COURT OF APPEALS
DECISION
DATED AND RELEASED

May 23, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1249

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

93 CV 4628 (Dane)
POLSKY ENERGY CORPORATION,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent.

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94 CV 215 (Dane), 94 CV 783 (Milwaukee),
94 CV 720 (Dane), 94 CV 2173 (Dane),
94 CV 2574 (Milwaukee), 94 CV 2977 (Dane)
ENERTRAN TECHNOLOGY COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent.

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94 CV 2176 (Dane)
CITIZENS' UTILITY BOARD, INC.,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent.

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93 CV 1446 (Outagamie)
REPAP WISCONSIN, INC.,

Petitioner-Appellant,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN AND LS POWER CORPORATION,

Respondents-Respondents.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Dykman, Sundby and Vergeront, JJ.

VERGERONT, J. Repap Wisconsin, Inc., a paper company, appeals from a trial court order affirming a Public Service Commission (PSC) order which denied the application of Wisconsin Electric Power Company (WEPCO) to build a new electric generating facility. There are two primary issues on appeal: (1) whether the PSC erred in denying Repap's request for a contested case hearing under § 227.42, STATS., on the PSC's decision to deny WEPCO's application; and (2) whether the PSC erred in denying WEPCO's

application without holding a public hearing under § 196.491(3)(b), STATS. We resolve both issues in favor of the PSC and affirm.

BACKGROUND

WEPCO is a public utility that provides electricity to the public. On May 22, 1992, WEPCO filed an application for a Certificate of Public Convenience and Necessity (CPCN) with the PSC to build a 210 megawatt cogeneration facility at Repap's paper mill in the Village of Kimberly.[1] The proposed facility, referred to as the Kimberly Cogeneration Facility, would supply electrical energy to the WEPCO system and thermal energy in the form of steam for Repap's papermaking process. WEPCO intended to own the facility and Repap intended to operate it. The application stated that the purpose of the proposed project was to provide additional generating capacity for WEPCO's system and to replace Repap's aging boiler system.

Under § 196.491(3), STATS., the builder of a large electric generating facility such as the Kimberly Cogeneration Facility must apply for and receive a CPCN from the PSC prior to construction. Traditionally, only electric utilities constructed new electric generating facilities and the CPCN process involved PSC review of a single proposed project. This involved a consideration of alternate sources of supply and alternate designs and locations for the proposed facility. However, the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3, imposed restrictions on the ability of utilities to construct their own facilities without considering cogeneration facilities proposed by independent (non-utility) power producers (IPPs). Congress' intent was to encourage energy efficiency and promote competition in the power generation industry. ***FERC v. Mississippi***, 456 U.S. 742, 750-51 (1982). PURPA allowed IPPs to break into the electric generation monopoly by giving a qualifying facility[2] an enforceable right to sell power to a utility if the qualifying

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[1] A cogeneration facility is one that produces both electric energy and steam or some other form of useful energy, such as heat. ***FERC v. Mississippi***, 456 U.S. 742, 750 n.11 (1982).

[2] A qualifying facility is defined by PURPA regulations as either an independently-owned cogeneration facility that produces electricity and sells its waste heat for some other useful purpose, such as paper production, or an independently-owned small power plant that uses renewable resources. *See* 18 CFR 292.101(b)(1), 18 CFR 292.202(c), 18 CFR

facility can provide power at or below the sum the electric utility would have to pay if it produced the power itself or had to purchase the power from another source. 16 U.S.C. § 824a-3.

At the time WEPCO filed its CPCN application, the PSC was in the process of examining its responsibilities under PURPA and attempting to devise an appropriate method for including competing IPP projects in the CPCN process under § 196.491, STATS. This process was expedited when the PSC received notice that a number of IPPs were interested in meeting WEPCO's power needs through the construction of their own cogeneration facilities. As neither § 196.491(3) or PURPA addressed how to deal with multiple competing projects, each with its own size, timing, cost, operating characteristics and environmental aspects, the PSC was forced to modify its traditional CPCN review procedure.

