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.
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 Nos. 03-CV-003478, 03-CV-003731, 04-CV-000133, 04-CV-000149, 04-CV-000530, 04-CV-000533

(Caption continued on following pages)

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF INTERESTED PARTY-RESPONDENT-CROSS-APPELLANT CITY OF OAK CREEK

APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DAVID FLANAGAN PRESIDING

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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INTRODUCTION

The City of Oak Creek ("City") relies on the Statement of the Case in its initial brief to this Court.

STANDARD OF REVIEW

The City disagrees with the characterization by the Public Service Commision ("PSC") of the proper standard of review for the issue of the mitigation payments to the City. As discussed below, the PSC's erroneous and inconsistent interpretation of the relevant statute should be reviewed de novo.

ARGUMENT

I. THE PSC WAIVED THE RIGHT TO ARGUE THAT WIS. STAT. § 196.20(7) DOES NOT APPLY TO THE PAYMENTS TO THE CITY FROM WE ENERGIES.

The PSC argues at page 37 of its brief to this Court that Wis. Stat. § 196.20(7) "does not control the PSC's decision" with regard to the mitigation payments. *See also PSC Br.* at 11 (arguing that statute applies prospectively). It made this argument after having argued to the circuit court that this new statute applies to this case. R.89:10-11; R.63:68. The PSC is an appellant as to this issue, which means that it cannot assert an inconsistent position from the position it advanced in the circuit court. *State v. Darcy N.K.*, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998). This Court should rule that the PSC waived the

right to argue that this statute does not apply in this case.

In addition to, or instead of, ruling on the basis of waiver, this Court should rule that the PSC is judicially estopped from arguing that the new law does not apply. "Judicial estoppel precludes a party from asserting a position in a legal proceeding that is inconsistent with a position previously asserted." *Coconate v. Schwanz*, 165 Wis. 2d 226, 231, 477 N.W.2d 74 (Ct. App. 1991). The PSC's attempt to change its stance on the applicability of the statute is beyond inconsistency; it is a 180-degree turn-around.

The addition of subsection (7) to Wis. Stat. § 196.20 explicitly protects the payments from WE to the City because the payments are for "health or safety impacts" on the City. The evidence in the record regarding the "health or safety impacts" on the City is both overwhelming and undisputed. The payments to the City are protected because the new statute specifically (1) exempted payments for "health or safety impacts," and (2) allowed payments for other impacts if the agreement was received by the PSC by June 10, 2003, and the payments are reasonable.

Prior to the PSC's brief to this Court, the City understood that the PSC agreed with both the City and the

circuit court on the applicability of the new law — and for good reason: the PSC conceded in oral argument before the circuit court that subsection (7) applies in this case:

> THE COURT: Mr. Ludwig [a PSC Attorney], if I understand things correctly, the parties agree that the mitigation agreement is subject to the new statute, 196.20(7). There's no dispute about the applicability of that statute; am I right?
>
> MR. LUDWIG: The way I would describe it, Your Honor, is that it is specifically exempted by 196.20(7).
>
> . . . .
>
> Let's see. The first portion of this is the definitions in that subsection, and there is - - I guess it is at the end, so must be paragraph (c) or (d) which states that any mitigation agreement signed before a specific date, June 10, 2003, is not subject to the prohibition. That's how the law applies to this case. It specifically exempts this mitigation agreement from the general prohibition, and that's all it does.

R.89:10-11. The PSC's statement that the new law exempts the agreement containing the payments to the City is, in effect, a concession that the statute applies in this matter.

The PSC also argued in a brief to the circuit court that "[u]nder Wis. Stat. § 196.20(7)(c), such payments can only be made if a public utility reached an agreement with the municipality before June 10, 2003." R.63:68. That

amounted to a specific recognition of the statute's application.

As discussed below, the reason that the PSC has switched its position is to avoid the strong protection in the law that was created for payments for "health or safety impacts." Wis. Stat. § 196.20(7)(a).

Now, not only does the PSC assert that subsection (7) does not apply, but it also does not address the significance of the plain and clear exception for payments for "health and safety impacts." *PSC Br.* at 34-39. The PSC has chosen to apply other portions of relevant legislation and argue that those other sections militate in favor of reduced mitigation payments, *PSC Br.* at 36-38, while in the next breath saying that *certain* provisions in the new subsection (7) do not apply here.

II. THE PSC'S DECISION TO MODIFY THE MITIGATION PAYMENTS SHOULD BE REVIEWED DE NOVO BECAUSE THE PSC HAS INTERPRETED WIS. STAT. § 196.20(7) INCONSISTENTLY IN THIS CASE, HAS CONTRAVENED THE PLAIN MEANING OF THE STATUTE, AND HAS NO EXPEREIENCE WITH PARTICULARIZED REGULATION OF MITIGATION PAYMENTS.

The PSC contends that it is entitled to great weight deference on the issue of the payments to the City. *PSC Br.* at 9-10. However, its interpretation of the new law has been inconsistent *in this matter*. As discussed above, the PSC conceded in the circuit court that this new law

applies to this matter. R.89:10-11; R.63:68. Now, the PSC argues that the new law does not apply at all. The PSC fails to discuss in even one sentence of its brief to this Court the effect of the exception for "health and safety impacts" on this matter, much less analyze the record developed in the PSC hearings against the new standards brought about by the new statute. *PSC Br.* at 11, 34, 39. The PSC's inconsistent interpretation of the applicable law compels a de novo review of the PSC's decision on the mitigation payments. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 285, 548 N.W.2d 57 (1996).

The PSC's interpretation also does not deserve deference because it contravenes the plain meaning of the new law. "The plain meaning of a statute takes precedence over all extrinsic sources and rules of construction, including agency interpretations." *UFE Inc.*, 201 Wis. 2d at 282 n.2. Thus, even if an agency interpretation should otherwise be afforded deference, "it will not be upheld if the interpretation directly contravenes the clear meaning of the statute." *Id.* The PSC's interpretation of the new law ignores the exception for "health or safety impacts," in contravention of the plain language and meaning of the statute. Whether the PSC ignores the exception, and, as a result, misinterprets the law, is clear because the PSC

refuses to even mention the impact of the exception. In addition, the PSC's position that the new statute applies "prospectively," *PSC Br.* at 11, disregards the plain language that indicates the law applies to agreements received by the PSC before June 10, 2003. Wis. Stat. § 196.20(7)(c).

Furthermore, the PSC has no experience applying a statute that regulates mitigation payments in any particularized way; the statutes have not previously contained a provision specifically identifying mitigation payments. It is not the particular facts of this case that prevent great weight deference regarding the mitigation payments. Rather, it is because the PSC has no experience applying this "particular statutory scheme." *Honthaners Rests., Inc. v. LIRC*, 2000 WI App 273, ¶12, 240 Wis. 2d 234, 621 N.W.2d 660. The PSC's decision regarding the payments to the City is not entitled to deference because it does not have experience with this particular statutory scheme. *Id.; see also UFE Inc.*, 201 Wis. 2d at 285 (de novo review applicable when the matter is one of first impression for the agency).

III. THE PSC FAILS TO ACKNOWLEDGE A NEW EXCEPTION FOR PAYMENTS RELATED TO HEALTH AND SAFETY IMPACTS IN WIS. STAT. § 196.20(7).

The PSC's erroneous interpretation is exemplified in its statement that "[b]y its explicit terms, the statute does only one thing: prohibit the PSC from allowing a utility to recover in its rates the cost of mitigation payments made in an agreement received by the Commission on or after June 10, 2003." *PSC Br.* at 37.

Contrary to the PSC's interpretation of the statute, this new law does a number of things that are relevant to this case. The most important results of the new statute are that it (a) governs mitigation-type payments with specific statutory language for the first time; (b) excepts payments for "health or safety impacts" from the reasonableness requirement of the law; and (c) requires that mitigation payments for non-"health or safety impacts" be reasonable and submitted to the PSC before June 10, 2003.

In considering the impact of the addition of subsection (7) to Wis. Stat. § 196.20, it is important to consider the state of the law immediately before its adoption. Prior to enactment of Wis. Stat. § 196.20(7), no statute specifically governed mitigation-type payments. Rather, if an electric utility agreed to make mitigation

payments to a municipality, the PSC would consider whether such payments could be passed on to ratepayers under its general rate-setting authority, Wis. Stat. § 196.37. Under that section, the PSC would determine whether the rates including the mitigation payments are unjust or unreasonable, among other factors.[1]

Under the new subsection (7) of Wis. Stat. § 196.20, the Legislature dramatically modified the way that the PSC is to analyze these types of payment agreements. By declaring that payments for reasons other than "health and safety" must be reasonable, the Legislature permitted some continued authority by the PSC in that regard, although that authority continued only with regard to agreements received by the PSC before June 10, 2003. Meanwhile, by specifically exempting payments for "health and safety

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[1] The general rate-setting statute provides a broader set of considerations than the reasonableness consideration under Wis. Stat. § 196.20(7):

> If, after an investigation under this chapter or ch. 197, the commission finds rates, tolls, charges, schedules or joint rates to be *unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise unreasonable or unlawful*, the commission shall determine and order reasonable rates, tolls, charges, schedules or joint rates to be imposed, observed and followed in the future.

Wis. Stat. § 196.37(1) (emphasis added).

impacts," the Legislature expressly removed such payments from the PSC's control. The statute states that a "[m]itigation payment does not include payments made . . . to directly address health or safety impacts." Wis. Stat. § 196.20(7)(a). This is relevant because the statute goes on to cut off recovery in rates for non-"health and safety impacts" in agreements after June 10, 2003. Accordingly, with the use of precise language the Legislature removed altogether the ability of the PSC to examine the reasonableness of the payments called for by the Development Agreement between WE and the City, to the extent those payments are for "health or safety impacts." This Court should restore the payments to the City as a matter of law based on the undisputed evidence of "health or safety impacts" well beyond the amounts called for by the Development Agreement.

IV. THE PSC DID NOT MAKE A FINDING, NOR CONDUCT ANY ANALYSIS, WITH REGARD TO THE REASONABLENESS OF THE PAYMENTS TO THE CITY AND THERE IS NOT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT ITS MODIFICATION OF THE MITIGATION PAYMENTS.

The PSC did not make a finding, nor conduct any analysis, regarding the types of impacts to be mitigated by the payments from WE Energies. As the PSC itself said in a related matter, mitigation payments are relevant to whether a CPCN should be issued in the first place, under the CPCN

statute. R.Supp.App.102 (*Public Service Commission Order to Reopen and Amended Order*, Docket No. 05-CE-117 et al., at 2 (Feb. 27, 2003)).

As the PSC points out in its brief, the record underlying its decision in this matter are staggeringly voluminous. *PSC Br.* at 3. Despite that fact, the PSC claims that one line of testimony from one witness constitutes substantial evidence to support its decision to modify the mitigation payments to the City. *Id.* at 36 (citing R.18:157:20:3985). The witness testified that recent modifications to the state shared formula law will result in increased revenue for the City, in an amount nearly equal to the amount that the City was to receive in payments from WE. *Id.*[2]

When endorsing the mitigation payments in We Energies' Port Washington application for a CPCN, the PSC declared

---

[2] It should be noted that any similarity between the amount of state shared revenue dollars and the payments to the City from WE is pure coincidence. When the payments were negotiated at arms-length with WE, the current state shared revenue formula was not in existence. The PSC's decision to limit the payments to the City to the amount of state shared revenue was arbitrary. The amount of state shared revenue dollars bears no relationship to the impacts on the City, and the amount of state shared revenue could change at any time. The current shared revenue program evolved through a number of changes to the law in the early 1970s. The state shared revenue statute, Wis. Stat. Ch. 79, has been amended many times in the past thirty years.

that the CPCN statute (particularly, Wis. Stat. § 196.491(3)(d)3., 4., & 6.) provides support for mitigation payments "because they allow the Commission to consider individual hardships, public health and welfare, and unreasonable interference with orderly land use and development plans in the area involved." R.Supp.App.102 (*Public Service Commission Order to Reopen and Amended Order*, Docket No. 05-CE-117 et al., at 2 (Feb. 27, 2003)). The PSC should have applied the same analysis to this matter. Instead, without considering the overwhelming evidence presented by the City that there will be impacts well beyond the state shared revenue dollars, the PSC decided that the mitigation payments "are not required." Such a decision did not fulfill the PSC's duty to analyze the record before it and to consider the effect of the Elm Road Generating Station ("ERGS") on the host community.

Contrary to what the PSC argues in its brief at page 35-39, the City has never argued that any law specifically requires the PSC to approve the mitigation payments to the City. Rather, the City has consistently maintained that the PSC was tasked with conducting an actual review of the evidence put before it to consider the mitigation payments in light of the considerations in the CPCN statute. After the passage of Wis. Stat. § 196.20(7), the City also has

matter, in part so that a Conditional Use Permit could be issued for the ERGS. In addition, as noted in the City's brief to this Court, it still cannot quantify all of the impacts. Notably, however, when all of the "health or safety impacts" are totaled, including annual costs, one-time costs, and costs now difficult to calculate, the amount will exceed the total fiscal impact to the City of ERGS.

Further, the City released WE Energies from claims related to the "health or safety impacts" of the ERGS, which is a major component of the consideration for the Development Agreement. R.App.248:¶8 (R.18:158:Ex.142:¶8). Paragraph 8 of the Development Agreement provides as follows:

> COMPROMISE OF CITY CLAIMS. WEC and the City acknowledge and agree that the construction and operation of the New Facility, and other activities related thereto as described in the applications before the PSCW for CPCN approval, are anticipated to have a substantial effect on the City (the "Effects"). Without limitation, the Effects might include safety concerns, noise, or the need for additional fire, police and emergency medical service. WEC and the City agree that the obligations undertaken by WEC in this Agreement are designed to mitigate the Effects, and the City agrees not to sue WEC nor any of its Subsidiaries for the Effects except as set forth herein. Nothing in this Agreement shall be construed to preclude the City from taking any action, including the filing of legal actions, to enforce provisions of its ordinances, permits or approvals, or the provisions of this

> Agreement related to the New Facility; provided, however, that such actions shall not prevent the continued use or operation of the New Facility in accordance with paragraph 1 and all other state permits.

R.App.248:¶8 (R.18:158:Ex.142:¶8).

Such a release cannot be broken down into an enumerated list when the City does not know what claims may exist in the future. Nevertheless, there is certainly the potential for that release being worth a significant sum, which further justifies the payments to the City. While the cost to ratepayers for that release will be paid by WE over the course of the term of the Development Agreement, the release could end up as a savings to WE (and ratepayers) when the City cannot assert those released claims against WE. The release of claims was not an after-thought to the Agreement. It was part of arm-length negotiations implicit in which was the parties' contemplation of the costs of impacts on the City. Unfortunately, the PSC neglected to engage in any analysis regarding the effect of this release provision on the reasonableness of the mitigation payments.

CONCLUSION

No party, other than the PSC, opposes the payments from WE Energies to the City. In fact, other parties have specifically acknowledged the significant impacts that the

City is bound to suffer as a result of hosting a large power plant for numerous decades. *E.g., Br. of Clean Wisconsin, Inc. and S.C. Johnson, Inc.* at 22. The City requests that this Court reverse the PSC decision and restore the mitigation payments to the City in full as a matter of law, based on Wis. Stat. § 196.20(7) and the undisputed evidence of "health or safety impacts" exceeding the amounts to be paid to the City.

Dated this 24th day of February, 2005.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 15 pages.

Dated this 24th day of February, 2005.

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX
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Order to Reopen an Amended Order of the Public Service Commission of Wisconsin, Docket No. 05-CE-117 et al. (Feb. 27, 2003). R.Supp.App.101

DATE MAILED

FEB 2 8 2003

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Approval of Affiliated Interest Transactions Between W.E. Power; LLC; Wisconsin Electric Power Company; and Wisconsin Energy Corporation	05-AE-109
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	05-CE-117
Application of Wisconsin Gas Company, as a Gas Public Utility, for Authority to Construct a High-Pressure Natural Gas Line in Washington and Ozaukee Counties, Wisconsin	6650-CG-211
Application of American Transmission Company for a Certificate of Authority to Rebuild and Upgrade Certain Transmission System Facilities to Support the Port Washington Generating Station	137-CE-104

ORDER TO REOPEN AND AMENDED ORDER

On December 19, 2002, the Commission issued a final decision in the above referenced dockets. As part of its decision the Commission set the route for a gas pipeline to the Port Washington power plant in docket 6650-CG-211. It also denied a $500,000 annual mitigation payment from Wisconsin Energy Corporation to the city of Port Washington.

The city of Port Washington requested the Commission to reconsider, reopen, and amend its decision regarding the mitigation payments. Mr. Gerry Geiger filed a petition for rehearing concerning the proper route for a gas pipeline, received by e-mail on January 10, 2003. Mr. and

Ms. Thomas and Michelle Holtz also filed comments regarding the proper route for the gas pipeline, received by e-mail on January 13, 2003.

Gas Pipeline Petitions

The Commission determines that the gas pipeline route had been deliberately reviewed and chosen, that there was significant evidence supporting the selected route in the record and that the decision had been communicated appropriately. Therefore, the Commission will not reopen the matter with respect to that issue.

City of Port Washington Petition

The proposed $500,000 per year mitigation payment in this matter is similar to mitigation actions that project applicants in other cases have taken to assure local support for power plant locations, such as agreements by the applicant to pay for road improvements and pollution abatement. The mitigation proposal offers a flexible and creative approach to the use of a brownfield site. The city of Port Washington presented testimony that it will incur real costs from the continued use of this site for electric power generation and by the conversion from coal to gas, costs that would not otherwise be reimbursed. However, the record contains undisputed testimony that the statistical fiscal impact on ratepayers would be zero. Furthermore, the ratepayers will ultimately benefit by improved reliability of service and cost-effective service. Wis. Stat. § 196.491(3) (d)3., 4., and 6 also provide statutory support for such a payment, because they allow the Commission to consider individual hardships, public health and welfare, and unreasonable interference with orderly land use and development plans in the area involved.

The Commission orders the matter to be reopened and grants the mitigation payment as set forth in Exhibit 211 (the agreement dated September 17, 2002, between the city of Port Washington and Wisconsin Energy Corporation) subject to the following conditions:

1. The Commission reserves its authority to review this approval prospectively in the event the state of Wisconsin increases remuneration to municipalities through shared revenue or other mechanisms created by legislative action.

2. Jurisdiction is retained.

Dissent

Commissioner Garvin dissents.

Dated at Madison, Wisconsin, January 27, 2003

By the Commission:

Lynda L. Dorr

Lynda L. Dorr
Secretary to the Commission

LLD:LMS:bap:g:\order\pending\05-AE-109, 05-CE-117, 6650-CG-211 137-CE-104 reopen.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 review able.

Revised 9/28/98

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)

APPEAL FROM A DECISION OF THE CIRCUIT COURT OF DANE COUNTY, THE HONORABLE DAVID FLANAGAN, PRESIDING

RESPONDENT 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,
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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.

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

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ISSUE ADDRESSED IN THIS RESPONDENT BRIEF

1. Does the Final Decision violate the Energy Priorities Law, Wis. Stat. §§ 1.12 (4) and 196.025, by failing to include Calpine's alternative proposal in the chosen energy expansion plan?

   Trial court decision: Yes.

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. SUPPLEMENTATION AND CORRECTION OF APPELLANTS AND CO-APPELLANTS' STATEMENT OF THE CASE.

A. Introduction.

Calpine Corporation's initial brief included a detailed statement of the case that will not be repeated here, except to the extent necessary to provide context to the issue addressed. However, several statements made by Wisconsin Electric Power Company, Wisconsin Energy Corporation, and W.E. Power, LLC (referred to collectively as "WEC"), the Public Service Commission of Wisconsin ("PSC"), Wisconsin Public Power, Inc. ("WPPI"), and Madison Gas and Electric Company ("MG&E") in their Statements of the Case require clarification and, in some cases, correction.[1]

This case involves numerous issues emanating from WEC's 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 known as the Elm Road Generating Station ("ERGS") in Oak Creek, Wisconsin. Calpine Corporation ("Calpine") participated in the CPCN proceeding in order to propose a gas-fired power supply option that would provide Wisconsin's utility ratepayers the least cost power supply available, consistent with Wisconsin's statutorily required energy priorities.

[1] The initial briefs of these parties, filed with this court on February 4, 2005, are referred to as "WEC Brief," "PSC Brief", and "WPPI/MG&E Brief," respectively.

Specifically, 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. R.38, Item 160, Exh. 201c.; 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, and is capable of providing baseload energy. R.18, Item 157, pp. 3366-3367.[2] Calpine's proposal did not preclude the construction of coal-fired facilities by WEC at the Oak Creek site, or other locations.

B. 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. R.18, Item 119. In the FEIS, the PSC stated its intention to adhere to the mandate of the Energy Priorities Law by quoting Wis. Stat. § 196.025 and the priorities listed in Wis. Stat. § 1.12(4), and then stating that "[t]he following sections in this chapter [of the FEIS] address these priorities, in the order listed [in that statute]." R.18, Item 119, pp. 47-48.[3]

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[2] WEC generalizes, without citation, that gas fired units are designed to address intermediate load needs while coal filed units are designed to provide baseload power. WEC Brief p. 3. WPPI/MG&E similarly claim that natural gas facilities are necessarily intermediate or peak load facilities, as opposed to baseload facilities. WPPI/MG&E Brief p. 8. These claims are not accurate, as demonstrated by the PSC's issuance of CPCNs to Calpine's gas-fired Fond du Lac Energy Center and Fox Energy Center as baseload facilities. R.54:9-10 (the "*Fond du Lac Order*"), App.I.59-60; R.79:9 (the "*Fox Energy Order*"), App.I.83. References to "App.I.___" and "App.II.___" are to Volumes I and II of Calpine's Appendix, respectively, submitted with its initial brief.

[3] The PSC repeated this mandate in its Final Decision. R.18, Item 150 (hereinafter, "Final Decision") p. 14.

To address these priorities in the appropriate order, the PSC Staff used the Electric Generation Expansion Analysis System ("EGEAS") model to identify the most 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.

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 NW 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.

In comparing the costs of the ERGS facility to the costs of the Calpine proposal, the FEIS concluded, in part:

- 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.

R.18, Item 119, Summary, pp. xxv, 68, 93.

As demonstrated in greater detail in Calpine's initial brief, according to the PSC's EGEAS analysis, 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 alone. 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 first in the supply mix. R.18, Item 158, Exh. 273.

Furthermore, unlike the ERGS project, the Calpine proposal promotes fuel diversity in the state. Wisconsin, and WEC in particular, 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.

C. The Final Decision and Circuit Court Order

On November 10, 2003, the PSC issued its Final Decision granting a CPCN for the ERGS project. Final Decision pp. 19-23. 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 WEC's energy expansion plan even though it is

lower in 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.*[4]

Several parties, including Calpine, sought judicial review of the PSC's Final Decision. On November 29, 2004, the circuit court issued its Order Upon Judicial Review of Public Service Commission Order (the "Order"). R.84. In the Order, the circuit court vacated and remanded the PSC's Final Decision for numerous reasons. R.84:52-54. The court determined that, in the Final 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." *Id.* at 35. Instead, the circuit court found that

> [t]he 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 [Final Decision] simply states, repeatedly, that coal-fired equipment must be used because the need is for baseload power... The Commission candidly describes the preference for high-sulfer 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
> >
> > [Final Decision], p. 21, emphasis added.
>
> The above passage is revealing. The selection of the appropriate fuel is not a policy choice. The policy choice had been made by the legislature with the enactment of sec. 1.12, Wis. Stats.

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[4] Although the PSC, WEC, and WPPI/MG&E devote substantial attention in their briefs to describing the volume of the record before the PSC, the length of the hearings in this proceeding, and the nature of the technical testimony elicited during those hearings, *see* PSC Brief pp. 3, 6-7, WEC Brief pp. 4-5, WPPI/MG&E Brief p. 13-16, such details are immaterial to this court's consideration of the errors of law made by the PSC in applying the Energy Priorities Law in the Final Decision.

Id. at 36-37. The circuit court further found that "[n]o 'policy' as to which fuel is always best for baseload operation has been identified" and that other "qualitative factors" purportedly favoring high-sulphur coal over natural gas "are not stated in the [Final Decision] nor can they be readily inferred." *Id.* at 37.

In response to the PSC's claim that the legislative history of the Energy Priorities Law and its purported conflict with another statute allowed the PSC to exercise broad discretion in applying that law, the circuit court held that:

> 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 [sic] now the case, *City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992)....

and

> There is no obvious conflict between the [Energy Priorities Law and the Plant Siting Law] and each deals with an entirely separate question.

Id. at 38-39.

The circuit court concluded that "[t]he [Final Decision], 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." *Id.* at 40.

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 PSC failed to implement 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. Instead, the PSC overrode the legislature's policy choice and made its own policy determination regarding which fuel resource ought to be Wisconsin's priority. As a result, 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.

The PSC and WEC attempt to justify the decision by pointing to factors, not found in the text of the Energy Priorities Law, that they claim support the PSC's decision. However, the PSC's and WEC's emphasis upon a claimed priority for "baseload" generation, which has never before been applied by the PSC in making a determination under the Energy Priorities Law, does not justify rejecting the Calpine proposal. Neither do the alleged other factors, cited by WEC or alluded to in the Final Decision, supply that justification.

Moreover, WEC's and the PSC's effort to expand the PSC's discretion beyond the limits imposed by the language of the law itself is contrary to the rules of statutory construction and results in the PSC assuming discretion that neither the statutory language nor legislative history support. Furthermore, WEC's and the PSC's argument that the Calpine proposal was not included in the energy expansion plan because it could not completely displace the need for ERGS

misconstrues the Energy Priorities Law and is inconsistent with the PSC's own interpretations of that law.

The only way for the PSC to have met its obligations under the Energy Priorities Law was to include Calpine's Fond du Lac Energy Center in the chosen resource supply option. Adoption of WEC's most recent business plan required the PSC to fundamentally alter its prior interpretation and application of the Energy Priorities Law, undermining coherence and consistency in the administrative process.

Accordingly, this court should require the PSC to apply the Energy Priorities Law to include the Calpine proposal in the chosen energy expansion plan consistent with the mandate of the legislature and the interest of Wisconsin's ratepayers.

ARGUMENT

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

The PSC interpreted Wisconsin's Energy Priorities Law contrary to the clear meaning of that law, inconsistent with its prior interpretations of that law, and assuming a degree of discretionary authority that was not conferred by the legislature. 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. Labor & Indus. Review Comm'n ("LIRC")*, 2004 WI 77, ¶ 16, 272 Wis. 2d 586, 601 N.W.2d 157 (citations omitted).

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. Department of Indus. Labor, and Human Relations ("DILHR")*, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993). 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).

Moreover, review of discretionary determinations are given due weight deference only if discretionary authority is lawfully conferred. Wis. Stat. § 227.57(10); *see Heritage Credit Union v. Office of Credit Unions*, 2001 WI App 213, 247 Wis. 2d 589, 611, 634 N.W.2d 593, 604. Where discretionary authority is unlawfully assumed, no deference is accorded to the agency determination. *See Stern by Mohr v. Wisconsin Dep't of Health and Family Servs.*, 212 Wis. 2d 393, 398, 569 N.W.2d 79, 82 (Ct. App. 1997).

Furthermore, as this court held in *UFE*, "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." *UFE*, 201 Wis. 2d at 282 n.2. Thus, 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; *Lisney v. LIRC*, 171 Wis. 2d 499, 493 N.W.2d 14 (1992).

In their briefs, neither the PSC nor WEC applies their general statements concerning the great weight deference standard to the PSC's interpretation of the Energy Priorities Law. The great weight standard is inapplicable to the PSC's determination under the Energy Priorities Law because it fails to satisfy any, much less all four, of the prerequisites to applying such deference. *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 539 N.W.2d 98 (1995); *Currie v. DILHR, Equal Rights Div.*, 210 Wis. 2d 380, 565 N.W.2d 253 (Ct. App. 1997).

Further, this court should reject WPPI/MG&E's argument that substantial deference should be afforded the Final Decision on the basis that it comprises a "decision as to the meaning or reach of a statute" that involved "reconciling conflicting policies." *See* WPPI/MG&E Brief p. 23. This is not the standard applied in Wisconsin, and WPPI/MG&E cite no Wisconsin authority in support of this proposition. Moreover, WPPI/MG&E fail to identify any conflict present here that would merit deference to the PSC. On the contrary, the circuit court recognized that no such conflict exists: "[t]here is no obvious conflict between the [Energy Priorities Law and Plant Siting Law] and each deals with an entirely separate question." R.84:38.

This court also should reject WPPI/MG&E's argument, made without citation to Wisconsin law, that deference is required based upon a distinction between "adjudicative" and "general" facts. WPPI/MG&E claim that the Final

Decision was based upon the latter, "such as the state's need for fuel diversity," and then claims that "agency decisions based on general facts are inherently policy based, and hence entitled to substantial judicial deference." WPPI/MG&E Brief p. 40.

However, the same treatise cited by WPPI/MG&E, in the same section cited by WPPI/MG&E, cautions against deference in cases like the one before this court:

> A court does not invade agency expertise when it refuses to adopt without question an agency pronouncement. Mere existence of expertise is not enough, the agency must have actually exercised the expertise in making the finding. Moreover, "expertise cannot be used as a cloak for fiat judgments."

3 Charles H. Koch, Jr., *Admin. L. & Prac.* §12.24[2] (2d ed. 2005) (quoting *Tennessee Gas Pipeline, Co. v. F.E.R.C.*, 926 F.2d 1206, 1211 (D.C. Cir. 1991) (remanding order to F.E.R.C. due to F.E.R.C.'s unsupported use of market theory that was inconsistent with previously applied theories)).

In the Final Decision, the PSC demonstrated no exercise of expertise in making findings related to fuel diversity or "other factors." Rather, as the circuit court found, "the 'qualitative factors' alluded to [in the Final Decision] are not stated in the [Final Decision] nor can they be readily inferred." R.84:37. Indeed, the PSC abandoned the language of the Energy Priorities Law, and acted inconsistently with its prior orders, in issuing a CPCN to WEC by fiat rather than on the basis of established law.

Finally, WEC's and the PSC's claim that only the substantial evidence test applies to the PSC's application of the Energy Priorities Law is wrong. The substantial evidence test does not apply to the purely legal issue of the PSC's misinterpretation of that law. *See Epstein v. Benson*, 2000 WI App 195, ¶26, 238 Wis. 2d 717, 735, 618 N.W.2d 224 ("A different standard of review for agency decisions is applied for questions of law [*i.e.*, great weight, due weight, or de novo] and questions of fact [*i.e.*, substantial evidence]."(citation omitted)).

For all these reasons, no deference is due to the Final Decision.

II. THE PSC INCORRECTLY INTERPRETED AND APPLIED THE ENERGY PRIORITIES LAW.

The PSC's refusal to include the gas-fired Calpine proposal as part of the selected energy expansion proposal violates the clear statutory requirements of Wis. Stat. §§ 196.025(1) and 1.12(4), and is inconsistent with the PSC's prior interpretation of those statutes. Instead of enforcing the mandate of the law, the PSC manufactured discretion that it used to disregard the statutory requirements. Such a misguided application of the Energy Priorities Law is unlawful.

A. The Energy Priorities Law And The PSC's Prior Interpretations Of That Law Mandate The Inclusion Of The Calpine Option In The Selected Energy Expansion Plan.

1. The Energy Priorities Law is clear on its face.

The plain language of the Energy Priorities Law mandates the selection of the highest priority resource provided it is cost effective, technically feasible, and

environmentally sound. In this case, that resource is Calpine's Fond du Lac Energy Center.

Proper statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, the court applies that meaning without resorting to extrinsic sources. *See Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110; *Prison Litig. Reform Act in State ex rel. Cramer v. Schwarz*, 2000 WI 86, ¶ 18, 236 Wis. 2d 473, 481, 613 N.W.2d 591, 596 (citations omitted); *State ex rel. Neelen v. Lucas*, 24 Wis. 2d 262, 267, 128 N.W.2d 425, 428 (1964) ("[I]t is often said that when the words are plain there is no room for judicial construction."). Further, the general rule in interpreting statutory language is that "the word 'shall' is presumed mandatory when it appears in a statute. " *In re Commitment of Sprosty*, 227 Wis. 2d 316, 324, 595 N.W.2d 692, 696 (1999) (internal citation omitted).

The Energy Priorities Law identifies the policy choice made by the legislature with respect to the energy priorities of this 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***:
>
> * * *
>
> (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.

Wis. Stat. § 1.12(4) (emphasis supplied).

The legislature has required the PSC to implement these energy priorities:

> 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.

Wis. Stat. § 196.025(1) (emphasis supplied).

The plain language of Wis. Stat. § 196.025 ***mandates*** that the PSC follow the requirements of Wis. Stat. § 1.12(4). The PSC is not given the discretion to disregard those priorities.

The requirements in Wis. Stat. § 1.12(4) are similarly clear. In meeting energy demands, the options are to be considered "***in the order listed***." Following the mandate of this section, the PSC must select a natural gas-fired energy resource instead of a coal-fired resource, if the natural gas-fired source is cost effective, technically feasible, and environmentally sound. Moreover, as between coal resources, coal with a sulfur content of less than 1% must be chosen over other types of coal.

This plain interpretation is supported by the PSC's past applications of these statutes. The PSC previously and repeatedly has concluded that, pursuant to Wis. Stat. § 196.025(1), it "***must*** implement these priorities in its energy-related decisions, to the extent 'cost-effective, technically feasible and environmentally sound.'" R.54:16.[5] (Emphasis supplied).

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[5] *See, e.g.*, the following PSC orders: *Fond du Lac Order*, R.54:15-16, App.I.11-12; *Fox Energy Order*, R.79:12, App.I.85-86; Final Decision, Docket No. 05-CE-131 (June 30, 2004), p. 8 (the "*Power Ventures Order*"), R.App.89; Final Decision, Docket No. 05-CE-121 (October 9, 2003), pp. 11-12 (the "*West Campus Order*"), App.II.458-459; Final Decision, Docket No. 05-CE-117 (December 20, 2002), p. 12 (the "*Port Washington Order*"), R.App.27; Final Decision, Docket No. 05-CE-128 (October 30, 2002), p. 8 (the "*Rainy River Order*"), R.App.8; Final Decision, Docket No. 9346-CE-100 (September 24, 2002), p. 13 (the "*Riverside Order*"), App.I.121;

Thus, under the plain language and prior PSC interpretations of the Energy Priorities Law, the PSC must select an option that utilizes natural gas as part of a resource expansion plan over an option that utilizes only coal where utilization of the natural gas option is cost-effective and technically feasible.

2. The Energy Priorities Law mandates the inclusion of the higher priority, cost effective, technically feasible, and environmentally sound Calpine option in WEC's resource expansion plan.

The PSC acknowledged, in the FEIS and Final Decision, that it "must implement," in the order listed in the statute, "[the priorities set forth in Wis. Stat. § 1.12(4)] in its energy related decisions, to the extent 'cost effective, technically feasible and environmentally sound.'" Final Decision p. 14; R.18, Item 119, pp. 47-48. There is no debate that Calpine's natural gas option is the highest priority resource under the Energy Priorities Law while the ERGS' high-sulphur coal option is the lowest priority resource, ranking below even oil and low-sulphur coal. *See* Wis. Stat. § 1.12(4). The PSC and WEC do not challenge this fact.

The Calpine proposal also is cost effective, technically feasible, and environmentally sound. Consequently, according to the PSC's own acknowledged directive to implement the energy priorities of the state in the order listed in Wis.

Findings of Fact, Conclusions of Law, Certificate, and Order, Docket No. 05-CE-116 (March 22, 2002), p. 9 (the "*Mirant Portage Order*"), App.II.419; Findings of Fact, Conclusions of Law Certificate, and Order, Docket No. 9340-CE-100 (November 22, 2000), pp. 8-9 (the "*BadgerGen Order*"), App.II.359-360. The court "shall take judicial notice" of agency orders, such as these. *See* Wis. Stat. § 902.03(1); *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). References to "R.App.___" are to Calpine's Respondent Appendix provided with this brief.

Stat. § 1.12(4), inclusion of the Calpine option in the chosen resource expansion is mandated by the Energy Priorities Law.

a. Calpine's proposal is cost effective.

Neither WEC nor the PSC claim, nor could they, that by any quantitative measure the Calpine option is not cost effective. WEC's own EGEAS analysis and the PSC staff's EGEAS runs demonstrate that the Calpine proposal is a cost-effective -- indeed, the most cost-effective -- option. The PSC's EGEAS modeling "select[ed] 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...." R.18, Item 157, p. 3899. The PSC's FEIS stated that "[t]he Calpine 523 MW CC Proposal in Fond du Lac using natural gas is lower cost than the ERGS – w/o IGCC Proposal." R.18, Item 119, Summary, pp. xxv, 68, 93.

WEC admitted before the circuit court that inclusion of the Calpine Fond du Lac Energy Center is "economic if supported by subsequent construction of baseload coal." R.66:26. WEC went on to explain how the Energy Priorities Law should operate, when it admitted to the circuit court that a gas-fired unit that has a present-value life cycle cost that is the same as the life cycle cost of a coal-fired unit based on EGEAS modeling should be chosen because "gas is higher on the priorities list than coal." R.66:26.

b. Calpine's proposal is technically feasible and environmentally sound.

Neither the PSC nor WEC claim, nor could they, that Calpine's proposal to include the Fond du Lac Energy Center in the chosen energy expansion is not technically feasible or environmentally sound. The Fond du Lac Energy Center is capable of producing electrical power from natural gas, as Calpine has demonstrated in numerous projects in Wisconsin and throughout the country. *See* R.18, Item 157, pp. 3368; *see* Calpine Initial Brief p. 5.

Moreover, the PSC's and the DNR's approval of the Fond du Lac Energy Center demonstrates that the Calpine proposal is technically feasible, *i.e.*, capable of construction and operation, and environmentally sound. That CPCN approval authorized Calpine "to construct and place in operation" the Fond du Lac facility. *Fond du Lac Order* p. 5, App.I.59. The CPCN would not have been issued if the PSC had deemed Calpine incapable of constructing and operating the Fond du Lac facility.

Furthermore, the PSC found that "[t]he generating facility approved in this order is reasonable and in the public interest after considering ... environmental factors," and that "[t]he Fond du Lac Energy Center will not have undue adverse impact on other environmental values...." *Fond du Lac Order* p. 4. Consequently, by granting a CPCN for the construction and operation of the Fond du Lac Energy Center in May 2003, the PSC is precluded from arguing that the Fond du Lac Energy Center is not technically feasible or environmentally sound.

Thus, as the higher priority, cost effective, technically feasible, and environmentally sound alternative, the Calpine option should have been selected as part of the chosen energy expansion pursuant to the plain language of the Energy Priorities Law, and prior interpretations of the PSC.

B. The PSC's Application Of The Energy Priorities Law Eviscerates The Priorities Established By The Statute.

The PSC's failure to select the higher-priority Calpine proposal as part of the chosen energy expansion represents an erroneous interpretation of the Energy Priorities Law. By applying language and factors not found in the Energy Priorities Law, such as the "baseload" designation, and by exercising "discretion" that the legislature did not grant to the PSC, the PSC did the opposite of what the Energy Priorities Law requires. The PSC implemented the lowest priority option on the assumption that this option was technically feasible and, as a consequence of having chosen to ignore gas-fired plants, concluded by default that the ERGS project is cost effective. However, no justifications exists for departing from the directive of the Energy Priorities Law.[6]

[6] The circuit court broadly criticized the PSC's application of the Energy Priorities Law. Despite this, the PSC claims that the circuit court merely held that the Final Decision "failed to adequately address why the PSC was not selecting oil or 'low sulphur' coal as a fuel source." PSC Brief p. 8. Similarly, WEC narrowly casts the Order as only criticizing the factual basis for the PSC's determination under the Energy Priorities Law, WEC Brief p. 7. The PSC and WEC thus gloss over the circuit court's more fundamental critique of the PSC's usurpation of the legislature's policy making role and the PSC's misinterpretation of the law.

1. There are no exceptions in the Energy Priorities Law for baseload generation.

Despite acknowledging its obligation to follow the Energy Priorities Law, the PSC eliminated Calpine's proposal from further consideration because the PSC concluded that it did not comprise a baseload resource. Final Decision pp. 14, 19. This baseload artifice, through which the PSC justified its refusal to consider Calpine's higher energy priority project, is based upon unsupported determinations and must be rejected.

a. There is no support in the Energy Priorities Law for a baseload/non-baseload distinction.

The PSC's baseload/non-baseload distinction is flawed in numerous respects. First, there is nothing in the language of the Energy Priorities Law authorizing or even contemplating such a dichotomy. *See* Wis. Stat. § 1.12(4)(d). By utilizing a baseload/non-baseload distinction in its application of the Energy Priorities Law, the PSC in effect claims that the legislature intended that there would be multiple priority lists when the text of Wis. Stat. § 1.12(4)(d) contains only one. Based on the PSC's approach, there is a separate priority list for baseload facilities only and other priority lists for intermediate load and peaking facilities.

Adding language or requirements to a statute, as the PSC did here in creating a separate priority list, violates the canons of statutory interpretation. *Town of LaGrange v. Auchinleck*, 216 Wis. 2d 84, 92, 573 N.W.2d 232, 235 (Ct. App. 1997) ("Under the rules of statutory construction, [courts] cannot supply

something that is not included in a statute."); *Responsible Use of Rural and Agric. Land v. Public Serv. Comm'n of Wisconsin*, 2000 WI 129, ¶ 37, 239 Wis. 2d 660, 675, 619 N.W.2d 888 ("[courts] will not read extra words into a statute to achieve a specific result."). Here, by creating, in effect, more than one list, the PSC has improperly wiped out the legislature's priority list in favor of its own. *See State v. Petty*, 201 Wis. 2d 337, 355, 548 N.W.2d 817, 823, 824 (1996) ("We must give words their ordinary and accepted meanings and try to give effect to every word so as to not render any part of the statute superfluous." (citations omitted)).

Second, in its CPCN orders prior to the ERGS proceeding, the PSC has never interpreted the plain language of the Energy Priorities Law to require different treatment for baseload and other types of units. *See* footnote 5, *infra*. Indeed, at oral argument before the circuit court, the PSC's counsel acknowledged that the PSC has never before made a distinction between baseload and non-baseload generation:

> THE COURT: Okay. Then this distinction between baseload and intermediate load hasn't been in the past a distinction that was used to make a selection, make an approval?
>
> MR. LUDWIG: No, it hasn't...

R.89:46-48. By imposing, for the first time and without explanation, a separate analysis for baseload and non baseload facilities, the PSC acted inconsistently with its prior interpretations of the Energy Priorities Law. *See Robertson Transp. Co. v. Public Serv. Comm'n*, 39 Wis. 2d 653, 661, 159 N.W.2d 636 (1968) ("Consistency, of course, is a virtue" in administrative determinations);

Continental Web Press, Inc. v. N.L.R.B, 742 F. 2d 1087, 1093-94 (7th Cir. 1984) (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.")

Third, the EGEAS modeling performed by the PSC does not draw a distinction between baseload and non-baseload. *See* R.18, Item 119, pp. 66-72. As stated in the FEIS, EGEAS "is used to find least-cost generation system expansion plans by comparing ***all*** combinations of multiple generation options to meet forecasted system load." *Id.* at 66 (emphasis added). The EGEAS modeling performed by PSC staff clearly demonstrated that the least-cost resource option was one that included Calpine's Fond du Lac project. *Id.* at 68, 69, 72. The EGEAS model directly contradicts WEC's position that ERGS-only baseload capacity is needed, by concluding that Calpine's Fond du Lac project should be included in the least-cost resource plan, given the capacity needs. *Id.* Despite the clear economic evidence provided by EGEAS, the PSC elected instead to simply agree with WEC's business plan.

Fourth, there is no basis for the PSC's unfounded assessment that "no gas-fired, baseload facilities were presented" as an alternative to the ERGS and that "while natural gas-fired generation facilities may be better suited for peak and intermediate load generation, coal-fired generation provides the most practical means to serve WEC's needs for baseload capacity." Final Decision pp. 19 and 21. These conclusions are directly contradicted by the PSC's previous orders.

The PSC specifically noted in its order approving the Fond du Lac Energy Center that "Calpine expects to operate the Fond du Lac facility as either a baseload or intermediate load plant...." *Fond du Lac Order*, pp. 5-6, App.I.59-60. Indeed, Calpine's Fond du Lac Energy Center is capable of and available to operate more than 6,132 hours, including planned outages required by prudent utility practices. R.38, Item 160, Confidential Exh. 201, § 5.6, pp. 17-19. Further, in granting Calpine a CPCN for the gas-fired Fox Energy Center currently under construction in the Town of Kaukauna, the PSC acknowledged that "[t]he generating plant would be capable of either baseload or intermediate load operation." *Fox Energy Order*, p. 7, App.I.83. Clearly, the Final Decision is contrary to prior PSC orders recognizing the efficacy of gas-fired baseload generation.

b. The PSC's baseload/non-baseload dichotomy constitutes an invalid, unpromulgated rule.

The PSC's baseload/non-baseload distinction is also an invalid unpromulgated rule. Because this rule was applied in this case, the Final Decision must be reversed. A "rule" is a "statement of policy or general order of general application which has the effect of law." Wis. Stat. § 227.01(13). Rules must be properly promulgated and adopted under Wis. Stat. § 227.10(1). If a statement of policy that should have been promulgated as a rule is applied by an administrative agency in a given case, that agency has abused its discretion and its decision must be reversed. *See State ex rel Clifton v. Young*, 133 Wis. 2d 193, 200, 394 N.W.2d

769 (Ct. App. 1986); *State ex rel. Richards v. Traut*, 145 Wis. 2d 677, 680, 429 N.W.2d 81 (Ct. App. 1988).

In the Final Decision, the PSC made a "policy judgment" that WEC's ERGS proposal "provides the most practical means to serve WEPCO's needs for baseload capacity," creating, for the first, time, a distinction between baseload and non-baseload facilities in its application of the Energy Priorities Law and ruling that gas-fired facilities are not baseload facilities. Final Decision p. 21. The PSC used this "policy judgment" exactly as though it were a rule: the PSC inaccurately generalized about gas-fired plants, concluding that they could not supply baseload needs, and used that generalization in its application of the Energy Priorities Law to ignore the Calpine proposal. This clearly inaccurate "policy judgment" that a gas-fired facility cannot provide baseload generation as an alternative to ERGS constitutes an invalid unpromulgated rule. The PSC's application of this rule in the ERGS proceeding constitutes an abuse of discretion and the Final Decision should be reversed.

By failing to select the Calpine proposal as part of the chosen energy supply, the PSC ignored the mandate of Wis. Stat. §§ 1.12(4) and 196.025 and ignored, without explanation, its previous application of the law. Accordingly, the Final Decision should be reversed.

2. WEC's "qualitative" factors do not justify the reordering of the energy priority list.

In addition to the unprecedented baseload/non-baseload distinction, WEC articulates several other *post hoc* rationalizations for the rejection of Calpine's proposal. *See* WEC Brief pp. 30-31.[7] These rationalizations do not justify the Final Decision and should be rejected.

The PSC did not cite to these rationalizing factors in its initial brief to this court, and did not explain these factors in the Final Decision.[8] This court cannot affirm the Final Decision based upon these alleged other factors, especially where the PSC itself did not rely on these factors in justifying its Final Decision. *See Williams Gas Processing-Gulf Coast Co. v. F.E.R.C.*, 373 F.3d 1335, 1345 (D.C. Cir. 2004) ("It is axiomatic that we may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review,... *post hoc* rationalizations will not suffice.") (internal quotes and citations omitted).

Confining review to the decision at issue fosters a rational process:

> One important reason for requiring an agency to set forth written reasons for its decision is to force the administrator to go through the decision-making process: to pick and choose among conflicting facts, to reach a result based on the facts so found, and to articulate that process in writing. Decision-making is difficult and may be unconsciously avoided unless it must be done in an fixed way. The act of assembling and enunciating reasons in writing forces the act of reasoning and prevents its opposite, arbitrariness.

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[7] WPPI/MGE also make a cursory reference to similar rationalizations in its initial brief to this court. WPPI/MG&E Brief pp. 43-44.

[8] Of the myriad factors cited by WEC and WPPI/MG&E, the purported need for fuel diversity as a justification for rejecting the Calpine proposal is the only factor mentioned, in a conclusory fashion, by the PSC in the Final Decision. *See* Final Decision pp. 23, 31. However, even the PSC did not cite to the need for fuel diversity as a proper justification in its initial brief to this court. As set forth in this brief, the interest in fuel diversification actually supports the inclusion of the Calpine proposal in WEC's energy expansion plan.

State ex. rel. Meeks v. Gagnon, 95 Wis. 2d 115, 124-25, 289 N.W.2d 357 (Ct. App. 1980); *see also GTE North Inc. v Public Serv. Comm'n of Wisconsin*, 169 Wis. 2d 649, 486 N.W.2d 554 (Ct. App. 1992) (remanding to the PSC a decision in which the PSC claimed that its decision was based "on our expertise" without articulating reasoning process), *rev'd on other grounds*, 176 Wis. 2d 559, 500 N.W.2d 284 (1993). WEC's *post hoc* reliance upon factors not articulated by the PSC in the Final Decision or in its brief cannot avoid arbitrariness in the way the PSC applied the law. None of the factors are found in the text of the Energy Priorities Law and none support the rejection of Calpine's proposal.

WEC argues that reliability and price volatility concerns justify the PSC's refusal to select the Calpine proposal. Specifically, WEC identifies five issues: the potential for interruptions in the natural gas system during extreme cold weather, pressure problems on the pipelines, the need for additional pipeline capacity to serve new gas fired facilities, the unavailability of onsite natural gas storage, and the volatility of natural gas prices. WEC Brief p. 31. All of these concerns were debunked during the proceeding before the PSC.

Interruptions in the natural gas system and the inability to store natural gas may be addressed by the onsite storage of alternative fuels. *See* R.18, Item 119, p. 86. The Fuel Conversion Services Agreement included in Calpine's proposal specifically provided for backup fuel capability. *See* R.38, Item 160, Confidential

Exh. 201(c), p. 11. PSC staff confirmed that the proposed agreement provides back-up fuel storage facilities. R.18, Item 159, p. 4656.

Concerns regarding pipelines pressure and capacity have been similarly discredited. Wisconsin has two major pipeline interconnection points located at its doorstep. "[T]hese nearby sources of gas supply dwarf the state's current annual consumption of 1.1 billion cubic feet per day." R.18, Item 157, p. 3223. WEC's witnesses agreed that "there would be no [ ] constraints strictly within the Wisconsin market." R. 18, Item 157, p. 910.

Volatility of natural gas prices was explicitly addressed in the EGEAS scenarios presented to the PSC. *See* R.18, Item 157, p. 3016. All the scenarios demonstrated that adding gas-fired generation is the least-cost alternative to meet WEC's next generating capacity need, even if gas prices greatly exceed historical price levels for the next thirty years. *Id.*[9] Coal-fired generation only becomes cost-effective after the commercial operation of Calpine's Fond du Lac Energy Center. R.18, Item 157, pp. 3935-3937. Moreover, neither the PSC nor WEC dispute that coal prices have been increasing significantly since the fall of 2003, more than doubling for some sources of coal since that time.

In short, no evidence was presented in the FEIS to demonstrate that gas supply reliability is a chronic or significant concern that might prevent a gas-fired

[9] In its brief to the circuit court, the PSC acknowledged that it accounted for high natural gas prices in its EGEAS runs: "WEC ran EGEAS extensively and submitted the results of its modeling in the record. It completed a total of 18 modeling runs with varying inputs (***for example, high future natural gas price forecasts and low future natural gas price forecasts***) as sensitivity analyses." R.63:20 (emphasis supplied).

alternative such as the Calpine proposal from supplying WEC's near-term needs in a cost-effective and reliable manner. R.18, Item 157, p. 3016. Indeed, if there were such a problem, the PSC should not have approved WEC's own gas-fired Port Washington Generating Station. *Id.* WEC cannot have it both ways.

WEC also claims that Calpine's proposal was rejected in the name of diversification of fuels. WEC Brief pp. 27, 31. However, from a fuel diversity perspective, the generation portfolios of both WEC and Wisconsin indicate an existing, overwhelmingly predominant use of coal rather than natural gas. *See* p. 4, *infra*; R.18, Item 119, p. 89, Table 5-2. The addition of the ERGS increases WEC's reliance on coal. R.18, Item 119, p. 90.[10] Clearly the Final Decision does not result in improved fuel diversification for either WEC or the state. Instead, the decision further exacerbates the current reliance on coal-based generation. Even if fuel diversification were an issue, it would support the selection of the Calpine proposal, rather than the ERGS.

WEC's alleged "qualitative" factors are absent from the text of the Energy Priorities Law and provide no foundation for the PSC's rejection of the Calpine proposal. Rather, these factors, and many others previously cited by WEC but abandoned on appeal, are nothing more than a desperate attempt by WEC to preserve its business plan despite the clear mandate of controlling law. The PSC's misinterpretation of the Energy Priorities Law is not rescued by WEC's other

[10] WEC's concern for fuel diversification was absent when it sought approval for its natural gas fueled plant in Port Washington, in the first phase of WEC's "Power the Future" business plan.

"factors" and, therefore, the Final Decision should be reversed. *See* Wis. Stat. § 227.57(5).

3. The Energy Priorities Law does not provide the discretion claimed by the PSC and WEC.

WEC and the PSC attempt to justify the consideration of the baseload/non-baseload distinction and other factors by claiming that the PSC has the discretion to re-order Wisconsin's energy priorities under the Energy Priorities Law. However, the discretion used by the PSC to approve the ERGS project without including the Calpine option, destroys the criteria set forth in the Energy Priorities Law. Such discretion, unfettered even by the plain language of the Energy Priorities Law, was never granted by the legislature and, until the ERGS proceeding, was never claimed by the PSC. Accordingly, the Final Decision should be reversed.

a. The legislative history of the Energy Priorities Law does not grant the discretion claimed by the PSC and WEC.

WEC claims that the Prefatory Note that accompanies 1993 Wis. Laws Act 414 grants the PSC broad discretion in making energy-related decisions. WEC Brief pp. 26-27.[11] However, WEC ignores the fact that the legislature set forth in the language of the Energy Priorities law the specific criteria for the PSC to follow in applying the statute.

[11] While the PSC made a similar claim in the Final Decision, Final Decision p. 15, it has made no such claim in its brief to this court regarding its own authority.

It is only within the boundaries of these expressly stated criteria, *i.e.*, cost effectiveness, technical feasibility, and environmental soundness, that the PSC may exercise any discretion. Here, given that the Calpine proposal was cost effective, technically feasible, and environmentally sound, *see* section II.A.2 *infra*, there remained no discretion for the PSC to exercise. Instead, as mandated by the Energy Priorities Law, the PSC was required to include the higher priority Calpine proposal in the selected energy expansion.

To avoid this result, which would alter WEC's business plan, WEC needed the PSC to exercise "discretion" that was so broad as to render the clear directive of the statute meaningless. To this end, WEC and the PSC refer to a discretionary ability to apply the Energy Priorities Law based upon "the overall pattern of decisions made by each agency." Final Decision p. 23 (citing to Prefatory Note that accompanies 1993 Wis. Laws Act 414); WEC Brief pp. 26-28. WEC and the PSC interpret this snippet of legislative history as bestowing a vaguely defined, amorphous "discretion" from which apparently flows the PSC's ability to loose itself from the bonds of the Energy Priorities Law and consider virtually any factor it chooses in applying the law. Indeed, in the Final Decision, the PSC did not even purport to relate its exercise of discretion to the explicit statutory criteria of cost effectiveness, technical feasibility, and environmental soundness. Final Decision pp. 15 and 23.

As a threshold matter, in the face of such a clear statutory mandate, WEC and the PSC's position that legislative history forms the basis of limitless

discretion allowing the PSC to ignore the statutory criteria is contrary to Wisconsin law. *See Kalal*, 2004 WI 58, ¶ 46 ("Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history."). Nor can WEC or the PSC use legislative history to inject ambiguity into the Energy Priorities Law in order to obtain discretion where none exists. As this court held in *Seider v. O'Connell*, 2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659, courts are prevented "from tapping legislative history to show that an unambiguous statute is ambiguous..." *Id.* at ¶ 51.

Further, the legislative history cited by WEC and the PSC does not disavow the statutory criteria of cost effectiveness, technical feasibility, and environmental soundness. Rather, the prefatory note to 1993 Wisconsin Act 414 emphasizes these essential criteria five times. *See* 1993 Wisconsin Act 414 Prefatory Note. Moreover, the discretion that WEC and the PSC claim is derived from the legislative history results in a decision in which the PSC selected the lowest energy priority, higher cost coal project rather than the higher energy priority, lowest cost natural gas project. Such a reliance on legislative history clearly does not comply with the text of the statute, does not promote the legislative purpose, does not reflect the legislature's intent, and does not produce a reasonable and just meaning. *Id.* at ¶ 70 ("'The court's interpretation should comply with the legislative text, promote the legislative purpose, reflect the legislature's intent, and produce a reasonable and just meaning.'") (C.J. Abrahamson, conc.) (quoting *Ontario v. Hamilton*, [2002] 58 O.R.3d 37, ¶ 18).

Moreover, the limitless discretion that WEC and the PSC claim under this legislative history is contrary to the PSC's prior applications of the Energy Priorities Law. In its prior orders, the PSC does not refer to any "pattern" based discretion in applying the Energy Priorities Law to avoid approval of gas-fired resources. *See Fond du Lac Order*, R.54:16, App.I.66; *see also Fox Energy Order*, R.79:12, App.I.86; *Riverside Order*, pp. 13-14, App.II.360; *BadgerGen* order, p. 9; *Mirant Portage Order*, p. 9, App.II.419; *Power Ventures Order*, pp. 9-10, R.App.90-91; *Rainy River Order*, p. 8, R.App.8. Further, and fortuitously for WEC, the PSC did not refer to any pattern of energy resource decisions in recently approving WEC's proposal to construct the gas-fired Port Washington Generating Station. Instead, in that order, and in the PSC's approval of MG&E's West Campus Cogeneration Facility, the PSC expressly limited its analysis of energy priority to the projects presented in the proceeding at hand. *See Port Washington Order*, p. 16, R.App.31; *West Campus Order*, pp. 12-13, App.II.459-460.

Thus, to the extent that any discretion exists under the Energy Priorities Law, the conclusion is inescapable that the discretion is limited to the determinations of cost effectiveness, technical feasibility, and environmental soundness with regard to the particular matter before the PSC. *See* Wis. Stats. §§ 196.025(1) and 1.12(4). Calpine's Fond du Lac Energy Center is technically feasible and environmentally sound, as demonstrated by the fact that the PSC has already granted that facility a CPCN. The cost effectiveness of the Calpine proposal is beyond dispute, as demonstrated by the EGEAS runs used by the PSC

to evaluate cost effectiveness. No matter how the alternatives are sliced in this particular case, the Calpine proposal is superior to the ERGS coal-only proposal.

b. The PSC does not have the discretion, in applying the Energy Priorities Law, to consider factors set forth in a separate statute.

In the Final Decision, the PSC claimed that it could extend its consideration under the Energy Priorities Law to factors such as "individual hardships, as well as concerns about engineering, economics, safety, reliability, environmental impacts, interference with local land use plans, and impact upon wholesale competition." Final Decision p. 15. However, the PSC failed to examine any of these factors in its Final Decision or develop any argument in its brief to this court that supports or justifies such an exercise of "discretion." Moreover, these other factors cited by the PSC are the requirements for obtaining a CPCN under the Plant Siting Law. Wis. Stat. § 196.491. ERGS must meet these requirements to obtain a CPCN regardless of the Energy Priorities Law.

Even if the PSC could consider such other factors, the PSC made no such comparison of these factors between the Fond du Lac Energy Center and the ERGS project. Thus, if the PSC truly had discretion to consider such matters and make such comparisons it totally failed to do so in the context of its decision. *Tennessee Gas*, 926 F.2d at 1209 ("the notion of lawfulness requires insistence that the chosen framework [for decision] not collapse in practice into a standardless exercise of Commission discretion resting on no more than an assertion of 'expertise.'").

