150	515	515	0	0	665	7340

State's Sum Ann

Docket 05-CE-130
Exhibit ___ (MAR-1)
Schedule 3
Revised

Updated EGEAS Model Runs

	EGEAS Model Results ($000,000)				Differences from ERGS-no IGCC		
	Optimal without Calpine	Calpine	ERGS-no IGCC		Optimal without Calpine	Calpine	ERGS-no IGCC
Revised Staff Base	20,036.8	20,027.9	20,085.1		(48.3)	(57.2)	-
SC Johnson Blended	17,479.5	17,544.1	17,715.1		(235.6)	(171.0)	-
Alternative SC Johnson Blended	17,826.7	17,882.2	18,010.0		(183.3)	(127.8)	-

Note: As in the other EGEAS model runs, "Optimal without Calpine" means the EGEAS model is allowed to choose the optimal date to add new generating units. It could pick any of WEC's SCPC or IGCC units, but could not pick a Calpine combined-cycle unit. "Calpine" means the EGEAS model has the same choices, but the Calpine 523 MW combined-cycle unit must be picked in either 2006 or 2007. "ERGS-no IGCC" means WEC's two 515 MW SCPC units are forced, in years 2008 and 2009, and no Calpine unit is available for selectionby EGEAS.

State's Sum Ann

Docket 05-CE-130
Exhibit ___ (MAR-1)
Schedule 4
Page 1
Revised

Summary of Expansion Plans

Proposal	Unit Description	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	Totals
Revised Staff Base																														
Optimal	150 MW CT																													
	WEP 545 MW CC		545		545	545	450			300	600	150	150			300	150	300	150		300	300				150	150			3450
$20,036.8 MM	100 MW Biomass																													1635
	WEP 515 MW Coal								515		515			515						515			515	515			100		100	200
	WEP 500 MW IGCC																									515		515	515	4635
	Totals	0	545	0	545	545	450	0	515	300	1115	150	150	515	0	300	150	300	150	515	300	300	515	515	0	665	250	515	515	0
Calpine	150 MW CT																													8920
	WEP 545 MW CC		545			545	450	150		150	600	150	300	150			150	300	150		300	300		545		150	150			3450
$20,027.9 MM	100 MW Biomass																													1635
	Calpine 523				523																						100		100	200
	WEP 515 MW Coal								515		515				515					515			515		-523			515	515	4635
	WEP 500 MW IGCC																								515	515				0
	Totals	0	545	0	523	545	450	150	515	150	1115	150	300	150	515	0	150	300	150	515	300	300	515	545	-8	665	250	515	515	8920
ERGS w/o IGCC	150 MW CT																													
	WEP 545 MW CC		545			545			450	300	600	150	150	300	150			300	150		300	300				150	150			3450
$20,086.1 MM	100 MW Biomass										545																			1635
	WEP 515 MW Coal					515	515									515				515			515	515		515	100		100	200
	WEP 500 MW IGCC																											515	515	4635
	Totals	0	545	0	0	1060	515	0	450	300	1145	150	150	300	150	515	0	300	150	515	300	300	515	515	0	665	250	515	515	0
																														8920

Proposal	Unit Description	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	Totals
SCJ Blended																														
Optimal	150 MW CT																													
	WEP 545 MW CC		545		300		300		150	300		150	150	150	150							160		150					150	2100
$17,479.5 MM	100 MW Biomass					545					545																			1635
	WEP 515 MW Coal										515					515				515			515		515	515			515	3605
	WEP 500 MW IGCC																													0
	Totals	0	545	0	300	545	300	0	150	300	1060	150	150	150	150	515	0	0	0	515	0	150	515	150	515	515	0	0	665	7340
Calpine	150 MW CT																													
	WEP 545 MW CC		545			545			150	450			300		150	150	150	300				150		150					150	2100
$17,544.1 MM	100 MW Biomass										545																			1635
	Calpine 523				523																				-523					0
	WEP 515 MW Coal										515									515			515		1030	515			515	3605
	WEP 500 MW IGCC																													0
	Totals	0	545	0	523	545	0	0	150	450	1060	0	300	0	150	150	150	300	0	515	0	150	515	150	507	515	0	0	665	7340
ERGS w/o IGCC	150 MW CT																													
	WEP 545 MW CC		545			545					1050	150	150	150	150							150		150					150	2100
$17,715.1 MM	100 MW Biomass															545														1635
	WEP 515 MW Coal					515	515													515			515		515	515			515	3605
	WEP 500 MW IGCC																													0
	Totals	0	545	0	0	1060	515	0	0	0	1050	150	150	150	150	545	0	0	0	515	0	150	515	150	515	515	0	0	665	7340

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Summary of Expansion Plans

Proposal	Unit Description	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	Totals
Alternative SCJ Blended																														
Optimal	150 MW CT																		150					150						2100
$17,826.7 MM	WEP 545 MW CC		545		300		300		150		300	150	150	150	150															1090
	100 MW Biomass					545										515				515			515		515	515			515	4120
	WEP 515 MW Coal									515	515																			0
	WEP 500 MW IGCC																													0
	Totals	0	545	0	300	545	300	0	150	515	515	150	150	150	150	515	0	0	150	515	0	0	515	150	515	515	0	0	665	7310
Calpine	150 MW CT																							150					150	2100
$17,882.2 MM	WEP 545 MW CC		545						150		450	150	150	150	150	150	150	150	150											1090
	100 MW Biomass					545																								0
	Calpine 523				523																				-523					0
	WEP 515 MW Coal									515	515									515			515		1030	515			515	4120
	WEP 500 MW IGCC																													0
	Totals	0	545	0	523	545	0	0	150	515	965	150	150	150	150	150	150	150	150	515	0	0	515	150	507	515	0	0	665	7310
ERGS w/o IGCC	150 MW CT																		150					150					150	2100
$18,010.0 MM	WEP 545 MW CC		545		545						1060	150	150	150	150															1090
	100 MW Biomass					515	515									515				515			515		515	515			515	4120
	WEP 515 MW Coal																													0
	WEP 500 MW IGCC																													0
	Totals	0	545	0	545	515	515	0	0	0	1060	150	150	150	150	515	0	0	150	515	0	0	515	150	515	515	0	0	665	7310

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