In a Notice of Opportunity to File Alternative Projects (Bidding Notice), the PSC proposed a two-stage CPCN review process. In the first stage, the PSC would use a competitive bidding scheme in order to identify and evaluate alternative projects to the Kimberly Cogeneration Facility and to select the best project to supply needed electrical power to WEPCO's system. This included the use of a computer model to help determine which of the competing proposals would be the least-cost supply plan for WEPCO. In the second stage, the PSC would address the environmental effects of the winning bid and hold a public hearing in the area affected by the winning bid, as required by § 196.491(3)(b), STATS.[3]

The PSC received nine letters of intent to submit project bids from other utilities and IPPs vying to replace the Kimberly Cogeneration Facility as the next facility in WEPCO's system. Each bidder was asked to submit

(..continued)
292.203(a) and 18 CFR 292.206.

[3] Section 196.491(3)(b), STATS., provides:

> The commission shall hold a public hearing on the application 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.

information regarding its project costs, schedules, operating characteristics, contract terms and environmental factors associated with its proposed facility. Under protective orders issued by the PSC, all of the filed information was made available to all of the bidders (with certain exceptions not relevant to this appeal). Confidential materials, including the PSC's comments on each bid, were not made available to non-bidders.[4] In order to evaluate the bids in stage one, the PSC's staff used a computer model which allowed a direct comparison of the long-term costs of supply options which varied as to size, type of capacity, fuel type, capacity factor, dispatchability and in-service date.

On August 11, 1993, the PSC circulated its Preliminary Modeling Results. The results provided an initial ranking of the competing bids in the order of the least system cost. The bidders were asked to comment on the preliminary results, the modeling process, unmodeled costs and the intangible factors of the competing bids. On September 3, 1993, the PSC's staff reviewed these comments and submitted its final staff report to the PSC with the final modeling results and reviews of the proposals. On the same date, the PSC circulated a non-confidential portion of the final staff report to all parties, with exhibits showing the project rankings based on the final computer modeling. A confidential portion of the final staff report was circulated to the bidders which summarized the bidders' confidential comments and the staff's assessment of the bids and comments. The parties were again asked to make written comments and given until September 13, 1993, to request a hearing. Only one bidder, Polsky Energy Corporation, requested a hearing prior to September 13, 1993, and that request was later withdrawn.

On September 16, 1993, the PSC denied WEPCO's CPCN application and selected a project proposed by LS Power Corporation to proceed to stage two. The Kimberly Cogeneration Facility finished in second place and was permitted to proceed to stage two in the event LS Power failed to proceed, provided WEPCO make certain modifications to its bid.

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[4] Repap was not a bidder, but rather the operator of WEPCO's proposed facility. Consequently, although Repap had access to the non-confidential portions of all materials, it did not have access to the confidential submissions until the trial court granted it access on December 16, 1994. Repap made no objection to WEPCO's representation of the Kimberly Cogeneration Facility in the confidential portion of the case at the time the bidding notice was circulated, or at any time until after the PSC denied WEPCO's CPCN application.

On September 28, 1993, Repap asked the PSC for a contested case hearing under §§ 196.491(3)(b) and 227.42, STATS. In an order dated November 4, 1993, the PSC denied this request as untimely and memorialized its September 16, 1993 rulings.

Following the selection of LS Power in stage one, the PSC conducted a full environmental review of LS Power's bid in stage two. This included a public hearing under § 196.491(3)(b), STATS., held in Whitewater, Wisconsin, the area affected by LS Power's facility. The PSC issued a CPCN for the LS Power project on March 6, 1995. The events of stage two are not a subject of this appeal.

STANDARD OF REVIEW

We review the decision of the PSC, not the decision of the trial court. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 777, 530 N.W.2d 392, 395 (Ct. App. 1995). Nonetheless, we value the opinion of the trial court, particularly where, as here, the court has provided a very thorough, lengthy and well-reasoned decision. *See* ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475-76, 507 N.W.2d 163, 165 (Ct. App. 1993).