Of equal importance, had the PSC compared the Fond du Lac Energy Center and ERGS's SCPC units, it could not have concluded that the ERGS project was in any of these respects superior to the Fond du Lac Energy Center. For example, the Fond du Lac Energy Center is feasible from an engineering and economic perspective. *See* R.18, Item 119, pp. 66-73, 417-422. There is no reason to suggest that it is unsafe, unreliable, interferes with local land use plans, or that its environmental impacts exceed the enormous negative impacts which have been identified in the ERGS proceeding. *See Fond du Lac Order*, App.I.55-76; *see also* R.18, Item 119, pp. 417-422. The PSC's grant of a CPCN to the Fond du Lac Energy Center is indisputable evidence to that effect. Furthermore, the Fond du Lac Energy Center is the only project that provides wholesale competition in this proceeding. Exclusion of the Fond du Lac Energy Center serves to exclude any wholesale competition to the utility business plan. In sum, all of the "other factors" which the PSC identified as being subject to consideration in addition to the energy priority list are supportive of the selection of the Fond du Lac Energy Center as part of the resource option.

The PSC's reference to "other factors" to justify its approval of WEC's business plan is merely an attempt to avoid implementing the Energy Priorities Law. Ultimately, both WEC's and the PSC's resort to extrinsic sources to justify the PSC's use of "discretion" share a fundamental flaw. The purpose of resorting to extrinsic sources is to discern the legislative intent in enacting a statute. *See Kalal*, 2004 WI 58, ¶ 43. However, WEC and the PSC's interpretations of the

Energy Priorities Law, based on these extrinsic sources, takes the Energy Priorities Law through the looking-glass where the PSC can reject the least cost, higher priority option in favor of the higher cost, lowest priority option, contrary to the plain language of the law.

The clear language of the Energy Priorities Law -- words chosen by the legislature that passed it -- prevents such an absurd result. This case demonstrates the danger of allowing extrinsic sources and limitless discretion to trump the clear language of a statute. Since the PSC's unfounded exercise of discretion is not supported by the law, the Final Decision must be reversed. *See* Wis. Stat. § 227.57(5).

4. The Energy Priorities Law does not require that alternative supply plans displace the need for ERGS.

WEC and the PSC continue to present hollow claims to this court when they wrongly suggest that, to satisfy the Energy Priorities Law, an alternative proposal must be cost effective and technically feasible and ***completely displace*** the need for the ERGS project. WEC Brief p. 30, PSC Brief p. 23. This claim, which WEC did not make before the circuit court, is not supported by the text of the Energy Priorities Law, is not supported by the PSC interpretations of the Energy Priorities Law, and is not supported by the Final Decision.

WEC attempts to justify the PSC's exclusion of Calpine's proposal by stating that the PSC "considered whether gas-fired generation was appropriate." WEC Brief p. 30. WEC states that "EGEAS modeling also demonstrated that

Calpine's proposal 'would not replace the need for additional coal-fired, baseload generation.'" *Id.* (quoting Final Decision pp. 30-31).[12] This argument is inaccurate and must be rejected.

First, the Energy Priorities Law does not require that alternative proposals completely displace the need for projects like ERGS. Nothing in the text of that law even suggests that total replacement is required. Rather, as the PSC concluded in its *Weston Order*[13] issued the day before oral argument in the circuit court:

> The plain language of the Energy Priorities Law together with the directive in Wis. Stat.§ 196.025, require the Commission ***to maximize the overall use of the preferred options to the extent possible, even in incremental amounts***. 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.

Id. at 11-12 (emphasis supplied), R.App.111-112.

Second, a "full displacement only" requirement is inconsistent with the PSC's interpretations of the Energy Priorities Law. In the Final Decision, the PSC recognized that it must determine "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." Final Decision p. 14 (emphasis supplied). In its brief to the circuit court, the PSC candidly stated that it considered whether a package of energy priority resources

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[12] The PSC parrots this argument to some extent in its brief when it describes the EGEAS modeling system then concludes that "[t]he Commission concluded that the EGEAS forecasts demonstrated that energy priority resources, alone or in combination, could not replace the need for new coal-fired based load generation to serve WEPCO." PSC Brief p. 23.

[13] Final Decision, Docket No. 6690-CE-187 (October 7, 2004) (the "*Weston Order*"), R.App.101-142.

"could ***delay the need*** for two coal plants..., but not avoid them entirely." R.63:27 (emphasis supplied). Moreover, in the *Weston Order*, the PSC confirmed that "...prior [PSC] decisions have interpreted these statutes [i.e., the Energy Priorities Law] to require that, in order to be selected and implemented, any given block of conservation or renewable resources must be of significant magnitude to entirely displace ***or delay*** the need for the construction project at hand." *Id.* at 11, R.App.111.

Furthermore, WEC ignores the EGEAS runs that analyzed the Calpine proposal in terms of its ability to delay the need for ERGS. For example, the EGEAS analysis showed that including the Calpine proposal in the resource expansion plan was the lowest cost, higher priority alternative and that "[s]everal scenarios suggest that a coal plant would not be needed until 2011, if not later, if the Calpine proposal is selected." R.18, Item 119, Summary, pp. xxv.

Thus, WEC's hyperbolic claims that a "gas only" alternative would cost "billions more to operate" and its citation to the cost of a exclusively gas expansion plan are misleading. In fact, the analysis cited by WEC concluded that "a mixture of properly timed gas and coal-fired units ***would result in the lowest overall cost expansion plan for WEPCO***." R.18, Item 119, p. 72. Calpine's proposal provided this optimal mix of recourses, as demonstrated by EGEAS, since Calpine was the least cost option. R.18, Item 119, pp. 68, 73; R.18, Item 158, Exh. 273. Therefore the Calpine proposal should have been selected to

"maximize the overall use of the preferred options to the extent possible, even in incremental amounts."

Despite acknowledging in the Final Decision that full displacement is not a prerequisite to implementing the directive of the Energy Priorities Law, the PSC failed to apply that interpretation in the Final Decision and, instead, improperly rejected the Calpine proposal. Once the ERGS proceeding concluded, however, the PSC returned to an application of the Energy Priorities Law, in the *Weston Order*, that did not demand full replacement as a prerequisite to consideration. R.App.111. WEC's effort to cling to this disingenuous full displacement argument is contrary to the Energy Priorities Law. Accordingly, the Final Decision should be reversed. *See* Wis. Stat. § 227.57(5).

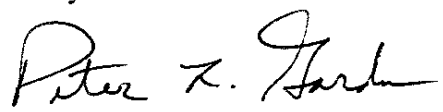
CONCLUSION

The Final Decision cannot be allowed to stand. The Final Decision is contrary to the language and purpose of the Energy Priorities Law and is contrary to prior PSC interpretations of that law. In order to affirm the Final Decision, this court would have to approve the selection of the lowest energy priority fuel source and higher cost project rather than the higher energy priority fuel source and lowest cost project, under the pretense that this is what the legislature intended, even though such a result is contrary to the clear language and purpose of the Energy Priorities Law.

The court should not countenance such an extraordinary interpretation of the Energy Priorities Law. Accordingly, the court should reverse the Final Decision and require the PSC and DNR to follow the law.

Dated this 24th day of February, 2005.

Attorneys for CALPINE CORPORATION



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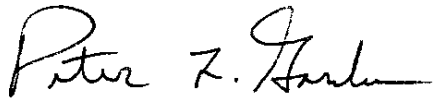
CERTIFICATION

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 9,849 words.

Dated this 24th day of February, 2005.

Attorneys for CALPINE CORPORATION



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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

(Caption continued on following pages)

APPEAL FROM A DECISION OF THE CIRCUIT COURT OF DANE COUNTY, THE HONORABLE DAVID FLANAGAN, PRESIDING

APPENDIX TO RESPONDENT 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.

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

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February 24, 2005

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N/A	Final Decision – Power Ventures Group – 05-CE-131, June 30, 2004	82-100
N/A	Final Decision – Weston Generating Station – 6690-CE-187, October 7, 2004	101-142

Date Mailed
October 30, 2002

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of the Rainy River Energy Corporation-Wisconsin for a Certificate of Public Convenience and Necessity to Construct and Place in Operation a Large Natural Gas-Fired Electric Power Generating Facility and Associated High Voltage Transmission Line and Natural Gas Pipeline Interconnection Facilities to be Located in the City of Superior, Douglas County

05-CE-128

FINAL DECISION

On February 11, 2002, Rainy River Energy Corporation - Wisconsin (Rainy River) filed an application with the Commission for a Certificate of Public Convenience and Necessity (CPCN) that would grant it authority to construct a large electric generating facility. This new electric generating plant, known as the Superior Generation Project, would be a simple-cycle, natural gas-fired electric generating facility comprised of a single combustion turbine and generator. The facility would have a net electrical output of approximately 170 megawatts (MW). Rainy River proposes to build and operate the Superior Generation Project as a merchant plant, which would provide power in the competitive electric market of the Midwest.

In its application, Rainy River 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 Superior Water, Light & Power Company (SWL&P), the local gas distribution utility. A natural gas pipeline with sufficient capacity to supply the proposed project without additional upgrades exists within 700 feet of the proposed project site alternatives. Rainy River will pay for required new natural gas facilities as part of the cost of the project.

The proposed plant will be connected to the electric transmission system at the existing SWL&P Stinson Substation. Output of the plant will be delivered to the Stinson Substation bus over a new 115 kilovolt (kV) radial transmission line. The Stinson Substation is located within 0.75 mile of the proposed project site alternatives. The new transmission line would be located on or adjacent to existing transmission line rights-of-way. In order to accommodate connection of the new line to the Stinson Substation bus, some alterations to other existing transmission lines connected to the substation will be necessary. Rainy River will construct and own the new transmission line facilities necessary to connect the plant with the existing transmission system. The cost of any modifications to facilities owned by SWL&P will be paid by Rainy River as a cost of the project.

Rainy River will obtain its water supply for the proposed plant from SWL&P's water distribution system. Rainy River will pay for the new water facilities as a cost of the project.

Rainy River and SWL&P are both wholly owned subsidiaries of Minnesota Power, based in Duluth, Minnesota. Minnesota Power's parent company is Allete, Inc., also located in Duluth.

On May 3, 2002, the Commission determined that Rainy River's CPCN application was complete. The Commission scheduled public hearings on the project application on September 4, 2002, which were held at the Rothwell Student Center, Superior, Wisconsin.

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

The application is GRANTED, subject to conditions.

Findings of Fact

1. Rainy River 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.

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 Superior Generation Project will not have undue adverse impact on other environmental values such as ecological balance, historic sites, aesthetic and recreational use.

5. The Superior Generation Project will not unreasonably interfere with orderly land use and development plans for the area involved.

6. The County Site is in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors. Other alternative sites for the Superior Generation Project, brought forth in the record, are not in the public interest.

7. It is reasonable to make a CPCN for the Superior Generation Project 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 being required prior to construction of the facility.

b. That Rainy River shall prepare a construction and mitigation plan to protect sensitive resources at the authorized site. The plan shall be reviewed by Commission and DNR staff, and the Commission shall approve the plan prior to commencement of construction.

c. That Rainy River 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.

8. It is reasonable to require that construction of the Superior Generation Project commence within one year after Rainy River 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 Rainy River complete its project and that the Superior Generation Project be fully operational within three years after the date that construction commences.

Conclusions of Law

1. The Superior Generation Project 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 Rainy River to construct and

place in operation the generation, transmission, and pipeline facilities at the site described below, and to impose the conditions specified in this order.

Opinion

Rainy River proposes to construct a natural gas-fired simple-cycle power plant, with a maximum capacity of approximately 170 MW. The power plant will consist of a single combustion 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 115 kV.

Rainy River 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 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.

Rainy River expects to operate the Superior Generation Project as a peak load plant, at an overall plant efficiency of up to approximately 38 percent, depending on ambient conditions. Rainy River forecasts that it will begin commercial operation in 2003 and that the plant will have an expected life of 30 years.

The proposed plant will be connected to the existing electric transmission system at the existing SWL&P Stinson Substation, and output of the plant will be delivered over a new 115 kV radial transmission line. The new electric transmission line will be approximately 3,930 feet in

length, and will be located on or adjacent to existing transmission line rights-of-way. In order to accommodate connection of the new line to the Stinson Substation bus, some alterations to other transmission lines connecting to the substation will be necessary. Rainy River will construct and own the new transmission facilities necessary to connect the plant to the existing transmission system. The cost of modifications to facilities owned by SWL&P will be paid by Rainy River.

The Superior Generation Project would be a simple-cycle plant. As such, water use would be limited to evaporative cooling of combustion air, and employee domestic use. Water would be obtained from the existing SWL&P water distribution system, via an extension of water main approximately 3,700 feet in length. Rainy River will pay for the main extension, which will be 6 or 8 inches in diameter. Water consumption for the proposed project is estimated at 43,000 gallons per day, which is less than 1 percent of SWL&P's maximum daily water demand. Rainy River will pay the cost of the new water facilities.

Wastewater, resulting from employee domestic water use, will be discharged to the existing city of Superior Wastewater Treatment plant via a sewer lateral extension approximately 2,500 feet in length. Rainy River will also pay the cost of the sewer lateral extension.

Several DNR permits will be required to construct and operate the Superior Generation Project, including: an air pollution control permit; a construction storm water permit; and a Chapter 30 water quality certification for wetland impacts.

Rainy River proposed two site alternatives for the location of the plant. The sites were identified after Rainy River conducted a screening process that involved the existing electric transmission grid, natural resource factors, fuel supply availability, and other criteria to identify

locations for the Superior Generation Project. Two potential site locations, referred to as the County Site and the Lakehead Site, were ultimately identified.

The County Site is a 20-acre parcel located in the SE ¼ of the NW ¼ of Section 31, Township 49 N, Range 31W, in the city of Superior, Douglas County, Wisconsin. The site is bounded by 31st Avenue East on the northwest side, East 18th Street on the southwest side, Douglas County land and the Nemadji Cemetery on the northeast side, and the Nemadji River on the southeast side. Several existing electric transmission lines and a natural gas pipeline cross the property. Current land use in the area of this site is primarily heavy industrial development. Portions of the site were previously disturbed by construction and maintenance activities associated with the existing electric transmission and natural gas pipeline facilities that cross the property. Zoning of the site was changed to M2, heavy manufacturing, by the Superior City Council on July 2, 2002.

The Lakehead Site is a 27-acre parcel located partly in the SW ¼ of Section 30, Township 49 N, Range 13W, and partly in the SE ¼ of Section 25, Township 49 N, Range 14W in the city of Superior, Douglas County, Wisconsin. The site is bounded by a railroad corridor on the northwest side, the Dome Petroleum Natural Gas Liquids Refinery on the southwest side, and the Enbridge Energy Partners (Lakehead Pipeline Company) on the southeast side. Current land use in the area of the site is primarily heavy industrial development. The site is currently zoned M2, heavy manufacturing, by the city of Superior.

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 Superior Generation Project 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 Superior Generation Project 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 Superior Generation Project. 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 lines.

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." By order dated June 21, 2002, in docket 9345-CE-100, the Commission made a determination that the Superior Generation Project would not have a material adverse impact on competition in the relevant wholesale electric service market.

Site Alternatives

Existing electric transmission lines and a natural gas pipeline currently cross the County Site. Current land use in the area of this site is primarily heavy industrial development. Portions of the site were previously disturbed by construction and maintenance activities associated with the existing electric transmission and natural gas pipeline facilities that cross the property.

Zoning of the site was changed to M2, heavy manufacturing, by the Superior City Council on July 2, 2002.

Land use in the area of the Lakehead Site is primarily heavy industrial development. Portions of the site were previously disturbed by construction of tank foundations, and construction and maintenance of an existing electric transmission line. The Lakehead Site is also currently zoned M2, heavy manufacturing, by the city of Superior.

The applicant, the city of Superior, and most members of the public prefer that the Superior Generation Project be constructed on the County Site.

Constructing the proposed facility should not irrevocably harm natural resources at either the County Site or the Lakehead Site. However, additional precautions are necessary to construct the plant at the County Site. The Nemadji River forms the southeastern boundary of the site, and lies at the base of a slope, at the top of which Rainy River would construct the plant. The mouth of the river is an area of side-channel wetlands that extend for about a mile upstream, and supports spawning of several warm water fish species, including muskellunge. The slope at the County Site and the flatter areas at the base of the slope form an important environmental corridor. Because of the nature of the clay soils in the area, the banks of the Nemadji River, including the slope at the top of which the plant will be constructed, are prone to sloughing and have a history of slope failures.

Because the clay soils are very susceptible to failure and erosion, construction in areas with steep slopes can lead to environmental impacts. Construction of the proposed plant at the County Site can be accomplished with limited impact if a carefully designed Construction and Mitigation Plan (CMP) is prepared, approved by the Commission prior to commencement of

construction, and rigorously followed during construction. It is reasonable that Rainy River prepare and submit such a plan to the Commission and the DNR before commencing construction.

In its application, Rainy River 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 Rainy River perform these measurements after the Superior Generation Project 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 Rainy River report these post-construction measurements to the Commission as quickly as practicable.

The Commission finds that the County Site is reasonable and in the public interest. This site is properly zoned, and the city of Superior and most residents in the area prefer that the plant be constructed at that site. Construction of the project at the County Site will not interfere with orderly land use and development. In addition, selecting the County Site for the plant, subject to the conditions specified in this order regarding erosion of the slopes leading to the Nemadji River, will not unduly affect the area's ecological balance or other environmental values.

Certificate

Rainy River may commence construction of the Superior Generation Project, described in this order and in its project application as amended, at the County Site in the city of Superior, Douglas County, Wisconsin.

Order

1. The approved site for the Superior Generation Project is the County Site. Rainy River shall construct the project in conformance with the design specified in its application, and subject to the conditions specified in this order.

2. The electric transmission line, modifications to the existing SWL&P Stinson Substation, the natural gas pipeline, and water supply and wastewater pipelines shall be constructed in conformance with the design specified in the project application.

3. The CPCN for the Superior Generation Project 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.

4. As a condition of this certificate:

a. To limit the impacts of construction on environmentally sensitive resources at or near the project site, Rainy River shall prepare and submit a CMP to the Commission and the DNR. The CMP shall be approved by the Commission prior to commencement of construction, and rigorously followed during construction.

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

5. Until the Superior Generation Project is fully operational, Rainy River 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. Rainy River 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. 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.

6. Rainy River shall commence construction of the Superior Generation Project no later than one year after Rainy River has received all necessary federal, state, and local permits and approvals. Rainy River shall complete its project, so that the Superior Generation Project is fully operational, within two years after construction commences. The CPCN shall expire upon this date, unless the Commission grants an extension.

7. Rainy River shall promptly inform Commission staff of any substantial scope or design modifications in the approved facilities.

8. Rainy River shall notify the Commission, in writing, within 24 hours of any decision not to proceed with the Superior Generation Project or to enter into any partnership or other arrangement with a third party concerning the ownership or operation of the facility.

9. Jurisdiction is retained.

Dated at Madison, Wisconsin, _____

By the Commission:

_____

Lynda L. Dorr
Secretary to the Commission

LLD:JAL:bap:G:\Order\Pending\\05-CE-128 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.

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(Not a party, but must be served)
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Date Mailed
December 20, 2002

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Approval of Affiliated Interest Transactions Between W.E. Power; LLC; Wisconsin Electric Power Company; and Wisconsin Energy Corporation	05-AE-109
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	05-CE-117
Application of American Transmission Company for a Certificate of Authority to Rebuild and Upgrade Certain Transmission System Facilities to Support the Port Washington Generating Station	137-CE-104
Application of Wisconsin Gas Company, as a Gas Public Utility, for Authority to Construct a High-Pressure Natural Gas Line in Washington and Ozaukee Counties, Wisconsin	6650-CG-211

FINAL DECISION

Introduction

This is the final decision regarding Part I of Wisconsin Energy Corporation's (WEC's) proposal to construct new electric generating plants, which it has named Power The Future (PTF). Applications were filed by Wisconsin Energy Corporation, Wisconsin Electric Power Company, W.E. Power, LLC, American Transmission Company, and Wisconsin Gas Company (Applicants) for all necessary approvals to construct PTF.

Leased generation is governed by a law that the Wisconsin Legislature recently enacted as part of 2001 Wis. Act 16. A leased generation contract is an affiliated interest transaction regulated under Wis. Stat. § 196.52(9), which was created as part of 2001 Wis. Act 16. WEC offered proposed leases in this docket, which have been the subject of extensive negotiation and revision with other interested parties. Although these proceedings have focused upon the Unit 1 Facility Lease that would be signed between WEPCO and PWGS LLC, WEC also introduced a proposed Ground Lease, Ground Sublease, and Asset Purchase and Sale Agreement as part of PTF.

The principal element of this contract is WEC's Facility Lease for Unit 1, between the holding company's generating plant subsidiary (PWGS LLC) and its electric utility (WEPCO). During the course of this proceeding, the Facility Lease has been revised and reintroduced numerous times, both by WEC and another entity known as the Customer Groups[1], as a result of negotiations. Accompanying the Facility Lease for Unit 1 are a Ground Lease, Ground Sublease, and an Asset Purchase and Sale Agreement. Applicants also propose to convert these documents into a leased generation contract for Unit 2, and is seeking the approval of its contracts for Unit 1 and Unit 2 in this docket.

This portion of PTF addresses the application of WEC and its subsidiaries to construct two 545 megawatt (MW), natural gas-fueled, combined cycle units, which WEC has named the PWGS. PWGS would be located in the city of Port Washington at the current site of the Port Washington Power Plant, after retiring the existing 320 MW coal plant that is situated there. Within its holding company WEC has set up a generating plant subsidiary, W.E. Power LLC,

[1] Customer Groups consist of Citizens' Utility Board (CUB), Customers First! Coalition, Wisconsin Industrial Energy Group, Inc., and Wisconsin Initiative Seeking Energy Reform, LLC.

and beneath that company another subsidiary, PWGS LLC. The latter corporation would construct and own the generating units, which would then be leased to and operated by the affiliate electric utility, Wisconsin Electric Power Company (WEPCO).

WEC filed an application for the approvals needed to construct PTF with the Commission on January 31, 2002. In its original form, this application proposed to construct not only two gas-fired units at Port Washington but also three new coal-fired units at Oak Creek. Because of WEC's contention that review of at least the first gas unit at Port Washington was needed as soon as practicable, given the projected on-line date of 2005, the Commission separated the application into two parts. The first part, which is the subject of this order, consists of the application for review and approval of the two PWGS units, as well as their associated natural gas line, transmission facilities, and the related affiliated interest transactions. The second part, which the Commission will consider at a later date, concerns the proposed coal units, their associated facilities and their related affiliated interest transactions.

WEC submitted numerous amendments to its PWGS filing until, on April 25, 2002, the Commission found that the Certificate of Public Convenience and Necessity (CPCN) application was complete under Wis. Stat. § 196.491(3)(a)2. This triggered the 180-day period under which the Commission is required to conduct its review of a CPCN application. 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. In addition, Wisconsin Gas Company (WGC) filed an application for a Certificate of Authority under Wis. Stat. § 196.49, in order to construct a high-pressure steel natural gas pipeline that would serve the PWGS facility and would reinforce its existing distribution system in the Port Washington area. American Transmission Company (ATC) also applied for a Certificate of Authority, to

upgrade elements of its transmission system that interconnect with or would be affected by the PWGS facility.

Three wholesale merchant plant developers (or IPPs) and an entity named Midwest Independent Power Suppliers, NFP (MWIPS) entered the case in opposition to the PWGS project, arguing that independent power sources could meet the energy and capacity needs of WEPCO more economically than the leased generation project that WEC proposed. The Commission held public hearings in these dockets before Administrative Law Judge David Whitcomb from September 13 to 25, 2002, at which the technical witnesses of parties and Commission staff were examined. In addition, the Commission held a hearing in Port Washington seeking the testimony of interested members of the public on October 1, 2002. The parties then submitted briefs to the Commission. At open meetings on December 5 and 9, 2002, the Commission considered this matter.

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

This decision adopts a new regulatory framework which authorizes a public utility to procure generation through a non-utility affiliate under the terms of a lease generation contract. 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 projects proposed in this docket.

2. The PWGS facility satisfies the reasonable needs of the public for an adequate supply of electric energy.

3. The PWGS facility is reasonable and in the public interest after considering alternative sources of supply, alternative locations, individual hardships, engineering, economic, safety, reliability, and environmental factors.

4. WEC's proposed layout for its new facilities, at the site of the existing Port Washington Power Plant, is in the public interest after considering alternative locations, individual hardships, engineering, economic, safety, reliability, and environmental factors.

5. The PWGS facility will not have undue adverse impact on other environmental values.

6. The PWGS facility will not unreasonably interfere with orderly land use and development plans for the area involved.

7. The PWGS facility will not have a material adverse impact on competition in the Wisconsin Upper Michigan System (WUMS) wholesale electric service market.

8. A leased generation contract is a reasonable means of financing the PWGS facility.

9. The leases proposed in this docket, as modified by this Final Decision, are reasonable and in the public interest.

10. The Port Washington Asset Purchase and Sale Agreement is reasonable and in the public interest.

11. The conditions attached to the CPCN for the PWGS facility, as described in this Final Decision, are reasonable.

12. Requiring that PWGS LLC commence construction of Unit 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 PWGS LLC file an updated demand forecast and EGEAS modeling[2] before commencing construction on Unit 2 is reasonable.

13. WGC's construction of a high-pressure steel natural gas pipeline to serve the PWGS facility and to reinforce the utility's existing distribution system in the Port Washington area would not substantially impair the efficiency of WGC's service, would not provide facilities unreasonably in excess of the utility's probable future requirements, and, when added to the cost of service, would proportionately increase WGC's value or available quantity of service.

14. The public convenience and necessity require WGC to construct its proposed pipeline, subject to the conditions specified in this Final Decision.

15. The pipeline route specified in this Final Decision is in the public interest.

16. ATC's rebuilding of two double-circuit and one single-circuit 138 kV transmission lines, replacing seven 138 kV circuit breakers and disconnect switches at Port Washington Substation, and installing other improvements at Port Washington, Saukville, and Range Line Substations to serve the PWGS facility would not substantially impair the efficiency of ATC's service, would not provide facilities unreasonably in excess of the utility's probable future requirements, and, when added to the cost of service, would proportionately increase ATC's value or available quantity of service.

[2] "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.

17. The public convenience and necessity require ATC to reconstruct the three 138 kV transmission lines and install improvements at Port Washington, Saukville, and Range Line Substations to serve the PWGS facility.

Conclusions of Law

The Commission has jurisdiction under Wis. Stat. §§ 1.11, 1.12, 196.02, 196.025, 196.395, 196.49, 196.491, 196.52, and 196.795 to issue certificates authorizing PWGS LLC, WGC, and ATC to construct and place in operation the generation, transmission, and pipeline facilities at the site described below, and to impose the conditions specified in this Final Decision.

Opinion

This proceeding involves the first application by a public utility in Wisconsin to construct large-scale generating facilities through an affiliated entity. The proposed arrangement between the public utility and non-utility affiliate has been described as a "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 affiliate, PWGS LLC, would construct two 545 MW natural gas fired, combined cycle units, which would then be leased to and operated by the affiliate electric utility, Wisconsin Electric Power Company. Applicants seek approval for construction authority to build these generation facilities and approval of the related leases between WEPCO and PWGS LLC.

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 the paramount obligation to the consuming public.

This lengthy process required the Commission to conduct an extensive up front review of WEPCO's planning process to determine its needs for 2005 and 2008, as well as an after-the fact review process that WEPCO employed to procure the resources to meet that need. 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 inter-related and the Commission considered each policy priority in the context of this proceeding.

Project Description

The PWGS facility is sized at 1,090 MW, consisting of two units that would generate 500 MW each, with additional peaking capacity of at least 45 MW through the use of duct firing. Each generating unit would include two combustion turbines, two heat recovery steam generators with supplemental duct firing capability to produce additional steam, and a steam turbine. Steam exhausted from the steam turbine would run through a condenser utilizing water from Lake Michigan, while the generators attached to the turbines would produce the electrical power and the transformer would step up the voltage to 138,000 volts (138 kV). The plant would have an expected life of 30 to 40 years.

The generating plant would be capable of either base load or intermediate load operation; its actual operation would depend on market conditions and the market price for natural gas.

WEC is seeking to place Unit 1 in service in 2005 and Unit 2 in service in 2008. PWGS LLC intends to begin construction of the first unit within one year after issuance of a CPCN, during which time it would demolish portions of the existing Port Washington Power Plant.

Several permits from the Wisconsin Department of Natural Resources (DNR) would be required to construct and operate the PWGS plant, to construct the gas pipeline to serve the plant, and to improve the electric transmission lines serving the plant. WEC would need to secure air pollution control permits, a wastewater discharge permit, a permit to grade on an unbroken slope, a permit to construct a pond within 500 feet of a navigable waterway, storm water discharge permits, a trench dewatering permit, a hydrostatic pressure test permit, stream and wetland crossing permits, a permit to place structures on the bed of Lake Michigan, and a permit to grade more than 10,000 square feet along a navigable waterway.

Facilities currently on the site of the existing Port Washington Power Plant include the power plant building, the Port Washington Substation, a parking lot, a coal dock, coal handling equipment, and a dock holding wastewater treatment facilities. A tributary to Sauk Creek flows through the western edge of the site, adjacent to the substation. South of the power plant is a 50 to 100-foot bluff, the northern third of which is grassy and shrubby with a few groupings of trees. The southern two-thirds are cropland with several tree lines.

WEC proposed two layouts for the new PWGS facilities. Its preferred site layout configures the combustion turbines, heat recovery steam generators, and steam turbine generators partly within the bounds of the existing power plant building. The alternative site layout would place the plant south of the existing facility, roughly perpendicular to Lake Michigan and parallel to the cut portion of the bluff.

WGC proposes to construct a high-pressure steel natural gas pipeline to serve the PWGS facility and to reinforce its existing distribution system in the Port Washington area. WGC, a natural gas utility within the WEC holding company, filed a Certificate of Authority to construct this pipeline, which would be approximately 16.5 miles long and would cost an estimated $24.5 million. WGC developed alternate routes for portions of the proposed pipeline, running generally eastward from ANR Pipeline Company's existing interstate pipeline located near the village of Jackson, Washington County, to the PWGS site.

ATC seeks a Certificate of Authority to perform necessary improvements to its transmission system, to accommodate the power generated at the PWGS facility. ATC proposes to rebuild the three transmission lines that move energy from the existing Port Washington Power Plant with conductors of greater capacity, and to make other related improvements to the lines and their substations. At the power plant site, the fenced area of the Port Washington Substation may need to be expanded slightly to accommodate one of the generator step-up transformers. If the alternative site layout is used, it would be necessary to rebuild the substation completely at a new location on the power plant site.

The off-site proposed electric transmission facilities are located in eastern Ozaukee County and northern Milwaukee County. Minor equipment work inside the station fence is required at the existing Range Line and Saukville Substations, which are located at the ends of the affected transmission lines.

An existing double-circuit, 138 kV Port Washington-Range Line overhead transmission line runs south from the Port Washington Substation, through the city of Port Washington, town of Port Washington, village of Thiensville, village of Grafton, town of Grafton, and the city of Mequon (all in Ozaukee County), and the village of Brown Deer, city of Milwaukee, and city of

Glendale (all in Milwaukee County), to the Range Line Substation (city of Glendale, Milwaukee County). An existing 4.8-mile, double-circuit 138 kV Port Washington-Saukville transmission line and an existing 4.7-mile, single-circuit 138 kV Port Washington-Saukville transmission line would be rebuilt within their current rights-of-way (ROWs). The double-circuit line is located in a 130-foot wide ROW as it heads west from the Port Washington Substation. The single-circuit line, on H-frame structures, is located in a 90-foot wide ROW as it heads west from the Port Washington Substation. These lines share a ROW at their western end, where they enter the Saukville Substation. The lines run through the city and town of Port Washington, as well as the village and town of Saukville in Ozaukee County.

Each of these transmission lines would need to be rebuilt. Land use along the transmission line routes is predominantly residential or agricultural. Residences along the Port Washington-Range Line transmission line are most concentrated at the southern end of the line in Glendale and Milwaukee. Between Thiensville and the Range Line Substation, the transmission line lies adjacent to a railroad corridor. Along the Port Washington-Saukville line, the highest concentrations of residences are located in and near the city of Port Washington and the village of Saukville. Between Thiensville and the Range Line Substation, the transmission lines lie adjacent to a railroad corridor. The lines to be rebuilt cross numerous wetlands and streams.

Statutory Energy Priorities

A threshold issue this Commission must decide is whether or not there is enough energy conservation or renewable resources to cancel or delay the construction approvals sought 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."

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 the historical usage data is the net impact of energy efficiency and the increased utilization of energy efficiency programs. WEPCO's forecasting method implies that the future impacts of energy efficiency and increased utilization will be similar to the historical impacts. For this reason, in their testimony on energy efficiency potential both WEPCO and Commission staff attempted to estimate the amount of potential energy efficiency savings above that already included in the forecast.

The estimates of both WEPCO and Commission staff spanned a broad range. At the low end, WEPCO found approximately 10 MW of additional cost-effective conservation available in

the 2003-2015 timeframe. Commission staff calculated an additional 367 MW of energy efficiency by 2008 as the upper bound of the range provided. All of the estimates of energy efficiency have shortcomings, relating to the unknown amount of energy efficiency already included in WEPCO's forecast, restrictions on the type of measures and customer segments included in the energy efficiency analysis, and the limited availability of current data on energy efficiency measures. The broad range and shortcomings of these estimates add sufficient certainty that the record does not demonstrate that energy efficiency would be a feasible substitute for new generation.

WEPCO has provided energy efficiency services to its customers for many years. As a result, WEPCO has already captured the least expensive energy efficiency. Additionally, WEPCO's forecasting method assumes that energy efficiency gains similar to those of the past will continue in the future, regardless of whether they occur naturally in the market, or are captured by WEPCO's energy efficiency programs, public benefits programs, or federally mandated energy efficiency standards. The cost-effectiveness of other energy efficiency savings, not already reflected in WEPCO's forecast, can only be determined on a statewide basis in a separate docket.

There was considerable evidence in this record to estimate future energy efficiency potential. In addition, parties employed different screening measures in an effort to demonstrate the costs and benefits of energy efficiency. The record is replete with different programs and different standards to measure energy efficiency. Measuring each program's effectiveness is even more difficult as Wisconsin implements market-based energy efficiency through the public benefits programs. These programs, which are administered by the Wisconsin Department of

Administration, are an intregal part of our state's efforts to transform the current marketplace for energy efficiency.

The Commission lacks sufficient evidence 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. In addition, PSCW staff testified that there may be additional cost efficient measures—but they are not a sufficient substitute for the proposed plants.[3]

In addition to energy efficiency, the Commission considered whether the benefits of renewable resources outweigh the need for the gas-fired generation sought in this proceeding. The state energy priorities express a preference for generating facilities that utilize renewable fuels. The Commission, in carrying out the state's energy policy, shares this goal in our efforts to reduce emissions of pollutants from our other fuel sources.

As part of its PTF proposal, WEC committed to a goal of obtaining five percent of its energy from renewable resources by 2011. This exceeds the renewable portfolio standard set forth under state law that requires at least 2.2 percent of each electric provider's retail energy must be from renewable resources by the same date. Wis. Stat. § 196.378. WEC has also

[3] Transcript, p. 1499.

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.

Wind power and biomass were the two forms of renewable generation considered in the record. The record developed on renewables in this proceeding focused on wind. The evidence demonstrates that wind is increasingly becoming more cost effective when compared with traditional fossil-fuel sources.

A significant factor affecting the cost of wind-generated electric power is the federal production tax credit, which allows a wind facility owner to take a 1.8 cent per kilowatt-hour tax credit for a period of ten years. Under current law, this ten-year tax credit is available only to those projects that go online no later that December 31, 2003, although Congress has extended the credit in the past and may do so again. If the tax credit is presumed to expire in 2003, the EGEAS program does not pick enough wind units to replace either PWGS Unit 1 or Unit 2, making such projects speculative from a cost effective prospective.

In addition to the cost of these resources, the other principal concern with wind is whether the capacity from this energy resource would be available on a scope and scale to replace either PWGS Unit 1 or 2. The intermittent nature of this resource also does not provide the Commission with the necessary confidence that this resource can effectively displace the need for gas-fired combined cycle units that will be needed in 2005 and 2008.

PSCW staff provided an estimate of the actual wind resources in our state that was extremely optimistic in meeting WEPCO's short-term energy needs. PSCW staff testified that there is the potential in Wisconsin for 42,000 megawatts of wind, including conceivably a little over 2,000 megawatts of wind that is categorized as class 4 or 5.[4] PSCW staff, however, did not

[4] Trancript, p. 1541-1542.

recommend that the construction applications sought in this proceeding—for over 1,000 megawatts of generation sought in this proceeding—be denied. On the contrary, a staff witness testified that wind resources be looked at "more seriously" and that it could meet part of the demand that would be met by PTF-2. For these reasons the Commission finds that current renewable resources are neither technically feasible nor cost-effective options to displace the need for a project the size and scope presented in these applications.

Conservation programs and the development of renewable generation technologies are, and will continue to be, an important part of Wisconsin Electric's supply activities, as they are required to be by law. Given the scale and the timing of the energy capacity needs of Wisconsin Electric's customers as well as the EGEAS Model results discussed in the record, however, the Commission is not convinced that conservation programs and renewable generation could serve the energy capacity needs that the applicants propose to serve in this docket more reliably or cost-efficiently than the applicants' proposal.

The Commission supports the expansion of future tracking and analysis of relevant, reliable data regarding conservation efforts in Wisconsin.

Reasonable needs of the public

Wis. Stat. § 196.491(3)(d)2. 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. To justify the need and timing of PWGS Units 1 and 2, WEPCO submitted optimal expansion plan results from the EGEAS computer model.

As part of its EGEAS computer model simulations, WEPCO employed various base forecasts for electric demand and energy, as well as fuel. WEPCO forecasts that retail electric

demand, including 286 MW in new wholesale electric requirements, will grow from 5,627 MW in 2001 to 7,405 MW in 2010 and to 9,414 MW in 2020.[5] Similarly, WEPCO expects that electric energy will grow from 31,364 GWH in 2001 to 38,940 GWH in 2010 and to 47,754 GWH in 2020. WEPCO's base fuel price forecast increases natural gas prices using a 1.9 percent per year real escalation rate. To test the robustness of its modeling effort, WEPCO also examined various high and low sensitivities of its demand, energy, and fuel forecasts. WEPCO contends that its base EGEAS simulations and all sensitivities demonstrate conclusively that the two 545 MW units are needed in 2005 and 2008 to satisfy the reasonable needs of the public.

The Commission concurs. The various base forecasts WEPCO used in the EGEAS model are reasonable. With those input parameters, the EGEAS model results contained in the record conclusively show that the reasonable needs of the public for generating capacity and energy do require the construction of both PWGS units, with the first unit beginning commercial operation in 2005 and the second in 2008. Since construction of the second unit will not commence in 2003, it is reasonable to require that WEPCO file an electric demand and energy forecast and an updated EGEAS computer model simulation analysis, prior to the construction of the second PWGS unit. Upon doing so, the Commission will also set an appropriate start date for Unit 2.

[5] This is a growth rate of 2.9 percent per year in total system demand, from 2002 to 2011. This growth rate includes 286 MW in new firm sales to non-native load wholesale customers. By comparison, WEPCO's native load system alone is expected to grow 2.5 percent per year over the 2002 to 2011 period.

Competing proposals from independent power producers

In an earlier ruling on the applicants' request for a declaratory ruling in this proceeding,[6] the Commission declined the opportunity to mandate, for the purpose of its review in this proceeding, a formal request for proposal (RFP) process. The Commission reasoned that neither current law nor any administrative rule imposed this obligation to conduct a formal RFP process.

The Commission through past orders has placed the burden on the applicants to demonstrate how they would competitively evaluate their PTF proposal and several proposals that were offered in this proceeding, including those submitted in advance of hearing as well as those developed at the hearing. The Commission concluded that the applicant "maintain the burden of showing in the relevant future CPCN proceedings that the PTF projects are needed and cost effective. To do so, WEPCO will need to show a thorough, complete, and accurate evaluation of alternatives.[7]

The applicants and Commission staff conducted a rigorous analysis of the applicants' proposal and the "lock box proposals" offered by wholesale merchant plant suppliers as each was modified during the course of this proceeding. Staff witnesses conducted comprehensive EGEAS modeling on various proposals with indicated adjustments. Moreover, the applicants' analysis of the various proposals submitted as part of this proceeding and summarized as revised Exhibit A in the applicants' brief demonstrates that the applicants conducted a thorough, complete and reasonably accurate evaluation of alternatives during the course of this proceeding.

In this docket the IPPs argued that WEC conducted an unfair process of reviewing their proposals, and that should have been utilitzed competitive bidding with an independent

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[6] *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).

[7] *Id.* at 5.

evaluator. The Commission does not accept this contention. The process served the interests of ratepayers, as can be seen by the fact that costs for all projects declined during the evaluation process. The Commission's review process also allowed each bidder ample opportunity to advocate on behalf of its project via proposal submission and revision, testimony at both public and *in camera* hearings, and briefing. Regardless of how one may view WEC's appraisal of the IPP proposals, the Commission is the ultimate independent evaluator and the Commission staff performed its own objective analysis. In making the above determinations, the Commission relied on this analysis in addition to that provided by WEC and the IPPs.

The Commission did not require WEC to use an RFP process or an independent evaluator, and WEC's analysis of alternatives available through the market was sufficient. Whether a similar process will be reasonable in future generation construction dockets must be judged on a case-by-case basis.

The testimony and exhibits presented in this proceeding attest to a very competitive process that resulted in an exhaustive economic comparison of different generation alternatives. This process also produced what every competitive procurement process is supposed to do—lower costs to the ratepayers who will ultimately pay for the generation constructed as a result of this process. Accordingly, the Commission reasonably concludes that a complete and thorough evaluation of the applicants' proposal and those submitted by wholesale merchant power suppliers was considered in this proceeding.

The Commission further deemed it necessary to establish a reasonable projection of costs for PWGS in order to establish a baseline figure to consider the various generation alternatives and to protect ratepayers from any cost overruns associated with the certificates sought in this proceeding. WEC estimated construction costs of $309.6 million (2001$) for Unit 1 and

$280.3 million (2001$) for Unit 2. Adjusting for inflation, in nominal dollar values these construction costs become $326.6 million and $316.0 million, respectively. In addition, WEC estimated variable operations and maintenance (O&M) costs for each PWGS unit would be $2.26/MWH (2001$) and fixed O&M costs would be $4.11/kW (2001$), assuming a 25-year lease.

Competing with PWGS as alternate means of meeting the reasonable needs of the public were five IPP projects. The first two, titled "Project C" and "Project D" in the record, originated from a request for proposals (RFP) that WEPCO conducted two years ago. In addition, three IPPs submitted competing proposals in February 2002, which they subsequently revised at hearing. Calpine Corporation proposed a 523 MW generating plant to be located in Fond du Lac; Mirant Americas proposed a 560 MW project at Plover; and PG&E National Energy Group proposed a 1,083 MW facility at Pleasant Prairie. Cost and engineering aspects of all five IPP proposals are confidential. Similar to the PWGS project, all the IPP projects involve the construction of combined cycle generating units.

Under Wis. Stat. § 196.491(3)(d)3, the Commission may only issue a CPCN if it finds that a project is in the public interest after considering "alternative sources of supply . . . individual hardships, engineering, economic, safety, reliability and environmental factors." WEC's projected cost values for the PWGS facility are reasonable estimates to use during comparative project evaluation. Since the construction cost estimates found in the competing IPP proposals are all fixed and not subject to subsequent revision, in order to compare the PWGS project against these alternatives, it is necessary to fix WEC's specific construction cost

estimates for the PWGS units at the proposed values.[8] This means that the Facility Lease must include these figures, with no subsequent revisions.

With respect to the quantitative analysis, the overall cost projections of the projects are quite similar, especially when the comparison is confined to the PWGS project and the three IPP proposals submitted for evaluation during 2002. This is the relevant competitive group because the two other IPP projects from WEPCO's 2000 RFP are too dated to be of value. Commission staff's in-depth analysis, using the EGEAS model and adjustments to the EGEAS input data based on the record, shows that substituting one of these three IPP bids for the PWGS project causes the total cost of WEPCO's generation resources (approximately $14 billion) to vary by only $50 million on a net present value basis. Commission staff's cost analysis covers capacity and lease payments, fixed and variable O&M, and fuel expense over the life of the project.

The applicants' lifecycle analysis showed a significant disparity between its PWGS project and the three IPP bids. The applicants'analysis purported to show the quantitative benefits of it proposal by calculating the total annual costs of its project and the generation alternatives presented at hearing for each year of the analysis period and discounted those costs back to 2005 to provide a net present value analysis of the total cost for each alternative.

Any quantitative estimation of the project proposals by the Commission does not produce an optimal generation alternative. For example, the staff's EGEAS analysis suggests that none of the projects stands out as necessarily the lowest cost for the ratepayers. The applicants' life cycle analysis suggests that the PWGS proposal is either equivalent or superior to the three

[8] In its project application WEC notes that the construction cost estimates are subject to change for force majeure events. This is reasonable. It is also reasonable to adjust the fixed costs of construction for inflation, escalating the cost values at no more than the general rate of overall gross domestic product (GDP) price inflation. Such inflation adjustments should be based on the PWGS project design and construction schedule, as specified in the project application, so that costs are inflated according to the year of scheduled incurrence.

generation alternatives when considering which project will provide the lowest cost for ratepayers.

For these reasons, qualitative factors are especially relevant. These factors support a conclusion that the PWGS project is in the public interest, Applying the quantitative and qualitative factors that are set forth in Wis. Stat. § 196.491(3)(d)3 clearly support the conclusion that PWGS project is in the public interest. One advantage of the PWGS project is its use of an existing generation site, or brownfield, over a greenfield site. The PWGS proposal, as refined by negotiation with the Customer Groups, also includes certain provisions that hold ratepayers harmless, if transfer or assignment of the Facility Lease were to degrade WEPCO's credit quality. Such provisions do have value to ratepayers if the project is transferred outside the holding company. 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. In addition, the PWGS project is more likely to be financed on a timely basis than any of the IPP proposals. Recent events in the credit markets have seriously deteriorated the ability of IPPs to obtain needed financing, which raises an unacceptable electric system reliability risk were the Commission to pick an IPP project.

Finally, the enactment of the very law which permits this Commission to consider for the first time an application by a public utility to build generation through an affiliate suggests another major qualitative factors supporting the conclusion that the PWGS project is in the public interest. Wis. Stat. § 196.52(a). The legislative intent behind the leased generation statute is to provide an incentive for utility holding companies to continue providing generation services for the affiliate utility's native load customers.

As the Commission recognized in its earlier order in this proceeding, the Legislature could very well have directed this Commission to no longer permit load serving entities such as WEPCO to construct base-load or intermediate load and direct that all their future needs be met through a formal competitive bidding process for resource acquisition that relied solely on wholesale merchant plant suppliers. The enactment of this new law permits the Commission to consider leased generation through a non-utility affiliate as a new way to ensure greater reliability in Wisconsin and deliver greater long-term price certainty to ratepayers at a time of unprecedented price volatility in wholesale energy markets across the country. The PWGS project furthers this legislative goal.

Effects 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, this analysis will focus only on horizontal market power issues associated with the construction and operation of the PWGS facility. 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 in which a large electric generating firm can obtain leverage over the prices paid for electricity.

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. 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.

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.

Lease financing and rate-based financing

In their resource planning, WEPCO considered both utility owned generation (i.e. traditional rate-based generation), procurement from wholesale merchant plant suppliers and leased generation financing. After reviewing these alternatives, WEPCO decided to pursue leased generation financing to fulfill their supply needs for 2005 and 2008.

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.

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, discussed *infra*, provide further protection to ratepayers during the term of this lease.

In addition, recent legislative changes in Wisconsin have fundamentally changed 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. The Commission contends that the means to fulfill its mandate to ensure just and reasonable rates and reliable service includes leased generation financing. The Commission finds the inter-affiliate leased generation proposal is the most reasonable choice for this PWGS facility and provides certainty that consumers will have these needed facilities in 2005 and 2008.

Review of the proposed leases

The PTF leases are affiliated interest agreements under Wis. Stat. § 196.52(9). WEC proposed financing and operating each PWGS unit with a Facility Lease, a Ground Lease, and a Ground Sublease. Since WEC first submitted it as an exhibit on June 14, 2002, the Facility Lease evolved over the course of hearings. Both WEC and Customer Groups introduced numerous new versions of this lease into the record during continual negotiations. The final versions introduced during the hearings were Exhibit 223, as proposed by WEC, and Exhibit 230 from Customer Groups. After the hearings concluded, Customer Groups submitted even further refinements to the Facility Lease, including the results of more negotiations with WEC, as delayed Exhibit 250, and identified other areas where agreement had been reached in its initial brief. Finally, on November 26, 2002, WEC and Customer Groups proposed that the Commission extend its briefing schedule so they could provide a "brief supplement" indicating additional negotiated areas where each party was willing to withdraw from its position on particular issues. When no party objected to this request, the Commission granted the motion to extend the briefing schedule and accepted the brief supplement. This final negotiated version of the Facility Lease resolves most, but not all, of the areas of dispute between WEC and the Customer Groups.

For purposes of discussion in this Final Decision, the Facility Lease now before the Commission constitutes the version found in Exhibit 223 as modified by Exhibit 250, the agreed-upon changes identified in the Joint Initial Brief of the Customer Groups dated October 25, 2002, and the agreed-upon changes identified in the brief supplement dated November 26, 2002. In general, the Commission finds that the Facility Lease is reasonable but some changes to the Facility Lease are needed, to balance risk and responsibility properly between the parties to this

contract. Some of these modifications to the Facility Lease are detailed in Appendix B of this Final Decision, and other modifications are discussed below.

During the course of hearings, no changes were made to the Ground Lease and Ground Sublease. They remain as submitted in the June 14, 2002, filing. As a result, both documents need to be modified to bring them into conformity with the Facility Lease that is being approved in this Final Decision. Necessary changes to the Ground Lease and Ground Sublease are also identified in Appendix B.

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.

Fixed financial terms

The Commission finds it reasonable to set the following financial terms of the Facility Lease:

1. Rate of return

In its application, WEC included a 13.90 percent rate of return on equity in the Facility Lease payments. By negotiation with Customer Groups, this rate dropped to 12.90 percent with the proviso that, if WEC failed to construct the Elm Road Generating Station (ERGS) coal facilities within 72 months of PWGS construction, the return on equity would be reset to 12.15 percent.

The Commission will not prejudge matters relating to ERGS by tying a return on equity for the PWGS facility to the outcome of the ERGS proposal. However, the Commission does find reasonable a return on equity of 12.7 percent for the PWGS project. This return is within the broad range of estimated cost of capital found in the record. A 12.7 percent return will also provide the necessary financial incentive to construct needed new generating plants in Wisconsin, during a period of heightened investor uncertainty with respect to generation construction.

The 12.7 percent return on equity deemed reasonable here reflects the fact that PWGS LLC faces increased financial risk associated with this Commission's decision to fix construction costs and to establish higher commercial delay damages of $100,000 per day. WEPCO's current authorized return on equity for its rate-based assets of 12.2 percent reflects a blend of distribution and generation assets, and stand-alone generation assets ordinarily face larger business risk than distribution assets and therefore require a higher investor return on equity. On the other hand, a return on equity as high as that earned by a true wholesale merchant plant or an IPP is not needed because, under this lease and Wisconsin's leased generation law, PWGS LLC will face less risk than these entities.

2. Cost of debt

Included in lease payments under the Facility Lease, is an amount of debt cost deemed appropriate by an "Independent Financial Advisor," based upon the cost of senior long-term debt for an entity with the credit rating of WEC. Presently, that rating is A- by Standard and Poors. The Facility Lease also allows for a call or refinancing of the debt, if this advisor finds it appropriate. Rather than relying on such an advisor to determine the cost of debt and the need for a call or refinancing, as the Facility Lease currently provides in Annex B to Schedule 7.1, it is reasonable to delete all references to the advisor and set the debt rate using published indices at the time during the construction process when long-term debt would ordinarily be required. Annex B to Schedule 7.1 of the Facility Lease must be revised accordingly and the definition of "Independent Financial Advisor" in Schedule 1.1 must be deleted. It is also reasonable to grant WEPCO the right to exercise a call or refinancing option in this portion of the lease.

3. Capital structure

For purposes of establishing lease payments, the Facility Lease creates a capital structure of 55 percent common equity and 45 percent long-term debt—unless WEC fails to construct the ERGS coal facilities, in which case the appropriate capital structure would be reset to 53 percent common equity and 47 percent debt. For the reasons described above, the Commission must reject this attempt to tie together two separate CPCN projects. However, the Commission does find reasonable a Facility Lease capital structure of 53 percent common equity and 47 percent debt for the PWGS project, because current Standard and Poors credit rating guidelines indicate that the appropriate amount of debt to use is between 46 and 50 percent for a utility like WEPCO with an "A-type" credit rating and an above-average business position.

4. Current return on construction work in progress (CWIP)

Under the Facility Lease, lease payments include a current return on CWIP, including pre-CPCN expenses. WIEG protests that such treatment should not be allowed for intergenerational equity reasons, because future ratepayers will not be paying their share of these costs even though they benefit from the project. Earning a current return on CWIP, however, is less costly to ratepayers on a net present value basis and for this reason the Commission finds these terms of the Facility Lease to be reasonable.

5. Initial lease term

Wis. Stat. § 196.52(9)(b)9. declares that the term of a leased generation contract for a gas-fired generating plant must be 20 years or more. The initial term of the Facility Lease is 25 years. No party disagreed with this length of term, and the Commission finds it reasonable.

6. Renewal rent terms

The Facility Lease grants WEPCO the right to renew the lease, upon its expiration, at lower rent 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,[9] the lease payments drop to 15 percent of the original rent. These terms provide sufficient ratepayer protection in terms of overall cost-effectiveness and are therefore reasonable.

7. Delay damages

The Facility Lease sets damages payable for failure to meet the commercial operation date of $25,000/day (May to September) and $12,500/day (October to April), with a $10 million cap backed by a letter of credit. Customer Groups argues that these amounts are too low, and that more reasonable amounts are $100,000/day (year-round) with a $15 million cap backed by a

[9] In order to be considered a "true" lease for tax purposes, the PWGS facility 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 the PWGS facility, as determined by an independent evaluator.

letter of credit. Commission staff showed at hearing that the damages payable in recent utility power purchase agreements use figures higher than those found in the Facility Lease. To protect system reliability by discouraging commercial delay, it is reasonable to require that Schedule 3.3 of the Facility Lease be revised accordingly, substituting the figures proposed by Customer Groups. Chairperson Bie dissents, finding $65,000/day with a $12 million cap to be reasonable.

8. Securitization of lease payments

The stream of rent payments that WEPCO will be making to PWGS LLC 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. WEC contends that any such lease payment securitization would not harm the utility and need not be subject to Commission review or approval. Given the innovative and novel aspects of this lease, however, the Commission holds that it review and approve any such securitization in order to ensure that it not cause harm to the utility or its ratepayers.

9. WEPCO credit quality degradation

WEC and Customer Groups negotiated restrictions on the transfer or assignment of the PWGS plant or Facility Lease and, to protect WEPCO's credit quality from degradation, 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. The Commission finds these terms reasonable. Commissioner Mettner dissents in part, finding that the hold harmless provision should apply more broadly to cover situations where the existence of the lease itself causes a downgrade of WEPCO's debt rating.

The Facility Lease does not include a mechanism for determining how and when compensation should be paid to WEPCO under the hold harmless clause. It is reasonable to require WEC to submit to the Commission for its review and approval, within 90 days of the date this Final Decision is signed, a proposed method of accomplishing the purpose of this clause.

10. Events of total loss

Customer Groups proposed several changes, as shown in Exhibit 230, to the Facility Lease in situations where an "Event of Total Loss" occurs. Customer Groups recommended modifying § 5.5(c) so that, if the lessor elects to sell the plant to WEPCO during the construction phase because of an Event of Total Loss, the purchase price is then reduced by any loss proceeds and condemnation award. Customer Groups also proposed revising § 13.1(d), to specify the compensation paid to the lessor if an Event of Total Loss occurs during the lease term (the lessor will receive any loss proceeds and condemnation award, plus lease payments for six months) and to provide for continuation of the lease upon mutual agreement and the Commission's approval. This modification removes the lessor's sole discretion regarding continuation of the lease, limits WEPCO's liability for lease payments after an Event of Total Loss to six months rather than the remaining term of the lease, and allows lease continuation with Commission approval. Customer Groups also recommended removing the provision in § 17.2(a) that treats an Event of Total Loss as a lessee default. These modifications provide proper protection to the utility and its ratepayers. It is therefore reasonable to require that the changes Customer Groups proposed to these sections of the Facility Lease, as shown in Exhibit 230, be made.

11. Force majeure

Customer Groups alleges that the Facility Lease improperly assigns liability to WEPCO in events of force majeure and "excused" events.[10] Under § 5.5 of the lease, a force majeure event that delays construction so that the project is not completed on time is considered a lessee event of default. Customer Groups recommend that force majeure events should not be considered any party's fault, and that cost liability should be allocated both to the lessor and the lessee.

The assignment of responsibility for these events is ultimately an allocation of risk between WEPCO and PWGS LLC, which necessarily affects the ultimate return on equity becomes a part of rent payments and flows through the lease. The risk assignment in § 5.5 of the Facility Lease, coupled with the Commission's determination concerning equity costs, is reasonable and need not be changed.

12. Demolition and removal costs; new gas units

The Facility Lease states that the new gas generating units to be located on the site must be demolished and removed, and WEPCO is responsible for all costs associated with demolition and removal of these units. WEC maintains that costs incurred by the lessor for the lessee's benefit should be recovered by the lessor through lease payments. Customer Groups did not argue against the recovery of these costs from the lessee, but did contest lease provisions regarding when recovery should start and by what method it should take place. It is reasonable that the collection of these demolition and removal costs not take place until the plant is completed. The Facility Lease also includes the demolition and removal costs in the principal amount to be recovered over the rental term as part of base rent, which means the lessor

[10] Generally, Schedule 1.1 of the Facility Lease defines an "excused" event as the failure or delay of the lessee, or the transmission provider, to meet any conditions for commercial operation.

inappropriately realizes a return on these costs prior to their occurrence. The rent schedules must be revised to ensure that demolition and removal costs do not earn a return. In addition, it is reasonable to require that the demolition and removal costs be recovered over the initial term of the lease.

The Facility Lease as proposed would make WEPCO fully liable for demolition and removal costs, even if the lessor terminates the lease, retains ownership, and rents to another party. It is more reasonable to recover these costs from all the parties that may have benefited from the use of the facility. Requiring that the Facility Lease be changed so WEPCO is liable only for its pro rata share of demolition and removal costs is reasonable.

13. Damage amounts

The Facility Lease 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. It is reasonable to require that this amount, which is defined in Schedule 1.1, be reduced to 48 months.

Other terms and conditions

In addition to the financial terms specified above, the Commission makes the following findings:

1. Third party beneficiaries

As proposed, § 22.8 of the Facility Lease states that none of the lease provisions is available for the benefit of third parties. WEC asserts that this section is necessary to avoid litigation by others who are not express parties to the lease, which could disrupt construction

schedules or jeopardize the financial positions of the lessor and lessee. Customer Groups recommended that this restriction be removed and replaced with a statement that the lessee (WEPCO) is subject to the standard of prudence applicable to public utilities. Such a provision, according to Customer Groups, would make clear that WEPCO ratepayers also have an interest in full performance under the lease. Since the Commission's authority to measure WEPCO's actions under the standard of prudence is granted by law, not by the terms of this lease, the provision requested by Customer Groups is surplusage. The Commission finds that § 22.8 is reasonable without modification.

