SUPREME COURT OF WISCONSIN

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Appeal No. 2010AP2762

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WISCONSIN INDUSTRIAL ENERGY GROUP, INC.
and CITIZENS UTILITY BOARD,
Petitioners-Appellants,
v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
Respondent-Respondent,

WISCONSIN ELECTRIC POWER COMPANY and
WISCONSIN POWER AND LIGHT COMPANY,
Intervenors-Respondents,
WISCONSIN PUBLIC SERVICE CORPORATION
Intervenor.

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# BRIEF OF WISCONSIN INDUSTRIAL ENERGY GROUP, INC. AND CITIZENS UTILITY BOARD

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Dated: January 23, 2012

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## STATEMENT OF THE ISSUE

Does the statutory requirement for the Public Service Commission of Wisconsin to review and approve proposals for large electric generating facilities apply when a Wisconsin public utility proposes to build a large electric generating facility out of state?

> The Circuit Court answered "no," and the Court of Appeals deferred in favor of certification of the issue to this Court.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Citizens Utility Board of Wisconsin, Inc. (CUB) and Wisconsin Industrial Energy Group, Inc. (WIEG) believe oral argument will be helpful for the Court's complete understanding of the issues involved in this appeal. Pursuant to the Court's Order dated December 14, 2011, CUB and WIEG understand that oral argument is to be held and that the parties will be notified of the date and time in due course.

Publication is also warranted as this case addresses an issue of first impression that is likely to recur.

## STATEMENT OF THE CASE

### I. INTRODUCTION.

Petitioners-Appellants CUB and WIEG (collectively "Wisconsin Ratepayers") are ratepayer advocacy organizations with members that are customers of Wisconsin Power and Light Company (WPL). (R: 1, pp. 2-3) WPL is a regulated public utility, as defined in Wis. Stat. § 196.01(5), engaged in the generation, distribution and sale of electric energy to customers in service areas in central and southern Wisconsin. (R: 7) The Public Service Commission of Wisconsin (PSC or Commission) is an administrative agency charged with administering the public utility laws in Wisconsin. (R: 4)

This Court has clearly recognized that, "The primary purpose of the public utility laws in this state is the protection of the consuming public." *GTE North Inc. v. Pub. Serv. Comm'n*, 176 Wis. 2d 559, 568, 500 N.W.2d 284 (1993). One such protection is the requirement that the Commission review a Wisconsin public utility's application for a large electric

generating facility – sized at 100 megawatt (MW) or greater – under the Certificate of Public Convenience and Necessity statute, known as the "CPCN statute," and approve such application only where the public utility satisfies the CPCN statute's considerable requirements. Wis. Stat. § 196.491. Large electric generating facilities are extraordinarily expensive. (*See*, *e.g.*, R: 9, PSC R: 4, Final Decision, p. 1; App. 41, noting the estimate for WPL's proposed Bent Tree Wind Farm was approximately $500 million) If the Commission approves a Wisconsin public utility's application to build a large electric generating facility, that utility's ratepayers will bear the costs to construct and operate the facility. (R: 31, p. 1) To protect ratepayers from having to pay for unnecessary or inefficient large electric generating facilities, the CPCN statute demands that the Commission take specific actions and make certain findings to ensure that consumers' scarce financial resources will be well spent. Wis. Stat. § 196.491(3)(d).

A second statute – Wis. Stat § 196.49, the Certificate of Authority statute, known as the "CA statute" – provides some ratepayer protection in connection with the construction of smaller electric generating facilities. Critically, the protections of the CA statute are considerably less demanding than those required by the CPCN statute. The CA statutory protections are a subset of those required by the CPCN statute, as they are incorporated by reference into the CPCN statute. Wis. Stat. § 196.491(3)(d)5. That is, the CA statutory requirements are necessary, but not sufficient, to support a Wisconsin public utility's application to build a large electric generating facility. Thus, to build a large electric generating facility, a Wisconsin public utility must meet the CA statute criteria, and those required by the CPCN statute.

This case involves WPL's proposal to build a large electric generating facility – a 200 MW wind farm – in Minnesota, at a cost of approximately $500 million, to supply electricity to its customers in Wisconsin. (R: 9, PSC R: 4, Final

Decision, p. 1; App. 41) These Wisconsin customers will pay the costs to construct and operate the wind farm. Despite the fact that the wind farm is double the size of the 100 MW minimum trigger for applying the CPCN statute, the Commission reviewed and approved the wind farm under the CA statute. (R: 9, PSC R: 3, Interim Decision, p. 1; App. 19; R: 9, PSC R: 4, Final Decision, p. 1; App. 41) Wisconsin Ratepayers petitioned the Dane County Circuit Court for review of the PSC's decisions to consider WPL's application under the less stringent CA statute. (R: 1)

## II. PROCEDURAL HISTORY.

On September 22, 2010, the Honorable John C. Albert of Dane County Circuit Court agreed with Wisconsin Ratepayers that *de novo* review of the Commission's decisions was appropriate but denied the petition for review. (R: 35) Wisconsin Ratepayers timely appealed. (R: 38) On November 23, 2011, the Court of Appeals certified the case to this Court. On December 14, 2011, the Court accepted the certification.

## III. FACTUAL BACKGROUND.

### A. Public Utility Regulation in Wisconsin.

Wisconsin public utilities[1] are required to furnish reasonably adequate service and facilities to their customers at just and reasonable rates. Wis. Stat. § 196.03(1). In order to fulfill that responsibility, public utilities occasionally construct electric generating facilities to serve their customers' electricity needs. The cost to construct public utility-scale electric generating facilities can range from the hundreds of millions to billions of dollars. *See, e.g.*, *Final Decision*, p. 32, PSC Docket Nos. 05-CE-130 and 05-AE-118, *Application for a Certificate of Public Convenience and Necessity for Construction of Three Large Electric Generation Facilities to be Located in Milwaukee and Racine Counties* (November 10, 2003), *available at* http://psc.wi.gov/apps35/ERF_search/default.aspx PSC REF#: 86450 (granting a CPCN to Wisconsin Electric Power

[1] For the remainder of this brief, all references to "public utilities" are to Wisconsin public utilities unless otherwise specified.

Company (WEPCO), a public utility, to construct an approximately $2.2 billion coal plant).

Generally speaking, the larger the electric generating facility, the greater its cost. *See, e.g.*, *Final Decision*, pp. 1-3, PSC Docket No. 6690-CE-187, *Application for a Certificate of Public Convenience and Necessity for Construction of a Large Electric Generating Plant in Marathon County* (October 7, 2004), *available at* http://psc.wi.gov/apps35/ERF_search/default.aspx PSC REF#: 22652 (granting a CPCN to Wisconsin Public Service Corporation (WPSC), a public utility, to construct a 515 MW coal plant at an authorized cost of approximately $752 million); *compare* PSC Docket Nos. 05-CE-130 and 05-AE-118, *Final Decision* (November 10, 2003) (PSC REF#: 86450), pp. 3, 32 (granting WEPCO a CPCN to construct two 615 MW coal plants (a total of 1,230 MW) at an authorized cost of approximately $2.2 billion). Public utilities recover those costs from their ratepayers. (R: 31, p. 1)

Historically, public utilities constructed electric generating facilities within their respective service territories near the load[2] they serve. (R: 9, PSC R: 3, Commissioner Azar's Dissent, p. 3; App. 33) However, recently public utilities have begun seeking permission to construct facilities farther away from their load centers, including in other states. *See, e.g.*, *Certificate and Order*, p. 1, PSC Docket No. 6690-CE-194, *Application for a Certificate of Authority to Acquire a 99 MW Wind Generation Facility in Howard County, Iowa* (May 23, 2008), *available at* http://psc.wi.gov/apps35/ERF_search/default.aspx PSC REF#: 94876 (granting a Certificate of Authority to WPSC to construct a 99 MW wind farm in northeastern Iowa). Whether a proposed electric generating facility is located in-state or out-of-state, public utilities have maintained their practice of

[2] "Load" means the demand, expressed in watts, of one or more electric consumers.

seeking to recover the cost of construction for the facility from their ratepayers. (R: 31, p. 1)

Wis. Stat. chapter 196 requires a public utility to seek approval from the Commission before it can construct an electric generating facility that is to be paid for by the utility's ratepayers. *See* Wis. Stat. §§ 196.49 and 196.491. Two statutes govern such construction projects: (1) Wis. Stat. § 196.49, the CA statute; and (2) Wis. Stat. § 196.491, the CPCN statute.

### B. Criteria for Application of the CA and the CPCN Statutes.

The CA statute prohibits a public utility from constructing or improving facilities unless the public utility has complied with "any applicable rule or order of the Commission." Wis. Stat. § 196.49(2). The CA statute also allows (but does not require) the Commission to refuse to certify the construction or improvement of facilities under certain circumstances. Wis. Stat. § 196.49(3)(b).[3] The CA

[3] Specifically, the CA statute states that the Commission "may" refuse to certify a project if it appears that completion of the project will:

statute does not distinguish between in-state and out-of-state facilities, and it applies without regard to size.

The CPCN statute applies only to the largest of facilities and states, in relevant part:

> [N]o person may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity under this subsection.

Wis. Stat. § 196.491(3)(a)1. The CPCN statute defines "facility" as a "large electric generating facility." Wis. Stat. § 196.491(1)(e). A "large electric generating facility" is further defined as:

> [E]lectric generating equipment and associated facilities designed for nominal operation at a capacity of 100 megawatts or more.

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1. Substantially impair the efficiency of the service of the public utility,
2. Provide facilities unreasonably in excess of the probable future requirements, or
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. § 196.491(1)(g). Like the CA statute, the CPCN statute does not distinguish between in-state and out-of-state facilities.

### C. The Standards for Commission Review Under the CPCN Statute and the CA Statute.

The legislature requires the Commission to exercise greater scrutiny of construction projects under the CPCN statute than under the CA statute. Many of the CPCN statute's provisions dictate this charge to the Commission including, but not limited to, the following.

First, under the CPCN statute, the Commission **must** hold a contested case hearing to receive evidence from the applicant and other interested parties regarding the proposed project. Wis. Stat. § 196.491(3)(b). By contrast, the CA statute does not require any hearing, and it does not require the Commission to accept any evidence from the applicant or anyone else. (R: 9, PSC R: 3, Commissioner Azar's Dissent, p. 7; App. 37)

Second, under the CPCN statute, when the public utility proposing to construct a large electric generating facility seeks cost recovery from its ratepayers, it **must** prove that its proposed project is cost effective as compared to other alternatives. Wis. Stat. §§ 196.491(3)(d)3 and 5. Under the CA statute, by contrast, a project can be approved even if it is not cost effective, either on its face or as compared to alternatives. Wis. Stat. § 196.49(3)(b)3.

Third, under the CPCN statute, a public utility seeking to recover costs from its ratepayers **must** prove that the proposed project is necessary to satisfy the reasonable needs of the public for an adequate supply of electric energy. Wis. Stat. §§ 196.491(3)(d)2 and 5. Not so under the CA statute, which permits project approval even when the facility would be unreasonably in excess of a utility's probable future requirements. Wis. Stat. § 196.49(3)(b)2.

Fourth, under the CPCN statute, a public utility **must** prove that the design of its proposed project is in the public

interest considering engineering, safety, and reliability factors. Wis. Stat. §§ 196.491(3)(d)3 and 5. Under the CA statute, though, a project can be approved even if it would substantially impair the efficiency of the service of a public utility. Wis. Stat. § 196.49(3)(b)1.

Finally, under the CPCN statute, the three commissioners (who comprise the Commission) themselves collectively review the evidence and decide whether to approve an application for a large electric generating facility. Wis. Stat. § 196.491(3)(d). However, an application for a CA can be approved by the Gas and Energy Division Administrator at the Commission, without the individual commissioners ever learning of the Application's existence, much less ruling on it. (R: 9, PSC R: 3, Commissioner Azar's Dissent, p. 1; App. 31 , *quoting Minutes of Open Meeting of Thursday, May 5, 1995, Commission Delegation No. 4, Attachment B, Item No. 8* "The Division Administrator or Acting Division Administrator is empowered to make decisions

on applications for electric construction orders which do not require a CPCN under 196.491.")

**D. WPL's CPCN Application for Bent Tree.**

In June 2008, WPL proposed to construct a 200 MW wind farm in Minnesota to be known as Bent Tree. (R: 9, PSC R: 1, WPL Application, p. 2; App. 64) WPL estimated the cost of the project at approximately $500 million, and WPL intended to seek recovery of that cost from its ratepayers. (*Id*. at 8, 17; App. 65-66) Because the project was larger than 100 MW, WPL applied to the Commission for a CPCN. (*Id*. at 2; App. 64)

Shortly after WPL filed its CPCN application, the Commission, on its own motion, issued a Notice of Proceeding and Request for Comments as to whether the CPCN statute or the CA statute applied to WPL's project. (R: 9, PSC R: 2, PSC Notice of Investigation; App. 17) The Request for Comments stated:

> WP&L filed its application under Wis. Stat § 196.491 and other applicable requirements as an application for a Certificate of Public Convenience and Necessity (CPCN). The Commission may conduct its review under Wis. Stat. §

> 196.49 and Wis. Admin. Code § PSC 112, and review WP&L's filing as an application for a Certificate of Authority (CA). The Commission requests comments regarding whether such applications for out-of-state projects should be reviewed as CPCN or CA applications.

(*Id*.)

CUB, WIEG, other organizations, and several utilities filed comments in response to the Commission's Notice. (R: 1, p. 4) CUB and WIEG argued that the Commission did not have discretion to choose between the CPCN and the CA statute because WPL's proposed project was greater than 100 MW and was thus a "large electric generating facility" falling under the CPCN law. (*Id*.) On September 25, 2008, the Commission deliberated at its open meeting and, on a 2-1 vote (then-Commissioner Lauren Azar dissenting), concluded that it would review WPL's Bent Tree application as a CA, not a CPCN. (R: 9, PSC R: 3, Interim Order, p. 1; App. 19) Also on a 2-1 vote (then-Chairman Eric Callisto dissenting), the Commission decided to hold a contested case hearing regarding the Bent Tree application even though a hearing was

not required under the CA statute. (R: 9, PSC R: 3, Commissioner Azar's Dissent, p. 7; App. 37)

The Commission issued the written order memorializing the majority's decision to treat WPL's CPCN application as one seeking a CA on November 6, 2008 (Interim Order). (R: 9, PSC R: 3; App. 19) Testimony was taken and a hearing was held on April 29, 2009. (R: 9, PSC R: 4, Final Decision, p. 4; App. 44) The Commission issued WPL a CA for Bent Tree on July 30, 2009 (Final Decision). (*Id.*) Wisconsin Ratepayers timely appealed both the Commission's Interim and Final Decisions to both the Dane County Circuit Court and the Court of Appeals. (R: 1; R: 38)

## STANDARD OF REVIEW

This is a review of an administrative agency's decisions under Wis. Stat. § 227.52. When an agency's actions are challenged on appeal, the court reviews the decisions of the agency and not that of the circuit court. *Responsible Use of Rural*

*and Agricultural Land (RURAL) v. Pub. Serv. Comm'n*, 2000 WI 129, ¶ 20, 239 Wis. 2d 660, 619 N.W.2d 888.

As the circuit court found, *de novo* review of the Commission's decisions is appropriate in this case. *De novo* review applies when the issue is clearly one of first impression for the agency. *Clean Wisconsin v. Public Serv. Comm'n*, 2005 WI 93, ¶ 43, 282 Wis. 2d 250, 700 N.W.2d 768.

The question in this case – whether the Commission can ignore the CPCN statute when faced with a public utility application for an out-of-state project sized greater than 100 MW– is one of law and is of first impression for the Commission. That the issue is a question of law is evident by the fact that it requires interpretation of the CA and CPCN statutes to the undisputed facts at hand (i.e., a public utility proposal to construct a project sized greater than 100 MW outside of Wisconsin). That the issue is one of first impression is evident by the Commission's request for comments regarding how it should review WPL's Application; the fact

that WPL filed a CPCN application (and not a CA application) for the project; and the fact that no other Commission decision has considered application of the CA statute to construction of an electric generating facility sized at 100 MW or larger. As the circuit court found:

> [T]his case concerns a legal interpretation by the PSC regarding the extra-jurisdictional scope of § 196.491. Since this legal question is a novel one, PSC has not exercised sufficient expertise in interpreting the scope of the statute. Without such expertise this is an issue of first impression, reviewed *de novo*, with no deference to PSC's decision.

(R: 35, pp. 4-5)

In its certification to this Court, the Court of Appeals did not directly address the appropriate standard of review. However, it appeared to give no weight to the Commission's determination in its summation.

For the foregoing reasons, this Court should give no weight to the Commission's legal interpretation of the CA and CPCN statutes.

## ARGUMENT

### INTRODUCTION

In its certification to this Court, the Court of Appeals framed the issue well: did the legislature intend to give the PSC the discretion to approve large electric generating facilities without considering the ratepayer-protection criteria in the CPCN statute? The answer is "no."

The legislature provided a bright-line – the size of an electric generating facility – in setting the procedure the PSC is to use and the substance the PSC is to consider in reviewing applications. It is size, not a facility's location, that provides the clear distinction between application of the CPCN statute and the CA statute. The distinction is fundamentally sound: the larger the facility, the greater the cost, the greater the need for ratepayer protections. It makes no sense that the legislature would have intended geography to serve as that bright line because there is no fundamentally sound reason to provide ratepayers less protection for out-of-state facilities.

Moreover, the fact that the legislature enumerated several exceptions to the applicability of the CPCN statute, but no exception for a facility's in-state or out-of-state location, supports the determination that no exception should be provided for large out-of-state electric generating facilities.

That interpretation is also consistent with the overall purpose of Wisconsin's public utility laws, which is to protect the consuming public, and it avoids absurd results. Large electric generating facilities are expensive to construct and operate, and Wisconsin ratepayers will be required to pay those costs for a public utility's large electric generating facility regardless of its location. The mandatory ratepayer protection provisions applicable to large electric generating facilities should not evaporate simply because a public utility chooses to locate its facility outside Wisconsin. The words "in this state" do not appear in the criteria for determining whether the CPCN or the CA statute applies, and the Court should not "read" them in.

The Commission and the utilities relied heavily on legislative history in the proceedings below to support an interpretation that the CPCN statute should not apply to Bent Tree. Because the plain language of the CPCN statute unambiguously applies to large electric generating facilities, wherever located, the Court need not turn to legislative history. But even if it finds a degree of ambiguity, legislative history fails to support the Commission because it does not offer any clearer view of legislative intent than the statutory language itself.

Moreover, contrary to the utilities' arguments, the dormant Commerce Clause does not prohibit application of the CPCN statute to Bent Tree. If any burden on interstate commerce exists due to application of the CPCN statute to large electric generating facilities constructed by public utilities out-of-state, it is *de minimis* and outweighed by the substantial benefits provided to Wisconsin ratepayers through the stringent ratepayer protections in that statute.

Finally, the handful of "misfits" (to borrow the Court of Appeals' apt phraseology) that result from application of the CPCN statute to large out-of-state electric generating facilities should not trump the significant mandatory ratepayer protections and the plain language requiring application of the CPCN statute to large facilities. Thus, the Court should find that the Commission erred when it failed to apply the CPCN statute to WPL's 200 MW Bent Tree project.

## I. THE CPCN STATUTE CLEARLY AND UNAMBIGUOUSLY APPLIES TO BENT TREE.

This Court recently examined its tenets of statutory interpretation. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 36-52, 271 Wis. 2d 633, 681 N.W.2d 110. In that case, the Court repeated its oft-cited holding that statutory interpretation begins with the language of the statute. If the meaning of the language is plain, the inquiry stops. *Id*. at ¶ 45. Extrinsic sources, like legislative history, are to be considered only where a statute presents ambiguity. *Id*. Because the

application of the CPCN statute to "large electric generating facilities" is clear, this Court need not look to legislative history.

The CPCN statute states that "no person may commence the construction" of an electric generating facility designed for nominal operation at a capacity of 100 MW or more "unless the person has applied for and received a certificate of public convenience and necessity." Wis. Stat. § 196.491(3)(a). The plain reading of that clear and unambiguous language is that the Commission must review proposals for all large electric generating facilities under the CPCN standards.

The CPCN statute does not state that it applies only to in-state projects; in fact, it provides no distinction between in-state and out-of-state projects. Similarly, the CA statute does not distinguish between in-state and out-of-state projects. The legally significant difference between those two statutes is the **size of a proposed project**, not a project's location. There is no ambiguity in the plain meaning of the statutes: the CA statute applies to construction projects sized less than 100 MW, and the

CPCN statute applies to construction projects sized at 100 MW or greater. Thus, the CPCN statute applies to WPL's construction of the 200 MW Bent Tree wind farm.

## II. THE TENET OF *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* ALSO DEMONSTRATES THAT THE CPCN STATUTE APPLIES TO BENT TREE.

In addition to the clear and unambiguous language discussed above, another well-established canon of statutory interpretation supports application of the CPCN statute to Bent Tree. *Expressio unius est exclusio alterius* means the expression of one thing excludes another. *See, e.g.*, *State v. Delaney*, 2003 WI 9, ¶ 22, 259 Wis. 2d 77, 658 N.W.2d 416. Based on that rule, this Court declared that where the legislature specifically enumerates certain exceptions to a statute, a court properly concludes that the legislature intended to provide only those exceptions it expressly identified. *Id.; see also State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974).

The legislature **did** enumerate several such exceptions in the CPCN statute, but none with respect to a project's location.

For example, under Wis. Stat. § 196.491(3), the legislature expressly provided that portions of the CPCN statute would not apply to wholesale merchant plants. And in Wis. Stat. § 196.491(4), the legislature specifically excepted persons who are not public utilities and are using the facility primarily for manufacturing processes. If the legislature had intended to except out-of-state facilities like Bent Tree from review under the CPCN statute, it would have provided such an exception.

Under the *expressio unius est exclusio alterius* rule, the legislature's expression of specific exceptions together with its silence as to any similar exception for out-of-state projects, means that the legislature did not intend to relieve the Commission of its duty to review proposed facilities of 100 MW or greater, wherever located, under the stringent provisions of the CPCN statute. Absent any location exception, the test for determining whether a construction project falls under the CPCN statute or the CA statute is its size, not location.

## III. THE SCOPE, CONTEXT, AND PURPOSE OF CHAPTER 196 ALSO DICTATE THAT THE CPCN STATUTE APPLIES TO BENT TREE.

In connection with statutory interpretation in *Kalal*, this Court also recognized that:

> scope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute *as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself*, rather than extrinsic sources, such as legislative history.

*Kalal,* 2004 WI 58, at ¶ 48 (emphasis added). The Court also distinguished "statutory meaning" and "legislative intent." *Id.* at ¶ 39. With respect to "legislative intent" the opinion states:

> We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but it is not the primary focus of inquiry. *It is the enacted law, not the unenacted intent, that is binding on the public*. Therefore, the purpose of the statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

*Id*. at ¶ 44 (emphasis added). The scope, context, and purpose of Chapter 196 supports the interpretation that the CPCN statute applies to large public utility projects like Bent Tree.

Wisconsin courts have long held that the primary purpose of the public utility laws is the protection of the

consuming public. *Wisconsin Envtl. Decade v. Pub. Serv. Comm'n*, 81 Wis. 2d 344, 351, 260 N.W.2d 712 (1978); *GTE North Inc. v. Pub. Serv. Comm'n*, 176 Wis. 2d 559, 568, 500 N.W.2d 284 (1993). The Court in *Kalal* also stated:

> [T]he cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act.

*Kalal*, 2004 WI 58, at ¶ 38, *quoting Student Ass'n v. Baum*, 74 Wis. 2d 283, 294-95, 246 N.W.2d 622 (1976).

As noted above, generally speaking, the larger the size of a project, the greater its costs. *See infra* p. 8. The manifest object of the law regarding public utility construction of generation facilities is to distinguish between those facilities that are 100 MW or greater (and therefore cost more) and those facilities that are less than 100 MW (and therefore cost less).

Interpreting the CPCN statute to only apply to large electric generating projects that are located inside the state eviscerates this manifest intent. Ratepayers will be asked – as they have been here – to pay for public utility construction

costs of a large electric generating project whether it is located in-state or out-of-state. Differentiating the levels of protection for ratepayers for otherwise identical facilities frustrates the consumer protection purpose of Wisconsin's public utility laws.

## IV. NOT INTERPRETING THE CPCN STATUTE TO APPLY TO OUT-OF-STATE LARGE ELECTRIC GENERATING FACILITIES LEADS TO ABSURD RESULTS.

A goal of statutory interpretation is to avoid unreasonable or absurd results. *Kalal*, 2004 WI 58, at ¶ 46. Treating otherwise identical large electric generating facilities differently based on their location, both of which must be paid for by Wisconsin ratepayers, leads to unreasonable and absurd results. This is evident when comparing how ratepayers are affected when a Wisconsin public utility seeks to construct a 1,000 MW coal plant close to the Wisconsin border. If the utility builds a large electric generating facility on the other side of Wisconsin's border and the CA statute controls, the utility will not have to: introduce any evidence, make any

showing that the plant is needed, demonstrate that the plant is cost-effective, show that the plant will not harm the efficiency of the utility's service, or submit the application for commissioner review, and the Division Administrator could approve it. But if it builds the plant on the Wisconsin side of the border, it would need to make all of those showings, and the Commission would decide if the project moves forward. **The result is the same under both scenarios; ratepayers pay.** The difference is that ratepayers' hard-earned money is subject to mandatory protections under the CPCN scenario and left to chance under the CA scenario.

The CPCN statute manifests a clear intent to protect public utility ratepayers based on the size of an electric generation facility, not where it is located. Thus, the question is not whether the legislature intended the CPCN statute to apply to out-of-state projects, but whether the legislature intended the CPCN statute, and not the CA statute, to apply to electric utility projects of 100 MW or more. The answer to the latter question,

which does not lead to unreasonable or absurd results, is "yes." The CPCN statute clearly states that it applies to all construction projects sized at 100 MW or greater, and no limitation is placed on that language.

## V. THE COURT SHOULD NOT "READ IN" STATUTORY LANGUAGE THAT IS NOT PRESENT.

In its decisions in the Bent Tree case, the Commission noted the legislature's *silence* on any "in-state" or "out-of-state" requirement in either the CPCN or the CA statutes and implicitly "read" the words "in this state" into the CPCN statute to determine that the CPCN statute did not apply to large out-of-state electric generating facilities. (R: 9, PSC R: 3, Final Decision, p. 4; App. 22) Wisconsin law is clear that it is not the job of those interpreting the law to "read" words into statutes that the legislature failed to include. As the court of appeals has noted:

> We cannot rewrite statutes to reach a desired result. "If a statute fails to cover a particular situation, and the omission should be cured, the remedy lies with the legislature, not the courts."

*Michael T. v. Briggs*, 204 Wis. 2d 401, 410, 555 N.W.2d 651 (Ct. App. 1996) (internal citations omitted).

Similarly:

> A legislature "expresses its purpose by words." We must, therefore, construe what has been written: "It is for us to ascertain—***neither to add nor to subtract***, neither to delete nor to distort."

*State v. Bruckner*, 151 Wis. 2d 833, 844-45, 447 N.W.2d 376 (Ct. App. 1989) (emphasis added, internal citations omitted).

If the legislature intended the CPCN statute to apply to construction projects sized 100 MW or greater except when that project would be located out-of-state, it would have said so. Similarly, if the legislature intended the CA statute to apply to projects sized 100 MW or greater if they are located out-of-state, the legislature would have said so. In fact, Wis. Stat. Chapter 196 uses the phrase "in this state" 105 times, including six times within Wis. Stat. § 196.491 (the CPCN statute), to specify when particular provisions apply only in this state. But no semblance of those words appear anywhere in the statutes to limit application of the CPCN statute to in-state large electric

generating facilities. This Court should reject the Commission's invitation to "read" in those words.

## VI. THREE WORDS IN A 1975 LEGISLATIVE REFERENCE BUREAU SUMMARY CANNOT UNDO THE FACT THAT THE PLAIN LANGUAGE OF THE CPCN STATUTE APPLIES TO BENT TREE.

Both the PSC and the circuit court looked outside of the plain language of the CPCN statute to legislative history when interpreting the statute. (R: 9, PSC R: 3, Interim Order, p. 7; App. 25; R: 35, p. 6; App. 14) For the reasons stated above, such review was inappropriate because the language of the statute is unambiguous. *See Kalal*, 2004 WI 58 at ¶ 45.

However, even if this Court turns to legislative history, it will not uncover any discussion, much less recognized distinction, between in-state and out-of-state requirements in either the CPCN or the CA statutes. Nor will it uncover any intent to differentiate those two statutes on any basis other than the size of a construction project. Instead, the Court would find the Legislative Reference Bureau's (LRB) introductory

statement to the then-proposed CPCN statute, written in the spring of 1975. That introduction states, "This bill establishes a method whereby the development of major electric generating and transmission facilities in this state is subject to scrutiny…" (R: 27, p. 18)

The Commission and the circuit court honed in on the LRB's inclusion of the words "in this state" and concluded that, in contrast to the CPCN statute's plain language, those three words were dispositive evidence that: (1) the legislature intended the CPCN statute to apply to in-state construction of large electric generating facilities; (2) the legislature did not intend the CPCN statute to apply to out-of-state construction of large electric generating facilities; (3) the legislature intended the CA statute to apply to construction of large electric generating facilities out-of-state; and (4) the legislature intended to require significantly less scrutiny of the need for, cost effectiveness of, and reliability of large electric generating facilities that are constructed out-of-state rather than in-state

even though ratepayers would pay for the facilities regardless of their location.