Whether the PSC erred in denying Repap's motion for a contested case hearing under § 227.42, STATS., involves the application of the law to an undisputed set of facts. This presents a question of law. We are not bound by an agency's conclusions of law. *See* ***Kelley Co. v. Marquardt***, 172 Wis.2d 234, 244, 493 N.W.2d 68, 73 (1992). However, in some cases, it is appropriate to give deference to an agency's conclusions. ***Local No. 695 v. LIRC***, 154 Wis.2d 75, 82, 452 N.W.2d 368, 371 (1990). As the PSC is not charged with administering ch. 227 and does not claim to have any particular expertise in applying § 227.42, we review this issue de novo.

Whether the PSC erred in failing to hold a public hearing under § 196.491(3)(b), STATS., before denying WEPCO's CPCN application involves the construction of a statute. This also presents a question of law. We recognize that the PSC is charged with administering ch. 196, STATS., and has experience, technical competence and specialized knowledge in processing applications for

CPCNs. Moreover, the PSC has broad discretion to manage its own docket. *See* ***Friends of the Earth v. PSC***, 78 Wis.2d 388, 409, 254 N.W.2d 299, 307 (1977) ("Unquestionably, the PSC possesses broad discretion in managing the progress of cases on its docket provided it does so in good faith"); § 196.02(1), STATS. (the PSC may do "all things necessary and convenient to its jurisdiction"). However, the parties agree that this case, including the issue of when to hold the public hearing under § 196.491(3)(b) was one of first impression for the PSC, involving the harmonization of § 196.491(3) and its obligations under PURPA. Also, while the PSC had promulgated administrative rules to implement § 196.491(3) when a single utility proposes a facility, it had not promulgated rules regarding the two-stage CPCN procedure used when there are multiple competitors. *See* ***Richland Sch. Dist. v. DILHR***, 174 Wis.2d 878, 894, 498 N.W.2d 826, 832 (1993) (the promulgation of rules indicates the agency has gained experience and expertise in interpreting a statutory provision). Accordingly, we also review the public hearing issue de novo.

HEARING UNDER § 227.42, STATS.

Repap contends that the PSC erred in denying its request for a contested case hearing under § 227.42, STATS., as untimely.[5] We disagree and

[5] Section 227.42(1), STATS., provides:

> In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:
>
> (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
>
> (b) There is no evidence of legislative intent that the interest is not to be protected;
>
> (c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and
>
> (d) There is a dispute of material fact.

In denying Repap's request for a contested case hearing under § 227.42, STATS., the

conclude that Repap waived its right to a hearing under § 227.42 by not requesting one within ten days of the PSC's September 3, 1993 memo.

The PSC's memo was circulated to all of the parties on September 3, 1993. Attached to the memo was a portion of the staff's final report containing the project rankings based on the final computer modeling. A confidential portion of the staff's final report, summarizing the competitors' confidential comments and the staff's assessment of the parties' respective bids and comments, was also attached to the copies of the PSC memo sent to the bidders, including WEPCO. The PSC memo asked the parties to "comment on this staff mailing and if desired, to comment on the other parties' prior comments by Monday, September 13, 1993." The PSC memo also notified the parties that its decision on the matter was scheduled for September 16, 1993. The non-confidential portion of the final staff report stated:

> The parties have also been given an opportunity to respond to the staff report. These supplemental comments will be routed to you [the PSC] separately. *If any party wishes to ask for hearing on some aspect of this analysis, the request should be included with these comments. Any such request should be explicit as to precisely which issues require hearing in the requester's view*.

(Emphasis added.)

Repap does not dispute that the PSC has the authority to establish a deadline to request a contested case hearing. Rather, Repap contends that a deadline was not actually set because the ten-day deadline to request a hearing was explained in the staff's final report, not in the PSC memo to which it was attached. We reject this argument. The PSC memo asked the parties to comment within ten days on the staff mailing. The staff mailing referred to was the staff's final report and that report expressly refers to requests for a hearing. A reasonable person reading the PSC memo in conjunction with the staff's final

(..continued)
PSC did not question Repap's entitlement to such a hearing if one had been timely requested.

report would understand that all comments and any requests for a hearing must be made within ten days of the PSC memo.