2. Right of first refusal

Section 22.7(d) and Exhibit D, § 1.1 of the Facility Lease grant WEPCO a right of first refusal over any proposal by W.E. Power to transfer a controlling interest in PWGS LLC, and over any proposal by PWGS LLC to transfer its interest in the Facility Lease. If WEPCO exercises its right to purchase this interest, it must then pay to the proposed transferee its reasonable out of pocket costs (up to 5 percent of the proposed purchase price), plus a premium equal to one percent of the proposed purchase price (capped at $1 million). Such payments, which would have the perverse effect of increasing WEPCO's purchase costs, are not in the public interest and it is reasonable to require that they be removed from the lease.

3. Operating lease treatment in rate cases

At hearing WEPCO indicated that, in future rate cases, it would only seek operating lease treatment for its obligations under the PTF leases. The Commission finds this reasonable because, on a present value basis, operating lease treatment would be less costly to ratepayers than if the leases were accorded capital lease treatment for ratemaking purposes. It is therefore reasonable to require that 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.

4. Accounting for costs; tracking mechanism

At hearing WEC acknowledged that, without proper tracking of accounts, WEPCO ratepayers could pay twice for certain costs that are built into WEPCO's budget—once through utility rates, and again through lease payments. It is reasonable to require that WEPCO work with Commission staff to develop a tracking mechanism, and appropriate accounting practices, to prevent such a double collection of costs.

5. Asset Purchase and Sales Agreement

WEC submitted an Asset Purchase and Sales Agreement that allows WEPCO to sell certain assets associated with the existing Port Washington generating coal units to PWGS LLC. After these coal units are retired and decommissioned, PWGS LLC can productively incorporate certain assets no longer deemed used and useful to the utility into the construction of its new generating facilities. The Agreement provides that these assets, which will be used to build a new plant for the benefit of the utility, will be transferred at book value and leased back at the same book value. This is reasonable and in the public interest.

6. Conforming leases

This Final Decision makes numerous modifications to the PTF leases proposed by WEC. It is reasonable to require that WEC rewrite these leases for Unit 1 and Unit 2, making the changes specified herein (including all changes listed in Appendix B) 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 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.

7. 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 and the Asset Purchase and Sale Agreement for PWGS Unit 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 PWGS Unit 2. Pursuant to Wis. Stat. § 196.52(9)(f), the Commission shall maintain jurisdiction to ensure that the construction of the PWGS 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 each Facility Lease, Ground Lease, Ground Sublease, and Asset Purchase and Sales Agreement. 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 PWGS facility, must first receive Commission approval.

Siting the PWGS facility

WEC's CPCN application characterizes the conversion of the existing Port Washington Power Plant to the PWGS facility as a "repowering." The filing requirements under Wis. Admin. Code § PSC 111.53 are different for repowering projects. While Wis. Admin. Code

§ PSC 111.53(1)(e) requires that an ordinary CPCN application must include at least two proposed sites for a proposed generating facility, for a repowering project this requirement can be met with two plant configurations on the site of the existing generating facility. Wis. Admin. Code § PSC 111.53(2)(b)(2). The Commission's rules do not define "repowering," but those of both DNR and the U.S. Environmental Protection Agency do. *See* Wis. Admin. Code § NR 405.02(25m) and 40 CFR 72.2. Because the PWGS proposal to replace existing coal-fired units with gas-fired, combined cycle generating plants fits within these rules, it is reasonable to conclude that this project would be a repowering and the CPCN application complies with the Commission's rules regarding proper siting information.

Reuse of the existing Port Washington Power Plant site would allow the PWGS facility to be located on and near areas supporting the existing power plant and would limit construction impacts to lands that were previously disturbed. WEC proposes to use once-through, open-cycle cooling, which would improve the efficiency of the plant. WEC's preferred plant configuration maximizes the reuse of the existing infrastructure, including the electrical substation and its tie into the transmission system, and the cooling water intake and discharge facilities. Aesthetically, it would also allow part of the plant to continue to look much as it does today because WEC proposes to maintain the exterior red brick facade of the west and north walls. The primary reasons WEC prefers this layout are lower cost and ease of construction. If the alternative layout were to be used, it would be necessary to retire all the units of the existing power plant before construction could begin.

Air emissions would change at the Port Washington site as a result of the proposed project. Nitrogen oxides (NO_X), sulfur dioxide (SO_2), mercury, sulfuric acid, fluoride, and lead emissions would all decrease. The decrease in NO_X and SO_2 would be dramatic. On the other

hand, emissions of carbon monoxide (CO), particulates, and volatile organic compounds (VOC) would increase. Because of required VOC offsets, regional emissions of VOC would decrease. Reductions in SO_2, sulfuric acid, and NO_X emissions would decrease the amount of acid rain caused by the plant. These changes would occur while electric generation is roughly tripled at the site. For the categories of emissions for which there would be an increase, air quality would decline, but not enough to violate state emission standards.

The existing power plant's coal dock would be retired as part of the project. Elimination of the coal pile would be a significant environmental improvement by removing a pollutant source that contributes coal dust and dissolved metals to the runoff and wastewater discharge. Because the coal dock is located on filled lakebed that must be returned to public use, WEC would need to continue coordination with the state of Wisconsin and city of Port Washington to determine the ultimate use and disposition of the dock.

The new power plant could use cooling water at a rate 25 percent greater than the existing plant. Nevertheless, environmental impacts on Lake Michigan due to cooling water discharge may not change significantly. Significant numbers of DNR-stocked trout and salmon are currently impinged by the existing water intake, which is not best available technology and would need to be modified. The plant is currently authorized to discharge under the terms and conditions of a Wisconsin Pollution Discharge Elimination System Permit that expires on June 30, 2005. This wastewater discharge permit would need to be changed to accommodate new water quality standards for temperature and modifications to the water intake structure to reduce fish impingement and entrainment.

The Port Washington Power Plant's existing north stack has had a peregrine falcon nest box in place for almost a decade. A pair of state endangered peregrine falcons (*Falco*

peregrinus) successfully fledged young the last three years. Removal of the nest while falcons are nesting could result in adult abandonment of the nest and subsequent failure of the eggs or nestlings to survive. In order to avoid a take of peregrine falcons or their young, the nest box should not be disturbed while the falcons are nesting or while their young are present. WEC plans to work with staff from the DNR Bureau of Endangered Resources and the Milwaukee Public Museum to develop a plan to relocate the nest box, without harming the falcons.

Suitable habitat may be present for forked aster (*Aster furcatus*, a federal species of concern and a state threatened species) along the creek on the western edge of the power plant property. Conducting a survey of the creek corridor between mid-August and late September would determine if the plant is present and any likely impact to this species.

In its application, WEC 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 WEC perform these measurements after the PWGS facility 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 WEC report these post-construction measurements to the Commission as quickly as practicable.

The city of Port Washington has negotiated with WEC a development agreement and a conditional use grant to substantially mitigate local concerns about the proposed power plant. These concerns include the use of air emission offsets, noise, traffic, security, financial impacts to water and wastewater utilities, and the public use of excess lands. Construction of the plant at the proposed site would not interfere with orderly land use and development. However, if the

proposed power plant were not built, the city contends that the existing power plant site could be redeveloped with a mix of single-family homes, condominiums, and commercial development that would benefit the city. In the development agreement, WEC agreed to pay the city $500,000/year over the life of the Facility Lease to compensate it for community impacts. The city argued that the approximately $750,000 in annual shared revenue payments it would receive because of the PWGS project is not adequate compensation for all of these impacts, and that these payments face an uncertain future. The development agreement conditions these payments upon the Commission's willingness to allow WEPCO to recover these costs through rates.

Mitigation payments such as these constitute a transfer of funds from WEPCO's ratepayers, throughout its service territory, to a particular municipality's property taxpayers. Although the state Legislature authorized similar payments recently for the construction of high-voltage transmission lines in 1999 Wis. Act 9, it made no such provision for generating plants. The shared revenue program remains the Legislature's sole approved compensation for the impact of locating an electric generating plant within a municipality; resolving concerns about the adequacy of this program is outside the scope of the Commission's authority. In addition, absent specific legislative direction, the Commission finds that imposing upon ratepayers the costs of a mitigation payment to supplement shared revenue is not reasonable. Chairperson Bie dissents in part, finding that such payments are a reasonable incentive for communities who host such facilities.

Siting the natural gas line

Under state law, the Commission may refuse to issue a Certificate of Authority for a project that would do any of the following:

> 1. Substantially impair the efficiency of the service of the public utility.
>
> 2. Provide facilities unreasonably in excess of the probable future requirements.
>
> 3. When placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service unless the public utility waives consideration by the commission, in the fixation of rates, of such consequent increase of cost of service.

Wis. Stat. § 196.49(3)(b). The record demonstrates that WGC's proposed gas pipeline project is necessary to provide natural gas service to the PWGS facility and to reinforce WGC's existing natural gas distribution system in the Port Washington area. WGC has shown that its estimated cost of $24.5 million is reasonable. The Commission therefore finds that the project complies with Wis. Stat. § 196.49 because it will not impair the efficiency of WGC's service, will not provide facilities that exceed probable future requirements, and will proportionately increase the value and quantity of WGC's service.

WGC divided the proposed natural gas pipeline routes into segments, and developed alternate routes for the segments between nodes A and E, F and I, and M and O. WGC proposed a single gas pipeline route between nodes E and F, I and M, and O and P.

In order to minimize potential total impacts to wetlands and forests between nodes A and E, a gas pipeline route consisting of segments A to A1, A1 to B1, B1 to C1, C1 to D1, D1 to D, and D to E is reasonable. For the remainder of the route, the record demonstrates that the best overall balance of land use, environmental, and ease of construction considerations is the proposed route between nodes E and F, route Option 1 between nodes F and I, the proposed route between nodes I and M, route Option 2 between nodes M and O, and the proposed route between nodes O and P.

WGC requests that any Commission authorization for the proposed natural gas pipeline grant some flexibility to modify the final location of the pipeline without further Commission approval, to accommodate environmental factors and landowner concerns. Since most of the natural gas pipeline route overlaps existing electric transmission line ROW, it is reasonable to allow WGC to relocate the pipeline up to 100 feet from the reference centerline of the approved route, if the change does not cross wetlands or affect any other sensitive resources. WGC may also move the pipeline more than 100 feet from the reference centerline, if the pipeline remains entirely within the same landowner's property, if the landowner grants written permission, and if the change does not cross wetlands or affect any other sensitive resources. If WGC seeks to make any other modifications to the approved route, it is reasonable to require that the utility receive the written, advance approval of the Natural Gas Division Administrator, and that it first demonstrate that the proposed modifications are consistent with this Final Decision.

At the close of hearing, WGC had not completed its on-site field surveys for some threatened or endangered species and species of special concern. While WGC's preliminary field survey results for the endangered Hine's emerald dragonfly (*somatocholra hineana*) indicated that this species is not present along the natural gas pipeline routes, DNR Bureau of Endangered Resources did not have the opportunity to review the results of that survey work. Other surveys for various rare species that may inhabit the general project area were also still occurring. As a result, WGC is willing to defer construction of its project until the Bureau confirms that the Hine's emerald dragonfly, swamp metalmark butterfly (*calephelis mutica*), and other endangered or threatened species and species of special concern are not present along the approved route, or until the Bureau concludes that the project, with any appropriate mitigation measures, would not harm any of these species. WGC is also willing to secure the

Commission's approval if the identified mitigation measures would result in a material change to the gas pipeline project, before WGC begins physical construction of the modified project. It is reasonable to incorporate these conditions to ensure the protection of rare species. With these conditions, the approved route for the project would not have undue adverse impacts on the human or natural environments.

Transmission construction

ATC owns and operates the transmission facilities serving the Port Washington Power Plant and would be responsible for providing interconnection and transmission service to the PWGS facility. Five 138 kV circuits currently transmit power from Port Washington Substation to Saukville Substation (Ozaukee County) and Range Line Substation (Milwaukee County). ATC conducted an interconnection study to examine the effects on the existing transmission system of adding new generation at Port Washington. In addition, ATC conducted a transmission service study for delivering 1,200 MW from the PWGS plant to WEPCO's control area. Based on its interconnection and the transmission service studies, ATC identified the transmission upgrades proposed in its application.

ATC describes these upgrades as "Phase 1" transmission improvements, which would be sufficient to support both PWGS units. ATC estimates that these improvements will cost $24 million and is seeking a Certificate of Authority to proceed with construction. It plans to commence construction of the Phase 1 improvements in October 2003, and to complete its work by May 2005. The Phase 1 transmission upgrades are detailed below:

> Rebuild the double circuit, 138 kV overhead transmission line (circuits KK742 and KK752) from Port Washington Substation to Saukville Substation. This line is 4.8 miles long and uses lattice towers. It would be rebuilt on the existing ROW using larger 1033.5 kcmil ACSR conductors in place of the present 300 AWG

copper conductors. The lattice tower structures would be replaced with direct-embedded, double circuit steel poles near the existing structure locations.

Rebuild the single circuit, 138 kV overhead transmission line (circuit KK762) from Port Washington Substation to Saukville Substation. This line is 4.7 miles long and uses H-frame structures. It would be rebuilt on the existing ROW using larger 1033.5 kcmil ACSR conductors in place of the present 300 AWG copper conductors. The H-frame structures would be replaced with stronger H-frame structures near the existing structure locations.

Rebuild the double circuit, 138 kV overhead transmission line (circuits KK751 and KK761) from Port Washington Substation to the Range Line Substation. The existing line is 21.2 miles long and uses lattice towers. The existing 477 ACSR conductors would be replaced with 795 kcmil ACSR conductors. The lattice tower structures would be replaced with direct-embedded, double circuit steel poles.

Replace seven 138 kV circuit breakers and disconnect switches at Port Washington Substation.

Make other improvements, including reinforcing the dead-end structures at Port Washington, Saukville, and Range Line Substations; installing new protective relaying at Port Washington, Saukville, and Range Line Substations; and replacing minor thermal limiters at Port Washington, Saukville, and Range Line Substations.

W.E. Power would pay for the facilities connecting the generator circuit breaker and ATC's 138 kV substation bus, which it would turn over to ATC upon commercial operation and the initiation of transmission service. W.E. Power would also pay for the cost of the required interconnection system upgrades. ATC would compensate W.E. Power for the actual reasonable cost of the interconnection system upgrades, plus interest, upon commercial operation of the power plant. ATC would install and own the transmission system upgrades required to provide the transmission service needed by the PWGS facility.

The record demonstrates that the transmission upgrades are necessary to maintain the efficiency of ATC's service, and that the facilities are reasonably necessary when considering ATC's probable future requirement. 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 interconnection and transmission upgrades, as detailed in its application, and that its project is in the public interest.

The lines to be rebuilt cross numerous wetlands and streams without mitigation or construction protocols, work in wetlands can cause damage to the wetland structure and subsurface water flow, and introduce invasive species. The probability of these impacts occurring could be reduced through such measures as performing construction at times when wetlands are dry or frozen; using alternative, off-ROW routes to access construction sites; using low ground-pressure construction equipment; using timber mats; and thorough cleaning of construction equipment to remove invasive plant seeds and stems prior to entering wetlands.

Purple loosestrife (*Lythrum salicaria*), an invasive, non-native weed, may be introduced to a wetland by seeds or plant parts carried by construction equipment that has been used in an infested area. Once introduced to a wetland, purple loosestrife spreads rapidly, crowding out native vegetation. Purple loosestrife has little value for wildlife in providing food or cover.

To help avoid spreading purple loosestrife, construction machinery should be cleaned before beginning work on a project and after working in infested wetland areas. Because it is possible that cleaning may miss some plant seeds or parts, post-construction inspection of wetlands in the ROW is essential to locate any new infestations. Inspections in the years immediately following construction would make possible the early identification and removal of new infestations, when this work can be most easily accomplished. These inspections and removals must continue for several years to eradicate any infestations resulting from construction. DNR can provide guidance on the identification and removal of purple loosestrife.

Habitat within the transmission line ROW is currently significantly disturbed, as the linear corridor traverses light industrial, residential, cropland, pasture, and regularly maintained upland and wetland areas. The habitat within the transmission line upgrade corridors is generally unsuitable for the rare plant and animal species listed for the area. However, two plant species, slender sedge (*Carex gracilescens*) and Indian cucumber root (*Medeola virginiana*), both state species of special concern known to occur in Milwaukee County, have been found within or at the edge of the transmission line ROW. No other rare, threatened, or endangered species that could be disturbed by the transmission work were observed within the transmission line ROW.

Butler's garter snake (*Thamnophis butleri*), a state threatened species, may occur in the vicinity of the proposed transmission projects. This species prefers wet-mesic prairies, marshes, and adjacent grassy and vacant areas and is likely to occur in the project corridor. Impacts to this species can be avoided by restricting construction during times of the year when the snake is active. If this is not possible, an Incidental Take Authorization would be needed from the DNR before the project could proceed. ATC will need to coordinate with DNR Bureau of Endangered Resources, to minimize impacts to the snake.

The proposed transmission line work would not impact any historic buildings or structures. Along the length of the transmission line rebuilds are several known archeological sites, including burial sites and Native American village sites. The Wisconsin State Historical Society (WSHS) recommends that a qualified archeologist monitor construction work adjacent to one archeological site, to prevent any disturbance to previously unidentified burial sites during construction. Federal permits are required for the project, and Section 106 of the National Historic Preservation Act may require a pre-construction archeological field survey of all areas to be disturbed by the project.

Approximately 11 linear miles of cropland and pasture are crossed by the lines to be rebuilt. Primary crops raised in the area include corn, oats, soybeans, alfalfa, and other row crops. The potential agricultural impacts that could result from the project include land removed from production due to the specific placement of relocated transmission line structures, soil compaction, and impacts to efficient tillage due to line placement. Relocated transmission line structures could create areas that are difficult or impossible to cultivate, or affect drain tiles and surface drains. Replacing lattice tower structures with single-pole structures would reduce the amount of untillable land around the base of each structure.

Construction work in farm fields can compact soils, damaging crops and drainage tile. Soil compaction reduces crop yields and may take years to be reversed through natural processes. ATC has stated that, if made aware of the presence of drainage tile, it would attempt to avoid those locations and would repair any tile it does damage. The probability of farmland impacts occurring could also be reduced through such measures as performing construction at times when soils are frozen or not saturated; using alternative, off-ROW routes to access construction sites; using low ground-pressure construction equipment; using deep soil aeration following construction to reduce soil compaction; and providing compensation to property owners for crop damage and loss of production.

Environmental assessment

The proposed facilities have been reviewed by the Commission for environmental impact. The PWGS facility and the gas pipeline are Type II actions under Wis. Admin. Code § PSC 4.10(2), and the transmission improvements are a Type III action under Wis. Admin. Code § PSC 4.10(3). An environmental assessment was prepared to determine if an

environmental impact statement would be necessary under Wis. Stat. § 1.11. No significant environmental impacts are likely. Therefore, an environmental impact statement is not required.

Certificate of Public Convenience and Necessity

PWGS LLC may commence construction of the 1,090 MW PWGS facility, Units 1 and 2, as described in WEC's project application and modified by this Final Decision, at an estimated cost of $326.6 million for Unit 1, and $316 million for Unit 2 (nominal dollars).

Certificates of Authority

WGC may commence construction of the connecting natural gas main to serve the PWGS facility and to reinforce WGC's existing distribution system in the Port Washington area, as described in WGC's project application and modified by this Final Decision, at an estimated cost of $24.5 million.

ATC may commence reconstruction of the three 138 kV transmission lines and install necessary improvements at Port Washington, Saukville, and Range Line Substations needed to deliver power from PWGS to WEPCO's control area, as described in ATC's project application and modified by this Final Decision, at an estimated cost of $24 million.

Order

PWGS generating plants

1. PWGS LLC may construct the PWGS facility at the existing Port Washington Power Plant site. The approved plant configuration is the layout preferred by WEC, reusing two walls of the existing plant and placing the plant parallel to the Lake Michigan shoreline. PWGS

LLC 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. PWGS LLC shall commence construction of Unit 1 within 12 months after receiving all necessary federal, state and local permits and approvals. Before commencing construction of Unit 2, PWGS LLC shall file an updated demand and energy forecast and updated EGEAS computer modeling with the Commission.

3. PWGS LLC may not disturb the peregrine falcon nesting box at the Port Washington Power Plant while the falcons are nesting or while their young are present. PWGS LLC shall consult with staff from DNR Bureau of Endangered Resources and the Milwaukee Public Museum and take the measures these entities recommend to relocate the nesting box without harming the falcons.

4. PWGS LLC shall conduct a survey of the creek corridor on the Port Washington site to determine if the forked aster is present and if there is a potential for impacts to this species. If present, PWGS LLC shall consult with DNR Bureau of Endangered Resources and take the measures it recommends to minimize impacts to the forked aster.

5. Within three months of the date when Unit 2 is fully operational, PWGS LLC shall repeat the noise measurements that it took 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. PWGS LLC shall report its findings to the Commission, using the same format as its pre-approval noise studies.

6. PWGS LLC shall provide documentation to the Commission of all work with individuals who raise concerns about noise, interference with radio or television reception, or fogging and icing, and of the resolution of those concerns.

Leased generation contracts

7. The Facility Lease for Unit 1 shall use a construction cost of $309.6 million (2001$) and, for Unit 2, of $280.3 million (2001$). Each Facility Lease shall allow these construction cost values to escalate at no more than the general rate of the overall GDP price inflation.

8. 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.

9. Within 90 days after the date this Final Decision is signed, WEC shall submit to the Commission for its review and approval a proposed method that holds WEPCO harmless if a transfer or assignment of the PWGS facility or of the Facility Lease causes a national rating agency to downgrade the utility's debt rating, or causes the utility to issue equity to prevent such a downgrade.

10. 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.

11. No future changes may be made to a Facility Lease, Ground Lease, Ground Sublease, or Asset Purchase and Sale Agreement 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 PWGS facility may be transferred or assigned, without first receiving the Commission's review and approval.

12. WEPCO shall work with Commission staff to develop a tracking mechanism, and appropriate accounting practices, that prevents a double collection of costs from ratepayers through utility rates and lease payments.

13. WEC shall revise the Facility Lease, Ground Lease, and Ground Sublease for Unit 1 and for Unit 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.

14. All books and records underlying any transaction made pursuant to a Facility Lease, Ground Lease, Ground Sublease, or Asset Purchase and Sale Agreement shall be made available to the Commission upon request.

15. WEPCO shall submit all accounting entries associated with the Asset Purchase and Sale Agreement to the Commission within 60 days of the completion of the transaction.

16. 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.

WGC pipeline

17. WGC may construct a high-pressure steel natural gas pipeline to serve the PWGS facility and to reinforce WGC's existing distribution system in the Port Washington area. WGC shall construct the project in conformance with the design specified in its application and subject to the conditions specified in this Final Decision. The approved route for this pipeline is as described in this Final Decision.

18. WGC may not begin construction of the gas pipeline until the DNR Bureau of Endangered Resources confirms that the Hine's emerald dragonfly, swamp metalmark butterfly, and other endangered or threatened species and species of special concern are not present along the approved route, or until the Bureau concludes that the project, with any appropriate mitigation measures it specifies, will not harm any of these species. WGC may not begin physical construction of the modified project without first securing the Commission's approval, if the identified mitigation measures would result in a material change to the natural gas pipeline project.

19. Within 60 days of the date when this Final Decision is signed, WGC shall file with the Commission a set of maps that depict the reference centerline for the approved route.

20. WGC may, without further Commission approval, relocate the pipeline up to 100 feet from the reference centerline of the approved route, if the change does not cross wetlands or affect any other sensitive resources. WGC may also move the pipeline more than 100 feet from the reference centerline without further Commission approval, if the pipeline remains entirely within the same landowner's property, if the landowner grants written permission, and if the change does not cross wetlands or affect any other sensitive resources. WGC may not make any other modifications to the approved route without receiving the written, advance approval of the Natural Gas Division Administrator, after first demonstrating that the proposed modifications are consistent with this Final Decision.

21. WGC shall promptly notify Commission staff of any substantial scope or design modifications in the approved facilities. If the estimated cost of WGC's project exceeds the amount specified in the Certificate of Authority by more than 10 percent, the utility shall promptly notify Commission staff.

ATC transmission improvements

22. ATC may reconstruct its existing three 138 kV transmission lines and install necessary improvements at Port Washington, Saukville, and Range Line Substations, to connect the PWGS facility to the transmission system and to accommodate the delivery of its power to WEPCO's control area. ATC shall construct this project in conformance with the design specified in its application and subject to the conditions specified in this Final Decision.

23. ATC shall promptly inform Commission staff of any substantial scope or design modifications in the approved facilities. If the estimated cost of reconstructing the three 138 kV transmission lines and upgrades at Port Washington, Saukville, and Range Line Substations exceeds the amounts specified in the Certificate of Authority by more than 10 percent, the utility shall promptly notify Commission staff.

24. ATC shall ensure that all construction equipment is clean of purple loosestrife before beginning work on the project. ATC shall inspect wetlands within the ROW of the transmission lines to be rebuilt for this project for the presence of purple loosestrife, prior to beginning construction. In areas where purple loosestrife is present, 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. ATC shall remove new infestations of the plant using methods recommended by DNR. Inspections and plant removal shall occur in June or July, prior to seed dispersal, and ATC shall provide written documentation of its inspection and removal activities. This documentation, describing the results of such activities and the dates on which they took place, shall be submitted to the Commission within 90 days of undertaking these activities.

25. ATC shall, where feasible, relocate transmission line structures that are currently found in wetlands to upland locations within the existing ROW.

26. ATC shall use other appropriate measures, including those described in this Final Decision, to minimize wetland impacts.

27. ATC shall use other appropriate measures, including those described in this Final Decision, to minimize impacts to croplands.

28. ATC shall consult with DNR Bureau of Endangered Resources and take the measures it recommends to minimize impacts to the slender sedge and Indian cucumber root wherever it is located within or at the edge of the ROW of the transmission line rebuilds.

29. If it is not possible to restrict work in the habitat of the Butler's garter snake to periods when the snake is not active, ATC shall consult with DNR Bureau of Endangered Resources and take the measures it recommends to minimize impacts to the snake.

30. ATC shall have a qualified archeologist monitor construction work adjacent to the identified archeological site along the Port Washington-Range Line rebuild to ensure that any previously unidentified burial sites are not disturbed during construction. If archeological materials or human remains are found during the construction of the plant, electric transmission line, or natural gas facilities, the company performing the work shall stop construction immediately and notify WSHS and the Commission for further direction. Each company engaged in construction activities shall follow WSHS's directives to mitigate adverse impacts to any discovered archeological sites.

General requirements

31. PWGS LLC, WGC, and ATC shall each notify the Commission within five working days of the date when it commences construction. PWGS LLC, WGC, and ATC shall each 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.

32. PWGS LLC, WGC, and ATC shall each submit quarterly progress reports to the Commission that summarize the status of construction, the status of ROW acquisition, 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 permi-ts. 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. PWGS LLC's first report is due for the quarter ending March 2003; Wisconsin Gas Company's first report is due for the quarter ending March 2003; and ATC'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.

33. PWGS LLC, WGC, and ATC 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.

34. 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.

35. This Final Decision takes effect on the day after it is mailed. The CPCN for the PWGS facility 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.

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.

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Appendix B

Other Modifications to the Facility Lease

1. In § 14.1(d), change 120 days to 180 days.

2. Delete WEPCO's waiver of rights by amending or deleting §§ 7.3(c), 17.2(a)(i), and 17.5, as shown in the Updated Revised Facility Lease of the Customer Groups.

3. Authorize WEPCO to make time payments to acquire the PWGS facility after the lease effective date, in the same manner as is as provided in § 5.6(f) for a transfer during the construction period.

4. Revise § 5.6, adding § 5.5(c) and (d) as also qualifying for time payments.

5. Revise § 15.1(b), specifying that improvements financed by WEPCO are sold at the lower of fair market value or original cost reduced by straight line depreciation.

6. Modify the Facility Lease for the following corrections or clarifications:

   i. In the definition of "Additional Insureds," replace the reference to Schedule 13.2(a) with a reference to Schedule 13.2, § 1.3(b).
   ii. Change § 3.7(a)(i) to parallel § 3.7(a)(ii), clarifying that the intent of § 3.7(a)(i) is to cover physical loss that, net of insurance proceeds, is less than $1,000,000.

7. Change Schedule 4.2 to allow WEPCO employees to verify Commercial Operation Tests.

8. Delete pre-termination, pre-CPCN expenses from § 5.2(d), as shown in Exhibit 230.

9. Delete the phrase "Lessor has agreed in writing to continue this Facility Lease and" from § 5.3(e).

10. Delete the phrase "Lessee has agreed in writing to continue this Facility Lease and" from § 5.4(e).

11. Delete § 17.2(a)(iv).

12. Modify Schedule 13.2, § 2.1, as proposed in Exhibit 230.

13. Modify § 14.3(a), as proposed in Exhibit 223.

Modifications to the Ground Lease and Ground Sublease

1. Modify the Ground Lease § 3.1(b), changing 10 days to 30 days.

2. Modify the Ground Lease and Sublease to be consistent with the revised Facility Lease, making each of the following changes:

    i. Revise § 2.3(b) so the multiple renewal periods match the Facility Lease.
    ii. Revise § 22.3(a) and (b) regarding binding arbitration, making these paragraphs consistent with the Facility Lease.
    iii. Revise definitions in Schedule 1.1, making them consistent with the Facility Lease.

Date Mailed
June 30, 2004

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Power Ventures Group, LLC, for a Certificate of Public Convenience and Necessity to Construct a Large Electric Generating Facility in Sheboygan County — 05-CE-131

FINAL DECISION

This is the final decision concerning the application of Power Ventures Group, LLC, (PVG) 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 Sheboygan Falls, Sheboygan County. PVG is the owner of Sheboygan Power, LLC, which is the specific project company established for the ownership and operation of the Sheboygan Energy Facility.

The CPCN for the Sheboygan Energy Facility, a 530 MW natural gas-fired simple cycle electric generating power plant at the Highway 23 site, is granted subject to the conditions set forth in this order.

Introduction

On March 4, 2003, PVG filed an application with the Commission for a CPCN that would grant it authority to construct a large electric generating facility. An Amendment to the application was filed on November 3, 2003. The application was declared complete on December 11, 2003. This new electric generating plant, known as the Sheboygan Energy Facility, will be a simple-cycle, natural gas-fired electric generating facility comprised of three combustion turbines and associated electric generators. The facility will have an electrical

output of approximately 530 megawatts (MW). Initially, PVG proposes to install two combustion turbines, each of 177 MW. PVG has proposed two sites. The Highway 23 Site is located on the south side of Highway 23 and east of Bridgewood Road, and the Sheboygan River Site is located south of County Road O and west of Alpine Road. Both sites are located in the town of Sheboygan Falls, Sheboygan County.

As originally proposed, PVG will build and operate the Sheboygan Energy Facility as a merchant plant, which will provide power in the competitive electric market of the Midwest. However, PVG is presently negotiating to sell the proposed project to Alliant Energy Generation (AEG). AEG would own the power plant but would then lease the project to Wisconsin Power & Light Company (WP&L) who would operate the power plant. WP&L is affiliated with Alliant Energy Generation, Inc. (AEG) and is a Wisconsin utility. If this arrangement is finalized, the Commission, for the purpose of protecting ratepayer interests, would open a proceeding to review and approve, disapprove, or modify the arrangements between AEG and WP&L. Any new owner of an approved power plant would be bound by the terms and conditions of the Commission's CPCN order.

In its application, PVG 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 project area by ANR Pipeline Company (ANR). ANR pipelines are located approximately 1,600 feet from the Highway 23 Site and cross the River Site. PVG states that ANR will construct the necessary pipeline lateral facilities to serve the proposed project.

The proposed plant will be connected to the existing Point Beach-Granville 345,000 volt (345 kV) transmission line. This double-circuit 345/138 kV transmission line is adjacent to both the proposed power plant sites. The interconnection of the PVG power plant will not require any

transmission system modifications if the three generation sources ahead of the PVG generation plant in the American Transmission Company (ATC) interconnection request queue are connected to the ATC transmission grid prior to the PVG's power plant in-service date. The capital costs associated with the substation (also called switchyard) and other interconnection facilities associated with the Sheboygan Energy Facility will be paid by PVG or through a cost allocation between PVG and ATC. ATC has applied for a Certificate of Authority in a separate docket (137-CE-118) to interconnect the PVG's power plant to its grid.

Upgrades of several existing transmission facilities and construction of new transmission facilities will be required to accommodate output of the Sheboygan Energy Facility. ATC estimates that these upgrades and new construction may cost over $35 million. ATC will need to apply for a separate Certificate of Authority or CPCN prior to upgrading and constructing these transmission facilities.

PVG will use raw water from one of two new high-capacity wells. Water will be stored in a 500,000 gallons water storage tank. The wells are expected to be between 500 and 600 feet deep. Water use at the facility would be limited by the allowable hours of operation defined in the Wisconsin Department Natural Resources (DNR) air permit. The plant would use water at a rate of about 61 gallons per minute (gpm) during peak load operation. The total annual water usage for the plant is estimated at approximately 7,567,200 gallons.

The Commission scheduled public hearings on the project application which were held at the Sheboygan Falls City Hall, Sheboygan Falls, Wisconsin, on May 25, 2004.

Persons certified as 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. PVG 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 Sheboygan Energy Facility will not have undue adverse impact on other environmental values such as ecological balance, historic sites, or aesthetic and recreational use.

5. The Sheboygan Energy Facility will not unreasonably interfere with orderly land use and development plans for the area involved.

6. The Highway 23 Site is in the public interest after considering alternative locations, individual hardships, safety, reliability, and environmental factors. Other alternative sites for the Sheboygan Energy Facility, brought forth in the record, are not in the public interest.

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

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

b. PVG 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 PVG start construction of the Sheboygan Energy Facility within 12 months of issuance of this CPCN.

Conclusions of Law

1. The Sheboygan Energy Facility 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 a certificate authorizing PVG to construct and place in operation the generation and water facilities at the site described below, and to impose the conditions specified in this order.

Opinion

General Description of Facility

PVG proposes to construct a natural gas-fired simple-cycle power plant, with a maximum capacity of approximately 530 MW. The power plant will consist of three combustion turbines, each 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. Initially, PVG proposes to install two combustion turbines of 177 MW each.

PVG will use combustion turbines and electric generators produced by General Electric Company. The combustion turbines, Model 7FA, will be equipped with dry low nitrogen oxide

(NO_x) combustors. Because the power plant will use only natural gas as the fuel, it will not emit significant amounts of sulfur dioxide. Exhaust gases from each combustion turbine will pass through a 75-foot tall stack, equipped with sound baffles and continuous emission monitoring system. Each combustion turbine will be housed in an enclosure for thermal insulation, acoustical attenuation, and fire containment.

PVG expects to operate the Sheboygan Energy Facility for about 1,800 hours each year as a peaking load plant, at an overall plant efficiency of up to approximately 35 percent, depending on ambient conditions. PVG forecasts that it could begin commercial operation in 2005, and that the plant will have a useful life of 40 years.

PVG proposed two site alternatives for the location of the plant. PVG 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 Sheboygan Energy Facility. Two potential site locations, referred to as the Highway 23 Site and the Sheboygan River Site, were ultimately identified.

The Highway 23 Site is located on the south side of Highway 23 and east side of Bridgewood Road in the town of Sheboygan Falls and is approximately 40 acres in size. The site lies in the NW ¼ of the SW ¼ of Section 21, Township 15N, Range 22E. The Highway 23 Site has about 30 acres in agriculture. On the northwest side of the property there is about 10 acres developed for a tree nursery and landscaping business. The proposed power plant and substation facilities would convert about 11 acres to industrial land use. The proposed project would leave approximately 29 acres of open space. This property is currently zoned as B1 Industrial/Commercial. PVG has purchased an option to buy the Highway 23 Site.

The Sheboygan River Site is located on the south side of County Road O in the town of Sheboygan Falls and is about 30 acres in size. The site lies in the SW ¼ of the SW ¼ of Section 6, Township 15N, and Range 22E. This site is bordered on the northwest and west by the Sheboygan River. The land is in agricultural use and is zoned as A-1 Exclusive Agriculture. The property has no direct access to local roads. PVG has obtained an option to purchase the Sheboygan River Site.

The proposed Sheboygan Energy Facility will be interconnected to the transmission system via the double-circuit 345/138 kV Point Beach-Granville line that abuts the two proposed sites. The new plant will be connected to the 345 kV grid system. A new substation will be constructed on the selected site to accommodate the interconnection with the transmission system. The substation, also called switchyard, will include a three-breaker ring bus with three positions, with future expansion to a total of six positions. ATC will construct it to meet all applicable code and permit requirements and ATC's criteria. ATC estimates that interconnection to the 345 kV Point Beach-Granville line will require five-single structures, which will be located on the existing 345/138 kV line right-of-way and the power plant site. ATC will own and operate the switchyard.

The estimated capital costs for the substation and other interconnection facilities will be paid either by PVG or through a cost allocation between PVG and ATC. The cost allocation between PVG and ATC is detailed in the agreement between these two parties entered on October 15, 2003.

PVG states that it will purchase natural gas in the competitive natural gas market and will transport the natural gas on ANR pipeline system. PVG believes that the existing nearby ANR pipelines will provide adequate capacity to deliver natural gas for the operation of the power

plant in summer months. However, the existing capacity of the ANR pipelines may limit the plant operation in winter months. PVG states that ANR will construct the necessary pipeline lateral facilities to serve the proposed power plant, including about 1,600 feet of 16-inch steel gas pipeline. The ANR lateral facilities will be subject to the review and approval of the Federal Energy Regulatory Commission (FERC).

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 Sheboygan Energy Facility 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 Sheboygan Energy Facility prevents any analysis of whether renewable resources would be more cost-effective than this project.

The electric transmission line extensions and substation necessary to connect the plant to the existing electric transmission system are directly related to the Sheboygan Energy Facility. 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 proposed interconnection facilities.

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, with the addition of the Sheboygan Energy Facility of 530 MW, PVG will remain a relatively small operator of power plants in Wisconsin. At 530 MW, PVG 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. The Sheboygan Energy Facility will be 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 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 PVG's Sheboygan Energy Facility will act as a new entrant means that the facility is unlikely to have a material adverse impact on competition in WUMS.

If AEG acquires the Sheboygan Energy Facility from PVG and leases it to WP&L, the above conclusion that the proposed power plant will not result in horizontal market power concerns would remain unchanged. This is because capacity and energy from the project would be sold at terms and conditions price regulated by the Commission.

Site Alternatives and Environmental Protection

The existing Point Beach-Granville 345/138 kV electric transmission line is adjacent to the proposed two sites.

At the present time the land use for both sites is primarily agricultural. However, the Highway 23 site is zoned for commercial/industrial use, supports a landscaping business on the north side of the property, and is near other development occurring along Highway 23. The Sheboygan site is more remote and is entirely in agricultural use.

[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.

This project would not have a direct impact on endangered and threatened species or wetlands. However, the Sheboygan River Site's close proximity to the Sheboygan River increases the potential for environmental impacts for that site.

Reviews of the archeological and historic site database at the Wisconsin Historical Society (WHS) found no traditional cultural, archeological, or historic architectural properties on either site. Archeological surveys conducted for this project found no archeological resources at either site.

A natural gas pipeline connection is required for the project. A 1,600 foot natural gas pipeline would be required for the Highway 23 Site. Because the existing supply pipeline passes directly through the Sheboygan River Site, no off-site pipeline construction would be required for that site. The Highway 23 Site pipeline would not affect wetlands, endangered or threatened species, or archeological/historic sites. The pipeline would be built entirely in an open agricultural field. Impacts to farming operations will be temporary. Long term impacts would not be involved.

DNR permits required for construction include the air quality permit and high-capacity well permits. The air quality permit for the Highway 23 Site was issued on June 1, 2004. On May 27, 2004, the DNR issued a Record of Decision for the well permits. DNR well permits will be issued in the near future.

The potential for adverse impacts to nearby domestic and municipal water wells has been studied and reviewed by DNR and Commission staff. Impacts to private or municipal wells as a result of this project are very unlikely. The project wells will be much deeper than surrounding private wells so that significant impacts should not occur. In addition, water use at the plant will be limited by the allowable hours of operation specified in the DNR air permit and by use of an

on-site water storage facility. PVG has also agreed to a procedure to resolve any unlikely well impact issues. This agreement is part of the Conditional Use Permit (CUP) issued for the project by the town of Sheboygan Falls.

Noise from the power plant has been an important concern throughout the project's development. In order to reduce noise impacts, PVG has incorporated, in its application materials, a commitment to install noise attenuation equipment and to enclose the turbines in a structure. PVG submitted a noise study for the project following the Commission's Noise Measurement Protocol. Based on the estimated noise likely to be produced by the plant, significant increases to the ambient noise environment are not expected. However, the accuracy of PVG's plant noise estimates is crucial to this assessment. The finding of no significant noise impact may be in error if the actual noise produced by the plant is significantly different from that which was predicted. A post-construction operational noise assessment, following the Commission's Noise Measurement Protocol, will be necessary in order to ensure that no significant impact to the ambient noise environment occurs.

The aesthetic impact of the plant is an important concern. The Sheboygan River Site is located largely in a farming landscape. The site is flat, relatively open and situated near the Sheboygan River. A power plant at this site would be less visible from local roads than the Highway 23 Site. While the aesthetic impact may be argued to be less because of reduced visibility from roads, it is also true that the immediate surrounding environment has no existing commercial or industrial development. The landscape is dominated to the west by the Sheboygan River and forested properties immediately adjacent to the river.

Because of its location, the Highway 23 Site is better suited for this kind of development. Sensitive residential receptors located southwest of this site would, however, have unobstructed

views of the power plant. Residences to the south are approximately 20 feet higher in elevation than the plant site. Some relief to aesthetic impact could be achieved by creating site screening berms and planting tall growing shrubs and trees. Residential receptors north of the site are set at or below the proposed plant's elevation and may be more easily screened by berms and plantings. Nighttime visual impacts would be reduced by using limited and down-focused lighting. Because this area is zoned for commercial and industrial development, some level of aesthetic impact is, in the long term, unavoidable. However, it is in the public interest that reasonable efforts be exerted to limit the aesthetic impacts of this project. Aesthetic impacts are best reduced by developing a landscape and aesthetic impact mitigation plan. Such a plan should be prepared by a qualified landscape architect.

Both the Highway 23 Site and the Sheboygan River Site are viable alternatives for this project. However, the Highway 23 Site has distinct advantages over the Sheboygan River Site. The Highway 23 Site is located in an area of increasing commercial development, the site is already zoned B1 Commercial/Industrial, access to the site is good, and this site is more removed from the Sheboygan River. Because of these factors, the Highway 23 Site is the better of the two site options presented in this case.

Public Comment

Comments from the public during the preparation of the final Environmental Impact Statement (FEIS) and the public hearing were balanced and thoughtful. Concern primarily focused on land use, noise, aesthetics, and well impacts. An additional concern was expressed with regard to the applicant keeping its promises related to construction, operation, and mitigation of noise, aesthetic, and well impacts. This concern is relevant because of the ongoing

purchase of this project by AEG. It is reasonable to require that any future owner of the Sheboygan Energy Facility must build and maintain the project at or above the technical level that has been described in the application and FEIS. In fairness to public concerns, all agreements found in the CUP issued by the town of Sheboygan Falls must transfer to any future owners of the project.

Certificate

PVG may commence construction of the Sheboygan Energy Facility, described in this order and in its project application as amended, at the Highway 23 Site in the town of Sheboygan Falls, Sheboygan County, Wisconsin, subject to the conditions described below.

Order

1. The approved site for the Sheboygan Energy Facility is the Highway 23 Site. PVG 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 Sheboygan Energy Facility 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. PVG shall implement the sound mitigation measures designed to minimize impacts in the community, as described in the application, FEIS, and Opinion section of this order.

b. Within three months of the commercial operation of the project, the owner of the plant shall complete the post-construction sound and vibration measurements for the project, as described in the Commission's Noise Measurement Protocol and the Opinion section of this order. The finding that the project will not significantly impact the ambient noise environment must be achieved in actual fact. If the actual noise produced by the plant results in an increase to the ambient noise level at the nearest residence of 5 dBA or more then the owner of the power plant shall take whatever steps are necessary to reduce that increment to less than 5 dBA.

c. The owner of the approved project shall complete a landscape and aesthetic impact mitigation plan for the selected site with input from local officials and the public, as described in the Opinion section of this order. This plan shall be prepared by a qualified landscape architect and be submitted to Commission staff for review at least three months prior to commencement of commercial operation of the plant. Plantings should use native vegetation as appropriate. Plant construction is not considered complete until the landscape and aesthetic impact mitigation plan has been successfully implemented.

d. PVG shall obtain all necessary DNR permits and approvals.

e. PVG shall notify nearby neighbors when it plans activities that will cause the plant to emit loud noises, and shall submit a plan for such notification to the Commission within six months of the date of this order.

f. If archeological materials or human remains are found during the construction of the plant or any of its auxiliary facilities, PVG shall stop construction immediately and notify the WHS and Commission for further direction. PVG shall

follow the WHS's directives to mitigate adverse impacts to any discovered archeological sites.

g. All agreements for landowner compensation negotiated by PVG must carry over to any new owners of this project. This includes assurances that residences near the plant will be compensated for any negative impacts to water wells as outlined in the CUP agreement with the town of Sheboygan Falls.

f. Any owner of the approved project must build, maintain, and operate the plant at or above the technical level that has been described in the application and FEIS.

4. Until the Sheboygan Energy Facility is fully operational, PVG 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. PVG 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 January 31, 2005, and each report shall be filed within 31 days after the end of the six-month period.

5. PVG shall begin construction within 12 months of the issuance of the CPCN. The CPCN shall expire if this condition is not met, unless the Commission grants an extension.

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

7. PVG shall notify the Commission, in writing, within 14 days of any decision not to proceed with the Sheboygan Energy Facility 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

LLD:USS:crb:G:\Order\pending\05-CE-131.doc

Appendix A

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

POWER VENTURES GROUP, LLC
James P. O'Brien
130 E. Randolph Drive
Chicago, IL 60601

AMERICAN TRANSMISSION COMPANY, LLC
ATC MANAGEMENT, INC.
Dan L. Sanford
PO Box 47
Waukesha, WI 53188-0047

STEVE H. BAUER
W3798 County Road C
Plymouth, WI 53073

TOWN OF SHEBOYGAN FALLS
Trina Theobald, Town Clerk
PO Box 46
Sheboygan Falls, WI 53085-0046

Date Mailed
October 7, 2004

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

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	6690-CE-187

FINAL DECISION

Introduction

This is the final decision regarding the proposal filed by Wisconsin Public Service Corporation (WPSC) to construct a new electric generating plant, known as Weston Unit 4 (Weston 4), at its existing Weston Generating Station located south of Wausau in Marathon County. The new facility would use super-critical pulverized coal (SCPC) technology and would consist of a single 515 megawatt (MW) baseload unit. Sub-bituminous coal would be the principal fuel for the new unit.

The Commission received the initial Certificate of Public Convenience and Necessity (CPCN) application for the approval needed to build Weston 4 on September 26, 2003. WPSC proposes to place Weston 4 in service in 2008 and to finance this new generating unit using a rate base approach.

On February 10, 2004, the Commission issued a determination that WPSC's CPCN application for the Weston 4 project was complete. This triggered the 180-day statutory period under which the Commission is required to conduct its review of this CPCN application.

Because of the complexity of this coal-fired power plant proposal, the Commission extended this period to 360 days by petitioning the Dane County Circuit Court on May 17, 2004, for additional review and received the necessary order, pursuant to Wis. Stat. § 196.491(3)(g)1. During this period Commission staff prepared a final 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 hearing record.

The Commission held technical hearings in this docket before Administrative Law Judge David Whitcomb from August 3 to 5, 2004. At these hearings, witnesses with technical and professional expertise testified on behalf of the parties, Commission staff, and DNR staff. In addition, the Commission held a public hearing in the project area on August 10, 2004, seeking the testimony of interested members of the public. The parties then submitted briefs and reply briefs to the Commission on September 3 and 10, 2004, respectively. At its open meeting on September 23, 2004, the Commission considered this matter in oral deliberations.

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

This application is 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 or technically feasible alternatives that could totally displace the project proposed in this docket.

2. The demand forecast used by Commission staff in its Electric Generation Expansion Analysis System (EGEAS) modeling representing a 2.3 percent annual demand growth is reasonable and demonstrates a need for new baseload generation.

3. Weston 4 and commitments to secure additional energy conservation and renewable resources satisfy the reasonable needs of the public for an adequate supply of electric energy.

4. The public convenience and necessity require WPSC to construct Weston 4, at an estimated cost of $752,441,209 in year of occurrence dollars, subject to the conditions specified in this final decision.

5. The Weston 4 project at the North Site is in the public interest after considering alternative locations, individual hardships, engineering, economic, safety, reliability, and environmental factors.

6. The Weston 4 project located at the North Site will utilize brownfields to the extent practicable.

7. The Weston 4 project will not have undue adverse impact on other environmental values.

8. The Weston 4 project will not unreasonably interfere with orderly land use and development plans for the area involved.

9. The final EIS accurately describes the environmental effects of this project.

10. It is not in the public interest for the Commission to require WPSC to substitute a dry condenser cooling system for the proposed wet cooling tower system.

11. The addition of the Weston 4 facility to WPSC's electric supply portfolio will not have a material adverse impact on competition in the relevant wholesale electric service market per Wis. Stat. § 196.491(3)(d)7, because the output will be sold to native load customers at prices, terms and conditions regulated by the Commission.

12. WPSC's generation alternative evaluation method utilizing proxy costs for independent power producer (IPP) projects is reasonable. The Commission approved a similar approach in a recent construction case for Madison Gas and Electric Company (MGE).

13. WPSC's proposal for rate-based financing for the Weston 4 project is reasonable.

14. It is reasonable for WPSC to earn a current return on 100 percent of construction work in progress at its weighted cost of capital..

15. The conditions attached to the CPCN for Weston 4, as described in this Final Decision, are reasonable.

16. Requiring that WPSC commence construction of the Weston Unit 4 within 12 months after it receives all necessary government permits and approvals 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 a certificate authorizing WPSC to construct and place in operation one 515 MW SCPC electric generating unit at the site described below, and to impose the conditions specified in this Final Decision. The final EIS prepared in this proceeding complies with Wis. Stat. § 1.11(2)(c).

Opinion

This proceeding involves the application by WPSC to construct a large-scale coal-fired generating facility. The applicant seeks approval for construction authority to build this generation facility.

In this docket, the Commission has attempted to balance responsibilities under the Power Plant Siting Law, Wis. Stat. § 196.491, and its paramount 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

WPSC proposes to build a coal-fired electric generating facility with a nominal generating capacity of 500 MW and actual capacity of 515 MW. A majority of the project would be owned and financed by WPSC. WPSC would have primary or exclusive responsibility for the plant's design, construction, start-up, testing, operation, and maintenance. The facility is expected to be in service by June 2008.

The assumed capacity factor for the proposed plant is approximately 85 percent. The plant is expected to have a life of 40 years, operating 24 hours per day and approximately 7,400 hours per year.

The new facility would use SCPC technology and would consist of a single 515 MW baseload SCPC unit to be installed as Weston 4 adjacent to the existing Weston Unit 3 on WPSC's Weston Generating Station (Weston) property straddling the boundary between the villages of Rothschild and Kronenwetter in Marathon County, Wisconsin. The project includes the coal-fired boiler and generator and also attendant cooling towers, electric transmission facilities, coal and ash handling facilities, railroad improvements on the Weston property, an auxiliary boiler to aid with plant start-up, and a new 8-inch natural gas pipeline for plant start-up and to serve the auxiliary boiler.

The railroad improvements will allow a complete coal train to move onto the property while reducing the potential for road traffic blockages near the site and the potential for noise from decoupling and coupling of rail cars. The existing Weston coal storage yard is to be expanded to the south. The proposed fuel is low-sulfur Powder River Basin sub-bituminous coal, the fuel used by the other Weston coal-fired units.

Feed water to supply the boiler makeup water will come from existing on-site wells. General plant service water and cooling water tower makeup water will come from the Wisconsin River through existing intake facilities. As part of the cooling system, the cooling towers are expected to evaporate about 4,400 gallons of river water per minute at maximum operating conditions, passing the heat from the boiler to the atmosphere through the steam as it moves through the turbines to the condenser. Potable water will be obtained from the village of Kronenwetter municipal water supply system.

Regarding the cooling towers that would be part of Weston 4, the Sierra Club argues that air-cooled condenser technology would be just as efficient and more environmentally sound because it would require less water from the Wisconsin River. WPSC argues the air-cooled technology is more expensive and less efficient, and is typically reserved for arid climates. As described in the final EIS, the DNR consumptive water loss approval process shows that the river has the capacity to provide the water for evaporation from the WPSC-proposed cooling towers without impact to the river itself. The cooling tower plume models in WPSC's application show that fogging and icing from the proposed wet cooling towers on neighboring properties and roads would be very low in amount and duration. The cooling towers as WPSC proposes are in the public interest.

The design of the Weston 4 electric transmission interconnection is expected to be the subject of a separate Commission proceeding in 2005.[1] The uncertainty of the transmission interconnection at this time is discussed under "Transmission Conditions," below.

The proposed project includes certain air pollution emission control equipment. Nitrogen oxide (NO_x) production is to be reduced through the use of low-NO_x burners, and by a selective catalytic reduction (SCR) system. Sulfur dioxide (SO_2) and particulate (PM) emissions will be controlled by a semi-dry, lime-based flue gas desulfurization (FGD) system ("dry scrubber") and a pulse-jet cleaned, fabric filter ("baghouse"). Hazardous air pollutant (HAP) emissions will also be controlled by the FGD system and the baghouse. Mercury emissions will be reduced by use of a sorbent injection system planned to be located between the air heater and the FGD system. The proposed air pollution control equipment is currently under consideration by DNR as Best Available Control Technology (BACT) or Maximum Achievable Control Technology (MACT) through the DNR air pollution control construction permit process.

With the proposed air pollution controls, bottom ash is to be collected and conditioned for reuse markets or placement in landfills, and fly ash is to be collected in the baghouse with the by-products from the dry scrubber and is expected to be landfilled.

Retirement of Existing Aging Units

The Commission recognizes the eventual need for the retirement of existing baseload, coal-fired generation given the ages of several generating units currently in operation by WPSC. The Commission, however, is not persuaded by the argument raised by certain parties

[1] PSC docket 137-CE-122, Gardner Park to Central Wisconsin 345 kilovolt (kV) line and new Central Park Substation, to be located in the vicinity of Shawano or Clintonville to the east.

concerning the reasonableness of requiring WPSC to commit to retire any specific generating units at this time.

Other than the recent Power the Future (PTF) proceeding, docket 05-CE-130, the Commission has not approved construction of any new baseload, coal-fired generation in Wisconsin since 1980. The evidence presented in this case reflects the fact that WPSC's existing fleet of baseload plants is aging. Continued operation of WPSC's aging baseload resources, in particular Pulliam Units 3 through 6 and Weston Unit 1, may be necessary over the next decade as transmission constraints within Wisconsin Upper Michigan System (WUMS) continue to limit the ability of Wisconsin load-serving entities to import electricity.

More likely, what may influence retirement is a combination of any or all of the following:

- Compliance with changing air emission regulations
- Equipment degradation and aging of critical systems at older units
- Changes to transmission constraints within WUMS
- Adding fewer wholesale customers than anticipated
- Updated load forecasts being at the low end of the current forecast range

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 facility proposed by WPSC. 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 per Wis. Stat. § 196.491(3)(d)2. To justify the need and timing of Weston 4, WPSC submitted four different growth forecasts for electric

demand and energy over the next 17 years and then provided optimal expansion plan results from the EGEAS computer model which identifies least cost generation expansion plans.

WPSC presented two different native load forecasts. Under WPSC's base native load forecast, demand is projected to grow by 1.7 percent for the 2002–2008 forecast period and by 2.0 percent for the subsequent 10 years. Under WPSC's high native load forecast, demand is projected to grow by 2.0 percent for the 2002–2008 forecast period and by 2.2 percent for the subsequent 10 years. These two native load forecasts are then combined with two different wholesale load growth projections, resulting in the four load growth forecasts modeled by WPSC in EGEAS. The varying levels of demand-side management (DSM) projected by WPSC and Commission staff are modeled in EGEAS as non-dispatchable generation sources beginning in 2003. When modeled in EGEAS, even considering the estimates of DSM savings, three of four basic demand and energy forecasts demonstrate an optimal need for new baseload supply resources beginning in 2008. Only in a lower demand growth rate scenario (base native load forecast and no new wholesale customers), does EGEAS pick Weston 4 later, but then it does so in 2009.

The Commission is not persuaded by the argument raised by certain parties questioning the reasonableness of WPSC's capacity and energy needs. Sierra Club criticizes the demand and energy forecasts as too high. The forecast growth rates in this docket are consistent with WPSC's historical growth patterns. WPSC's total demand has been growing 2.2 percent per year since 1998. WPSC's annual energy growth has been growing 2.4 percent per year since 1998. Annual energy growth can be an important predictor of the need for baseload generation facilities. Commission staff reviewed WPSC's four forecasts in the EIS and considered the

"base native load plus three new wholesale customers" forecast to be reasonable. For the period 2002 to 2012, Commission staff forecasted electric demand to grow about 2.3 percent annually, while the utility showed about a 2.0 percent annual increase in its base native load forecast with no new wholesale customers. The Commission believes that the 2.3 percent demand forecast used by Commission staff in EGEAS is reasonable.

Statutory Energy Priorities

The Commission in this proceeding must consider other options for meeting Wisconsin's energy needs when evaluating the proposed construction of Weston 4 consistent with the Energy Priorities Law. Wis. Stat. § 1.12(4) establishes energy priorities for Wisconsin and 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."

This Energy Priorities Law is not a mandate to state agencies that must be mechanically applied to achieve a specific outcome. In the Prefatory Note to 1993 Wisconsin 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 encouragements, while reserving substantial discretionary authority to the decision-maker." 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. In this case, 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. The quantitative evidence presented in this proceeding supports the construction of new baseload generation to address WPSC's needs.

As noted in the dissent, prior decisions have interpreted these statutes 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 or delay the need for the construction project at hand.[2] This approach changed somewhat in the Elm Road proceeding in which the applicant's witness testified that 55 MW of conservation was cost-effective and technically feasible and the applicant committed to spend $20 million for implementing efficiency initiatives. Although this level of savings was not sufficient to displace that project, on the basis of evidence in that record, the Commission required that the applicant submit a program to capture 55 MW of additional energy efficiency as part of the CPCN.

In this proceeding the Commission must again apply these provisions. The Commission believes that the Energy Priority Law provides more flexibility when considering other options to meet energy demands. Wis. Stat. § 1.12(4) does not expressly provide that conservation or renewable resources must *displace or delay* a proposed project; the statute requires that such

[2]Docket 05-CE-117.

alternatives be considered if shown to be cost-effective and technically feasible. The plain language of the Energy Priorities Law together with the directive in Wis. Stat. § 196.025, require the Commission to maximize the overall use of the preferred options to the extent possible, even in incremental amounts. 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.

The record in this proceeding demonstrates that other options such as conservation and renewable resources do not displace the need for Weston 4. However, as discussed below, this record also establishes a basis to require implementation of additional options that are "cost effective, technically feasible, and environmentally sound" consistent with the Energy Priorities Law.

Energy Conservation and Efficiency

WPSC's forecast of future demand and energy needs already includes some level of energy efficiency, because WPSC uses an econometric forecasting method that relies upon historical electrical usage data. Incorporated in its historical usage data are the impacts of market effects (naturally occurring conservation) and energy efficiency services. WPSC estimates that embedded in its forecast are historical energy efficiency savings and 48 MW of new energy efficiency in 2008, the in-service date of the proposed power plant. Because some level of energy efficiency is included in WPSC's forecast, both the applicant and Commission staff attempted to estimate the amount of additional energy efficiency savings potential; *i.e.* the "achievable potential."

The applicant's 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 applicant's analysis suggests achievable energy efficiency potential in 2008 for the Minimally Aggressive, Moderately Aggressive, and Highly Aggressive Scenarios of 10, 24 and 32 MW, respectively. The applicant's energy efficiency witnesses testified that this analysis shows that there is additional energy efficiency available in the WPSC service territory. WPSC's EGEAS modeling indicates that the Moderately Aggressive Scenario of 24 MW of energy efficiency savings by 2008 is part of the least-cost supply plan.