It is not reasonable to infuse the LRB's casual use of the phrase "in this state" with such weighty legislative intent, particularly where that "intent" is at odds with the clear language of the enacted statute. A far more likely explanation, particularly since there is no in-state versus out-of-state discussion anywhere in the legislative history or statutory language, is that neither the LRB nor the legislature gave any thought at all to that phrase. (*See*, *e.g.*, R: 9, PSC R: 3, Commissioner Azar's Dissent, pp. 3-4; App. 33-34)

Regardless, the LRB's use of those three words does not answer the question whether the Commission erred in determining that the CPCN statute does not apply to WPL's half-billion dollar, 200 MW project. The plain language of the CPCN and CA statutes indicates clear legislative intent to differentiate the level of Commission review required for

projects based on their size, and WPL's Bent Tree project is twice the size of the legislature's threshold.

It makes no sense that the legislature intended for Wisconsin ratepayers to pay for construction of an electric generating facility of unlimited size and cost with no commissioner review, no hearing, no finding of cost effectiveness, no finding of need, no finding that the project will not impair the service of the utility, and no submission of evidence simply because the project will be located outside Wisconsin. The care the legislature took to differentiate between the level of Commission review based on the size of a construction project is the clearest expression of legislative intent, not three words in an LRB summary.

Moreover, more recent legislative history of the text in the CPCN statute contravenes the LRB's summary. Wis. Stat. § 196.491 requires the Commission to make a decision regarding a CPCN application within 180 days, or 360 days if an extension is granted for good cause, after the application is

deemed complete. Wis. Stat. § 196.491(3)(g). In 1998, the Wisconsin legislature amended the CPCN statute. 1997 Wis. Act 204. Among other things, the legislature added the following provision regarding the timing for Commission decision on a CPCN application:

> Subdivision 1 [imposing time restrictions for Commission decision on a CPCN application] 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.

Wis. Stat. § 196.491(3)(g)1m. 97-98 Stats. (emphasis added).[4] This recognition of other states' involvement does not support the interpretation that the CPCN statute only applies to large electric generating projects constructed within Wisconsin.

## VII. THE DORMANT COMMERCE CLAUSE DOES NOT PROHIBIT APPLICATION OF THE CPCN STATUTE TO BENT TREE.

In the proceedings below, WEPCO argued and the circuit court agreed, that Commission consideration of WPL's CPCN Application under the CPCN statute would violate the

[4] This provision was removed in 2003 Wis. Act 89.

dormant Commerce Clause. (R: 31, pp. 2-6; R: 35, p. 7; App. 15) That conclusion, too, is in error. The Commission's application of the CPCN statute to Bent Tree does not even implicate the dormant Commerce Clause. Moreover, even if it did implicate the dormant Commerce Clause, Wisconsin has a strong interest - namely the protection of the welfare of ratepayers - to be weighed against any *de minimis* burden the CPCN statute places on interstate trade.

Article 1, Section 8, clause 3 of the United States Constitution gives Congress the power "[t]o regulate commerce… among the several states…" *Northwest Airlines, Inc. v. Wisconsin Dept. of Revenue*, 2006 WI 88, ¶ 27, 293 Wis. 2d 202, 717 N.W.2d 280. Courts have consistently held that there is a negative implication to this affirmative grant of power to Congress that restricts the ability of states to regulate interstate commerce. *Id*. This restriction upon states, called the dormant Commerce Clause, prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state

competitors." *Id.*, *quoting Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996).

Application of the CPCN statute to WPL's construction of a 200 MW wind farm in Minnesota does not burden interstate commerce. WPL's application implicates the sale of electricity to Wisconsin that will be paid for by Wisconsin ratepayers. There is no measure in the CPCN statute designed to benefit in-state economic interests by burdening out-of-state competitors. Thus, the dormant Commerce Clause does not apply.

But even if the CPCN statute has some indirect or incidental effects on interstate commerce it will not violate the dormant Commerce Clause "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 911 (7th Cir. 2003), *quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As noted above, there are significant local benefits to application of the CPCN statute to large electric generating

facilities that will be paid for by Wisconsin ratepayers. *See infra* pp. 12-15. For instance, under the CPCN statute, the public is protected with a contested case hearing which must be held so that evidence can be taken regarding the benefits and detriments of a proposed large electric generating facility. Wis. Stat. § 196.491(3)(b). And before the Commission can authorize a public utility to construct a large electric generating facility to be paid for by Wisconsin ratepayers, the Commissioners themselves must review the evidence and make specific findings that the proposed project:

- Is necessary to satisfy the reasonable needs of the public for an adequate supply of electric energy, Wis. Stat. §§ 196.491(3)(d)2 and 5;

- Is cost effective as compared to alternatives, Wis. Stat. §§ 196.491(3)(d)3 and 5; and

- Will not substantially impair the efficiency of the service of the public utility, Wis. Stat. §§ 196.491(3)(d)3 and 5.

None of these provisions discriminate against out-of-state economic interests and all are necessary for the protection of

the welfare of Wisconsin ratepayers. When interpreting Wisconsin law, the Seventh Circuit found similarly protective and non-discriminatory provisions of the Wisconsin Utility Holding Company Act did not violate the dormant Commerce Clause. *Bie*, at 916-18.

Wisconsin ratepayers will be required to pay for public utility large electric generating facilities wherever they are located. Provisions regulating the need for and cost effectiveness of these large facilities are crucial to protecting ratepayers scarce financial resources. The dormant Commerce Clause does not prohibit application of the CPCN statute to public utility construction of large electric generating facilities located outside of the state.

## VIII. THE FEW "MISFITS" IN THE CPCN STATUTE THAT DO NOT LEND THEMSELVES TO OUT-OF-STATE CONSTRUCTION PROJECTS DO NOT PROHIBIT APPLICATION OF THE REMAINDER OF THE CPCN STATUTE TO BENT TREE.

As explained above, many of the provisions in the CPCN statute are targeted to protect ratepayers from, for example,

paying excessive costs for unnecessary large electric generating facilities. *See infra* pp. 12-15. Because ratepayers will be asked to pay for the costs of a public utility's proposed large electric generating facility whether it is located in-state or out-of-state, those provisions are applicable regardless of where a facility is proposed to be located. However, there are a few "misfits" in the CPCN statute that do not lend themselves well to out-of-state construction projects.

For instance, the CPCN statute addresses local siting impacts such as environmental protection, individual hardships, and compliance with orderly land use and development plans. Wis. Stat. §§ 196.491(3)(d)3 and 6. Applying those provisions to local impacts outside of Wisconsin could conflict with the regulatory province of the host state. However, that problem could be easily remedied by the Commission applying those local siting impact provisions only to those impacts that affect Wisconsin. (*See* R: 9, PSC R: 3, Interim Order, p. 6; App. 24; Commission noting that it could,

for instance, interpret the statutory prohibition on "undue adverse impact on other environmental values" to mean only environmental impacts that affect Wisconsin).

Another provision that may not be applied to out-of-state facilities is the requirement that, if a CPCN has been granted, no local ordinance could preclude construction of the large electric generating facility. Wis. Stat. § 196.491(3)(i). Assuming arguendo that this provision conflicts with sovereignty of the host state, it is easily severable from the many ratepayer protection provisions in the CPCN statute.

"Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." *State v. Janssen*, 219 Wis. 2d 362, 379, 580 N.W.2d 260 (1998) *quoting Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be

dropped if what is left is fully operative as a law." *Id.*, *quoting Buckley v. Valeo*, 424 U.S. 1, 108 (1976). These canons of statutory construction have been codified by Wis. Stat. § 990.001(11) which states:

> The provisions of the statutes are severable…. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

Wis. Stat. § 990.001(11).

Thus, if the size of a proposed construction project causes it to fall under the CPCN statute, the next step is to determine whether there are provisions in the CPCN statute that are inapplicable due to the proposed location. If there are, those provisions should be severed, but the rest should remain. The size distinction for construction of electric generating facilities should not be ignored simply because there are minimal CPCN provisions that may need to be severed.

## CONCLUSION

The CPCN statute affords ratepayers significantly greater protections than the CA statute. The legislature mandated greater procedural protections and more scrutiny of the need for, cost effectiveness of, and reliability of large electric generating facilities that are to be paid for by Wisconsin ratepayers. Those protections should not be eviscerated whenever a large electric generating facility is to be located across the Wisconsin border.

For the reasons in this brief, the Court should uphold the circuit court's determination regarding *de novo* review of the Commission's decisions, reverse the circuit court's denial of Wisconsin Ratepayers' petition for review, and find that the Commission erred when it failed to apply the CPCN statute to WPL's 200 MW Bent Tree project.

Dated: January 23, 2012.

CITIZENS UTILITY BOARD OF WISCONSIN, INC.

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## FORM AND LENGTH 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 7,234 words.

Dated this 23rd date of January, 2012.

_____

Kira E. Loehr

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stats. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of January, 2012.

_____

Kira E. Loehr

SUPREME COURT OF WISCONSIN

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Appeal No. 2010AP2762

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WISCONSIN INDUSTRIAL ENERGY GROUP, INC.
and CITIZENS UTILITY BOARD,
Petitioners-Appellants,
v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
Respondent-Respondent,

WISCONSIN ELECTRIC POWER COMPANY and
WISCONSIN POWER AND LIGHT COMPANY,
Intervenors-Respondents,
WISCONSIN PUBLIC SERVICE CORPORATION
Intervenor.

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**APPENDIX OF PETITIONERS-APPELLANTS**

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**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of January, 2012.

_____

Kira E. Loehr

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)**

I hereby certify that I have submitted an electronic copy of this Appendix which complies with the requirements of Wis. Stats. § 809.19(13).

I further certify that this electronic Appendix is identical in content and format to the printed form of the Appendix filed on this date.

A copy of this certificate has been served with the paper copies of this Appendix filed with the court and served on all opposing parties.

Dated this 23rd day of January, 2012.

_____

Kira E. Loehr

**Appeal No. 2010AP2762** **Cir. Ct. No. 2009CV4313**

**WISCONSIN COURT OF APPEALS**
**DISTRICT IV**

---

**WISCONSIN INDUSTRIAL ENERGY GROUP, INC. AND CITIZENS UTILITY BOARD,**

**PETITIONERS-APPELLANTS,**

**V.**

**PUBLIC SERVICE COMMISSION OF WISCONSIN,**

**RESPONDENT-RESPONDENT,**

**WISCONSIN ELECTRIC POWER COMPANY AND WISCONSIN POWER AND LIGHT COMPANY,**

**INTERVENORS-RESPONDENTS,**

**WISCONSIN PUBLIC SERVICE CORPORATION,**

**INTERVENOR.**



---

## CERTIFICATION BY WISCONSIN COURT OF APPEALS

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Before Lundsten, P.J., Higginbotham and Sherman, JJ.

We certify to the Wisconsin Supreme Court the question whether a statute governing the Public Service Commission's review and approval of a proposed large electric generating facility applies when a Wisconsin public utility proposes to build an out-of-state facility.

This case involves a Wisconsin public utility's proposal to build a wind farm in Minnesota to supply electricity to the utility's Wisconsin consumers.

We are told by the parties that the costs associated with building the facility would be borne by Wisconsin ratepayers. The Public Service Commission of Wisconsin approved the wind farm by applying WIS. STAT. § 196.49.[1] Groups representing energy consumers sought review in the circuit court, arguing that the PSC should have applied a more demanding large-facility approval statute, WIS. STAT. § 196.491. Three Wisconsin public utilities intervened, including the company that seeks to build the wind farm in Minnesota, Wisconsin Power and Light Company. The circuit court affirmed the PSC, and the consumers appealed.

For purposes of this certification, we adopt the shorthand used by the parties. They refer to the statute the PSC did apply, WIS. STAT. § 196.49, the Certificate of Authority statute, as the "CA statute." The parties refer to WIS. STAT. § 196.491, the more demanding Certificate of Public Convenience and Necessity statute, as the "CPCN statute."

It is undisputed that, if the large-scale wind farm at issue here were to be built in Wisconsin, the CPCN statute would apply. The question is whether the CPCN statute applies even though the facility is to be built in Minnesota.

It is the position of the PSC and the utilities that the CA statute, not the CPCN statute, applies to such out-of-state facilities.

Both the CA statute and the CPCN statute provide criteria to be applied by the PSC when deciding whether to approve a new facility. The statutes are similar in that both contain criteria that seemingly are designed to protect

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Wisconsin ratepayers from having to pay for unnecessary or inefficient new facilities. For example, under both statutes, the criteria include whether a proposed project would, "[w]hen placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service." *See* WIS. STAT. § 196.49(3)(b)3.; WIS. STAT. § 196.491(3)(d)5. (by cross-reference); *see also* ***GTE N. Inc. v. PSC***, 176 Wis. 2d 559, 568, 500 N.W.2d 284 (1993) ("The primary purpose of the [chapter 196] public utility laws in this state is the protection of the consuming public.").

The dispute here stems from a number of differences between the two statutes.

First, the CPCN statute applies only to large facilities, namely, a "large electric generating facility," defined as having an operating capacity of 100 megawatts or more. *See* WIS. STAT. § 196.491(1)(e) and (g). There is no dispute that the wind farm here would be a "large" facility under this definition. The CA statute does not indicate whether a facility's size matters to its application.

Second, although both statutes allow consideration of the effects on ratepayers, the CPCN statute appears to contain more meaningful ratepayer protection. For example, the CPCN statute *requires* the PSC to apply ratepayer protection criteria. *See* WIS. STAT. § 196.491(3)(d)2. (allowing approval "only if," for example, "[t]he proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy"); *cf.* WIS. STAT. § 196.49(3) (in the CA statute, providing that the PSC "may refuse to certify a project" if criteria are not met). The CPCN statute also requires a public hearing, § 196.491(3)(b), whereas the CA statute does not.

Third, and as we explain in more detail below, the CPCN statute incorporates the CA statute's criteria,[2] and then adds significant additional criteria. There are other differences, but we do not attempt to list them all here.

With this general background in mind, we describe the dispute in this case.

In support of applying the CPCN statute, the energy consumers begin with the correct observation that the CPCN statute is not expressly limited to in-state facilities. The CPCN statute contains no express language suggesting a geographical limit. Instead, so far as the CPCN statute explains, the key feature that makes the statute applicable is the size of the proposed facility. *See* WIS. STAT. § 196.491(3)(a); § 196.491(1)(e) and (g). Further, some of the requirements in the CPCN statute appear to apply regardless of location. *See*, *e.g.*, § 196.491(3)(d)2. (limiting approvals to where "[t]he proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy").

---

[2] The CA statute provides that "[t]he commission may refuse to certify a project if it appears that the completion of the project will 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). By cross-reference, WIS. STAT. § 196.491(3)(d)5. incorporates this criteria into the CPCN statute's mandatory requirements applicable to public utilities.

The PSC and the utilities take the position that the consumers' interpretation of the statute is unreasonable because some parts of the CPCN statute are incompatible with out-of-state applications. The PSC points to the following examples:

- The CPCN statute requires a determination that "[t]he proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved," *see* WIS. STAT. § 196.491(3)(d)6., but the orderly use of out-of-state land is a concern of the people of the other state, not the people of Wisconsin.

- The CPCN statute provides: "If installation or utilization of a facility for which a [CPCN] has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility may nevertheless proceed," *see* § 196.491(3)(i), but Wisconsin authorities have no power to override such out-of-state local ordinances.

- The CPCN statute provides: "The commission shall hold a public hearing on an application … in the area affected," *see* § 196.491(3)(b), but it is obvious that our legislature did not contemplate holding public hearings in other states.

The CPCN statute contains other apparent misfits, but a further listing is unnecessary for purposes of this certification.

The CA statute, on the other hand, does not contain these same apparent misfits. One seemingly minor exception is that the CA statute requires a determination that "brownfields … are used to the extent practicable." *See* WIS. STAT. § 196.49(4). By cross-reference to the definition in WIS. STAT. § 560.13(1)(a), we know that brownfields are "abandoned, idle or underused industrial or commercial facilities or sites." Seemingly, the legislature would not have intended that the PSC make this determination for out-of-state sitings.

It is the PSC's view that looking at the statutes in terms of fits and misfits appears to lead to the conclusion that the CA statute is a better fit and, therefore, what the legislature intended. But this view has its own problem.

The consumers point out that, under the PSC's view, an otherwise identical facility, presumably with identical potential impacts on Wisconsin ratepayers, is treated differently based on its location. That is, assuming that the PSC and the utilities are correct that the CA statute applies, rather than the CPCN statute, this means that fewer criteria apply to an otherwise identical out-of-state facility. More importantly, although both statutes have ratepayer-protection criteria, application of the ratepayer-protection criteria is mandatory only in the CPCN statute. It is the consumers' position that ratepayer-protection criteria is mandatory in large facility approval situations because large facilities inherently have a greater potential to significantly affect ratepayers. Thus, the question arises whether the legislature intended to give the PSC the discretion to approve a large facility without considering ratepayer-protection criteria. It is apparent that the energy consumers are concerned about this scenario. They argue that there is no apparent reason why ratepayers should lose this mandatory safeguard when a large facility is built out of state, rather than in state.

Thus, to summarize, we are left with two problematic interpretations. One view would apply the CPCN statute to the wind farm because the wind farm is sufficiently large, but that would bring into play some specific CPCN requirements that cannot be literally applied to an out-of-state facility. This view would treat similar facilities the same way for purposes of ratepayer protection, regardless of a facility's location. The contrary view would avoid misfits in the CPCN statute's subsections, but would deprive ratepayers of

mandatory protections and would produce a seemingly illogical distinction based on the location of a facility.

We note that, in this particular case, it appears that the PSC did more than necessary under the CA statute, but less than required under the CPCN statute. The PSC argues that, if it was error to not apply the CPCN statute, that error was harmless because the PSC did everything it would have done had it applied the CPCN statute, considering the out-of-state location of the facility. Our review of this issue suggests that the PSC's argument falls short. For example, the consumers point out that the PSC did not comply with the CPCN statute requirement that the PSC deem the application complete under WIS. STAT. § 196.491(3)(a)2. A supreme court opinion strongly suggests that this is a significant step in the procedure under the CPCN statute. *See* ***Clean Wisconsin, Inc. v. PSC***, 2005 WI 93, ¶¶57-96, 282 Wis. 2d 250, 700 N.W.2d 768 (explaining that "the filing of the CPCN application and the PSC's determination that the application is complete are the first two steps in the process leading up to the ultimate issuance of the CPCN," ***id.***, ¶57; holding that a completeness determination is "subject to judicial review," ***id.***, ¶58; and proceeding to determine whether a completeness determination was proper). Thus, it appears to us that the legal issue presented cannot be avoided by a harmless error analysis. And, regardless whether this case could be resolved on the basis of harmless error, it appears to us that the supreme court should resolve the legal issue to avoid delays and legal battles over the next large out-of-state project.

Finally, we note that the representation of interests in this case favors granting the certification. Two Wisconsin public utilities have submitted briefs in support of the PSC's position. On the other side, both large industrial consumers and residential and other smaller-scale consumers are represented.

Because it appears that all of the major interests are represented in this case, and because the parties are in agreement that the issue is likely to recur, this is an appropriate case for supreme court review.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 DANE COUNTY

WISCONSIN INDUSTRIAL ENERGY and CITIZENS UTILITY BOARD,
Petitioners,

v. Case No. 09CV4313

PUBLIC SERVICE COMMISSION OF WISCONSIN,
Respondent,

**DECISION AND ORDER ON PETITION FOR JUDICIAL REVEIW**

The facts surrounding this petition are undisputed. Wisconsin Power and Light (WP&L) applied to the Public Service Commission of Wisconsin (PSC) for permission to build and operate the Bent Tree Wind Farm in Minnesota. Bent Tree Wind Farm is expected to generate 200mw of power. Because the plant is designed to produce more than 100mw of power, WP&L applied for both a certificate of authority (CA) under Wis. Stat. §196.49 and a certificate of public convenience and necessity (CPCN) under Wis. Stat. §196.491. In an Interim Order dated November 6, 2008 PSC decided that WP&L did not have to obtain a CPCN. Their rationale was that §196.491 requires PSC to consider environmental factors related to the site of the power plant. In this case, since the plant was located in Minnesota, PSC concluded that the consideration of site-specific environmental criteria would exceed PSC's territorial jurisdiction. Instead, PSC evaluated the project under the auspices of Wis. Stat. §196.49. PSC approved construction of the project in a decision dated July 30, 2009.

The petitioners, Wisconsin Industrial Energy Group and Citizens Utility Board, are now moving under Wis. Stat. §227.53 for judicial review of PSC's decision not to examine WP&L's application under §196.491. Briefs have been filed by both parties, WP&L and Wisconsin Electric Power Company (WEPCO). The merits of the petition are now ripe for decision.

**TIMELINESS**

WP&L, appearing as a non-party in opposition to the petition, challenges the timeliness of the petition under Wis. Stat. § 227.53(1)(a)2. That section requires §227 appeals to be filed within thirty days of the decision being served. In this case, the petition was filed on August 27, 2009. This is within thirty days of the July 30, 2009 final decision. However, the issue being challenged, that PSC would not consider §196.491 factors, was decided in the November 6, 2008 Interim Order. WP&L argues this is the decision being appealed, therefore the petition needed to be filed within thirty days of November 6, 2008.

Judicial review of administrative decisions can occur only if the agency decision is a final order. *Pasch v. Dept. of Revenue,* 58 Wis. 2d 346, 353, 206 N.W.2d 157 (1973); *Clean Wisconsin, Inc. v. PSC*, 2005 WI 93, ¶58, 282 Wis. 2d 250, 700 N.W.2d 768. An appealable order directly affects the legal rights, duties or privileges of a person. *Friends of the Earth v. Pub. Serv. Comm'n*, 78 Wis. 2d 388, 405, 254 N.W.2d 299, 306 (1977). The form or labels on the order are not dispositive. *Id.* Instead it is the substantive holdings of the order which characterize it as final. *Pasch,* 58 Wis. 2d at 356.

WP&L compares the Interim Order to a declaratory judgment because it delineated the application of a statute to a particular fact scenario. In *Kimberly-Clark v. PSC*, the Supreme Court held that a declaratory judgment by PSC, finding that it did not have the statutory authority to retroactively resolve utility rate disputes, was a final order. 110 Wis.2d 455, 329 N.W.2d 143 (1983). WP&L argues that, similarly, the determination by PSC that §196.491 does not apply to out of state projects is a declaration of the statutory authority of PSC and not a procedural or interlocutory decision.

Petitioners argue that it would have been impossible to obtain judicial review of the Interim Order prior to an ultimate decision because they were not an aggrieved party until the project was approved. In this respect, the situation is more analogous to *Pasch*. 58 Wis.2d 346. In *Pasch*, the petitioner appealed an order which determined whether the agency had the authority to proceed to a hearing and determination. The Supreme Court concluded that the agency decision was not a final one because petitioner's rights had not been affected even though the interim decision impacted the final agency analysis. This is contrary to *Kimberly-Clark* and *Friends of the Earth*, where the interim agency decisions themselves aggrieved petitioners (respectively, ending the administrative appeals process in *Kimberly Clark*, and affixing temporary utility rate increases in *Friends of the Earth*). In this case, as in *Pasch*, the interim decision was only a step towards the ultimate decision on the merits. Therefore, the November 6, 2008 order should not be characterized as a final order triggering the statute of repose in § 227.53(1)(a)2.

## DEFERENCE

PSC decisions reviewed under ch. §227 are subject to the standards and deference enunciated in *Clean Wisconsin, Inc. v. PSC*, 2005 WI 93, ¶35-46. In *Clean Wisconsin*, the Supreme Court affixed great weight deference to PSC's interpretation of §196.491 because PSC had been legislatively tasked with administering that statute and was familiar with the practical and policy concerns behind the statute. *Id* at ¶62.

Petitioners argue that, despite this familiarity, this particular issue, the jurisdictional scope of §196.491, is one of first impression. Issues of first impression are reviewed *de novo. Tower Automotive Milwaukee LLC v. Samphere*, 2010 WI App 46, ¶17, 324 Wis. 2d 307, 784 N.W.2d 183

Respondents counter by citing to *Clean Wisconsin*, where the Supreme Court holds that it is not the particular fact scenario which characterizes an issue as one of first impression, but rather, if the agency "has experience in interpreting the particular statutory scheme". *Clean Wisconsin*, 2005 WI 93 at ¶40. Therefore, since PSC has expertise in applying §196.491, as held by the Supreme Court in *Clean Wisconsin*, PSC should be given great weight deference.

This court finds respondents argument very persuasive but distinguishes specific factual scenarios from legal interpretations. This court agrees, as it must, with the Supreme Court that it is not specific fact scenarios which characterize an issue as one of first impression. However, petitioners don't argue for *de novo* review based upon a specific fact scenario. Instead, this case concerns a legal interpretation by PSC regarding the extra-jurisdictional scope of §196.491. Since

this legal question is a novel one, PSC has not exercised sufficient expertise in interpreting the scope of the statute. Without such expertise this is an issue of first impression, reviewed *de novo*, with no deference to PSC's decision.

## ANALYSIS

The main issue in this petition is whether the interpretation, by PSC, that §196.491 does not apply to power plants built outside the state, is correct. When interpreting a statute, the court must first look to the plain meaning of the statute and, if the language is clear and unambiguous, use that meaning. *Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. The court looks to extrinsic sources only if a statute is ambiguous. *Id.* The statute in question holds:

> **3) Certificate of public convenience and necessity.** (a)1. Except as provided in sub. (3b), *no person may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity under this subsection.* An application for a certificate issued under this subsection shall be in the form and contain the information required by commission rules and 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 an application under this subdivision, 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. *(Emphasis Added)*, Wis. Stat. § 196.491.

To obtain a CPCN, under §196.491(3), PSC must evaluate a number of factors including: the engineering of the plant, environmental impacts, impacts on the availability of electricity, impacts on the electricity market, and impacts on utility ratepayers. Petitioner argues that the statute is clear and unambiguous that all

power plants must obtain a CPCN. Therefore, petitioners argue, PSC should use §196.491 for all out of state plants.

However the statute's silence on the in state/out of state distinction is deafening to this court. An ambiguity is created when a statute is "capable of being understood by reasonably well-informed persons in two or more different senses". *Kalal*, 2004 WI 58, ¶47. The failure to identify the jurisdictional scope of the statute, especially when elements of that statute are relevant only to in state projects, creates the two interpretations argued by the parties. Both of these interpretations are reasonable and well supported. Therefore §196.491 is ambiguous regarding jurisdictional scope.

To resolve this ambiguity, this court relies upon the legislative history proffered by respondent. In the enactment of §196.491 the legislature states, "[t]his bill (enacting §196.491) establishes a method whereby the development of major electric generating and transmission facilities *in this state* is subject to...PSC" (Emphasis Added). Not only is the "in this state" language the expression of legislative intent, it complements the intrastate nature of the §196.491(3) elements. This interpretation also acknowledges that out of state projects must also comply with the state regulations where the project is located. This court's interpretation is encouraged by the fact that all site specific criteria were evaluated by the state of Minnesota in approving this project. Given the legislative history, the practical impacts of the elements in the statute and interstate regulatory schemes, this court agrees with PSC that §196.491 does not apply to the construction of out of state power plants.

This court is also persuaded by WEPCO's dormant commerce clause argument. Wis. Stat. §196.491, if interpreted to cover out of state projects, impacts interstate commerce by adding an additional hurdle to the construction of power plants. However, the additional factors considered in §196.491 (beyond those applied in §196.49) do not advance Wisconsin's interests because they concern site specific, and therefore out of state, impacts. Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Because Wisconsin's interests are not advanced and interstate commerce would be impacted, this court finds that petitioners interpretation of §196.491 would lead to a violation of the dormant commerce clause. This violation only lends support to this court's interpretation that §196.491 does not apply to out of state projects.

Finally, petitioners argue that, even if parts of §196.491 are inoperable, PSC was wrong to refuse to apply the operable sections to the Bent Tree application. Severance of operable statutory sections from inoperable ones is authorized by Wis. Stat. §990.001(11). However, petitioner has jumped the gun in seeking review on this issue. PSC never decided whether or not to sever applicable sections of §196.491 from inoperable ones, because they never determined there were operable sections of §196.491. Since PSC never made the decision not to sever provisions of §196.491, judicial review on this issue

would be advisory and prohibited by law. *See, Tammi v. Porshce Cars N. American., Inc.*, 2009 WI 83, ¶3, 320 Wis. 2d 45, 768 N.W.2d 783.

Supported by the above rationale, petitioners motion seeking relief under Wis. Stat. §227.53 is DENIED.

**IT IS SO ORDERED**

September 22, 2010

BY THE COURT:

John C. Albert, Judge
Circuit Court, Branch 3

CC: Dennis Grzezinski
Steven Heinzen
Brian Winters
Brian Potts

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application By Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota

6680-CE-173

**NOTICE OF PROCEEDING**
**AND REQUEST FOR COMMENTS**

| Comments Due: | Address Comments To: |
|---|---|
| **July 3, 2008 – 4:00 p.m.** | Sandra J. Paske, Secretary to the Commission<br>Public Service Commission |
| This docket uses the Electronic Regulatory Filing system (ERF) | P.O. Box 7854<br>Madison, WI 53707-7854<br>FAX (608) 266-3957 |

**THIS IS A PROCEEDING** to consider the application of Wisconsin Power and Light Company (WP&L) for authority under Wis. Stat. §§ 196.49 or 196.491 and Wis. Admin. Code § PSC 112 to construct, own, and operate a new wind electric generation facility. The facility, which would be known as the Bent Tree Wind Project, would be located in the townships of Hartland, Manchester, Bath, and Bancroft, Freeborn County, Minnesota, and have a generating capacity of approximately 200 megawatts (MW).