Repap next contends that it believed that a contested case hearing would be held automatically after the PSC selected the winning bid in stage one. This argument is not persuasive. When the two-stage CPCN procedure was announced in the bidding notice, it did not contain any provision for a contested case hearing. Repap did not raise any objections to this proposed procedure. When several of the competing IPPs requested more formal contested-case hearing procedures than were proposed, Repap objected to these requests. Repap specifically stated that it "is most concerned that the proceeding be administered in an efficient way which does not delay any longer the consideration of, and decision on, the [Kimberly Cogeneration Facility] CPCN application." In response to the requests for more formal contested-case hearing procedures by the competing bidders, the PSC informed the parties by letter dated June 17, 1993, that a hearing in stage one was not planned. The letter provided:

> Although it is possible that hearing may be appropriate at the "intangibles"[6] stage of the process, (See Notice of Opportunity to File issued May 19, 1993) it is not apparent at this point whether hearing will be necessary to resolve disputes, or whether the matters that may arise are more appropriate for comment or brief.... *Consequently, the Commission will not establish any hearing schedule or requirement at this time in stage one of this case*.

(Emphasis added; footnote added.)

In light of this record, Repap's assertion that it believed a contested case hearing would automatically be held after the winning bid was selected in stage one was unreasonable.

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[6] The PSC's November 4, 1993 order described the intangible factors as follows: site control, environmental concerns, financial security performance and construction guarantees, and fuel supply. The intangible factors were considered by the staff prior to issuing its final report.

Repap also takes the position that the staff's final report invited hearing requests only on the confidential staff analysis, to which it did not have access, and that regardless of whether it waived its right to a hearing on the confidential staff analysis, it had a right to a contested case hearing on the PSC's decision to deny WEPCO's application and to select LS Power's proposed facility. We disagree. First, Repap misreads the PSC memo. The memo provided the parties with the opportunity to comment and request hearings on the "staff mailing." The staff mailing referred to was the staff's final report. All parties, including Repap, received the portion of the staff's final report containing the project rankings based on the final computer modeling. The invitation for hearing requests was not directed solely to the confidential portion of the staff's analysis. Second, as we have already stated, it was clear from the announcement of the bifurcated CPCN procedure set out in the bidding notice that if a hearing were held at all in stage one, it would be at the intangibles stage, not after the winning bid was selected.

PUBLIC HEARING UNDER § 196.491(3)(b), STATS.

Repap contends the PSC erred in denying WEPCO's CPCN application without holding a public hearing under § 196.491(3)(b), STATS. We conclude that the PSC's decision to hold the public hearing in stage two satisfies the requirement of the statute.[7]

Section 196.491(3)(b), STATS., provides in relevant part: "The Commission shall hold a public hearing on the application in the area affected pursuant to s. 227.44." Neither the statute itself or any case law describes the purpose of the hearing. However, the fact that the public hearing must be held "in the area affected" indicates that the legislature was concerned that local citizens have the opportunity to comment on how the proposed facility will affect them. Further, since the CPCN review process consisted of the PSC's evaluation of a single proposed facility when this statute was enacted, it is reasonable to construe the purpose of the public hearing as an opportunity for local citizens to voice their criticisms of, or opposition to, the proposed project.

[7] The parties appear to agree that the public hearing under § 196.491(3)(b), STATS., cannot be waived.