Commission staff also conducted an energy efficiency analysis. Commission staff provided three estimates, based on varying assumptions of economic and market potential, of achievable energy efficiency in 2008. Staff's most conservative scenario identified 50 MW of achievable potential, while its most aggressive scenario identified 256 MW. E4, an intervenor, provided an estimate of energy efficiency potential of 235 MW. Staff's most aggressive scenario, as well as the estimate of E4, is the upper bound of the range of estimates provided.

The estimates of energy efficiency potential provided all have shortcomings. WPSC's analysis used outdated information to derive the baseline end-use demand and energy and to populate its energy efficiency measures database. It also did not adequately address industrial process changes in its analysis. Commission staff's analysis is based on an outdated study, the Statewide Technical and Economic Potential (STEP) study completed in 1994. The STEP study also did not adequately address the industrial sector. E4's analysis applied national estimates of achievable potential to WPSC. This kind of analysis is a useful guide to the reasonableness of

other estimates of energy efficiency potential. However, because of regional differences, it is not appropriate to rely on the results of this type of analysis for planning purposes.

All three analyses identified additional energy efficiency potential, above that which is already included in WPSC's forecast. However, none of the estimates of achievable potential demonstrate that energy efficiency could reliably or cost-effectively serve to substitute, or postpone, Weston 4. On the other hand, the record demonstrates that increased intervention in the energy efficiency market would produce at least an additional 32 MW of cost-effective and technically feasible energy efficiency in WPSC's service territory by the end of 2008. Although this is more than the 24 MW of energy efficiency included in WPSC's optimal plan, WPSC's energy efficiency potential estimates are conservatively low. The 32 MW level of achievement would put savings in the WPSC service territory at the lower end of the range of the annual 0.5 to 1.0 percent of peak demand savings being achieved by electric utilities nationwide through actual experience. The Commission recognizes that implementation of recommendations from the Governor's Task Force on Energy Efficiency and Renewables regarding future directions for energy efficiency in Wisconsin may change the structure and funding level of statewide public benefits (known as Focus on Energy) efforts. As the dissent notes, the Commission's Strategic Energy Assessment recommended that energy efficiency and renewable resources should be pursued in separate proceedings. However, the Commission is statutorily obligated to apply the Energy Priorities Law in this proceeding and may not rely upon future efforts to meet this requirement. In addition, without increased energy efficiency efforts now, customers of WPSC would forgo the benefits of additional cost-effective energy efficiency until the recommendations of the Governor's Task Force could be implemented. It is therefore reasonable to require WPSC

to submit a plan to the Commission, by January 14, 2005, for the capture of at least an additional 32 MW in its service territory by the end of 2008. WPSC's plan should take into consideration existing public benefits efforts and address, to the extent possible, future energy efficiency directions. Any incompatibilities with future statewide efforts that result from these additional efforts, as well as additional efforts by other utilities, can be addressed concurrently in the future. Commissioner Garvin dissents.

Non-combustible Renewables

After energy conservation, the Energy Priorities Statute favors "non-combustible" renewable resources (wind, hydro, and solar) followed by "combustible" renewables (biomass). Wind power is the only non-combustible technology considered in this record. The record shows that the applicant has 10.4 MW of wind power capacity on line at the present time and has recently contracted to purchase another 70 MW of wind capacity from an IPP beginning in 2005, which the Commission finds encouraging. The EGEAS model chooses Weston 4 in 2008 ahead of any additional wind capacity.

Combustible Renewables

Generally, biomass as a combustible renewable energy alternative to Weston 4 did not compete well in the EGEAS modeling. Evaluating landfill gas energy generation, methane gas energy generation produced from dairy farm manure digesters, and solid biomass fuel generation at 50 MW using stoker boiler technology, staff found that the only biomass option selected by EGEAS in the examined years was approximately 20 MW from dairy farm manure digesters. RENEW Wisconsin (RENEW) proposed a 25 MW biomass gasifier be added to the Weston 4 project to create a "syngas" that could be co-fired (5 percent) with coal in the boiler. RENEW

placed on the record information about the potential fuel supply (wood) for the gasifier, including some studies illustrating its potential availability and cost. The gasifier would represent a large addition of equipment and cost to the Weston 4 project. A biomass gasifier would perform the same function if added to any coal-fired installation in the state. It might be more feasible if added to a less-efficient coal-fired unit. If tied directly to WPSC's proposal, it would not only add cost but would also likely require the preparation of a supplemental draft EIS and another final EIS.

The Commission finds that renewable resources over and above those to which the applicant has already committed and those necessary to meet the Renewable Portfolio Standard (RPS) are not a cost-effective alternative to Weston 4.

Non-renewable Combustible Energy Resources

The Commission considered whether natural gas-fired generation is a cost-effective or technically feasible alternative that could replace the need for new baseload generating facilities. The quantitative evidence presented in this proceeding supports the construction of new baseload generation to address WPSC's needs. The Commission's decision addresses its obligations under the Energy Priorities Law and the Power Plant Siting Law. It also 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 WPSC's needs for baseload capacity. No gas-fired, baseload facilities were presented in this record as either a cost-effective or technically feasible alternative to the applicant's coal-fired proposal.

There are qualitative factors set forth in Wis. Stat. § 196.491(3)(d) that also support the Commission's conclusions that new coal-fired generation is in the public interest. The evidence in this proceeding demonstrates the advantages of using cleaner burning coal technologies like SCPC as a baseload resource over natural gas-fired generation. The Commission believes also that 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. 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 WPSC's baseload capacity needs.

The applicant proposed a unit that it believes utilizes the best available control technology (BACT) or maximum achievable control technology (MACT) for several pollutant emissions. The Commission is not persuaded by the argument raised by the Sierra Club questioning the reasonableness of the WPSC's proposed BACT and MACT for the air permit, and the higher costs that would be associated with additional emissions control equipment. If DNR requires significantly different emission controls, the Commission might need to reopen this proceeding.

The evidence in this proceeding demonstrates the advantages of using cleaner burning coal technologies like SCPC as a baseload resource over gas-fired generation, but the Sierra Club also proposed the potentially less polluting integrated gasification combined-cycle coal technology (IGCC) instead of SCPC. An IGCC unit would break down coal into its basic constituents and produce a synthetic gas (syngas) for use in combustion turbines. However, IGCC is not competitive economically. It is more expensive to build than the proposed SCPC

plant and the IGCC technology is not yet proven from a reliability standpoint. For these reasons, the construction of the Weston 4 SCPC is reasonable when compared to an IGCC unit.

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-based generation that have addressed peaking and intermediate capacity needs. In docket 05-CE-130, the Commission approved an additional 1,200 MW of coal generation. 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.

Transmission Conditions

Unrestricted operation of the Weston 4 generating unit requires several planned transmission lines to be in place. The previously planned transmission lines in the area include upgrades to the 138 kV system in the Wausau area, the Arrowhead – Weston 345 kV line, and the Morgan – Werner West 345 kV line. The American Transmission Company (ATC) interconnection study for Weston 4 also shows the need for a new 50-mile 345 kV line from the Gardner Park 345 kV substation at the Weston plant site to be interconnected with the Morgan – Werner West 345 kV line. The interconnection of these lines would involve a new substation, called Central Wisconsin, in the Shawano/Clintonville area.

Weston 4 is proposed to be in service in June 2008. The approved Arrowhead – Weston (Gardner Park) 345 kV transmission line is also planned to be in service June 2008. The new Gardner Park – Central Wisconsin 345 kV line and the Morgan – Werner West 345 kV line are

planned to be in service December 2009. Application for authority to construct both of these lines is expected in early 2005. The difference in time for the start-up of Weston 4 and completion of the planned transmission system improvements requires some special temporary operating guides and modified system protection techniques. One engineering approach, known as a transfer trip mechanism, would keep the system stable during special fault situations. This would allow Weston 4 to operate at full capacity until the Arrowhead to Weston 345 kV line and/or the Gardner Park to Central Wisconsin 345 kV line are in service. Alternatively, another technique would require Weston 4 to run at a lower output level depending on the system load, other generation in the area, and the amount of transmission capacity available.

The record indicates that reasonable operating guides and system protection methods are available such that the operation of Weston 4 would not be precluded prior to the completion of the necessary transmission system improvements. It is not necessary to require the implementation of specific operating guides or system protection methods at this time. However, the Commission will require WPSC to file a plan prior to Weston 4 start-up showing the operating guides and system protection methods it intends to use prior to the completion of the necessary transmission facilities.

Effects on Wholesale Competition

Horizontal Market Power

Wis. Stat. § 196.491(3)(d)7 requires the Commission to discern whether the addition of Weston 4 to WPSC's electric supply portfolio would have a material adverse impact on competition in the relevant wholesale electric service market. The Commission finds it would not. Prices, terms, and conditions of the capacity and energy being sold to native load customers

will be regulated by the Commission. No party contested this claim, and no Independent Power Producer (IPP) submitted a proposed PPA to challenge the Weston 4 project facility. Because WPSC has divested ownership of its transmission assets to the American Transmission Company and control to the Midwest Independent Transmission System Operator, there is no need for the Commission to investigate matters of vertical market power.

Generation Alternatives from Independent Power Producers

In EGEAS expansion plan computer modeling and its cost analysis, WPSC used proxy costs for IPP generation alternatives to Weston 4. Such proxy costs were based on recent contracts it had signed with IPPs, particularly Calpine Corporation. WPSC conducted no competitive bidding per se. WPSC believes use of such proxy costs and its market price insight is acceptable and reasonable in this proceeding. The Commission finds the use of proxy costs can, under certain circumstances, allow for meaningful comparison of potential generation alternatives. Commission staff's EGEAS modeling sensitivity analysis indicates that lower IPP costs did not affect the outcome of the EGEAS modeling. The EGEAS model still selected the optimal timing for Weston 4 to be 2008. Accordingly, the Commission finds at this time that the generation alternative evaluation method utilized by WPSC is reasonable for purposes of this proceeding.

WPSC and DPC Ownership Options

Dairyland Power Corporation (DPC) has an option to obtain 150 MW of ownership interest in Weston 4. The EGEAS modeling assumes two different load forecasts that allow WPSC to take 515 MW or 315 MW. The evaluated costs for both load forecasts are essentially the same.

The record indicates that DPC intends to acquire an ownership interest in Weston 4. However, if DPC does not exercise its option, WPSC could experience a temporary excess capacity situation. The Commission finds it reasonable to authorize construction of the Weston 4 unit at 515 MW. If WPSC and DPC fail to execute an agreement for DPC ownership of 150 MW of Weston 4, the Commission will require WPSC to notify the Commission and submit a plan for how it intends to address any potential excess capacity situation resulting from DPC's decision.

Project Cost

Construction of Weston 4 as authorized is estimated to cost $752,441,209 as shown below. The estimated cost is based on year-of-occurrence dollars. The Commission's authorization assumes a current return on Construction Work in Progress (CWIP) at WPSC's weighted cost of capital.

Item	Estimated Costs	
Engineering Costs		**$35,602,471**
Procurement Costs:		
Civil/Structural Equipment	$45,257,123	
Mechanical Equipment	$72,811,933	
Electrical Equipment	$13,897,651	
Control Equipment	$6,086,948	
Chemical Equipment	$7,389,774	
		$145,443,429
Construction and Fabrication/Engineering Contract Costs:		
Civil/Structural Erection	$93,602,099	
Mechanical Erection	$332,623,982	
Electrical Erection	$35,869,075	
Control Erection	$2,342,214	
Chemical Erection	$616,669	
		$465,054,039
Owner Construction Costs		**$47,832,534**
Construction Management Costs		**$58,508,736**
Total Cost		**$752,441,209**

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).

WPSC proposed two sites, a "North Site" and a "South Site," both on its own Weston Generating Station (Weston) property between Business USH 51 and the Wisconsin River, in the village of Kronenwetter, and possibly the village of Rothschild, in Marathon County, Wisconsin. Because they are both located on the Weston property, one to the north and one to the south of the existing coal handling facilities, the two sites have several aspects in common. They each share with existing plant the same planned coal storage and delivery systems, ash storage and transport systems, water intake facilities from the Wisconsin River and the ground water, waste water discharge facilities to the Wisconsin River, and property-bounded railroad improvements. For either proposed site, this sharing of facilities with the existing plant would reduce the environmental impact of a new plant by avoiding the need to build these items anew.

The Citizens' Utility Board (CUB) and the Sierra Club maintain that the two Weston 4 site alternatives are more like different plant configurations on the same parcel of land than separate and alternative sites. CUB states that the North and South Sites on the Weston property do not satisfy the Commission's statutory and rule requirements. It argues that site alternatives

must be geographically distinct and that these site alternatives do not demonstrate real differences.

However, the Commission has already determined that the fact that alternate sites may be geographically close together does not automatically render them unreasonable alternatives.[3] The Commission has accepted CPCN applications for numerous other power plant projects where the alternate sites have been close together. The Commission determines on a case-by-case basis whether proposed site alternatives are reasonable by applying two standards: (1) the site alternatives must each be feasible locations and (2) 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 has determined that the North Site and the South Site are distinct sites that can be considered alternatives to each other.

The North Site and South Site differ in several respects. They are about one-half mile apart. The North Site boiler and generator building would be adjacent to the existing Weston Unit 3 boiler and generator building, probably sharing one wall with the Weston 3 boiler and generator building. The South Site boiler and generator building would be south of the coal storage areas, mostly in what is now an agricultural field used most recently for pasturing or manure disposal. The North Site grounds are already graded from previous construction work but need some small buildings to be removed, while the South Site grounds are undisturbed except for agricultural field work. The North Site, located partially in the village of Rothschild and partially in the village of Kronenwetter, would have economic impacts different than the South Site, located totally in the village of Kronenwetter. The cooling towers for the North Site

[3] Commission Order Denying Petition to Review Interim Determination, Issued April 18, 2003, PSC Docket 05-CE-130.

would be at the north end of the Weston property, displacing a 46 kV electric line. The cooling towers for the South Site would be in the southwestern part of the property, displacing some woodland. The ground fogging from the North Site cooling towers could occasionally reach Business USH 51. The ground fogging from the South Site cooling towers could occasionally reach westward into the woodland in neighboring properties along the Wisconsin River but would not reach Business USH 51. The noise impact of Weston 4 would be different between the two sites. The North Site is located nearer to industrial operations of other companies on the north side of the Weston property while the South Site is located nearer to residences on the south side of the Weston property. In terms of power plant operations, the plant at the North Site would be able to utilize personnel currently working at Weston 3. The plant at the South Site would be too far away from Weston 3 to be able to share Weston 3 plant personnel efficiently. The South Site would also require longer coal conveyance equipment than the plant at the North Site. Finally, as discussed below, the North Site can be considered a "brownfield" site, but the South Site should be considered more of a "greenfield" site.

A site at Pulliam, in Green Bay, might be reasonable, but it does have potential problems of its own for this case. There appears not to be space for the additional rail facilities that could deliver the coal, for instance. There may also be difficulties associated with the quality of the water in the Fox River and Green Bay. Potential DNR permitting issues are unknown. Regardless, the Commission would need more information about a Pulliam plant before it could make its required determinations under Wis. Stat. § 196.491(3)(d). While the Commission could reject the Weston sites because they are unreasonable or have no adequate alternative, and order

the utility to investigate and propose a Pulliam property alternative, the record in this case indicates that this action is not necessary.

The Commission finds these to be determining factors in rejecting the need for consideration of a Pulliam site and in choosing between the two proposed alternatives, and selects the North Site alternative as the proper location for Weston 4. The record demonstrates that either of the two sites proposed would meet the standards established under Wis. Stat. § 196.491(3) and could be selected for construction of Weston 4. Both sites are reasonable in terms of performance and potential impact, and either can serve the public interest.

Brownfields Consideration

Under the recently-created Wis. Stat. § 196.491(3)(d)8, the Commission must determine that a plant it is preparing to approve uses brownfields to the extent practicable. Under Wis. Stat.§ 560.13(1)(a), a "brownfield site" is an "abandoned, idle, or underused industrial or commercial facility or site, the expansion or redevelopment of which is adversely affected by actual or perceived environmental contamination." The use of brownfields is not required, but the applicant must consider brownfields first.

The applicant has proposed a brownfield site (the North Site) and a site (the South Site) that is essentially "greenfield" but also includes facilities from the existing industrial facility. A greenfield site would be a site where there has been no power plant or other industrial plant and where there is not yet an direct industrial impact. The North Site is almost all brownfield and industrially used land on the Weston Generating Station property. The South Site, on the same property but one-half mile to the south, utilizes the same brownfield acreages for the coal

delivery and handling facilities, but is otherwise "greenfield" in woodland and fields that have been subjected only to agricultural disturbance.

The Pulliam site described in Appendix A of the EIS can also be considered a brownfield site. However, it is not a reasonable site to consider for approval in this case, as discussed above.

Land Use and Economic Development

The WPSC property is zoned for industrial use, and the project area is a mix of residential and industrial/commercial. Both the villages of Kronenwetter and Rothschild have developed comprehensive land use plans which indicate planned expansions of the commercial areas. Located on the site of an existing power plant, Weston 4 will not unreasonably interfere with the orderly land use and development plans for the area.

Natural Gas Pipeline

WPSC will need to construct a new 8-inch diameter natural gas pipeline to connect Weston 4 to the interstate pipeline system of ANR Pipeline Company. Approximately two miles of the new gas pipeline will be located on privately-owned lands outside of the boundaries of WPSC's Weston property. WPSC identified potential gas pipeline routes in its application. Construction of the proposed natural gas pipeline along proposed route segments 1, 3, 4, and 6 will minimize disruption to residential and commercial areas during construction.

Health and Safety Payments

The enactment of 2003 Wisconsin Act 31 on July 15, 2003 significantly increased shared revenue payments to municipalities. Prior to Act 31, monetary compensation to municipalities and counties was based on a power plant's net book value, with a maximum payment of

$750,000 per year. As the power plant's net book value depreciated over time, the compensation declined.

In contrast, the new shared revenue program payments are based on a plant's megawatt output capacity and do not decline over time. The program includes additional shared revenue incentive payments which increase the dollars distributed to the municipalities and the county. Over the life of a plant, the municipalities and the county could receive millions more dollars than they would have received under the former program.

Annual payments under the new shared revenue program begin when a generating unit becomes operational. With the start-up of Weston 4 at the North Site, annual shared revenue payments to the villages of Kronenwetter and Rothschild will be $883,880 and $382,787, respectively. These payments will be in addition to the shared revenue payments that the villages currently receive for the existing Weston Generating Station.

On December 3, 2003, Wisconsin Act 89 was enacted. Act 89 eliminated Commission approval and the recovery in rates of mitigation payments after June 10, 2003 (Wis. Stat. § 196.20(7)). The statute states:

> "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.

An important issue the Commission must decide is what issues and payments would "directly address health or safety impacts". The Commission believes that these impacts would need to be directly linked to the construction and/or operation of the generation unit and exceed the compensation the municipalities would receive from shared revenue payments. It excludes generalized impacts caused by existing electric

generating facilities or monies that would be spent to the general benefit of the municipality apart from the generating facility direct impacts.

The villages of Kronenwetter and Rothschild have introduced evidence that Weston 4 would have quality of life, road safety, and emergency response (police, fire, and emergency medical services) impacts on the villages.

The Commission is not persuaded that the costs identified by the villages have a direct link to Weston 4. The quality of life issues did not take into account the economic benefit of the electric facility on the local municipalities or the compensation of shared revenue payments. Quality of life issues may not, by their nature, meet the "health or safety" standard for additional compensation. WPSC is responsible for road safety of the construction site and the Wisconsin Department of Transportation is responsible for ensuring the safety of state roads. Regarding police, fire, and EMT impacts, the record did not answer how the construction or operation of Weston 4 would directly cause these additional costs to the villages.

Commissioner Meyer dissents and finds that the villages of Kronenwetter and Rothschild would incur emergency response costs during the construction phase of Weston 4 that meet the statutory requirements for additional health and safety payments. Commissioner Meyer proposes that the Commission require the villages and WPSC to negotiate a single agreement to address these costs, not to exceed a specified dollar amount determined by the Commission.

Individual Hardships

The Commission must determine whether the project is in the public interest considering, in part, individual hardships, under Wis. Stat. § 196.491(3)(d)3.

Noise impacts

In this case, as with other power plant cases before the Commission, the potential for noise impacts has been a strong local concern. Concerns were expressed by residents south of the Weston property during the comment period on the draft EIS and by residents across Business USH 51 during the public hearings on the EIS and the proposal.

It appears that noise impacts on local residents would be greater if the plant were approved and located at the South Site because, in addition to the coal trains and coal handling noise, the noise of the boiler building and cooling towers would be further south and closer to the residents than it would be at the North Site.

The applicant was required during the application process to measure ambient noise at several agreed-upon measuring points according to the Commission's Noise Measurement Protocol and consultation with staff. The Protocol indicates that, if the project is approved, the same measurements should be taken again after the project has been constructed and operating. It is reasonable and in the public interest for the applicant to construct the project using all the noise attenuating techniques described in its application and in the EIS. It is also reasonable and in the public interest for the applicant to comply with the post-construction items required in the Noise Protocol. Post-construction noise measurements should be taken according to Protocol directions within three months of the date when Weston 4 is operational at full capacity.

Businesses locating in the area

The Sierra Club testified that businesses wanting to locate into the community might not be able to locate in the area of the power plant because of high existing air pollution levels resulting from Weston 4 and the other Weston units operating. As disclosed in the EIS,

(page 135, Table 6-7), levels of total suspended particulates from Weston 4 at the North Site would reach 100 percent of the National Ambient Air Quality Standard (NAAQS) approximately 900 meters to the northeast of the plant, levels of sulfur dioxide would reach 95.9 percent over 24 hours about 2,000 meters north of the plant, and levels of nitrogen dioxide would reach 98.3 percent about 770 meters northwest of the plant. It would be unlikely for a business that might emit these pollutants to qualify for required air permits for these locations but, as one locates farther away from the peak impact, the allowable increments of pollution would be greater and the chances of a business staying within its allowed increment toward the NAAQS would also be greater. The ability to locate would be affected mainly by the DNR air permitting processes.

In fact, if DNR determines that the proposed facility meets the requirements of Wis. Stat. ch. 285 (Wis. Stat. § 196.491(3)(d)3 and 4.), the Commission does not have the authority to determine if the design or location of the proposed plant is in the public interest or if it will have any undue adverse impact on environmental values because of the impact of air pollution.

Combined impacts on near neighbors

Homeowners across Business USH 51 from the Weston property, particularly those across from the coal handling facilities, have testified about levels of coal dust, emissions, and noise impact that they have experienced from the existing Weston generation facilities. They expressed concern that the impacts would increase with the additional coal handling and emissions with Weston 4 in operation. At least one property owner asked to have their home bought by the utility.

WPSC indicated on the public hearing record that it is WPSC's policy to discuss with landowners their concerns and the possibility of purchasing properties. Properties have already been acquired in this manner south of the existing facilities. The purchase of such properties would allow WPSC to create or expand buffer space between the facilities and local residents. The Commission supports the utility's negotiations to purchase the homes of families that would experience undue hardship, both to alleviate the hardship that would result from the project and to expand a buffer area between the power plant facilities and the other area residents.

DNR Permits

Under Wis. Stat. § 196.491(3)(e), before issuing a CPCN, the Commission must determine that DNR can grant the permits that have been identified under Wis. Stat. § 196.491(3)(a)3.a. as required for the construction or operation of the facility. The Commission has no jurisdiction over the DNR permits, but it remains aware of the status of the DNR permits that are required before any construction may begin and those that are of significant importance to the ability of the plant to operate if it receives a CPCN.

In this case, the only DNR permit that is required before start of construction is the air pollution control construction permit pursuant to Wis. Stat. ch. 285 and Wis. Admin. Code chs. DNR 405-408. DNR's draft air permit was submitted for the record in this proceeding (Exhibit 42), and DNR held its own hearing on the draft permit on August 12, 2004. In the meantime, DNR also contributed to the draft and final joint EIS with the Commission and testified at the Commission's public hearings, which served not only as CPCN hearings but also as hearings on the final EIS. The Commission takes administrative notice that the DNR issued a Record of Decision (ROD) on August 17, 2004, concluding that it has complied with the WEPA

requirements. The ROD released all prepared DNR permits to be issued in compliance with WEPA.

In the public hearings on the CPCN, the Sierra Club argued that WPSC's air permit application and the DNR draft permit were not correct. However, if DNR determines that a project will meet its air pollution requirements under Wis. Stat. ch. 285, the Commission has no authority under Wis. Stat. §§ 196.491(3)(d) and 4 to determine that a project would have undue adverse air pollution impacts.

The combustion of coal involves the release of numerous air pollutants. During the Commission hearings, concerns relating to these pollutants were expressed both by expert witnesses testifying on behalf of the parties and by members of the public. 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, 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.

Sierra Club indicated that it intended to intervene in DNR's air permit proceeding. DNR indicated during the CPCN hearing that the Sierra Club's air permit comments would be considered in its preparation of the final air permit.

Other DNR permits for the Weston 4 project relate to the Wisconsin River water intake, water loss to the atmosphere, water discharge to the river, property storm water control,

modification of high capacity wells, and modifications of the existing "Plan of Operation" to accept Weston 4 ash at the Legner Landfill ash disposal site. These permits, approvals, and permit modifications have all been issued except the approval for consumptive water loss. DNR Bureau of Endangered Resources has already indicated (EIS, Exh. 96, pp 210-211) that the project will not affect endangered, threatened, or special species of concern. The water loss approval has not been controversial in the Weston case and is expected to be issued within 30 days of this order as specified in Wis. Stat. § 30.025(4).

Adequacy of the 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.

Commission staff has collaborated with DNR staff to prepare an EIS about Weston 4. The staff of the two agencies developed agency contacts to answer questions, sent mailings and press releases soliciting comments, questions, or concerns, and held scoping sessions in the area of the plant at which members of the public could learn about the project and could relate particular concerns about its environmental impacts. The Commission and DNR then released a joint draft EIS dated March 17, 2004, containing professional analysis of Weston 4 as progress towards compliance with the agencies' WEPA requirements. The draft EIS, 263 pages long with a second volume of 18 figures, was distributed broadly to interested persons. The agencies

encouraged people to respond to it with concerns and criticisms during a 45-day public comment period that ended on May 10, 2004. 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, signed on June 24, 2004, was issued in early July 2004 as additional progress towards compliance with the Commission's and DNR's WEPA requirements. It corrected, updated, and expanded the draft EIS to about 370 pages, including copies of the written comments received and agency staff responses to those comments. Figures in the second volume of the final EIS were also updated and corrected.

The Commission held hearings on WPSC's CPCN application and on the final EIS in August, 2004, including hearings for the public in the area of the proposed project on August 10, 2004. These hearings were held at least thirty days after the issuance of the final EIS.

Some of the parties argued that the EIS's discussion of the environmental impacts of Weston 4 is inadequate. CUB articulated dissatisfaction with the EIS's description of potential alternative sites and transmission interconnections, and RENEW testified that the final EIS should have included a discussion of the potential effects of the "peak oil" phenomenon. In addition, the Sierra Club contended that the EIS was not adequate regarding the appropriateness of the DNR air permit review.

After hearing these concerns and reviewing the detailed record prepared in this case, much of which concerns environmental impacts, the Commission has determined that the final EIS adequately describes the potential direct and indirect impacts on the human environment. The EIS has helped the Commission with determinations under Wis. Stat. § 196.491(3)(d)3. and 4. It also helped members of the public who testified at the public hearing. The portions of

the EIS related to air impacts describe the situation as it was during the Commission review period and indicate that the final air permit is to be issued by DNR, outside the Commission's purview. DNR's August 17, 2004, Record of Decision also indicates that the joint final EIS is adequate from the point of view of its permits. In those areas where the likely environmental consequences associated with Weston 4 are unknown, the EIS identifies the uncertainties. The draft DNR air permit (Exhibit 42) has since responded to the uncertainties related to air pollution. The Commission recognizes DNR's continuing regulatory oversight of the project with respect to air pollution and, by the conditions imposed in this order, defers to DNR 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

WPSC may commence construction of the proposed Weston 4, a 515 MW SCPC electric generating unit, as described in WPSC's project application, at an estimated cost of $752,441,209.

Order

1. WPSC may construct Weston 4 at the North Site, as described in the project application with an estimated in-service date of June 1, 2008.

2. WPSC shall commence construction of Weston 4 within 12 months after receiving all necessary federal, state, and local permits and approvals.

3. Within three months of the date when Weston 4 is operational at full capacity, WPSC 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. WPSC shall report its findings to the Commission using the same format as its pre-approval noise studies.

4. WPSC shall submit a plan by January 14, 2005, for the capture of a minimum of 32 MW of additional cost-effective energy efficiency by the end of 2008.

5. WPSC shall submit quarterly progress reports to the Commission that summarize the status of the construction, the status of land acquisitions, the status of environmental control activities, and the overall percent of physical completion of the project. 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 Weston 4 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 project is fully operational.

6. WPSC shall report to the Commission the intended operating strategy, conditions, techniques, and limits on the utilization of Weston 4 during the period of limited transmission access. This information, as developed, should be reported in the standard quarterly progress reports. This report shall be submitted to the Commission no later than one year in advance of projected commercial operation.

7. WPSC shall notify the Commission within five working days of the date when construction commences on Weston 4. WPSC shall notify the Commission, in writing, within 10 days of any decision not to proceed with the approved project or to enter into any partnership or other arrangement with another entity with respect to the project.

8. WPSC shall provide the Commission with copies of all final executed agreements related to the operation or ownership of the project when they are obtained. Upon request, WPSC shall provide the Commission with copies of all final executed agreements related to the construction.

9. WPSC shall promptly inform the Commission of any substantial scope or design modifications in the approved facilities, or if the expected cost exceeds the authorized cost by more than 10 percent.

10. The estimated cost for construction of Weston 4 in year of occurrence dollars is $752,441,209.

11. Upon completion of construction for Weston 4, WPSC 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. This Final Decision takes effect on the day after it is mailed. The CPCN for Weston 4 takes effect only 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.

13. If DPC terminates its option to purchase 150 MW of Weston 4, WPSC shall notify the Commission in writing within 10 days of such termination and, within 60 days, shall provide the Commission with a plan for addressing any potential excess capacity situation resulting from DPC's decision.

14. WPSC shall construct the natural gas pipeline along route segments 1, 3, 4, and 6, as identified in the project application.

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

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

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.

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)

RESPONSE BRIEF OF INTERESTED PARTIES-CO-APPELLANTS-CROSS-RESPONDENTS WISCONSIN PUBLIC POWER, INC. AND MADISON GAS AND ELECTRIC COMPANY

STATE OF WISCONSIN
SUPREME COURT

Clean Wisconsin, Inc. p/k/a Wisconsin's
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Appellants-Cross-Respondents,
Town of Caledonia,
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City of Oak Creek,
Interested Party-Respondent-
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Robert H. Owen, Jr.,
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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 24, 2005

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is scheduled for March 30, 2005, at 1:30 p.m.

The court's decision should be published for the reasons previously stated in appellants' briefs.

ARGUMENT

I. INTRODUCTION.

Wisconsin Public Power, Inc. ("WPPI") and Madison Gas and Electric Company ("MGE") submit this joint brief in response to the initial brief of Clean Wisconsin, Inc. ("CW") and S.C. Johnson & Son, Inc. ("SCJ"), as well as the initial brief of Calpine Corporation ("Calpine").

WPPI and MGE limited their initial brief to two main points. First, the proposed Elm Road Generating Station ("ERGS") has statewide importance. The ERGS plants are needed to serve not only the customers of Wisconsin Electric Power Company ("WEPCO"). They are also needed to serve the nearly 300,000 customers throughout Wisconsin who are served directly or indirectly by WPPI or MGE. Second, the court should give deference to the Public Service Commission's

("PSC") expertise in granting a certificate of public convenience and necessity ("CPCN"). The decision to issue a CPCN involves a myriad of technical issues and, more importantly, requires expert judgment in weighing and balancing competing policy interests before deciding whether proposed new generating plants are "in the public interest." That is the kind of agency expertise that courts should overturn only in extra-ordinary circumstances. Such action is not warranted here.

As with their initial brief, WPPI and MGE once again rely primarily on the briefs of We Energies and the PSC/DNR.[1] In this brief we address two topics pertinent to the limited scope of our initial brief. Section II concerns the standard of review

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[1] By "We Energies" we refer to Co-Appellants-Cross-Respondents Wisconsin Electric Power Company, W.E. Power, LLC, and Wisconsin Energy Corporation. By "PSC/DNR" we refer to Respondents-Co-Appellants-Cross Respondents Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources.

on certain issues raised by CW/SCJ and Calpine. Section III addresses the deference due the PSC on its use of EGEAS modeling and other tools in reaching its public interest determination.

II. CW/SCJ AND CALPINE ARGUE INCORRECTLY FOR A *DE NOVO* STANDARD OF REVIEW.

Calpine argues that the PSC's final decision should be reviewed *de novo* because the decision is contrary to the clear meaning of the CPCN statute (Wis. Stat. § 196.41) and inconsistent with the PSC's prior interpretations of that law. (Calpine Br. at 13-14.) CW/SCJ argue that the PSC violated the CPCN statute by failing to analyze statutory factors relating to a public interest determination and failing to make statutory findings as to such factors. (CW/SCJ Br. at 9-11.) They argue that these alleged failings are "legal errors" that should be reviewed *de novo*.

The ERGS opponents argue for the wrong standard of review. They seek to avoid or minimize the deference the court should give to the PSC in precisely the kind of case where maximum deference is appropriate. We address here the standard of review applicable to the adequacy of the EIS (an issue raised by both Calpine and CW/SCJ) and the standard of review applicable to the CW/SCJ argument that the PSC failed to explain and make findings to support its public interest determination.

A. *The Court Should Give Great Weight Deference to the PSC's Determination That the EIS Is Adequate.*

The question is what standard of review should be employed to determine whether an EIS is adequate to meet the requirements of the Wisconsin Environmental Policy Act

(WEPA).[2] The answer is that the PSC's determination of adequacy is entitled to "great weight" deference because of the agency's expertise on matters relating to the siting and construction of power plants and related facilities. *Citizens' Util. Bd. v. PSC*, 211 Wis. 2d 537, 551-52, 565 N.W.2d 554, (1997). Indeed, the *Citizens' Utility Board* court said:

> We can conceive of few matters in which the test of "comparative qualification of court and agency to decide the particular issue" tips more heavily in favor of the agency than does a determination of the adequacy of an EIS relating to the construction of a spent fuel storage facility for a nuclear power plant.

Id. at 551 (citation omitted). Later in the same opinion, the court explained that great weight deference means the PSC's determination that an EIS is adequate will be sustained "unless . . . there is no rational basis for that determination." *Id.* at 553.

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[2] Wis. Stat. § 1.11.

Just as important as the ultimate holding in *Citizens' Utility Board* is the underlying rationale, because that rationale extends beyond the PSC's determination that the EIS is adequate. It extends to the PSC's determination that approving a CPCN for ERGS is in the public interest. After reviewing the four criteria for employing great weight deference,[3] the court in *Citizens' Utility Board* explained its rationale as follows:

> Finally, although not one of the four requirements for great weight deference, we have held that 'where a legal question is intertwined with factual, value or public policy determinations, courts will defer to the agency whose responsibility it is to make those determinations.' *See Wisconsin Power & Light Co. v. PSC*, 148 Wis. 2d 881, 887-88, 437 N.W.2d 888, 891 (Ct. App. 1989) (citing *West Bend Educ. Ass'n v. WERC*, 121 Wis. 2d 1, 12, 357 N.W.2d 534, 539-40 (1984)). As our analysis in *WED IV*

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[3] Those criteria are: (1) the agency is charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660, 539 N.W.2d 98, 102 (1995).

> [*Wisconsin's Environmental Decade, Inc. v. PSC*, 98 Wis. 2d 682, 694-95, 298 N.W.2d 205, 210 (Ct. App. 1980)] and that which follows demonstrate, the PSC's evaluation of the adequacy of an EIS relating to a pending application is very much intertwined with the PSC's fact-finding and public policy-making responsibilities.

Id. at 552.

WPPI and MGE submit: Just as the PSC's evaluation of the adequacy of an EIS is very much intertwined with the PSC's fact-finding and public policy-making responsibilities, so too is the PSC's determination to approve a CPCN for new generating plants. That point is addressed in Section II.B., below.

B. *The PSC Adequately Explained and Supported Its Public Interest Determination.*

CW/SCJ argue that the PSC violated the CPCN statute and failed to make required findings to support its determination that ERGS is "in the public interest." (CW/SCJ Br. at 9-11.)

CW/SCJ label these alleged deficiencies "legal errors," and claim they are subject to *de novo* review.

WPPI and MGE rely on the briefs submitted by We Energies and PSC/DNR for the details of how the PSC decision includes more than ample findings and discussion of statutory criteria to support its public interest determination. Here we address the legal framework – *i.e.,* the *de novo* standard of review – that CW/SCJ incorrectly claim applies to the PSC's public interest determination.

CW/SCJ's argument for a *de novo* standard of review relies on the assertion that the PSC failed to make adequate, detailed findings of fact to support its ultimate determination that ERGS is in the public interest. The argument has two main faults. First, the PSC is not required to make more detailed findings than it did. Second, the public interest determination

itself is much more than a finding of fact. It is a complex, policy-based value judgment that involves the PSC using its broad-based expertise in applying the CPCN statute to a specific set of facts. As such, the PSC's public interest determination is entitled to great weight deference.

In *City of Brookfield v. Milwaukee Metropolitan Sewerage District*, 141 Wis. 2d 10, 414 N.W.2d 308 (Ct. App. 1987), the court reviewed a claim, *inter alia*, that the PSC had failed to make adequate findings of fact. The basic PSC determination at issue was its ultimate finding of fact that the district's method of charging for certain capital costs was "not unreasonable or unjustly discriminatory." In rejecting Brookfield's claim that the PSC did not make adequate detailed findings of fact to support its ultimate finding, the court said:

> No recitation of what evidence was believed and what was rejected was necessary to comply with the elements of due

> process.... There is no requirement that the administrative agency indulge in the elaborate opinion procedure of an appellate court. It is sufficient if the findings of fact and conclusions of law are specific enough to inform the parties and the courts on appeal of the basis of the decision.

Id. at 17-18 (quoting *State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis. 2d 646, 661, 275 N.W.2d 668, 675 (1979)).

The court held that, taken together, the three portions of the PSC order (discussion, ultimate findings of fact, and conclusions of law) were sufficient to inform the parties and reviewing courts of the basis for its decision. *Id.* at 18.

The *Brookfield* court also noted that the standard of review applicable to the PSC's basic determination (whether the district's charges were unreasonable or unjustly discriminatory) did not hinge on whether the determination was called an ultimate conclusion of fact or a question of law. The court acknowledged that application of a legal standard to a set of

facts presents a question of law *Id.* at 14. That, however, did not mean that a *de novo* standard of review applies. The court said,

> The determination of whether the district's charges are unreasonable or unjustly discriminatory calls for a value judgment. Moreover, rate setting is an area in which the commission has special expertise. When an administrative agency's determination calls for a value judgment, an appellate court must decide to what extent it should substitute its evaluation for that of the agency. When the expertise of the agency is significant to the value judgment, the agency's decision, although not controlling, should be given weight.

Id. at 14-15 (citation omitted).

Like rate setting, deciding whether the construction of proposed power plants is in the public interest is an area in which the PSC has special expertise, as discussed at length in our initial brief. In fact, as the analysis in *Citizens' Utility Board* suggests, the PSC's fact-finding and public policy-

making responsibilities are so intertwined in that decision that a court should accord it great weight deference.

III. THE PSC EXERCISED REASONABLE JUDGMENT IN ITS USE OF EGEAS COMPUTER MODELING.

CW/SCJ argue that the PSC failed to use proper inputs (particularly monetization of alleged health effects) for its EGEAS[4] computer modeling. (CW/SCJ Bf. at 17-31.) Calpine argues that the EGEAS modeling required the PSC to choose Calpine's proposal as part of the supply option. (Calpine Bf. at 14-23.) The positions of these ERGS opponents have something in common. Both would have the PSC place too much reliance on a limited computer model and too little reliance on PSC expertise in weighing all the factors (quantifiable and nonquantifiable) that inform its public interest determination.

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[4] EGEAS stands for Electrical Generation Expansion Analysis System. It is a computerized model used to estimate the future cost of electric generation under a variety of assumptions and scenarios.

Wouldn't this be a simpler world if deciding whether to approve new generating plants were just a matter of finding the right inputs for a computer model and then approving the computer's optimal plan? There would be no need for long hearings and a voluminous record. The PSC commissioners would have little or no discretion to exercise. Court review would be either non-existent or narrowly limited.

That simpler world is not the real world. In the real world, the EGEAS computer model is merely a tool, albeit an important one. The PSC itself recognized the model's limitations: "The EGEAS model is an engineering tool that depends upon a great deal of numerical data inputs, assumptions, and forecast uncertainty." (R.18-PSC 150, p. 25.)

The PSC must apply expert judgment to decide how to use EGEAS and all the other volumes of qualitative and

quantitative information at its disposal. Expert judgment is required on the front end in deciding what scenarios to model, what inputs to utilize, and how to quantify the inputs used. Expert judgment is required on the back end in deciding how to evaluate the model's results and what weight to give those results in the process of balancing a variety of factors (some quantifiable, some not) that affect the public interest. As the PSC said in its final order:

> 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.

(R.18-PSC 150, p. 25.) In other words, the PSC does not blindly follow EGEAS results.

What the ERGS opponents are really asking is that the court should second guess the PSC in both its front-end and

back-end judgments in regard to EGEAS. This the court should decline to do. If ever there were an area where great deference should be afforded to the PSC, it is the area of computerized modeling of electric generation planning.

In applying its expert judgment to use of the EGEAS model, the PSC was not obliged to monetize disputed health effects and use the resulting cost estimate as a data input for the model. The Commission acknowledged that it had no "appropriate methods" for doing so. (R.18-PSC 150, pp. 52-53.) The PSC need not quantify an alleged effect if the PSC lacks an adequate methodology for a projection. *Wisconsin's Environmental Decade, Inc. v. PSC*, 98 Wis. 2d 682, 694-95, 298 N.W.2d 205 (Ct. App. 1980). (EIS need not quantify the "energy promotional potential" resulting from a proposed time-of-day electric rate structure where PSC had no adequate

methodology for such a projection.) Similarly, the PSC need not rely on studies performed by others to quantify alleged effects if the results are "inconsistent" or "suspect." *Id.* at 695. In this case, the quantification of health costs claimed by CW/SCJ was hotly disputed by experts, both as to amount and as to any causal connection in the first instance. (R.18-PSC 157: pp. 2379, 2397-2398, 2383-2386, 4222-4224, 4253-4254.) The PSC specifically noted that We Energies had "introduced contrary evidence on these subjects." (R.18-PSC 150, p. 52.)

The court should reject the attempts of CW/SCJ and Calpine to have this court substitute its judgment for that of the PSC on how to use, and how much to rely on, the EGEAS computer model.

CONCLUSION

WPPI and MGE urge the court to reject the attacks levied by ERGS opponents CW/SCJ and Calpine. Their attacks call for the court to substitute its judgment for the Commission's. To do so would be inappropriate because approving the construction of new power plants requires technical expertise and limited policy-making within the scope delegated by the legislature to the PSC in the CPCN statute. In short, a PSC decision that construction of a new power plant is in the public interest is precisely the kind of decision that a court should review with great deference to agency expertise.

The court should deny the cross-appeals of CW/SCJ and Calpine. It should affirm the PSC's decision of November 10, 2003.

Dated: February 24, 2005.

STAFFORD ROSENBAUM LLP

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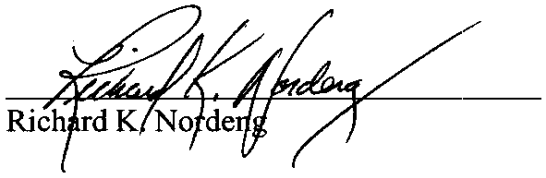
CERTIFICATION

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 2, 510 words.

Dated: February 24, 2005.



Richard K. Norden

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.
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,

Appeal No. 04-3179

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

(Caption continued on following pages)

BRIEF OF INTERESTED PARTY-CROSS-RESPONDENT DAIRYLAND POWER COOPERATIVE

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,
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 &

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ISSUES PRESENTED FOR REVIEW

Dairyland Power Cooperative concurs 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. Dairyland Power Cooperative supports publication of the court's decision for the reasons stated in the brief filed by We Energies.

STATEMENT OF THE CASE

Dairyland Power Cooperative concurs in the Statement of the Case appearing in the brief filed by We Energies.

ARGUMENT

I. INTRODUCTION

Dairyland Power Cooperative is a not-for-profit generation and transmission ("G&T") electric cooperative headquartered in La Crosse, Wisconsin. Dairyland is owned by and provides the wholesale power requirements for 25 separate distribution cooperatives in western Wisconsin, southern Minnesota, northern Iowa, and northern Illinois.[1] Dairyland also provides wholesale power requirements for 14 municipal utilities in Wisconsin, Minnesota, and Iowa.[2] In Wisconsin, Dairyland primarily provides wholesale electric service to rural areas in the western half of the state, from central Wisconsin to the state's western border, and from Lake Superior south to the Illinois border. Dairyland owns or has

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[1] Dairyland's member cooperatives include Allamakee-Clayton Electric Cooperative, Barron Electric Cooperative, Bayfield Electric Cooperative, Chippewa Valley Electric Cooperative, Clark Electric Cooperative, Dunn Energy Cooperative, Eau Claire Energy Cooperative, Freeborn-Mower Cooperative Services, Hawkeye Tri-County Electric Cooperative, Heartland Power Cooperative, Jackson Electric Cooperative, Jo-Carroll Energy, Jump River Electric Cooperative, Oakdale Electric Cooperative, People's Cooperatives Services, Pierce-Pepin Cooperative Services, Polk-Burnett Electric Cooperative, Price Electric Cooperative, Richland Electric Cooperative, Riverland Energy Cooperative, Scenic Rivers Energy Cooperative, St. Croix Electric Cooperative, Taylor Electric Cooperative, Tri-County Electric Cooperative, and Vernon Electric Cooperative.

[2] Municipal utilities served by Dairyland include Arcadia Electric Utility, Argyle Municipal Water and Electric Utility, Cashton Municipal Light & Water Utility, Cumberland Municipal Utility, Elroy Light & Water Utility, Fennimore Municipal Utilities, Forest City Light & Power, Independence Light & Power, La Farge Municipal Electric, Lanesboro Public Utilities, Merrillan Electric Light & Water Department, New Lisbon Municipal Light & Water Department, and Viola Municipal Electric Utility.

under contract generating units totaling approximately 1,125 megawatts and owns approximately 3,132 miles of transmission line ranging from 34.5 kilovolts ("kV") to 161 kV.

Dairyland is not a "public utility" as defined in Wis. Stat. § 196.01 (5). Therefore, Dairyland is generally not subject to regulation by the Public Service Commission of Wisconsin ("PSC" or "Commission") under Wis. Stat. Chapter 196. However, Dairyland is an "electric utility" as defined in Wis. Stat. § 196.491 (1) (d)[3] since it owns and operates large electric generating facilities and high voltage transmission lines in the state. Dairyland has in the past obtained certificates of public convenience and necessity ("CPCN") from the PSC under Wis. Stat. § 196.491 (3), and may need to do so in the future. Moreover, as part of the interconnected electric grid that includes Wisconsin, Dairyland and its members are very concerned that the reliability of the grid be maintained and enhanced.

The outcome of this appeal is critical to every electric utility in Wisconsin, as well as to the business and residential customers of each of those electric utilities. Although Dairyland will not own any portion of the Elm Road Generating Station ("ERGS"), the specific project under review in this case, it has a vital interest in the process

[3] Wis. Stat. § 196.491 (1) (d) defines "electric utility" to include, *inter alia*, "any cooperative association, which owns or operates, or plans within the next 3 years to construct, own or operate, facilities in the state."

by which applications to build additional electric infrastructure are reviewed and approved.

The issues raised in this appeal have been well briefed by We Energies (the applicant for the ERGS CPCN), the PSC, and Wisconsin Public Power, Inc., and Madison Gas and Electric Company. Dairyland adopts the arguments made in those briefs and will not repeat them in detail. Dairyland's brief instead will focus on why the circuit court erred when it determined that the application for a CPCN was not complete, and the potential impact of this error on Wisconsin's electric power system.

II. THE CIRCUIT COURT MISINTERPRETED BOTH WIS. STAT. § 196.491 AND WIS. ADM. CODE PSC 111.53.

The Wisconsin Legislature recognized in 2001 that "[t]here 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." Appendix of Respondents-Co-Appellants-Cross-Respondents Wisconsin Public Service Commission and Wisconsin Department of Natural Resources ("State's App." 249). The Commission, the agency charged with maintaining a reliable electric system in the

state, agrees that "[c]oncerns over electric reliability are paramount today." PSC Final Decision ("Final Decision") at 22.

The Legislature has in Wis. Stat. § 196.491(3) enacted a detailed statutory scheme for complete, efficient, and timely review of applications to construct new power plants to meet Wisconsin's future electricity needs. The Commission followed that statutory procedure scrupulously in this case. After a lengthy review process involving 11 days of technical hearings and 3 days of community hearings, a massive record, and extensive briefing, the Commission determined that the proposed projects must be approved "now to ensure these facilities are in service in 2009 and 2010." *Id.* at 20, 25.

On November 29, 2004, however, the Dane County Circuit Court vacated the Commission's decision and held that the entire administrative review process must start over again. (State's App. 172-226). The Circuit Court vacated and remanded the Commission's a carefully reasoned 65-page decision, reached by the Commission after it heard 68 witnesses and examined a record comprising 6,000 pages of testimony and 302 exhibits. The primary basis for the Circuit Court's decision was the Court's erroneous conclusion that the initial application to the Commission was incomplete.

The Circuit Court's decision, if applied to other CPCN proceedings, will further complicate and protract already complicated and protracted proceedings, will thwart the Legislature's recent efforts to streamline agency review of applications to construct generation facilities desperately needed to meet the electric power needs of Wisconsin, and could jeopardize or delay other pending projects. This Court should reject the Circuit Court's analysis and affirm the Commission's decision to issue a CPCN.

A. Wis. Adm. Code PSC 111.53 Requires an Applicant For a CPCN To Submit Information About Permits and Information About Transmission Agreements Needed by The Project, Not the Documents Themselves.

At the heart of the Circuit Court's decision is its determination that the Commission erred when it found the ERGS application complete. (State's App. 180-196). The court ruled that Wis. Adm. Code PSC 111.53 was not ambiguous, and thus that the Commission's interpretation of this rule was not entitled to any deference. (State's App. 195). But the Circuit Court itself misconstrued the rule, finding in it a "plain meaning" that is not there.

The rule must be read in the context of the statute which gives rise to the rule. *See, e.g., Beloit Corp. v. Labor and Industry Rev.*

Comm'n, 152 Wis. 2d 579, 594, 449 N.W. 2d 299 (Ct. App. 1989). PSC 111.53 was promulgated in response to the direction of Wis. Stat. § 196.491. That statute provides:

> no person may commence the construction of a [large electric generating] facility unless the person has applied for and received a certificate of public convenience and necessity under this subsection. <u>An application for a certificate issued under this subsection shall be in the form and contain the information required by commission rules...</u>

Wis. Stat. § 196.491(3)(a)1 (emphasis added). The Commission duly promulgated Wis. Adm. Code PSC 111.53, which prescribes the form of an application for a CPCN, and the "information required" in such an application.

The Circuit Court found that three items allegedly required by the rule were absent, and that thus the application was not complete. The first "missing" item identified by the court was a second proposed site for the facility. This issue has been extensively and well briefed by the parties in this case, and Dairyland will not address it here.

The Circuit Court also ruled that the application was incomplete because some required permits had not yet been obtained, and because it did not include agreements for the use of transmission facilities. The Circuit Court's decision says it relies on

the plain meaning of the rule, but a careful reading demonstrates that the court in fact misinterpreted the regulation.

The applicable section of Wis. Adm. Code PSC 111.53 states,

> (1).... 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 ... 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...
> 5. Other auxiliary facilities, including fuel storage and water storage.
> 6. Natural resources at each site...
> 7. Community-related information ...
> 8. Aesthetics.

Wis. Adm. Code PSC 111.53(1)(f). The introductory phrase of subsection (f) calls for site-related **information**, not for the items listed in the following numbered sections themselves. In other

words, as other parties, including the Commission, have vigorously argued, the rule requires **information about** permits and transmission agreements, **not** the documents themselves.

Applying the Circuit Court's interpretation consistently to the other numbered requirements of subsection (f) leads to absurd results, which demonstrates that the interpretation is wrong. *See, e.g., State ex rel. WEPCO v. Bardwell*, 71 Wis. 2d 718, 729, 239 N.W. 2d 78 (1976). Surely the applicant is not required to attach "natural resources" or "endangered or threatened species" to the application. The only reasonable way to read the rule is that the applicant is required to submit **information about** the listed items, *e.g.*: information about auxiliary facilities (111.53(f)5)); information about natural resources (111.53(f)6.); and information about aesthetics (111.53(f)8.).

Likewise, the rule plainly requires the applicant only to submit information about required permits, and information about transmission agreements that may be needed, not the permits or agreements themselves. This reading of the rule is supported by the reference in Wis. Adm. Code PSC 111.53(f)2 to "permitting expectations from the beginning of construction to the in-service date." If, as the Circuit Court ruled, all permits must be submitted with the initial application, what "permitting expectations" remain

for the later period "from the beginning of construction to the in-service date"? The Circuit Court's interpretation would render this part of the rule entirely superfluous. Under the well-known canons of statutory construction, an interpretation leading to this result should be avoided. *See, e.g., State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N. W. 2d 110.

B. Wis. Stat. §196.491 Gives the Commission the Power to Conclusively Determine Whether a CPCN Application Is Complete.

Wis. Stat. § 196.491(3) sets up an orderly process for applying for a CPCN to build a facility covered by the statute. First, the utility must submit an application "in the form and contain[ing] the informing required by commission rules." Wis. Stat. § 196.491(3)(a)1. Next the Commission determines whether the application is complete. Wis. Stat. § 196.491(3)(a)2. If the Commission determines that the application is not complete, it is required to state the reason the application is not complete, and the applicant may "supplement and refile" the application. Wis. Stat. § 196.491(3)(a)2. This iterative process by which the Commission asks for additional information and the applicant provides it can go on indefinitely. "There is no limit on the number of times that an

applicant may refile an application under this subdivision." *Id.* Once the Commission decides that it has the information it needs to go to the next stage—a public hearing under Wis. Stat. § 196.491(3)(b)—the Commission can declare that the application is complete. Wis. Stat. § 196.491(3)(a)2. In contrast with the requirement that the Commission state the reason why an application is incomplete, the statute does **not** require the Commission to state any findings or reasons to support a determination that an application is complete.

However, the application can also become complete in another way. "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." Wis. Stat. § 196.491(3)(a)2. In other words, if the Commission takes no action addressing the completeness of an application, by statute the application is considered complete, and will automatically go to the next step in the approval process, a public hearing.

This statutory default provision shows that the language in Wis. Stat. § 196.491 about "completeness" is there to benefit the Commission when it reviews CPCN applications. If the Commission thinks that it will need more information in the application in order to conduct its review, it must notify the

applicant within 30 days. If the Commission does nothing, however, the application will go forward to the next step in the review process, as submitted. The statute thus gives the Commission complete discretion to decide what information it needs for a complete application.

Once an application is deemed complete, either by Commission determination or Commission inaction, the application proceeds to a public hearing. "The commission shall hold a public hearing on an application filed under par. (a) 1. that is **determined or considered to be complete**..." Wis. Stat. § 196.491(3)(b) (emphasis added). At that stage the Commission applies the substantive criteria listed in Wis. Stat. § 196.491(3)(d) in deciding whether to approve the application.

The following points about the structure of Wis. Stat. § 196.491 are important. First, subsection (3)(a)1. outlines the form of the application, but does not mention "completeness." Subsection (3)(a)2. addresses completeness, but while the Commission must state why an application is not complete, the statute does not require the Commission to state why an application is complete, and if the Commission does nothing, the application is by statute deemed to be complete. Finally, Wis. Stat. § 196.491(3)(d), the substantive provision that the Commission must apply to determine whether a

CPCN should be approved, makes no reference at all to whether the application was or is complete.[4]

The structure of the statute indicates that the provisions dealing with what an application includes, and whether an application is complete, are simply preliminary steps to benefit the Commission in its role as decision maker, and are not related to the substantive grounds for approving a CPCN. When the Commission decides it has enough information to go forward with a public hearing, the application is complete.

Several conclusions necessarily follow. First, the Commission has absolute discretion to determine when an application is complete. The Commission itself defines completeness. Second, the Commission has absolute discretion to decide that an application satisfies Wis. Adm. Code PSC 111.53. Finally, even if others may disagree that the application precisely conforms to each and every item listed in the rule, the Commission can still determine, through action or inaction, that the application is "complete" enough to proceed to the next stage of the review process.

---

[4] The circuit court's decision incorrectly states that Wis. Stat. § 196.491(3)(e) gives the Commission only two options when an application is incomplete – to reject the application, or approve it with modifications. (State's App. 195). However, subsection (3)(e) refers not to incomplete applications, but to applications which fail to meet the substantive requirements of 196.491(3)(d). The substantive requirements under subsection (3)(d) do not refer to completeness at all.

C. The Commission's Determination that the Application Was Complete Was Not Reviewable by the Circuit Court, and the Court Erred in Basing Its Decision on that Factor.

"In some limited circumstances, an administrative decision may be unreviewable." Charles H. Koch, Jr., *Administrative Law and Practice,* § 13.1, p. 305 (2d ed. 1997). The Commission's decision that the CPCN application was complete is such an unreviewable decision.

An administrative decision is unreviewable if one of the following three criteria applies:

(1) a statute precludes review;

(2) the administrative scheme "provide[s] no basis on which to evaluate an agency's resolution and hence implies such complete administrative authority and decisionmaking freedom, 'discretion,' that the courts are not left any role"; or

(3) "the agency acquires complete administrative authority and decisionmaking freedom by the operation of law," including judge-made common law.

Id. at § 13.1[3], p. 307. The Commission's decision that the CPCN application was complete satisfies all of these criteria, and is thus unreviewable.

As discussed in section II. B. above, Wis. Stat. § 196.491(3) gives the Commission complete control over the determination that an application is complete enough to proceed to hearing. The fact that the statute does not explicitly bar review is irrelevant. If the

"overall legislative scheme" shows the Legislature's "intent to preclude review," the agency action is unreviewable. *Id.* at § 13.2[1], pp. 309-10. Wis. Stat. § 196.491(3) gives absolute discretion to the Commission to determine when a CPCN application is complete, and that level of discretion renders the decision unreviewable.

The Commission's decision is unreviewable under the second standard stated above, as well. When a statutory scheme gives the courts no "standards by which the court may evaluate the agency decision," the decision is unreviewable. *Id.* § 13.3[1], p. 316. Neither Wis. Stat. § 196.491(3) nor Wis. Adm. Code PSC 111.53 prescribes any standards by which a court can evaluate the Commission's decision that a CPCN application is complete. The statute explicitly gives the Commission the right to prescribe the form of the application and the information it must contain. Wis. Stat. § 196.491(3)(a)1. The Legislature provided no method under which the court can evaluate the Commission's completeness decision and hence "intended no role for the courts." Koch, supra, § 13.3[1], p. 316. And while Wis. Adm. Code PSC 111.53 lists items about which an applicant must submit information, it says nothing about how much information is sufficient. That decision is left wholly to the Commission's discretion.