WP&L filed its application under Wis. Stat. § 196.491 and other applicable requirements as an application for a Certificate of Public Convenience and Necessity (CPCN). The Commission may conduct its review under Wis. Stat. § 196.49 and Wis. Admin. Code § PSC 112, and review WP&L's filing as an application for a Certificate of Authority (CA). The Commission requests comments regarding whether such applications for out-of-state projects should be reviewed as CPCN or CA applications. Comments are due at 4:00 p.m. on Thursday, July 3, 2008, and should be filed as described below.

**NOTICE IS GIVEN** that the Commission considers it necessary, in order to carry out its duties, to investigate all books, accounts, practices, and activities of the applicant. The expenses incurred or to be incurred by the Commission which are reasonably attributable to such an investigation will be assessed against and collected from the applicant in accordance with the provisions of Wis. Stat. § 196.85 and Wis. Admin. Code ch. PSC 5.

This would normally be a Type II action under Wis. Admin. Code § PSC 4.10(3). Type II actions require an environmental assessment to determine whether preparation of an environmental impact statement is necessary under Wis. Stat. § 1.11. However, because this

project would be constructed outside of the state of Wisconsin, the Commission intends to review the environmental effects of the proposal as if it were a Type III action.

The Commission requests comments on the above issue. Comments must be filed using the Electronic Regulatory Filing (ERF) system. The ERF system can be accessed through the Public Service Commission's website at http://psc.wi.gov. Members of the public may file comments using the ERF system or may file an original in person or by mail at Public Service Commission, 610 North Whitney Way, P.O. Box 7854, Madison, Wisconsin 53707-7854.

The Commission does not discriminate on the basis of disability in the provision of programs, services, or employment. Any person with a disability who needs accommodations to participate in this proceeding or who needs to obtain this document in a different format should contact the docket coordinator listed below.

Questions regarding this matter may be directed to docket coordinator Jim Lepinski at (608) 266-0478.

Dated at Madison, Wisconsin, June 20, 2008

By the Commission:

Sandra J. Paske

Sandra J. Paske
Secretary to the Commission

SJP:JAL:jlt:g:\notice\pending\6680-CE-173 NOI.doc

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

| | |
|---|---|
| Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota | 6680-CE-173 |

# INTERIM ORDER

## Introduction

This Interim Order addresses the question of whether the Commission should review Wisconsin Power and Light Company's (WP&L) Bent Tree Wind Project, to be located in the state of Minnesota, as a Certificate of Authority (CA) project under Wis. Stat. § 196.49 or as a Certificate of Public Convenience and Necessity (CPCN) project under Wis. Stat. § 196.491. WP&L intends to construct its Bent Tree Wind Project as a 200 megawatt (MW) facility, and it filed a CPCN application with the Commission. In the Notice of Proceeding, however, the Commission requested comments regarding whether an out-of-state project such as this should be reviewed as a CA application or a CPCN application. The Commission set July 3, 2008, as the deadline for receiving comments.

The Commission accepted comments and legal analyses from numerous entities, and deliberated on the issue at its open meeting on September 25, 2008. The Commission concludes that it will review the Bent Tree Wind Project as a CA application, not a CPCN application. Commissioner Azar dissents.

**Legal Background**

The CA law and the Commission's administrative rules that interpret this law require prior Commission approval of a variety of public utility projects. The CA law states:

> 196.49(2) **No public utility may begin the construction, installation or operation of any new plant, equipment, property or facility**, nor the construction or installation of any extension, improvement or addition to its existing plant, equipment, property, apparatus or facilities unless the public utility has complied with any applicable rule or order of the commission.
>
> (3)(a) In this subsection, **"project" means construction of any new plant, equipment, property or facility, or extension, improvement or addition** to its existing plant, equipment, property, apparatus or facilities. The commission may require by rule or special order that a public utility submit, periodically or at such times as the commission specifies and in such detail as the commission requires, plans, specifications and estimated costs of any proposed project which the commission finds will materially affect the public interest.
>
> (b) Except as provided in par. (d), **the commission may require by rule or special order under par. (a) that no project may proceed until the commission has certified that public convenience and necessity require the project**. The commission may refuse to certify a project if it appears that the completion of the project will 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.

(Emphasis added.)

The CA law prevents a public utility from constructing, installing, or operating new facilities unless it complies with Commission rules. The Commission may also require, by rule or special order, that a project cannot proceed until the Commission certifies that it is required by public convenience and necessity. The Commission has established rules to apply these portions of the CA law. Wisconsin Administrative Code §§ PSC 112.05(1) and (3) identify the facilities

that require advance Commission approval according to the type of project the public utility is proposing and its estimated gross cost. WP&L's Bent Tree Wind Project is such a project. It involves construction of a generating plant, which is a type of public utility project that requires advance Commission approval under Wis. Admin. Code § PSC 112.05(1)(a), and its estimated gross cost exceeds the cost threshold specified in Wis. Admin. Code § PSC 112.05(3). Pursuant to Wis. Admin. Code § PSC 112.07,[1] the Commission's decision about issuing a CA to a facility like the Bent Tree Wind Project depends on whether the public convenience and necessity require the project under review.

The CPCN law applies to fewer types of projects than the CA law. A CPCN is required only for construction of high-voltage transmission lines and large electric generating facilities. The law states:

> 196.491(1)(e) "Facility" means a large electric generating facility or a high-voltage transmission line.
>
> (f) Except as provided in subs. (2) (b) 8. and (3) (d) 3m., "high-voltage transmission line" means a conductor of electric energy exceeding one mile in length designed for operation at a nominal voltage of 100 kilovolts or more, together with associated facilities, and does not include transmission line relocations that the commission determines are necessary to facilitate highway or airport projects.
>
> (g) "Large electric generating facility" means electric generating equipment and associated facilities designed for nominal operation at a capacity of 100 megawatts or more.

[1] **Wis. Admin. Code § PSC 112.07 Processing of applications by the commission.** (1) If upon consideration of the application, together with any supplemental information and objections, the commission finds that the public convenience and necessity require the project as proposed and the project complies with s. 196.49(3)(b), Stats., the commission may authorize the project without public hearing but with modifications and conditions it considers necessary.

(2) Except as provided in sub. (1), the commission shall hold a public hearing on the application and grant or deny the application, in whole or in part, subject to any conditions the commission finds are necessary to protect the public interest or promote the public convenience and necessity.

While the CPCN law covers only two types of facilities, it regulates more project applicants than the CA law. The CPCN law applies to any person[2] who intends to construct a high-voltage transmission line or large electric generating facility, while the CA law only applies to public utility projects. The CPCN law declares:

> 196.491(3)(a)1. Except as provided in sub. (3b), **no person** may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity under this subsection. . . .

(Emphasis added.)

**Discussion**

The portions of the CA law and the CPCN law quoted above describe the scope of these statutes. Neither statute explicitly addresses the question of whether a project proposed to be constructed outside the state of Wisconsin requires a CA or a CPCN. Both laws are written broadly enough that, on first impression, they appear to regulate both in-state and out-of-state electric utility construction projects.

Applying the CPCN law to a facility proposed to be built in another state, however, creates problems with Wisconsin's extraterritorial jurisdiction. As the United States Supreme Court succinctly stated over 100 years ago:

> [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

[2] Wisconsin Statute § 990.01(26) broadly defines "person." The definition includes "all partnerships, associations and bodies politic or corporate."

*Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). Our Legislature expressed this same limitation in Wisconsin law, which provides:

> **1.01 State sovereignty and jurisdiction.** The sovereignty and jurisdiction of this state extend to all places within the boundaries declared in article II of the constitution, subject only to such rights of jurisdiction as have been or shall be acquired by the United States over any places therein; and the governor, and all subordinate officers of the state, shall maintain and defend its sovereignty and jurisdiction. . . .

Several provisions of the CPCN law directly implicate extraterritorial jurisdiction and, if applied to out-of-state projects, would conflict with Wis. Stat. § 1.01. For projects outside Wisconsin, the CPCN law would not only address impacts of the facility that affect Wisconsin, but would also require the Commission to examine impacts that occur in the state where the project would be built. These "local siting impacts" are regulated under Wis. Stat. §§ 196.491(3)(d)3., 4., and 6. Under these provisions of the CPCN law, the Commission must address local siting impacts such as safety, individual hardship, economic effects on property values, environmental protection, and compliance with orderly land use and development plans. One manifestation of this local focus is the requirement that every CPCN application must propose alternative locations or routes for the project.[3]

If the Commission were to address local siting impacts of an out-of-state project by applying these portions of the CPCN law, it would be attempting to assert jurisdiction over matters within the regulatory province of the host state. Overlapping Commission regulation of

[3] *See* Wis. Stat. § 196.491(3)(d)3. This requirement applies only to CPCN projects, not to CA projects. As provided in Wis. Stat. § 196.025(2m)(c), "[T]he commission and the department [of natural resources] are required to consider only the location, site, or route for the project identified in an application for a certificate under s. 196.49 and no more than one alternative location, site, or route; and, for a project identified in an application for a certificate under s. 196.491(3), the commission and the department are required to consider only the location, site, or route for the project identified in the application and one alternative location, site, or route."

these local siting impacts would not advance any legitimate Wisconsin interests and would likely be an unlawful exercise of extraterritorial jurisdiction.

The Commission could attempt to avoid this problem by construing some parts of the CPCN law that regulate local siting impacts as applying only to project impacts on Wisconsin. This means the Commission would apply the CPCN law to facilities whose construction is proposed in another state, but it would interpret the provisions of the law that regulate local siting impacts to mean only those impacts that affect Wisconsin. For example, Wis. Stat. § 196.491(3)(d)4. requires that the Commission, prior to approval, determine that "[t]he 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." The Commission could interpret this statutory prohibition on "undue adverse impact on other environmental values" to mean only environmental impacts that affect Wisconsin.

However, such a construction would not correct all of the problems that arise when the CPCN law is applied to out-of-state projects. Under Wis. Stat. § 196.491(3)(a)1., the Commission must send copies of a CPCN 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, while Wis. Stat. § 196.491(3)(b) requires the Commission to hold a public hearing on a CPCN application "in the area affected." Sending copies of the application to municipal clerks and libraries in Minnesota, or holding a Commission hearing in Minnesota to receive testimony from local members of the public, would not help the Commission identify a project's impacts on Wisconsin. Instead, these requirements of the CPCN law would burden local officials and sow

confusion without serving any legitimate Wisconsin purpose. These problems indicate that narrowly construing those parts of the CPCN law that regulate local siting impacts, so they only apply to project impacts inside Wisconsin, would not avoid all of the dilemmas created by applying the law to out-of-state projects.

Even more importantly, the CPCN law's legislative history demonstrates that the Legislature intended to confine the CPCN law to in-state projects. The CPCN law was enacted on September 30, 1975, as ch. 68, laws of 1975. It was introduced as 1975 Assembly Bill 463 and what passed both houses was Assembly Substitute Amendment 2 to Assembly Bill 463. Because the relevant provisions of the CPCN law are identical in both the original Assembly Bill 463 and in the substitute amendment that actually passed, the description of the CPCN law in the Legislative Reference Bureau (LRB) Analysis of Assembly Bill 463 is useful legislative history. The LRB Analysis to Assembly Bill 463 states, "This bill establishes a method whereby the development of major electric generating and transmission facilities **in this state** is subject to scrutiny by the public and all levels of government and to approval by the public service commission (PSC) and the department of natural resources (DNR)." (Emphasis added.) As the supreme court ruled in *Dairyland Greyhound Park v. Doyle*, 2006 WI 107, ¶ 32, 295 Wis. 2d 1, 719 N.W.2d 408, "Because the LRB's analysis of a bill is printed with and displayed on the bill when it is introduced in the legislature, the LRB's analysis is indicative of legislative intent." The LRB Analysis to Assembly Bill 463 is a strong statement of legislative intent that the CPCN law applies not to out-of-state projects, but to in-state projects.

Construing the CPCN law to apply only to in-state projects is also consistent with a fundamental rule of statutory construction, "that any result that is absurd or unreasonable must be avoided." *Lake City Corporation v. Mequon*, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997). None of the provisions of the CPCN law would be unreasonable if the statute is interpreted to apply only to in-state projects. On the other hand, if the CPCN law is interpreted as governing out-of-state proposals like the Bent Tree Wind Project, the Commission would needlessly be required to mail copies of CPCN applications to Minnesota libraries and hold hearings in the local area. This would be an unreasonable interpretation of the law.

Another portion of the CPCN law that would be unreasonable if applied to out-of-state projects is Wis. Stat. § 196.491(3)(i). Under this law, the issuance of a CPCN preempts any local ordinances that would preclude or inhibit the CPCN project's construction or use. Surely the state Legislature did not have the intent or the authority to preempt the ordinances of another state's municipalities.

Furthermore, applying the CPCN law to out-of-state wholesale merchant plants would lead to absurd results. The CPCN law defines a "wholesale merchant plant" as an electric generating unit not owned by a Wisconsin public utility, not providing retail electric service, and "located in this state." Wis. Stat. § 196.491(1)(w)1. Because such a project is not part of a Wisconsin utility's rate base and ratepayers are not liable for its construction costs, a wholesale merchant plant is exempt from some of the CPCN law's approval criteria. When the Commission reviews a wholesale merchant plant CPCN project, Wis. Stat. §§ 196.491(3)(d)2.

and 3. prevent it from considering whether the public needs the plant's power, alternative sources of supply or engineering, and from considering the economics of the project. Yet, if the CPCN law were applied to out-of-state projects, a proposal that meets most of the elements of a wholesale merchant plant but is located beyond the borders of Wisconsin would not qualify for these exemptions from the CPCN law's approval criteria. In other words, the Commission would review more completely a wholesale merchant plant to be built outside Wisconsin than one to be built inside Wisconsin. This would be an absurd interpretation of the CPCN law.

Unlike the CPCN law, the CA law can be applied to out-of-state projects. The CA law's legislative history does not show that the Legislature intended to confine the CA law only to in-state projects. In addition, requiring a CA for out-of-state projects does not conflict with Wis. Stat. § 1.01 or with principles of extraterritorial jurisdiction. This is because the CA law applies only to Wisconsin utilities, while the CPCN law regulates "any person," and because no part of the CA law compels the Commission to consider out-of-state local siting impacts.

Interpreting the CA law to apply to out-of-state projects is consistent with the Commission's prior interpretation of this law. As Wis. Admin. Code § PSC 112.05(2) provides, electric utilities must notify the Commission of CA projects that they intend to construct in other states and the Commission may require that the utility submit a CA application of such a project for the Commission's prior approval. The rule states:

> PSC 112.05(2) A Wisconsin electric utility proposing to construct, install or place in operation any of the utility facilities listed in sub. (1) in another state in which it serves shall notify the commission at least 60 days before beginning construction. The notification shall include a description of the project, its location, the estimated cost, a discussion of need, permits or approvals required

> by the other state or local governments, and the approximate jurisdictional allocation of the cost between Wisconsin and the other state. Notwithstanding sub. (3), if a significant portion of the cost of the project will be allocated to Wisconsin for ratemaking purposes, the commission may require that the utility submit an application under s. PSC 112.06, for commission authorization prior to construction, installation or operation.

Based on this rule, the Commission has reviewed CA applications for projects proposed to be built outside Wisconsin.[4] The Commission has no equivalent rule concerning the CPCN law.

Some of those who filed comments argued that the Commission would lose jurisdiction over environmental impacts if it reviewed out-of-state projects only under the CA law. The Commission disagrees. As provided in Wis. Stat. § 196.49(3)(b) and Wis. Admin. Code § PSC 112.07, the Commission must determine whether a CA project will promote the public convenience and necessity, and the Commission may impose any condition it finds necessary to protect the public interest. When applied to an out-of-state CA project, these standards are broad enough to address environmental issues that affect the state of Wisconsin.

The Commission concludes that applying some portions of the CPCN law to out-of-state projects, to regulate local siting impacts, would conflict with statutory limits on Wisconsin's sovereign jurisdiction. The Commission further concludes that applying other portions of the CPCN law to such projects would be unreasonable or absurd, and that the Legislature intended the CPCN law to apply only to projects in this state.

[4] For example, *see Application of Wisconsin Electric Power Company for Authority to Construct a TOXECON Baghouse for Units 7, 8, and 9 at the Presque Isle Power Plant, Located in the City of Marquette, Marquette County, Michigan*, docket 6630-CE-287 (March 12, 2004) and *Application of Wisconsin Electric Power Company for Authority to Construct a Particulate Control Baghouse for Units 5 and 6 at the Presque Isle Power Plant, Located in the City of Marquette, Marquette County, Michigan*, docket 6630-CE-290 (July 30, 2004).

**Order**

For these reasons, the Commission concludes that it must review the Bent Tree Wind Project, which WP&L intends to construct in Minnesota, pursuant to the CA law rather than the CPCN law.

Dated at Madison, Wisconsin, November 6, 2008

By the Commission:

Sandra J. Paske
Secretary to the Commission

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See attached Notice of Rights

Docket 6680-CE-173

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT**

The following notice is served on you as part of the Commission's written decision. 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.

*PETITION FOR REHEARING*

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing 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 petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

*PETITION FOR JUDICIAL REVIEW*

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.[1] The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

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

Revised July 3, 2008

[1] *See State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota — 6680-CE-173

**COMMISSIONER AZAR'S DISSENT**

This is one of the most significant decisions made by the Commission during my tenure here and, I believe, the majority decision errs on both policy and the law, and sets the stage to run afoul of our rich tradition for public utility regulation. The following hypothetical is an example of what the majority decision could lead to:

> The Division Administrator[1] could approve the construction of a two billion dollar 600 megawatt (MW) out-of-state coal plant that would be paid for by Wisconsin ratepayers. This would be possible even if that plant: (1) was unnecessary,[2] and/or (2) was not cost effective,[3] and/or (3) would impair the service of the utility.[4,5] The Commission would neither see the application nor the final decision.

To any Wisconsin ratepayer or policymaker, this scenario should be cause for alarm. My concern does not arise from the current staff or Commission, for I have the utmost trust in the current Division Administrator and my fellow Commissioners to act appropriately. However,

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[1]The Division Administrator or Acting Division Administrator is empowered to make decisions on applications for "electric construction orders which do not require a CPCN under 196.491." See Minutes of Open Meeting of Thursday, May 5, 1995, Commission Delegation No. 4, Attachment B, Item No. 8.

[2]"[U]nreasonably in excess of the probable future requirements." Wis. Stat. § 196.49(3)(b)2.

[3]"[A]dd to the cost of service without proportionately increasing the value . . . of service." Wis. Stat. § 196.49(3)(b)3.

[4]"Substantially impair the efficiency of the service of the public utility." Wis. Stat. § 196.49(3)(b)1.

[5]The majority opinion contends that, under the Commission's rules, to approve the project the Commission must first certify that the public convenience and necessity require the project. (See page 10.) However, this is only true if a hearing is not held. Wis. Admin. Code § PSC 112.07(1). If a hearing is held, the rule does not mandate a finding of public convenience and necessity. Wis. Admin. Code § PSC 112.07(2).

our actions in the present could have ramifications in the future, and we must consider that future with our decision today.

The foundation of our democratic system is a system of checks and balances that helps to ensure that the decisions of government are scrutinized, subject to public input and review. When the Legislature and Governor enacted the current Certificate of Public Convenience and Necessity (CPCN) statute, I believe that they clearly intended for a rigorous review of large utility projects to ensure that the interests of Wisconsin ratepayers would be adequately safeguarded. Because I feel today's decision threatens this system of checks and balances, I intend to seek a statutory clarification to ensure that large utility projects paid for by Wisconsin ratepayers are subject to sufficient review by this Commission. I ask my colleagues to join me in seeking this important clarification.

The applicant before us here seeks to construct a 200 MW generation facility with a proposed cost of $495 million. Because Wisconsin Power & Light Company's (WP&L) application is for 200 MW, it triggers the threshold limits in the CPCN statute. Wis. Stat. § 196.491(1)(e) and (g). In turn, the Commission is legally obligated to apply the CPCN statute. Wis. Stat. § 196.491(3)(a)1. The only way to avoid application of that statute is if the Commission is somehow legally barred from applying the CPCN statute.[6]

The majority believes the Commission is prevented from applying the CPCN statute because the proposed project would be located in Minnesota rather than Wisconsin. The CPCN

[6]The majority misapplies the requirements of the CPCN statute by empowering the Commission with the discretion to choose between the CPCN and the Certificate of Authority (CA) statute, depending on the facts before it. I find no legal basis for concluding that the Legislature provided us with such discretion.

statute, on its face, is not limited to in-state projects.[7] A plain reading of the statute requires that the CPCN statute apply to any major construction project proposed by Wisconsin public utilities, regardless of where the facility would be located.

**Legislative History**

The majority opinion relies heavily on legislative intent, arguing that the drafting documents for the 1975 CPCN law clearly state the Legislature intended for the law only to apply to "in-state projects." (Page 7.) However, looking only at the legislative intent of the CPCN law, and then simply applying the in-state/out-of-state distinction, is misleading.

**Legislative Intent of Both the CPCN and CA Laws Regarding the In-State/Out-of-State Distinction**

Unlike the majority, I do not find the fact that the Legislature's writing of the CPCN law for in-state projects to be particularly enlightening. Given the historical context within which the CPCN law was written, it is clear that the Legislature was considering only in-state projects in the law. The CPCN statute was written in 1975 during the "old" utility world, before the Public Utility Regulatory Policies Act, Energy Policy Act of 1992 and Federal Energy Regulatory Commission Order 888 – events that have dramatically reshaped the electric industry. Specifically, the CPCN statute was created when utilities were generally expected to build generation within their own service territories. The thought of wheeling power across state lines was unnecessary unless a utility service territory happened to span between neighboring states. Beginning in 1996, the "new" energy world saw the creation of the open access transmission

[7]The one exception, which is discussed later, is that the CPCN statute defines a "wholesale merchant plant" as "facilities located in this state." Wis. Stat. § 196.491(1)(w)1.

grid, allowing public utilities to begin building generation facilities far away from their service territories, indeed, even in other states because they knew they would have the opportunity to transmit the energy back to their service territory. Hence, it was only after 1996, twenty-one years after the passage of the CPCN law, that the wheeling of power across state lines became common place.

While there is no question in my mind that the Legislature was only considering in-state projects when it wrote the CPCN law, that is even more emphatically true for the Certificate of Authority (CA) law which was created over four decades earlier in 1931. In 1931, the concept of transmitting power across state lines would have been the subject of science fiction, not legislation.[8]

Given the historical context of both the CPCN and CA statutes, the Legislature had to have assumed that it was writing both laws for facilities that would be built in Wisconsin. Hence, if one relies on legislative intent, neither the CPCN nor the CA law could apply to out-of-state projects. From this, one must conclude that looking at the legislative intent as to the in-state/out-of-state distinction is not helpful in determining whether the CPCN law applies to WP&L's application. It also reminds us that the plain language of the statute is always the first place to look for legislative intent. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Here, the CPCN statute is silent on the issue of in-state versus out-of-state projects.

[8]In 1931, the electricity industry was still in its infancy. Transmitting power to the next service territory would have been considered a technological marvel, and the thought of building a generator in another state and transmitting its power into Wisconsin would have been inconceivable.

**Legislative Intent on the Size of the Project**

However, the CPCN statute is not silent on what type of projects fall within its scope. The plain and unambiguous language of Wis. Stat. § 196.491(1)(g) demonstrates that the Legislature clearly intended the rigorous CPCN law to apply to the construction of any facility "designed for nominal operation at a capacity of 100 megawatts or more." In contrast, the CA law applies its less rigorous standards to a much broader set of projects; it applies to "any new plant" that meets the threshold requirements set forth in the Commission rules. Wis. Stat. § 196.49(2). Again, the Supreme Court requires us to begin statutory interpretation "with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Kalal*, 271 Wis. 2d 633, ¶ 45. Here, the meaning is clear: applications for generation over 100 MW are subject to the rigorous standards found in the CPCN law.

**Severing Invalid Provisions of the CPCN Law**

The majority's concern with out-of-state projects arises from the few CPCN provisions that require the Commission to render decisions on siting issues. Because of those provisions, the majority concludes that none of the rigorous standards found in the CPCN statute should be applied to WP&L's application. I agree that siting decisions for projects outside of Wisconsin could not be rendered by this Commission since, among other things, Wis. Const. art. II, § 1, and Wis. Stat. § 1.01 limit the state's jurisdiction to our state boundaries. However, I do not agree with the majority that, when dealing with out-of-state projects, the siting provisions require us to jettison the entirety of the CPCN statute.

Our world is constantly changing. The rules of statutory interpretation empower the administrators of the law to interpret statutes through the lens of today's world. The

Commission continually administers public utility laws within the framework of new facts. And, that is what we are tasked with today. Both the CPCN and CA statutes were created during the old utility world, so neither of them perfectly fits the current fact scenarios with stand alone transmission owners, a regional transmission operator and energy markets.

To accommodate these new facts that were not even imaginable when the statutes were written, I turn to Wis. Stat. § 990.001(11) on severability. This section provides that:

> [I]f any provision of the statutes is invalid . . . or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications, which can be given effect without the invalid provision or application.

According to case law, there is a presumption that invalid provisions will be severed. One can overcome that presumption only by showing the Legislature, intending the statute to be effective only as an entirety, would not have enacted the valid part of the statute by itself. *Nankin v. Village of Shorewood*, 2001 WI 92, ¶ 49, 245 Wis. 2d 86, 630 N.W.2d 141.

Here Wis. Const. art. II, § 1, specifies the boundaries of the state of Wisconsin and establishes a state government that will work within those boundaries. The Commission is part of the state government that is subject to the state boundaries set forth in Wis. Const. art. II, § 1. Accordingly, the following provisions of the CPCN law that would require the Commission to act outside the state boundaries as set by the Constitution are invalid and are severable:

- Wis. Stat. § 196.491(2r) – overriding local ordinances in another state;
- Wis. Stat. § 196.491(3)(a)1 – sending the application to out-of-state clerks and libraries;
- Wis. Stat. § 196.491(3)(a)3 – filing an engineering plan with the Wisconsin Department of Natural Resources (WDNR) over which the WDNR would have no authority;
- Wis. Stat. § 196.491(3)(b) – holding a hearing in the out-of-state affected area;

- Part of Wis. Stat. § 196.491(3)(d)(3) – relating to out-of-state "individual hardships" and "environmental factors;" note that the remainder of this subparagraph and individual hardships and environmental factors affecting Wisconsin are valid;

- Part of Wis. Stat. § 196.491(3)(d)4 – relating to out-of-state "environmental values;" note that environmental values that affect Wisconsin are valid; and

- Wis. Stat. § 196.491(3)(d)6 – interfering with orderly land use and development plans for the out-of-state area involved.

There is nothing in the statute to suggest that the overall intent of the CPCN law would be harmed by severing the above provisions. Equally as important, the remaining statutory provisions of the CPCN law can stand independent of the severed portions. The following are examples of what remains valid in the CPCN law after the invalid portions are severed:

- Contested case hearing – a hearing must be held.[9]

- The standard for project approval – the Commission (not the Division Administrator) must make certain findings in order to issue a CPCN. If such findings are missing, then the Commission cannot issue a CPCN. Wis. Stat. § 196.491(3)(e). The necessary findings for an out-of-state project would include the following:

    - Wis. Stat. § 196.491(3)(d)2 - The facility satisfies the reasonable needs of the public for an adequate supply of electric energy;

    - Wis. Stat. § 196.49(3)(d)3 - The design and location is in the public interest considering alternative sources of supply, engineering, economics, safety, and reliability as well as individual hardships and environmental factors affecting Wisconsin;

    - Wis. Stat. § 196.49(3)(d)4 - The facility will not have undue adverse impact on other environmental values affecting Wisconsin;

[9]While a hearing must be held under the CPCN law, the CA law does not require one. In the case before us, once the majority selected the CA standard for this half-billion dollar application, I immediately requested that a contested hearing be held. One of the Commissioners did not want to hold a hearing in spite of my request for one. 2-1 decision dated June 20, 2008. Whether to hold a contested case hearing for a half-billion dollar project that will be billed to the ratepayers should not be at the discretion of the Commission. This is another reason that the CPCN law should be applied to large utility projects regardless of whether they are located in or out-of-state.

- Wis. Stat. § 196.49(3)(d)5 - The project is necessary, cost effective and will not impair the service of the utility; and

- Wis. Stat. § 196.49(3)(d)7 - The project will not have a material adverse impact on competition in the relevant wholesale electric service market.

The clear and unambiguous intent of the CPCN statute is to address economic and reliability issues affecting Wisconsin ratepayers. Retaining these valid provisions empowers the Commission to carry out the clear legislative intent of rigorously reviewing large generation facilities being built with Wisconsin ratepayer funds. By applying the severability statute,[10] the Commission can fulfill its legislative mandate of applying the CPCN statute in all cases involving a 200 MW generation facility, regardless of where those activities take place. [11]

**Absurdity**

The majority opinion also argues that applying the CPCN statute to out-of-state projects creates an absurdity as to merchant plants. (Pages 8-9.) However, the CPCN law specifically limits the term "wholesale merchant plants" to those plants that are "located in this state." Wis. Stat. § 196.491(3)(a)1. Statutory provisions must be interpreted within the context of all other provisions. *State v. Schaefer*, 2008 WI 25, ¶ 55, 308 Wis. 2d 279, 746 N.W.2d 457.