The PSC's decision to conduct the public hearing under § 196.491(3)(b), STATS., in stage two is in keeping with the statute's purpose. With multiple competing projects, the PSC could not know what the "area affected" would be until it selected the winning bid in stage one. Moreover, holding a public hearing in the area affected by each competing project would be burdensome and confusing to the public since only one of the bids was likely to succeed. As the PSC stated in its November 4, 1993 order:

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

Repap contends that the PSC must hold a public hearing under § 196.491(3)(b), STATS., in stage one to address "alternative sources of supply." We are not persuaded. It is true that part of the PSC's review of a CPCN application must involve the consideration of alternative sources of supply. Section 196.491(3)(d)3 provides that a CPCN application shall be approved if, among other factors, "[t]he 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." (Emphasis added.) The parties agree that, in this case, the alternative sources of supply were the proposals submitted by competitors of the Kimberly Cogeneration Facility. However, there is no indication in § 196.491(3) that the PSC's consideration of alternative sources of supply must be a subject of the public hearing under § 196.491(3)(b). Rather, as stated above, the purpose of § 196.491(3)(b) is to provide an opportunity for local citizens to voice their criticisms of, or opposition to, the proposed facility. Repap provides no support for its assertion that the public hearing was intended to give the public an opportunity to participate in evaluating competing alternative projects throughout the state, particularly in light of the fact that when the statute was created, there was no competition between alternative projects.

MODIFICATIONS OF WEPCO'S SECOND-PLACE BID

In its November 4, 1993 order denying WEPCO's CPCN application and selecting LS Power as the project to proceed to stage two, the PSC also determined that WEPCO's bid was the second-place bid, subject to conditions. The PSC stated that WEPCO's bid could proceed if the LS Power project failed to proceed, as long as WEPCO corrected some "weaknesses" in its bid concerning the proposed site of the facility and certain accounting practices. In an order dated February 4, 1994, the PSC approved WEPCO's proposal to change the Kimberly Cogeneration Facility site and WEPCO's modification of its accounting practices.

The trial court determined that the PSC improperly allowed WEPCO to make a material change to its bid. The court stated that, "The PSC clearly implied [in its November 4, 1993 order] that the failure to cure would result either in the disqualification of the proposal or in a lower ranking," and that "[n]othing in the PSC's order explains why such a right to cure was permitted and the principle of `a bid is a bid' overlooked." The court vacated that part of the PSC's order which placed WEPCO's bid in second place and remanded with directions to the PSC to provide an adequate explanation as to why WEPCO was allowed to make the modifications to its bid.

Repap asks us to reverse the trial court's February 4, 1994 order and affirm the PSC's determination that WEPCO's modifications did not constitute a material change to its bid. We decline to do so because we conclude the issue is moot. The PSC's November 4, 1993 order provided that WEPCO's second-place bid could proceed only if LS Power failed to proceed. On March 6, 1995, the PSC approved LS Power's CPCN application. Since LS Power has completed the CPCN process, the issue of which bidder was properly in second place is no longer an issue.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 95-1249(D)

SUNDBY, J. (*dissenting*). In this appeal, we construe § 196.491(3), STATS., requiring a person wishing to construct and operate an electric generating facility to obtain a certificate of public convenience and necessity from the public service commission. The parties agree that this presents a question of law which we review *de novo*. *See* ***City of Brookfield v. Public Service Comm'n***, 186 Wis.2d 129, 134, 519 N.W.2d 718, 721 (Ct. App. 1994).

Section 196.491(3), STATS., provides in part:

> (a) No person may commence the construction of a facility unless such person has applied for and received a certificate of public convenience and necessity from the commission *as provided in this section*.... 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....
>
> (b) The commission shall hold a public hearing on the application *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) ... [T]he *application* for a certificate of public convenience and necessity shall be approved if the commission determines that:
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> ....
>
> 6. The proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved.
>
> ....
>
> (hm) The commission and the department shall schedule as many hearings under this subsection as

> practicable *at a time and place reasonably convenient to the majority of persons in the area of the facility*.
>
> ....
>
> (j) Any person whose substantial rights may be adversely affected or any county, municipality or town having jurisdiction over land affected by an advance plan or certificate of public convenience and necessity may petition for judicial review, under ch. 227, of any decision of the commission regarding the advance plan or the certificate.

(Emphasis added.)