Finally, the Commission's decision that the CPCN application was complete is unreviewable because both Wisconsin and federal case law hold that a preliminary agency decision that a matter is ready to proceed to hearing is not reviewable. It "is well settled that 'not all decisions, orders or determinations which might fit within a literal reading of [§227.52] are subject to judicial review.'" *Wisconsin Dept. of Revenue v. Hogan*, 198 Wis. 2d 792, 803, 543 N.W. 2d 825 (Ct. App. 1995) (internal citation omitted). The rule against review of preliminary determinations is grounded in common sense:

> Courts are averse to review interim steps in an administrative proceeding... Review of preliminary or procedural orders is generally not available primarily on the ground that such a review would afford opportunity for constant delays in the course of administrative proceedings...

Id. at 804 (citations omitted). The Wisconsin Supreme Court has specifically ruled that "an order which determined that the [tax appeals] commission had the authority to proceed to a hearing and determination upon the merits" was not reviewable. *Pasch v. Dept. of Revenue*, 58 Wis. 2d 346, 355-57, 206 N.W. 2d 157 (1973).

Both state and federal cases have ruled that an agency's initial decision to file a complaint or tentatively approve an application is not reviewable. In *Abbs v. Sullivan* , 963 F.2d 918 (7th Cir. 1992), the court stated that the "issuance of the administrative complaint,

kicking off the administrative proceeding" was "emphatically" not subject to review by the district court. *Id.* at 926 (citations omitted). Similarly the court held in *Independent Bankers Assoc. of America et al. v. National Credit Union Administration, et al.*, 936 F. Supp. 605, 616 (W.D. WI 1996), that the defendant's initial approval of insurance for the plaintiff was not subject to review. Other cases have held that an agency's decision about the scope and content of the information required by the agency to make its decision is not reviewable. *See, e.g., Southwest Ctr for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1448 (9th Cir. 1996).

The Commission's decision that the CPCN application was complete is analogous to a court's decision to deny a motion to dismiss a complaint for failure to state a claim. Wisconsin cases have long treated orders denying a motion to dismiss as unreviewable. *See, e.g., Town of Ashwaubenon v. Public Service Comm'n*, 15 Wis. 2d 445, 115 N.W.2d 412 (1962); *State v. Jenich*, 94 Wis. 2d 74, 97a, 292 N.W. 2d 348 (1980). The Commission, like a court in the analogous "motion to dismiss" context, decided that there was enough information for the application to proceed to public hearing. Such preliminary decisions to move a case forward are not reviewable.

III. EVEN IF THE COMMISSION'S DECISION WAS REVIEWABLE, THE CIRCUIT COURT ERRED BY REFUSING TO DEFER TO THE COMMISSION'S INTERPRETATION OF WIS. STAT. § 196.491 AND WIS. ADM. CODE PSC 111.53.

Wisconsin appellate courts have developed an extensive body of case law which elucidates when a court should (or should not) defer to an administrative agency's interpretation of statutes and regulations. This case presents a classic example of why those rules are important, and why they should be followed by lower courts.

Agency interpretation and application of statutes which the agency administers are generally given "great weight" deference. *Sauk County v. WERC*, 165 Wis. 2d 406, 413, 477 N.W. 2d 267 (1991). An agency interpretation is given great weight deference when the agency is "charged by the Legislature with the duty of administering the statute"; employs "its expertise or specialized knowledge" in reaching a decision; and is "long-standing" and will promote "uniformity and consistency." *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660, 539 N.W. 2d 98 (1995).

Each of these criteria is met in this case. The statute gives to the Commission the duty to determine when an application for a CPCN is complete. Wis. Stat. § 196.491(3)(a)2. The Commission used its expertise and specialized knowledge, including knowledge about Wisconsin's projected electricity needs, and knowledge of all

the complex steps involved in constructing and operating a large generating facility, in reaching its decision. The Commission's "interpretation of the provisions governing the substantive review of certificate applications in Wis. Stat. § 196.491(3) is long standing." *RURAL v. PSC*, 2000 WI 129, ¶ 23, 239 Wis. 2d 660, 677, 619 N.W. 2d 888.

The Circuit Court nevertheless ruled that the Commission's decision that the ERGS application was complete was entitled to no deference. In doing so the court relied on an idiosyncratic and incorrect interpretation of the "plain meaning" of a narrow subset of words in Wis. Stat. § 196.491(3), and the regulation enacted pursuant to the statute. The Circuit Court ignored the context in which the statute was passed, the language of other sections of the statute, and the function of the rule promulgated under the statute.

IV. THE CIRCUIT COURT'S DECISION UNDERMINES THE PROCESS DESIGNED BY THE LEGISLATURE TO ENSURE THAT WISCONSIN BUSINESS AND RESIDENTIAL CUSTOMERS WILL CONTINUE TO HAVE AN ADEQUATE SUPPLY OF ELECTRICITY.

The potential consequences of the Circuit Court's decision on Wisconsin's electric utilities, and on all Wisconsin consumers of electricity, cannot be overstated. The Circuit Court's decision would essentially stop the construction of new facilities needing a CPCN from the Commission. An entity seeking to construct new facilities

in the state requiring a CPCN could never conclusively know that its application was legally "complete," even if the Commission had so determined, until the conclusion of the judicial review process after the Commission's hearing process. If the courts were to decide on judicial review that the application was not complete, the process, under the Circuit Court's decision, would restart after another application is filed. But then the same uncertainty regarding the completeness of the new application could exist. Opponents of a facility could in theory challenge the completeness of an application multiple times, effectively stalling any project for an indeterminate amount of time.

The disincentive caused by the Circuit Court's decision to projects that need a CPCN from the Commission is obvious. The uncertainties raised by the decision will discourage utilities from undertaking projects to construct electric infrastructure. Such projects already require extensive, costly and time-consuming studies before an application for a CPCN can even be filed. Approvals from the PSC, the DNR and other agencies must be sought. A decision from the Commission once the application is complete may not be received for up to 360 days. If the Circuit Court's decision is allowed to stand, utilities face the possibility that they could be forced to go through this onerous process not just once

or twice, but multiple times. The Circuit Court's ruling is a powerful disincentive for utilities to invest in constructing the additional electric infrastructure that Wisconsin needs.

As other parties have ably argued, this was not the Legislature's intent when it enacted Wis. Stat. § 196.491. The Legislature recognized the impending problems with Wisconsin's supply of electric power. It passed a statute under which the Commission could review projects to meet future needs thoroughly but efficiently, with measured haste, in order to avert a potential crisis. The Circuit Court's ruling thwarts the legislative purpose of Wis. Stat. § 196.491(3), misconstrues the "plain meaning" of the statute and the Commission's rule, ignores the Commission's expertise and specialized knowledge, and subjects Wisconsin residents to an increased risk of inadequate future supplies of electricity.

CONCLUSION

For the reasons discussed above, Dairyland Power Cooperative respectfully urges the Court to affirm the final decision of the Commission approving a CPCN for the construction of the Elm Road Generating Station.

Dated this 24th day of February, 2005.

Respectfully submitted,

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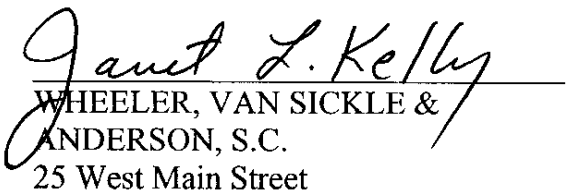

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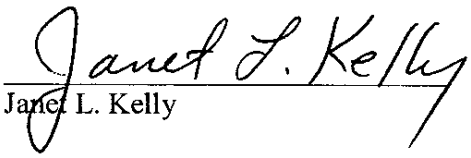
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,058 words.



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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)

REPLY BRIEF 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

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 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.

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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INTRODUCTION

CW/SCJ identified legal errors requiring reversal of the CPCN and EIS. PSC/WEC mischaracterize legal issues as discretionary and factual. An agency cannot lawfully exercise discretion or make sustainable findings based on erroneous legal premises.

WEC's opening paragraph misquotes CW/SCJ's brief to assert that CW/SCJ do not challenge PSC's determination that ERGS is needed. Nothing could be further from the truth. CW/SCJ assert that resolution of this case does not turn on whether new power plants are needed, but whether PSC erred in approving ERGS in lieu of higher priority alternatives, and in the absence of required information and analyses.[1]

ARGUMENT

I. PSC ERRED IN DETERMINING THAT ERGS IS IN THE PUBLIC INTEREST

All parties agree that PSC must conduct economic analysis of the proposed project and alternatives. It is necessary to evaluate cost-effectiveness and the public interest. Wis. Stat. §§ 1.12 and 196.491(3)(d)3. The parties also agree that PSC used EGEAS to perform

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[1] WEC also accuses CW/SCJ of misciting Kegonsa Jt. San. Dist. v. Stoughton, 87 Wis.2d 131, 274 N.W.2d 598 (1979). CW/SCJ correctly cited Kegonsa for extolling the "legislative policy in Wisconsin to favor judicial review of administrative decisions . . . ." Id. at 152.

its analysis. PSC/WEC's argument that PSC relied on "qualitative" criteria does not diminish the importance of EGEAS. WEC's brief at 14-15, purporting to identify evidence of qualitative factors, identifies evidence regarding cost.[2]

EGEAS requires inclusion of project-related cost information. PSC's modeler testified that a cost not included in modeling cannot influence its selection of units. PSC-R.157 at 4746. By excluding a significant cost, EGEAS may select units that would not otherwise be selected.

PSC rationalized construction of ERGS because its EGEAS runs showed that coal plants are eventually built: the issue for PSC is not whether but when to build coal plants. CW/SCJ-Ap.124. This conclusion is flawed because:

1. An option may cost more than coal but still be sufficiently cost-competitive to be "cost-effective" under the Energy Priorities Law. Inclusion of coal in the optimal plan does not reveal the cost differential between coal and alternatives unless one expressly models those alternatives. A higher priority option that is only slightly more expensive than coal would not be selected by EGEAS for inclusion in the optimal

---

[2] WEC also alleges that natural gas deliveries may be interrupted, but PSC did not mention this as a justification for its decision. Natural gas is so reliable that WEC proposed and PSC recently approved WEC's new Port Washington natural gas project without back-up fuel. Calpine's natural gas projects have back-up fuel to protect against supply disruption. WEC's criticisms of Calpine are irrelevant. Under the Energy Priorities Law, WEC could propose its own higher priority alternative or purchase from others.

plan, even if it is cost-effective and therefore required under the Energy Priorities Law.

2. Accelerating construction of coal plants ousts higher priority options. Under PSC's decision, WEC would rely on ERGS instead of natural gas options that EGEAS showed to be technically feasible and lower cost.

3. Failure to include known, significant ERGS-related costs biases the results, precluding a determination that ERGS is cost-effective or in the public interest.

A. PSC Failed to Make Necessary Findings

WEC acknowledges that PSC's "findings" are "conclusions." WEC Br. at 7. WEC's quotations from the CPCN decision do not explain the factual basis for those conclusions. As the Circuit Court observed, PSC made no findings explaining why natural gas is not cost-effective or technically feasible; or why natural gas, which PSC has consistently approved for baseload use, is now unacceptable for baseload use. CW/SCJ-Ap.34-40. Appellants ignore the cases under Wis. Stat. § 227.47 requiring such explanations, but concede that the agency must explain its reasoning and basis for decision. WEC Br. at 6.

Here, the Court must guess what facts PSC relied upon to satisfy statutory criteria, including the purported lack of cost-effective, technically feasible, higher priority alternatives.

PSC relies on "qualitative criteria," implicitly acknowledging that quantitative criteria do not support ERGS. But PSC made no findings as to the specific factors codified in the "public interest" section of the CPCN

statute to explain why ERGS ranks higher than other alternatives. CW/SCJ-App.121-22. Instead, PSC created a new, uncodified criterion – the distinction between baseload and other generation units.

B. PSC Failed to Model Higher Priority Alternatives

PSC/WEC do not dispute that PSC was required to model alternative sources of supply. It is necessary to determine whether the proposal is in the public interest, and whether it is the highest priority, technically feasible, "cost-effective" option under the Energy Priorities Law. Irrespective of whether an option is "least cost," PSC may only approve the highest priority, "cost-effective" options.

PSC/WEC only respond that PSC evaluated an "integrated alternative." PSC Br. at 7. But that single run on the last day of hearing, mislabeled "SCJ Blended," only adjusted discrete variables: it used slightly lower electric demand and gas price forecasts, adjusted one SCPC performance assumption, and increased Calpine facility costs. PSC-R.157 at 4708.

This model run does not address CW/SCJ's point. PSC did not evaluate an expansion plan that relies on higher priority alternatives instead of the 1030 MW ERGS.

WEC inaccurately states that PSC ran EGEAS for natural gas "as a substitute for coal-fired generation from ERGS." WEC Br. at 19, 22, 30. PSC performed that EGEAS run assuming *only* natural gas plants for the

entire 30-year duration (8585 MW). PSC-R.119, vol.1, App.B. This strawman is no substitute for evaluating the cost of replacing all of ERGS with natural gas or a combination of higher priority alternatives.

PSC decided against evaluating higher priority alternatives because none "were presented . . . in this record." CW/SCJ-Ap.119. This is legal error. PSC cannot shift to objectors its responsibility to evaluate higher priority alternatives.

C. PSC Ignored Significant Costs

PSC/WEC do not dispute that PSC was required to evaluate economic factors under the CPCN statute and cost-effectiveness under the Energy Priorities Law. Rather, they argue that economics is but one factor under the CPCN statute, and that PSC was not required to use EGEAS.

The CPCN statute does not mandate use of EGEAS. But PSC used EGEAS as its only cost-evaluation tool. Its undisputed failure to include relevant costs resulted in a biased output favoring ERGS.

1. Health-Related Costs

PSC/WEC acknowledge that PSC did not consider health-related costs. They argue that PSC has no "jurisdiction" to consider such costs. PSC Br. at 5. WEC adds that there was conflicting evidence regarding these costs. WEC Br. at 12-13.

PSC has jurisdiction to consider health costs as an "economic" factor. It is undisputed that the thousands of ERGS-related premature

deaths and incidents of illness will have economic impacts beyond their human toll. PSC has previously considered health impacts to be a cost factor. PSC Br. at 10 (discussing 112 Order). Additionally, the statute limits consideration of health impacts (but not costs) only if the facility meets ch. 285 requirements. Here, PSC deferred to DNR's "preliminary determination" of air permit approvability, before DNR had even considered public comments, and contrary to Wis. Stat. § 196.491(3)(e).

WEC argues that health-related costs were speculative. PSC and DNR never made that finding or adopted that rationale. CW/SCJ's witnesses used a peer-reviewed methodology endorsed by U.S.EPA. PSC-R.157 at 4040. WEC's witnesses also identified substantial health-related costs.

PSC was required to evaluate these costs under the CPCN statute, Energy Priorities Law and WEPA. PSC placed the burden of evaluating health-related costs on opponents and then ignored them.

2. Transmission Costs

PSC acknowledges that ERGS will require $164+ million in transmission upgrades. Citing the EIS, PSC vaguely argues that it "considered transmission improvements in connection with its EGEAS analyses." PSC Br. at 7. The EIS, however, states that transmission costs must be but were *not* modeled:

> A proper cost analysis requires the inclusion of both generation and transmission costs. The EGEAS . . . results depicted above only factor in electric generation capacity and energy costs.

PSC-R.119, vol.1 at 74. Although the EIS discusses ERGS and Calpine transmission costs, these costs were never incorporated into EGEAS to determine the effect on unit selection.

3. Community Impact Costs

PSC/WEC acknowledge that local communities would suffer tens of millions of dollars in ERGS-induced impacts, costs that were excluded from modeling. They argue that PSC considered community impact costs "outside" of EGEAS. PSC Br. at 6. They do not explain how PSC accounted for those costs, and it is not evident in the CPCN. They merely state that PSC directed WEC to work with communities to mitigate impacts, and that PSC is not required to consider every conceivable cost. Id.

Mitigation does not negate cost: it confirms cost. WEC agreed to make compensation payments for those impacts at ratepayer expense.

PSC used EGEAS to monetize and compare an ERGS-based expansion plan to an optimal expansion plan with and without the Calpine facility. It is undisputed that PSC ignored community impact and transmission costs in its economic analysis, even though they were known and disclosed in the EIS, biasing the results to select coal units. These costs

were substantial: transmission costs alone would increase the cost of ERGS by nearly 10%.

D. PSC Ignored Other Modeling Flaws

CW/SCJ have identified other PSC modeling errors, including:

1. Arbitrary Availability Restrictions

WEC assumed ERGS would operate at an unprecedented 90% availability, but artificially restricted the availability of all of WEC's existing facilities to less than their actual availability. Like the CPCN decision, appellants' briefs ignore this bias. WEC simply asserts that "modeling assumptions for existing capacity were reasonable." WEC Br. at 17. The testimony it cites, however, does not address limiting the availability of WEC's fleet of existing units.

2. Allocation of Costs to Other Units

PSC's modeling allocated $149 million in ERGS-related costs to existing OCPP units 5 through 8 and $78.4 million to the unapproved IGCC unit. PSC-R.160, Exh.91. PSC/WEC concede that PSC's 11th-hour modeling only adjusted the common costs allocated to units 5 and 6. PSC Br. at 8. Even after this adjustment, PSC continued to artificially reduce the apparent cost of the SCPC units by allocating tens of millions of dollars of ERGS-related costs to units 7 and 8 and the IGCC, while simultaneously assuming that the IGCC unit would not be built.

II. THE EIS VIOLATES WEPA

The EIS violated WEPA because it did not contain information essential to take a "hard look" at the impacts of ERGS, the feasibility of less polluting alternatives, and mitigation measures.

A. The EIS Does Not Provide Any Estimate of the Cost of Using Less Polluting Alternatives to ERGS

ERGS would emit extraordinary air pollution, harm Lake Michigan, and adversely affect local communities due to, *inter alia*, pollution and coal train traffic. Yet the EIS did not disclose or evaluate the environmental impacts or cost of replacing electricity from ERGS with less polluting sources, such as natural gas or wind. *See* Section I.B., above; CW/SCJ's Cross-Appeal Br. at 23-25, 37-40. Without this information, one cannot make a reasoned choice among alternatives, as WEPA requires.

WEC asserts that the EGEAS runs establish that ERGS is "cost-effective and reliable." WEC Br. at 31. WEC's statement is irrelevant and wrong. At issue is the cost-effectiveness of ERGS alternatives, not the cost-effectiveness of ERGS. Additionally, one cannot determine ERGS's cost-effectiveness without considering the cost of alternatives.

PSC asserts that "the EGEAS runs were completely proper" (PSC Br. at 24), contradicting its witness's testimony that all of the EIS EGEAS runs were wrong and had very limited value. PSC-R.157 at 4733. It is also irrelevant, since PSC never considered the cost of alternatives to ERGS.

B. The EIS Failed to Analyze Alternatives to Once Through Cooling

PSC acknowledges that the EIS failed to examine the feasibility of using alternatives to once through cooling. PSC Br. at 25. Since once through cooling would withdraw 2.25 million gallons per minute from Lake Michigan (equivalent to a river), killing virtually all biota in that water (PSC-R.157 at 4289-94), it was imperative that the agencies examine available alternatives to protect the public interest in Lake Michigan's ecology.

PSC rationalizes this deficiency by stating that DNR had concluded that once through cooling would be approvable under the Clean Water Act. PSC Br. at 25. Yet even PSC questioned this conclusion, including a caveat in the CPCN if it is not approvable. Moreover, PSC's explanation is irrelevant under WEPA. An EIS must examinate impacts and alternatives beyond those required by other environmental statutes. Calvert Cliffs' Coordinating Comm. v. U.S.AEC, 449 F.2d 1109, 1123 (D.C.Cir. 1971). It must present information about alternatives and potential mitigation irrespective of the agency's jurisdiction to impose those measures. National Wildlife Federation v. NMFS, 235 F.Supp.2d 1143, 1154 (W.D.Wash. 2002).

C. The EIS Did Not Analyze Alternative Sites

PSC concedes that the EIS only considered the OCPP site: its only response is that the EIS examined the North-CUP option, which is at the OCPP site. PSC Br. at 25-26. Absent an examination of alternative sites, one cannot weigh the environmental drawbacks and benefits of the OCPP site. PSC/WEC do not dispute the cases holding that an EIS must evaluate alternative sites. CW/SCJ Cross-Appeal Br. at 43-44; Muckleshoot Indian Tribe v. USFS, 177 F.3d 800, 813 (9th Cir. 1999).

WEC notes that DNR has issued two of the permits required to build ERGS. WEC Br. at 36. Issuance of these permits (presently under judicial review) is irrelevant. Since the EIS failed to evaluate alternative sites, DNR also issued those permits without examining alternative sites. One cannot conclude that the OCPP site is superior to alternative sites that have never been examined.

D. The EIS Failed to Analyze Health Impacts

The EIS does not analyze the health impacts of the tens of thousands of tons of pollutants that the ERGS would emit. CW/SCJ Cross-Appeal Br. at 44-45. PSC does not respond to this argument.

WEC points to the EIS chapter on "Air Emissions." WEC Br. at 36. This chapter documents ERGS's massive amounts of air pollution but does not discuss health impacts from ERGS emissions.

WEC asserts that ERGS's emissions will not contravene National Ambient Air Quality Standards (NAAQS). WEC Br. at 14, 37. But the EIS states that the "potential increase of PM [particulate matter] by the ERGS may result in Milwaukee area counties that are not in attainment for $PM_{2.5}$." PSC-R.119, vol.1 at 136. More significantly, compliance with NAAQS is no substitute for a health analysis, since adverse health effects occur below NAAQS levels. Whitman v. American Trucking Associations, 531 U.S. 457, 475 (2001) ("ozone and particulate matter . . . inflict a continuum of adverse health effects at any airborne concentration greater than zero"). The National Research Council has approved EPA's practice of assuming, in health assessments, that emission reductions below NAAQS reduce adverse health effects. PSC-R.158, Exh.133 at 109-11.

WEC repeatedly relies upon a phrase in the EIS referring to "inhalation risks." WEC Br. at 14, 37-38 (quoting EIS, vol.3 at 20). But the sentence in which that phrase appears concerns the "virgin fossil fuel exemption" – an exemption relating exclusively to hazardous air pollutants ("HAPs"). *See* PSC-R.119, vol.1 at 155. The referenced "inhalation risks" do not include the principal health risks from ERGS: PM, SO_2 and NO_X, which are not HAPs. Id. at 175-76; PSC-R.157 at 4040-42.

PSC ignored all health-related evidence, assuming that DNR would evaluate it. CW/SCJ-Ap.152. DNR then refused to consider health risks, concluding they are not "relevant to the criteria for permit approvability." CW/SCJ-R.Ap.260. The DNR air permit is not a substitute for WEPA-required health impacts analysis.

The EIS acknowledges that "increased respiratory symptoms and other adverse health effects" may occur at ambient concentrations below NAAQS (PSC-R.119, vol.3 at 20). Nevertheless, PSC and DNR have issued ERGS approvals without ever studying the human health impacts of ERGS emissions.

E. The EIS Fails to Adequately Analyze Water-Related Impacts and Mitigation

DNR's water witness confirmed the inadequacy of aquatic studies: "there has not been sufficient scientific discussion of the potential impacts of the proposed [intake] design on the impingement and entrainment of Lake Michigan organisms." PSC-R.157 at 4465.[3] DNR's wetlands witness testified that she questioned the accuracy of wetlands information in the EIS. Id. at 4402, 4419-21.

The EIS confirms the dearth of required mitigation analysis:

> No mitigation plans or strategies have been proposed by the applicants to avoid or minimize the potential adverse effects of the water intake structure, the thermal discharge from the plan, placing fill in wetlands, or the loss of important biological resources.

CW/SCJ-Ap.226.

F. DNR Permits Do Not Cure WEPA Violations

PSC/WEC acknowledge that an EIS must discuss mitigation opportunities. PSC Br. at 26. They do not identify *any* mitigation evaluation in the EIS, obscurely deferring to DNR "permit applications." PSC/DNR advance the astonishing contention that "[i]t is in these [DNR] permit applications, as DNR becomes familiar with a project, that mitigation methods properly take shape." Id. They cite no legal authority for this erroneous proposition.

The EIS was prepared for both the CPCN and DNR permit applications and is integral to each permit proceeding. DNR cannot wait until later to "become familiar" with the project. It must study the project in detail through the EIS. DNR permits issued without a WEPA-compliant EIS are invalid. The EIS's failure to evaluate mitigation compounds PSC's

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[3] PSC's brief at 21 grossly distorts Dr. Jude's testimony. He consistently testified that WEC had not adequately evaluated its unprecedented proposal, but that the limited data suggest significant adverse impacts. PSC-R.157 at 3550-54, 3576-80.

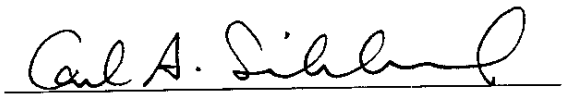
unlawfully issuing the CPCN before DNR had issued permits required for construction.

CONCLUSION

The CPCN and EIS must be reversed and vacated. CW/SCJ respectfully request the Court to direct PSC not to reconsider this or a replacement project unless WEC submits a complete application that complies with the CPCN and Energy Priorities statutes, including all information necessary to make required findings and conclusions, and subject to a WEPA-compliant EIS.

Dated this 7th day of March, 2005.

WICKWIRE GAVIN, P.C.



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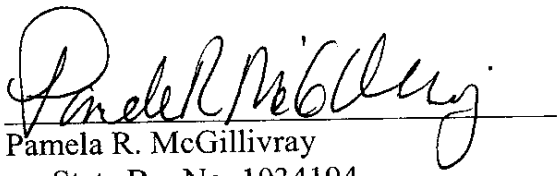

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CERTIFICATION

I certify that this Reply 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), 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 2,976 words.

Dated this 7th day of March, 2005.

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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-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

REPLY BRIEF OF RESPONDENTS-CO-APPELLANTS-CROSS-RESPONDENTS WISCONSIN PUBLIC SERVICE COMMISSION AND WISCONSIN DEPARTMENT OF NATURAL RESOURCES

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.,
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INTRODUCTION

None of the challengers' arguments support affirming the circuit court's decision, either on grounds accepted, rejected or considered *sua sponte*. The Final Decision properly determined that WEPCO needs additional baseload capacity; that the appropriate fuel is coal; and that the appropriate location is the North CUP site in Oak Creek.

This case completed the PSC's work on PTF: WEC's comprehensive and innovative[1] plan for insuring that WEPCO fulfills its responsibility to supply electricity to its residential, commercial and industrial customers in Southeastern Wisconsin through a diversified fleet of both natural gas-fired and coal-fired power plants and other sources.

In phase 1 of PTF, the PSC authorized the construction of two 545 MW natural gas-fired units for intermediate and peak load to replace an existing 320 MW coal plant in Port Washington. *Re W. E. Power, LLC,* 2002 WL 32067560, at *1 (Wis. P.S.C.) (December 20, 2002). In phase 2, the PSC authorized two new 615 MW coal-fired units for baseload in Oak Creek. Together, these decisions provide a balance of natural gas- and coal-fired generation in order to satisfy reasonable needs for the foreseeable future.

ARGUMENT

I. THE CPCN APPLICATION WAS COMPLETE.

Wis. Admin. Code § PSC 111.53(1) specifies the "information" required for a complete application for a large electric generating facility, including:

- At least two proposed "sites." (111.53.(1)(e));

[1] The Legislative Council recognized that PTF and other "[r]egulatory innovations" proposed by WEC had "dominated recent discussions of electric utility regulation." (State's App. 249.)

- "Site-related information . . . including . . . regulatory approvals required for construction and operation of the facility" and "agreements for the use of the transmission system to deliver plant power . . . ." (111.53(1)(f)1. and 4.); and

- "If a CPCN is needed for construction of transmission lines as part of this application, the required information under s. PSC. 111.55" dealing with CPCN applications for high-voltage transmission lines. (111.53(1)(f)9.)

The PSC interprets the two-site requirement as consisting of two standards: (1) whether the proposed sites are each feasible locations; and (2) whether they are sufficiently distinct to offer different packages of costs and benefits. The PSC interprets the regulatory approvals requirement to call for submission of information about required approvals, not the filing of the approvals themselves. The PSC interprets the "transmission agreements" requirement to call for information about required agreements, not the filing of the agreements themselves. The PSC interprets the high-voltage transmission lines requirement as not applying to an application for a power plant unless a CPCN for high-voltage transmission is needed by that applicant. These interpretations are correct.

A. The Application contained sufficient information about required regulatory approvals.

The circuit court raised this issue *sua sponte* and then erred in interpreting the rule to require an applicant to obtain all regulatory approvals required for construction and operation of a facility as a condition of filing a complete CPCN application. No party is arguing that the court decided the issue correctly. The PSC interprets the rule to require information about required approvals. The Court should affirm the PSC's interpretation.

B. The Application contained sufficient information about transmission agreements.

The circuit court also raised this issue *sua sponte.* The court erred in interpreting the rule to require an applicant to obtain transmission agreements as a condition of filing a complete CPCN application. SCJ/CW argue the issue in their brief but failed to raise the issue before the PSC or the circuit court. Consequently, they have waived it. *State v. Outagamie County Bd. Of Adjustment,* 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376. No other party argues that the circuit court correctly decided the issue. The PSC interprets the rule to require information about required agreements. The Court should affirm the PSC's interpretation.

Even if the Court were to consider SCJ/CW's argument, it should reject it. SCJ/CW argue, at p. 22 of their Brief: "[T]he rule does not require information 'regarding' transmission line agreements for use. Transmission line agreements are among that information that is required." If SCJ/CW were correct then the rule does not require information regarding "the fuel source;" it requires the fuel itself and does not require information regarding "the endangered, threatened, and special-concern species and communities;" it requires the species and communities themselves. Of course, this is absurd but logically follows from SCJ/CW's and the lower court's interpretation.

C. The Application did not need to include the information required for a high-voltage transmission line CPCN.

SCJ/CW contend that the Application violated the completeness rule because it did not include the information required by Wis. Admin. Code § PSC 111.55, regarding CPCN applications for high-voltage transmission lines. The Court should reject this contention because Wis. Admin. Code § PSC 111.53(1)(f)9. requires an applicant for a power plant CPCN to file information regarding high-voltage transmission lines only if "a CPCN is needed for construction of such lines as part of ***this*** application. . . ." (Emphasis

added.) The Applicants sought permission to construct ERGS, not a high-voltage transmission line.

SCJ/CW's interpretation is unreasonable. The CPCN statute does not require an applicant for a power plant to prove up a case for a high-voltage transmission line (which would be constructed, not by the power plant applicant, but by the American Transmission Company). Therefore, it would make no sense for the PSC to require the equivalent of a complete high-voltage transmission CPCN application in order to declare complete a power plant CPCN application.

The Application contained information regarding "transmission improvements," *e.g.*, R. 18-1/Vol. 3, Appendix Y, sufficiently detailed to permit the PSC to find that the design and location of ERGS is in the public interest considering "engineering, economic, safety, reliability and environmental factors," Wis. Stat. § 196.491(3)(d)3., the only statutory factors conceivably relevant to transmission.

D. The Application contained information about alternative sites.

The circuit court invalidated the PSC's test for what constitutes alternative sites without articulating a different test. None of the parties articulate a different test either. SCJ/CW rely on inapplicable statutory definitions which, even if they did apply, do not support SCJ/CW's arguments. A "site" is defined in Wis. Stat. § 16.11(2)(9r) as the "geographical location of a facility." A "site or facility" is defined in Wis. Stat. § 292.01(18) as "an approved facility, an approved mining facility, a nonapproved facility or a waste site."

Wis. Admin. Code § PSC 111.53(2)(b)1. states that an application for a cogeneration facility "may meet the [alternative sites] requirement under sub. (1)(e) by filing information on 2 sites that are both located at the steam host's existing industrial plant . . . ." Wis. Admin Code § PSC 111.53(2)(b)2. states that an application for repowering an existing facility can contain information on "2 sites that are both located at the existing generation facility site . . . ."

SCJ/CW argue that these are the only two exceptions to the alternative sites requirement. The PSC did not, however, except the Applicants from the requirement; it required them to satisfy the requirement.

The general rule requires alternative "sites" and the question is "What constitutes a site." That there are exceptions for unique facilities which can only be located in one way—a power plant tied to an existing "steam host" and an "existing [generation] facility—" is irrelevant to the interpretation of the word "site."

At bottom, SCJ/CW are begging, not answering, the question by arguing perfunctorily that the PSC limited its review to "one site" and by stressing the similarities among the alternatives—which it dismisses as "configurations,"—which the PSC carefully considered. (SCJ/CW Br. at 8-10.) The Court should look at the real and substantial differences among the alternatives, among them:

- The primary site was in the City of Oak Creek; the alternatives were in the Town of Caledonia.
- The North and South sites were located entirely on WEPCO-owned property; the South Site-Exp. extended onto federal land.
- The locations of the wastewater discharge channel and ash haul roads were different.
- Water cooling equipment was "located closer to Lake Michigan without as much bluff removal" at the South Site-Exp.
- The sources and amounts of air emissions varied.
- There were differences in the amount of excavation required.
- There were differences in wetlands impacts.

(State's App. 274; R.18, Record Item 119/Vol. 15:96, 101-102, 161, 217; R.18, Record Item 157/Vol. 20:4374-4375.)

E. The PSC's request for additional information did not defeat the determination that the Application was complete.

SCJ/CW contend that the PSC erred by determining that the Application was complete while at the same time requesting additional information. One thing had nothing to do with the other. Administrator Norcross declared the Application complete. He did request particular environmental information but did not state that that information was required by the completeness rule. On the contrary, he stated that the information was necessary for the purposes of staff review of the project, preparation of the EIS, scheduling of hearings and otherwise "complet[ing] the record." (State's App. 228.)[2]

II. THE PSC COMPLIED WITH WIS. STAT. § 196.491(3)(E) BY ORDERING THAT THE CPCN WAS NOT EFFECTIVE UNTIL THE DNR ISSUED CERTAIN PERMITS.

SCJ/CW argue that the CPCN statute contemplates only one CPCN decision. The PSC agrees; its Final Decision did not contemplate another substantive determination. By operation of law the CPCN would issue, *i.e.*, come into legal being as an effective right to construct, when the DNR issued all required pre-construction permits.

SCJ/CW argue that *RURAL v. PSCW*, 2000 WI 129, 239 Wis. 2d 660, 619 N.W.2d 888, "recognized that PSC's CPCN decision 'issues' the CPCN." The question of what constitutes issuance was not presented in *RURAL*.

A previous version of the CPCN statute permitted the DNR to waive the requirement of obtaining a particular

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[2] SCJ/CW argue, at p. 21 of their Brief: "WEC still had not submitted complete and accurate *wetlands data* at the time of the hearing." (Emphasis added.) The testimony SCJ/CW cite does not support this argument. Even if it did, there is no evidence that Mr. Norcross did not receive the information requested in his completeness determination.

permit or approval in advance of the issuance of a CPCN. Contrary to SCJ/CW's argument, this does not inform the Court's decision on this issue in the slightest. The question is not whether obtaining a permit or approval is required before a CPCN is issued; it is the meaning of "to issue."

SCJ/CW argue that DNR did not act before the PSC's decision because WEC had not submitted a complete application and that "the agencies privately met and planned a strategy whereby DNR would not act until PSC had acted." (SCJ/CW Br. at 32.) The implication of this dark language is that the PSC and the DNR conspired to flout the law, an accusation as false as it is insulting. The only record citation for this accusation, a page of the testimony of the DNR's Heidi Hopkins, discusses a meeting between WEPCO and the DNR about the timing of site grading work. (WE-App. 258-259.)

SCJ/CW contend that the public has been prejudiced by the "issuance" of the CPCN because the DNR did not complete a Practicable Alternatives Analysis until after the PSC's decision on the appropriate site. SCJ/CW do not argue however, that the DNR erred in deferring to the PSC on site selection.

The PSC and the DNR have different skill sets and resources. This was recognized by the administrative law judge in the DNR water permit proceeding who cited the following testimony of Ms. Hopkins (referring to the PSC):

> They look at more things and have more experts than the department could ever evaluate such as modification—railroad modifications and transportation issues and the need of having that type of facility, and also they look at various alternatives regarding what type of energy should be generated and how it should be generated which the department does not have experts for or the capability of reviewing that detail of analysis or doing that evaluation.

(WE-App. 299.) The Legislature charged both agencies with evaluating proposed power plants. The Legislature did not

intend the agencies to duplicate work; it intended them to work together. The Legislature's division of labor does not prejudice the public, it benefits it.

Nothing in the law prohibits the PSC from making its Final Decision in a CPCN case before the DNR acts on permit applications. The statute requires the PSC to "take final action on an application" within a prescribed number of days and deems the application approved if the PSC fails to do so. Wis. Stat. § 196.491(3)(g).

There is a difference between taking final action and issuing a CPCN. The PSC properly took final action, by issuing the Final Decision, within the prescribed timeframe. The PSC also properly delayed issuance of a legally effective CPCN until after the DNR acted. The public was fully protected because the Applicants were prohibited from commencing construction until both agencies had approved the project.

III. THE PSC PROPERLY APPLIED WIS STAT. § 1.12(4) (THE ENERGY PRIORITIES LAW) AND WIS. STAT. § 196.025(1).

The Energy Priorities Law provides that it is "state policy" to consider cost-effective and technically feasible options for meeting energy demands based on a list of priorities. This was the Legislature's "attempt [ ] to influence the energy-related decisions of all energy users, generators and regulatory bodies." (Prefatory Note to 1993 Wisconsin Act 414.)

To be sure, the statute is more than precatory when it comes to the PSC, which "shall implement the priorities" of the Energy Priorities Law. Wis. Stat. § 196.025(1). But the PSC's duty is subject to the caveat that the priorities must be cost-effective, technically feasible and environmentally sound. Moreover, the PSC has a duty to follow the CPCN statute which requires the consideration of all of the caveats in the Energy Priorities Law plus several other factors.

The PSC balanced its responsibilities under both laws. (State's App. 115.) The Commission required WEPCO to implement energy efficiency programs to capture at least 55 MW of cost-effective energy efficiency by 2008 and recognized that WEPCO had committed to a goal of obtaining 5% of energy from renewable resources by 2011. (State's App. 117-119.) Most importantly, it did exactly what the opponents of ERGS contend it should have done: it considered whether a natural gas-fired plant or other alternatives to ERGS were cost-effective and technically feasible:

> 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.
>
> . . . .
>
> [The] 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.
>
> . . . .
>
> [C]oal-fired generation is in the public interest and . . . ERGS is the most cost-effective and technically feasible way to address WEPCO's baseload needs.

(State's App. 119-121.)[3]

SCJ/CW rely on public statements of the PSC Commissioners. Such statements are irrelevant. The Final Decision stands or falls on its own. In addition, by using words such as "predilection" and "disdain," SCJ/CW attempt

---

[3] Calpine and the circuit court read too much into the PSC's discussion in the Final Decision of baseload capacity, contending that the PSC equated baseload with coal-fired. As argued above, and in the State's previous briefs, the PSC explicitly considered natural gas as a potential source of baseload capacity but rejected it on the facts.

to impugn the integrity of the Commissioners. Although the PSC objected to the unofficial transcript of the Commissioners' public discussion being included in the record, the State now would encourage the Court to read it in its entirety, for it demonstrates how carefully and responsibly the Commissioners approached this very difficult case.

IV. THE PSC DID NOT "PREDETERMINE" THE LOCATION FOR A FUTURE COAL UNIT.

The PSC's authorization of common systems to accommodate possible future expansion at the OCPP did not create a bias for OCPP and was otherwise entirely reasonable. "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." (State's App. 132.)

Contrary to SCJ/CW's self-serving hypothetical, the Court must presume that the PSC will conscientiously evaluate any future application for construction at the OCPP, at which time the existence of common systems would be considered along with the myriad of other facts and circumstances relevant to the decision.

V. THE PSC PROPERLY LIMITED THE EXTENT OF RATEPAYER SUBSIDY TO THE CITY OF OAK CREEK.

Oak Creek argues that the PSC waived the argument that Wis. Stat. § 196.20(7) does not apply to the Development Agreement. At oral argument in the circuit court PSC counsel agreed that the Development Agreement "is specifically exempted by" the statute. (R. 89:11). The State does not contend otherwise on appeal. There is no basis for concluding that the statute is retroactive in the sense argued by Oak Creek—and the PSC has never conceded that there is.

Oak Creek inappropriately asks the Court to weigh the evidence. The test is whether there is substantial evidence in the record. Such evidence was supplied by Marilyn Weiss,

whose testimony demonstrated that she carefully evaluated the sufficiency of shared revenue payments to mitigate the impacts of ERGS.

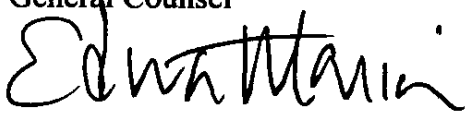
CONCLUSION

For all of the reasons argued above and in the State's previous briefs, the Court should reinstate the PSC's Final Decision.

Dated this 7th day of March, 2005.

Respectfully submitted,

DAVID J. GILLES
General Counsel



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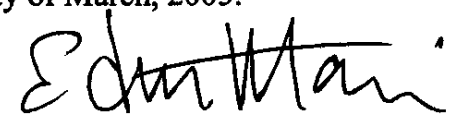
CERTIFICATION

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 2913 words.

Dated this 7th day of March, 2005.



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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-Cross-
Appellants-Cross-Respondents,

Appeal No. 04-3179

TOWN OF CALEDONIA,
Petitioner-Cross-Respondent,

v.

Circuit Court Case Nos.
03CV003478, 03CV003731,
04CV000133, 04CV000149,
04CV000530, 04CV000533

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,

(Caption continued on following pages)

APPEAL FROM A DECISION OF THE CIRCUIT COURT OF DANE
COUNTY, THE HONORABLE DAVID FLANAGAN, PRESIDING

REPLY BRIEF OF INTERESTED PARTIES-APPELLANTS-CROSS RESPONDENTS WISCONSIN ELECTRIC POWER COMPANY, W.E. POWER, LLC AND WISCONSIN ENERGY CORPORATION

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, W.E. POWER, LLC and
WISCONSIN ENERGY CORPORATION,
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.,
SC JOHNSON & SON, INC. and
CALPINE CORPORATION,
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,
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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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INTRODUCTION

Wisconsin faces increasing electrical needs with aging generation facilities. *Final Dec.* at 13, 20-21. As the Legislative Council recognized, "new electric generation capacity, including base load facilities, must be built . . . ." (State's App. 249.) The Commission in this case determined "public convenience and necessity require" ERGS be constructed, and directed that steps be taken "now to ensure these facilities are in service in 2009 and 2010." *Final Dec.* at 5, 20. Unless the Commission's ruling is promptly reinstated, ERGS cannot be operational at that time.

Although Respondents SCJ/CW and Calpine strain to cast the issues before the Court as legal, the Commission's factual findings and judgments are at the core of this case:

- "[N]ew baseload supply" is needed. *Id.* at 13;
- Under ***all*** scenarios, coal-fired generation "is needed during the forecasting period" and other energy priorities, "alone or in combination, cannot replace the need for new baseload, coal-fired units." *Id.* at 20, 24;
- The question is not "whether" Wisconsin requires ERGS, but "when it should be installed." *Id.* at 24.
- To "maintain a reliable electric system" the first ERGS units should be operating in 2009. *Id.* at 25.
- The selected site is "in the public interest"; indeed, Oak Creek—a city fully aware of the positives and negatives of hosting a coal-based generation facility (having done so for 50 years)—***favors*** the site. *Id.* at 5, 47.

The Commission determined ERGS is an essential component of a broader initiative to address future energy needs. The comprehensive plan submitted by WE, known as Power the Future ("PTF"), includes new gas-fired plants for

intermediate load, retirement of older coal facilities, and commitments to renewable generation and efficiency measures. *Final Dec.* at 21-22; WE App. 136-137. ERGS is a necessary element of a broader pattern of energy decisions being made by the Commission. *Final Dec.* at 23.

Differences of opinion on ERGS are expected. Vigorous dispute on such proposals, as in this case, is an essential component of the regulatory process. Unfounded *ad hominem* attacks on the integrity of Commissioners and the good faith of agency staff are not. Accusations that Chairperson Bridge followed "her own predilections," "Commissioner Bie made plain her disdain" for the law, SCJ/CW Resp. at 39, or PSC sought "to justify its approval of WEC's business plan," Calpine Resp. at 33, are not only inappropriate, they reflect fundamental weakness in Respondents' arguments.

Respondents' differences with the Commission's judgments and factual determinations offer no basis for judicial reversal of the thorough regulatory process here. The deference properly accorded agencies on matters delegated to their expertise is well-established and codified. *See* § 227.57, Wis. Stats.; *Town of Ashwaubenon v. Highway Commission*, 17 Wis. 2d 120, 130-31, 115 N.W.2d 498 (1962). This is particularly true in the complex realm of the Commission's responsibility to oversee long-term energy needs for the State, as the Legislature has recognized. *See* § 196.02(9), Wis. Stats. The Commission fully understood and discharged its responsibilities under the law.

ARGUMENT

I. The Commission's Acceptance of the Application for Review Provides No Grounds for Reversing the Final Decision.

Only SCJ/CW argues the Commission's ***initial*** decision to accept the CPCN application for review should invalidate the Final Decision rendered ***after*** the 360-day review process. SCJ/CW cites no case reversing final agency

action based on grounds the agency should not have accepted an application. No error occurred and SCJ/CW identifies no defect in the ***final*** Commission action.

A. Permits

Neither Respondent defends the Circuit Court's erroneous construction of § PSC 111.53(1)(f)1 to require DNR permits when submitting a CPCN application. The Circuit Court misinterpreted the rule; it does not require each enumerated item, but rather "information" about each item. *See* WE Brief at 15-17. *See also* Dairyland Brief at 8-12.

B. Transmission Agreements

This same error undermines SCJ/CW's argument that signed "transmission agreements" were required with the CPCN application. SCJ/CW Resp. at 21-23. SCJ/CW does not contest that the Application contained "information" on transmission agreements and the agreements are now in place. WE Brief at 17, 23.

§ PSC 111.53(1)(f)9 does not apply here. SCJ/CW Resp. at 23. The provision applies only where a "CPCN is needed for construction of transmission lines ***as part of this application*** . . ." WE did not apply to construct transmission lines, nor could it. American Transmission Company controls transmission. *Final Dec.* at 10-12.

Neither Respondent argues the Commission's ***Final Decision*** fails to appropriately address transmission matters, WE Brief at 33-36, thereby conceding the Circuit Court's ruling was error. *Id.*

C. Completeness Letter

SCJ/CW asserts the Commission erred when it determined the application was complete but purportedly "acknowledged" the "application was incomplete." SCJ/CW Resp. at 20-21. The completeness letter included no such acknowledgement; it accepted the application as "complete"

and requested "additional information." (State's App. 227-231.) Nothing precludes the Commission from requiring additional information after accepting an application. SCJ/CW presents an apparent block quote from the letter, but misleadingly redacts. SCJ/CW Resp. at 20. The letter actually states (in the portion redacted): "Substantial amounts of information relative to items 6 and 7 have been provided, and will allow our review of the wetland delineations to begin." (State's App. 228.) SCJ/CW's claim that WE failed to supply the requested materials is false. SCJ/CW Resp. at 21. The materials were timely submitted and discussed in the EIS. *See* EIS at 179-183, 197-200, 216-217, 226, 254, Figures 2-9, 2-10.

D. Two Proposed Sites

SCJ/CW focuses on the "two proposed sites" requirement of § PSC 111.53(1)(e). *Final Dec.* at 5, 11-12, 44-47. Recognizing the fatal flaw in its argument, SCJ/CW asserts this Court need not "substitute its judgment for that of the PSC" to resolve the issue. SCJ/CW Resp. at 9. Its argument demands just that.

SCJ/CW states, as fact, that "the application identified only one location: the OCPP site." SCJ/CW Resp. at 9. That is incorrect. The application plainly identified the "Oak Creek Site" and "Caledonia Site" as alternatives. (WE App. 107-108; R.18-1:Vol. 3 at 100-106.)

While SCJ/CW points to ***similarities*** between the sites, the Commission recognized important ***differences***, including that the sites were in different municipalities and counties, and involved, *inter alia*, different surface water discharge channels, ash haul roads, air impacts, wetland impacts, excavation requirements, noise impacts, habitat impacts, and aesthetics. (WE Brief at 21-22; EIS at 96, 101-102, 218, 412-415; R.18-157:4374-4375.) The weighing of such evidence is precisely the type of factual assessment for which the Court may not substitute its judgment. *See* § 227.57(6), Wis. Stats. Deference must also be accorded the agency's interpretation

and application of its own rule. *See Vonasek v. Hirsch & Stevens, Inc.*, 65 Wis. 2d 1, 7, 221 N.W.2d 815 (1974).

The alleged similarities do not undermine the Commission's finding. That two proposed sites are geographically close or share common features is neither unusual nor determinative. Calpine's Fond du Lac proposal, which SCJ/CW touts as including distinct alternatives, SCJ/CW Resp. at 17, also involved two sites ½ mile apart, each using the same water intake and discharge system. EIS at 65, 418. The suggested distinction that Calpine involved "separate parcels" is meaningless. No legal standard supports a rule that would base the "alternatives" inquiry on ownership or "parcel" boundaries. Under such an unfounded theory, an alternative ½ mile north (on a parcel not owned by WE) would meet the test, but the alternative ½ mile south (on the 1,000 acre property) would not. Regardless, the Caledonia site ***did*** involve, in part, a separately owned parcel. EIS at 102.

The sites were not mere "alternative configurations," SCJ/CW at 9, but involved geographically different locations. Indeed, different municipalities would receive shared-revenue and control zoning depending on the site selected. *See Final Dec.* at 47; EIS at 96; § 79.04(7)(b), Wis. Stats.

SCJ/CW's claim that environmental differences are "inconsequential," SCJ/CW Resp. at 12, is belied by the evidence it cites. SCJ/CW selectively cites testimony of a DNR Engineer, but ignores his continued testimony confirming that the North Site—CUP site would have 50% lower SO_2 impacts and 15% lower PM_{10} impacts than Caledonia. (R.18-157:4374-4375; R.18-158:Exh. 155). SCJ/CW claims no "significant differences in wetland impacts," SCJ/CW Resp. at 12, but the cited chart demonstrates a 26.6% difference. EIS at 217. SCJ/CW's characterization of a 36% difference in excavation (2.7 million cubic yards) as "modest," *id.* at 18 n.2, is revealing. *See* EIS at 96 (recognizing "significant" excavation differences).

The Commission correctly found the Application provided "two proposed sites." Regardless, the ***statutory*** "alternative locations" standard was also independently satisfied. *See* § 196.491(3)(d)3, Wis. Stats. Although SCJ/CW asserts "PSC cannot fulfill its statutory directive" unless the applicant submits appropriate alternative sites, SCJ/CW Resp. at 24, this is incorrect. The Commission fulfilled the statutory "alternative locations" analysis for over two decades before § PSC 111.53(1)(e) was promulgated. SCJ/CW does not dispute the Commission here ultimately considered "alternative locations" ***beyond*** the application—Calpine's proposal to provide energy from Kaukauna and elsewhere. *Final Dec.* at 30-31; EIS 65-66, 417-422. The suggestion this was "*post hoc* rationalization," SCJ/CW Resp. at 13-14, is wrong. Calpine expressly submitted its proposal as an "alternative" to ERGS. EIS at 65; *Final Dec.* at 30; R.18-158:Exh. 202.

E. Prejudice

SCJ/CW can articulate no prejudice. Indeed, it does not claim prejudice based on the sites identified in the application, but instead argues there was insufficient "wetlands and aquatic impacts information." SCJ/CW Resp. at 24. Aside from presenting a different issue, the argument is wrong. WE timely submitted all requested information, and the EIS addresses wetlands and aquatic impacts. *See* EIS at 179-183, 197-200, 216-17, 226, 254. DNR has found wetlands issues satisfied. (WE App. 299).

The final location is appropriate: It is a "brownfield," with necessary infrastructure, involving no undue adverse environmental consequences, in a municipality that desires the facility.

II. The Commission and DNR Properly Coordinated Their Respective Regulatory Duties.

SCJ/CW claims the form of order rendered by the Commission violates § 196.491(3)(e) and DNR failed to

fulfill independent responsibilities to the public. SCJ/CW Resp. at 25-36. Neither assertion is correct.

DNR and PSC worked on an interdependent, coordinated basis throughout the ERGS review. DNR informed the Commission's review of the CPCN application. (R.18-34, 38, 46.) DNR and PSC staff jointly prepared a comprehensive EIS. DNR witnesses testified in the CPCN hearings. (R.18-157:4360-4392; 4394-4451; 4453-4457; 4459-4504.) During the period of CPCN review, DNR determined it "did not consider any of the sites to be unpermittable" for Chapter 30 purposes, (WE App. 299), and the North Site-CUP site should meet air permit requirements. *Final Dec.* at 51. DNR issued both permits following contested case proceedings, and found ERGS does not pose undue adverse environmental impacts. (WE App. 261-318.)

Through these coordinated regulatory activities, PSC understood DNR was addressing environmental concerns, was advised of environmental considerations, and was aware air and Chapter 30 permits would not be issued at the time a Final Decision was required. Consistent with the plain purpose of § 196.491(3)(e), the Commission rendered a form of order ensuring the CPCN could not have legal effect until those permits issued. (State's App. 62.) That order was proper and a sound regulatory decision given the coordinated agency requirements at issue. *See RURAL v. PSC*, 2000 WI 129, ¶¶ 60-61, 239 Wis. 2d 660, 700, 619 N.W.2d 888.

While SCJ/CW characterizes the form of order as "sophistry," SCJ/CW Resp. at 29, its argument would ascribe ***no*** legal meaning to the explicit ruling that the CPCN "only takes effect when the DNR issues" the requisite permits.

SCJ/CW asserts § 196.491(3)(a) "requires that DNR make its completeness determination" before the Commission can accept a CPCN application. SCJ/CW Resp. at 28. Nothing in the statute imposes any such requirement. To the contrary, each agency has discretion to adjudge the information needed in permit applications. *Compare* § 196.491(3)(a)2 and § 196.491(3)(a)3.b.

SCJ/CW strains to conjure prejudice from the regulatory proceedings and form of order. There is none. The Commission found that ERGS "will not have undue adverse impact on [] environmental values," *Final Dec.* at 5, and DNR has thoroughly considered environmental issues. By its permits, DNR concluded that environmental concerns have been appropriately addressed. *See* WE App. 261-318.

To suggest prejudice, SCJ/CW claims DNR impermissibly limited its "practicable alternatives" wetlands analysis and failed to consider "health effects" from air impacts. SCJ/CW Resp. at 33-35. Both assertions are wrong. As Judge Boldt found, DNR's decision to coordinate its wetlands review with the site determination by PSC was an appropriate exercise of "scoping" discretion under § NR 103.08(1). (WE App. 299, 303-304). Contrary to SCJ/CW's sinister suggestion this was done in dark of night, SCJ/CW Resp. at 32, it was a matter of public notice. (R.18-130.) The assertion that this sound exercise of DNR discretion (and efficient use of limited DNR resources) "prejudiced the public" is false, and proven so by the fact that the Legislature now ***mandates*** this approach. *See* § 30.025, Wis. Stats. (effective Dec. 18, 2003). DNR's discretionary scoping decision could not have adversely impacted ***the CPCN*** decision, as DNR had identified no reason why any of the sites would fail to meet Chapter 30 standards (WE App. 299), and the Commission's site selection process requires consideration of numerous other "public interest" factors. *See* § 196.491(3)(d)3.

SCJ/CW's claim that DNR did not address health impacts misstates the record. Total air emissions, from ***both*** the existing Oak Creek facilities ***and*** ERGS, will not exceed the actual emissions from the Oak Creek facility in 2000. EIS at App. E. "[P]ast DNR analyses" of such emissions demonstrate "the risks resulting from well-controlled facilities with tall stacks are low." EIS at 20. DNR expressly found that "ERGS would not likely pose a significant inhalation risk if operated according to required standards." (WE App. 272.) DNR independently rejected SCJ/CW's "health impact

quantification" arguments because they are speculative and unaccepted. (WE App. 285-286.)

No environmental considerations have been short-changed and no prejudice arises from the interrelated DNR/PSC process in this case. Both agencies, given the specific circumstances in this complex and dynamic regulatory process, fulfilled the inter-agency cooperation the Legislature intended and the Commission's order ensured the CPCN did not have legal effect until DNR completed its review. *See* Wisconsin Legislative Council Information Memorandum 75-8, at 1 (October 20, 1975).

III. The Commission Properly Construed and Applied the Energy Priorities Law.

Respondents want the Court to believe this case presents a choice between coal and natural gas. That is false. As the Commission conclusively found, there is ***no*** scenario by which natural gas, "alone or in combination" with other priorities, can displace the need for new coal-fired facilities in Wisconsin. *Final Dec.* at 20, 24. The Commission specifically found that Calpine's proposal "would not replace the need for additional coal-fired, baseload generation." *Id.* at 30-31.

SCJ/CW states, without record cite, that "the evidence shows that natural gas generation is cheaper than the PSC-approved ERGS." SCJ/CW Resp. at 35. The evidence is squarely to the contrary: a "gas-only" option is nearly $2 billion more expensive. EIS at 73. Reliance on gas-fired facilities for these energy needs also presents various feasibility and reliability concerns. (R.18-157:4529-4530; EIS at 45; Wisconsin Energy Customers Amicus Brief at 9-16.) No Respondent argues low sulfur coal or oil is feasible. They are not. WE Brief at 32-33.

Calpine's assertion that the "only way for PSC to have met its obligations under the Energy Priorities Law was to include Calpine's Fond du Lac Energy Center in the chosen resource supply option," Calpine Resp. at 8, is confused at

best. The Fond du Lac facility has already been approved. It does not eliminate the need for ERGS. *Final Dec.* at 31-32.

The issue was ***timing***. Although Calpine would prefer that PSC mandate that WE purchase energy from it, the Commission's prudent decision that reliability concerns necessitate ERGS be operational "sooner, rather than later," *id.* at 25, is a judgment well within the Commission's discretion once it determined that new coal-fired facilities are necessary.

Respondents suggest the Commission believed it could ***ignore*** the Energy Priorities Law. SCJ/CW Resp. at 36-40; Calpine Resp. at 28-34. SCJ/CW even impugns each Commissioner personally, claiming Chairperson Bridge follows "her own predilections," Commissioner Bie has "disdain" for the law, and Commissioner Garvin does not understand the law. SCJ/CW Resp. at 38-40. The thoughtful treatment of the Energy Priorities Law in the Final Decision states all that is necessary regarding the baselessness of such accusations. *Final Dec.* at 14-23.

Respondents also improperly minimize the broader scope of the Commission's implementation of the Energy Priorities Law. *See* 1993 Wis. Act 414, Prefatory Note. The Commission properly considered ERGS within the context of the multi-faceted PTF initiative, the Commission's history of generation facility decision-making, and the need for fuel diversity. *Final Dec.* at 23.

IV. The Commission Did Not Predetermine Future Action.

SCJ/CW asserts that the prudent decision to construct facilities with a potential for future capacity "predetermined" future approval. SCJ/CW Resp. at 48-50. It did not. Future expansion, if any, will be subject to independent review and approval.

CONCLUSION

PSC and DNR have exhaustively analyzed ERGS through sharply contested administrative proceedings. They faithfully fulfilled their responsibilities and rendered sound judgments after weighing the competing evidence: ERGS is required for an adequate and reliable future supply of energy, coal is the correct fuel, Oak Creek is the appropriate location, and environmental concerns are satisfied. DNR has issued the requisite air and Chapter 30 permits.

Judicial review of matters squarely within the expertise and delegated authority of agencies is appropriately limited. There is no reversible error in the Commission's Final Decision and Order.

ERGS is an essential component of Wisconsin's long-term ability to meet this State's energy needs. Construction must begin if ERGS is to be operational by 2009 as the Commission directed in order to ensure a reliable electrical system. As set forth more fully in the petition for direct, expedited appeal, prompt reinstatement is thus needed.

Wherefore, WE respectfully requests that this Court reverse the Circuit Court and reinstate the Final Decision and Order.

Dated this 7th day of March, 2005.