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[10]In addition to the severability provisions of Wis. Stat. § 990.001(11), there are two other rules of statutory interpretation that require application of the CPCN law to WP&L's application: when statutes appear to conflict, the Supreme Court mandates that those provisions be harmonized. *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 184, 532 N.W.2d 690 (1995); and, statutes must be interpreted so as to not create absurd results. *Kalal,* 271 Wis. 2d 633, ¶ 45. Here, we must harmonize the Wis. Stat. § 196.491, the CPCN statute, with Wis. Stat. § 1.01, the state jurisdiction statute. I believe that the majority position both fails to adequately harmonize the statutes and creates an absurd result.
The CPCN and state jurisdictional statutes can be harmonized by focusing on the CPCN provisions that pertain to protection of the Wisconsin ratepayers and ignoring the provisions that pertain to issues outside of the state's jurisdictional boundaries. Further, by focusing on provisions that impact Wisconsin ratepayers, we also avoid the potential absurd result of eliminating Commissioner review of proposed "large electric generating facilities" simply because the facility would be located outside of the state's borders.

[11]I fear that the majority is sending precisely the wrong signal to our public utilities by refusing to apply the CPCN statute to out-of-state projects. The majority opinion could encourage Wisconsin utilities to focus their generation priorities outside our borders where regulatory approvals may be easier to obtain and where regulatory and environmental oversight is less stringent. In turn, this decision may lead to a "race to the bottom" for generation projects, a "race" that may frustrate our collective goal of reducing carbon emissions and global warming.

Accordingly, when one is applying the term "person" in Wis. Stat. § 196.491(1)(w)1 to the owner of a merchant plant, one should do so in the context of the definition provided by subparagraph (3)(a)1, namely the owner of a merchant plant located in this state. By doing so, the absurdity created in the majority opinion is avoided.

Moreover, the absurdity discussed in the majority opinion is a red herring. The issue of the Commission's regulation over out-of-state merchant plants is not currently before us and will probably never be before us. I sincerely doubt that the Commission will ever receive a single application for the construction of a merchant plant located outside of Wisconsin.

**Conclusion**

For over 100 years, the Public Service Commission of Wisconsin has been a recognized leader and innovator in the regulation of public utilities. With this decision, however, I fear that we could be placing Wisconsin's ratepayers at significant risk.

I want to be clear: I am not attacking the ideals of my colleagues. Today's decision involves a wind generation project that is likely to bring the benefits of clean energy to the market, a goal that we have been rightly directed by law to achieve. I am cognizant of the need and desire to bring renewable energy to market as quickly as possible. I suspect that my colleagues are taking today's action in order to allow and encourage the development of this renewable energy resource. Of course, I join in that commitment. However, I fear that today's decision seeks to achieve a laudable outcome by forsaking the process that has made us leaders in the field of utility regulation.

Today's decision would have been far simpler had the Commission been working from statutes designed for today's energy world. Working with the Legislature and other

stakeholders, I am confident that we can update these statutes and find the proper balance to allow renewable energy to come to market quickly without compromising the oversight that protects ratepayers. I am committed to working with the Legislature and Governor Doyle to ensure that future projects proposed by Wisconsin utilities, to be paid for with Wisconsin ratepayers' dollars, are subject to proper checks and balances regardless of where those projects may be constructed. I sincerely hope that my colleagues will both support me and join me in this important endeavor.

Dated at Madison, Wisconsin, this 6TH day of November, 2008.

By Commissioner Lauren L. Azar

Lauren Azar
Commissioner

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BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

| | |
|---|---|
| Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota | 6680-CE-173 |

**FINAL DECISION**

On June 6, 2008, Wisconsin Power and Light Company (WP&L) filed an application with the Public Service Commission (Commission) to construct, own, and operate a new wind electric generation facility. The facility, which would be known as the Bent Tree Wind Farm (Bent Tree), would be located in the townships of Hartland, Manchester, Bath, and Bancroft, Freeborn County, Minnesota, and have a generating capacity of approximately 200 megawatts (MW).

The application is APPROVED, subject to conditions and as modified by this Final Decision.

**Findings of Fact**

1. WP&L is a public utility, as defined in Wis. Stat. § 196.01(5)(a), engaged in rendering electric service in Wisconsin. WP&L is proposing to construct a wind-powered electric generating facility, to be known as the Bent Tree Wind Farm, as described in its application and as modified by this Final Decision. WP&L estimates the total capital cost of the project to be $497,370,500, based on a commercial operation date of 2010 and current return on construction work in progress (CWIP).

2. Conservation or other renewable resources, as listed in Wis. Stat. §§ 1.12 and 196.025, or their combination, are not cost-effective alternatives to WP&L's proposed facility.

3. The WP&L project, as modified by this Final Decision, satisfies the reasonable needs of the public for an adequate supply of electric energy.

4. The WP&L project, as modified by this Final Decision, will not substantially impair WP&L's efficiency of service or provide facilities unreasonably in excess of probable future requirements. In addition, when placed in operation, the project will increase the value or available quantity of WP&L's electric service in proportion to its cost of service.

5. The WP&L project, as modified by this Final Decision, assists WP&L in complying with its Renewable Portfolio Standard obligations under Wis. Stat. § 196.378.

6. A brownfield site for the project is not practicable.

7. The public interest and public convenience and necessity require completion of the WP&L project.

## Conclusions of Law

The Commission has jurisdiction under Wis. Stat. §§ 1.11, 1.12, 196.02, 196.025, 196.395, 196.40, and 196.49, and Wis. Admin. Code chs. PSC 4 and 112, to issue a Final Decision authorizing WP&L, as an electric public utility, to construct and place in operation a wind-powered electric generation facility with a capacity of approximately 200 MW and to impose the conditions specified in this Final Decision.

## Discussion

WP&L is a public utility, as defined in Wis. Stat. § 196.01(5)(a), engaged in rendering electric service in Wisconsin. It is proposing to construct Bent Tree with a generating capacity

of approximately 200 MW. The project is being developed by Wind Capital Group, and will be acquired by WP&L from Bent Tree LLC. Wind Capital Group is responsible for site development, and WP&L will be responsible for equipment procurement, engineering, and construction. WP&L states that Bent Tree is an out-of-state project that will receive all approvals applicable in Minnesota.

WP&L will develop the project in phases, and WP&L's application in this docket covers the first 200 MW based on a 2010 commercial operation date. WP&L has not made final turbine selections for the project. The conceptual array for the site represents 400 MW, modeled using a representative turbine model. Associated facilities include access roads, an operations and maintenance building, permanent meteorological towers, an electrical collection system, and a radial interconnection to a transmission substation. Equipment selection, site layout, and spacing are designed to make the most efficient use of land and wind resources, while complying with all applicable rules and regulations related to Minnesota Rules Chapter 7836. WP&L estimates that the project will have an operational life of 25 years.

This Final Decision is the Commission's final action on WP&L's application for authority under Wis. Stat. § 196.49 and Wis. Admin. Code ch. PSC 112 to construct, own, and operate a wind electric generating facility to be known as the Bent Tree Wind Farm. This Final Decision does not exempt WP&L from any required affiliated interest approval associated with this project and/or the acquisition of the project, if required under Wis. Stat. § 196.52.

While Bent Tree is located in Minnesota and will receive all approvals applicable in Minnesota, WP&L, as a public utility, is required to obtain construction authority for the project under Wis. Stat. § 196.49 and Wis. Admin. Code ch. PSC 112. As a result, WP&L is required to

obtain authorization to construct the project from the Commission as the cost of the project exceeds the construction cost filing threshold listed in Wis. Admin. Code § PSC 112.05(3)(a)3.

WP&L is in the process of securing the rights to interconnect Bent Tree to the transmission grid.

Initially, WP&L filed its application under Wis. Stat. § 196.491 and other applicable requirements as an application for a Certificate of Public Convenience and Necessity (CPCN). At its open meeting on September 25, 2008, the Commission ruled that the application is for a Certificate of Authority and must be reviewed under Wis. Stat. § 196.49 and Wis. Admin. Code § PSC 112. The Commission made this determination after considering comments filed in this docket in response to the Commission's June 20, 2008, Notice of Proceeding and Request for Comments about the scope of its authority over out-of-state electric utility construction projects. The Commission's decision regarding the level of the review is included in its Interim Order dated November 6, 2008, in this docket.

The Commission held hearings in this docket in Madison on April 29, 2009. Comments on the proposed project were requested from members of the public in the Commission's January 22, 2009, Notice of Hearing in this docket. No public comments were received.

In its June 20, 2008, Notice of Proceeding and Request for Comments in this docket, the Commission gave notice that this is a Type III action under Wis. Admin. Code § PSC 4.10(3). Type III actions normally do not require the preparation of an environmental impact statement (EIS) or an environmental assessment (EA) under Wis. Stat. § 1.11. The Commission investigated the potential for significant environmental effects that would occur as a result of WP&L's ownership and operation of Bent Tree and determined that preparation of neither an EIS nor an EA is required.

**Project Need**

Results of Commission staff's Electric Generation and Expansion Analysis System (EGEAS) modeling for the proposed project show that Bent Tree is the least-cost option in all modeling scenarios, except in the unlikely no-$CO_2$, no-RPS requirement scenario with a 20-year depreciation schedule.

While modeling is an important analytical tool available to the Commission as it conducts its needs determination, it is only one factor to be considered. A Renewable Portfolio Standard (RPS) exists in Wisconsin, and the Commission must consider the utility's obligation to increase the amount of renewable energy resources in its system to meet the RPS. The RPS in 2005 Wisconsin Act 141 (Act 141) and Wis. Stat. § 196.378, which took effect on April 1, 2006, built upon state policy to aggressively increase the level of renewable resources in the electric supply mix. Under these requirements, each Wisconsin electric provider must increase its renewable energy levels by 2 percentage points by 2010 and by 6 percentage points by 2015, above its 2001 to 2003 baseline average. With the addition of Bent Tree, WP&L will add approximately 666,000 megawatt hours (MWh) of renewable energy beginning in 2011 toward meeting its and its wholesale customers' obligations under Act 141 for 2010 through 2014. WP&L's renewable energy obligation under the RPS will increase to approximately 1,130,000 MWh in 2015. Assuming commercial operation by the end of 2010 as planned, this project, along with banked renewable resource credits (RRC) and other purchases, will allow WP&L to meet its 2010 through 2014 obligations under the RPS.

In docket 6680-CE-170, and as supported by evidence in the application and testimony in this case, the applicant needs energy. Placing a wind farm in operation in 2010 to support energy needed at that time and as required by statute in 2015 is consistent with Wis. Stat. § 196.49 and

sound planning principles and not unreasonably in excess of WP&L's probable future requirements. The capacity factors and turbine construction costs make the cost of the project commensurate with the value of service being provided.

Under Wis. Stat. § 196.49(3)(b), at its discretion, the Commission may refuse to authorize a construction project if the project will 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.

Because of the requirements of the RPS, WP&L requires more renewable resource generating facilities than it currently owns or has under contract. Based on WP&L's application, this project is a means of complying with WP&L's renewable resource requirements and the project meets the criteria specified in Wis. Stat. § 196.49(3)(b). The project will not result in unreasonable excess facilities and will satisfy the reasonable needs of the public for an adequate supply of electric energy.

The Commission must implement a state energy policy when reviewing any application. The Energy Priorities Law establishes the preferred means of meeting Wisconsin's energy demands as listed in Wis. Stat. §§ 1.12 and 196.025(1).

The Energy Priorities Law, Wis. Stat. § 1.12, creates the following priorities:

> **1.12 State energy policy.** (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.

In addition, Wis. Stat. § 196.025(1) declares, "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 . . . ." Because wind is a noncombustible renewable resource, WP&L's proposed electric facility fits within the second-highest statutory priority.

While each of these statutes is applicable to the project at hand, there is a certain degree of friction that exists between them that must be reconciled. Wisconsin Statute § 196.49 requires the Commission to consider whether a proposed project "provide[s] facilities unreasonably in excess of probable future requirements." The RPS law under Wis. Stat. § 196.378(2) requires the utility to build to meet its 2010 benchmark regardless of whether new generation is needed. It should be noted that Wis. Stat. § 196.49 does not prohibit the construction of unnecessary generation, but gives the Commission the discretion to reject or approve the application for generation that is "in excess of future probable requirements."

The second area to consider is the competing directives on the cost of the proposed generation. Wisconsin Statute § 196.49 requires the Commission to consider whether the proposed project "add[s] to the cost of service without proportionately increasing the value or available quantity of service." In contrast, the RPS statute requires utilities to increase their renewable energy percentage and, under Wis. Stat. § 196.378(2)(d), the Commission shall allow a utility to recover the cost of renewable energy from the ratepayer.[1] While the modeling in this case suggests that WP&L's proposed project is the least-cost option in all relevant scenarios,

Wis. Stat. § 196.49(3)(b) gives the Commission the discretion to reject or approve an application for a project that disproportionately adds to the cost of service when considering the value or available quantity of service.

The third area of overlap arises between the RPS and the Energy Priorities Statute, Wis. Stat. § 1.12. The Energy Priorities Statute lists energy conservation and efficiency as a higher priority than renewable generation, such as wind. Here, the applicant does not propose any conservation or efficiency measures. WP&L states the project was designed to meet the RPS requirement and energy conservation cannot be substituted under the energy priorities law.

When construing Wis. Stat § 196.49 and Wis. Stat. § 196.378, it is important to apply two rules of statutory construction:

1. Where two statutes relate to the same subject matter, it is the specific statute that controls the general statute. *Kramer v. City of Hayward,* 57 Wis. 2d 302, 311, 203 N.W.2d 871 (1973).

2. "It is a cardinal rule of statutory construction that conflicts between statutes are not favored and will be held not to exist if the statutes may otherwise be reasonably construed." *State v. Delaney,* 259 Wis. 2d 77, 84 658 N.W.2d 416 (2003). When statutes on the same subject conflict or are inconsistent with one another, courts must attempt to harmonize them in order to effectuate the legislature's intent. The statutory construction doctrine of *in pari materia* requires a court to read, apply and construe statutes relating to the same subject matter in a manner that harmonizes them in order to effectuate the legislature's intent. *Turner v. City of Milwaukee,* 193 Wis. 2d 412, 420, 535 N.W.2d 15 (Ct. App. 1995).

Reviewing these statutes in light of the rules of construction, the Commission construes the RPS statute as more specific than Wis. Stat. § 196.49. Therefore, to the extent there is a conflict between the statutes, the requirements of the RPS statute control.

[1] The RPS law creates an off-ramp if a utility finds that compliance with the RPS will "result in unreasonable increases in rates." Wis. Stat. § 196.378(2)(e)2.

Moreover, the Commission balances competing interests and approves this project to address WP&L's need for energy as well as to implement the RPS. To the extent there is any concern that this project may be providing energy sooner than demand indicates, the need to develop renewable energy sources, a priority established by the legislature, outweighs any such concern.

Similarly, for the Commission to implement energy priorities, it must determine and balance whether any higher priority alternatives to a proposed project would be cost-effective, technically feasible, and environmentally sound while meeting the objectives the proposed project is intended to address. Regarding other noncombustible renewable energy resources, no other form of currently available renewable generation is as cost-effective and technically feasible as wind. For these reasons, the Commission concludes that the WP&L project complies with the Energy Priorities Law.

**Impact on Locational Marginal Prices and Congestion**

To project the hourly locational marginal price (LMP) differences between the Minnesota node where Bent Tree will interconnect with the electric transmission system and the WP&L load node, WP&L performed a review of 2006 and 2007 congestion charges. WP&L found that the LMP in the Bent Tree area tended to be between $2 and $4 per MWh higher than in the WP&L load node. WP&L states that, because the LMP price in the Bent Tree area is higher than in the WP&L load zone, energy generated by the project will be paid a premium that not only compensates WP&L for the cost of the load, put produces surplus revenue that would reduce the cost paid by customers.

Commission staff testified that while historical data suggests that the LMP in the Bent Tree area may be higher than the WP&L load node, a 2010 PROMOD simulation suggests that

the LMP at the WP&L load node may actually be higher than the LMP for the Bent Tree area. This would result in a cost to move energy from Bent Tree to the WP&L load node that could be as high as $10 per MWh. Commission staff used a $5 per MWh cost to move energy from Bent Tree to the WP&L load zone in its EGEAS modeling. The results of Commission staff's EGEAS modeling suggest that, even with a cost to move energy of $5 per MWh, Bent Tree is the least-cost option in all likely modeling scenarios.

**Environmental Factors**

The proposed project would require no environmental permits from any governmental agency in Wisconsin. Appropriate permit applications for the project are proceeding through the Minnesota Public Utilities Commission (MPUC) process, and applications for other local, state, and federal permits are proceeding through the appropriate agencies.

WP&L's project will have a number of positive environmental effects. The energy produced by the project will avoid many of the impacts that fossil fuel and nuclear electric generation create. The operation of this wind farm will produce none of the air pollutants that are regulated under the federal Clean Air Act. It will release no greenhouse gases, which are the electric industry's principal contribution to global warming and climate change, and it will emit no hazardous air pollutants such as sulfuric acid, hydrochloric acid, ammonia, benzene, arsenic, lead, formaldehyde, or mercury. Furthermore, it will generate power without using any significant amount of water or producing any solid waste.

This project will support Wisconsin's goal of increasing its reliance upon renewable resources. It fits well with existing land uses, will help preserve the agricultural nature of the project area, will impose no reliability, safety, or engineering problems upon the electric system, and will have no undue adverse impacts on environmental values. After weighing all the

elements of WP&L's project, including the conditions imposed by this Final Decision, the Commission finds that authorizing the project will promote the public health and welfare and is in the public interest.

**Brownfield Siting**

Under Wis. Stat. § 196.49(4), the Commission may not issue a certificate for the construction of electric generating equipment unless it determines that brownfields are used to "the extent practicable." However, Wisconsin does not have a single brownfield site, or set of contiguous sites, that would be of sufficient size and would meet the siting criteria of available wind resources, land, and electric infrastructure. WP&L's project complies with Wis. Stat. § 196.49(4).

**Compliance with the Wisconsin Environmental Policy Act**

Wisconsin Statute § 1.11 requires all state agencies to consider the environmental impacts of "major actions" that could significantly affect the quality of the human environment. In Wis. Admin. Code ch. PSC 4, the Commission has categorized the types of actions it undertakes for purposes of complying with this law. As provided by this rule, and due to the fact that this project, which was planned, developed, and permitted for construction in a state other than Wisconsin, the Commission categorized this project as a Type III action, which normally requires the preparation of neither an EIS nor an EA. The Commission's review of the application and environmental permitting requirements concluded that the project is unlikely to have a significant impact upon the quality of the human environment. The Commission finds that the requirements of Wis. Stat. § 1.11 and Wis. Admin. Code ch. PSC 4 have been met.

**Project Purpose, Capital Cost, and Schedule**

As noted previously, Bent Tree is necessary for WP&L to meet its RPS requirements for the period 2010 to 2014. WP&L anticipates that additional renewable capacity will be required to meet its entire RPS obligations for 2015, but specific projects that comprise that additional capacity have not yet been identified.

WP&L estimates that the total cost of the project is between $470,000,000 and $497,000,000, depending on which turbine model is selected for the project. WP&L's detailed cost estimate is $497,370,500, based on a commercial operation date of 2010 and current return on CWIP. The detailed cost estimate by plant account is as follows:

| **Description** | **Amount** |
|---|---|
| Account 340 – Land | $100,000 |
| Account 341 – Surfaced Areas, Operations Building | $16,734,410 |
| Account 344 – Turbine Generators, Engineering, Procurement, Construction Management, Erection | $456,587,974 |
| Account 345 – Met Towers, Electrical Connection, SCADA | $18,970,728 |
| Account 345 – Substation | $4,977,388 |
| **Total Project Cost** | **$497,370,500** |

**Certificate**

WP&L may construct Bent Tree with a generating capacity of up to 200 MW, as described in its application and subsequent filings and as modified by this Final Decision.

**Order**

1. WP&L may construct the Bent Tree Wind Farm in conformance with the design specified in its application and subsequent filings, subject to the conditions specified in this Final Decision.

2. The total gross project cost is estimated to be $497,370,500.

3. This authorization is for the specific project as described in the application and subsequent filings and at the stated cost. Should the scope, design, or location of the project change significantly, or if the project cost exceeds $497,370,500 by more than 10 percent, WP&L shall promptly notify the Commission as soon as it becomes aware of the probable change.

4. WP&L shall notify the Commission in writing, within 10 calendar days, of each of the following: the date of commencement of construction of the interconnection substation, the date of commencement of construction of project facilities other than the interconnection substation, and the date that the facilities are placed in service.

5. WP&L shall ensure that all necessary permits have been obtained prior to commencement of construction and operation of the facilities, and it shall submit to the Commission quarterly reports of the status of the environmental permitting process for Bent Tree. The first report is due 90 days after the issuance of this Final Decision and reports shall continue through commencement of operation of the project.

6. WP&L shall submit to the Commission the final actual costs segregated by major accounts within one year after the in-service date. For those accounts or categories where actual costs deviate significantly from those authorized, WP&L shall itemize and explain the reasons for such deviations in the final cost report.

7. Until its facility is fully operational, WP&L shall submit quarterly progress reports to the Commission that summarize the status of construction, the anticipated in-service date, and the overall percent of physical completion. WP&L shall include the date when construction commences in its report for that three-month period. The first report is due for the

quarter ending September 30, 2009, and each report shall be filed within 31 days after the end of the quarter.

8. WP&L shall comply with the requirements of the National Electric Safety Code when constructing, maintaining and operating its facility.

9. WP&L shall notify the Commission in writing within ten days of any decision not to proceed with its project or to enter into any partnership or other arrangement with a third party concerning ownership or operation of the facility.

10. All commitments and conditions of this Final Decision shall apply to WP&L and to its agents, contractors, successors, and assigns.

11. This Final Decision takes effect on the day after it is mailed.

12. Jurisdiction is retained.

Dated at Madison, Wisconsin, July 30, 2009

By the Commission:

Sandra J. Paske

Sandra J. Paske
Secretary to the Commission

SJP:JAL:mem:g:\order\pending\6680-CE-173 final.doc

See attached Notice of Rights

Docket 6680-CE-173

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT**

The following notice is served on you as part of the Commission's written decision. 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.

*PETITION FOR REHEARING*

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing 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 petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

*PETITION FOR JUDICIAL REVIEW*

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.[2] The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

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

Revised: December 17, 2008

[2] *See State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

APPENDIX A
(CONTESTED)

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

Public Service Commission of Wisconsin
*(Not a party but must be served)*
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RENEW WISCONSIN
Curt F. Pawlisch
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Integrys Energy Group, Inc.
700 North Adams Street
Green Bay, WI 54301

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

| | |
|---|---|
| Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota | 6680-CE-173 |

**COMMISSIONER AZAR'S CONCURRENCE**

It is no secret that I have disagreed with my colleagues on key decisions in this docket. I dissented from the decision to apply the lesser Certificate of Authority (CA) standard to this application rather than the heightened Certificate of Public Convenience and Necessity (CPCN) standard. *See Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota*, Public Service Commission of Wisconsin Docket No. 6680-CE-173, *Interim Order, Commissioner Azar's Dissent* (Nov. 6, 2008). While I continue to believe we should apply the CPCN standard in this case (and similar cases in the future), the law of this case requires me to apply the CA standard. Applying the CA standard here, I agree with my colleagues that this project should be approved under the discretionary standard identified in Wis. Stat. § 196.49(3).

In this concurrence, I identify a number of factual findings in the Final Decision that are not based on the elements of the CA statute, but which are based on the requirements of the CPCN statute. I do not make these observations out of a sense of "sour grapes" about the Commission's earlier decision. Instead, I point out that the actual language of this Final Decision provides further evidence of the sound policy reasons for applying the CPCN standard to this, and other projects like it. To the extent we need statutory changes to apply the CPCN standard in the future, the Commission should be seeking those changes.

Also, in this concurrence, I identify that the dispute over the load forecasts used in this docket is a moot point in light of the discretionary standard of the CA statute and the specific requirements of Wisconsin's Renewable Portfolio Standard (RPS).

**CPCN Statutory Requirements Identified in the Final Decision**

**Finding of Fact #3 (Page 2 of Final Decision)**

This finding of fact identifies that the project "satisfies the reasonable needs of the public for an adequate supply of electric energy." Final Decision at 2. This is not a requirement under the CA statute, but rather it is a requirement under the CPCN statute, Wis. Stat. § 196.491(3)(d)2. Because this docket proceeded under the CA statute, I do not believe this finding is properly included in the Final Decision.

**Finding of Fact #7 (Page 2 of Final Decision)**

This finding of fact identifies that the "public interest and public convenience and necessity require the completion" of the project. Final Decision at 2. Again, since the Commission decided to apply the CA statute and not the CPCN statute, this finding of fact is inappropriate for this case.

I recognize that the CA statute provides that the Commission may adopt a rule or special order that requires that CA projects be required by the public convenience and necessity. Wis. Stat. § 196.49(3)(b). However, to date, the Commission's rules only require this finding when the Commission does not hold a hearing on the application, which is not the case here. Wis. Admin. Code § PSC 112.07(1).

**Promotion of Public Health and Welfare and the Public Interest (Pages 10-11 of Final Decision)**

The Final Decision identifies that "the Commission finds that authorizing the project will promote the public health and welfare and is in the public interest." Final Decision at 10-11. While I agree with this statement, again I do not believe that this is a required finding under the CA statute. This appears to be a standard that the Commission would apply to a CPCN application. *See* Wis. Stat. 196.491(3)(d)3. (establishing a public interest standard with respect to the design and location of proposed facilities); Wis. Stat. § 196.491(3)(d)4. (establishing a public health and welfare standard for proposed facilities).[1] Since we were specifically applying the CA statute, this finding is misplaced and unnecessary in this Final Decision.

**Project Need and Renewable Energy Requirements**

**Project Need (Pages 5-9 of Final Decision)**

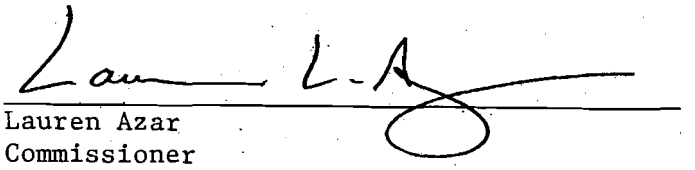
In this docket, there was a dispute in the record about the applicant's demand projections and whether this project was needed to meet the utility's future demand. I found this dispute to be immaterial in my decision to approve this project under the CA statute.

Under the CA statute, at the Commission's discretion, we may refuse to authorize a project if, among other things, the project will "provide facilities unreasonably in excess or probable future requirements." Wis. Stat. § 196.49(3)(b)2. This discretionary provision does not require that the Commission find there is a specific "need" for the project. Indeed, under this standard, the Commission could still approve the project even if the Commission found that the project was unnecessary from an energy demand perspective. *See* Final Decision at 7.

[1] Pursuant to Wis. Admin. Code § PSC 112.07(2), the Commission can add conditions to a project approval that are "necessary to protect the public interest or promote the public convenience and necessity." However, the CA statute does not require that the Commission find that the proposed project, as a whole, meet these requirements.

As the Final Decision notes, in this case we are operating under the discretionary standard of Wis. Stat. § 196.49(3) and we must consider the RPS requirements of Wis. Stat. § 196.378. Under these facts, the Commission does not need to resolve any dispute about the utility's load forecast. Since WP&L must obtain or generate a certain amount of its energy from renewable sources, this project will not lead to generation "in excess of future probable requirements."

Dated at Madison, Wisconsin, this 30th day of July, 2009.



Lauren Azar
Commissioner

LLA:BR:sp:K:\Azar\Dissenting or concurring opinions\Azar Concurrent in 6680-CE-173 7-30-09

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**APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

## Introduction

Wisconsin Power and Light Company ("WPL"), a Wisconsin public utility, pursuant to the requirements of Wis. Stat. §§ 196.49, 196.491, and 196.52 and Wis. Admin. Code §§ PSC 111.51, 111.53, 112.05, 112.06, 4.10, and any other rule or law deemed applicable by the Public Service Commission of Wisconsin ("PSCW"), hereby requests a Certificate of Public Convenience and Necessity ("CPCN") and any other authorization required to construct and place in utility service an electric generation facility located in south central Minnesota, to be known as the Bent Tree Wind Project, and related interconnection and associated rights and facilities (the "Project").

Wis. Stat. § 196.378, enacted as part of the "Reliability 2000" provisions of 1999 Wisconsin Act 9, requires all Wisconsin electric utilities to supply a specified portion of their retail electric sales from renewable resources. 2005 Wisconsin Act 141 ("Act 141") modified the renewable portfolio standard ("RPS") and established a goal that 10 percent of all energy used in the state would be supplied from renewable resources by 2015. The Project will help WPL comply with its RPS requirements, and also will provide WPL customers with an additional renewable energy resource.

Regulations promulgated by the PSCW identify the information that must be provided with a CPCN application. The required information is provided in this application and its appendices, according to Wisconsin statutes, administrative rules, and the PSCW's filing guidelines.