"Facility" includes the cogeneration plant which was the subject of WEPCO's application to the commission. In an early order, the commission stated: "The existing [public convenience and necessity] review process was not designed to handle multiple competing projects...." The commission designed a review process to handle multiple competing projects, without seeking statutory authorization for such process. An administrative agency has only such powers as are expressly delegated to it by the legislature or are necessarily implied from such delegation. ***Wisconsin Patients Compensation Fund v. Wisconsin Health Care Liability Ins. Plan***, No. 95-0865, slip op. at 10 (Wis. May 8, 1996). Because the review process fashioned by the commission failed to follow important provisions of the existing public convenience and necessity review process, the commission cannot claim that § 196.491(3), STATS., gave implicit authority to fashion the procedure followed in this case. "Any reasonable doubt as to the existence of an implied power in an agency should be resolved against the exercise of such authority." *Wisconsin Patients* at 11 (quoting ***Kimberly-Clark Corp. v. Public Service Commission***, 110 Wis.2d 455, 462, 329 N.W.2d 143, 146 (1983)). While the commission undoubtedly acted in good faith, the effect of its new process was to deny the right to be heard *in the*

selection process to local communities and local residents in the area affected. One need only recall the furor over construction of the Lake Koshkonong nuclear plant to realize how important the legislature regards input of local communities and local citizens into the public convenience and necessity review process.[8]

The majority concludes that the public hearing which the commission held *after the facility had already been selected* satisfied § 196.491(3)(b), STATS. It is undisputed that the commission did not hold a public hearing in the first stage of the bidding and selection process. The commission concedes, and the majority finds, that the commission used the first stage to "identify and evaluate alternative projects to the Kimberly Cogeneration Facility *and to select the best project to supply needed electrical power to WEPCO's system*." Maj. op. at 5 (emphasis added). The commission had no power to select "the best project" without following the existing certificate of public convenience and necessity procedure. The alternative process adopted by the commission may have been practical, may have been efficient, may have been fair to the competing facilities, but it suffers from an irredeemable fault: It is not authorized by law.

It is undisputed that only WEPCO applied to the commission under § 196.491(1), STATS., for a certificate of public convenience and necessity. The certificate of public convenience and necessity process is triggered *only* by the filing of an application for a certificate from the commission. The entire procedure follows from the application. It is that application which the commission must process, and it must do so by following the requirements of sub. (3), particularly the public hearing requirements. It is also undisputed that no hearing was ever held on WEPCO's application. WEPCO's application was

[8] Undoubtedly, the impetus for the creation of § 196.491, STATS., was this furor. The bill which became ch. 68, Laws of 1975, and which created § 196.491, STATS., was introduced at the request of Governor Lucey by legislators in whose districts nuclear power plants were proposed to be sited.

summarily dismissed *after* the commission selected the project proposed by LS Power Corporation in lieu of the Kimberly Cogeneration Facility.

The importance of public input in the public convenience and necessity process is demonstrated by the outpouring of support for the requests of Repap and EnerTran for a hearing under § 227.42(1), STATS. These requests were supported by the Department of Natural Resources, the Citizens' Utility Board, numerous federal and state elected officials, the Village of Kimberly and other local governments and economic development organizations, the Wisconsin Paper Council, the Wisconsin Manufacturers and Commerce Association, several unions, and petitions signed by almost 6,000 residents of the Fox River Valley.

Plainly, the local communities, businesses and residents in an area to be affected by an electrical generating facility cannot be expected to understand the intricacies of operation of such facilities. But they do understand and have an intense interest in the creation of jobs and the economic and environmental impact of a proposed facility upon the area in which the facility is proposed to be located. The legislature has responded to these interests by providing for local input on an application for a certificate of public convenience and necessity. When the legislature has provided for the input of local communities, businesses and other persons, it is not our function to rewrite the statutes to preclude a fair hearing for the public in deciding whether a particular facility serves the public convenience and necessity. The majority suggests that the public hearing requirement of § 196.491(3)(b), STATS., was satisfied by the hearing the commission held in stage 2 in Whitewater, Wisconsin, where LS Power Company's facility is located. Thus, a public hearing was never held in the area affected by WEPCO's application.