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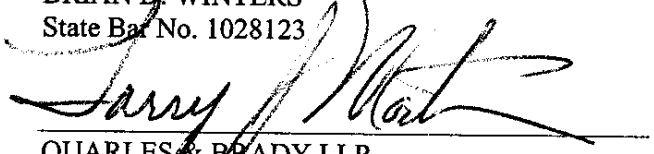

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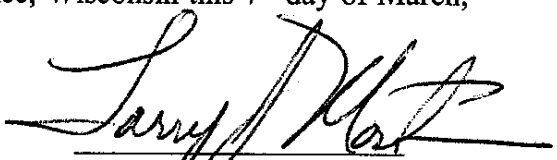
CERTIFICATION PURSUANT TO
§ 809.19(8)(b), WIS. STATS.

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,991 words.

Dated at Milwaukee, Wisconsin this 7th day of March, 2005.



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CPCN Statute - § 196.491(3), Wis. Stats. (2002)

(3) CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY. (a) 1. No person may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity from the commission as provided in this section. An application in the form and containing the information required by commission rules for such certificate shall be filed with the commission not less than 6 months prior to the commencement of construction of a facility. Within 10 days after filing the application, the commission shall send a copy of the application to the clerk of each municipality and town in which the proposed facility is to be located and to the main public library in each such county.

2. 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.

3. a. At least 60 days before a person files an application under subd. 1., the person shall provide the department with an engineering plan showing the location of the facility, a description of the facility, including the major components of the facility that have a significant air, water or solid waste pollution potential, and a description of the anticipated effects of the facility on air and water quality. 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.

b. Within 20 days after the department provides a listing specified in subd. 3. a. to a person, the person shall apply for the permits and approvals identified in the listing. The department shall determine whether an application under this subd. 3. b. is complete and, no later than 30 days after the application is filed, notify the applicant about the determination. If the department 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 department has determined to be incomplete. There is no limit on the number of times that an applicant may refile an application under this subd. 3. b. If the department fails to determine whether an application is complete within 30 days after the application is filed, the application shall be considered to be complete. The department shall complete action on an application under this subd. 3. b. for any permit or approval that is required prior to construction of a facility within 120 days after the date on which the application is determined or considered to be complete.

(b) The commission shall hold a public hearing on an application that is determined or considered to be complete in the area affected pursuant to s. 227.44. A class 1 notice, under ch. 985, shall be given at least 30 days prior to the hearing.

(d) Except as provided under par. (e) and s. 196.493, the commission shall approve an application for a certificate of public convenience and necessity only if the commission determines all of the following:

2. The proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy. This subdivision does not apply to a wholesale merchant plant.

3. 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, except that the commission may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant. 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 ch. 285.

3m. For a high-voltage transmission line, as defined in s. 30.40 (3r), that is to be located in the lower Wisconsin state riverway, as defined in s. 30.40 (15), the high-voltage transmission line will not impair, to the extent practicable, the scenic beauty or the natural value of the riverway. The commission may not require that a high-voltage transmission line, as defined in s. 30.40 (3r), be placed underground in order for it to approve an application.

3r. For a high-voltage transmission line that is proposed to increase the transmission import capability into this state, existing rights-of-way are used to the extent practicable and the routing and design of the high-voltage transmission line minimizes environmental impacts in a manner that is consistent with achieving reasonable electric rates.

3t. For a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more, 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.

4. The proposed facility 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. In its consideration of the impact on other environmental values, the commission may not determine that the proposed facility will have an undue adverse impact on these values because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285.

5. The proposed facility complies with the criteria under s. 196.49 (3) (b) if the application is by a public utility as defined in s. 196.01.

6. The proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved.

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

(dm) In making a determination required under par. (d), the commission may not consider a factual conclusion in a strategic energy assessment unless the conclusion is independently corroborated in the hearing under par. (b).

(e) If the application does not meet the criteria under par. (d), the commission shall reject the application or approve the application with such modifications as are necessary for an affirmative finding under par. (d). 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.

(g)1. The commission shall take final action on an application within 180 days after the application is determined or considered to be complete under par. (a) 2. If the commission fails to take final action within the 180-day period, the commission is considered to have issued a certificate of public convenience and necessity with respect to the application, unless the commission, within the 180-day period, petitions the circuit court for Dane County for an extension of time for taking final action on the application and the court grants an extension. Upon a showing of good cause, the court may extend the 180-day period for no more than an additional 180 days. If the commission fails to take final action within the extended period, the commission is considered to have issued a certificate of public convenience and necessity with respect to the application.

1m. Subdivision 1. does not apply to an application for a certificate of public convenience and necessity if another state is also taking action on the same or a related application.

(gm) The commission may not approve an application filed after October 29, 1999, under this section for a certificate of public convenience and necessity for a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more unless the approval includes the condition that the applicant shall pay the fees specified in sub. (3g)(a). If the commission has approved an application under this section for a certificate of public convenience and necessity for a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more that was filed after April 1, 1999, and before October 29, 1999, the commission shall require the applicant to pay the fees specified in sub. (3g)(a). For any application subject to this paragraph, the commission shall determine the cost of the high-voltage transmission line, identify the counties, towns, villages and cities through which the high-voltage transmission line is routed and allocate the amount of investment associated with the high-voltage transmission line to each such county, town, village and city.

(h) The commission may waive compliance with any requirement of this section to the extent necessary to restore service which has been substantially interrupted by a natural catastrophe, accident, sabotage or act of God.

(i) If installation or utilization of a facility for which a certificate of convenience and necessity has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility may nevertheless proceed.

(j) Any person whose substantial rights may be adversely affected or any county, municipality or town having jurisdiction over land affected by a certificate of public convenience and necessity may petition for judicial review, under ch. 227, of any decision of the commission regarding the certificate.

(k) No person may purchase, or acquire an option to purchase, any interest in real property knowing that such property is being purchased to be used for the construction of a high-voltage transmission line unless the person gives written notice to the prospective seller of the size, maximum voltage and structure type of any transmission line planned to be constructed thereon and the person by whom it will be operated. Contracts made in violation of this paragraph are subject to rescission by the seller at any time prior to the issuance of a certificate of public convenience and necessity for the high-- voltage transmission line by the commission.

(3c) COMMENCEMENT OF CONSTRUCTION OF LARGE ELECTRIC GENERATING FACILITIES. (a) Except as provided in par. (b), an electric utility that has received a certificate of public convenience and necessity under sub. (3) for constructing a large electric generating facility shall commence construction no later than one year after the latest of the following:

1. The date on which the commission issues the certificate of public convenience and necessity.

2. The date on which the electric utility has been issued every federal and state permit, approval, and license that is required prior to commencement of construction.

3. The date on which every deadline has expired for requesting administrative review or reconsideration of every federal and state permit, approval, and license that is required prior to commencement of construction.

4. The date on which the electric utility has received the final decision, after exhaustion of judicial review, in every proceeding for judicial review described in sub. (3)(j).

(b) Upon showing of good cause, the commission may grant an extension to the deadline specified in par. (a).

(c) If an electric utility does not commence construction of a large electric generating facility within the deadline specified in par. (a) or extended under par. (b), the certificate of public convenience and necessity is void, and the electric utility may not commence construction of the large electric generating facility.

Wisconsin Admin. Code § PSC 111.53 (2002)

PSC 111.53 CPCN applications for large electric generating facilities. (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:

(a) The operating characteristics of the proposed facility, including all of the following:

1. The number of generating units to be included in the facility.
2. A description of each generating unit, including type, size, and fuel.
3. The expected hours of operation and lifetime of the facility.
4. The names and addresses of owners and investors and the percent of ownership.
5. The fuel source and availability. If the facility uses fossil fuel, the fuel's heating value and chemical analysis, the type of transportation to be used, and the approximate capacity of on-site storage shall be provided.
6. The facility's estimated capacity factors, for each generating unit, and the basis for the estimates.
7. The estimated rate of discharge of pollutants for appropriate time intervals, as related to applicable regulatory standards.
8. The heat rates over the range of operating capacity for each generating unit.

(b) The need for the proposed facility in terms of demand and energy.

(c) The economic aspects of the proposed facility, including all of the following:

1. 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.
2. The projected unit fuel cost, in cents per million Btu, both for the first year of operation and levelized in nominal terms over the life of the unit or facility. All cost escalation factors used in the estimate shall be identified.
3. The estimated annual production cost, calculated as operating, maintenance and fuel costs for the first year of operation and levelized in nominal terms over the life of the facility. All cost escalation factors used and other significant supporting data shall be included.
4. The estimated annual total cost, calculated as capital and production costs for the first year of operation, in mills per net kWh generated, and levelized in nominal terms over the life of the facility. All cost escalation factors used and other significant supporting data shall be included.
5. The estimated useful life of facility, based on depreciation rates established by the commission.

(d) The alternative sources of supply considered, including information about all of the following alternatives:

1. Energy conservation and efficiency.
2. Any alternative whose energy source has a higher priority ranking under s. 1.12 (4) (b) to (d), Stats., than the fuel proposed to used for the facility.
3. For any facility that will use a combustible energy resource but not provide cogeneration, an explanation regarding why cogeneration is not feasible.
4. Purchased power.

(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:

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. If a certificate of authority under s. 196.49, Stats., is required to construct the gas pipeline, the location, termini, length in miles, size of pipe, and pressure.
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.
5. Other auxiliary facilities, including fuel storage and water storage.
6. Natural resources at each site, including all of the following:
   a. Air quality.
   b. General soil associations.
   c. Geology, noting active mines and quarries.
   d. Water, including wetlands, rivers, streams and groundwater.
   e. Vegetative cover, including wildlife habitat.
   f. Endangered, threatened, and special-concern species and communities.
7. Community-related information, including all of the following:
   a. Site history.
   b. Existing and proposed land uses at the sites.
   c. Local infrastructure, including sewer, water, police, and fire protection.
   d. Historical and archeological sites.
   e. Potential health impacts.
   f. Secondary impacts, including effects on revenue, jobs, and development.
   g. Visual and noise impact.
8. Aesthetics.
9. If a CPCN is needed for construction of transmission lines as part of this application, the required information under s. PSC 111.55.

(g) Any additional information the commission may request, including information necessary for it to make the determinations listed in s. 196.491 (3) (d), Stats., or to prepare an environmental assessment or an environmental impact statement under s. 1.11, Stats.

(2) EXCEPTIONS TO FILING REQUIREMENTS. (a) An application for a wholesale merchant plant need not include the information identified in sub. (1) (b) to (d). In addition, an application for a wholesale merchant plant that will be owned, controlled, or operated by an affiliated interest of a public utility, shall include any additional information required by the commission in order to make a determination under s. 196.491 (3m) (a), Stats.

(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.

History: Cr. Register, June, 2000, No. 534, eff. 7-1-00.

Energy Priorities Law – §§ 1.12 & 196.025, Wis. Stats. (2002)

§ 1.12 State energy policy. (1) DEFINITIONS. In this section:

(a) "Local governmental unit" has the meaning given in s. 19.42(7u).

(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.

(2) CONSERVATION POLICY. A state agency or local governmental unit shall investigate and consider the maximum conservation of energy resources as an important factor when making any major decision that would significantly affect energy usage.

(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).

§ 196.025 Duties of the commission. (1) 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.

Commission's Powers -- § 196.02, Wis. Stats. (2002)

§ 196.02. Commission's powers. (1) JURISDICTION. The commission has jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient to its jurisdiction.

(2) DEFINITION; CLASSIFICATION. In this subsection, "public utility" does not include a telecommunications cooperative or a small telecommunications utility except as provided under s. 196.205 or 196.215(2) and does not include an alternative telecommunications utility. The commission shall provide for a comprehensive classification of service for each public utility. The classification may take into account the quantity used, the time when used, the purpose for which used, and any other reasonable consideration. Each public utility shall conform its schedules of rates, tolls and charges to such classification.

(3) RULES. The commission may adopt reasonable rules to govern its proceedings and to regulate the mode and manner of all inspections, tests, audits, investigations and hearings.

(4) INFORMATION REQUIRED; STOCK HOLDERS. (a) The commission may inquire into the management of the business of all public utilities. The commission shall keep itself informed as to the manner and method in which the same is conducted. The commission may obtain from any public utility any information necessary to enable the commission to perform its duties.

(b) Each public utility shall furnish to the commission, in such form and at such times as the commission requires, the following information respecting the identity of the holders of its voting capital stock in order to enable the commission to determine whether the holders constitute an affiliated interest within the meaning of this chapter:

1. The names of each holder of one percent or more of the voting capital stock of the public utility.

2. The nature of the property right or other legal or equitable interest which the holder has in the stock.

3. Any other similarly relevant information which the commission prescribes and directs.

(c) If any public utility fails to furnish the commission with information required of it by the commission, the commission may issue an order directing the delinquent public utility to furnish the information immediately or to show good cause why the information cannot be obtained. Failure of any public utility to comply with the order of the commission is a violation of this chapter within the meaning of s. 196.66.

(5) INSPECT BOOKS. The commission or any commissioner or any person employed by the commission for that purpose may, upon demand, inspect the books, accounts, papers, records and memoranda of any public utility, and examine under oath any officer, agent or employee of the public utility in relation to its business and affairs. Any person, other than one of the commissioners, who makes a demand shall produce his or her authority to make the inspection.

(6) PRODUCTION OF RECORDS. The commission may require, by order or subpoena served on any public utility as a summons is served in circuit court, the production within this state at the time and place the commission designates of any books, accounts, papers or records kept by the public utility outside the state, or verified copies in lieu thereof, if the commission orders. If a public utility fails or refuses to comply with the order or subpoena, for each day of the failure or refusal the public utility shall forfeit not less than $50 nor more than $500.

(7) COMMISSION INITIATIVE. In any matter within its jurisdiction, including, but not limited to, chs. 197 and 201 and this chapter, the commission may initiate, investigate and order a hearing at its discretion upon such notice as it deems proper.

(8) EMPLOY COUNSEL. The commission may employ counsel in any proceeding, investigation, hearing or trial had by it or in which it is a party, and the expenses thereby incurred shall be charged to the commission's appropriation.

(9) TECHNICALITIES DISREGARDED. Substantial compliance with the requirements of the statutes shall be sufficient to make effective any rule, regulation, order or action of the commission. No rule, regulation, order or action of the commission is invalid for any omission of a technical nature.

(10) COMMISSION NOTICES; CERTIFICATIONS. Any notice of investigation or hearing or certification to a copy of a record of the commission may be issued or certified by any member of the commission or by its secretary or assistant secretary.

(12) SUE; BE SUED. The commission may sue and be sued in its own name, and may confer with or participate in any proceedings before any regulatory agency of any other state or of the federal government.

Scope of Review -- § 227.57, Wis. Stats. (2002)

§ 227.57. Scope of review.

(1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.

(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.

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.
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 Nos. 03-CV-003478, 03-CV-003731, 04-CV-000133, 04-CV-000149, 04-CV-000530, 04-CV-000533

(Caption continued on following pages)

REPLY BRIEF OF INTERESTED PARTY-RESPONDENT-CROSS-APPELLANT CITY OF OAK CREEK

APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DAVID FLANAGAN PRESIDING

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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ARGUMENT

I. THIS COURT SHOULD RULE THAT WIS. STAT. § 196.20(7) APPLIES IN THIS CASE.

There should be no dispute that Wis. Stat. § 196.20(7) applies in this case. Under that provision, the Public Service Commission ("PSC") is precluded from altering the terms of the Development Agreement between the City of Oak Creek ("City") and Wisconsin Energy Corporation and its affiliates (collectively, "WE"). Perhaps recognizing that outcome, the PSC now argues for the first time that the new law does not apply.

The PSC concedes that it failed to raise the issue of the applicability of the new law in circuit court. *PSC Response Br.* at 34. The PSC argues nonetheless that this Court should consider the PSC's applicability argument. The PSC fails to recognize the major difference between (1) not raising an argument in circuit court, and (2) taking an affirmative position on a legal issue and later seeking to change that position. The latter is what occurred here. The PSC's concession that the new law applied framed the arguments of the parties before the circuit court. R.89:10-11; R.63:68; *see also generally* R.76:7-20. Further, the circuit court based its decision on the new law, albeit with an erroneous interpretation. R.App.223-24

(R.84:51-52). The PSC cannot, at this late juncture, change course and contend that this statute does not apply.

The PSC's applicability argument would have more merit if it argued that consideration by this Court will have an impact in a number of other cases, but that is not what the PSC has argued.

The PSC says "[t]he 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." *PSC Response Br.* at 35. The answer to the PSC's concern is simple: Because the City has presented overwhelming evidence which relates to "health or safety impacts," and because those impacts will exceed the amount of the payments to the City, this Court should rule that the City is entitled to the full amount of the payments called for by the Development Agreement. R.App.242 (R.18:158:Ex.142). The record related to health or safety impacts was created by the City through testimony at the technical hearings and the evidence of such impacts on the City is undisputed. The City is entitled to the payments as a matter of law because of (1) the undisputed evidence in the record, and (2) the correct ruling of the circuit court that the law applies.

Just because a matter has been decided by an agency, and a retroactive law is passed when a party is seeking judicial review of that agency decision, does not preclude either the party or the agency from applying the law in that matter. This is particularly the case when that law mandates a result through application to an already established factual record.[1]

The PSC attempts to distinguish *State v. Chrysler Outboard Corp.*, which was cited by the City for the proposition that when a statute by its language or implication shows the Legislature intended retroactive application, the statute applies retroactively. 219 Wis. 2d 130, 162, 580 N.W.2d 203 (1998). The PSC's discussion is an attempt to divert the analysis. The City did not assert this situation is anything like *Chrysler*. Rather, the City relied on the quoted general proposition contained in *Chrysler* (and many other cases). What the PSC fails to do is explain why the new law should not be interpreted to apply retroactively when its plain language makes it clear

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[1] One way of seeing that Wis. Stat. § 196.20(7) is intended to be retroactive is that, if, for example, the PSC were presented with a situation in which a party submitted a mitigation payment agreement after the deadline date in June 2003 but before passage of the law in December 2003, the PSC could argue that the law's terms prevent the recovery of certain mitigation payments.

that the Legislature looked backward in time to any agreement received before the deadline date. If anything, this matter is far clearer than *Chrysler* because in the new subsection (7) the Legislature explicitly provided a past date to which certain portions of the law apply, whereas in *Chrysler* the Legislature did not refer to a specific date and this Court ruled the statute applied retroactively "by necessary implication." *Id.* at 163.

The new law applies to this case, and the PSC argued in circuit court that the new law applies - until it realized the implications of that argument. Accordingly, this Court should apply the doctrine of waiver or judicial estoppel to the PSC's applicability argument.

II. THE PSC'S DECISION TO LIMIT MITIGATION PAYMENTS BY THE AMOUNT OF STATE SHARED REVENUE IS A SUBSEQUENT MODIFICATION OF THE AGREEMENT BETWEEN WE AND THE CITY.

The City agrees with the circuit court that the PSC's decision to eliminate the mitigation payments after state shared revenue kicks in and then reinstate some or all of the mitigation payments in the event state shared revenue is decreased below current levels constitutes a modification of the agreement, which is prohibited by Wis. Stat. § 196.20(7)(c). Once the agreement is approved, the PSC "shall not subsequently modify the agreement." Wis.

Stat. § 196.20(7)(c). The circuit court ruled on this basis, although it incorrectly ruled that the mitigation payments either had to be initially approved or rejected in their entirety. R.App.223-24 (R.84:51-52). The City's position is that, once the agreement is approved, it cannot be modified in the future. *City of Oak Creek Br.* at 27, 44-45.

According to the PSC's decision, if state shared revenue dollars dip below the current level by $100,000 one year, WE will have to pay the City that amount. If the dip is $500,000 the next year, WE will have to pay that amount. Under that scenario, *the agreement* between the City and WE is modified, subsequent to its approval. The statute prohibits "the agreement" from being modified. Wis. Stat. § 196.20(7)(c). One of the most important aspects of the Development Agreement is the amount of the payments. Because the PSC's decision could result in a change of the payments, it results in a violation of the statute.

For purposes of the modification provision of the statute, it is irrelevant that the City will still receive an amount equal to current state shared revenue under the PSC's decision. Presumably, the statute was to benefit host communities, utilities, and ratepayers alike. As a result of the PSC decision, WE and ratepayers do not have

predictability as to what they will pay over the life of the lease; the amount of the payment - a key term of the agreement - may be subsequently modified based on a factor that is entirely independent of the terms of the agreement, i.e., changes in shared revenue. The statute states that an approved "agreement" should not be subsequently modified. It protects the agreement, not the total level of funding received by the City from state shared revenue and the Development Agreement.

If this Court rules the PSC's decision was erroneous based on this subsequent modification issue, the payments should be restored as a matter of law because the PSC found the payments reasonable during construction of the ERGS.

III. THE LEGISLATURE CURTAILED THE PSC'S AUTHORITY TO EXAMINE THE INCLUSION IN RATES OF PAYMENTS RELATED TO HEALTH OR SAFETY IMPACTS.

The PSC claims that the City has not presented any analysis regarding its argument that the new law curtailed the PSC's authority regarding mitigation-type payments to host communities. *PSC Response Br.* at 33. The City's argument on this point is simple.

First, prior to enactment of Wis. Stat. § 196.20(7), the PSC had the general authority to approve or disapprove the inclusion of mitigation payments in electric rates,

pursuant to Wis. Stat. § 196.37, based on whether the payments were reasonable.

Second, with the new subsection (7), the Legislature now regulates whether the PSC can approve certain mitigation payments. As a result, a conflict has developed between the previous, general rate-setting statute, and the new, specific statute governing the inclusion of mitigation payments in rates. Under a "cardinal rule of statutory construction," when two statutes address the same matter, the more specific statute governs. *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970). "[T]his is especially true when the specific statute is enacted after the enactment of the general statute," which is what occurred here. *Id.*

Third, the newer, specific statute provides that mitigation payments are cut off after June 10, 2003, except for: (a) mitigation payments for "health or safety impacts," and (b) mitigation payments in agreements submitted before June 10, 2003, that are deemed to be reasonable. Based on the language of the statute, the Legislature made an overt decision to carve out mitigation payments from the PSC's general rate-setting authority and chose to regulate such payments with one specific statute. Because the new statute is so specific about how mitigation

payments should be treated, this Court does not need to look any further than the new subsection (7) to determine the rules for approval of mitigation payments in rates. The new law requires (1) denial of payments for non-health or safety impacts after the deadline date (with no measuring standard such as reasonableness), (2) approval of payments for health or safety impacts regardless of the date of the agreement regarding payments (with no measuring standard such as reasonableness), and (3) approval of payments for non-health or safety impacts before the deadline date (if the payments are deemed to be reasonable).

By adopting subsection (7), the Legislature eliminated any consideration by the PSC of mitigation payments under its general rate-setting authority, whether related to health or safety or not. Had the Legislature wanted what the PSC apparently argues, it could have stated that payments related to health or safety are required to be reasonable, as it specifically did with payments for non-health or safety impacts received before the deadline date. It did not do so.

Fourth, the exceptions in the new statute are not "limited" exceptions, as the PSC characterizes them. *PSC Response Br.* at 33. Particularly with regard to the City,

the exceptions are not limited; the City met the deadline and presented evidence of millions of dollars in economic impacts. Further, the PSC fails to acknowledge the total and continuing exception for "health or safety impacts." The City is going to incur millions of dollars in such impacts annually. Communities hosting power plants will inevitably have impacts related to health or safety. The Legislature not only exempted such payments from the elimination of mitigation payments, but it wrote the statute in a way that leaves the PSC to approve them as a matter of course and without a standard such as reasonableness.[2]

The PSC also argues that "there is no evidence in the legislative history that suggests ratemaking responsibility is limited by this measure." *PSC Response Br.* at 33. The PSC does not cite any authority for this proposition nor does it indicate what legislative sources, if any, it

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[2] The inconsistency in the PSC's position on the new law is exemplified by its argument that the new law "establishes a substantive standard to be applied in ratemaking proceedings." *PSC Response Br.* at 36. The PSC takes that position when it argues the new statute is substantive, not procedural or remedial, for the purposes of determining whether the statute should be applied retroactively. However, when it comes to the question of the law's actual operation, the PSC in effect argues that nothing has occurred to change its responsibility to examine the payments to the City. *Id.* at 33.

examined. This Court does not need to examine the legislative history of the new law because it is plain from the statute's language that the Legislature decided (1) it was time to make specific rules regarding mitigation payments, and (2) to alter the PSC's general rate-setting authority by carving out such payments from the general rate-setting statute. *See State ex rel. Kalal v. Circ. Ct. for Dane County*, 2004 WI 58, ¶¶50-51, 271 Wis. 2d 633, 681 N.W.2d 110.

IV. EVEN UNDER THE OLD LAW, THE STANDARD ESPOUSED BY THE PSC, THE PSC'S DECISION TO MODIFY THE MITIGATION PAYMENTS SHOULD BE REVERSED.

Even under the standard the PSC now asserts is applicable, the payments to the City should not have been modified based on state shared revenue. The PSC failed to examine the reasonableness of the payments in light of the evidence presented by the City. Not only would the rate-setting statute require that examination, but the CPCN statute requires that the PSC determine the facility "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). Without the mitigation payments, the City will be fiscally constrained in dealing with such

factors as safety and environmental concerns. The PSC's decision, which is to consider those factors under the CPCN statute, is arbitrary because it fails to account for that fact.

In issuing its decision as to the mitigation payments, the PSC was required to consider the relevant facts, apply the proper standard of law, and use a rational process to reach a reasonable conclusion. *Thielman v. Leean*, 2003 WI App 33, ¶16, 260 Wis. 2d 253, 659 N.W.2d 73. Instead of engaging in those mandatory tasks, the PSC arbitrarily chose to modify the payments to the City. The arbitrariness of the PSC's decision to limit the payments during operation of the ERGS is demonstrated by its choice of the level of current state shared revenue payments as the only amount the City is eligible to receive. There is no analysis or explanation in the PSC's decision as to how that amount relates in any way to the many impacts on the City. That state shared revenue may approximate the payments to the City from WE is irrelevant when the Development Agreement shows the parties contemplated the City receiving both mitigation payments and state shared revenue. R.App.247 (R.18:158:Ex.142). Further, assuming the new law does not apply to this matter, this Court should nonetheless look to that law as strong evidence of

the reasonableness of a community receiving both mitigation payments and state shared revenue. The PSC's decision ignored that possibility for the City as a matter of course without analysis.

The evidence presented by the City included $2.17 million in specific annual impacts related to health or safety, as well as other such impacts that are not quantifiable but will exist. *City of Oak Creek Br.* at 11-19, 37. In addition, one-time impacts related to health or safety will exceed $1.5 million, which when spread over the term of the 30 year lease, add another $50,000 annually. *Id.* at 15-16, 37. The $2.25 million mitigation payment would cover just those impacts. As previously shown, the City will also suffer up to $10.4 million of lost property tax revenue that will not be compensated by state shared revenue. *Id.* at 17-19. In light of all of this evidence, the PSC should have approved the mitigation payments entirely, even under the old law.

CONCLUSION

The City and WE entered into a Development Agreement, which provides for mitigation payments. The PSC cannot subsequently modify that agreement nor can it interfere with payments for health or safety impacts. Even under the standards asserted by the PSC, the PSC failed to analyze

the payments in light of the evidence before it. This Court should restore the full mitigation payments as a matter of law.

Dated this 7th day of March, 2005.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 13 pages.

Dated this 7th day of March, 2005.

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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

(Caption continued on following pages)

APPEAL FROM A DECISION OF THE CIRCUIT COURT OF DANE COUNTY, THE HONORABLE DAVID FLANAGAN, PRESIDING

REPLY 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.

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

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March 7, 2005

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INTRODUCTION

Nothing asserted by WEC or PSC in their briefs alters the conclusion that the Final Decision must be vacated. The Final Decision is fundamentally flawed because of PSC's misinterpretation of the Energy Priorities Law and the Plant Siting Law. Rather than implementing the plain language of those statutes, PSC and WEC create contortions of interpretation which yield a result directly contrary to the very purposes of those laws.

Moreover, the tangled web created by the *misinterpretation* of these statutes now has forced PSC and WEC to *reinterpret* the Final Decision in a vain attempt to save the order. PSC and WEC, inconsistently with PSC's prior decisions, and often inconsistently with each other, continue to ignore the plain language of those statutes. Their arguments are beyond rescue because the statutes do not support the ultimate conclusion reached by the Final Decision – that a proposal which is the lowest priority under the Energy Priorities Law and is more expensive under the Plant Siting Law was nevertheless chosen as the expansion plan.

The court should not countenance nor undertake this massive reordering of Wisconsin law and should reject the twists and turns relied upon to approve the ERGS proposal. Accordingly, Calpine requests that the court set aside the Final Decision and require PSC and DNR to follow the law by including Calpine's proposal in the selected energy expansion plan.

ARGUMENT

I. THE FINAL DECISION VIOLATES THE PUBLIC INTEREST AND LEAST COST REQUIREMENTS UNDER THE PLANT SITING LAW.

Calpine has demonstrated that the Plant Siting Law mandates the inclusion of its Fond du Lac Energy Center in the selected energy expansion plan because it is in the public interest as the least cost alternative. Calpine Brief pp. 7-9, 19-20. Calpine has not been alone in emphasizing the least cost mandate. In its briefs before the trial court, PSC acknowledged the least cost requirement of the Plant Siting Law:

> The CPCN statute is about least cost.

R.63:29.

> [Calpine] begins by arguing that the Commission's history of applying the CPCN statute is to select the least cost alternative as being in the public interest, which is correct. . .

Id. These quotes directly contradict PSC's position before this court.

The apparent reason for PSC's change of position before this court demonstrates the results-oriented nature of the Final Decision. In its brief to the circuit court, WEC conceded that Calpine's proposal was "least cost" but claimed that selection of a "least cost" alternative is not really a requirement of the Plant Siting Law. R.66:28, 33.[1] PSC, on the other hand, admitted that it had interpreted

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[1] Contrary to its earlier concession, WEC misleadingly attempts to demonstrate an alleged cost disadvantage of the Calpine proposal through a comparison of the ERGS to a "gas-only" proposal. WEC Resp. Br. p. 22. The "gas-only" proposal referred to by WEC involved providing nearly 8600 MW of electricity through the year 2031 using only gas-fired generation, which is not Calpine's proposal. R.18, Item 119, p. 436. The Calpine proposal evaluated in the FEIS

the public interest requirement under the Plant Siting Law as mandating the selection of the least cost source of supply. R.63:29. Taken together, WEC's concession and PSC's legal interpretation mandate the inclusion of Calpine's proposal in the selected energy expansion plan.

To avoid this result, and apparently guided by WEC's argument, PSC now claims that it "has never insisted that 'least cost' is the sole criterion for judging a CPCN application." PSC Resp. Brief p. 12.[2] PSC's ever changing position on this and other issues[3] illustrates the *post hoc* rationalizations employed in an attempt to overcome the Final Decision's misinterpretation of the Plant Siting Law.

The remainder of WEC's and PSC's briefs fail to support PSC's new position. WEC and PSC quote snippets of PSC's prior orders which refer to intangible considerations as affecting the selection of certain projects. However, neither WEC nor PSC refute the fact that PSC always selected the least cost

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pertained to the 1200 MW of ERGS and demonstrated that the inclusion of Calpine's proposal resulted in the least cost scenario, as the FEIS found. *Id.* at 72. If one were to evaluate the gas-only proposal referred to by WEC, the only appropriate comparison would be to a coal-only scenario for 8600 MW which was never done by WEC or PSC.

[2] PSC's response brief also is internally inconsistent on this point. PSC contends that "[c]ost simply was not the determinant for the selection of ERGS," then lists a number of purported reasons why it selected the coal-fired ERGS - ***every one of which relates to cost***, PSC Resp. Brief. pp. 14-15, and every one of which has been previously refuted by Calpine. *See* Calpine Resp. Brief. pp. 24-27.

[3] For example, PSC could approve the ERGS project only by departing from its prior interpretations of the Energy Priorities Law and the Plant Siting Law's wholesale competition analysis, Calpine Brief pp. 19-27, and by inconsistently applying the Plant Siting Law's environmental requirements. Calpine Brief p. 31.

alternative in these prior orders, even when PSC's concern about certain of these considerations has been significant. *See, e.g., Rhinelander Order*, R.79:9-11.[4]

Further, the Final Decision does not explain the exclusion of Calpine's proposal on the basis of any such intangible considerations. Instead, as the circuit court recognized, the other factors allegedly favoring high-sulphur coal over natural gas "are not stated in the [Final Decision] nor can they be readily inferred." R.84:37. Rather, the Final Decision rests upon a newly created baseload/non-baseload distinction to reject Calpine's proposal, a distinction that Calpine already has demonstrated to be unfounded. *See* Calpine Resp. Brief pp. 19-23.

PSC's, WEC's, WPPI/MG&E's, and some Amici's *post hoc* allusion to other factors is improper as a matter of law because they are not relied upon in the Final Decision. *See Williams Gas Processing-Gulf Coast Co. v. F.E.R.C.*, 373 F.3d 1335, 1345 (D.C. Cir. 2004) ("It is axiomatic that we may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review,... *post hoc* rationalizations will not suffice.") (internal quotes and citations omitted).

Moreover, Calpine demonstrated that the "other factors" that WEC and some Amici now claim support the rejection of Calpine's proposal, including reliability and price volatility, in fact do not supply a basis for that rejection. *See*

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[4] PSC criticizes Calpine's citation of the *112 Order*, based upon PSC's Order to Rescind in 2000. Contrary to PSC's implication, the Order to Rescind removed only the mandatory nature of the two-stage process, and retains all other aspects of the *112 Order*, including the elements of the two-stage process and the requirement to evaluate alternative proposals. R.54:142. Consequently, PSC continued to review CPCN applications under the least cost standard. *See Port Washington Order*, pp. 21-22, R.App.36-37.

Calpine Resp. Brief pp. 25-27. Furthermore, the reliance of Amici on additional "other factors" is likewise misplaced. In an inappropriate political argument, Amici Hispanic Chamber of Commerce of Wisconsin, et. al. ("HCOC"), claim that ERGS will materially benefit the Hispanic and African-American communities through job creation and low energy prices. However, a claim that certain groups will benefit from ERGS cannot trump the statutory requirements of the Plant Siting Law and the Energy Priorities Law.

Further, HCOC's concern about high energy prices is based solely upon citation to WEC's self-serving, untested, and non-record affidavits submitted in support of its petition for bypass. Contrary to those affidavits, Calpine has demonstrated that PSC's own analysis revealed that the inclusion of Calpine's proposal in the selected energy expansion plan results in the least cost alternative for all of Wisconsin's ratepayers -- a point which neither WEC nor PSC has refuted. *See* Calpine Brief pp. 7-9.[5]

Finally, one alleged qualitative factor dredged up by WEC in its response brief demands a specific response: WEC's unfounded claim that Calpine's proposal was rejected due to alleged financial difficulties. Nowhere in the Final Decision is such a consideration even identified. Moreover, evidence in the record demonstrates that this conjecture is invalid: (1) Calpine has completed and has

[5]Amici Wisconsin Energy Customers ("Customers") echo this illegitimate "high energy price" scenario by citing to a comparison of coal and natural gas prices and other non-record information. Customers Brief p. 10. Customers fail to point out, however, both the exponentially higher captial cost to construct a coal facility as compared to a gas facility, and the fact that the relevant Eastern coal prices have more than doubled since the issuance of the Final Decision.

under construction multiple facilities for the purpose of providing power to Wisconsin utilities for the benefit of Wisconsin's ratepayers, R.18, Item 157, pp. 3365-3368; (2) Calpine has sufficient cash on hand ($2 billion) to complete all of the construction that Calpine has permits for (7,500 MW) throughout the country, R.157, p. 3286; (3) Calpine has never failed to complete construction on a power plant for which market commitments were in place, *id.*, pp. 3290-2; (4) if Calpine had a commitment from WEC to purchase the power from the Fond du Lac Energy Center, Calpine would not need bank approval to undertake the obligation, *id.* p. 3295; and (5) WEC's financial filings contain the same standard cautionary statements that WEC raised as an issue at hearing regarding Calpine's financial statements, R.158, Ex. 194, *see also* R.157, p. 3272. Furthermore, WEC's own conduct in signing a power purchase agreement for the electrical output from Calpine's Zion Energy Center in Illinois, R.157, p. 3272, dispels any credibility in WEC's assertion regarding alleged financial difficulties.

In effect, WEC and PSC urge this court to adopt a standardless approach, under which PSC may select or reject ***any*** facility for ***any*** reason, regardless of the least cost criteria it previously recognized. *See* PSC Resp. Brief p. 15. No matter how much is saved by including Calpine's proposal in the selected energy expansion plan, and despite PSC's prior interpretations, PSC could reject Calpine's proposal based on factors never analyzed in the Final Decision, but now used as *post hoc* rationalizations for that decision.

Such a standardless approach is inconsistent with language of the Plant Siting Law and PSC's prior interpretations of that law, and cannot stand. *See* Wis. Stat. §§ 227.57(5) and (8); *State ex. rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 124-25, 289 N.W.2d 357 (Ct. App. 1980); *see also GTE North Inc. v. Public Serv. Comm'n of Wisconsin*, 169 Wis. 2d 649, 486 N.W.2d 554 (Ct. App. 1992) (remanding to PSC a decision in which PSC claimed that its decision was based "on our expertise" without articulating reasoning process), *rev'd on other grounds*, 176 Wis. 2d 559, 500 N.W.2d 284 (1993). Since the Final Decision violates the public interest and least cost requirements of the Plant Siting Law, the Final Decision should be reversed.

II. THE FINAL DECISION VIOLATES THE PLANT SITING LAW BECAUSE IT RESULTS IN A MATERIAL ADVERSE IMPACT ON WHOLESALE MARKET COMPETITION.

Calpine has established that the regulation of rates by PSC cannot satisfy the Plant Siting Law requirement that a CPCN avoid a material adverse impact upon wholesale market competition. Calpine Brief pp. 29-30. Otherwise, the wholesale competition analysis mandated by Wis. Stat. § 196.491(3)(d)7 would be rendered meaningless because electric rates in Wisconsin already are subject to PSC regulation pursuant to separate statutory provisions. *See* Wis. Stat. §§ 196.03, 196.19, 196.37. Rather than even attempt to refute this argument, WEC and PSC merely repeat their flawed position that PSC's regulation of WEC's electric rates will serve to mitigate any potential adverse impact on competition

arising out of the approval of the ERGS. WEC Resp. Brief p. 26, PSC Resp. Brief p. 18.

However, with the rate regulation argument debunked, the Final Decision is stripped of any basis for its conclusion under Wis. Stat. § 196.491(3)(d)7 because it does not otherwise evaluate the effect of ERGS on wholesale market competition. Although PSC challenges Calpine's discussion of its previous orders in which PSC's finding under Wis. Stat. § 196.491(3)(d)7 was premised under the introduction of new competitors to the market, PSC Resp. Brief pp. 16-18, PSC fails to identify any alternative standard in those orders.

PSC's desire for unlimited discretion in applying Wis. Stat. §196.491(3)(d)7 is further illustrated by its attempt to shed accountability for the standard it established under the Plant Siting Law's wholesale competition analysis. As identified by Calpine, PSC's staff witness recognized that ERGS "could thwart wholesale market power development..." Calpine Brief p. 26 (citing R.157, p. 3898). In its response brief, PSC completes the quote, *i.e.*, "...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," and states that PSC was satisfied with how WEC addressed these issues. PSC Resp. Brief p. 19. However, PSC fails to point out that there is no mention in the Final Decision of competitive bidding requirements and the Final Decision is not conditioned upon a commitment by WEC to maintain a certain level of purchases from IPPs.

This was not the first or only time in this proceeding that PSC failed to adhere to a required standard. In the Declaratory Ruling proceeding leading up to the ERGS proposal, PSC ordered that

> 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.

R.54:236 (Emphasis added). Contrary to this directive and the mandate of Wis. Stat. § 133.01, PSC approved the ERGS project even though WEC never even considered IPPs as an alternative source for the capacity sought. R.18, Item 157, p. 1743.

Since the Final Decision results in a material adverse impact on wholesale market competition, in violation of the Plant Siting Law, the Final Decision must be reversed.

III. THE FINAL DECISION VIOLATES THE ENVIRONMENTAL REQUIREMENTS OF THE PLANT SITING LAW AND THE EIS RULE.

Calpine has established that the grant of a CPCN for ERGS despite undue adverse water related environmental impacts, violates the environmental requirements of the Plant Siting Law in the following ways: (i) PSC and DNR acted inconsistently (*i.e.*, more leniently) in applying Wis. Stat. § 196.491(3)(d)4 and other requirements to ERGS as compared to other facilities; (ii) PSC improperly delegated its responsibility to DNR; and (iii) PSC failed to explain its conclusion regarding environmental impacts even though compliance with known

or proposed numerical environmental standards was not reasonably demonstrated by WEC. *See* Calpine Brief pp. 30-41.

PSC failed to address the first two of these errors and therefore has conceded them. *See Hoffman v. Economy Preferred Ins. Co.*, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590. The explanation included in PSC's response brief, but not in the Final Decision, regarding the third error took two forms: (i) DNR would ensure that ERGS would comply with whatever standards eventually applied; and (ii) some of the standards involved were proposed and could change. Final Decision p. 22. The first argument effectively concedes the position concerning improper delegation. The second argument is wrong on the facts and advocates a standardless, unreviewable application of law. *See e.g.* R.18, Item 157, pp. 1547, 1549, 1622-1623; R.18, Item 119, p. 219.

For these reasons, the Final Decision should be reversed.

CONCLUSION

The Final Decision cannot be allowed to stand. The conclusion that a project which was the lowest priority under the Energy Priorities Law and more expensive under the Plant Siting Law should nevertheless be chosen as the sole expansion plan cannot be justified.

PSC's change in the position taken just months ago before the circuit court with respect to the public interest and least cost requirements of the Plant Siting Law is symptomatic of PSC's broader approach to the ERGS proceeding. At nearly every turn, statutory language and prior interpretations and orders were

discarded in approving WEC's business plan. Remanding the Final Decision with only a general instruction to comply with the law will not prevent the search for new ways to avoid the statutory mandates. This court is not confined to such ineffective relief.

A reviewing court may "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." Wis. Stat. § 227.57(5); *Keeler v. Labor and Indus. Review Comm'n*, 154 Wis. 2d 626, 635, 453 N.W.2d 902 (Ct. App. 1990). The instructions upon remand can compel a particular modification of an administrative decision. *See Lewis Realty, Inc. v. Wisconsin Real Estate Brokers' Bd.*, 6 Wis. 2d 99, 125, 94 N.W.2d 238 (1959).

The inclusion of the Fond du Lac Energy Center in the expansion plan selected is the only way for PSC to comply with its legal obligations to:

(1) approve a resource addition which implements the statutorily mandated energy priorities under Wis. Stat. §§ 1.12 and 196.025;

(2) approve a resource addition which is in the public interest as the least-cost project, consistent with Wis. Stat. § 196.491(3)(d) and PSC's long-standing policy;

(3) approve a resource addition which provides for wholesale competition in Wisconsin pursuant to Wis. Stat. § 196.491(3)(d)7, PSC policy, and Wis. Stat. § 133.01;

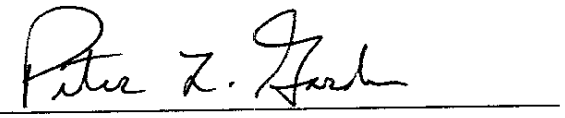
(4) approve a resource addition which minimizes adverse impact on the environment and natural resources as required under Wis. Stat. § 196.491(d)(3)4; and,

(5) approve a resource addition which prudently controls the adverse effects on ratepayers of electricity rate increases created by the extraordinary economic and environmental risks associated with WEC's ERGS proposal.

Because PSC misinterpreted the applicable law, this court should modify the Final Decision, or remand the Final Decision with specific directions, to include the Calpine proposal in the selected energy expansion plan.

Dated this 7th day of March, 2005.

Attorneys for CALPINE CORPORATION



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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 2,967 words.

Dated this 7th day of March, 2005.

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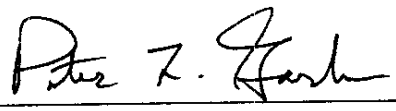

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STATE OF WISCONSIN
SUPREME COURT

Clean Wisconsin, Inc. p/k/a Wisconsin's
Environmental Decade Institute, Inc.,
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)

REPLY BRIEF OF INTERESTED PARTIES-CO-APPELLANTS-CROSS-RESPONDENTS WISCONSIN PUBLIC POWER, INC. AND MADISON GAS AND ELECTRIC COMPANY

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
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March 7, 2005

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ARGUMENT

I. INTRODUCTION.

Wisconsin Public Power Inc. (WPPI) and Madison Gas and Electric Company (MGE) submit this short reply to the respondent brief of Calpine Corporation (Calpine). Calpine's respondent brief directly addressed the arguments of WPPI/MGE. The respondent brief of Clean Wisconsin, Inc. (CW) and S.C. Johnson & Son, Inc. (SCJ) did not address our arguments directly. We reply to the respondent brief of CW/SCJ only to the extent it makes arguments similar to those of Calpine.

Our reply makes two main points. First, courts should give deference to agency expertise if the agency is performing the functions delegated by the legislature and exercising the kind of judgment the legislature intended it to exercise. Second, the

Energy Priorities Law and the CPCN statute overlap. In this case, the PSC reasonably applied both, just as the legislature intended.

II. JUDICIAL DEFERENCE TO AGENCY EXPERTISE STEMS FROM THE REASONS THAT THE LEGISLATURE CREATED THE AGENCY IN THE FIRST INSTANCE; IT DOES NOT NECESSARILY DEPEND ON WHETHER THE QUESTION BEING REVIEWED IS LABELED "FACT" OR "LAW"

Calpine criticizes WPPI/MGE for pointing out the volume, complexity, and technical nature of the record. (Calpine Resp. Br., p. 5, n. 4.) Calpine refers to the technical record as "details [that] are immaterial to this court's consideration of the errors of law made by the PSC in applying the Energy Priorities Law in the Final Decision." *Id.* This argument is the latest in a series of arguments that seek to dissuade the court from according any deference to the PSC on the ground that the matter under review is a question of law.

WPPI/MGE have two replies. Our first reply is that distinctions between questions of fact, questions of law and mixed questions of law and fact are often blurred. Those distinctions do not necessarily provide sound guidance as to when deference is appropriate. Our second reply looks to the reasons underlying the principle of judicial deference. A good indication of when deference is appropriate may be gained from considering the reasons why the legislature created the agency in the first place.

The difficulty in distinguishing questions of law from questions of fact,[1] and the implications for the judicial standard

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[1] The difficulty is compounded because there are adjudicative facts and legislative facts. Calpine criticizes, as being without citation to Wisconsin law, WPPI/MGE's argument that "deference is required based upon a distinction between 'adjudicative' and 'general' facts." (Calpine Resp. Br., pp. 10-11.) This court has recognized the distinction between the two kinds of facts, using language that would support greater deference to an agency decision that relies on legislative facts: "Adjudicative facts are facts about the parties and their activities, businesses, and properties, usually answering the questions of who did what, where, when, how, why,

of review, are discussed at length in *Citizens' Utility Board v. PSC*, 211 Wis. 2d 537, 565 N.W.2d 554 (Ct. App. 1997). *Citizens' Utility Board* concerned the judicial standard of review applicable to the PSC's determination that an EIS was adequate. One party argued that the matter at hand was a question of fact. The other party characterized the same matter as a question of law. The court, however, regarded the EIS-adequacy question as neither purely fact nor purely law, but rather the application of a statute to a particular set of facts. *Id.* at 550. The court concluded the PSC's determination of adequacy was "an application or interpretation of law . . . entitled to great weight

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with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." *Westring v. James*, 71 Wis. 2d 462, 474, 238 N.W.2d 695 (1976). *See also State v. Rewolinski*, 159 Wis. 2d 1, 33 n.1, 464 N.W.2d 401 (1990) ("legislative facts ordinarily refer to the factual grounds for policy judgments") (Abrahamson, J., dissenting).

deference from a reviewing court." *Id.* at 552. In short, the "great weight deference" standard applied notwithstanding that the question was characterized in part as an interpretation of law.

The court's explanation is important:

> Finally, although not one of the four requirements for great weight deference, we have held that "where a legal question is intertwined with factual, value or public policy determinations, courts will defer to the agency whose responsibility it is to make those determinations."

Id. (Citations omitted.)

An excellent article from Harvard Law Review discusses how the United States Supreme Court reviews an agency's application of a broad statute to a specific set of facts:

> A number of recent Supreme Court decisions, as well as many not so recent, have held that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine

> it initially, the reviewing court's function is limited" – *i.e.*, that the administrative judgment is to be treated in the same way as a finding of fact. This means that the administrative determination "is to be accepted if it has 'warrant in the record' and a reasonable basis in law," or that "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Dobson v. Comm'r* [320 U.S. 489, 502 (1943)] explicitly recognized the mixed nature of these determinations, and declared that "when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision" of the administrative tribunal must stand.

Robert L. Stern, *Review of Finding of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 99 (1943).

The underlying rationale for this approach stems from the reasons that the legislature created the agency in the first place:

> But the creation of a special agency, coupled with an express or implied grant of authority to decide a matter, manifests a legislative intention that the question be decided by that agency. It is precisely

> because the judgment of the agency on the point is desired that the administrative process is employed.

Id. at 58. The article further explains that the most frequent reason for creation of an administrative agency "is the need for, or at least the advantage of, special knowledge and expertness in a particular field – a need which can best be met by the creation of a body of persons who can devote all their time to one subject." *Id.*

In plain terms, when the legislature creates an agency and invests it with certain discretion, the legislative intent is that such discretion be exercised by the agency, not by a reviewing court. The article cites *Gray v. Powell*, 314 U.S. 402 (1941) as recognizing this point:

> [*Gray*] holds that the administrative judgment is to be respected because the determination has been left by Congress to the administrative body; the emphasis is upon the exercise of judgment,

> not the "factual" nature of a problem which possess legal and factual ingredients intertwined. If the administrative decision is "a sensible exercise of judgment," one that a reasonable person could have reached in the light both of the facts and the law, it is not to be disturbed even if the court itself might have reached a different conclusion.

Stern, *supra*, at 103.

The same underlying rationale explains the proper role of a court in reviewing agency interpretations of law that may have application beyond the specific facts at hand:

> When Congress establishes an administrative agency and lays down general standards for it to follow, the agency has the function of filling in the interstices which have been deliberately left open. The duty of the courts in reviewing the administrative decision for error of law is to see that the agency has stayed within the bounds of the exercise of discretion fixed by Congress, and that it has applied the statutory standards and no others. As long as the agency does so, the courts are not to substitute their judgment, even though the administrative determination has a general

> applicability beyond the facts of the particular case.

Id. at 106.

In summary, Calpine misses the mark when it criticizes WPPI/MGE for referring to the volume and technical nature of the record. Contrary to Calpine's assertion, the technical record does not consist of "details" that are immaterial to the court's review of how the PSC applied the Energy Priorities Law to the specific facts of this case. Rather, in its review the court should determine whether there is a rational basis for how the PSC applied the statute and whether there is substantial evidence in the voluminous technical record to support the PSC's finding that:

> Energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. §§ 1.12

> and 196.05, or their combination, are not cost-effective or technically feasible alternatives to the projects proposed in this docket.

(R.18-PSC 150, p. 4.)

III. THE ENERGY PRIORITIES LAW AND THE CPCN STATUTE OVERLAP; THE PSC REASONABLY APPLIED BOTH.

Calpine urges the court to "reject WPPI/MG&E's argument that substantial deference should be afforded the Final Decision on the basis that it comprises a 'decision as to the meaning or reach of a statute' that involved 'reconciling conflicting policies.'" (Calpine Resp. Br., p. 10.) Calpine says WPPI/MGE cite no Wisconsin authority and "fail to identify any conflict here that would merit deference to the PSC." *Id.* Calpine also states: "the circuit court recognized that no such conflict exists: '[t]here is no obvious conflict between the

[Energy Priorities Law and Plant Siting Law][2] and each deals with an entirely separate question.'" *Id.* Finally, Calpine argues that WPPI/MGE offer *post hoc* rationalizations for the PSC's failure to include the Calpine proposal in We Energy's expansion plan – an omission that Calpine claims to be a violation of the Energy Priorities Law. (*Id.* at 24, nn. 7-8.)

WPPI/MGE offer no apology for the authority they cited. The holdings of the United States Supreme Court are always entitled to serious consideration, even when they are not binding precedent.

As for the PSC's role in reconciling conflicting policies, that function is obvious in its administration of the CPCN statute. The PSC must make a public interest determination "considering alternative sources of supply, alternative locations

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[2] Our references to the CPCN statute or the Plant Siting Law refer to Wis. Stat. § 196.491.

or routes, individual hardships, engineering, economic, safety, reliability and environmental factors...." Wis. Stat. § 196.491(3)(d)3. Clearly these considerations sometimes will conflict with one another.

Calpine specifically asserts there is no identified conflict between the CPCN statute and the Energy Priorities Law and quotes the trial court as saying "each deals with an entirely separate question." That quotation is both revealing and disturbing. Revealing because it shows the trial court did not appreciate the interplay between the two statutes. Disturbing for the same reason.

While there may be no obvious conflict between the CPCN statute and the Energy Priorities Law on their face, there is at least some overlap that requires the two to be construed and applied in conjunction with one another. One area of overlap is

cost and economics. *Economic factors* are one consideration in the public interest calculus under the CPCN statute. Under the Energy Priorities Law, options are to "be considered based on the . . . [listed] priorities" "to the extent [they are] *cost-effective* and technically feasible." Wis. Stat. § 1.12(4). (Emphasis added.) Economic factors and cost-effectiveness are, at the very least, overlapping considerations.

In the context of a proceeding to consider approval of proposed new generating plants, it is naive to think that the CPCN statute and the Energy Priorities Law deal with "entirely separate questions." First, under both statutes the PSC must consider cost and economics. Second, and more importantly, in practice, the PSC must conduct its CPCN-statute analysis in order to know what options are truly viable, and thus eligible for prioritizing under the Energy Priorities Law. For example, the

PSC must conduct its CPCN analysis to determine what options will "satisf[y] the reasonable needs of the public for an adequate supply of electric energy" and what options satisfy the CPCN public interest test, including cost-effectiveness. Wis. Stat. §§ 196.491(3)(d)2 and 3. Surely the PSC would not authorize an option, no matter how high on the energy priorities list, if it fails to meet the public's need or is otherwise not in the public interest.

The interplay of the two statutes is perhaps easiest to understand with a simple hypothetical. Imagine a proposed 500 MW wind energy farm and a proposed 500 MW coal-fired plant. Suppose further the wind option is technically feasible and less expensive overall than the coal option. Arguments advanced by the ERGS opponents would lead to the conclusion

that the wind option must be chosen because, as a renewable resource, it ranks higher on the priorities list.

But what if the public needs 500 MW of new power to be available nearly around the clock? In other words, the identified need is for a reliable baseload facility. That is where the CPCN statute comes in. The proposed wind facility would be ineligible for a CPCN because the wind does not necessarily blow when baseload power is needed. Thus, in the hypothetical being considered, wind would not satisfy the reasonable needs of the public for an adequate supply of electric energy. For that reason, wind energy could not be a viable "option" to be prioritized under the Energy Priorities Law.

In a different hypothetical, there may be a generating option that meets the public's need for electric energy, but relies on a fuel source that is too expensive or whose price is too

volatile. Such an option would not meet the CPCN public interest test. Nor would it be cost-effective within the meaning of the Energy Priorities Law.

Although the hypothetical examples necessarily oversimplify the issue, they do demonstrate the need for construing and applying the CPCN statute and the Energy Priorities Law in conjunction with one another. The two statutes do not deal with "entirely separate questions." (Calpine Resp. Br., p. 10.)

Finally, it is not true that WPPI/MGE offer *post hoc* rationalizations for the PSC's application of the Energy Priorities Law. The PSC itself discussed the rationale for its application of that law for more than nine pages in the Final Order. (R.18-PSC 150, pp. 14-23.) Included in the PSC's Final Order is a specific discussion of whether gas-fired generation should be chosen over ERGS. (*Id.* at 19-21.) The PSC

specifically found: "No gas-fired, baseload facilities were presented in either a cost-effective or technically feasible alternative in this record." (*Id.* at 19.) When WPPI/MGE cite to the PSC record on pages 15-16, 42, and 44 in our initial brief, we are not engaging in *post hoc* rationalization. We are pointing to a small portion of the substantial evidence that supports the PSC's conclusion that gas-fired generation is not a cost-effective and technically feasible option to meet the public's need for baseload power.

Calpine's complaint seems to be that the PSC did make more specific findings relative to cost-effectiveness and technical feasibility in applying the Energy Priorities Law. (*See, e.g.* Calpine Resp. Br., p. 29.) CW/SCJ contend similarly in their response brief at 43.[3]

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[3]Similarly, CW/SCJ argue that the PSC's public interest determination under the CPCN statute lacked findings as to each of the

Each of these arguments suffers from the same defect. The PSC is not required to make specific findings as to each of the factors it considers in applying either the Energy Priorities Law or the CPCN statute. The situation is analogous to the one this court addressed in *Westreng v. James*, 71 Wis. 2d 462, 238 N.W.2d 695 (1976). In *Westreng*, the court reviewed an administrative decision that recommended dismissal of a petition to incorporate a town as a village. The challengers argued that the administrative decision did not include specific findings regarding the effect of the proposed incorporation on tax revenues, level of services, and impact on the metropolitan community. *Id.* at 470. The court rejected this challenge, noting that the statute (section 66.016) required no findings as to each of these specific considerations. Rather, the statute required a

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public interest factors. (CW/SCJ Initial Br., pp. 12-31.)

finding of whether the proposed incorporation was "in the public interest" upon consideration of the enumerated factors. *Id.* at 470-71.

Similarly here, the PSC's findings and discussion in its 62-page order, along with the substantial evidence in the record, are more than sufficient to support its application of both the CPCN statute and the Energy Priorities Law.

CONCLUSION

On behalf of the nearly 300,000 customers they serve, WPPI and MGE urge the court to affirm the PSC's Final Order.

Dated: March 7, 2005.

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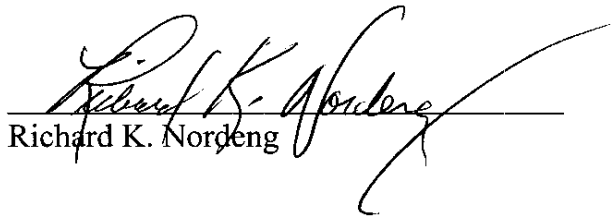
CERTIFICATION

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 2,767 words.

Dated: March 7, 2005.



Richard K. Nordeng

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,

Appeal No. 04-3179

TOWN OF CALEDONIA,
Petitioner-Cross-Respondent,

v.

Circuit Court Case Nos.
03CV003478, 03CV003731,
04CV000133, 04CV000149,
04CV000530, 04CV000533

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,

(Caption continued on following pages)

AMICUS CURIAE BRIEF OF THE WISCONSIN ENERGY CUSTOMERS

Submitted by:

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Dated: February 28, 2005

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, W.E. POWER, LLC, and
WISCONSIN ENERGY CORPORATION,
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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Wisconsin's Strategic Energy Assessment, Energy 2010, PSC Docket No. 05-ES-102, Final Report – September 2004 available at http://psc.wi.gov/electric/cases/sea/2004/document/FinalSeaWeb.pdf 5, 9, 10, 11, 14

I. INTRODUCTION.

All of the Wisconsin Energy Customers[1] are statewide organizations actively involved in the Wisconsin electric industry either as customers or as workers. Two of these groups (MEUW and WFC) together represent more than 100 of the state's municipal utilities and rural electric cooperatives. In industry terms, they are "load-serving entities" and "distribution utilities." They purchase wholesale electric power from public utilities and other generators and provide it to their retail customers and members throughout the state. Two of the amici (NFIB/W and WPC) represent commercial and industrial retail customers, respectively, many of whom are customers of WEPCO. They are directly interested in the price and reliability of electricity in the state. The other amici (IBEW Locals 2150 and 2304 and UWC[2]) are labor organizations whose members are residential retail

[1] The Wisconsin Energy Customers Amici are: Municipal Electric Utilities of Wisconsin ("MEUW"), Wisconsin Federation of Cooperatives ("WFC"), National Federation of Independent Business/Wisconsin ("NFIB/W"), Wisconsin Paper Council ("WPC"), International Brotherhood of Electrical Workers ("IBEW") Locals 2150 and 2304, and Utility Workers Coalition ("UWC").