## 1.0 General Project Location and Description

1.1 Project Location. WPL proposes to build the Project in northwest Freeborn County, in south central Minnesota, approximately 4 miles northwest of Albert Lea, Minnesota (the "Project Area"). The Project Area was selected based on wind regime, transmission access, and constructability.

1.2 Map Depicting Project Location. Please reference Appendix D for a regional site map.

1.3 Project Description.

1.3.1 Project Area in Acres. The Project Area consists of approximately 32,500 acres composed primarily of agricultural land and rolling hills.

1.3.2 Project Capacity in Megawatts ("MW"). The Project pursuant to this CPCN application will be approximately 200 MW. The Project Area will be developed in phases, and WPL is filing this application for the first 200 MW based on a 2010 commercial operation date. WPL has not made final turbine selections for the Project, and proposes to permit the Project for a range in turbine size of [redacted] The Project Area's conceptual array represents 400 MW, modeled using a representative [redacted] MW turbine. Associated facilities include access roads, an Operations and Maintenance ("O&M") building, permanent meteorological towers, an electrical collection system, and a radial interconnection to a transmission substation. Equipment selection, site layout, and spacing are designed to make the most efficient use of land and wind resources, while complying with all applicable rules and regulations related to Minnesota Rules Chapter 7836. Please see Section 4.3 for complete regulations related to Minnesota Rules Chapter 7836.

1.3.3 Number of Turbine Sites. WPL requests PSCW approval to construct and place in utility service approximately [redacted] turbines and associated facilities, with a total capacity of approximately 200 MW and an installed cost of up to $497 million, including allowance for funds used during construction ("AFUDC"). Please reference Appendix H for a detailed project site map.

2010-14 Compliance. In 2010, WPL estimates that it will provide 544,000 MWH in retail electricity from renewable resources, which is short of the 600,000 MWH required to meet the RPS requirement for 2010-14. However, WPL expects some banked RRCs to be available. Moreover, biomass capability from the proposed Nelson Dewey 3 facility ("NED3") and the 200 MW of new wind generation from the Project will allow WPL to meet its RPS requirement.

If the Project is on-line before 2011, as expected, WPL may briefly exceed its RPS requirement. However, WPL believes that the value of bringing the Project online earlier is of significant benefit to WPL ratepayers. First, the Project will satisfy the reasonable needs of the public for the adequate supply of electricity without unreasonable excess facilities. Second, WPL believes that it would be imprudent to delay the Project, because national and international growth in the wind energy industry has increased, and likely will continue to increase, costs associated with (a) raw materials (steel, copper, concrete, and other materials); (b) transportation; (c) wind facility sites; (d) turbine and ancillary equipment; (e) large cranes; and (f) balance of plant construction. Additional state and federal mandates for renewable generation may further increase demand for project inputs, and delaying Project procurement and construction activities could expose WPL ratepayers to unnecessary cost increases.

Other potential benefits of early construction include having excess RRCs available for banking or sales. WPL sales of RRCs or M-RETS Certificates would benefit WPL ratepayers, while presumably helping other utilities meet their own RPS requirements. Early construction of the Project also allows for more production variance for M-RETS purposes over the next few years. Wisconsin and Minnesota allow a 4-year life on M-RETS Certificates created from new renewable energy facilities, and a 4-year life levels the annual peaks and valleys associated with weather-dependent generation.

Compliance beyond 2015. In 2015, WPL's RPS requirement climbs to 1,130,000 MWH. Without the Project, WPL would have the capacity to generate approximately 650,000 MWH of renewable energy, producing a shortfall of 480,000 MWH. This shortfall would increase with load growth and the expiration of PPAs. WPL estimates that even more renewable energy will be needed to meet 2020 RPS requirements.

3.1 Baseline and Future Renewable Requirements. The PSCW currently shows WPL's renewable baseline requirement percentage at 3.28%. For 2006, this equated to 336,713 MWH. A forecast of renewable energy requirements is provided in Table 3.1.

*Table 3.1 Renewable Energy Requirements Forecast*

| Reporting Year | RPS % Rqmt | WPL Obligation for Retail Sales (MWH) | WPL Transfer to Wholesale (MWH) | Total Renewable Obligation (MWH) |
|---|---|---|---|---|
| **2006-2009** | 3.28% | 336,713-352,703 | 92,998-95,870 | 429,711-448,573 |
| **2010-2014** | 5.28% | 577,081-624,947 | 150,438-114,910 | 727,518-739,857 |
| **2015** | 9.28% | 1,126,708 | 205,756 | 1,332,464 |
| **2020** | 9.28% | 1,286,995 | 227,058 | 1,514,053 |
| **2025** | 9.28% | 1,496,003 | 254,563 | 1,750,565 |
| **2030** | 9.28% | 1,738,531 | 284,881 | 2,023,412 |
| **2035** | 9.28% | 2,012,418 | 317,100 | 2,329,518 |

3.2 Existing Renewable Resources.

3.2.1 Total Existing Renewable Generation Capacity. As seen in the following section, WPL obtains nearly 175 MW of nameplate renewable capacity through owned and

## 5.0 Cost

The Project is proposed as a rate-based project, and WPL proposes to finance the Project using the traditional utility capital structure.

5.1 Capital Cost by Plant Account Codes. WPL estimates the 2010 capital cost of the Project, at the pre-tax weighted cost of capital of 9.02%, with AFUDC, to be approximately $497 million. The estimate of costs by major plant account is shown in Table 5.1.

*Table 5.1 Capital Cost by FERC Account 2010 COD with Construction Work In Progress in Rate Base*

| | FERC Acct | Account Description | Total Capital |
|---|---|---|---|
| **5.1.1** | 340 | Land | $ 100,000 |
| **5.1.2** | 341 | Surfaced Areas, Operations Building | $ 16,734,410 |
| **5.1.3** | 344 | Turbine Generators, Engineering, Procurement, Const. Mgmt., Erection | $ 456,587,974 |
| **5.1.4** | 345 | Met Towers, Electrical Collection, SCADA | $ 18,970,728 |
| **5.1.4** | 345 | Substation | $ 4,977,388 |
| | | **Total Capital** | **$ 497,370,499** |

WPL is currently analyzing turbine pricing for turbine deliveries in 2010. The turbines being analyzed include [redacted]. The capital costs associated with each turbine scenario range from $470 million to $497 million. To enable flexibility in turbine selection, WPL requests PSCW approval for the higher amount.

In the IRP, WPL reviewed the economics of 2009 and 2010 wind resources. EGEAS sensitivity case B42 found that wind resources had a levelized, break-even cost of about [redacted]. WPL estimates that the Project's 200 MW of wind generation will cost approximately [redacted]

5.2 Terms and Conditions of Wind Easement and Cooperation Agreements.

5.2.1 Turbine Site Lease. WPL will offer landowners a wind easement agreement ("Easement Agreement") attached hereto as Confidential Appendix B. All landowners will sign an identical Easement Agreement, with the exception of names, contact information, and legal descriptions, which will be tailored to each specific landowner. WPL will offer compensation under three separate circumstances: (a) if a turbine is placed on a landowner's property; (b) if a site requires a special setback agreement from an adjacent landowner; and (c) if a landowner's residence is within one-third mile of the base of a turbine.

The Easement Agreement also recognizes that crops, drain tile, fences, and other improvements on the easement property could be damaged during construction, installation, and maintenance of turbine facilities. WPL will repair any such damage or fairly compensate landowners for losses. WPL will secure a local third-party contractor to repair any damage to drain tile.

5.2.2 Setback Waivers. All turbine siting efforts will conform to Minnesota Rules Chapter 7836. If alternative setback agreements are necessary, Developer will seek to compensate neighbors or relocate turbines to a position not requiring a setback waiver.

STATE OF WISCONSIN
SUPREME COURT

WISCONSIN INDUSTRIAL ENERGY GROUP, INC. AND CITIZENS UTILITY BOARD,

Petitioners-Appellants,

Appeal No. 2010AP2762
Circuit Court Case No. 2009CV4313

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent-Respondent,

WISCONSIN ELECTRIC POWER COMPANY AND WISCONSIN POWER AND LIGHT COMPANY,

Intervenors-Respondents,

WISCONSIN PUBLIC SERVICE CORPORATION,

Intervenor.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JOHN C. ALBERT PRESIDING

# BRIEF OF RESPONDENT-RESPONDENT PUBLIC SERVICE COMMISSION OF WISCONSIN

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## ISSUE PRESENTED

Does Wis. Stat. § 196.491(3) apply to applications to construct electric generating plants outside the State of Wisconsin?

Public Service Commission: No.

Dane County Circuit Court: No.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

The Public Service Commission (PSC) requests publication as this case presents issues likely to be of continuing public interest. The PSC requests oral arguments to afford the Court the opportunity to ask questions of the parties.

## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY.

This is an appeal from a September 22, 2010, Decision and Order of the Circuit Court for Dane County, Honorable John C. Albert, dismissing a petition for judicial review of two decisions of the PSC by Petitioners-Appellants Wisconsin Industrial Energy Group and Citizens Utility Board (WIEG and CUB).[1] They sought review of two orders of the PSC that applied Wis. Stat. § 196.49, the Certificate of Authority (CA) law, to an electric utility's application to construct an electric generating plant outside the State of Wisconsin rather than applying the Certificate of Public Convenience and Necessity (CPCN) law, Wis. Stat. § 196.491(3). On November 23, 2011, the Wisconsin Court of Appeals certified to the Wisconsin Supreme Court the

[1] *Application by Wisconsin Power and Light Company to Construct Bent Tree Wind Farm,* No. 6680-CE-173, *Interim Order* (Wis. PSC Nov. 6, 2008; R.9, Item 3; A-App. 19) and *Final Decision* (Wis. PSC July 30, 2009; R.9, Item 4; A-App. 41.)

question whether the CPCN law applies when a Wisconsin public utility proposes to build a large out-of-state electric generating facility. The Supreme Court accepted jurisdiction on December 14, 2011.

## II. FACTS.

### A. The Certificate of Authority Law.

The CA law grants the PSC broad authority over public utilities' construction projects. It applies to the "construction, installation or operation of any new plant, equipment, property or facility" and to the "construction or installation of any extension, improvement or addition to existing plant, equipment, property, apparatus or facilities." Wis. Stat. § 196.49(2). It applies to all electric, natural gas, and water utilities. *Id.* A public utility must follow all rules of the PSC before engaging in any of the above activities. The PSC has promulgated extensive administrative rules governing these activities. *See, e.g.,* Wis. Admin. Code ch. PSC 112.

PSC rules require a large public utility to obtain a CA if the cost of the project exceeds approximately $8 million. Wis. Stat. § 196.49(3)(a) and (b); Wis. Admin. Code § PSC 112.05(3)(a)3. and (b). For those projects, a public utility cannot proceed before the PSC certifies that the public convenience and necessity requires the project. Wis. Stat. § 196.49(3)(b).

The CA law grants the PSC the discretion to refuse to certify a project if it appears that the completion of the project will 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).

### B. The Certificate of Public Convenience and Necessity Law.

The CPCN law also requires public utilities to receive permission from the PSC to construct certain facilities. It applies to electric generation facilities of 100 megawatts or more. Wis. Stat. § 196.491(1)(g). The CPCN law relies as heavily on the PSC's discretion as does the CA law.

For example, in order to grant a CPCN the PSC must find that the location of the project is *in the public interest* after *considering* project alternatives, location alternatives, individual hardships, engineering, economic, safety, reliability and environmental factors and that the project meets the *reasonable* needs of the public for an *adequate* supply of energy. Wis. Stat. § 196.491(3)(d)2. and 3. The PSC must also find that the facility will not have *an undue* adverse impact on environmental values such as ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use. Wis. Stat. § 196.491(3)(d)4. In addition, the proposed facility cannot *unreasonably* interfere with the orderly land use and development plans for the area involved. Wis. Stat. § 196.491(3)(d)6. Nor can the facility have a *material adverse* impact on competition in the *relevant* wholesale electric service market. Wis. Stat. § 196.491(3)(d)7. The CPCN law does not require the PSC to weigh these factors in any particular manner nor does it assign a particular weight to any factor.

The PSC must also hold a hearing in the area affected by a CPCN project. Wis. Stat. § 196.491(3)(b). Finally, if the PSC grants a CPCN, any local ordinances that are more restrictive than the CPCN are superseded. Wis. Stat. § 196.491(3)(i).

Unlike the CA law, the CPCN law imposes limits upon PSC review of project applications. The PSC must perform a

completeness review of a CPCN application within 30 days of its receipt. If the PSC fails to do so, the application is deemed complete by operation of the CPCN law. Wis. Stat. § 196.491(3)(a)2. From the date of a completeness determination, the PSC must decide a CPCN application within 180 days or seek a one-time 180-day extension from the Dane County Circuit Court. Wis. Stat. § 196.491(3)(g). If the PSC fails to act, a CPCN is automatically granted. *Id.* These timeline restrictions can force a CPCN to be issued without a complete review or even without any review by the PSC.

### C. WPL's Application and PSC Investigation.

On June 6, 2008, Wisconsin Power and Light (WPL) filed an application with the PSC to construct a 200 megawatt wind-powered electric generating facility in Minnesota, to be known as the Bent Tree Wind Farm. (R.9, Item 4 at 1.) The Minnesota Public Utilities Commission also investigated and approved the Bent Tree project under Minnesota law. (R.27, Ex. B; PSC-App. 101.)

The application sought approval from the PSC under both the CA law and the CPCN law. (R.9, Item 3 at 1; A-App. 19) (*Interim Order*). The PSC requested comments as to whether the Commission should process the application as a CA or a CPCN. (*Id.)* On November 6, 2008, the PSC issued its *Interim Order* determining that the CPCN law did not apply to the Bent Tree Project because it is located outside Wisconsin:

> The Commission concludes that applying some portions of the CPCN law to out-of-state projects, to regulate local siting impacts, would conflict with statutory limits on Wisconsin's sovereign jurisdiction. The Commission further concludes that applying other portions of the CPCN law to such projects would be unreasonable or absurd, and that the Legislature intended the CPCN law to apply only to projects in this state.

(R.9, Item 3 at 10; A-App. 28.)

The PSC held a hearing and took testimony on April 29, 2009. The PSC considered 70 pages of testimony

from interested parties and PSC staff. (R.9, Item 5.) WPL and the intervenors also filed two rounds of briefs for PSC consideration. After two open meetings, the PSC granted a CA on July 30, 2009. (R.9, Item 4; A-App. 41-55.)

WPL constructed the Bent Tree Wind Farm and placed it into commercial operation on February 7, 2011.[2]

## STANDARD OF REVIEW

Courts apply three standards of deference to an administrative agency's legal interpretation: no deference, due weight deference, or great weight deference. This Court recently summarized the deference owed to an administrative agency's interpretation of a statute:

> A reviewing court accords an agency's statutory interpretation no deference when the issue is one of first impression, when the agency has no experience or expertise in deciding the legal issue presented, or when the agency's position on the issue has been so inconsistent as to provide no real guidance. When no deference to the agency decision is warranted, the court interprets the statute independently and adopts the interpretation that it deems most reasonable.
>
> A reviewing court accords due weight deference when the agency has some experience in an area but has not developed the expertise that places it in a better position than the court to make judgments regarding the interpretation of the statute. When applying due weight deference, the court sustains an agency's interpretation if it is not contrary to the clear meaning of the statute-unless the court determines that a more reasonable interpretation exists.
>
> Finally, a reviewing court accords great weight deference when each of four requirements are met: (1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency's interpretation is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming its interpretation; and (4) the agency's interpretation will

[2] The PSC requests the Court take judicial notice of WPL's compliance filing in Docket No. 6680-CE-173 (PSC REF#: 144486), which is a public record. (PSC-App. 114.)

> provide uniformity and consistency in the application of the statute. When applying great weight deference, the court will sustain an agency's reasonable statutory interpretation even if the court concludes that another interpretation is equally or more reasonable. The court will reverse the agency's interpretation if it is unreasonable-if it directly contravenes the statute or the state or federal constitutions, if it is contrary to the legislative intent, history, or purpose of the statute, or if it is without a rational basis.

*MercyCare Ins. Co. v. Wisconsin Comm'r*, 2010 WI 87, ¶¶ 29-31, 328 Wis. 2d 110, 786 N.W.2d 785.

The circuit court granted the PSC's interpretation of the CPCN law no deference but upheld it, finding that the PSC's interpretation is the most reasonable. (R.35:6-8; A-App. 9 at 6-8.)

## ARGUMENT

The Bent Tree project presented the PSC with the following question: Does a law that has no discussion of its jurisdictional scope apply beyond the borders of Wisconsin, even though it contains location-specific requirements that make no sense if applied outside Wisconsin?

WIEG and CUB say yes. They argue that the CPCN law's silence on its jurisdictional scope should be read to mean that the law applies everywhere. (WIEG/CUB Br. 23-25.) According to WIEG and CUB, any provision of the law that contradicts that interpretation should be severed or ignored. (WIEG/CUB Br. 41-44.) Their interpretation forces the PSC to ignore parts of the CPCN law and their proposed solution, severance, is unworkable.

The PSC's interpretation, on the other hand, gives effect to every word in the CPCN law and protects ratepayers as effectively as WIEG and CUB's interpretation. Because the CPCN law is silent on its territorial application and contains numerous requirements that would be absurd to apply out-of-state, the law is, at best, ambiguous. To avoid statutory conflicts and avoid absurd results, the PSC interprets the CPCN law to only apply to in-state construction projects.

## I. THE CPCN LAW DOES NOT PROTECT RATEPAYERS BETTER THAN THE CA LAW.

A central theme of WIEG and CUB's brief is that the CPCN law must apply to bigger projects because larger projects are more expensive, and therefore, require the greater scrutiny mandated in the CPCN law. (WIEG/CUB Br. 12-14, 20, 27-29.) The PSC's interpretation of the CPCN law, however, is not detrimental to Wisconsin ratepayers. Nor is WIEG and CUB's characterization of the CA and CPCN laws correct. They overstate the discretion afforded the PSC in adjudicating CA applications and overstate the mandate of the CPCN law.

WIEG and CUB argue that the CA law gives so much discretion to the PSC that the Legislature could not have intended a large out-of-state project to only require a CA. (WIEG/CUB Br. 27-29.) But the CA law's reliance on PSC discretion is not unique. Under the CPCN law, it is up to the PSC to determine whether a project is "in the public interest," what adverse impacts would be "undue," what the "reasonable" needs of the public for an "adequate" supply of electricity are, what a "material" adverse impact on competition would be, and what would "unreasonably" interfere with the orderly use of land. Wis. Stat. § 196.491(3)(d)2., 3., 4., 6., and 7.

WIEG and CUB also overstate the discretion present in the CA law. (WIEG/CUB Br. 12-14.) They find meaning in the possibility that a CA may be granted even if the project will:

> 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). However, WIEG and CUB note no instance where the PSC has actually granted a CA under such circumstances. Furthermore, the CPCN law has exactly the same requirements. The CPCN law incorporates this provision of the CA law into CPCN determinations by reference and without modification. Wisconsin Stat. § 196.491(3)(d)5. provides:

> 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.

With this cross-reference, the Legislature incorporated into the CPCN law Wis. Stat. § 196.49(3)(b) in its entirety. By doing so, the Legislature granted to the PSC the same level of deference in the CPCN law that it awarded the PSC in the CA law. Wis. Stat. § 196.49(3)(b).

Neither is it correct that the CPCN law regulates more expensive or more significant utility projects than the CA law. (WIEG/CUB Br. 12-15, 27-29.) Many projects that are subject to the CA law are projects of significant public importance and expense. For example, the CA law applied to the installation of $627 million of pollution control equipment at the Columbia Energy Center[3] and $137 million of equipment at the Edgewater Generating Station.[4] Neither required a CPCN. The PSC also applies the CA law to projects of significant public interest and expense at Wisconsin nuclear plants. The installation of dry cask storage for nuclear waste at the Point Beach Nuclear Power Plant[5]

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[3] *Joint Application of Wisconsin Power and Light Company*, No. 05-CE-138, *Certificate and Order,* Findings of Fact Nos. 2, 3, and 5 (Wis. PSC Mar. 15, 2008) (PSC REF#: 145848), *available at* http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=145848.

[4] *Application of Wisconsin Power and Light Company and Wisconsin Electric Power Company*, No. 5-CE-137, 2010 WL 2235045, *Certificate and Order,* Findings of Fact, Nos. 3, 4, and 6 (Wis. PSC May 27, 2010) (PSC REF#: 132485), *available at* http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=132485.

[5] *Application of Wisconsin Electric Power Company*, No. 6630-CE-275, 2001 WL 946546, *Final Decision*, Findings of Fact No. 4, 5, and 6 (Wis. PSC Mar. 28, 2001) (PSC REF#: 3037), *available at* http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=3037.

required a CA rather than a CPCN. Similarly, the replacement of the steam generators[6] and the reactor vessel head[7] at the Kewaunee Nuclear Power Plant required CAs, not CPCNs.

WIEG and CUB next contend that the CPCN law provides "significant mandatory ratepayer protections," unlike the CA law, because a CPCN project applicant "*must* prove that its proposed project is cost effective as compared to other alternatives" and "*must* prove that the proposed project is necessary to satisfy the reasonable needs of the public." (WIEG/CUB Br. 13, 23) (emphasis in original). What WIEG and CUB fail to recognize, though, is that the PSC's application filing requirements are identical for CA and CPCN projects. For either a CA or a CPCN project, the applicant must answer the same questions and provide the same information, including information about cost-effectiveness, alternatives, and project need.[8]

Having collected information about these issues, the PSC cannot ignore it. If the PSC failed to give due weight and apply reasoned logic to the record for a CA project or a CPCN project, its decision-making process would be arbitrary and capricious and would not withstand judicial review. *Reidinger v. Optometry Examining Bd.*, 81 Wis. 2d 292, 297-98, 260 N.W.2d 270 (1977). *See, e.g., Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n of Wis.*, 109 Wis. 2d 256, 325 N.W.2d 867 (1982) (holding that the PSC's change of policy was arbitrary and capricious and without a rational basis).

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[6]*Application for Authority to Replace the Kewaunee Nuclear Power Plant Steam Generators*, No 6690-CE-151, *Certificate and Order,* Ultimate Findings of Fact Nos. 7, 8, and 9 (Wis. PSC May 12, 1998) (PSC REF#: 307), *available at* http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=307.

[7]*Application of Wisconsin Public Service Company*, No. 6690-CE-186, 2003 WL 21226445, *Final Decision, Certificate, and Order* (Wis. PSC Mar. 28, 2003) (PSC REF# 5504), *available at* http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=5504.

[8]Application Filing Requirements for Wind Energy Projects in Wisconsin *available at* *http://psc.wi.gov/utilityinfo/electric/construction/documents/V45_Wind%20Farm.pdf.* The PSC requests the Court take judicial notice of the filing requirements, which are public records. (PSC-App. 112-159.)

WIEG and CUB raise miscellaneous other concerns with the CA law that they contend are instructive to the instant dispute. They are correct that the PSC has discretion not to hold a hearing for CA applications under some circumstances and must hold a hearing for all CPCNs. (WIEG/CUB Br. 12.) Because the PSC held a hearing for Bent Tree, however, WIEG and CUB's concern in this appeal is purely hypothetical. (R.9, Item 5.) Furthermore, if the PSC ever abused its discretion and refused to hold a hearing for a large CA application to the detriment of ratepayers or some party, that decision would be subject to judicial review under the existing arbitrary and capricious standard. Wis. Stat. § 227.57(8).

WIEG and CUB also complain that the PSC delegated the authority to decide applications for construction projects that only require a CA to a division administrator. (WIEG/CUB Br. 14-15.) This concern is also hypothetical, as the Commissioners themselves adjudicated the Bent Tree application. (R.9, Item 4.) In any event, the PSC may also delegate the authority to decide CPCN applications. Contrary to WIEG and CUB's allegation, state law does not mandate that only the PSC Commissioners can rule on CPCN applications. Wis. Stat. § 15.02(4).[9]

WIEG and CUB also maintain that, as a result of the delegation of CA applications to the division administrator, a CA could be issued without the Commissioners' knowledge. (WIEG/CUB Br. 14.) Even if a division administrator was so inclined, it is not possible for a project to be so approved. All

[9]Wisconsin Stat. § 15.02(4) provides:

> **(4) Internal organization and allocation of functions.** The head of each department or independent agency shall, subject to the approval of the governor, establish the internal organization of the department or independent agency and allocate and reallocate duties and functions not assigned by law to an officer or any subunit of the department or independent agency to promote economic and efficient administration and operation of the department or independent agency. The head may delegate and redelegate to any officer or employee of the department or independent agency any function vested by law in the head. The governor may delegate the authority to approve selected organizational changes to the head of any department or independent agency.

dockets, including CA and CPCN applications, are initiated by the issuance of a Notice. Notices are approved by the Commissioners at an open meeting. Wis. Admin. Code § PSC 2.09.

The CPCN law can actually be worse for ratepayers than the CA law, because the Legislature set a strict timeline for the PSC's review of a CPCN project. Under the CA law, the PSC can devote more time to complete review of a project.[10] Under the CPCN law, the PSC's timeline is very restricted. Wis. Stat. § 196.491(3)(a)2. and (g). In fact, if the CPCN law does apply to the Bent Tree project, a CPCN has already been issued simply by the passage of time. WPL's application requested both a CPCN and a CA. (R.9, Item 3 at 1.) The PSC did not act upon the request for a CPCN, except to state in its *Interim Decision* that the CPCN law does not apply. As a result, WPL's CPCN application has already been deemed complete and a CPCN has already been granted by operation of the CPCN law. Wis. Stat. § 196.491(3)(a)2. and (g).

## II. THE CPCN LAW IS AMBIGUOUS AS TO WHETHER IT APPLIES TO OUT-OF-STATE CONSTRUCTION PROJECTS.

### A. WIEG and CUB's Interpretation is Rife With Absurdities.

In its *Interim Order*, the PSC interpreted an ambiguous CPCN law as not applying to generating plant projects located outside the state of Wisconsin. Part of the PSC's interpretation was based upon the legislative history of the CPCN law. (R.9, Item 4 at 7.) The circuit court affirmed this interpretation of the law. (R.35, 6-8.) WIEG and CUB maintain that Wis. Stat. § 196.491 is not ambiguous. They contend that no ambiguity exists because the language of Wis. Stat. § 196.491 is clear. (WIEG/CUB Br. 24.) But that is not the law in Wisconsin concerning statutory ambiguity.

[10] The Legislature is currently considering adding the time limits from the CPCN law to the CA law. 2011 Assembly Bill 527.

A statute is ambiguous when it "is capable of being understood by reasonably well-informed persons in two or more senses." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 47, 271 Wis. 2d 633, 681 N.W.2d 110. Additionally, when a statute "makes no explicit reference" as to whether it applies to the fact situation at hand, this Court has determined legislative intent "by looking outside the statute at legislative history." *J.L. Phillips & Associates, Inc. v. E & H Plastic Corp*., 217 Wis. 2d 348, 355, 577 N.W.2d 13 (1998).

Ambiguity may also arise from a conflict between the statute at issue and another statute, as well as between portions of the same statute. *Lornson v. Siddiqui*, 2007 WI 92, ¶ 37, 302 Wis. 2d 519, 735 N.W.2d 55.

Wisconsin Stat. § 196.491 is ambiguous on the question of whether it applies to applications to construct power plants located in other states. The CPCN law is silent on its jurisdictional scope. The circuit court agreed with the PSC that the CPCN was ambiguous, noting that the law's silence on the issue "is deafening." (R.35:6; A-App. 14.) Reading the CPCN law in its entirety also reveals its ambiguity. If the statute applied to out-of-state projects, portions of the statute would:

1. Require an out-of-state project applicant to seek permission from the PSC to build a large electric generating facility in Hawaii. Wis. Stat. § 196.491(1)(g) and (3)(a)1.

2. Require the PSC to hold hearings in other states for out-of-state projects. Wis. Stat. § 196.491(3)(b).

3. Require the PSC to consider environmental and land use factors in another state, irrespective of that state's own environmental requirements and impinging on that state's sovereignty. Wis. Stat. § 196.491(3)(d)3., 4., and 6. For example, the PSC would be required to determine whether the project unduly affected the "aesthetics of land and water" resources in another state, regardless of whether the state has made its own determination about the project.

4. Require out-of-state counties and municipalities to convey land interests to Wisconsin applicants for transmission line projects. Wis. Stat. § 196.491(3e)(am).

5. Allow a CPCN to supersede local ordinances of municipalities in other states. Wis. Stat. § 196.491(3)(i).

6. Prevent an out-of-state municipality from limiting a project applicant's testing activities at a potential plant site. Wis. Stat. § 196.491(2r).

7. Require the PSC to send CPCN applications to municipal clerks and public libraries in other states. Wis. Stat. § 196.491(3)(a)1.

8. Require the CPCN applicant for an out-of-state project to send an engineering plan to the Wisconsin Department of Natural Resources, describing the project's effects on local natural resources in another state. Wis. Stat. § 196.491(3)(a)3.a.

WIEG and CUB propose to avoid these absurd outcomes by ignoring key provisions of the CPCN law, as if the Legislature had never written them. But these provisions are not merely "a few misfits" that can be ignored or severed, they make up a significant portion of the CPCN law. (WIEG/CUB Br. 41-44.)