The commission does not claim that § 196.491(3), STATS., is ambiguous. The majority does not hold that the statute is ambiguous. However, such a finding is necessary before a court may decline to apply the

plain and unambiguous language of a statute. *See* ***State ex rel. Girouard v. Jackson Circuit Court***, 155 Wis.2d 148, 155-56, 454 N.W.2d 792, 795 (1990). If we confine ourselves to the language of the statute, as I believe we must, we would construe the statute as follows. First, no person may begin construction of a large electric generating facility unless such person has applied for and received a certificate of public convenience and necessity from the commission "*as provided in this section [sub. 3]*." Section 196.491(3)(a) (emphasis added). The commission "shall hold a public hearing *on the application in the area affected* ...." Section 196.491(3)(b) (emphasis added). The "application" can only refer back to the application filed under para. (a). The only applicant in this case is WEPCO. "[T]he area affected" must refer to the area which is the subject of the application. Any other construction is unreasonable. To find "the area affected" we refer back to the application under para. (a). That area is the area in which WEPCO proposed to construct the Kimberly Cogeneration Facility at Repap's papermill in Kimberly, Wisconsin. Under sub. (3)(d), "the application" shall be approved if the commission makes the determinations required thereunder. A denial of an application is subject to judicial review under ch. 227, STATS. Further, any person whose substantial rights are adversely affected by the commission's decision or any county, municipality or town having jurisdiction over land affected by a certificate of public convenience and necessity may petition for judicial review of the commission's decision under ch. 227.

That is how the statute reads, and if we apply its plain language, the only permissible conclusion is that the commission has arrogated to itself the powers of the state legislature. The commission decided questions of policy which are best left to the legislature.

The majority concludes that we should not give a literal interpretation to § 196.491(3)(b), STATS., because "when the statute was created, there was no competition between alternative projects." Maj. op. at 16. However, the history of public utility law has been to allow but regulate competition. The Public Utilities Law was created by ch. 499, Laws of 1907. At that time, the legislature was concerned with resolving conflicts between

existing utilities and other utilities seeking to compete in the same area. *See* § 1797m-74, STATS., 1911. The utility seeking to compete had to obtain from the railroad commission a declaration "after a public hearing of all parties interested, that public convenience and necessity require such second public utility." ***Id.***

A certificate of public convenience and necessity will not be granted if the proposed facility duplicates existing electric facilities, § 196.495, STATS., and an applicant must show that a second public utility providing the same service is necessary, § 196.50, STATS. *See* ***Adams-Marquette E. Coop. v. Public Service Comm'n***, 51 Wis.2d 718, 188 N.W.2d 515 (1971) (dispute between a utility and a cooperative concerning rights to provide electric service to be resolved under § 196.495(1), STATS.).

Section 196.491, STATS., was created specifically to require long-range planning for electric generating facilities, including greater public participation in the planning and siting process. Subsection (2) requires each electric utility to file an advance plan with the commission every two years to describe its needs and identify and describe existing and planned programs and policies. These advance plans are to be given wide dissemination and are subject to written comments by any county, municipality, town or person affected thereby. The commission must also hold a hearing on these advance plans. At least 120 days prior to the filing of an application for a certificate of public convenience and necessity, the applicant shall notify the department of natural resources and the commission of its intention to apply, showing the location and describing the facility, including the major components thereof having significant air, water and solid waste pollution potential, and the description of the anticipated effects of such facility on air and water quality. Section 196.491(2m). These statutes are *in pari materia* with sub. (3). Subsection (3) is to be construed to effect the intention of the legislature. It would be unreasonable to construe the application and permitting procedure as optional with the commission depending on its own assessment of the exigencies.

I conclude that when § 196.491(3), STATS., is construed with those statutes which are *in pari materia*, the conclusion is inescapable that the procedure adopted by the commission is not consistent with the procedure clearly prescribed by the statute. Therefore, the decision of the circuit court should be reversed and the cause remanded to the commission with directions that it complete the certificate of public convenience and necessity review process on WEPCO's application. I dissent.