[2] The UWC includes the International Union of Operating Engineers ("IUOE").

customers located throughout the state. IBEW and IUOE members also operate and maintain many of the power plants in the state.

In this brief the Wisconsin Energy Customers provide their perspective on one of the major policy issues in this case: the importance of new coal-fired baseload power plants like the Elm Road Generating Station ("ERGS") in the state's electric-supply portfolio. This issue has three main aspects. Does Wisconsin have a need for baseload plants? Are coal-fired plants cost-effective compared with the alternatives? Are such plants a reliable means of providing electricity?

The available evidence demonstrates that the state (including WEPCO's service territory) needs to add new baseload generating capacity at the time the ERGS plants are planned to be operational. New, state-of-the-art, coal-fired plants are the most reasonable selections to meet this need in a cost-effective, reliable manner.

In this proceeding the Public Service Commission ("PSC" or "the Commission") weighed and balanced a complex array of quantitative and qualitative factors. It then

applied the public-interest factors of the Certificate of Public Convenience and Necessity ("CPCN") statute to the facts of this case. It made a well-informed regulatory-policy judgment that the ERGS plants were the best available choices, and the court should affirm its judgment by reversing the circuit court's decision in this case.

II. WISCONSIN'S CUSTOMERS NEED NEW BASELOAD ELECTRIC CAPACITY.

The electric-supply portfolio that serves customers consists of three types of power plants. They are: (1) "baseload" plants operating (except for maintenance outages) twenty-four hours a day, seven days a week; (2) "intermediate" plants that run when electric usage is high, but not at its maximum level (such as weekday business hours); and (3) "peaking" plants that run only during times of highest or "peak" electric usage, such as hot summer days when air-conditioning is extensively used.

Electricity cannot be stored, and must be provided in real time to meet whatever the actual demand is. This demand varies depending upon a host of economic and weather conditions. Hence, a public utility like WEPCO must

"stack" power plants in an economic order of dispatch in order to minimize generating costs. Baseload plants are dispatched first, and provide the lion's share of the electricity. Because they provide so much of the electricity, it is essential that such plants be built when needed, that their production costs be low, and that their output be highly reliable.

Need for new baseload power plants is determined by two factors: an increase in total electric demand (as opposed to peak demand) and a decrease in baseload capacity (due to the aging and retirement of existing baseload plants).

The Commission found that WEPCO's total electric demand is likely to grow between 2003 and 2012 by 2.8% annually, or nearly 2,000 MW. Total electric energy consumption for the same period is expected to grow 2.5% annually. These growth rates are net of the savings that can be achieved through energy-efficiency and demand-side management programs. *Final Dec.* at 13-14.

The conclusion that total Wisconsin electrical usage is growing is confirmed in the state's most recent Strategic Energy Assessment ("SEA"). Wis. Stat. § 196.491(2)(a). The

SEA pointed out that since 2001 annualized electric demand has exceeded baseload capacity in the state. *Wisconsin's SEA Energy 2010*, PSC Docket No. 05-ES-102, (September 2004) ("*SEA Energy 2010*"), p. 55. Baseload facilities in Wisconsin are currently operating at or near maximum capacity. The 2% annual increase in electric consumption is being met by newly constructed natural gas-fired plants intended to operate only during the "intermediate" and "peak" phases of the load curve. Because these gas-fired plants are generally more expensive to operate, this tends to increase electric prices. *Id.* at 55-58.

Currently, Wisconsin's baseload generators consist of coal plants and nuclear plants. This fleet is aging. *Final Dec.* at 21. The Commission has not approved a new baseload coal-fired plant since 1980. *Id.* The current licenses for Wisconsin's two nuclear power plants (Point Beach and Kewaunee) expire in 2010 and 2013. *SEA Energy 2010* at 83.

Wisconsin is unable to access available baseload power outside the state because it has one of the most congested transmission systems in the country. *Id.* at 32. Simply put,

there is no ability to import additional baseload power into Wisconsin. The transmission system is already fully utilized. Given the long lead time for building high-voltage transmission lines, Wisconsin will not be able to rely in the near term upon electric imports to meet its need for new baseload capacity.

Nor is new nuclear capacity an immediately feasible option. Wisconsin has a nuclear-moratorium law, prohibiting the construction of new nuclear plants until the federal government solves the problem of nuclear-waste storage. Wis. Stat. § 196.493. It has not yet done so, because the designated federal repository – Yucca Mountain in Nevada – continues to be caught up in controversy and litigation. *See e.g. Nuclear Energy Inst. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004). Even if this problem were solved, new nuclear plants have a longer lead time than coal plants – a minimum of 8-10 years.

In Wisconsin natural-gas combustion turbines have historically been used to meet peak demand for electricity. Combined-cycle, gas-fired plants have helped meet intermediate demand. Gas-fired plants have not been used to

meet the need for baseload capacity for two reasons. First, the production cost of gas-fired plants is higher than the production price of coal and nuclear plants (mainly because the price of natural gas itself is much higher and more volatile than the price of coal or nuclear fuel). Secondly, the reliability of natural-gas supply is much less certain for Wisconsin than the reliability of coal and nuclear fuel.[3]

Wisconsin has an Energy Priority Law, which lists energy-efficiency and renewables, where cost-effective and technically feasible, as high priorities. Wis. Stat. §§ 1.12(4) and 196.025(1). No one would seriously maintain, however, that Wisconsin's anticipated baseload need can be met solely through energy-efficiency measures. The potential for achievable, cost-effective energy conservation in Wisconsin is simply not that great. The Commission studied this option carefully, and required WEPCO to capture substantial additional energy efficiency in its service territory. *Final Dec.* at 18.

[3] Section III and IV of this brief provide greater detail regarding these facts.

Wind is the most feasible renewable-energy resource, and Wisconsin has an adequate wind resource. For the simple reason that no one can accurately predict when and how much the wind will blow, however, we cannot rely on wind as a baseload resource, even if it were shown to be cost-effective. In this case the Commission evaluated the availability of renewable resources, and required WEPCO to considerably increase the portion of its electricity derived from renewables. *Id.* at 1-2.

This leaves coal-fired generation as the most practical option to provide Wisconsin's needed new baseload capacity.

III. FOR CUSTOMERS COAL IS A MUCH MORE COST-EFFECTIVE WAY TO MEET THIS NEED THAN NATURAL GAS.

The U.S. has often been called the "Saudi Arabia of coal." It has more proven, recoverable coal reserves than any country in the world - at least an estimated 275 billion tons. *See* Environmental Impact Statement ("EIS") at 79 and *Energy Information Sheet Coal Reserves,* U.S. Department of Energy, Energy Information Administration ("EIA") (updated August 2004) available at

www.eia.doe.gov/neic/infosheets/coalreserves.htm. This translates to more than 200 years of supply at current levels of usage. *Id.*

Moreover, high volumes of coal are conveniently transportable via rail. The U.S. has an extensive railroad system, including into Wisconsin.

Contrast this situation with that of natural gas. Remaining U.S. reserves of natural gas are much less, and U.S. production of natural gas has been falling off. *See Annual Energy Outlook 2005*, EIA (February 2005), p. 98, available at www.eia.doe.gov/oiaf/aeo/. Also, natural gas for electric production will always be a lower priority than natural gas for heating, especially in a northern state like Wisconsin.

Wisconsin is also an "end of the line" state for interstate gas pipelines. It is far from the sources of gas production. The pipeline capacity into the state is also quite limited. *SEA Energy 2010* at 79.

These supply and demand factors add up to one thing: coal is a markedly less expensive fuel for electric generation in

Wisconsin than natural gas, and will continue to be so into the future.

This conclusion is amply demonstrated in the record of this proceeding and in publicly available energy statistics. At the time of hearing in this case (2003) forecasted coal prices were about $1.35/MMBtu. EIS at 14. Gas prices were much higher and much more volatile, averaging $4/MMBtu and at times reaching nearly $6/MMBtu. (R. 18-157: 0884.) Since that time coal prices have increased, but are still less than $3/MMBtu, whereas the average gas price has increased in the most recent weekly period to $6.22/MMBtu. *See EIA Coal News and Markets* (updated February 17, 2005) available at www.eia.doe.gov/cneaf/coal/page/coalnews/coalmar.html; *EIA Natural Gas Weekly* (updated February 24, 2005) available at http://tonto.eia.doe.gov/oog/info/ngw/ngpf.asp.

Natural gas also has a considerably higher Marginal Energy Cost ("MEC") than coal. MEC is the cost of electric energy for the last unit produced, measured in dollars per megawatt hours ("MWh"). *SEA Energy 2010* at Appendix G. MEC is comprised of fuel costs and variable operation and

maintenance costs. In Wisconsin from 2000-2002, the average MEC for baseload coal plants was $9.00 to $16.75 per MWh. Natural gas combustion turbines used for peaking ranged from $54.00 to $92.50 per MWh, and natural gas combined-cycle generation ranged from $25.00 to $45.00 per MWh. *See id.* at 49.

WEPCO intends to use Eastern Bituminous Coal as the principal fuel for the ERGS units. *Final Dec.* at 3. The heat value (British Thermal Unit ("Btu") content) of such coal is very high. (R. 18-157: 1199-1200; Wisconsin Energy Appendix ("WE App.") 248-250.) The ERGS units will be Super-Critical Pulverized Coal ("SCPC") units, which will heat water to much higher temperatures and raise it to much higher pressures than traditional coal-generation techniques. *Final Dec.* at 7-8. This combination of coal type and combustion technique will mean that more of the high heat content of the coal will be used to produce electricity. These SCPC units will thus be much more efficient than traditional coal plants, and produce much more electricity (and fewer emissions) per ton of coal than they do.

From a customer perspective, the high cost of natural gas – and its well-documented price volatility – is too high a risk for a plant needed to produce electricity around the clock. Fuel cost is a major component of the price of baseload power, and in Wisconsin major increases in fuel costs are generally passed through to customers. *See* Wis. Admin. Code ch. PSC 116. For customers natural-gas price spikes are a double whammy. Most Wisconsin customers also depend upon natural gas as a fuel for heating homes and businesses. If they become dependent upon natural gas to produce electricity as well, and natural-gas price spikes continue, this would mean that their electric bill would increase at the same time as their gas bill. Using more natural gas to fire electric generators would provide no diversification to mitigate the cumulative effect on customers of natural gas price spikes. It would only magnify the impact of those spikes for customers when they occur, as they have frequently. EIS at 89.

IV. THESE COAL UNITS WILL BE A MORE RELIABLE SOURCE OF BASELOAD POWER FOR CUSTOMERS THAN NATURAL GAS-FIRED UNITS.

Customers routinely rank reliability equal to price when listing the attributes of electricity they need. Whether the customer is a homeowner, a farmer, a small business, or a manufacturer, the lights have to stay on, and the appliances and equipment have to keep operating. A continuous supply of electricity is a *sine qua non* for the state's economic well-being.

Electrical service can be interrupted for many reasons, including fuel curtailment. Coal, given its plentiful supply and ease of delivery to the state, is much less susceptible to curtailment than natural gas. An incident in January 2003 illustrates what can happen when natural-gas supplies are curtailed in Wisconsin. Due to gas pipeline and other supply concerns Wisconsin utilities and Independent Power Producers ("IPPs") were able to get only 25% of the state's gas-fired power plants online when they were needed. The result was that Wisconsin Power and Light Company's interruptible electric customers (many manufacturing plants

are in this category) lost their electricity at the same time as Wisconsin Public Service Corporation gas-system customers were curtailed. *SEA Energy 2010* at 80. This is a risk to reliability that would increase if Wisconsin became dependent on natural gas as a baseload electric fuel.

Since no major coal plant has been built in Wisconsin in 20 years, the state is becoming increasingly dependent on natural gas as the fuel to produce electricity. In 1997 Wisconsin's electric providers relied upon contracts with IPPs operating gas-fired plants for only 235 MW of power. In 2003 they relied upon them for 2,200 MWs of power. *Id.* at 16. Many owners of gas-fired plants in Wisconsin ship their gas under interruptible transportation contracts with the interstate pipelines. Other owners have firm transportation contracts, but even these contracts can be limited if the pipeline approaches its capacity limits due to unexpectedly cold weather (as actually occurred in Wisconsin in January 2003). *Id.* at 80.

Customers also cannot afford to be blind to the financial situation in the electric industry today. The financial

soundness of a baseload generator is a key prerequisite to reliability. If the owner becomes financially stressed, reliability is at risk. Ability to secure firm fuel supplies is threatened, and expenditures for operating and maintaining the plant may be decreased.

A non-utility IPP providing electricity from a gas-fired plant pursuant to a long-term contract is the real-world alternative to the ERGS coal plants. Since the Enron debacle, the IPP industry has not flourished. Many IPPs went bankrupt, those that survived saw their credit ratings plummet, and their ability to secure continuing credit severely compromised. They conceded that they might not be able to obtain an adequate supply of natural gas in the future. *See e.g.* R. 18-158: Exh. 195, Tab 5 at 5.

Wholesale competition for electricity is beneficial for customers, but only to the extent that it allows electric providers to choose which supplier offers the best deal in terms of cost and reliability. The ERGS plants will be owned by an affiliate of a Wisconsin public utility, leased to the public utility on fixed terms, and operated and maintained by

the public utility itself. *Final Dec.* at 28. The PSC will have continuing jurisdiction over the ERGS plants, through its regulation of WEPCO as a public utility and Wisconsin Energy as an energy holding company. Wis. Stat. §§ 196.02(1) and 196.795. For this reason, the financial soundness and reliability of the ERGS plants are more assured than the financial soundness and reliability of a baseload plant owned and operated by a non-utility IPP.

V. CONCLUSION.

Before deciding this case the PSC held weeks of public and technical hearings, took testimony from scores of witnesses, reviewed hundreds of exhibits, and completed a comprehensive Environmental Impact Statement. It applied its considerable experience, technical expertise, and specialized knowledge, and concluded that WEPCO customers needed new baseload electric capacity, and that the ERGS units were the best available means to meet this need. Many years ago this court recognized the special regulatory role which the PSC was assigned to play by the legislature to

achieve the 'supreme purpose' of "service as efficient as practicable at as low rates as just and practicable":

> The next section [current Wis. Stat. § 196.02(1)] deals with administration giving the Commission the broadest of legitimate powers in that regard so as to enable it to supply all details of administrative work. Note the language: "The [Public Service] Commission of Wisconsin is vested with power and jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient in the exercise of such power and jurisdiction." There is administrative authority to the limit, including quasi legislative as well as quasi judicial power.

Calumet Service Co. v. City of Chilton, 148 Wis. 334, 135 N.W. 131, 143 (1912).

Since that time, this court has carefully deferred to the reasonable regulatory judgments of the PSC in all but the most exceptional circumstances. No such circumstances exist in this case. On the contrary, the Commission did its job well, and made a reasonable regulatory judgment about the need for and cost and reliability of baseload units. The Wisconsin Energy Customers respectfully urge the court to recognize the paramount public need for a timely supply of cost-effective, reliable electricity for the customers of the state. Meeting this public need in this case requires a reversal of the circuit court's decision.

Dated this 28th day of February, 2005.

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FORM AND LENGTH 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 2,969 words.

Dated this 28th day of February, 2005.

Lee Cullen, SBN: 1014859

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 04-3179

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.

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,

(Caption continued on following pages)

ON APPEAL FROM THE NOVEMBER 29, 2004 DECISION AND ORDER
OF THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE DAVID FLANAGAN, PRESIDING.

BRIEF OF AMICUS CURIAE THE HISPANIC CHAMBER OF COMMERCE OF WISCONSIN, THE AFRICAN AMERICAN CHAMBER OF COMMERCE AND THE METROPOLITAN MILWAUKEE ASSOCIATION OF COMMERCE, INC.

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, 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
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INTRODUCTION

This case arises out of the lower court's erroneous substitution of its conclusions for those of the Public Service Commission (PSC) related to the issuance of a Certificate of Public Convenience and Necessity (CPCN) for the construction of two large coal-fired electric power plants in the City of Oak Creek. When the lower court determined that its judgment was better than the regulatory agency whose expertise is specifically comprised of the matters to be analyzed and interpreted prior to the issuance of a CPCN, the lower court not only violated well established rules governing the review of such a decision by the PSC,[1] but also created the environment within which the failure to obtain the CPCN in question resulted in a

[1] The full panoply of the errors committed below will not be addressed in this brief. Only those errors with a direct impact on the amicus who are responsible for the submission of this brief will be addressed. However, one would be remiss not to comment upon a rather obvious problem with the lower court's decision. When the lower court's decision in a case like this is more than fifty pages long, indeed only a handful of pages shorter that the PSC's decision itself, and is packed full of specific factual references with which the lower court takes issue with the PSC's determinations, only one conclusion can be drawn - the lower court thought itself in a better position to make a regulatory determination than the PSC. Such a substitution of judgment by a reviewing court is simply wrong.

disparate impact upon the Hispanic and African American business communities.

The Hispanic Chamber of Commerce of Wisconsin and The African American Chamber of Commerce, Inc. advocate for and promote the economic development of the Hispanic and African American business communities within the City of Milwaukee and the State of Wisconsin. The Metropolitan Milwaukee Association of Commerce (MMAC) serves and advocates for metro Milwaukee companies to encourage business development, capital investment and job creation. The Chambers collectively seek to provide training, references and access to resources needed to create and expand commercial enterprises owned by Hispanics, African Americans and the Wisconsin business community as a whole. The construction of this project in Oak Creek would materially benefit the Hispanic and African American communities in three ways: (i) Since the vast majority of minority business enterprises that could be involved in the construction of a project like the one at issue are located in close proximity to the construction site, the ability of minority business enterprises to effectively compete and obtain bids for work on the project is greatly enhanced;

(ii) The largest population of Hispanics and African Americans in Wisconsin are located in close proximity to the site and are a ready component of the workforce that will then operate the proposed facilities once they are constructed, and (iii) Construction of the facilities would help to assure the availability of electricity at fair prices.

If the facilities are not constructed because of delay due to improper court intervention, the supply of electricity must then be supplemented by higher cost providers off of the electric grid. The companies most impacted by such higher costs are those least able to face such cost increases - the minority business enterprises.

The Chambers also oppose significantly greater amounts of state business dollars spent out of State if a natural gas plant is pursued. A natural gas plant would squander the business benefit associated with plant construction and ongoing plant operations by sending most Wisconsin dollars out of state. A comparable coal plant would keep most Wisconsin dollars in state and with the Wisconsin business community throughout the life of the plant.

I. THE LOWER COURT'S DECISION AND REDEFINING OF PSC RULES AND WISCONSIN STATUTES REGARDING CONSIDERATION OF "ALTERNATE SITES" AND FUEL SOURCES ADVERSELY IMPACTS THE HISPANIC AND AFRICAN AMERICAN COMMUNITIES.

A. The PSC was in Fact Presented with and Considered Two or More Alternative Sites, Such That the PSC Finding Should be Reinstated.

The thrust of the lower court's redefinition of the alternative site requirement of §196.491(3)(d)3, Wis. Stats., and Wis. Admin. Code sec. PSC 111.53(1)(e) seems to be based upon the erroneous theory that even though "none of the three submitted alternatives used precisely the same portion of the parcel,"[2] since "each of the three WEC alternatives could use precisely the exact same land (sic)" alternate locations or sites had not been submitted or considered. Lower Court Decision and Order at 13. In reaching that conclusion the lower court ignored the more significant alternative site distinctions defined by PSC rule and decision which properly determined that while the site proposed were within the same large parcel of land they (1) were in different municipalities and different

[2] Since the three submitted alternatives did not use the same portion of a larger parcel of land by the simplest definition of "alternate location" the three alternatives presented the PSC plants in three different physical locations. They had to be since the plants could not be built one on top of the other.

counties, (2) had different construction needs and potential environmental impacts, and (3) had different costs due to municipal government involvement and acceptance of lack of acceptance.

The more reasoned conclusion is that of the administrative agency charged with making the determination of whether real alternative sites are proposed. It is only at the administrative level that scrutiny of sites based upon the special skill set of the PSC can be made. The lower court should not have inserted itself in this process to reach a conclusion contrary to that of the PSC where their conclusion was, at a minimum, reasonable.

By inserting itself into the process and rejecting the CPCN for the Oak Creek facilities, the lower court will frustrate and potentially vitiate WEC's Proposed Supplier Diversity Program. See R. 18-119, Chapter 11, pp. 308-309.[3] This will create a direct and adverse impact on the Hispanic and African American Communities. The vast majority of minority owned businesses that could be involved in the construction of the facilities are located in Milwaukee County. See, 1997 Economic Census, Minority

[3] R. _____ refers to pages in the Record.

and Woman Owned Businesses, Milwaukee, WI, U.S. Census Bureau (last updated July, 2001). If the facilities are moved to a different location, say Sheboygan, Fond du Lac or a Jefferson County site, those businesses would be put at a competitive disadvantage in the bidding process to obtain work related to construction of the facilities.

Furthermore, if the facilities are moved from the Oak Creek approved site, Hispanic and African American workers will be all but shut out of the opportunity to gain employment once the facilities are constructed and operational. According to the U.S. Census Bureau in Milwaukee County, there are approximately 231,157 African Americans, and 82,406 Hispanic or Latino Americans. See, Census 2000 Data for the State of Wisconsin. More than 60% percent of the entire African American/Hispanic residents of the State of Wisconsin live in Milwaukee County. See, Census 2000 Data for the State of Wisconsin. In the neighboring counties of Jefferson, Walworth, Washington, Racine, Waukesha, and Kenosha, there are a total of 31,488 African Americans, and 45,949 Hispanic or Latino Americans. If the facilities are moved from the Oak Creek site, in Southern Milwaukee County, to a site in an outlying county,

more than three hundred and ninety thousand potential African-American and Hispanic Americans, or 79% percent of the entire state population of those communities, will be readily eliminated from the potential workforce for these facilities. The PSC decision properly benefits minority communities in dire need of economic opportunity.

B. A Natural Gas Powered Alternative Plant Sends Most Dollars Out of State, While a Coal Plant Over Time Will Spend Most Dollars in Wisconsin by Dramatically Higher Amounts.

The PSC was presented with substantial evidence that natural gas would not be an available and cost-effective fuel choice over the expected life of the facilities.[4] Although from a pragmatic perspective, this would appear to be rather determinative of following the PSC decision, it is important to note that the Wisconsin business community would be negatively affected by the choice of a gas plant versus a coal plant.

[4] The lower court's conclusion that alternative fuel sources, especially natural gas ignores the technical rationale for choice of fuel source in this case - whether the fuel is available for use in a baseload mode facility and at what price. R. 89, pp. 47 - 48. Decisions regarding availability and cost-effectiveness of fuel sources are at the core of the expertise of the PSC and should not be second-guessed by a lower court that may prefer alternative fuel sources.

The PSC considered, in the process of selection of the type of facility to be built, the impact on the local community in terms of jobs and capital infrastructure as opposed to actual fuel costs in reaching its conclusion. The contrast between a coal-fired facility and a gas-fired facility is stark. With a coal-fired facility, 75% of the monies spent over the life of the facility are capital investment and actual labor needs while only 25% comes from fuel. With a gas-fired facility, the opposite is true. With a gas-fired facility, 25% of the monies spent over the life of the facility are capital investment and actual labor needs while 75% comes from fuel costs, money that would leave the State. R. 18-158, Exhibit 32, Table 1-8, pp. 30 of 53. The conclusion is inescapable - if a coal-fired plant alternative is selected more capital investment is made in the local economy thereby providing for more opportunity for minority businesses and other Wisconsin business to participate in work needed to complete the construction cost. Also, more minorities and other Wisconsinites have the opportunity to be employed in the day-to-day operations of such a facility. If a natural gas-fired plant alternative is selected, fewer jobs are

created locally and the vast majority of the expenditures for the facility are made to the natural gas suppliers out of state with no benefit to our communities of approximately 50% of the total dollars to be spent.

II. THE DECISION AND ORDER OF THE LOWER COURT, IF NOT SOON REVERSED, WILL RESULT IN HIGHER ENERGY COSTS FOR ALL BUSINESSES AND CONSUMERS IN THE WEC DISTRIBUTION AREA BASED UPON THE COST OF DELAY AND THE COST OF PURCHASED POWER FROM OUTSIDE VENDORS - THESE HIGHER ENERGY COSTS ARE NOT IN THE PUBLIC INTEREST AND DISPROPORTIONATELY IMPACT THE MINORITY COMMUNITY.

The one thing in which the PSC, the lower court and WEC all agree upon is that forecasted demand coupled with the need to replace aging facilities, demonstrate the need for new baseload generation within the next decade. PSC Decision and Order of November 10, 2003, at p. 5; Id., at pp. 25-26. Indeed the urgent need to construct facilities to meet this projected need was the basis for WEC's request that this Court exercise immediate and expedited jurisdiction over this case. See Petition for Expedited and Immediate Review, at p. 6. If the baseload generation capacity is not available due to delay in construction of the facilities the result is inexorable - WEC will be forced to purchase higher cost supply from the power grid which will necessarily result in higher costs to consumers.

See, Id.; Accord, Affidavits of Eddy Liu and Tom Metcalfe (regarding increased costs associated with delay.)

While such a result is generally not in the public interest, the impact of unwarranted delay in the creation of baseload generation capacity has a disproportionate impact upon minority businesses. This is true because minority owned businesses as a whole often have a smaller capital base, less gross income and lower profit margins than their majority counterparts. See, 1997 Economic Census, Minority and Woman Owned Businesses, Milwaukee, WI, U.S. Census Bureau (last updated July, 2001).[5] Any added cost, energy costs included, has a direct and adverse impact on all businesses and consumers, however, those businesses in the minority community, based upon their relative size, capitalization, gross income and profit margins have less ability than their majority counterparts to absorb the additional costs. That result is not only unfair but is contrary to public policy, particularly when such outcome could be averted and otherwise diminished.

[5] For example, minority business enterprises had average annual sales of $637,189 versus $2,535,227 for their majority counterparts.

It would be one thing if the baseload generation capacity was delayed based upon actual failures on the part of the PSC to fulfill its administrative duties or as a result of inadequate justification being supplied by WEC, however, neither of those events happened here. On the contrary, this hardship has been created by the lower court rather than the PSC, assuming it was in the best position to determine whether a CPCN should issue based upon the administrative record. That result is simply wrong and should be overturned by this Court.

CONCLUSION

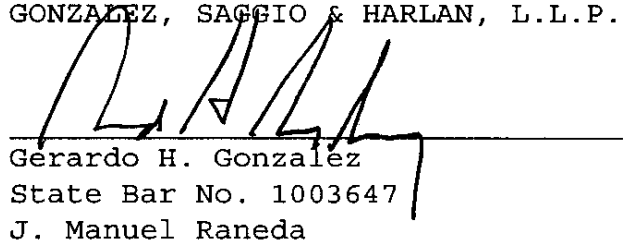
The businesses and consumers of the State of Wisconsin are adversely impacted when a court substitutes its judgment for that of the administrative agency charged with making decisions that are technical and rely upon administrative expertise. Potential minority job candidates and minority business enterprises are especially impacted in this case due to the attempts move this plant outside of their practical reach or to convert the fuel type to one that results in loss of jobs in the local economy. This Court should reverse the decision of the lower court and make it clear that the administrative

agencies, in this case the PSC, have the ability and authority to make decisions within their area of expertise without being second guessed by the courts of this State.

Dated this 28th day of February, 2005.

Respectfully Submitted,

GONZALEZ, SAGGIO & HARLAN, L.L.P.



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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(b) and (c), Wis. Stats., for a brief produced using the following font:

-- Monospaced font: 10 characters per inch; double spaced; a 1.5 inch margin on the left side and a one inch margin on all other sides; with a maximum length of 13 pages.

Dated this 28th day of February, 2005.

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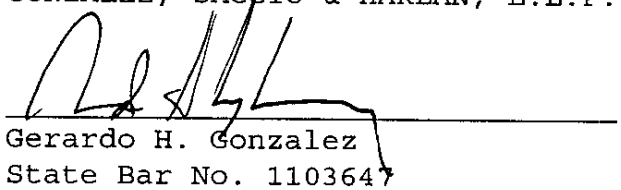

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STATE OF WISCONSIN
SUPREME COURT

Clean Wisconsin, Inc., p/k/a Wisconsin's Environmental Decade Institute, Inc., S.C., Johnson & Son, Inc. and Calpine Corporation,

Petitioners-Respondents,

Appeal No. 04-3179

Town of Caledonia,

Petitioner,

v.

Circuit Court Case Nos. 03CV3478, 03CV3731, 04CV133, 04CV149, 04CV530, 04CV533

Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources,

Respondents-Co-Appellants,

Wisconsin Electric Power Company, W.E. Power, LLC and Wisconsin Energy Corporation,

Interested Parties-Appellants,

(Caption continued on following pages)

NONPARTY BRIEF OF AMERICAN TRANSMISSION COMPANY, LLC, WISCONSIN MANUFACTURERS AND COMMERCE AND WISCONSIN MERCHANTS FEDERATION

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Dated: March 7, 2005

Dairyland Power Cooperative, Madison Gas &
Electric Company and Wisconsin Public Power, Inc.,

Interested Parties,

City of Oak Creek and Robert H. Owen,

Interested Parties-Respondents.

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
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.

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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This appeal does not want for parties, briefs or issues. Nor does it want for statewide significance and impact.

While the appellate debate stands framed in the vocabulary of statutory interpretation and administrative procedure, the principal stakes are economic and pervasive. For a century, perhaps more than any other state, Wisconsin has valued and used its regulatory authority to protect its resources and its citizens. Yet regulation, without context or balance, defeats its own purpose. Far from protecting the state, judicially-imposed regulation can jeopardize its economic future. The circuit court's decision would have that unintended effect here.

The American Transmission Company, LLC ("ATC"),[1] a public utility owned by electric public utilities, owns most of the state's electric transmission lines. *See* WIS. STAT. § 196.485. Wisconsin Manufacturers and Commerce ("WMC") and the Wisconsin Merchants Federation ("WMF") represent the state's businesses, large and small, that are powerless, literally and figuratively, without reliable energy. The circuit court's decision, left undisturbed, will increase the cost of electricity and delay the state's effort to increase energy reliability. ATC, WMC and

[1] In this brief, "ATC" refers to ATC, LLC, which owns the transmission assets, and ATC Management, Inc., a member of ATC, LLC which manages ATC, LLC. Both of these entities operate as a single transmission company.

WMF, as non-parties, join the Public Service Commission ("PSC") and the other appellants asking this Court to reinstate the PSC's decision approving the Elm Road Generation Station facility ("ERGS").

ARGUMENT

This brief, submitted pursuant to the Court's February 14, 2005 order, addresses the issues in this appeal involving transmission lines:

- Whether WIS. ADMIN. CODE § PSC 111.53(1)(f) requires an applicant for a Certificate of Public Convenience and Necessity ("CPCN") to submit executed transmission line agreements before the application can be deemed complete; and
- Whether WIS. STAT. § 196.491(3)(d)3 requires the PSC to "determine" the "design and location" of transmission facilities before issuing a CPCN.

The answer to both questions is no.

Nevertheless, the circuit court improperly overturned the PSC's Final Decision *conditionally* approving ERGS because Wisconsin Energy Corporation ("WE")[2] had failed, in its opinion, to submit the required proof with its CPCN application and the PSC had failed to make required findings about the facilities. The court overstepped its authority and its regulatory competence, however, substituting its public policy judgments

[2] In this brief, "WE" includes Wisconsin Energy Corporation and its subsidiaries, Wisconsin Electric Power Company ("WEPCO") and W.E. Power, LLC, a limited liability company formed to own ERGS and the separate Port Washington Generating Station ("PWGS").

for the PSC's. The court should have deferred to the PSC decision construing its own rule and regulatory processes entrusted to it by law.

I. THE STANDARD OF REVIEW REQUIRES JUDICIAL OVERSIGHT WITH DEFERENCE.

This Court necessarily will examine the PSC decision itself, without deference to the circuit court's conclusions. *See Citizens' Utility Bd. v. PSC*, 211 Wis. 2d 537, 543-44, 565 N.W.2d 554 (Ct. App. 1997). While not every agency decision faces Chapter 227 judicial review on the same terms, this Court's standards are clear. When an agency is construing its own rule, its interpretation receives great weight deference. *Marder v. Bd. of Regents*, 2004 WI App 177, ¶27 n.3, 276 Wis. 2d 186, 687 N.W.2d 832 (review granted Dec. 15, 2004).

An administrative decision construing a statute should be given that deference especially if the agency uses "its expertise or specialized knowledge" and its statutory interpretation will provide uniformity and consistency. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660, 539 N.W.2d 98 (1995). In this case, the PSC has long-standing and substantial—indeed, exclusive—experience processing CPCN applications and applying Chapter 196. *See Responsible Use of Rural & Agric. Land (RURAL) v. PSC*, 2000 WI 129, ¶24, 239 Wis. 2d 660, 619 N.W.2d 888.

The circuit court nevertheless found that the PSC's Final Decision construing § 196.491(3) was not entitled to any deference, ignoring the agency's experience. The "granting of CPCN approval without considering the question of transmission facilities," it held, "does not appear to be an interpretation of long standing, nor does it appear that this approach will provide uniformity and consistency." Order Upon Judicial Review of Public Service Commission Order, p. 32 ("Circuit Court Order"). Whether to give great weight to an administrative decision depends upon the agency's expertise and experience, however, not on whether it has ever examined substantially similar facts. *F.M. Mgmt. Co. Ltd. P'ship v. Wis. Dep't of Revenue*, 2004 WI App 19, ¶5, 269 Wis. 2d 526, 674 N.W.2d 922.

When, as here, legal questions are intertwined with value or policy determinations, courts should defer to the agency with primary responsibility for that policy. *See Hutson v. State Pers. Comm'n*, 2003 WI 97, ¶32, 263 Wis. 2d 612, 665 N.W.2d 212. The PSC necessarily weighed public policy considerations throughout its Final Decision. *See, e.g.*, Final Decision, pp. 15-16 ("the Commission is responsible for harmonizing the Energy Priorities Law and the Power Plant Siting Law,...to determine...the public interest); *id.* at 22 ("it is in the public interest to have more reliable baseload generation in place sooner rather than later as a matter of public

policy"). This appeal, given the public policy issues it presents, provides the quintessential predicate for great weight deference.

The circuit court repeatedly and improperly substituted its policy judgments for the PSC's. "It is certainly true," the court wrote, for example, that § 196.491(3)(d)3 "does not expressly compel the inclusion of transmission facilities[,] but this court concludes that 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 [is] contrary to the legislature's intent...." Circuit Court Order, p. 32. The legislature's intent, however, was unmistakable precisely because it did *not* "expressly compel" those determinations.

Giving the administrative analysis the great weight it deserves, this Court should sustain the PSC's Final Decision if it is reasonable, and it is the challengers' burden to demonstrate that the PSC's approval was unreasonable. *Citizens' Utility Bd.*, 211 Wis. 2d at 552-53. "An interpretation is unreasonable only if it directly contravenes the words of a statute, if it is clearly contrary to legislative intent or it is without a rational basis." *Id.* at 553. The PSC decision, especially with respect to the transmission facilities, violates none of those standards.

II. WIS. ADMIN. CODE § PSC 111.53(1)(f) DOES NOT REQUIRE A CPCN APPLICANT HAVE EXECUTED TRANSMISSION AGREEMENTS BEFORE FILING ITS APPLICATION.

The plain language of PSC § 111.53(1)(f) requires the applicant to submit *information* regarding transmission line construction and agreements.[3] The rule also requires the applicant to provide information about the regulatory process for the facility's construction and operation, the construction schedule, the availability of transportation for fuel delivery, the requirements for gas pipeline and other auxiliary facilities, and the natural resources at the site. *Id.*

Section 111.53(1)(f) is not ambiguous. The rule does not, on its face, require applicants to submit final transmission line agreements with the CPCN filing. The circuit court should have ended its inquiry there, *see*

---

[3] 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*...:

....

(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...and voltage for each transmission line.

....

PSC § 111.53(1)(f) (emphasis added).

State v. Peters, 2003 WI 88, ¶14, 263 Wis. 2d 475, 665 N.W.2d 171, but it went much farther—transforming application guidelines into regulatory shackles. The issue is not whether the application contained executed transmission line agreements, *see* Circuit Court Order, p. 20, but whether they were required for the application. If the PSC had intended to require applicants to have executed final transmission agreements in hand before it could consider the project, it would have specified that in its rule.

The respondents simply quote the rule and summarily state that it "does not require information 'regarding' transmission line agreements for use." Respondents Clean Wisconsin, Inc. and S.C. Johnson & Son, Inc.'s Response Brief, p. 22. They ignore the unambiguous language of the rule, demanding instead that CPCN applicants provide more than just "information."

Even if PSC § 111.53(1)(f) were deemed ambiguous, the PSC's construction of its own rule advances its obvious purpose—to enable the PSC to make a well-informed decision about the proposed project. The rule describes the information required for a complete application, and a complete application naturally requires "information" sufficient for the PSC to make a well-informed decision.

Ignoring a basic rule of construction, the circuit court read the word "information" out of the rule. "It is presumed that the legislature [or an administrative agency] is cognizant of what language to include or omit when it enacts laws." *F.M. Mgmt. Co. Ltd. P'ship*, 2004 WI App 19, ¶12. "Each word should be looked at so as not to render any portion of the statute superfluous." *In re Morford*, 2004 WI 5, ¶21, 268 Wis. 2d 300, 674 N.W.2d 349.

For instance, in *Hutson*, 2003 WI 97, ¶49, this Court construed the definition of "mismanagement" in WIS. STAT. § 230.80(7): "a pattern of incompetent management actions...." This Court rejected the court of appeals' construction of the word "pattern" to mean that only one action could trigger the definition. "[I]f the term 'pattern' means what the court of appeals suggests," the Court concluded, "it is essentially rendered superfluous...." *Id.* No words in a statute or administrative rule—whether "pattern" or "information"—can be ignored.

If the rule required executed transmission agreements, then the phrase "site-related information" would have been omitted:

> [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) [Omitted.] [F]or each proposed power plant site...:
>
> ....

> 4. Any required transmission line construction, [and] agreements for use of the transmission system to deliver plant power....

But the phrase was not omitted.

Even putting aside the word "information," the PSC's decision reflected the rule's focus on "required" transmission agreements, *see* PSC § 111.53(1)(f)4, in turn reflecting the current structure of the electric industry. ATC, in conjunction with the Midwest Independent Transmission System Operator, Inc. ("MISO"), are, respectively, the owners of the electric transmission lines and related facilities in the eastern two-thirds of the state and the provider of transmission service under federal law over those lines and facilities. In the last decade, there has been a "massive shift in regulatory jurisdiction from the states to the FERC" in the electric industry. *See* Carmen L. Gentile, *The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future*, 21 ENERGY L.J. 353, 373 (2000). Today, the transmission service that would be required for the power generated at ERGS is governed by federal tariffs, not state law or individual transmission service agreements.

In Order No. 888,[4] the FERC required public utilities under the Federal Power Act[5] to provide others access to their transmission lines, establishing a single *pro forma* tariff that established the minimum terms and conditions of transmission service. All public utilities that own, control or operate transmission facilities, including MISO, are required to file an Open Access Transmission Tariff ("OATT") with the FERC.

Therefore, the transmission service that would be necessary for this generating facility would be provided under federally approved tariff provisions, and the only other relevant "transmission agreements" to which the appellants or ATC could be a party would be a generator interconnection agreement, the terms of which are also governed by federal regulation and tariff requirements,[6] leaving little room for case-by-case negotiation.

WE necessarily relies on ATC for transmission facilities' information, and ATC is subject to federal timetables—timetables often at

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[4] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. and Regs. ¶ 31,036 (1996).

[5] 16 U.S.C. § 824 *et seq*. (2000 and Supp. 2004).

[6] *Standardization of Large Generator Interconnection Agreement and Procedures,* FERC Order Nos. 2003, 2003-A, 2003-B.

odds with the CPCN process. When a generator of electricity needs to interconnect to the transmission system, it must submit a request to MISO. Before ATC can upgrade its system to connect a generating facility, extensive technical studies need to be completed, and a interconnection agreement, conforming to the FERC's requirements, must be entered into and filed for approval with the FERC—a complex process that can take up to two years.

Unlike the circuit court, this Court cannot ignore the significant relationship between federal and state regulations. A decision to affirm the circuit court's interpretation of PSC § 111.53 would impermissibly ignore federal law and regulation implications, the jurisdiction of the FERC over the interconnection of generators to ATC's transmission system and the rendition of transmission service over ATC's transmission lines and facilities. *See* § 196.485(3m)(d) ("The transmission company is subject to the jurisdiction of the commission except to the extent that it is subject to the exclusive jurisdiction of the federal energy regulatory commission.")

III. WIS. STAT. § 196.491(3)(d)3 DOES NOT REQUIRE THE PSC TO "DETERMINE" THE FINAL "DESIGN AND LOCATION" OF THE TRANSMISSION FACILITIES.

The PSC is responsible for determining whether the proposed generating facility's design and location are in the public interest—

considering alternative sources of supply, alternative locations and a range of other factors:

> Except as provided under par. (e) and s. 196.493, the commission shall approve an application...only if the commission determines all of the following:
> ....
> 3. The design and location or route is in the public interest....

§ 196.491(3)(d)3.[7] The plain language of the statute does not, as the circuit court incorrectly held it does, require applicants to submit information on the precise or final design, "cost" and location of proposed transmission facilities. Indeed, while the circuit court repeatedly referred to "cost," the word does not appear in the statutory section.

To reach its decision, the circuit court again impermissibly wrote an obligation into the statute, openly conceding that the PSC has special expertise in this area and the statute does not expressly require "the inclusion of transmission facilities" in its analysis. Circuit Court Order, p. 32. Nevertheless, it held, "that those [transmission] facilities are so integral and necessary to the planned generation plant that the decision to

[7] Section 196.491(3)(d)3 refers to design and location *or* route. Depending on the facility being considered for a CPCN, therefore, different types of determinations are required. In this case, the proposed facility was ERGS and, therefore, design and location are the operative terms, not "route."

grant approval without determining the design, *cost* and location of those facilities [is] contrary to the legislature's intent...." *Id.* (emphasis added).

The circuit court cannot re-write the statute to reflect its preconceived notions about the CPCN process. The statute does not mention formal findings regarding the design, "cost" or location of transmission facilities, and courts can "not read extra words into a statute to achieve a specific result." *Lang v. Lang*, 161 Wis. 2d 210, 224, 467 N.W.2d 772 (1991). Section 196.491(3) repeatedly refers to the "proposed facility," not to transmission facilities. Had the legislature intended the PSC to make specific findings on transmission line routes and substations a precondition to a CPCN, it would have so provided.

The circuit court conceded that the plain language of the statute requires only a determination of whether the design and location of the proposed facility is in the public interest. The PSC made that determination. This Court should not consider extraneous requirements written into the statute by the circuit court.

IV. THE PSC EVALUATED THE TRANSMISSION FACILITIES TO BE USED BY ERGS.

WE's CPCN application, deemed incomplete by the circuit court, included all of the available information on the transmission facilities to be used in conjunction with the proposed power plant. WE submitted ATC's

comprehensive interconnection studies and environmental information. The respondents' argument that the final environmental impact statement ("FEIS") did not include information on the environmental impact of the transmission facilities is inaccurate. *See* Brief of Clean Wisconsin, Inc. and S.C. Johnson & Son, Inc., p. 46. The PSC considered this argument and rejected it. Final Decision, p. 56.

The FEIS contained extensive information about the proposed transmission facilities—including projected costs, recently approved transmission capacity, interconnection, substation changes, and the effects of the proposed improvements on new and existing transmission lines. *See* FEIS pp. 15-16, 35-36, 126-32, 345-50 (WE's Supplemental Appendix). The PSC specifically considered this information in its Final Decision, ordering WE to work with ATC, the DNR and neighboring communities to minimize the costs and environmental impact of moving and reconfiguring the existing substations. *See* Final Decision, pp. 10-12, 58.

The PSC emphasized that the transmission facilities would be constructed and operated by ATC, which was still conducting additional studies to determine how its facilities needed to be constructed or upgraded. Since the Final Decision, ATC has submitted additional information to the PSC and, in fact, just received its conditional approval for the construction

of transmission facilities for ERGS. *See* PSC Certificate and Order, Docket 137-CE-133 (Feb. 7, 2005).

Section 196.491(3)(d)3 and PSC § 111.53(1)(f) require that the PSC collect information regarding the transmission lines that will be used and make a determination whether the generating facility will be in the public interest. Nothing less and nothing more. These requirements were more than satisfied here.

V. THE STATE'S ENERGY NEEDS AND INDEPENDENCE ARE CENTRAL TO THE EVALUATION OF ANY APPLICATION.

Public policy considerations are vital in any statutory construction case, especially in this appeal where the statute and rule were enacted and adopted, respectively, to advance specific policy considerations. *See Rogers Dev't, Inc. v. Rock County Planning & Dev't Comm.*, 2003 WI App 113, ¶16, 265 Wis. 2d 214, 666 N.W.2d 504 ("We will not construe a statute in opposition to the legislative policy underlying the statute."). Neither state regulators, nor the courts reviewing their work with appropriate deference, can turn a blind eye toward the economic consequences of their decisions. Subject to judicial review, the PSC's primary duty is to regulate Wisconsin utilities in the public interest.

The circuit court's construction would not only defeat the objectives of § 196.491 and PSC § 111.53, it would make the CPCN approval process virtually unworkable. All the findings and agreements the circuit court concluded were required before the CPCN application could be filed (let alone approved) are, in fact, impossible to obtain before that approval.

The circuit court's decision would delay construction for years at the same time the PSC's modeling has demonstrated that construction needs to begin immediately to meet Wisconsin's baseload energy demands. *See* Final Decision, p. 20. And that could not have been the intent of a statute designed to facilitate energy production.[8]

As Wisconsin's economy grows, its energy sources must grow with it. The PSC's EGEAS models clearly demonstrate the need for new baseload generation over the next ten years. *See id.* While other parties challenged these models, the PSC was "not persuaded by the argument

[8] Section 196.491, drafted in 1975, could not have contemplated either the intricacies of ATC's regulatory requirements or the very existence of a transmission company. But the PSC could and did take that into account in its rules and its Final Decision here.

raised by certain parties concerning the reasonableness of WEPCO's capacity and energy needs." *Id.* at 13.[9]

Wisconsin has taken affirmative steps to ensure that its energy supply keeps pace with the demand. One of the principal goals of § 196.491(3)(a) was to establish an "orderly and efficient process through which utilities can obtain a permit to construct specific generators or high-voltage transmission lines." WIS. STAT. § 196.491, Legislative Council Note—1975. 1997 Wisconsin Act 204 streamlined the approval process for new electric plants. *See RURAL*, 2000 WI 129, ¶31.

The 1997 act also required Wisconsin utilities to begin transferring their transmission facilities to an Independent System Operator, which became ATC. Several years later, the legislature passed the Reliability 2000 Initiative specifically to increase the reliability of the state's electricity supply and foster economic growth. *See* Budget Brief 99-1, *Electric Reliability 2000*, Wisconsin Legislative Reference Bureau (Nov. 1999);[10] 1999 Wis. Act 9. In 2003 Wisconsin Act 89, the legislature further

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[9] Wisconsin has had electric use growth of 2.5 percent annually over the past decade. Almost 70 percent of Wisconsin's electricity sales go to the state's industrial and commercial sectors. *See* Wisconsin Division of Energy, Department of Administration, 2004 Wisconsin Energy Statistics Highlights, pp. 1-4, 16 ("Highlights") (available at http://www.doa.state.wi.us/docs_view2.asp?docid=4264).

[10] Available at http://www.legis.state.wi.us/lrb/pubs/budbriefs/99bb1.pdf.

expedited the administrative review process for electric power plants and certain transmission line projects. *See* Wisconsin Legislative Council Memorandum No. IM-2004-5.

More recently, Governor Doyle has created a Task Force on Energy Efficiency and Renewables in Executive Order No. 25.[11] In its first paragraph, the order states that "supplying reliable electric energy at reasonable rates with as little impact on the environment as practicable is a key to fueling Wisconsin's economic development...." The task force's report cited fostering the state's economic growth and decreasing Wisconsin's dependence on out-of-state energy as two of the state's most important goals.

Historically, Wisconsin has been overly dependent on out-of-state energy. Approximately two-thirds of Wisconsin's energy expenditures, $9 billion, left the state's economy in 2003. *See* Highlights, p. 1. For obvious reasons, this harms the state's economy, threatening the stability and availability of the energy supply for Wisconsin's consumers.

Several parties to this appeal have also challenged the choice of fuel for ERGS. Coal, the PSC found, is the most appropriate energy source for Wisconsin businesses' baseload needs. *See* Final Decision, p. 21. While

[11] Available at http://www.wisgov.state.wi.us/journal_media_detail.asp?prid=264.

Calpine Corporation may understandably be disappointed that it was not awarded the contract to provide this baseload energy supply, the PSC made a well-informed decision that Calpine's natural gas would not be a practical choice. *Id.* at 30-31.

The PSC concluded that the ERGS proposal is the most "cost-effective and technically feasible way to address WEPCO's baseload needs." Final Decision, p. 21. This conclusion 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." *Id.*

Before ERGS, the PSC had not approved a new baseload, coal-fired facility since 1980, notwithstanding a baseload supply in dire need of replacement. *Id.* In fact, the PSC recently approved the retirement of a 65-year old existing baseload, coal-fired facility in Port Washington, Wisconsin. *Id.* at 22. ERGS would be 50 percent more efficient than the Port Washington facility and produce radically lower emissions. WE App. 120. The PSC concluded that it was not a matter of *whether* Wisconsin required additional coal-fired baseload energy, but a matter of

when it was needed. Final Decision, p. 24. The PSC's answer: now. On review, it should be this Court's answer as well.

Affordable, reliable electricity keeps stores and schools open, factories running, homes functioning, and hospitals and businesses operating. The ERGS facility and the PWGS natural-gas fired facility proposed in conjunction with it will help provide needed, reasonably priced, reliable electricity for Wisconsin businesses and residential consumers.

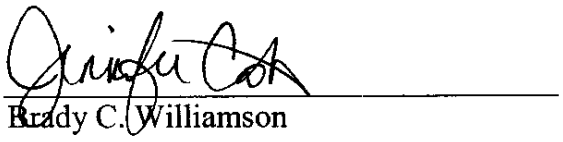
CONCLUSION

For the reasons stated above and in the briefs filed by the PSC and the other appellants, this Court should reverse the decision of the Dane County Circuit Court and reinstate the PSC's approval of the ERGS facility so needed by the state and its industrial and commercial consumers.

Dated: March 7, 2005.

Respectfully submitted,

LA FOLLETTE GODFREY & KAHN



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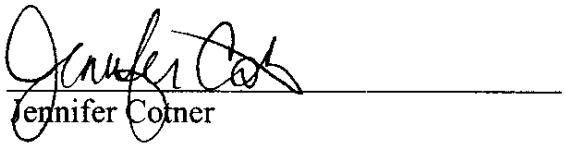
CERTIFICATION

I hereby certify that this brief conforms to the requirements of sections 809.19(8)(b) and (c), Stats., and this Court's February 14, 2005 Order for a brief produced with a proportional font. The length of this brief is 3,953 words.

Dated: March 7, 2005.



Jennifer Cotner

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,

Circuit Court Case No.
03CV3478, 03CV3731
04CV133, 04CV149
04CV530, 04CV533

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,

(Caption continued on following pages)

AMICUS CURIAE BRIEF OF THE STATE OF ILLINOIS

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 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.

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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PRELIMINARY STATEMENT

The proposed Elm Road Generating Station ("ERGS"), although physically located in Wisconsin, would not confine its impacts to Wisconsin. The facility's effects on water and air would not respect the state's boundary. Any harm caused by the facility to Lake Michigan and its fishery would necessarily impact Illinois residents as well, as would air emissions traveling south into heavily-populated northern Illinois.

Indeed, the record is clear that the proposed ERGS would have a significant negative impact on the natural resources shared by Wisconsin and Illinois, and on the health of both states' citizens. The facility would discharge into Lake Michigan and the atmosphere a large volume of mercury, a contaminant of particular concern because of its bioaccumulation in fish and toxicity to children and developing fetuses. Illinois and Wisconsin both have imposed a statewide mercury advisory because of the high mercury concentrations in found in fish, which have adversely impacted the commercial and sport fishing

industries; and ERGS would further exacerbate those conditions. In addition, ERGS would emit particulate matter that would impact air quality in northern Illinois, causing illness, premature death, and significant additional health costs. Finally, the facility's proposed cooling system, a type banned in Illinois (as well as in Indiana) for more than 30 years, sucks in tremendous volumes of water, the magnitude of a small river, and would destroy most of the aquatic life contained in that water. That type of cooling system would also discharge significant amounts of waste heat into Lake Michigan waters, destroying yet more aquatic life and further harming the Lake Michigan fishery shared by Wisconsin and Illinois.

The state of Illinois is well aware that virtually any type of power generation will have some negative environmental impact. It is also aware that Wisconsin is entitled to make its own choices as to how best to generate electricity and minimize its environmental impacts. However, Wisconsin law incorporates a central tenet of federal law governing such choices: that it is essential for decisionmakers to carefully evaluate alternatives that may minimize destructive environmental impacts before

deciding on a course of action. The Wisconsin Public Service Commission ("PSC") here failed to do so, under the incorporated federal standard set forth in the National Environmental Policy Act ("NEPA"). It declined to conduct even the most basic inquiry into alternatives to the environmentally-destructive cooling system proposed by the applicant, to which Illinois has found alternatives for more than three decades; and alternatives to burning coal, such as natural gas or other cleaner types of energy generation.

The state of Illinois therefore submits this amicus curiae brief respectfully requesting that this Court, in adherence to the incorporated NEPA standard, remand this matter to the PSC for further consideration of alternatives to the facility in its currently proposed form.

Point I

THE PSC WAS REQUIRED, UNDER THE INCORPORATED FEDERAL STANDARD, TO CONDUCT A THOROUGH AND INDEPENDENT EVALUTION OF ALTERNATIVES TO THE PROJECT AS PROPOSED

The Wisconsin Environmental Policy Act ("WEPA") is a "little NEPA," i.e., a state environmental

review statute closely modeled after the federal NEPA, established for the same purposes and containing substantially identical requirements. WEPA expressly requires Wisconsin agencies to adhere to the requirements of the federal NEPA regulations set forth at 40 C.F.R. Part 1502. Wis. Stat. 1.11(2)(c). Accordingly, federal NEPA case law is an essential source of guidance regarding the proper implementation of WEPA, constituting highly relevant persuasive authority. State ex rel Boehm v. DNR, 174 Wis.2d 657, 676 n.4, 497 N.W.2d 445 (Wis. 1993).

Analysis of alternatives is, by express definition in the NEPA regulations, "the heart of the environmental impact statement." 40 C.F.R. 1502.14. An environmental impact statement ("EIS") is expressly required to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." Id. It is "absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a

requirement that we have characterized as 'the linchpin of the entire impact statement.'" NRDC v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975) (citation omitted). See also All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir.1992) (holding that a thorough discussion of alternatives is "imperative").

NEPA regulations specifically require that an agency "[r]igorously explore and objectively evaluate *all* reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. 1502.14(a) (emphasis added). Thus, the question of whether NEPA has been complied with turns not only on whether the particular alternatives chosen for analysis were studied in sufficient detail, but also on whether the full range of *all* reasonable alternatives was considered to begin with. The agency must specify the reason for excluding *any* alternative as unreasonable. 40 C.F.R. 1502.14(a); City of Grapevine v. Department of Transp., 17 F.3d 1502, 1506 (D.C.Cir. 1994). While an agency "is not required to evaluate the environmental consequences of alternatives it has *in good faith* rejected as too remote, speculative, or ...

impractical or ineffective," All Indian Pueblo Council, 975 F.2d at 1444 (emphasis added), "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." Resources Ltd. v. Robertson, 35 F.3d 1300, 1307 (9th Cir.1993).

Here, as discussed below, the WEPA analysis ignores almost every reasonable alternative to the proposed ERGS that could have reduced the environmental impact on Illinois. The PSC largely failed to consider either alternative sources of energy, such as natural gas, that would greatly reduce the impact of the proposed facility's air emissions on public health in both Wisconsin and Illinois, or alternative cooling technologies that would have spared Lake Michigan the devastating effect of the once-through cooling method proposed by the applicant.

What is more, both the PSC and the Circuit Court, in evaluating petitioners' criticism of the EIS, offered legally inadequate reasons for dismissing it. The PSC decision stated, in response to expressed concerns regarding the completeness of the EIS in its evaluation of alternatives and their respective environmental impacts:

> 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.

State's App. 156. However, since the inception of NEPA more than 30 years ago, it has been unlawful to defer in this manner to natural resource agencies and their permitting processes to conduct the global environmental analysis required by NEPA. See Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C.Cir. 1971).[1] The Circuit Court, in

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[1] The court held in Calvert Cliffs,

> NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values. The magnitude of possible benefits and possible costs may lie anywhere on a broad spectrum. Much will depend on the particular magnitudes involved in particular cases. . . . .Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular . . . action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. . . .Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with

reviewing PSC's decision, likewise declined to find PSC's alternatives analysis inadequate, on the ground that the issue is "resolved based upon statutes specifically applicable to the Commission's process." CW/SCJ-Ap. 215. However, the referenced statutes address only the question of alternative *locations* for a proposed facility, and not the other types of alternatives that needed to be addressed here, i.e., alternative types of cooling technology to limit aquatic species damage and alternative energy sources to limit air emissions. See Wis. Stats. 196.491(3)(d).

Point II

THE EIS FAILED TO CONSIDER ALTERNATIVE SOURCES OF ENERGY THAT WOULD REDUCE EMISSIONS OF MERCURY AND OTHER AIR POLLUTANTS HARMFUL TO PUBLIC HEALTH IN ILLINOIS

The proposed facility would deposit large quantities of toxic mercury into the environment, both by discharging approximately 1.5 pounds of it per year directly to the Lake, and up to 120 pounds per year into the atmosphere,

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> overall responsibility for the proposed federal action-the agency to which NEPA is specifically directed.

449 F.2d at 1123.

at least some of which will also find its way to local waterbodies. R. 18, Item 119 (EIS) Vol. 1 at 163, Table 7-9; R. 18, Item 157 at 4200. Loading additional mercury to Lake Michigan would exacerbate an already very serious problem of mercury contamination in both states. All Illinois and Wisconsin waters are currently subject to a mercury advisory recommending limitations on consumption of predator fish. The Illinois advisory "is based on recent studies that have shown adverse effects [of mercury] to the developing nervous system of fetuses that could result in lower IQ, abnormal muscle tone and slowed motor function." See Wisconsin's and Illinois' respective informational documents regarding the advisory at http://dnr.wi.gov/org/water/fhp/fish/pages/consumption/mercury.shtml and http://www.idph.state.il.us/envhealth/fishadv/fishadvisory_qa.htm.[2] The information disseminated by Illinois concerning the advisory warned that "[t]he developing

[2] We request that this Court take judicial notice of the existence of the Illinois and Wisconsin fish advisories. See Wis. Stat. 902.01(2)(b), (4) (court shall take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," where a party requests it and supplies the necessary information).

nervous systems of fetuses and children could be damaged if exposed to even small amounts of methylmercury," and that, [a]t high doses, methylmercury can affect the central nervous system (causing such health problems as memory loss and slurred speech) and can cause kidney damage and failure, and gastrointestinal damage." Id.

Documents in the record demonstrate that public health is already jeopardized by current mercury levels in the Lake. Experts from the Harvard School of Public Health testified regarding studies indicating substantially increased levels of mercury found in the blood of those who consume Lake Michigan fish regularly. One such expert cited data collected from a population in South Haven, Michigan that regularly consumes Lake Michigan fish showing a direct relationship between mercury concentrations in blood and the quantity of fish consumed. He further cited a study of Lake Michigan recreational fishermen showing them to have substantially higher levels of mercury in their blood than recreational fisherman on Lake Huron and Lake Erie, which contain lower levels of mercury contamination. R. 18, Item 157 at 4201-02.