### B. WIEG And CUB's Proposed Resolution Of These Absurdities Is Not Workable.

WIEG and CUB concede that the Legislature could not reasonably have intended the CPCN law to apply to power plants in Hawaii or to subjugate municipal ordinances in Minnesota to a CPCN issued by a Wisconsin state agency. To deal with these absurdities, though, they ask the Court to sever those provisions that do not support their interpretation. (WIEG/CUB Br. 41-44.) As the circuit court noted, WIEG and CUB have "jumped the gun." (R.35:7; A-App. 15.) While Wis. Stat. § 990.001(11) permits severance for limited purposes, severance is not appropriate until *after* a statute's meaning is determined. That is, the CPCN law must first apply to out-of-state projects before unlawful sections of the

statute could be severed. While a provision of the CPCN law might be severable under some circumstance, it does not follow that the severable provision is irrelevant when interpreting the law.

The text of the CPCN law itself shows two possible legislative intents. Either the Wisconsin Legislature enacted a law that requires the PSC to ignore several of the law's provisions or the Wisconsin Legislature enacted a law whose every word has meaning, but applies only to in-state projects. The PSC's *Interim Order*, which adopts the latter interpretation, gives full effect to every word of the CPCN law by interpreting it to apply only to in-state projects.

The second problem with WIEG and CUB's proposed solution is that most of the absurdities of applying the CPCN law out-of-state are not severable.

Wisconsin Stat. § 990.001(11) provides:

> SEVERABILITY. The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is *invalid*, or if the application of either to any person or circumstance is invalid, such *invalidity* shall not affect other provisions or applications which can be given effect without the *invalid* provision or application.

(Emphasis added.)

A law is not invalid simply because its application would be absurd or meaningless. The PSC agrees that the provision of the CPCN law that would make another state's local ordinances subordinate to a decision of a Wisconsin administrative agency could be severed. Similarly, the provision that requires local municipalities to convey land to out-of-state CPCN applicants could also be severed. As the PSC noted in its *Interim Order*, however, the balance of the absurdities cannot be corrected by severance:

> However, such a construction would not correct all of the problems that arise when the CPCN law is applied to out-of-state projects. Under Wis. Stat. § 196.491(3)(a)l., the Commission must send copies of a CPCN

> 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, while Wis. Stat. § 196.491(3)(b) requires the Commission to hold a public hearing on a CPCN application "in the area affected." Sending copies of the application to municipal clerks and libraries in Minnesota, or holding a Commission hearing in Minnesota to receive testimony from local members of the public, would not help the Commission identify a project's impacts on Wisconsin. Instead, these requirements of the CPCN law would burden local officials and sow confusion without serving any legitimate Wisconsin purpose. These problems indicate that narrowly construing those parts of the CPCN law that regulate local siting impacts, so they only apply to project impacts inside Wisconsin, would not avoid all of the dilemmas created by applying the law to out-of-state projects.

(R.9, Item 3 at 6-7.) WIEG and CUB's proposed solution is not enough; to apply the CPCN law to out-of-state projects, the PSC must ignore key parts of the law.

### C. The Existence of The Words "In This State" In Other Statutory Provisions Does Not Resolve The Ambiguity Of The CPCN Law.

WIEG and CUB correctly point out that, at times, the Legislature has specifically indicated when a law applies only in-state by using the phrase "in this state." (WIEG/CUB Br. 32.) However, it is not reasonable to assume that the Legislature has identified every law that only applies within Wisconsin by using that phrase.

Even statutes that directly address territorial limits do not include that language everywhere WIEG and CUB would require it. For example, two criteria for a company to be considered a public utility are (1) ownership of plant or equipment "within the state," and (2) provision of utility

service to the public. Wis. Stat. § 196.01(5)(a).[11] The second criterion has no territorial limitation. Nor do the statutes that require public utilities to receive PSC authorization to set rates. Wis. Stat. §§ 196.03 and 196.20. Following WIEG and CUB's logic, the PSC would start setting retail electric rates for any customers of a Wisconsin public utility who live in neighboring states. In its 105 years of public utility regulation, the PSC has never construed the definition of "public utility" to award itself out-of-state rate-setting authority.

Furthermore, WIEG and CUB effectively concede that "in this state" has to be inserted somewhere into the CPCN law. In their brief they assert:

> For instance, the CPCN statute addresses local siting impacts such as environmental protection, individual hardships, and compliance with orderly land use and development plans. Wis. Stat. §§ 196.491(3)(d)3. and 6. Applying those provisions to local impacts outside of Wisconsin could conflict with the regulatory province of the host state. However, that problem could be easily remedied by the Commission applying those local siting impact provisions only to those impacts that affect Wisconsin.

(WIEG/CUB Br. 42.) Those provisions in the CPCN law do not include the words "in this state." WIEG and CUB's

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[11] Wisconsin Stat. § 196.01(5)(a) provides:

> (a) "Public utility" means, except as provided in par. (b), every corporation, company, individual, association, their lessees, trustees or receivers appointed by any court, and every sanitary district, town, village or city that may own, operate, manage or control any toll bridge or all or any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public. "Public utility" includes all of the following:
>
> 1. Any person engaged in the transmission or delivery of natural gas for compensation within this state by means of pipes or mains and any person, except a governmental unit, who furnishes services by means of a sewerage system either directly or indirectly to or for the public.
>
> 2. A telecommunications utility.

recommendation is an admission that, while the Legislature sometimes specifically indicates a statute applies only in this state, it does not always do so.

## III. THE LEGISLATIVE HISTORY OF THE CPCN LAW SUPPORTS THE PSC'S INTERPRETATION.

When a statute is ambiguous, this Court has affirmed the value of examining the statute's legislative history to determine legislative intent. *State ex rel. Kalal*, 271 Wis. 2d 633, ¶¶ 50-52.

The legislative history of the CPCN law further indicates that the law does not apply to out-of-state projects. Both the PSC and the circuit court relied on a bill Analysis by the Legislative Reference Bureau (LRB) when interpreting the CPCN law. (R.9, Item 3 at 7; A-App. 25; R.35:6.)

Bill Analyses by the LRB are particularly persuasive and dependable sources of legislative intent, because the LRB is the sole entity that drafts bills for the Legislature and it provides an Analysis for each bill, which is required by statute. Wis. Stat. § 13.92(1)(b)2.; *In re Estate of Haese*, 80 Wis. 2d 285, 296-97, 259 N.W.2d 54 (1977). "Because the LRB's analysis of a bill is printed with and displayed on the bill when it is introduced in the legislature, the LRB's analysis is indicative of legislative intent." *Dairyland Greyhound Park v. Doyle*, 2006 WI 107, ¶ 32, 295 Wis. 2d 1, 719 N.W.2d 408.

The LRB explanation of the original CPCN law[12] states that the proposed law applies to applications to construct "major electric generating and transmission facilities **in this state** . . ." (R.27, Ex. A; PSC-App. 111) (emphasis added). Legislators depended on the LRB Analysis that the law would apply to the construction of power plants "in this state" to understand the bill and decide how to vote.

[12]1975 Assembly Bill 463, enacted as Chapter 68, Laws of 1975.

WIEG and CUB minimize the LRB's use of the words "in this state" in its Analysis by calling the Analysis' inclusion of those words a "casual use." (WIEG/CUB Br. 35.) They further state, "A far more likely explanation . . . is that neither the LRB nor the legislature gave any thought at all to that phrase." *Id.* It should not be assumed, however, that the LRB or the Legislature was unaware of the possibility of out-of-state power plants providing service to Wisconsin. The United States Supreme Court has been hearing cases on the interstate transportation of electric power since 1927. *See, e.g., Public Utilities Comm'n of R.I. v. Attleboro Steam and Electric Co.,* 273 U.S. 83, 84 (1927). Rather, the clear expression of legislative intent should be given effect.

## IV. THE DOCTRINE OF *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* IS NOT HELPFUL IN INTERPRETING THE CPCN LAW.

WIEG and CUB next rely on the doctrine of *expressio unius est exclusio alterius* to support their argument that the CPCN law must cover out-of-state projects, because it does not specifically exclude them. (WIEG/CUB Br. 25-27.) Wisconsin courts have long held that the rule "[a]lthough based upon logic and the working of the human mind . . . is not a 'Procrustean standard to which all statutory language must be made to conform.'" *In re Custody of L.J.G.*, 141 Wis. 2d 503, 508, 415 N.W.2d 564 (Ct. App. 1987) (quoting *Columbia Hospital Assoc. v. Milwaukee*, 35 Wis. 2d 660, 669, 151 N.W.2d 750, 754 (1967)). The Court of Appeals determined that "[b]efore the rule is applied to a statute, 'there should be some evidence [that] the legislature intended its application lest it prevail . . . despite the reason for and the spirit of the enactment.'" *Id*. In *Columbia Hospital Assoc.*, this Court refused to apply the doctrine to Wis. Stat. § 70.11, a statute whose entire purpose is to list exemptions to property taxation. *Columbia Hospital Assoc*., 35 Wis. 2d at 669. Ultimately, this Court held that "an exemption statute need not be given an unreasonable construction or the narrowest possible construction" but rather "[a] 'strict but reasonable' construction." *Id*. at 668.

WIEG and CUB argue that the CPCN law does exclude some types of projects, so it is reasonable to apply the doctrine and conclude these are the only exempt projects. (WIEG/CUB Br. 25-27.) They enumerate two exemptions: generating plant projects built by wholesale merchants and projects built by manufacturers to generate electricity primarily for their own use. *Id.* But these two exemptions are about non-utility electric generating plants, where utility ratepayers are not responsible for the construction costs. They are irrelevant from a ratepayer's perspective. In fact, neither does the CA law regulate them. In addition, these exemptions are so different in nature than the exemption at issue in this case that it cannot be said the expression of one is the exclusion of the other. These exemptions provide no assistance in determining whether the CPCN law applies to an out-of-state project. In any event, the Legislature would have no need to specifically exclude out-of-state projects if the CPCN law does not apply to those projects in the first instance.

## V. THE CPCN LAW SHOULD NOT BE PRESUMED TO HAVE EXTRA-TERRITORIAL EFFECT.

The PSC's interpretation of the CPCN law is also supported by Wis. Stat. § 1.01. This law limits the territorial jurisdiction of Wisconsin's laws to "all places within the boundaries declared in article II of the constitution." When the legislature enacts a statute "[i]t is presumed that the legislature acted with full knowledge of the existing law, both the statute and the court decision interpreting it." *Kindy v. Hayes*, 44 Wis. 2d 301, 314, 171 N.W.2d 324 (1969). *See also, e.g., State v. Grady*, 2006 WI App 188, ¶ 9, 296 Wis. 2d 295, 722 N.W.2d 760.

Thus, when this Court interprets the CPCN law, it must presume that the Legislature understood the CPCN law would be limited to the boundaries of the state. The CPCN law has no validity to a project located outside Wisconsin because several provisions of that statute have impacts that would violate the territorial limitation of Wis. Stat. § 1.01 if applied to out-of-state projects.

The CA statute, conversely, does not conflict with Wis. Stat. § 1.01 when applied to out-of-state projects because it focuses solely on the in-Wisconsin effects of the project. It does not require the absurd procedures and results that the CPCN law mandates if applied out-of-state.

## VI. ANY REASONABLE DOUBT THAT THE PSC HAS THE AUTHORITY TO APPLY THE CPCN LAW TO CONSTRUCTION OF AN OUT-OF-STATE GENERATING FACILITY MUST BE RESOLVED AGAINST THE EXISTENCE OF THAT AUTHORITY.

Any reasonable doubt that the PSC is authorized to apply the provisions of the CPCN law to an out-of-state wind electric generating facility must be resolved against the existence of such authority. "An administrative agency has only those powers expressly conferred or necessarily implied from the statutory provisions under which it operates . . . and we resolve any reasonable doubt pertaining to an agency's implied powers against the agency." *Wisconsin Builders Ass'n v. Wisconsin Dept. of Transp.*, 2005 WI App. 160, ¶ 9, 285 Wis. 2d 472, 702 N.W.2d 433. *See also Kimberly-Clark Corp. v. Public Service Comm'n*, 110 Wis. 2d 455, 462, 329 N.W.2d 143 (1983).

Wisconsin Stat. § 1.01, the LRB Analysis expressly limiting the operation of the CPCN law to generating facilities "in this state," and provisions of the statute itself that are pointless but cannot be severed, such as the requirement in Wis. Stat. § 196.491(3)(d)4. that the PSC must consider aesthetic impacts in another state, certainly create reasonable doubt that the statute is applicable to generating facilities which are to be constructed in other states. This reasonable doubt should be resolved against the existence of authority. That is, the PSC does not have the authority to apply the CPCN law to generating facilities to be constructed outside Wisconsin.

## VII. DUE WEIGHT IS THE PROPER STANDARD OF JUDICIAL DEFERENCE TOWARD THE PSC'S LEGAL INTERPRETATION.

The circuit court acknowledged the Wisconsin Supreme Court's determination in *Clean Wisconsin, Inc. v. Public Service Commission of Wisconsin,* that the PSC interpretation of the CPCN law is generally entitled to great weight deference. 2005 WI 93, 282 Wis. 2d 250, 700 N.W.2d 768. However, the circuit court distinguished that holding from the present case by stating that *Clean Wisconsin* involved a "factual scenario," while the present case involves a "legal interpretation." (R.35:4-5.) The circuit court also stated that because "this legal question is a novel one, PSC has not exercised sufficient expertise in interpreting the scope of the statute. Without such expertise this is an issue of first impression, reviewed *de novo*, with no deference to PSC's decision." (R.35:4-5.) Even so, the circuit court upheld the PSC's legal interpretation of the CPCN law. While the PSC agrees with the circuit court's construction of the CPCN law and agrees that this construction is correct under any standard of deference, the proper standard in this proceeding is due weight deference. As this Court noted in *Mercycare*, which was another case about an issue of first impression:

> A reviewing court accords due weight deference when the agency has some experience in an area but has not developed the expertise that places it in a better position than the court to make judgments regarding the interpretation of the statute. When applying due weight deference, the court sustains an agency's interpretation if it is not contrary to the clear meaning of the statute-unless the court determines that a more reasonable interpretation exists.

*MercyCare*, 328 Wis. 2d 110, ¶ 30.

The PSC has substantial experience in interpreting and applying the CPCN law. The CPCN law was enacted in 1975 and has been administered by the PSC since its enactment. In *Clean Wisconsin*, this Court gave great weight deference to the PSC's discretionary determinations under the CPCN law. In doing so the Court noted:

> It is not the function of this court to determine this state's energy policy. Nor is it this court's place to decide whether the construction of the power plants at issue in this case is in the public interest. These are legislative determinations that the legislature has assigned to the PSC.

*Clean Wisconsin*, 282 Wis. 2d 250, ¶ 35.

While the legal question at issue in this case has infrequently arisen, a longstanding interpretation of the law is only required for great weight deference. As a result, the PSC is entitled to due weight deference. The PSC's interpretation may be upheld even if this Court determines that WIEG and CUB's interpretation is as reasonable as the PSC's.

## VIII. EVEN IF THIS COURT CONCLUDES THAT THE PSC ERRONEOUSLY CONSTRUED ITS LAWS, PROCESSING THE BENT TREE APPLICATION UNDER THE CA LAW RATHER THAN THE CPCN LAW WAS HARMLESS.

Even if the Court were to conclude that the PSC erred in applying the provisions of the CA law to the Bent Tree application rather than the CPCN law, that error would be harmless.

The PSC has statutory authority to impose any conditions and issue any orders needed to ensure that a CA project is in the public interest. Wis. Stat. §§ 196.395, 196.49(2), and 196.49(3)(b). In this case, the PSC did just that to protect ratepayers.

First, the PSC held a full evidentiary hearing on the Bent Tree application, in which CUB participated. (R.9, Item 5.) Thus, they received the same process in this case as they would have if the PSC applied the CPCN law.

Second, the PSC's specific findings related to ratepayer protection were the same as those under a CPCN. The majority of findings related to consumer protection are identical for CA and CPCN projects when a public utility is involved because, as discussed above, the CPCN law merely

incorporates the CA law's standards by reference. Wis. Stat. § 196.491(3)(d)5. The PSC also imposes on CA projects the remaining findings that WIEG and CUB allege are unique to a CPCN. The PSC demands identical information about cost-effectiveness, project alternatives and need for CA and CPCN projects and it uses all that information in CA decisions. In the Bent Tree CA Order, the PSC made every finding related to consumer protection that would be included in a CPCN order.

In short, the PSC made the findings concerning the ratepayer-protecting aspects of the CPCN law, even though the Bent Tree application was processed as a CA. The PSC's failure to apply environmental safeguard portions of the CPCN law to the application cause no harm to WIEG and CUB's members as utility ratepayers. In any event, the Minnesota Public Utilities Commission also evaluated and approved the project. (R.27, Ex. B; A-App. 101-110.)

WIEG and CUB and their members suffered no harm from the PSC's processing the Bent Tree application under the CA law. If the PSC erred in its choice of statute, that error was harmless error and does not require reversal. As the Court of Appeals held in *Seebach v. Public Service Comm'n*, the burden is on petitioners seeking reversal to demonstrate that PSC error prejudiced them "to a material degree." 97 Wis. 2d 712, 721, 295 N.W.2d 753 (Ct. App. 1980).

## CONCLUSION

The legislative history, the language of several parts of the statute itself, and the limits imposed by Wis. Stat. § 1.01, all indicate that Wis. Stat. § 196.491(3) was intended by the Legislature to apply to the construction of in-state power plants only. Contrary to the allegations of WIEG and CUB, the CPCN law does not provide significantly different ratepayer protections than the CA law.

The PSC's interpretation of the CPCN law, unlike the interpretation of WIEG and CUB, properly preserves and gives effect to every word of that statute. WIEG and CUB propose an inferior alternative that ignores parts of the law, parts that are meaningless for out-of-state projects but cannot

be severed. The PSC's legal interpretation is the most reasonable construction of the CPCN law and should be upheld. Moreover, even if this Court concludes that the CPCN law applies to out-of-state projects, PSC's application of the CA law to the Bent Tree project was harmless error.

For all these reasons, the PSC respectfully requests that this Court affirm the PSC's legal interpretation that the CA law, not the CPCN law, applied to the Bent Tree project.

Dated this 13th day of February, 2012.

Respectfully submitted,

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## FORM AND LENGTH 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 6,867 words.

Dated this 13th day of February, 2012.

***/s/ Justin W. Chasco***

_____

Justin W. Chasco

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of February, 2012.

***/s/ Justin W. Chasco***

_____

Justin W. Chasco

STATE OF WISCONSIN
SUPREME COURT

WISCONSIN INDUSTRIAL ENERGY GROUP, INC. AND CITIZENS UTILITY BOARD,

Petitioners-Appellants,

Appeal No. 2010AP2762
Circuit Court Case No. 2009CV4313

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent-Respondent,

WISCONSIN ELECTRIC POWER COMPANY AND WISCONSIN POWER AND LIGHT COMPANY,

Intervenors-Respondents,

WISCONSIN PUBLIC SERVICE CORPORATION,

Intervenor.

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**SUPPLEMENTAL APPENDIX OF RESPONDENT-RESPONDENT PUBLIC SERVICE COMMISSION OF WISCONSIN**

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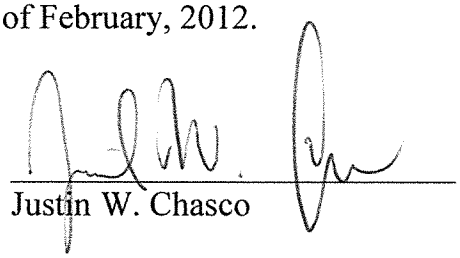
## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(3)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(3)(b) and that contains: (1) a table of contents; (2) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (3) portions of the record essential to an understanding of the issues raised, except where those portions are included in Appellant's Appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of February, 2012.



Justin W. Chasco

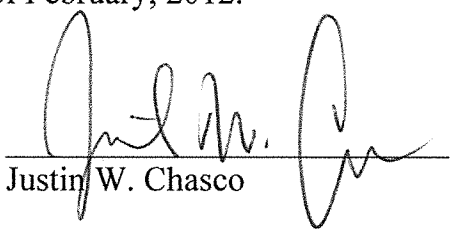
## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 13th day of February, 2012.



Justin W. Chasco

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

| | |
|---|---|
| David C. Boyd | Chair |
| J. Dennis O'Brien | Commissioner |
| Thomas Pugh | Commissioner |
| Phyllis A. Reha | Commissioner |
| Betsy Wergin | Commissioner |

In the Matter of the Application of Wisconsin Power and Light Company for a Certificate of Need for a 200 Megawatt Wind Farm in Freeborn County in Southwestern Minnesota

ISSUE DATE: October 19, 2009

DOCKET NO. ET-6657/CN-07-1425

ORDER GRANTING CERTIFICATE OF NEED FOR PHASE I OF THE BENT TREE WIND PROJECT

## PROCEDURAL HISTORY

### I. Petition for Certificate of Need

On November 6, 2007, Wisconsin Power and Light Company (WPL, the Company or the Applicant) filed a request for exemption from some of the data requirements (Minn. Rules, Chapter 7849) applicable to the completeness of an application for a Certificate of Need for Phase I of the Bent Tree Wind Project (the Project) in Freeborn County in Southwestern Minnesota.[1]

On January 15, 2008, the Commission issued an Order granting WPL full or partial exemptions for several of these provisions and the Company filed an application requesting a Certificate of Need for Phase I of the Project on June 27, 2008.

On June 27, 2008, WPL filed a certificate of need application for Phase I of the Project. Phase I consists of a 200 megawatt (MW) wind generation facility and an 18-mile 161-kilovolt (KV) radial line to connect the project to the transmission grid.

On August 27, 2008 the Commission issued its ORDER VARYING RULE ACCEPTING APPLICATION AS COMPLETE CONTINGENT UPON COMPLIANCE FILING AND APPROVING INFORMAL REVIEW PROCESS and issued its ORDER APPROVING NOTICE PLAN AND AUTHORIZING EXECUTIVE SECRETARY TO APPROVE FINALIZED NOTICE on September 18, 2008.

On January 8, 2009, the Department of Commerce's Office of Energy Security (the OES) filed comments on the merits of the proposed need application. The OES recommended that the Commission issue an Order granting WPL a Certificate of Need for Phase I of the Bent Tree Project.

[1] Phase II of the Bent Tree Wind Project, for which WPL has not yet filed a request for a Certificate of Need or site permit, would be located to the north of Phase I and would provide the balance of the approximate 400 MW anticipated to be generated by the Bent Tree Wind Project.

On April 9, 2009 the Commission issued its ORDER DENYING REQUEST FOR CONTESTED CASE and on the afternoon and evening of June 29, 2009, public hearings were conducted by an Administrative Law Judge (ALJ), who submitted his Summary of Public Testimony on August 25, 2009.

The Commission met to consider this matter on October 1, 2009.

**II. Environmental Report**

On January 8, 2009 and pursuant to Minn. Rules, Part 7849.7050, subp. 7, OES Director William Glahn issued a scoping decision determining alternatives and items to be addressed in the Environmental Report regarding Phase I of the Bent Tree Wind Project and the schedule for completion of the Environmental Report.

On June 12, 2009 the OES' Facilities Permitting staff issued the Environmental Report on Phase I of the Bent Tree Wind Project. The OES also provided the Minnesota Department of Health's White Paper on Public Health Impacts of Wind Turbines as an attachment to the Environmental Report.

The Commission met to consider this matter on October 1, 2009.

## FINDINGS AND CONCLUSIONS

**I. Proposed Project**

The Bent Tree Wind Project (Project) is a large wind energy conversion system (LWECS), as defined in the Wind Siting Act, Minn. Stat. § 216F.01–216F.07. This Project is also a large energy facility (LEF), as defined in Minn. Stat. § 216B.2421.

The first phase of the Bent Tree Wind Project (Phase I) as proposed would be an LWECS of up to 200 MW and would consist of up to 121 1.65 MW wind turbine generators. Phase I is part of a larger Bent Tree Wind Project site application. The entire project could be comprised of up to 242 Vestas 1.65 MW turbines with a nameplate capacity of approximately 400 MW. WPL has designated approximately 50 square miles as the Project area.

Phase I towers would be 80 meters (262.5 feet) in height. The rotor diameter would be 82 meters (269 feet), resulting in a maximum overall height of 121 meters (388.8 feet) when one blade is in the vertical position. The electrical collector system would consist of underground 34.5 kV collection lines and facilities providing step-up transformation.

WPL is also proposing to build a wind farm collector substation which would be comprised of: eight (8) 34.5 kV collector circuits that feed from the turbine sites into the substation; two 34.5/161 kV transformers with high and low side circuit breakers for protection; circuit breakers and protection devices for each collector feeder line; a reactor/cap bank system installed on the 34.5 kV bus for generator reactive power compensation purposes; a 161 kV switch station with two terminals. One of the terminals will connect into the new 161 kV high voltage transmission line (HVTL) going to the Hayward ITC-Midwest substation. The second terminal will be reserved for connecting the second, north phase (Phase II) of the Bent Tree wind farm at a later date.

Assuming an estimated net capacity factor of approximately 38 percent, projected average annual output for Phase I would be 666,000 megawatt hours (MWh). The annual capacity factor will vary based on weather conditions and operational and maintenance issues associated with the facility. Output will also be dependent on final design, site-specific features, and equipment.

Phase I of the Bent Tree Wind Project is to be located in northwestern Freeborn County, northwest of Albert Lea. The four townships encompassing the Project Area (Hartland, Manchester, Bath and Bancroft) are zoned as agricultural, with exception of the incorporated towns of Hartland and Manchester. Towers will not be placed within the incorporated areas.

The Bent Tree project will be owned and operated by WPL and the entire amount of output from the facility will be used to meet the requirements of Wisconsin's Renewable Portfolio Standard (RPS) and to meet the future electricity needs of WPL's customers.

## II. The Legal Standard for a Certificate of Need

### A. The Initial Certificate of Need Statutory Factors

As initially enacted, the certificate of need statute identified eight factors for the Commission to consider in evaluating the need for a proposed large energy facility[2] and directed the Commission to "adopt assessment of need criteria to be used in the determination of need for large energy facilities pursuant to this section."[3]

The statute also prohibited the Commission from granting any certificate of need unless the applicant demonstrated that the need for electricity cannot be met more cost effectively through energy conservation and load-management measures.[4]

### B. The Rules

In 1983, the Commission, in compliance with its statutory obligation to establish assessment of need criteria, adopted the certificate of need rules, Minnesota Rules Chapter 7849. One of those rules, Minn. Rules, Part 7849.0120, addressed the eight factors identified in the statute and directed the Commission to issue a certificate of need when the applicant demonstrates four things:

(A) the probable result of denial would be an adverse effect upon the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states;

(B) a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record;

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[2] Minn. Stat. § 216B.243, subd. 3.

[3] Minn. Stat. § 216B.243, subd. 1.

[4] Minn. Stat. § 216B.243, subd. 3.

(C) by a preponderance of the evidence on the record, the proposed facility, or a suitable modification of the facility, will provide benefits to society in a manner compatible with protecting the natural and socioeconomic environments, including human health; and

(D) the record does not demonstrate that the design, construction, or operation of the proposed facility, or a suitable modification of the facility, will fail to comply with relevant policies, rules, and regulations of other state and federal agencies and local governments.

### C. Additional Statutory Requirements

Subsequent to the adoption of the rules, Minn. Stat. § 216B.243 was amended to add four additional factors for the Commission to evaluate in assessing need:

- with respect to a high-voltage transmission line, the benefits of enhanced regional reliability, access, or deliverability to the extent these factors improve the robustness of the transmission system or lower costs for electric consumers in Minnesota;[5]

- whether the applicant or applicants are in compliance with applicable provisions of sections 216B.1691 and 216B.2425, subdivision 7, and have filed or will file by a date certain an application for certificate of need under this section or for certification as a priority electric transmission project under section 216B.2425 for any transmission facilities or upgrades identified under section 216B.2425, subdivision 7;[6]

- whether the applicant has made the demonstrations required under subdivision 3a;[7] and if the applicant is proposing a nonrenewable generating plant, the applicant's assessment of the risk of environmental costs and regulation on that proposed facility over the expected useful life of the plant, including a proposed means of allocating costs associated with that risk.[8]

The statute was also amended after the rules were adopted to prohibit the Commission from granting a certificate of need for any large energy facility that transmits electric power generated by means of a nonrenewable energy source unless the applicant demonstrates that it has explored

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[5] Minn. Stat. § 216B.243, subd. 3 (9).

[6] Minn. Stat. § 216B.243, subd. 3 (10).

[7] Minn. Stat. § 216B.243, subd. 3 (11). Minn. Stat. § 216B.243, subd. 3a states: **Use of renewable resource.** The commission may not issue a certificate of need under this section for a large energy facility that generates electric power by means of a nonrenewable energy source, or that transmits electric power generated by means of a nonrenewable energy source, unless the applicant for the certificate has demonstrated to the commission's satisfaction that it has explored the possibility of generating power by means of renewable energy sources and has demonstrated that the alternative selected is less expensive (including environmental costs) than power generated by a renewable energy source. For purposes of this subdivision, "renewable energy source" includes hydro, wind, solar, and geothermal energy and the use of trees or other vegetation as fuel.