In addition, the Harvard School of Public Health experts testified that particulate matter emitted from the proposed facility would cause significant health impacts, and that the bulk of these impacts would be to neighboring states, most notably Illinois. Fine particulate matter is a well-known cause of cardiovascular and respiratory disease. Id. at 4104. The Harvard experts concluded that *only 26 percent* of the health costs from the fine particulate matter and other pollutants generated by the proposed ERGS would occur in Wisconsin, with the remainder occurring throughout the region. R. 18, Item 158, Exhibit 239. Overall annual health damages from the facility in all states from the facility's air emissions was estimated at $170 million. Id., Ex. 240. Their modeling demonstrated that some of the heaviest levels of contamination outside of Wisconsin would occur in the Chicago metropolitan area. Id., Exhibit 241.

Use of natural gas, integrated gasification combined cycle ("IGCC"), or renewable sources of energy rather than the proposed supercritical pulverized coal ("SCPC") technology would all greatly reduce mercury, particulate matter, and other pollutant emissions from the proposed

facility. With respect to IGCC, the EIS acknowledges as much in its comparison of emission levels from the originally-proposed IGCC unit to those from the proposed coal units. R. 18, Item 119 (EIS) at Vol. 1 p. 164. Notwithstanding this fact, and despite the very serious anticipated health impacts associated with the ERGS, the EIS made essentially no effort to analyze gas, IGCC, and renewable energy alternatives to the proposed facility. Although the EIS purported to consider a natural gas alternative to the proposed coal-fired units, it failed to consider the most relevant and obvious alternative: simply replacing the coal-fired units with comparably-sized natural gas units. Instead, it looked only at the alternative of partially replacing the proposed ERGS generating capacity with a smaller natural gas unit (the Calpine proposal), and at the alternative of replacing *all* of Wisconsin's future new power generation with natural gas, an absurd straw-man proposal not suggested by any party in this matter. Moreover, it did not consider at all the specific question of whether the two proposed ERGS coal

units could be replaced by two IGCC units,[3] or by renewable energy technology such as wind energy.

This analysis does not meet the most basic threshold of what is required by NEPA, and accordingly by WEPA. Failure to consider even one reasonable alternative renders an EIS inadequate, Resources Ltd., 35 F.3d at 1307, and here the PSC has considered virtually *none* of the obvious reasonable alternatives to the ERGS coal units, or provided any reason for its failure to do so.

Point III

THE EIS FAILED TO CONSIDER ALTERNATIVES TO THE PROPOSED ONCE-THROUGH COOLING SYSTEM THAT WOULD GREATLY REDUCE HARM TO AQUATIC LIFE IN LAKE MICHIGAN

The applicant proposes to use a type of cooling system, known as "once-through" cooling, that has been banned in Illinois since 1971. See 35 Ill. Adm. Code

[3] Although the PSC analysis concluded that a proposed third unit powered by IGCC would be uneconomical, its analysis did not reveal whether this was merely because a third unit was unnecessary from a demand standpoint. The analysis thus has no bearing on whether replacing the remaining two coal units with IGCC units would be economical.

302.509.[4] This type of cooling system is prohibited in Indiana as well. See 327 IAC 2-1.5-8(c)(D)(v)(AA).

These systems, where they are still allowed to operate, have been shown to cause large-scale destruction of aquatic life. They function by taking in vast amounts of water on a continuing basis – the proposed ERGS facility would, together with the existing units, suck in 2,250,000 gallons per minute, i.e., 3.2 billion gallons per day, which is equivalent to the flow of a small river. R. 18, Item 157 at 4289. By contrast, two available alternative technologies – cooling towers and dry cooling – would reduce water intake by 90 percent or more. Id. at 4298. In contrast to once-through cooling, cooling towers operate by continuously circulating a limited amount of water, drawing in more only as necessary to replace the water that evaporates in the cooling process. Id. at 4298-99. Dry cooling uses even less water, operating on the same principle as an automobile radiator. Id. at 4298.

Experts testified that the massive water intake required for once-through cooling would kill a very large

[4] This provision grandfathers in once-through cooling systems in existence prior to the 1971 cutoff date. Therefore some such systems are still functioning in Illinois, but none has been constructed after the cutoff date.

volume of aquatic life in Lake Michigan. Fish eggs and larvae passing through the fine filter screens to the power plant's condensers may suffer a mortality rate as high as 97 percent. Id. at 4287. Larger fish will be killed or fatally injured through impingement when they are pressed against the filter screens by the force of the intake. Id. at 4288. All in all, even with mitigating measures in place, "[t]he proposed once-through cooling system will result in the annual destruction of tens of millions of fish, crustaceans and shellfish by entrainment and impingement." Id. at 4285. The discharge of heated water by the open-cycle cooling system would cause further harm to the aquatic environment by disrupting the timing of egg hatching, causing nuisance species such as zebra mussels to flourish, and causing fatal temperature shock whenever there is an upwelling or storm or the thermal discharge is temporarily discontinued. Id. at 3542.

Although the two available alternative cooling technologies would greatly reduce harm to Lake Michigan aquatic life by reducing the water intake, neither of these technologies were considered as an alternative in the EIS. Rather, the EIS merely states that measures should be

taken to mitigate the harm to aquatic life that would be caused by the proposed once-through cooling, and that additional studies of entrainment and impingement should be conducted after the once-through cooling system has been built. R. 18, Item 119 (EIS) Vol. 1 at 189. As one aquatic life expert indicated, this approach amounts to closing the barn door after the horse has left, since once an open-cycle cooling system is allowed, there is very little that can be done to significantly reduce its harm to the aquatic environment. He stated, "It is my opinion that there are few options to protect lake life from an offshore intake of the size proposed and that these options are further restricted if implementation is attempted after design and completion of construction." R. 18, Item 157 at 4314.

Once again, the EIS analysis does not meet the minimum threshold for evaluation of alternatives required by NEPA. Illinois and Wisconsin citizens both are an entitled to an EIS that gives full consideration to cooling technologies that will reduce damage to their shared Lake Michigan resource.

CONCLUSION

The State of Illinois respectfully requests that Court reverse that portion of the Circuit Court's decision that affirmed the validity of the EIS, and remand the EIS to the PSC for further consideration of alternatives to the facility in its currently proposed form.

Dated: March 9, 2005

Respectfully submitted,

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FORM AND LENGTH 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, including captions and footnotes, is 2969 words.

David C. Bender

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 PSC 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)

BRIEF OF ENVIRONMENTAL AND PUBLIC HEALTH AMICI CURIAE: CLEAN AIR TASK FORCE, CITIZENS FOR RESPONSIBLE POWER, ENVIRONMENTAL LAW AND POLICY CENTER, LAKE MICHIGAN FEDERATION, PHYSICIANS FOR SOCIAL RESPONSIBILITY OF MADISON, RIVER ALLIANCE OF WISCONSIN, SIERRA CLUB, UNION OF CONCERNED SCIENTISTS, WISCONSIN INTERFAITH CLIMATE AND ENERGY CAMPAIGN, AND WISCONSIN PUBLIC INTEREST RESEARCH GROUP

FILED IN SUPPORT OF RESPONDENTS CLEAN WISCONSIN, INC. AND S.C. JOHNSON & SON, INC.

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 PSC 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 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 PSC of Wisconsin,
Respondent.

Town of Caledonia,
Petitioner,

v.

Public Service PSC 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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INTERESTS OF THE AMICI

Environmental and Public Health Amici Clean Air Task Force, Citizens for Responsible Power, Environmental Law and Policy Center, Lake Michigan Federation, Physicians for Social Responsibility of Madison, River Alliance of Wisconsin, Sierra Club, Union of Concerned Scientists, Wisconsin Interfaith Climate and Energy Campaign and Wisconsin Public Interest Research Group are not-for-profit organizations that promote public policies to protect and improve public health and the environment in Wisconsin, including cleaner air and better water quality. Amici participate in administrative agency proceedings to achieve their goals and have a common interest in policies and practices that enable full and effective public participation.

This appeal presents legal questions on whether the Public Service Commission ("PSC") erred in approving an incomplete permit application for the largest and most expensive coal plant in Wisconsin history and arbitrarily rejected cleaner, less expensive energy resource alternatives. The ability of Amici to fully and effectively participate in environmental and public health permit proceedings will be impeded if agencies do not require the applicants to first submit all relevant information, which the Circuit

Court found that the PSC failed to do here. In addition, agencies' full and fair evaluation of environmentally preferable and healthier alternatives to the proposed construction of power plants and other major projects is central to Amici's interests.

SUMMARY OF ARGUMENT

The PSC failed to comply with Wisconsin laws that require the agency to: (1) hold a public hearing and review a proposed action only after the permit applicant has first submitted all relevant information, and (2) fully and fairly evaluate environmentally preferable alternatives to the proposed action. As a result, the public's right to full and effective participation in the administrative process was undermined.

The public participation values at issue have long been recognized as fundamental to this nation's representative democracy. Thomas Jefferson explained that informed citizens are "the most legitimate engine of government" because "they are the only sure reliance for the preservation of our liberty." Letter from Thomas Jefferson to Uriah Forrest (Dec. 31, 1787), in 12 The Papers of Thomas Jefferson 478 (Julian P. Boyd ed., 1955). Consistent with this principle, the U.S. Supreme Court has stated

that "[i]n a representative democracy such as this . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

Accordingly, Amici urge this Court to affirm the Circuit Court's reversal of the PSC's completeness determination and Final Order because of the specific impacts in this case and the unfortunate precedent set by the PSC's approach if applied in other environmental and public health proceedings. Amici also join with Cross-Appellants Clean Wisconsin and S.C. Johnson & Son in urging this Court to reverse the PSC's decision for failing to fully and fairly evaluate cleaner energy resource alternatives to the proposed new coal plant and for finding that the Environmental Impact Statement complies with the Wisconsin Environmental Policy Act.

ARGUMENT

I. THE CIRCUIT COURT'S REVERSAL OF THE PUBLIC SERVICE COMMISSION'S COMPLETENESS APPROACH CORRECTLY RECOGNIZES THE FUNDAMENTAL ROLE OF FULL AND EFFECTIVE PUBLIC PARTICPATION IN ADMINISTRATIVE PROCEEDINGS.

The right of the public to fully and effectively participate is a core tenet of administrative law. Public participation improves and legitimizes agency decisionmaking. Courts have long rejected agency actions that deny the public the ability to fully review and comment on all relevant information. The Circuit Court's decision rejecting the PSC's completeness determination and its Final Order is supported by laws involving public participation in both federal and state proceedings.

A. Public Participation Is Widely Recognized As A Crucial Element Of Agency Proceedings On Environmental Issues.

The laws governing this case are designed to ensure that the PSC's permitting procedures are "very much a public process." Circuit Court Order at 23. The Public Utilities Act requires the PSC to provide notice of a permit application and to hold a public hearing once the application is complete. Wis. Stat. § 196.491(3)(b). The PSC is also required to comply with the Wisconsin Environmental Policy Act ("WEPA"), which requires

many of the same public participation requirements as in the federal National Environmental Policy Act ("NEPA"). Wis. Stat. § 1.11(2)(c) and 42 U.S.C. § 4321, *et seq.*

One of NEPA's core goals is to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(d); *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1383 (9th Cir. 1986). An agency must "make diligent efforts to involve the public in preparing and implementing" NEPA's procedures. 40 C.F.R. § 1506.6(a). Agencies are required to notify the public of important steps in the NEPA process, make all relevant documents available, allow for public comment throughout the environmental impact statement process, and respond to such comments. 40 C.F.R. §§ 1506.6(b) & (f), 1503.1, 1503.4.

Similarly, the public has a meaningful role in the implementation of the Clean Water Act. *Waterkeepers Alliance v. U.S. Environmental Protection Agency*, 2005 U.S. App. LEXIS 3395, at *40-*41 (2nd Cir. Feb. 28, 2005). The Act requires that public participation in regulatory decisions involving water quality should "be provided for, encouraged, and assisted" (33 U.S.C. § 1251(e)) such as with the opportunity for public participation

in the drafting of permits. 33 U.S.C. § 1342. In applying these provisions, "the public must have a genuine opportunity to speak on the issue of protection of its waters," and the Act must be "administered and enforced in a fishbowl-like atmosphere." *Adams v. U.S. Environmental Protection Agency*, 38 F.3d 43, 52 (1st Cir. 1994); *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 859 F.2d 156, 177 (D.C. Cir. 1988). Public participation is also a fundamental element of other environmental laws, including the Clean Air Act ("to assure that any decision to permit increased air pollution in any area … is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process," (42 U.S.C. § 7470(5)), Surface Mining Control and Reclamation Act (30 U.S.C. §§ 1251, 1253, 1263, 1272(c)), Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9617), and Endangered Species Act (16 U.S.C. § 1539(c)).

Many states similarly recognize the importance of public participation in implementing their environmental laws. Michigan, Minnesota, New York and Washington – like Wisconsin – have state-level "little NEPA" laws that include public participation provisions similar to

those required under the federal NEPA. *See, e.g.,* Mich. Comp. Laws § 324.1701 *et seq.,* Minn. Stat. § 116D.03, Minn. R. 4410.1600; NY Envtl. Conserv. Law §§ 8-0105(7)(8), 8-0109(4); Rev. Code Wash. § 43.21C.030, Wash. Admin. Code § 197.11.030(2)(f). For example, the public is given a "privileged position" and public participation is an "essential part" of implementing the California Environmental Quality Act "based on a belief that citizens can make important contributions to environmental protection." *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Ass'n*, 727 P.2d 1029, 1033 (Cal. 1986), *citing* 14 Cal. Code Regs. 15073, 15087, 15201, 21064.

B. Public Participation Improves And Legitimizes Agency Decisionmaking Processes.

Public participation can better inform agency actions by providing additional data and perspectives about the impacts of, and alternatives to, proposed major projects such as the coal plant at issue here. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). Public participation can also help legitimize agency action by increasing the public "buy-in" necessary for smooth implementation. NEPA's public participation procedure "gives the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process"

(*Id.* at 349), and the environmental impact statement process "helps insure the integrity of the process of decision." *DuBois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1285-86 (1st Cir. 1996).

C. Numerous Federal And State Courts Have Recognized That Public Access To Information Is A Necessary Predicate To The Right To Full Participation In Agency Decisionmaking Processes.

The PSC's decision to review and approve Wisconsin Energy's incomplete permit application undermines the crucial role of public participation in agency decisionmaking. "Full participation requires access to a full record of information." Circuit Court Order at 24. The public cannot engage in full and meaningful review and comments when the applicant does not submit complete information.

Here, Wisconsin Energy's application did not include basic information that Wisconsin law plainly requires. For example, the applicant did not provide critical information regarding potentially adverse impacts on wetlands, Lake Michigan shoreline and lakebed, and water quality that would result from construction of the coal plant and its cooling water structure, and due to mercury emissions from the coal plant. Circuit Court Order at 16-19. In addition, the application did not present two alternative locations for the proposed coal plant or include agreements for the use of

transmission lines that would be needed to transmit the power created by the proposed new coal plant. Circuit Court Order at 11-16, 19-22.

Unfortunately, the PSC incorrectly deemed Wisconsin Energy's application complete, held a public hearing, and issued the permit despite this absence of full information regarding impacts, alternatives and other regulatory approvals. The Circuit Court correctly held that this approach violated applicable Wisconsin law.

There is substantial federal and state case law holding that public participation rights are violated in similar situations. For example, under NEPA, an agency cannot rely on belated information submitted after its administrative determination to provide information or analysis that should have been subject to public review and comment as part of the initial decisionmaking process. *See, e.g., Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 566-568 (9th Cir. 2000); *Friends of the Clearwater v. McAllister*, 214 F.Supp. 2d 1083 (D.Mont. 2002). Similarly, public participation requirements are violated when an agency entirely fails to provide information important to its decision (*Sierra Club v. State Bd. of Forestry*, 876 P.2d 505, 519 (Cal. 1994)), includes critical information only in a final environmental document that was not subject to public comment

(*Hutchings v. Dept. of Economic and Community Develop.*, 2000 Conn. Super. LEXIS 977 (Ct Sup. Ct. 2000)), or attempts to rely on analyses that were not subject to public review (*Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068 (1st Cir. 1980)). In short, courts reversed the agency actions because the public's lack of access to relevant information foreclosed "meaningful assessment" of various issues (*Sierra Club*, 876 P.2d at 519), and thereby prevented the public "from making meaningful substantive comments." *Friends of the Clearwater*, 214 F.Supp. 2d at 1089.

The PSC's decision to review and approve Wisconsin Energy's permit on the basis of incomplete applicant information hindered the public's ability to fully and effectively participate in the proceeding. Amici urge this Court to affirm the Circuit Court's decision in this regard.

II. THE PUBLIC SERVICE COMMISSION'S CURSORY CONSIDERATION OF CLEANER AND LESS EXPENSIVE ALTERNATIVE ENERGY RESOURCES WAS CONTRARY TO LAW.

The PSC failed to comply with its legal duty to consider cleaner and less expensive energy resource alternatives to the highly-polluting coal plants that the PSC authorized Wisconsin Energy to build. As the Circuit Court recognized (Order at 34-41), the PSC failed to provide any basis for

rejecting natural gas or low-sulfur coal alternatives. Amici also concur with Cross-Appellants Clean Wisconsin and S.C. Johnson that the PSC failed to fully and fairly consider renewable energy and energy efficiency alternatives and thereby violated the Wisconsin Energy Priorities Law and WEPA. *See* Brief of Clean Wisconsin and S.C. Johnson at 23-25, 37-40.

By ensuring that all relevant information is factored in, the full consideration of alternatives increases the likelihood "that the most intelligent, optimally beneficial decision will ultimately be made." *Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). The PSC's cursory discussion failed to evaluate and compare the full public health and environmental impacts of alternatives. A full and fair comparison of energy alternatives must examine not only the construction and operating costs, but also the public health costs and benefits of each competing resource. Those costs include, for example, the impacts of mercury pollution, especially on women of childbearing age and children, and the cumulative impacts of multiple exposures to toxins. The PSC failed to factor in health-related impacts, which were estimated to be as high as $3.3 billion, or community impacts, in its weighing of energy resource alternatives. *See* Brief of Clean Wisconsin and S.C. Johnson at

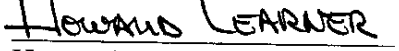
17-22. Ignoring the significant public health and environmental costs and benefits will bias agency decisionmaking in this and other proceedings. The PSC's flawed approach was contrary to law and should be rejected.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court: (1) recognize the fundamental role of full and effective public participation in administrative agency decisionmaking proceedings by affirming the Circuit Court and reversing the PSC's Final Order; and (2) accept the arguments of Cross-Appellants Clean Wisconsin and S.C. Johnson & Son on the PSC's failure to fully and fairly consider cleaner energy alternatives and reverse the PSC's Final Order as contrary to law on this ground.

Dated this 15th day of March, 2005

Respectfully Submitted,



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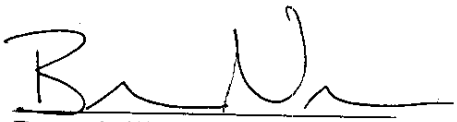

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CERTIFICATION

I hereby certify that this BRIEF OF ENVIRONMENTAL AND PUBLIC HEALTH AMICI CURIAE conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, maximum of 60 characters per full line of body text. The length of this brief is 2,174 words.

Dated this 15th day of March, 2005.

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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 04-3179

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.

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.

(Caption continued on the following page)

Appeal from the Order dated November 29, 2004
of the Circuit Court for Dane County
Honorable David Flanagan, Presiding

***AMICUS CURIAE* BRIEF ON BEHALF OF THE WISCONSIN UTILITIES ASSOCIATION**

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,

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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March 15, 2005

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INTEREST OF *AMICUS CURIAE*

The Wisconsin Utilities Association ("WUA") is a non-profit organization representing the interests of the major energy utilities in Wisconsin. WUA's members have obligations for planning, constructing, operating and maintaining reliable and affordable energy systems throughout the state. Critical to their ability to fulfill these obligations is an orderly and timely administrative process for securing a Certificate of Public Convenience and Necessity ("CPCN") from the Public Service Commission of Wisconsin ("PSC") for large electric generation and transmission projects.

WUA's members have a direct interest in the outcome of this appeal. The circuit court's decision raises numerous issues regarding the requirements and procedures mandated by the CPCN statute, Wis. Stat. § 196.491(3), and related PSC rules. This Court's disposition of these issues will affect future CPCN proceedings involving energy projects sponsored by WUA's members. It will also affect the cost and complexity of CPCN proceedings and the time and resources required for the preparation and disposition of future CPCN applications.

ARGUMENT

The circuit court's decision subjects CPCN applicants to new and onerous requirements and deprives the PSC of the authority and discretion it needs for the proper disposition of CPCN applications. Unless reversed, the circuit court's decision will impose costly and unworkable requirements upon CPCN applicants, and transform an already complicated and time-consuming permitting process into an administrative quagmire that will impede efforts of WUA's members to maintain and enhance the reliability of the state's energy infrastructure.

The CPCN statute establishes the broad parameters of the administrative process for the PSC's disposition of CPCN applications. Within such parameters, the Legislature delegated substantial authority and discretion to the PSC to manage the application review process and act upon CPCN

applications upon terms and conditions it deems to be in the public interest. The circuit court erred by substituting its judgment on CPCN procedures and decisions that are committed by statute to the PSC's discretion. The court's decision reflects an incomplete understanding of the arduous process established by the CPCN statute for the disposition of CPCN applications within strict time constraints. The court's attempt to impose its own views as to how CPCN applications should be handled creates an unwieldy process that threatens to obstruct essential energy projects. WUA respectfully urges this Court to affirm the PSC's decision on each of the issues discussed below.

I. THE CIRCUIT COURT'S DECISION IMPOSES NEW CPCN APPLICATION REQUIREMENTS WHICH ARE NEITHER MANDATED BY LAW NOR PRACTICAL.

The circuit court held that the PSC cannot deem a CPCN application "complete" without (1) all other regulatory approvals required for construction of the proposed facility; (2) final transmission-related agreements; and (3) "alternative sites" for the proposed facility on physically separate parcels.

The circuit court's holding contradicts the PSC's longstanding interpretation of the CPCN statute, and imposes new requirements that will not work in the real world.

A. The Circuit Court Misinterpreted The PSC Rules Relating To Regulatory Approvals And Transmission-Related Agreements.

By their plain language, the PSC rules[1] require that an applicant submit only "information" relating to regulatory approvals and transmission agreements; they do not require the actual regulatory approvals or transmission agreements. The PSC rendered its completeness determination in this case consistent with the rules' plain language.

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[1] *See* Wis. Admin. Code §§ PSC 111.53(1)(f)1 (regulatory approvals) and 111.53(1)(f)4 (transmission agreements).

The circuit court erred by reading the rules' reference to regulatory approvals and transmission agreements in isolation from other language that requires only the submission of "information" about the specified topics. *See Alberte v. Anew Health Care Services, Inc.*, 2000 WI 7, ¶ 10, 232 Wis.2d 587, 592, 605 N.W.2d 515.[2]

Under settled law, "an administrative agency's interpretation of its own rules or regulations is controlling unless plainly erroneous or inconsistent with the language of the rule or regulation." *Hillhaven Corp. v. DHFS*, 2000 WI App 20 ¶ 12, 232 Wis.2d 400, 606 N.W.2d 572 (footnote omitted). Because the PSC's interpretation of its rules is consistent with their plain language, the circuit court erred in failing to defer to the PSC's decision.

B. Submission Of Regulatory Approvals With A CPCN Application Is Not Feasible.

The circuit court's ruling regarding the submission of regulatory approvals reflects an unrealistic understanding of the permitting process. The court assumed that it is feasible for the Department of Natural Resources ("DNR") to issue the needed regulatory approvals *before* the CPCN process has even begun. In practice, the DNR does not act upon the permit applications for the proposed facility until late in the CPCN permitting process or even after the PSC acts upon the CPCN application. *See* Wis. Stat. § 196.491(3)(a)3.b (DNR to complete action on permits and approvals within 120 days after applications deemed complete). *See Responsible Use of Rural & Agric. Land (RURAL) v. PSC*, 2000 WI 129, ¶ 58, 239 Wis.2d 660, 619 N.W.2d 888 (DNR had not issued

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[2] Moreover, the circuit court apparently was unaware that, because of changes in federal law, transmission service from the proposed facility is now governed by federal tariffs, not transmission service agreements. *See* Nonparty Brief of American Transmission Company, LLC, Wisconsin Manufacturers and Commerce and Wisconsin Merchants Federation at 9-11.

permits at the time the PSC acted upon the CPCN application). *See also* PSC decisions cited in footnote 6.[3]

In the real world, the needed regulatory approvals cannot be secured early in the CPCN process, as the circuit court assumed. A rule requiring receipt of regulatory approvals will either significantly delay the processing of CPCN applications (as the PSC waits for the DNR to issue its permits before commencing the CPCN process) or produce regulatory gridlock (with each agency waiting for the other to act). The PSC's long-standing interpretation of § PSC 111.53(1)(f)1 avoids these results, is consistent with the rule's plain language, and should be sustained.

Respondents make no attempt to defend the circuit court's decision regarding regulatory approvals. Instead, Clean Wisconsin and S.C. Johnson ("CW/SCJ") attack the PSC's completeness determination as being arbitrary and capricious because it was rendered before the applicant submitted complete DNR permit applications. CW/SCJ Br. at 28-29. This argument should be rejected. Neither the CPCN statute nor the PSC rules make the submission of completed DNR permit applications a prerequisite to the PSC's completeness determination. Moreover, the PSC was entitled to conclude, based upon its past experience, that the CPCN applicant would be motivated to promptly submit completed applications for DNR permits needed for construction of the facility. *Sterlingworth Condo. Ass'n v. State*, 205 Wis.2d 710, 730, 556 N.W.2d 791 (Ct. App. 1996) ("Rational choices can be made in a process which considers . . . predictions based on experience.").

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[3] Legislation that became effective after the PSC's decision in this case authorizes the DNR to issue permits for major energy projects up to 30 days *after* the PSC's issuance of a CPCN. 2003 Wis. Act 89, § 19, codified at Wis. Stat. § 30.025(4). The legislation also created expedited review procedures for certain types of transmission line projects. Wis. Stat. § 196.491(3b) (2003-04).

C. The Circuit Court Failed To Give Appropriate Deference To The PSC's "Alternative Sites" Rule.

Wis. Stat. § 196.491(3)(d)3 requires that the PSC determine whether "[t]he design and location . . . is in the public interest considering . . . alternative locations." Wis. Admin. Code § PSC 111.53(1)(e) requires that a CPCN application include information describing "[a]t least two proposed sites for the proposed facility." In its decision under review, the PSC articulated the following standard for complying with the statute and the rule:

> . . . 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.*

(PSC Final Decision at 45) (emphasis added).

The circuit court rejected the PSC's interpretation, holding that "[t]he statute and the rule require that not less than *two distinct locations* be submitted as proposed alternate sites." (Decision at 14) (emphasis added). The court found that the "distinct locations" requirement was not satisfied where the alternative sites are within a single parcel, in this case a 1,000-acre existing electric generation site. (*Id.* at 14-16). The court's reasoning is flawed and should be rejected.

1. <u>The PSC's Standard Is Consistent With The CPCN Statute And The PSC's Rules.</u>

The circuit court concluded that the terms "alternative locations" and "two proposed sites" required "distinct locations," *i.e.*, physically separate parcels. Neither term compels that conclusion.

Black's Law Dictionary defines "location" as "[t]he specific place or position of a person or thing." *Black's Law Dictionary* 958 (8th ed. 2004). It defines "site" to mean "[a] place or location." *Id.* at 1420. Each definition would

countenance more than one "location" or "site" within a single parcel, provided that the parcel was large enough to accommodate at least two different locations for the proposed facility and allowed a meaningful basis for distinguishing each "location" or "site."

Therefore, the PSC's standard is consistent with the plain meaning of "location" and "site." Under this standard, proposed sites within a single parcel (or on separate parcels in close proximity to each other) are acceptable alternatives if each is feasible and sufficiently distinct from the other to offer a different package of costs and benefits. Because the PSC's interpretation is consistent with the statute and the rule, it is entitled to great weight deference and should be sustained. *See Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 660, 539 N.W.2d 98 (1995).

2. The PSC's Standard Provides Needed Flexibility For Siting Generating Facilities.

The PSC's standard should also be upheld because it provides flexibility for siting energy facilities, while insuring that the PSC has meaningful alternatives when evaluating a CPCN application.

Such flexibility is essential. Siting an electric generating facility is a difficult and complex process. Many factors must be considered, including physical space requirements, access to transmission facilities, access to fuel sources, the availability of a water supply, transportation facilities, current and future land use plans in the vicinity of the site, environmental impacts, community reaction, and other considerations. The process is even more difficult when attempting to site a base-load coal-fired generating facility, which has even more demanding siting requirements.

As a result, few suitable sites may be available, and the best available option may be to offer alternative plant locations within the most suitable parcel. As in this case, that

parcel may be the site of an existing generating facility,[4] which offers the benefit of using an already industrialized site (and avoids siting energy facilities in undeveloped and rural areas).[5] Indeed, the CPCN statute requires use of "brownfields" (abandoned or underused industrial sites) "to the extent practicable." Wis. Stat. § 196.491(3)(d)8 (2003-04).

The circuit court's standard eliminates that flexibility and, instead, establishes an arbitrary requirement that the alternatives be sited on separate parcels. Such a requirement produces little or no benefit (since the parcels can be in close proximity and still satisfy the court's test), but creates an onerous, expensive and unnecessary requirement for an energy producer attempting to site a generating facility. This Court should reject the circuit court's arbitrary requirement and accord proper deference to PSC's siting standard.

II. THE PSC PROPERLY CONSIDERED TRANSMISSION-RELATED ISSUES.

The circuit court held that the PSC cannot issue a CPCN for a large generating facility without a determination as to the cost, design and location of the transmission facilities needed for the proposed facility. (Decision at 31-32.) The court acknowledged that the CPCN statute does not require such a determination, but decided that the PSC decision was "without rational basis." *Id.* The court's holding should be rejected for three reasons.

First, the court's decision ignores substantial evidence in the record indicating that the PSC carefully considered transmission issues and concluded that it was prudent for the

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[4] The only other CPCN application for a coal-fired generating facility in recent years also proposed alternative sites within the boundaries of the site of an existing generating facility. *See Application of Wisconsin Public Serv. Corp.*, Docket No. 6690-CE-187 (Oct. 7, 2004), Final Decision at 22. No one sought judicial review of this CPCN order.

[5] *See RURAL,* 239 Wis.2d 660 at ¶ 14 (noting that opponents of the proposed facility sought to "maintain the rural and agricultural character" of the proposed site).

project to proceed. This evidence—summarized in the briefs of the PSC and Wisconsin Energy Corporation ("WEC")—provided a sound and rational basis for the PSC's decision, which should be affirmed. *See Wisconsin Prof'l Police Ass'n v. PSC*, 205 Wis.2d 60, 75, 555 N.W.2d 179 (Ct. App. 1996).

Second, the circuit court substituted its judgment for that of the PSC and overstepped the proper bounds of judicial review. *See* Wis. Stat. § 227.57(10). The PSC described the special circumstances that necessitated the then ongoing studies to determine the transmission system requirements for the proposed facility. (PSC Final Decision at 10-11). Because of its specialized knowledge and experience, the PSC was better suited than the circuit court to determine whether it was prudent to proceed with the project under these circumstances. *See Wisconsin Envtl. Decade, Inc. v. PSC*, 105 Wis.2d 457, 460, 313 N.W.2d 863 (Ct. App. 1981).

Finally, the circuit court's holding threatens to interfere with the PSC's ability to act timely upon a CPCN application. Under the court's holding, if the PSC lacks information regarding the final cost, design and location of transmission facilities at the end of the statutory period for acting upon a CPCN application, the PSC will be forced to either:

- reject the application (and thereby force the applicant to start the application process all over again); or

- take no action and allow the CPCN to issue by operation of law under Wis. Stat. § 196.491(3)(g).

Neither of these alternatives is in the public interest.

The better alternative is for the PSC to determine whether it has sufficient information on which to base issuance of a CPCN, as it did in this case. Accordingly, the circuit court's holding should be reversed.

III. THE CPCN STATUTE PERMITS THE PSC TO AUTHORIZE CONSTRUCTION OF COMMON SYSTEMS NEEDED FOR POSSIBLE FUTURE EXPANSION.

The circuit court held that the PSC violated the CPCN statute by authorizing construction of "common systems" needed if additional generating units were sited at the proposed project site in the future. (Decision at 41-42).

The PSC's decision constitutes an appropriate exercise of its authority under Wis. Stat. § 196.491(3)(e) to "approve the [CPCN] application with such modifications as are necessary" to serve the public interest. Evidence before the PSC indicated that future construction costs might be significantly reduced by "over-sizing" certain components of the proposed project. As the PSC's brief demonstrates, the PSC's decision was consistent with a decades-old agency policy of building generating facilities in a manner that reduces ratepayer costs in the event of future expansion. (PSC Br. at 33). *See also Application of Wisconsin Pub. Serv. Corp.*, Docket 6690-CE-187 (Oct. 7, 2004) (issuing CPCN for fourth coal unit at site using common facilities constructed with third unit); *Application of Madison Gas and Elec. Co.*, Docket No. 3270-CE-121 (Dec. 22, 1998) (issuing a certificate of authority for fourth natural gas combustion turbine unit at site with common facilities designed and originally constructed for multiple units).

The court ignored the potential benefits to ratepayers resulting from the construction of infrastructure at existing generating sites to support additional units in the future. The utility can accomplish economies of scale and reduce environmental impacts of electric generation when multiple units can be sited on the same campus. At a time when it is becoming increasingly difficult to site generation facilities, particularly large baseload facilities, the PSC should have the discretion to authorize facilities with future potential expansion in mind.

The court plainly erred in characterizing the PSC's action as authorizing "partial construction of a facility for which [a] CPCN has not been determined." (Decision at 42).

The PSC's decision merely approved certain design specifications for the proposed facility, consistent with its authority under § 196.491(3)(d)3 and (e).

Under the CPCN statute, the PSC has the responsibility to determine whether the benefits of reducing the overall cost and environmental impact of generation facilities outweigh the potential adverse competitive impacts resulting from its decision. Wis. Stat. § 196.491(3)(d)7. The Commission's decision in this case is consistent with its primary responsibility under Chapter 196 to protect ratepayers' interests. Because the PSC's decision was neither an abuse of discretion nor clearly erroneous, the circuit court improperly substituted its judgment for that of the Commission.

IV. THE PSC HAS AUTHORITY TO APPROVE A CPCN APPLICATION SUBJECT TO THE FUTURE RECEIPT OF REGULATORY APPROVALS.

The circuit court held that the PSC had no authority to issue a CPCN the effectiveness of which was conditioned upon the future receipt of DNR permits needed for the construction of the proposed facility. (Decision at 43-45). The court's conclusion is clearly erroneous and should be rejected.

The issuance of a conditional CPCN does not violate Wis. Stat. § 196.491(3)(e). The statute is satisfied because such a CPCN, by its express terms, is without legal effect until the DNR issues the necessary permits.

Such authority is essential for the proper and efficient administration of the CPCN statute in cases (such as this) where the DNR has not issued the permits required prior to construction by the time the PSC is required by law to act on the CPCN application. This situation arises with regularity, and it is the established practice of the PSC to issue a CPCN

that becomes effective only upon the applicant's receipt of the necessary DNR permits.[6]

Issuance of a conditional CPCN represents the most prudent alternative available to the PSC in this situation. The first alternative—taking no action and allowing the CPCN to issue by operation of law—hardly serves the public interest since the CPCN application is deemed approved as submitted. Wis. Stat, § 196.491(3)(g). The other option—denying the application—may significantly delay needed energy projects and negates months of work by the applicant and the PSC in preparing and processing the application, preparing the environmental impact statement, and conducting public hearings.

The agency's practice represents a prudent attempt to harmonize the various provisions of the CPCN statute. *RURAL*, 239 Wis. 2d 660 at ¶ 61. The need for harmonization is made manifest by recent legislation that authorizes the DNR to issue permits for major energy projects up to 30 days *after* issuance of a CPCN, *see* Wis. Stat. § 30.025(4) (2003-04), while Wis. Stat. § 196.491(3)(e) purports to prohibit the granting of a CPCN *prior* to issuance of the DNR permits.

The circuit court was concerned that a conditional CPCN would circumvent the statute's intent if the DNR's permitting decision resulted in significant increases in the cost of the project. (Decision at 45). The court failed to recognize, however, that the PSC's order included caps on approved construction costs and that WEC needs PSC approval to exceed those caps. (PSC Final Decision at 58-59). Therefore, if DNR action significantly increased the cost of the project, WEC would commence construction without further PSC approval only at its peril. Thus, the PSC's decision was carefully drawn to obviate the court's concern.

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[6] *See, e.g., Application of Fond du Lac Energy Ctr., LLC, a Calpine Subsidiary*, Docket No. 9343-CE-100 (May 5, 2003) (Final Decision at 18); *Application of the Rainy River Energy Corp.-Wis.*, Docket No. 05-CE-128 (October 30, 2002) (Final Decision at 12; *Application of Rock River Energy LLC (an Affiliate of Calpine Corp.)*, Docket No. 9346-CE-100 (Sept. 24, 2002) (Final Decision at 21).

Therefore, its narrow reading of § 196.491(3)(e) was unwarranted.

V. THE PSC IS NOT REQUIRED TO MONETIZE EXTERNALITIES; TO MONETIZE HEALTH IMPACTS BUT NOT OTHER IMPACTS AND BENEFITS WOULD BE ARBITRARY AND CAPRICIOUS.

CW/SCJ argue that the PSC is required to monetize one type of "externality" associated with electric generation, public health impacts, and to include the values in its economic modeling of proposed projects and their alternatives. CW/SCJ are wrong, for at least five reasons.

First, the CPCN statute does not require the quantification of environmental impacts and other externalities. The PSC must determine whether the "proposed facility will not have undue adverse impact on other environmental values." Wis. Stat. § 196.491(3)(d)4. The PSC has substantial discretion in how it considers such values.

Second, CW/SCJ's evidence pertained to the alleged health impacts of air emissions from the burning of coal. The CPCN statute expressly prohibits the PSC from determining "that the proposed facility will have an undue adverse impact on these values because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285." *Id.* In other words, the evaluation of air emission impacts, including health impacts, is delegated to DNR. If the PSC monetized health impacts from air pollution, included the values in its economic modeling, and for that reason denied a CPCN because the proposed project was too expensive, the PSC would accomplish indirectly what it is prohibited from doing directly.

Third, the circuit court properly deferred to the PSC's technical expertise on the question of whether to consider public health impacts and other externalities qualitatively or quantitatively. CW/SCJ mischaracterize the purpose of the PSC's economic modeling, which is not to determine a project's "total costs on society" (CW/SCJ Br. at 19), but

rather to evaluate the project's impact on a utility's total costs to its *ratepayers*.

Fourth, the PSC reasonably decided to consider public health impacts qualitatively given the sharp divergence of opinion between experts on both methodology and results. This record demonstrates that a scientific consensus with respect to the quantification of public health impacts of air pollution is lacking.

Fifth, even if the PSC was able to reasonably monetize one type of socioeconomic impact of the project, then the PSC would have to monetize other external costs and benefits as well. These would include the economic benefits from construction and operation of the project, as compared to the project's alternatives.[7] To include only health-related costs and not other external costs and benefits would bias the analysis. Of course, monetizing all significant external costs and benefits would be a daunting task even if there was a consensus among the experts on how to do it. In the absence of such a consensus, the PSC reasonably decided to consider externalities qualitatively.

CONCLUSION

Wisconsin's growing population and economy are generating an ever increasing demand for electric energy. A 2004 PSC report found that this demand is growing by approximately 2.5 percent annually, "or by the equivalent of about one major power plant every two years." Public Serv. Comm'n of Wis., *Wisconsin's Strategic Energy Assessment: Energy 2010 Final Report at 5* (Sept. 2004). That same PSC report described Wisconsin's electric transmission system as "highly constrained" and "only marginally adequate." *Id.* at 21. To partially address these deficiencies, American Transmission Company (one of WUA's members) has "plans

[7] The PSC evaluated these benefits qualitatively in the FEIS (at 225-30), but did not attempt to monetize and include them in the economic modeling of the project and its alternatives. Indeed, the FEIS evaluates a whole host of external impacts, positive and negative, of the proposed project.

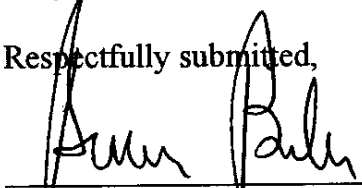
for constructing 70 major transmission projects in Wisconsin by 2010." *Id.*

A CPCN is required for construction of large generating or transmission facilities. Therefore, the ability of the state's utilities to build the facilities necessary to maintain and enhance the state's energy infrastructure are directly linked to the process by which the PSC reviews and acts upon CPCN applications, and the timeliness of that process. Unless reversed, the circuit court's decision will unnecessarily complicate and burden the permitting process for energy facilities.

For the foregoing reasons, WUA respectfully urges the Court to affirm the PSC's decision on each of the issues discussed above.

Dated this 15th day of March, 2005.

Respectfully submitted,



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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c), for brief produced using the following font:

> 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 of 60 characters per full line of body text. The length of this brief is 3,977 words.

Dennis P. Birke (#1018345)

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)

**RESPONSIVE BRIEF OF
PETITIONERS-RESPONDENTS-
CROSS-APPELLANTS-CROSS-RESPONDENTS
CLEAN WISCONSIN, INC. AND S.C. JOHNSON & SON, INC.
IN RESPONSE TO BRIEF OF DAIRYLAND POWER
COOPERATIVE**

**On Appeal From The Final Order Of The Circuit Court For Dane
County, The Honorable David T. Flanagan III Presiding**

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 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.

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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Sec. PSC 111.53(1), Wis. Adm. Code 5

INTRODUCTION

Clean Wisconsin, Inc. and S.C. Johnson & Son, Inc. ("CW/SCJ") respectfully submit this brief to respond to the brief of Dairyland Power Cooperative ("Dairyland"), pursuant to the Court's Order dated March 4, 2005. Dairyland's principal contention is that PSC has "absolute" discretion to determine whether or not an application is complete, and that its completeness determination is not subject to judicial review. Dairyland and other project proponents would insulate PSC from any judicial intervention or inquiry on subjects as fundamental as whether the agency has followed statutorily required procedures and obtained the information that is required by law and is necessary to make its statutorily required determinations. The proposed absolute invulnerability to review, contrary to established caselaw, would set dangerous precedent: it would deny the public access to the courts, and would undermine the judiciary's important role as a check on unlawful decisionmaking.

ARGUMENT

I. PSC DOES NOT HAVE "ABSOLUTE DISCRETION" TO DETERMINE THE INFORMATION NEEDED TO FULFILL ITS STATUTORY DUTIES

Dairyland's contention that PSC has "absolute discretion" to "conclusively determine" whether an application is complete (Dairyland Br. at 12-15) is flawed for several reasons. First, Wis. Stat. ch. 227 explicitly provides for judicial review of agency decisions, even those that are

discretionary. Second, nothing in Wis. Stat. § 196.491(3)(a) prohibits review of PSC's completeness determination. Third, specific standards exist by which a court can evaluate the agency's decision. Finally, interim agency decisions are reviewable in connection with a court's review of an agency's final decision.

A. An Agency's Exercise of Discretion Is Subject to Judicial Review Under Wis. Stat. Ch. 227

Dairyland cites no authority for giving PSC unchecked discretion. Its argument is antithetical to basic principles of judicial review. Wis. Stat. § 227.57 expressly contemplates judicial review of discretionary decisions. *See* Wis. Stats. § 227.57(8) (review of "agency's exercise of discretion") and (10) (due weight to be accorded "discretionary authority" of agency). Discretionary decisions are subject to review under, *inter alia*, the arbitrary and capricious and substantial evidence standards. See CW/SCJ Cross-Appeal Br. at 11-12. The principal parties also have extensively briefed the deference to be accorded to an agency in its interpretation and application of legal requirements. *See, e.g.*, CW/SCJ Cross-Appeal Br. at 9-11; CW/SCJ Respondents' Br. at 2-5. CW/SCJ are not aware of any Wisconsin case that has extended unreviewable, unbridled discretion to an agency.

B. Wis. Stat. §196.491(3)(a) Does Not Create an Exception to the Normal Standards of Judicial Review

There is nothing in Wis. Stat. § 196.491(3)(a) that creates an exception to the reviewability of an agency determination. Dairyland

acknowledges that the statute does not specifically bar review. It fails to note that the statute specifically authorizes review.

> Any person whose substantial rights may be adversely affected . . . by a certificate of public convenience and necessity for which an application is filed under par. (a)1. may petition for judicial review, under ch. 227, of *any decision of the commission regarding the certificate.*

Wis. Stat. § 196.491(3)(j) (emphasis added). Although issuance of a CPCN triggers the right to review, the statute does not limit review only to the CPCN but allows review of "any decision . . . regarding" the CPCN. If review were limited to the CPCN itself, as Dairyland advocates, that final phrase would be meaningless surplusage, an interpretation disfavored by well established canons of construction. *See, e.g.*, Landis ex rel. Landis v. Physicians Ins. Co. of Wis., Inc., 2001 WI 86, ¶ 16, 245 Wis. 2d 1, 628 N.W.2d 893.

Dairyland's argument is also inconsistent with the general treatise that it cites, which provides that when the Legislature intends to exclude review, it so provides. Charles H. Koch, Jr., *Administrative Law and Practice*, §13.2[1], p. 308 (2d. ed. 1997) (hereinafter "Koch Treatise"), citing Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) (reiterating "the general principle that review may only be precluded by 'clear and convincing evidence' of congressional intent to do so").

Dairyland's claim that the statutory scheme precludes judicial review is wrong. Dairyland Br. 16-17. Dairyland relies on three features of

Wis. Stat. § 196.491(3)(a): 1) PSC must give reasons for an incompleteness determination; 2) PSC does not need to state reasons for a completeness determination; and 3) if PSC takes no action, the application is deemed complete. Dairyland Br. at 12-15. Dairyland draws from these observations a conclusion that the statute "necessarily" gives PSC absolute discretion. Id. at 15.

Dairyland's observation that PSC must identify missing information in an incompleteness determination is simply logical. Without that disclosure, the applicant would be left to guess the deficiencies. Similarly, there would normally be no need for an agency to explain its reasoning for a completeness determination. Irrespective of whether that determination is correct, it is self-evident that the agency believes the application to be complete.

The fact that an application may be deemed complete by PSC's failure to act does not insulate PSC's determination in this case from review. The CPCN itself will issue automatically if PSC does not act within 180 (or, if extended, 360) days. Wis. Stat. § 196.491(3)(g). Yet no party has contended that the CPCN is exempt from judicial review due to this feature of the statute.

The statute's automatic trigger provision is a legislative incentive intended to encourage PSC to timely act on applications, and to ensure that applications do not languish – not to preclude judicial review of agency

decisions. Moreover, PSC's failure to make a determination (*i.e.*, to allow an application to become complete by default) may itself be an unreasonable abuse of discretion or arbitrary and capricious.

C. State Laws Provide Standards for Review of PSC's Completeness Determination

Dairyland asserts that PSC's decision is unreviewable because no standards exist by which a court can evaluate PSC's completeness determination. Dairyland cites no Wisconsin law for this proposition. It is also wrong because the statute and rules provide standards.

PSC rules governing the requirements for a complete CPCN application are set forth in sec. PSC 111.53(1), Wis. Adm. Code, which provides that "a CPCN application is not complete until the applicant has filed all of the following information." The regulation delineates specific categories of information that the applicant must submit for each of its two proposed sites, including, *inter alia*, cost, environmental, and transmission-related information, in order for the application to be deemed complete. Sec. PSC 111.53(1)(a)-(f), Wis. Adm. Code. The requirements of sec. PSC 111.53(1), Wis. Adm. Code, provide the requisite standards for a court to review PSC's completeness determination. Where PSC has by regulation prescribed the form of the application and the information it must contain, it is not at liberty to disregard its own regulations. The statute itself provides that an application for a CPCN "shall be in the form and contain

the information *required by commission rules*." Wis. Stat. § 196.491(3)(a)1 (emphasis added).

Although the articulation of standards to review is not a close question here, it should also be noted that courts are reluctant to preclude judicial review based on an asserted lack of agency standards. "It is rare that a court cannot find a standard to apply and thereby determines that review is precluded" and "in general, courts can be expected to resolve any ambiguity in favor of review." Koch Treatise at §13.3[1] at 317. Moreover, "courts have held that agency rules may supply the meaningful standards if the statute does not." Id. at 319.

D. Interim Agency Decisions are Subject to Judicial Review as Part of the Court's Review of an Agency's Final Decision

Finally, Dairyland argues that the completeness determination is unreviewable because it occurred before PSC issued the CPCN. Dairyland miscites Wisconsin cases to argue that interlocutory decisions of administrative agency decisions are unreviewable. Each of the cases cited in Dairyland's brief at 18-19 holds only that one may not obtain review of interlocutory decisions prior to final agency action.

Interlocutory decisions are reviewed at the time of the court's review of an agency's final decision. In Pasch v. Department of Revenue, 58 Wis.2d 346, 206 N.W.2d 157 (1973), the Tax Appeals Commission had issued an interlocutory order concluding that it had jurisdiction to proceed

to a hearing. The Court held that under Wis. Stat. ch. 227, "the jurisdiction of the commission *may be challenged upon review from the final decision* of the commission upon the merits of the controversy." 58 Wis.2d at 357 (emphasis added). Similarly, in Friends of the Earth v. PSC, 78 Wis.2d 388, 410-11, 254 N.W.2d 299 (1977), the Court stated that "an interim order of the character involved here is not immediately subject to judicial review, but *may be reviewed in connection with review of the final order* in the case" (emphasis added).

Dairyland's citation to Independent Bankers Assoc. of America v. National Credit Union, 936 F.Supp. 605 (W.D.Wis. 1996), is inapposite. The court merely held that it was premature to review the agency's initial approval of an application for insurance, because the final decision on whether or not to issue the insurance certificate was still pending before the agency. Id. at 616. It does not address the reviewability of an interim decision in connection with review of a final decision.

Dairyland's reliance on Southwest Center for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443 (9th Cir. 1996), is even more inappropriate. The court did not decline to review an interim decision. Rather, it reviewed the decision before it on the merits, ultimately agreeing with the agency's decision. 100 F.3d at 1448-49.

In this matter, in which CW/SCJ sought early review of the completeness determination, the Circuit Court in the earlier judicial review

proceeding granted PSC's and WEC's motion to dismiss, explicitly stating that PSC's completeness determination "is reviewable in an action for judicial review of the *final decision*." CW/SCJ-Ap.145 (as quoted in CPCN decision; emphasis added). Moreover, PSC reiterated and confirmed its determination that the application was complete in its final CPCN decision. CW/SCJ-Ap.144-48.

These authorities establish that PSC's decision to deem WEC's CPCN application complete is reviewable in this proceeding. Since WEC failed to submit required information, including complete information on two proposed sites, SCJ/CW and other project opponents have been prejudiced because PSC approved the proposal to locate ERGS at the OCPP site without considering any alternative location for the facility.

II. JUDICIAL REVIEW OF THE PSC'S COMPLETENESS DETERMINATION FURTHERS LEGISLATIVE GOALS AND IS SOUND PUBLIC POLICY

A. Submittal of Information Necessary for PSC to Fulfill Its Statutory Responsibilities Is a Critical Statutory Requirement

Dairyland fundamentally misunderstands the significance of the completeness determination. It is not merely an "i" to dot or a "t" to cross, irrelevant to subsequent decisionmaking. It is not there for the "benefit" of PSC. Dairyland Br. at 13. The beneficiary of this requirement is not the PSC, but the public it is supposed to serve and protect. The Legislature does not impose requirements on an agency for the agency's benefit, but to

protect the public from prejudice by providing it with procedural safeguards and substantive assurance of consistency and regularity in decisionmaking.

Completeness is a sufficiently critical stage that the Legislature described the process and agency requirements in detail. It signifies that the applicant has submitted the information necessary for PSC to perform its statutory responsibilities to determine, *inter alia*: a) that the applicant has proposed the highest priority, cost-effective, technically feasible, and environmentally sound options (Wis. Stat. §§ 1.12(4) and 196.025); b) that the proposal satisfies the reasonable needs of the public (Wis. Stat. § 196.491(3)(d)2); and c) that the design and location are in the public interest, considering alternative sources of supply, alternative locations, and other specified public interest factors (Wis. Stat. § 196.491(3)(d)3).

Submittal of necessary information before the completeness determination is also compelling because completeness triggers the statutory deadline for making the final decision on the CPCN application. If the applicant has not submitted all information necessary for PSC to make these determinations, as well as the information necessary for PSC and DNR to prepare the EIS and for DNR to issue permits required for construction, PSC creates the risk that it will have to deny the CPCN (or, in this case, to violate the CPCN statute, Energy Priorities Law and WEPA).

Consistent with the above discussion, the CPCN statute and regulations provide objective standards by which a court can review PSC's

completeness determination. Wis. Stat. § 1.11(2)(c) (and cases decided thereunder), § 1.12(4) and § 196.491(3)(d) specify the criteria that PSC must evaluate to satisfy those statutes. As discussed in section I.C. above, PSC's administrative regulations identify specific categories of information that the applicant must submit for an application to be deemed complete. An important and reviewable issue in this case is whether WEC submitted that required information.

B. Dairyland's Fear of Adverse Impacts on Service to Utility Customers Is Unfounded Speculation

Finally, Dairyland invokes the fear factor, that judicial review of an agency's interim determinations would subject the electric utility industry to uncertainty, would undermine the Legislative process, and would jeopardize supply of electricity. Of course, there is literally no evidence in the record to support this provocative proposition. Moreover, this Court has not been influenced by such provocative, extra-legal arguments to dissuade it from reviewing agency decisions. As noted in the above cited cases, judicial review of interim agency decisions in connection with the courts' review of the agency's final decision, has been a routine part of administrative decisionmaking for decades: it is known and predictable.

It is ironic that the project proponents would now complain of uncertainty associated with delayed review, since they uniformly and aggressively opposed early review of the completeness decision, arguing

that review of PSC's completeness determination should await the final decision on the CPCN. SCJ and CW alerted PSC and WEC to the infirmities of WEC's application early and often and cannot be held responsible for WEC's refusal to propose any alternative site for the ERGS facility. Any delay associated with the failure of PSC and WEC to follow the law lies exclusively at their doorstep.

Contrary to Dairyland's thesis, insulating an agency's interim decisions from judicial review would set dangerous precedent. PSC issued a poor decision based on multiple violations of State law. If this character and degree of error were impervious to judicial review, there would be virtually no judicial check on agency decisionmaking. An agency could tailor its record, because submittal and consideration of applications, public comments and evidence are merely "preliminary" matters. Review of the final decision would be meaningless, since the record could be cultivated to support that decision.

Indeed, the approach followed by WEC and PSC here is disturbingly illustrative of this danger. Having excluded all other sites from consideration, they now trumpet the OCPP site as the most suitable location for the new coal-fired power plant.

In addition to a final decision being legally flawed because the agency applied the wrong legal standard, reversible error can also be the consequence of having inadequate information necessary to satisfy legal

standards, or arbitrary, capricious or otherwise unlawful decisions along the way.

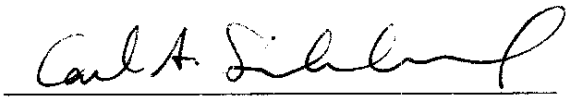
CONCLUSION

We end this discussion where our initial Cross-Appeal brief began. PSC approved the lowest priority, highest cost, environmentally poorest option available. It reached this decision based on a flawed process that was defective at its inception due to an inadequate application, perpetuated by PSC's recognition but failure to require necessary information, and compounded by its unlawful deviation from the statutory scheme carefully designed to avoid those errors.

For these reasons, and those set forth in our other briefs, S.C. Johnson and Clean Wisconsin respectfully request that the Court reverse, vacate and remand the CPCN and EIS, with instructions that PSC may not reconsider this or any other CPCN application unless that application satisfies all of the pertinent statutory and regulatory requirements.

Dated this 15th day of March, 2005.

WICKWIRE GAVIN, P.C.



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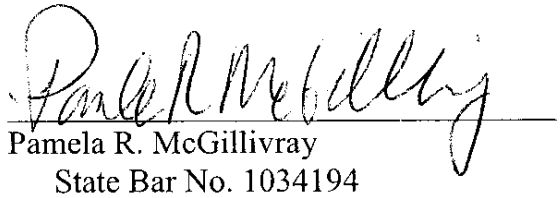

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CERTIFICATION

I certify that this Responsive 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), 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 2621 words and less than the 20 pages authorized by the Court in its Order dated March 15, 2005.

Dated this 15th day of March, 2005.

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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-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,	Appeal No. 04-3179 Trial Court Case No. 03CV003478, 03CV003731, 04CV000133, 04CV000149, 04CV000530, 04CV000533 (Caption continued on following pages)

REPLY BRIEF OF INTERESTED PARTY-CROSS-RESPONDENT DAIRYLAND POWER COOPERATIVE TO RESPONSIVE BRIEF OF PETITIONERS-RESPONDENTS-CROSS-APPELLANTS-CROSS-RESPONDENTS CLEAN WISCONSIN, INC. AND S.C.JOHNSON& SON, INC.

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,
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 &

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ARGUMENT

The response brief submitted by Clean Wisconsin, Inc. and S.C. Johnson & Son, Inc. (collectively, "CW/SCJ") argues that some of the cases cited in Dairyland's brief are inapposite because they concern only the reviewability of interim decisions. Responsive Brief of Petitioners-Respondents-Cross-Appellants-Cross-Respondents Clean Wisconsin, Inc. and S.C. Johnson & Son, Inc. in Response to Brief of Dairyland Power Cooperative ("CW/SCJ Response"), at 6-8.

CW/SCJ miss the point. There is no question in this case about **when** a Commission decision may be reviewed. Commission decisions may be reviewed after a final decision is issued by the agency. The issue, instead, is **what kinds** of decisions are subject to judicial review. The specific issue in this case is whether the monumental amount of evidence and testimony submitted to and reviewed by the Commission supports the Commission's decision to approve a CPCN for the ERGS. If the record **evidence** adequately supports the Commission's decision, given the appropriate level of deference, then whether the initial **application** was or was not "complete" in some abstract sense makes no difference. Likewise, if this Court were to decide that the Commission's decision is not supported by substantial evidence, it would return the case to the Commission to consider more evidence, not to tinker with the form of the application.

Dairyland also argued that the Commission's decision that the application was "complete" is unreviewable because only the Commission can make an informed decision that it has enough information about a highly technical matter to proceed to the next step. The statutory scheme plainly gives the Commission complete discretion to

make this judgment. *See,* Brief of Interested Party-Cross-Respondent Dairyland Power Cooperative at 13-17. To hold otherwise would subject applicants, the Commission, and the courts to endless disputes about how much information is "enough" to commence the complex project review process.

CONCLUSION

For the reasons stated here and its initial brief, Dairyland respectfully asks the Court to affirm the Commission's approval of the ERGS CPCN.

Dated March 18, 2005.

Respectfully submitted,

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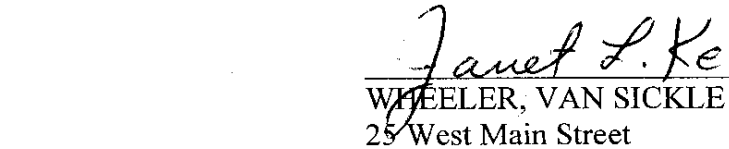

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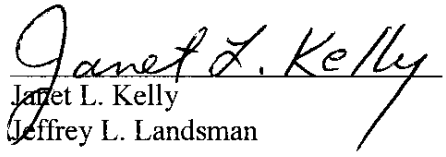
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 331 words.



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