[8] Minn. Stat. § 216B.243, subd. 3 (12).

using renewable resources and that the total costs of the project it proposes, including environmental costs, are lower than the cost of using renewables.[9]

## III. The OES's Comments Regarding WPL's Application for a Certificate of Need

In its comments filed January 8, 2009, the OES examined WPL's application for a certificate of need for Phase I with respect to criteria established in statute and rule and explained why it believed the Company's application met those criteria. An itemization of the criteria addressed and the OES's recommendations regarding them follows:

| Statutory Criteria: Minn. Stat. § 216B.243 | Where Addressed in the OES's January 8, 2009 Comments | OES's Statement |
|---|---|---|
| 216B.243, subd. 3 (9) | II.A.2 | The OES assumes that WPL, or WPL in conjunction with other affected entities, will complete any transmission upgrades that MISO determines is necessary to enable generation from the Project to be dispatchable. Therefore, the OES concludes that the Project will not degrade the robustness of the transmission system. |
| 216B.243, subd. 3a and 216B.2422, subd. 4 | II.B.2 | Minnesota Statutes indicate a clear preference for renewable facilities. The proposed facility meets that preference. |
| 216B.243, subd. 3 and 216B.243, subd. 3 (8) | II.B.3 | The OES concludes that the requirement regarding Demand Side Management has been met. |
| 216B.2426 | II.C.3 | According to WPL's response to OES Information Request No. 8, distributed generation is not a feasible alternative to the proposed Project. |
| 216B.1694, subd. 2 (a) (5) | II.C.4 | This statute does not apply since the proposed facility is not a fossil-fuel-fired generation facility. |
| 216B.243, subd. 3 (10) Compliance with 216B.1691 | II.E.3.a | Given that WPL has no retail customers in Minnesota, the OES concludes that this statute does not apply. |
| 216B.243, subd. 3 (12) | II.E.4 | In this case, WPL is proposing a renewable generation facility. Therefore, this statute does not apply. |
| 216B.243, subd. 3 (10) Compliance with 216B.2225, subd. 7 | II.E.5 | Since Minn. Stat. § 216B.2425 is applicable only to entities that own or operate electric transmission lines in Minnesota, this statute does not apply in this proceeding. |
| 216H.03, subd. 1 & 3 | II.E.6 | The OES concludes that the proposed Project will not contribute to statewide power sector carbon dioxide emissions. |

In addition, the OES addressed the criteria established in Minn. Rules, Part 7849.0120, Subparts A-D, which effectively cover the criteria established in Minn. Stat. § 216B.243, subd. 3, (1) to (8). The specific subcriteria considered in the OES's comments are as follows:

[9] Minn. Stat. § 216B.243, subd. 3a.

| Regulatory Criteria: Minn. Rules, Part 7849.0120 | Where Addressed in the OES's January 8, 2009 Comments | OES's Statement |
|---|---|---|
| 7849.0120, A (1) | II.A.1.a | WPL's forecasted need for renewable energy is reasonably accurate. |
| 7849.0120, A (2) | II.B.3 | The requirement regarding Demand Side Management has been met. |
| 7849.0120, A (3) | II.E.2 | This subcriterion has been met. |
| 7849.0120, A (4) | II.C.1.a | Current and planned facilities not requiring a certificate of need are not more reasonable than the proposed facility. |
| 7849.0120, B (1) | II.B.1.a-c | The OES concludes that the project's size is reasonable, that large-scale wind development is the most practical and cost-effective method of meeting the majority of its Renewable Portfolio Standard requirements, and that the timing of the proposed facility is reasonable. |
| 7849.0120, B (2) | II.C.1.b | The OES concurs with the WPL's conclusions that hydro, landfill gas, and biomass are cost-competitive with wind but that large-scale wind development is the most practical and cost-effective method of meeting the majority of its RPS requirements. |
| 7849.0120, B (3) | II.C.1.c | The OES concludes that this subcriterion has been met. |
| 7849.0120, B (4) | II.C.2 | The OES concludes that this subcriterion has been met. |
| 7849.0120, C (1) | II.A.1.b | The project will not have a negative impact on Minnesota's overall energy needs. |
| 7849.0120, C (2) | II.D.2 | Consider the Environmental Report that will be filed by the Energy Facilities Permitting Staff of the OES. |
| 7849.0120, C (3) | II.D.3 | Consider the Environmental Report that will be filed by the Energy Facilities Permitting Staff of the OES. |
| 7849.0120, C (4) | II.D.4 | Consider the Environmental Report that will be filed by the Energy Facilities Permitting Staff of the OES. |
| 7849.0120, D | II.E.1 | The OES concludes that the record does not demonstrate that the design, construction, or operation of the proposed facility, or a suitable modification of the facility, will fail to comply with relevant policies, rules, and regulations of other state and federal agencies and local governments. . . . . However, should WPL's application to the Wisconsin Public Service Commission be denied, the OES would conclude that the Project fails to comply with Wisconsin's policies, rules, and/or regulations. In that case, the OES stated, the Commission could deny WPL's request for a Certificate of Need. |

Having analyzed the standards established in Minn. Stat. § 216B.243 and Minn. Rules, Part 7849.0120, the OES recommended that the Commission issue a Certificate of Need to WPL for the 200 MW wind farm.

## IV. The Commission's Analysis and Action Regarding WPL's Application for a Certificate of Need

The Commission, having taken into consideration all the factors identified in statute and rule, finds that WPL has proved the need for the first phase (up to 200 MW) of it its proposed LWECS, the Bent Tree Project, in Freeborn County and will issue the Company a Certificate of Need.

The OES recommended, after the lengthy analysis of Phase I summarized above, that the Commission should grant the Company a Certificate of Need for Phase I. As shown above, the OES based its recommendation to grant the certificate of need on its examination of each of the four criteria listed in Minn. Rules, Part 7849.0120.

Having reviewed the OES's comments, the Commission will accept the OES's soundly grounded findings and recommendations. No party opposed granting the Certificate of Need to WPL based on the factors identified in statute and rule. Based on those findings, augmented by the OES's Environmental Report and the record as a whole, the Commission makes findings on these four points.

First, the probable result of denial of WPL's petition would be an adverse effect upon the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states, taking into account the five factors listed in Minn. Rules, Part 7849.0120, A(1)-(5)

Second, a more reasonable and prudent alternative to WPL's proposed facility has not been demonstrated by a preponderance of the evidence on the record, considering the four factors listed in Minn. Rules, Part 7849.0120, B(1)-(4).

Third, by a preponderance of the evidence on the record, the Company's proposed facility will provide benefits to society in a manner compatible with protecting the natural and socioeconomic environments, including human health, considering the four factors in Minn. Rules, Part 7849.0120, C(1)-(4).

Fourth, the record does not demonstrate that the design, construction, or operation of the proposed facility, or a suitable modification of the facility, will fail to comply with relevant policies, rules, and regulations of other state and federal agencies and local governments. See Minn. Rules, Part 7849.0120, D.

In its thorough and well-founded comments, the OES has also discussed WPL's asserted need in light of the applicable additional statutory factors listed in Minn. Stat. § 216B.243, Subd. 3 (9) - (11).[10] The Commission agrees with the OES's analysis that consideration of these statutory criteria support granting the Certificate of Need for Phase I of the Bent Tree Wind Project.

## V. The OES's Environmental Report

### A. Background

Minn. Rules, Part 7849.7090, subp. 2 requires the Commission to determine, at the time it makes a final decision on a Certificate of Need application, whether the environmental report and the record created in the matter address the issues identified by the Commissioner of the Department of Commerce. The rule states in relevant part:

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[10] Minn. Stat. § 216B.243, subd. 3 (12), which applies when the petitioner is proposing a nonrenewable generating plant, is inapplicable to WPL's application because the Company is proposing a wind generation facility.

At the time the PUC makes a final decision on a certificate of need application. . .; the PUC shall determine whether the environmental report and the record created in the matter address the issues identified by the commissioner in the decision made pursuant to part 7849.7050, subpart 7.

### B. The Environmental Report Scoping Decision

On January 8, 2009, OES Director Glahn issued a decision pursuant to Minn. Rules, Part 4400.2750 determining the scope of the Environmental Assessment to be prepared by OES staff on Phase I of WPL's proposed project.

### C. The Environmental Report

In response to that scoping decision, OES staff prepared and filed an Environmental Report on June 12, 2009 analyzing the potential impacts associated with the proposed project and the impacts of three alternatives to Phase I of the Bent Tree Project: 1) a no-build alternative; 2) another 200 MW wind project built in another location; and 3) a 77MW biomass plant.

Section 4 of the OES's Environmental Report provided an analysis of the no-build alternative.

Section 5 of the Report addressed the human and environmental impacts of the Bent Tree Project and its associated 161 kV transmission line, another 200 MW wind project built in another location, and a 77 MW biomass plant. For each of these projects, the section analyzed the impact of emissions, hazardous air pollutants and volatile organic compounds, visibility impairment, ozone formation, fuel availability and delivery, associated transmission facilities, water appropriations, wastewater, solid and hazardous waste, and noise.

Section 6 of the Report analyzed the mitigative measures that could reasonably be implemented to eliminate or minimize any adverse impacts identified for the proposed project and the alternatives analyzed.

In Section 7, the Environmental Report stated the following conclusions regarding the feasibility and availability of the alternatives:

- The no-build alternative is available, but would not help WPL meet Wisconsin's Renewable Energy Standard (RES).

- Regarding a 200 MW large wind energy conversion system (LWECS) in some other location: Minnesota's wind resources are more than sufficient to support numerous 200 MW LWECS facilities, and thousands of MW of wind energy are in development across the state and region. Feasibility and availability may be delayed or financially impacted depending on the location of the alternative's electrical interconnection to the high voltage transmission system, which is at capacity in many locations in Minnesota.

- While a 77 MW biomass facility alternative is feasible and a 38.5 MW biomass project *underwent environmental review in late 2003, the Department was unaware of any large* biomass projects that are currently available to meet WPL's needs in a timely manner.

- The Bent Tree Wind Project is feasible and could be developed to help WPL meet Wisconsin's Renewable Energy Standards.

### D. The Commission's Analysis and Action Regarding the OES's Environmental Report

Having reviewed the Environmental Assessment. the Commission finds that it and the record as a whole adequately addressthe issues identified in OES's scoping decision.

## ORDER

1. The Commission finds that the Environmental Report on Phase I of the Bent Tree project adequately addresses the issues identified by the Environmental Report Scoping Decision.

2. The Commission hereby grants Wisconsin Power and Light Company a Certificate of Need for Phase I (up to 200 MW) of the Bent Tree Wind Project and associated facilities.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(SEAL)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling 651.201.2202 (voice). Persons with hearing or speech disabilities may call us through Minnesota Relay at 1.800.627.3529 or by dialing 711.

STATE OF MINNESOTA)
)SS
COUNTY OF RAMSEY )

AFFIDAVIT OF SERVICE

I, Margie DeLaHunt, being first duly sworn, deposes and says:

That on the 19th day of October, 2009 she served the attached

ORDER GRANTING CERTIFICATE OF NEED FOR PHASE I OF THE BENT TREE WIND PROJECT.

MNPUC Docket Number: ET-6657/CN-07-1425

XX By depositing in the United States Mail at the City of St. Paul, a true and correct copy thereof, properly enveloped with postage prepaid

XX By personal service

XX By inter-office mail

to all persons at the addresses indicated below or on the attached list:

Commissioners
Carol Casebolt
Peter Brown
Eric Witte
Marcia Johnson
Kate Kahlert
Bob Cupit
Bret Eknes
Tricia Debleeckere
Mary Swoboda
DOC Docketing
AG - PUC
Julia Anderson - OAG
John Lindell - OAG

Margie DeLaHunt

Subscribed and sworn to before me,

a notary public, this 19th day of

October, 2009

Robin L. Rice
Notary Public

ROBIN L. RICE
Notary Public-Minnesota
My Commission Expires Jan 31, 2014

1975

STATE OF WISCONSIN

LRB-2415/3
DF:mb

# 1975 ASSEMBLY BILL 463

22

March 5, 1975 – Introduced by Representatives WAHNER, MUNIS, JACKAMONIS, MITTNESS, FLINTROP and MILLER; cosponsored by Senator FLYNN, by request of Governor Patrick J. Lucey. Referred to Committee on Environmental Quality.

AN ACT to amend 32.02 (6) and (10) (b) and 32.06 (7); and to create 30.025, 32.03 (5), 32.06 (14), 32.07 (1) and (1m), 32.09 (2m) and (6) (h), 196.491, 196.492 and 196.85 (1m) of the statutes, relating to long-range planning for and approval of electric generating facilities and high-voltage transmission lines, establishing additional prerequisites to the exercise of condemnation power by certain public utilities and granting rule-making authority.

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Analysis by the Legislative Reference Bureau

This bill establishes a method whereby the development of major electric generating and transmission facilities in this state is subject to scrutiny by the public and all levels of government and to approval by the public service commission (PSC) and the department of natural resources (DNR).

Every electric utility (including electric cooperative associations) is required to file an advance plan with the PSC every 2 years. Generally, the plans are to indicate expected demand for electric energy and what the utilities intend to do to respond to expected demand. If construction of major generating or transmission facilities is anticipated or planned, the utility must:

1. Describe the location, size and type of proposed facilities.

2. Indicate the demand the facilities are intended to satisfy.

3. Set forth practical alternatives.

4. Indicate the environmental impact, and cures for any adverse environmental impact, of projects for which specific pro-

posed or alternative sites are identified.

5. Describe the utilities relationship to other utilities and regional associations, power pools and networks.

6. Describe all major research projects which will continue or commence within the next 3 years and the reasons for undertaking them.

7. Identify existing or planned programs and policies to discourage inefficient and excessive power use.

Copies of advance plans are to be sent to specified state agencies and appropriate regional planning commissions, local units of government and public libraries. The state agencies and regional planning commissions are required to review the plans and submit comments, including a description of any permits or approvals required by the agencies. Local units of government and other persons may submit comments.

An advance plan shall be approved if, on the basis of the submitted comments and record of the public hearings, the PSC determines that the plan:

1. Will result in an adequate supply of electric energy.

2. Is technologically, economically and environmentally satisfactory.

3. Is reasonably coordinated with the plans and policies of other agencies.

4. Provides for programs which encourages conservation and efficient use of energy.

The PSC must also request the establishment of a site evaluation board to evaluate and make recommendations on the local social, economic and environmental impacts of a proposed site. The board is composed of members appointed by local governments in areas where the largest portion of the site is to be located. Members receive $25 per diem for up to 30 days work per year to be paid by the commission.

Before an electric utility may actually construct a major electric generating or transmission facility, it must obtain a certificate of public convenience and necessity from the PSC and all permits and approvals required by the DNR. The PSC shall conduct hearings on the application with notice being given to specified governmental agencies, owners of land which may be condemned, other interested persons and the general public. At the same time the DNR shall hold hearings on permits or approvals required by it and on whether the proposed facility will comply with environmental statutes and rules administered by the department. Public hearings are also to be held by local governments affected and their findings and recommendations are to be considered by the PSC.

The PSC will issue a certificate of public convenience and necessity if:

1. The DNR grants all permits and approvals required by it.

2. The proposed facility is consistent with the most recently approved advance plan and is necessary to supply adequate electric energy.

3. The facility is of satisfactory design and location and will not have an undue adverse impact on the environment or unrea-

sonably interfere with orderly land use and development.

No local ordinance may work to preclude or inhibit the installation or utilization of a facility for which a certificate of convenience and necessity has been granted.

The bill establishes several prerequisites to the exercise of condemnation powers by certain public utilities:

1. Electric utilities must obtain a certificate of public convenience and necessity from the PSC prior to condemning property for construction purposes. Issuance of such a certificate constitutes determination of the necessity of taking. An electric utility may condemn limited interests for test and study purposes without such a certificate, but the activity must be consistent with prior approved advance plans and other specified conditions.

2. Petitions for condemnation of lands for high-voltage lines must describe the interest to be taken and specify the length and width of the right-of-way, the maximum height of any structures, the minimum height and maximum voltage of transmission lines.

3. In awarding compensation for lands taken for high-voltage lines, there must be taken into consideration any losses due to lands being made inaccessible to agricultural machinery and any other effects such as interference with T.V. and radio reception.

4. Condemnees must be given the option of a lump sum or annual compensation for lands taken for high-voltage lines. The amount of annual compensation is variable in relation to increases or decreases in the total state assessment under section 70.575 of the statutes. Also, persons seeking to purchase interests in lands for such high-voltage lines must inform the seller of the proposed use and must offer the purchaser the option of a lump sum or rental payment method of compensation.

Under present law, the date used for evaluating condemned property for the purpose of fixing just compensation is the date a petition for condemnation proceedings and a lis pendens are filed. This bill set an earlier date of evaluation for property to be used in connection with the construction of an electric generating facility or high-voltage transmission lines. However, if the market value of the property increases between the date of evaluation and the filing of a lis pendens and if the increase is attributable to factors other than the planned facility, the increase shall be considered in determining the compensation to be paid the property owner.

The bill also requires the PSC to conduct research and authorizes it to sponsor demonstration projects relating to the forecasting of demand, pricing structure and power operation and supply with a view to ensuring an adequate supply of energy with minimal adverse effects and protection of scarce resources.

For further information, see the fiscal note which will be printed as an appendix to the proposal.

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The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

ALLIANT ENERGY

Wisconsin Power and Light Company

4902 North Biltmore Lane
Suite 1000
Madison, WI 53718

Writer's Phone: 608-458-0512
Writer's FAX: 608-458-4820
Writer's Email: arshiajavaherian@alliantenergy.com

February 7, 2011

Ms. Sandra J. Paske
Secretary to the Commission
Public Service Commission of Wisconsin
610 North Whitney Way
Madison, WI 53707-7854

**RE: Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota** **6680-CE-173**

Dear Ms. Paske:

Pursuant to Order Point No. 4 of the Final Decision in this docket issued July 30, 2009, Wisconsin Power and Light Company hereby submits its notice to the Public Service Commission of Wisconsin that the Bent Tree Wind Farm officially commenced commercial operation on Monday, February 7, 2011.

If you have any questions, please contact me.

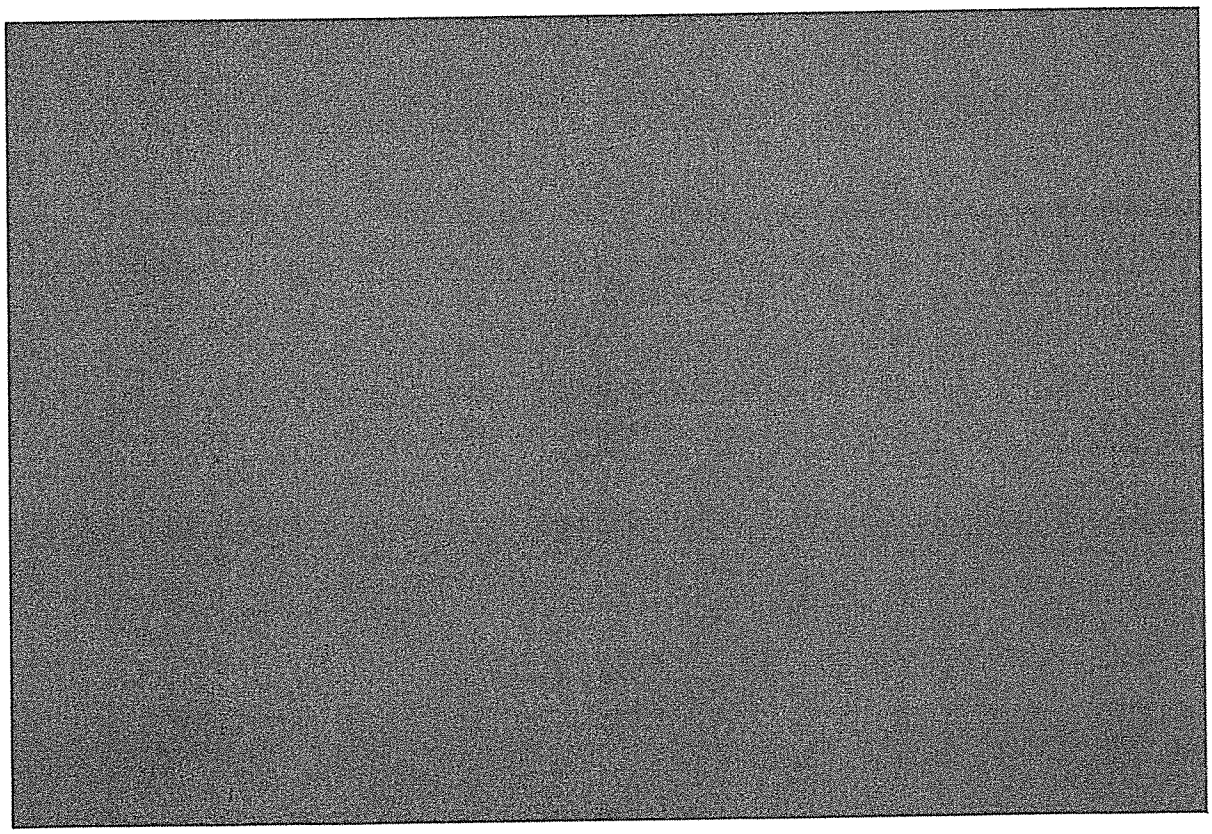
Sincerely,

*/s/ Arshia Javaherian*
Arshia Javaherian
Regulatory Attorney

# APPLICATION FILING REQUIREMENTS FOR WIND ENERGY PROJECTS IN WISCONSIN

**Version 4.5**
**August 2008**

**Public Service Commission of Wisconsin**
**Wisconsin Department of Natural Resources**
**Department of Agriculture, Trade, and Consumer Protection**
**Department of Transportation**



# APPLICATION FILING REQUIREMENTS FOR CONSTRUCTION OF WIND FARM PROJECTS

Version 4.4

## General Instructions

This Application Filing Requirement (AFR) applies to all wind energy power plant projects that require either a Certificate of Authority (CA) under Wis. Stat. § 196.49 or a Certificate of Public Convenience and Necessity (CPCN) under Wis. Stat. § 196.491 from the Public Service Commission of Wisconsin (PSC) as well as any Department of Natural Resources (DNR) permits necessary for the construction of such a project.[1] In addition, the Department of Agriculture, Trade, and Consumer Protection (DATCP) will use the applicant's responses to this AFR in preparing an Agricultural Impact Statement (AIS), should one be required.

### Participating State Agencies:

The application filing requirements in this document list the basic information and format required by the PSC and DNR for applications to construct wind powered electric generation facilities in Wisconsin. The information will be used by the PSC and DNR in the preparation of either an Environmental Impact Statement (EIS) or an Environmental Assessment (EA) and to support applications for DNR permits.

### Pre-application Consultation Process:

Pre-application consultation is required by law under Wis. Stat. § 30.025 (1m). The purpose of pre-application consultation is to help applicants refine the project application, and facilitate efficient regulatory review. Applicants should schedule pre-application consultation meetings with agency staffs well in advance of filing an application with the PSC. Consultation is also strongly recommended for projects not subject to permits under Wis. Stat. § 30.025. The filing requirements in this document will apply to most wind energy generation construction projects. However, the state recognizes that all projects are not alike and that the information needed for one project may not necessarily be appropriate for another. For this reason pre-application consultation with the agencies is extremely important. Early in the consultation process, agency staff will identify staff contacts, clarify which information requirements apply to the specific project application, and explain important elements of the state's review process.

### Other Required Facilities:

The operation of a new wind powered generation plant will also require construction of ancillary facilities such as overhead and/or underground collector circuits, new substations, interconnections to the existing distribution or transmission grid, O&M buildings, access roads,

[1] The data required in this Application Filing Requirement are needed in order for the Commission to meet its obligations under Wis. Stat. §§ 1.11, 1.12, 30.025, 182.017, 196.025, 196.377, 196.49, and 196.491 and Wis. Admin. Code chs. PSC 4, 111, and 112.

and materials handling facilities. During the pre-application consultation phase, all ancillary facilities required for the project to operate at full capacity must be identified. At that time Commission and DNR staff will assist the applicant to determine what information on ancillary facilities will be required for a complete power plant application. Because the Commission must review and take final action on a CPCN application within 180 days of finding an application complete, it is critical that the applicant clearly understands what information will be necessary for the review of the project. All the information required for a complete application will be identified during the pre-application consultation process.

## Biological Surveys:

Plant and/or animal surveys may be required for wind energy projects. The need for surveys will depend on the potential for impact to important natural resources that include, but are not limited to, high quality natural habitats and rare plant or animal populations.

Because there is a concern about the potential for bird and bat displacement and mortality, pre-construction bird and/or bat surveys may also be required for a project. Consultation with the DNR regarding pre-construction bird and bat surveys should be completed in advance of submitting a construction application to the Commission. Applicants should consult with the DNR early in the project development and site selection process and before designing any surveys. Pre-application consultation allows the Department to do a project-area screening to determine the need for and scope of surveys.

Pre-application consultations with the Department for the purposes of determining the need for biological surveys is a prerequisite for a complete construction case application with the PSC. Applicants should contact the DNR Office of Energy to arrange for a consultation and determination of survey need and scope. (Refer also to Section 5.4, page 23.)

## Application Completeness:

The regulatory review process for CPCN projects starts when the state receives a complete application. PSC and DNR staff will examine the application during the 30-day completeness review period required under Wis. Stats. §196.491(3)(a)(2). The PSC will notify applicants by letter whether an application is or is not complete. For incomplete applications, the letter will provide a list of information items that must be provided in order to have a complete application.

In practice, most applications require significant modification before they can be determined complete. For incomplete applications, applicants will be required to provide additional information and/or analyses, as outlined in the determination of completeness letter. In cases where serious incompleteness issues exist, separate responses to incompleteness items can result in a confusing array of application documents that contain both modified and outdated information, often created under separate covers and organized in a variety of formats. In cases where incompleteness responses are numerous, applicants will be required to resubmit their applications after fully integrating all responses to staff's completeness questions. This is necessary in order to provide complete, accurate, and well organized applications for PSC and

DNR staff, the PSC Commissioners, and the public. Subsequent 30-day completeness review periods will begin after the responses to all completeness items are received.

The PSC must review and take final action on complete applications within 180 days of the date the application is judged complete. The PSC may petition the Circuit Court for an additional 180 days for project review and decision making.

Applicants should be aware that complete applications rarely answer all the questions that the state agencies must address. It is likely that applicants will be asked to provide additional information and data to the state. These information and data needs are often critical to agency review and the decision making process. Applicants must respond to all staff inquiries made subsequent to a determination of completeness in a timely, complete, and accurate manner.

## DOT Permits and Reviews:

Wisconsin DOT OSOW (Oversize and Overweight) permits will be required for transporting wind turbine components to turbine construction sites. In addition, a review for high structure permits issued by the DOT's Bureau of Aeronautics may also be required (See Section 8.5). It is important for applicants to contact the Wisconsin DOT at an early stage in project development and before submitting an application to the PSC. For information on how to coordinate permitting efforts with DOT contact Dennis Leong, (608) 266-9910, email: dennis.leong@dot.state.wi.us or Ethan Johnson, (608) 261-6292, email: ethan.Johnson@dot.wi.us.

## DNR Permits and Reviews:

DNR construction site erosion control and storm water management plans, wetland and waterway permits, and incidental take permits for endangered species may be required for a project. Depending on the location of the project and ancillary facilities being proposed, other DNR permits and approvals may be required. These may include permissions and easements to place facilities on state-owned lands under DNR management.

The results of an endangered resources (ER) review, based on a search of the Natural Heritage Inventory database (NHI) and input from DNR biologists, is required for project applications (See Section 5.9). For instructions on how to request an ER review refer to the following DNR website http://www.dnr.state.wi.us/org/es/science/energy/ER or contact the DNR Office of Energy conservation biologist, Shari Koslowsky at 608/261-4382 or by e-mail shari.koslowsky@wisconsin.gov. All ER review materials and reports are CONFIDENTIAL and may not be distributed to the general public. An application's ER review and all supporting materials should be filed as a confidential document under the PSC ERF system (see below).

By following Application Filing Requirements (AFR) and by participating in the pre-filing collaborative process the application will provide most of the information required to issue DNR permits. It is important to understand that even though an application is deemed complete for CPCN or CA purposes, additional information and modifications to project plans may be needed in order to complete the review process.

## Independent Power Producers (IPPs) and Utilities:

In several sections of this AFR, IPPs proposing merchant plants and utilities are treated differently because of differences in the PSC's statutory authority. In those sections, such as Section 1.3, items that pertain only to utilities or to both utilities and IPPs are marked. In all other sections of this AFR where differences in treatment are not noted those sections apply to BOTH utilities and IPPs.

## Electronic Filing System:

CPCN and CA applications must be filed electronically using the PSC's Electronic Regulatory Filing (ERF) system. Detailed project plans required under Wis. Stat. §196.491(3)(a)(3) must be filed with the DNR. Do not file a copy of the detailed project plan submitted to the DNR using ERF. Instead file a letter confirming that the project plan has been filed with the DNR. Include the date the detailed project plan was filed.

Instructions for filing under the ERF can be found at the following web site: http://psc.wi.gov/apps/erf_public/default.aspx.

Applicants must also provide PSC and DNR staff with an electronic copy of the application in the latest version of Microsoft Word. If tables have been created in Microsoft Excel, then applicants must also provide digital copies of the Excel spreadsheets. In addition, provide a copy of the application and supporting maps and diagrams on CD or DVD, with the documents in *.PDF format. Copies of this CD/DVD will be provided to members of the public upon request. The files on the CD/DVD should be well organized, such that a person not familiar with PSC filings can easily locate desired information.

Paper copies, of the entire CPCN application must be received by the Commission before the state's 30-day completeness review period begins. Provide 25 copies[2] of the CPCN application for Commission use, three copies to the DNR's Office of Energy, plus one copy for each clerk and library as required by Wis. Stats. § 196.491(3)(a)1. Paper and digital copies of CA applications are also required. Applicants should contact the PSC case coordinator assigned to the project to verify the number of paper copies required for PSC use. Applicants must also provide three copies to the DNR Office of Energy. The DATCP will require one paper and one digital copy of the application as well as a digital copy of all GIS data submit for the project. Submit copies of the application to DATCP, Ag Impact Program, Ag Resource Management Division (PO Box 8911, 2811 Agriculture Drive Madison, WI 53708).

In addition to paper copies of the application, paper and digital copies of all maps, engineering diagrams, facility layouts, and aerial photographs must also be provided to PSC and DNR staff.

[2] Twenty-five copies are required in large part because the Commissioner's Office (CO) and the Office of General Council (OGC) must receive copies of the application in addition to project staff. Multiple copies of the application are needed in the CO since each Commissioner and Executive Assistant must be supplied with paper copies of the application. In addition, the OGC typically requires a copy for the General Council and one each for the attorneys assigned to the case. Members of the division's Core Management Team must also receive copies.

Questions about the number and format of maps, photos, and diagrams can be answered during the pre-application consultation meetings or by contacting the PSC case coordinator.

## Reduction of Paper:

Applicants are required to minimize the physical size of their applications by eliminating superfluous information and bulk information not material to the case. The following examples should be used as a guide:

- When submitting required information such as local ordinances, land use plans or other local and county planning documents only submit those pages relevant to the information requirement, i.e. pages specific to land use controls, safety, or noise. If PSC staff is interested in having the entire document for context, staff will request the applicant to file one copy under a separate cover.

- Minimize duplicative information. For example, if certain information, such as a Developer's Agreement, is applicable to more than one section of the CPCN application, include the entire document as an Appendix and reference it in the application text.

- When submitting correspondence between the applicant and state, local, and federal government permitting, planning, and land management agencies, submit only copies of "official" correspondence, i.e. letters from the applicant to an agency and the agency response to the applicant. PSC staff needs to review this correspondence to verify that the applicant has applied for the necessary permits and to ascertain the status of the permit review. Do not include unofficial minutes of meetings or records of telephone conversations between the applicant/applicant's consultant and permitting agencies as these documents represent hearsay and are not considered factual information.

- Submit applications on double-sided printed pages. This includes the text of the application as well as copies of supporting documentation submitted in the application. Exceptions to this requirement are large maps and figures (sized larger than 81/2 x 11 inches).

## Important notes on digital forms of graphics:

- All required drawings and maps identified in sections 1.1.11 and 1.2 must be supplied in both hard copy and digital formats.
    - Digital GIS map formats:
        - Provide map files in .mxd (ESRI ArcMap – v. 9x) format for all GIS maps in the application.

- Provide published map files in .pmf format for all GIS maps in the application.

- CAD may be used for scale drawings of proposed substation facilities, for example, AutoCad *.dwg format or *.dxf format is acceptable (check with PSC staff for the appropriate AutoCAD release). The preference is *.dwg.
- Geographic Information Systems (GIS) data files must be submitted in Shapefile format (ESRI ArcGIS 9x). All GIS data submitted must be projected to Wisconsin Transverse Mercator (WTM), a projection system unique to Wisconsin and used by Wisconsin state agencies. The WTM uses North American Datum (NAD) 83/91. The projection parameters for WTM are:

| **Projection** | Transverse Mercator |
|---|---|
| **Spheroid** | GRS80 |
| **Scale Factor at Central Meridian** | 0.9996 |
| **Longitude of Central Meridian** | 90° W (-90°) |
| **Latitude of Origin** | 0° |
| **False Easting** | 520,000 |
| **False Northing** | -4,480,000 |
| **Unit** | meter |

- Photographic renderings of proposed facilities on the existing landscape must be submitted in a high-resolution uncompressed *.tif format (preferred) or high-resolution *.jpg format.
- Digital versions of aerial photographic images of the existing landscape at the proposed plant site/sites MUST be suitable for use on the PSC's GIS platform. DO NOT obscure any portion of the aerial photographic images provided in the application. Digital aerial photographic images must be properly georeferenced. All digital aerial photographic images MUST be accompanied by the geographic coordinate and projection system to which they have been georeferenced.
- Scanned maps and diagrams which cannot be submitted in any other format must be submitted in *.gif format at a depth of 256 colors or less.
- When providing maps, note facility locations but do not obscure map details.

Direct questions concerning these information requirements to William A. Fannucchi of the PSC staff, at (608) 267-3594, e-mail William.Fannucchi@psc.state.wi.us.

# Application Filing Requirements (AFR) for Construction of a Wind Powered Electric Generation Facility Requiring either a CPCN or CA

A generation facility of 100 MW or greater requires an application for a Certificate of Public Convenience and Necessity (CPCN). A complete CPCN application will contain the information listed in this document. Exceptions will be documented during the pre-application consultation process. Information that an applicant believes does not apply to the proposed project may not be omitted without a showing as to why the information is not applicable. Applications must follow the organization and format of the AFR.

A Certificate of Authority (CA) will be required for any Wisconsin utility proposing to build a generation facility rated at less than 100 MW, where the cost exceeds the thresholds established in Wis. Admin. Code § PSC 112.05(3). These filing requirements also apply to CA projects. Consult with Commission staff prior to submitting an application.

## PROJECT AREA AND TURBINE SITE ALTERNATIVES

Under Wis. Stat. §§ 1.11, 196.025, and 196.491, and Wis. Admin. Code ch. PSC 4, the Commission decision for CPCN and CA projects must include an evaluation of alternatives.

### CPCN

For projects requiring a CPCN, under Wis. Stat. § 196.491(3), Commission review must include an evaluation of reasonable alternatives that include alternative locations and, in the case of utilities, alternative sources of supply (Wis. Stat. § 196.491(3)(d)3 and Wis. Admin. Code § PSC 4.70(2)(b)1). Applications must include:

1. Alternate project areas. For this analysis the application must describe the method and factors used to evaluate and eliminate competing project areas and why the proposed project site is the best possible option.

2. Alternate turbine sites. The applicant must provide alternate turbine sites for the Commission to consider. As a standard, an application should have a total number of viable turbine sites that is at least 25% greater than the minimum number of sites needed to achieve the rated output of the project. For example, for a 120 MW wind turbine project using 2 MW turbines, the application must identify and fully describe 75 turbine sites (60 sites + 15 alternate sites).

3. Alternate methods of supply. Describe the alternate methods of supply considered in the course of developing the proposed project including a no-build option. Alternate forms of supply can include other forms of renewable energy such as solar, biomass, fuel cells etc. For a utility project, an alternative source of supply could also be a purchase power

contract. This requirement that alternate methods of supply must be described does not apply to a CPCN application for a wholesale merchant plant, as defined in Wis. Stat. § 196.491(1)(w).

CA [redacted]

For projects under 100 MW requiring a CA under Wis. Stat. § 196.49 and Wis. Admin. Code ch. 112.05(3), the Commission must consider alternatives pursuant to Wis. Stat. § 1.11(2)(c)3 and Wis. Admin. Code chs. PSC 4.20(2)(e) and 4.70(2)(b)1. The application must include a description of reasonable alternatives that include, at a minimum, all project sites considered and a no-build alternative. The application must also describe the method and factors used to evaluate and eliminate competing project sites and why the proposed site is the best possible option.

It is not acceptable to break a single project into two or more smaller projects in order to avoid the regulatory review process under Wis. Stat. § 196.491 (3) or to avoid the regulatory review process under Wis. Stat. §196.49 (Wis. Admin. Code § PSC 112.)

# 1.0 PROJECT DESCRIPTION AND OVERVIEW

## 1.1 General Project Location and Description

1.1.1. Project location – Counties and townships of the project area.

1.1.2. General map showing project location, nearest community, and major roads. Include an inset map showing where the project is located in the state.

1.1.3. Provide the following information about the project:

1.1.3.1. Size of project area in acres.

1.1.3.2. Size (rated capacity), in megawatts, of the proposed project. *(If an actual turbine model is not yet under contract, the applicant must provide information on at least two turbine models that are being considered. Those turbines must represent the maximum and minimum megawatt size under consideration for purchase for the project.)*

1.1.3.3. Number of turbine sites identified for the project. If the project is designed for 100MW or greater, identify how many sites will be considered as alternate sites.

## 1.2 Ownership

Identify the corporate entity or entities that would own and/or operate the plant.

## 1.3 Project Need/Purpose

Sections 1.3.1 through 1.3.5 apply to Utilities only.
IPPs (merchant plants) skip to Section 1.3.6.

[redacted] To comply with Wis. Stat. § 196.374 Renewable Portfolio Standard (RPS) provide the following:

1.3.1. The utility's renewable baseline percentage and baseline requirement for 2001-2003 and the amount of renewables needed in the future.

1.3.2. Amount of renewable energy currently owned and operated by the utility as defined by the RPS requirements for additional renewable energy.

- 1.3.2.1. Total existing renewable generation capacity.
- 1.3.2.2. Total energy produced by renewable assets in previous calendar year separated by generation type (Hydro, biomass, methane, wind etc.).
- 1.3.2.3. Amount of renewable energy acquired through purchase power agreements (separated by type (hydro, biomass, wind etc.).
- 1.3.2.4. Amount of RPC credits purchased.

1.3.3. [redacted] Expected annual energy output for the project.

1.3.4. [redacted] **Other Need Not Covered in Section 1.3.1**

- 1.3.4.1. Monthly demand and energy forecast for peak and off peak periods over the next 20-25 years.
- 1.3.4.2. Describe how the availability of purchase power was analyzed.
- 1.3.4.3. Identify plant retirements forecast over the next 20-25 years.
- 1.3.4.4. Describe how the existing and expected applications for generation from Independent Power Producers (IPPs) have been factored into your forecast.
- 1.3.4.5. Describe how the proposed project meets the requirements the Energy Priorities Law, Wis. Stats. §§ 1.12 and 196.025(1).
- 1.3.4.6. Briefly describe utility's compliance under Wis. Stat. § 196.374 for energy efficiency.

1.3.5. [redacted] **EGEAS Modeling**

- 1.3.5.1. Describe the 25-year optimal generation expansion plan for all of the entities that are part of the generation plan.
- 1.3.5.2. The EGEAS modeling should include a 30-year extension period.
- 1.3.5.3. The wind resource should be modeled as non-dispatchable, using an hourly wind profile.

1.3.6. [redacted] **Energy Agreements**

- 1.3.6.1. Identify all Wisconsin utilities under contract for delivery of energy from the proposed project.
- 1.3.6.2. For each utility under contract or with which an agreement in principle for delivery of energy is in place provide the following, by utility:

1.3.6.2.1. Rated capacity under contract.
1.3.6.2.2. Annual energy to be delivered under contract or expected to be delivered.

## 1.4 Alternatives

Section 1.4.1 applies to Utilities only.
Section 1.4.2 applies to both Utilities and IPPs.

1.4.1. [redacted] **Supply Alternatives**: Describe the supply alternatives to this proposal that were considered (including a "no-build" option) and present the justification for the choice of the proposed option(s).
1.4.1.1. Describe any alternate renewable fuel options considered and why those options were not selected.
1.4.1.1.1. Solar
1.4.1.1.2. Biomass
1.4.1.1.3. Hydro
1.4.1.1.4. Landfill Gas
1.4.1.1.5. Fuel Cell
1.4.1.2. Describe Purchase Power Agreements (PPAs) considered or explain why a PPA was not considered for this project.
1.4.1.3. No-Build Option.

1.4.2. [redacted] **Project Area Selection**
1.4.2.1. Alternative Project Areas - Describe the project area screening and selection process used to select the proposed project area. Provide the following:
1.4.2.1.1. List individual factors or site characteristics used in project area selection.
1.4.2.1.2. Explain how individual factors and project area characteristics were weighted for your analysis and why specific weights were chosen.
1.4.2.1.3. Provide a list of all project areas reviewed with weighted scores for each siting factor or characteristic used in the analysis.
1.4.2.2. Provide a narrative describing why the proposed project area was chosen.

## 1.5 [redacted] Turbine Site Selection

1.5.1. List the individual factors or characteristics used to select turbine sites.
1.5.2. Provide information on how turbine site characteristics and type of turbines chosen factored into the selection of final turbine sites.
1.5.3. Turbine setback distances
1.5.3.1. Minimum setback from residences and/or property lines.
1.5.3.2. Minimum setback, if any, from other buildings (e.g. animal barns, storage sheds).
1.5.3.3. Minimum setback from roads.

1.5.3.4. Identify any sites where setback waivers are needed or have been executed.

## 1.6 [redacted] Cost

1.6.1. Provide capital cost of the completed facility organized by Plant Account Codes (PAC) found in the PSC's Uniform System of Accounts for Private Electric Utilities – 1/1/90. Provide a breakdown within each PAC and a subtotal. Include, at least, the following PACs:
- 1.6.1.1. PAC 340 –Land and Land Rights.
- 1.6.1.2. PAC 341 – Structures and improvements (O&M buildings, access roads).
- 1.6.1.3. PAC 344 – Generators (turbines towers, foundations, engineering, procurement, construction management, erection).
- 1.6.1.4. PAC 345 – Accessory Electrical Equipment (substation, meteorological towers, collector circuit system, SCADA.

1.6.2. Provide the complete terms and conditions of all lease arrangements.
- 1.6.2.1. Turbine site lease
- 1.6.2.2. Setback waivers
- 1.6.2.3. Neighbor agreements
- 1.6.2.4. Provide a statement demonstrating how conditions of Wis. Stat. § 196.52(9)(a)3(b) have been met.

1.6.3. Discuss and provide the comparative costs of the alternatives identified and evaluated in Section 1.4.

1.6.4. Describe the effect of the proposed project on wholesale market competition. Include a description of how, at the time of this filing, the proposed facility will be treated as an intermittent resource in the MISO market.

1.6.5. Provide an estimate of the expected life span for the power plant.

1.6.6. Describe how the facility will be decommissioned at the end of the project's life.
- 1.6.6.1. Provide an estimate of the cost of and source of funding for decommissioning.

## 1.7 [redacted] MISO and Project Life Span

1.7.1. MISO Market - Describe how, at the time of this filing, the proposed facility will be treated as an intermittent resource in the MISO market.

1.7.2. Provide an estimate of the expected life span for the power plant.

1.7.3. Describe how the facility will be decommissioned at the end of its life span.

## 1.8 [redacted] Required Permits and Approvals

1.8.1. **Approvals and Permits** - Provide a list of required approvals/permits from the following regulatory agencies listing the approvals/permits required, the status of each application, application filing date, regulatory agency, and agency contact name and telephone number:

1.8.1.1. Federal

1.8.1.1.1. Federal Aviation Administration (FAA)

1.8.1.1.2. US Army Corps of Engineers (USACE)

1.8.1.1.3. US Fish and Wildlife Service (USFWS)

1.8.1.1.4. Other federal agencies not listed above

1.8.1.2. State

1.8.1.2.1. Department of Transportation (DOT)

1.8.1.2.2. Wisconsin Department of Natural Resources (DNR)

1.8.1.2.3. Other state agencies not listed above

1.8.1.3. Local Permits – including county, town, city, and village

1.8.2. **Correspondence with Permitting Agencies** - Provide copies of correspondence to and from state and federal agencies that relate to permit approval, compliance approval, or project planning and siting. Provide copies of any correspondence to or from local governments. This should continue after submittal of the application.

# 2.0 TECHNICAL DESCRIPTION OF TURBINES AND TURBINE SITES

## 2.1 Estimated Wind Speeds and Projected Energy Production

Provide a complete wind speed and energy production assessment for the project. This report should include, at a minimum:

2.1.1. Wind speeds and source of wind speed data used in analysis

2.1.2. Wind roses (monthly and annual)

2.1.3. Gross and net capacity factor (explain the method used to calculate the capacity factors and provide the data used)

2.1.4. Estimated energy production of project

2.1.4.1. Estimated production losses

2.1.4.2. Estimated net energy production

## 2.2 Turbine Type and Turbine Characteristics

2.2.1. Identify the manufacturer and model of turbine generator to be used. (If no Turbine Purchase Agreement has been signed, applicants should identify the turbine or turbines being considered. It is acceptable to identify a range by providing information on the largest and smallest turbine being considered, however, consult with Commission staff prior to preparing the application.)

2.2.2. Turbine Delivery Date – Indicate whether or not this date is firm.

2.2.3. Total number of turbines required for project.

2.2.4. Technical Characteristics of Turbines
- 2.2.4.1. Hub Height
- 2.2.4.2. Blade length
- 2.2.4.3. Swept Area
- 2.2.4.4. Total Height
- 2.2.4.5. Cut-in Speed
- 2.2.4.6. Cut-out Speed
- 2.2.4.7. Fixed or Variable Speed – include rpm
- 2.2.4.8. Rated Wind Speed
- 2.2.4.9. Turbine Power Curve (provide actual data – wind speed and rated output needed to create the curve)

2.2.5. Technical Characteristics of Turbine Towers
- 2.2.5.1. Type of tower and material used
- 2.2.5.2. Tower dimensions and number of sections required

2.2.6. Scale drawings of turbines including turbine pad and transformer box.

## 2.3 Construction Equipment and Delivery Vehicles

Provide a description of the types of construction equipment needed to build the project and the types of delivery vehicles that would be used to deliver turbines, towers, and blades to tower sites. For large equipment and vehicles include:

2.3.1. Types of construction equipment and delivery vehicles

2.3.2. Gross vehicle weight (loaded and unloaded) for all vehicles using local roads

2.3.3. For vehicles used for turbine/tower/blade/crane delivery (diagrams or drawings of vehicles are acceptable). Include:
- 2.3.3.1. Overall vehicle length
- 2.3.3.2. Turning radius
- 2.3.3.3. Minimum ground clearance
- 2.3.3.4. Maximum slope tolerance

2.3.4. **Cranes** - Describe types of cranes to be used and for what purpose. Include:
- 2.3.4.1. Weight of crane
- 2.3.4.2. Crane lift rating
- 2.3.4.3. If assembly of crane is required at work site answer the following
  - 2.3.4.3.1. Time required to assemble crane
  - 2.3.4.3.2. If the crane must be disassembled and reassembled during construction explain why.

2.3.5. **Roads and Infrastructure** - Estimate the potential impacts of construction vehicles on the local roads. Provide the following:
- 2.3.5.1. Describe methods to be used to handle heavy or large loads on local roads.

2.3.5.2. Probable routes for delivery of heavy and oversized equipment and materials.
2.3.5.3. Potential for road damage and any compensation for such damage.
2.3.5.4. Probable locations where local roads would need to be modified, expanded, or reinforced in order to accommodate delivery of turbines, blades, or towers.
2.3.5.5. Include an estimate of whether or not trees near or in road ROW might need to be removed.
2.3.5.6. Provide an estimate of likely locations where local electric distribution lines will need to be disconnected in order to allow passage of equipment and materials
2.3.5.6.1. Describe how residents will be notified before local power would be cut.
2.3.5.6.2. Estimate the typical duration of a power outage resulting form equipment or materials delivery.

2.3.6. **Construction Traffic** - Anticipated traffic congestion and how congestion will be managed, minimized or mitigated. Include:
2.3.6.1. List of roads most likely to be affected by construction and materials delivery.
2.3.6.2. Duration of typical traffic disturbance and the time of day disturbances are most likely to occur.

## 2.4 Other Project Facilities

2.4.1. **Turbine Site Foundation** - Describe the type of foundation or foundations to be used. If more than one type of foundation may be needed describe each and identify under what circumstances each foundation type would be used. Include the following:
2.4.1.1. Dimensions, surface area and depth required for each foundation.
2.4.1.2. Amount of soil excavated for each foundation type.
2.4.1.3. Describe how excavated soils will be handled including disposal of excess soil.
2.4.1.4. Materials to be used for the foundation. Include:
2.4.1.4.1. Approximate quantity and type of concrete required for typical foundation.
2.4.1.4.2. Materials required for reinforcement.
2.4.1.4.3. Description of the tower mounting system
2.4.1.5. Provide technical drawings of each foundation type to be used showing foundation dimensions.

2.4.2. **Turbine Site Construction Area** - Describe turbine site construction area. Include location and dimensions for:
2.4.2.1. Crane pads.
2.4.2.2. Lay-down areas.
2.4.2.3. Parking area.

2.4.2.4. Provide a scale drawing showing the general construction setup for turbine sites.

2.4.3. **Access Roads**

2.4.3.1. Provide the total number of miles required for turbine access roads.

2.4.3.2. Describe materials to be used and methods for construction of access roads including road bed depth.

2.4.3.3. Specify the required width of access roads. Fully describe any differences between final road size and that required during construction. (e.g. if access roads would be used for temporary crane paths).

2.4.3.4. Describe any site access control – fences or gates and show locations.

2.4.3.5. Provide a map showing the location of all access roads. In addition provide a GIS shapefile of access road locations (see page 5 for instructions on GIS format).

2.4.4. **Crane Paths** – Provide the following if cross-country crane paths would be needed to move construction cranes between turbine sites:

2.4.4.1. Discussion of why existing roads and access cannot be used and why cross-country crane paths are required

2.4.4.2. Description of materials to be used and methods for construction of crane paths.

2.4.4.3. Crane path widths and depths.

2.4.4.4. Discuss when and how crane paths would be removed and land recovered.

2.4.4.5. Provide a map or maps showing the location of all crane paths and provide this information in a GIS shapefile.

2.4.5. **General Construction Areas**

2.4.5.1. Identify size and location of lay-down areas outside of those found at the turbine sites and any other areas used for material storage.

2.4.5.2. Identify size and location of construction parking areas.

2.4.5.3. Describe the expected use of these areas after project completion.

2.4.5.4. Provide a list of all hazardous chemicals to be used on site during construction and operation (including liquid fuel).

2.4.5.5. Discuss spill containment and cleanup measures including the Spill Prevention, Control, and Countermeasures (SPCC) and Risk Management planning for the chemicals proposed.

2.4.6. **Transmission Interconnection**

2.4.6.1. Describe any transmission grid interconnection requirement.

2.4.6.2. Describe all communications and agreements, official or otherwise, with the transmission owner.

2.4.6.3. Indicate where the project is in the MISO Queue and provide copies of the latest draft or final MISO report for the project interconnect. During the PSC review process applicant must continue to supply the latest reports from MISO.

2.4.7. **Collector Circuits**

2.4.7.1. Total number of miles of collector circuits required – separated by circuit type (overhead vs. underground).

2.4.7.2. Specify the collector circuit voltage to be used.

2.4.7.3. Transformer type, location, and physical size of transformer pad at each turbine site.

2.4.7.4. Provide a map and GIS data showing the proposed location of all underground and overhead collector circuits.

2.4.7.5. Underground Collector Circuits

2.4.7.5.1. Conductor to be used

2.4.7.5.2. Burial depth and width of trench

2.4.7.5.3. Describe trench and how lines would be laid (direct buried, conduit etc.) Provide scale drawing of underground circuit.

2.4.7.6. Overhead Collector Circuits

2.4.7.6.1. Size of pole to be used.

2.4.7.6.2. Engineering drawing of structure to be used.

2.4.8. **Construction Site Lighting**

2.4.8.1. Describe the site lighting plan during project construction.

2.4.8.2. Provide copies of any local ordinances relating to lighting that could apply.

## 2.5 Substation

If the project includes the construction of a substation or modifications to an existing substation, provide the following information:

2.5.1. Drawing or diagram showing the location, dimensions (in feet and acres), and layout of any new substation or proposed additions to an existing substation. Provide recent digital aerial photos of the substation site, suitable for use on the PSC's GIS platform. (See Important notes on digital forms of maps and diagrams Page 5)

2.5.2. Plat and topographic maps showing the location of the substation.

2.5.3. Size (in acres) of the land purchase required and orientation of the substation within the purchase parcel.

2.5.4. Indicate current land ownership and whether applicant has control of property or whether or not an option to buy has been signed.

2.5.5. Provide a complete electrical description of required substation facilities including a list of transformers, busses, and any interconnection facilities required.

2.5.6. **New Substation**

2.5.6.1. Show the location of all power lines entering and leaving the substation.

2.5.6.2. Show details on any turning structures that might impact adjacent land owners (size, type of structure, guying, etc.).

2.5.6.3. Show the location of the access road.

2.5.7. **Modifications to Existing Substations**
- 2.5.7.1. Show the location of all new power lines and reconfigured lines.
- 2.5.7.2. Show details on any turning structures that might impact adjacent land owners (size, type of structure, guying, etc.).
- 2.5.7.3. Provide details on changes to access roads that may be required (width, length, location, etc.).

2.5.8. Describe construction procedures (in sequence as they will occur) including erosion control practices (see Section 3.1).

## 2.6 Operations and Maintenance Building

2.6.1. Describe the purpose and use of the proposed O&M building
2.6.2. Number of full-time employees that would be working at the facility.
2.6.3. Size of property needed (provide physical dimensions and acres).

2.6.4. **Building and Building Footprint**
- 2.6.4.1. Provide a drawing or diagram of the O&M building with dimensions including square feet.
- 2.6.4.2. Describe the type of building to be constructed (metal, frame, etc.)
- 2.6.4.3. Map (including a GIS shapefile) showing the location of the O&M building(s).

2.6.5. **Lighting and Security Plan for O&M Property**
- 2.6.5.1. Describe how the building property will be lit and how the lighting plan minimizes disturbance to nearby residences.
- 2.6.5.2. Describe any security plans for the property (fences etc.).

2.6.6. **Describe any other facilities needed, including:**
- 2.6.6.1. Parking lots.
- 2.6.6.2. Sheds or storage buildings.
- 2.6.6.3. Supplies of water.
- 2.6.6.4. Sewer requirements.

# 3.0 CONSTRUCTION PROCESS SEQUENCE AND IMPACT ON INFRASTRUCTURE

## 3.1 Construction Sequence

3.1.1. Provide the construction schedule for the proposed project. Include a timeline showing construction activities from beginning of construction to in-service. Identify all ***critical path*** items.

3.1.2. Provide a description of the staging and construction sequence required for building the proposed project at a typical turbine site. Include the delivery of materials.
3.1.3. Estimate of time required to complete construction at a typical turbine site.

### 3.2 Workforce

3.2.1. Provide information on the workforce size and skills required for plant construction and operation.
3.2.2. Estimate how much of the expected workforce will come from local sources.

## 4.0 PROJECT MAPS AND PHOTO SIMULATIONS

**Aerial Photographs:** Recent aerial photos are required for every project. Aerial photographs submitted with an application should be no older than three years – more recent in rapidly developing areas. Aerial photos are typically used as a base for most maps and should be provided at a scale of at least 1:4800. **Actual aerial photographs are not acceptable. Rectified orthophotos created using GIS are required – reduced size photos are not adequate.** The standard GIS platform for Wisconsin state agencies is ESRI ArcGIS v. 9x.

In addition to providing the maps listed below, all GIS data used to create those maps must also be submitted with the application. See Page 7 of this AFR for instructions on GIS map projections. The extent of the aerial photography must be inclusive enough to show the landscape context within which the proposed facilities would be placed. Typically, this requires extending the map extent to at least 10 miles beyond any project boundary.

**Provide the following maps both as hard copy and digital versions.**

### 4.1 General Project Maps

4.1.1. **Project Area Maps**
Provide a project area map with a recent (within the last 3 years) aerial photograph as a base. Clearly show the boundaries of the project area, the location of all proposed turbine sites, the location of any new substation facilities or existing substation expansion, location of collector circuits, access roads, and any cross-country crane paths that may be needed. **The extent of this map should extend at least 10 miles beyond the project area boundary.** Maps should include local infrastructure including roads, existing utility facilities (electric transmission and distribution, pipelines etc.), and the location of sensitive sites including all residences, day-care centers, hospitals or other health care facilities, cemeteries, airports and private air strips, municipalities, recreational lands, major rivers and lakes. **If new residences, subdivisions, commercial or industrial facilities have been built since the date of the aerial photo base map, note those features accurately on the project area map and provide a separate GIS Shapefile with these additions.**

4.1.2. **Topographic Maps**
Provide topographic maps at 1:24,000 or larger scale showing all turbine sites, substation facilities, collector circuits, and access roads. The topographic extent should extend no less than 2 miles out from the project boundary.

4.1.3. **Natural Resources and Land Use/Ownership Maps**
All the following maps should be the most recent version available.

4.1.3.1. Wetland Maps

4.1.3.1.1. *Wisconsin Wetland Inventory (WWI) Maps (Out to 2 miles from the project boundary)*
Provide maps showing WWI wetlands within and around the project area boundary. Maps should show each turbine site and all connecting facilities (roads, collector circuits etc.) without obscuring map details. If available, provide digital versions of the WWI.

4.1.3.1.2. *Delineated Wetlands Maps(Within the project boundary)*
Provide maps (hard copy and digital) showing all field delineated wetlands and/or wetlands delineated using aerial photography found within the project area.

4.1.3.2. Land Ownership Maps (Out to 0.5 miles from the project boundary)

4.1.3.2.1. Provide maps (hard copy and digital) showing parcel boundaries with ownership, roads, and municipal boundaries. Parcel boundary maps should show the project boundary, owner of property, the location of all turbine sites, access roads, collector circuits, and crane paths. Parcel maps should be based on the most recent data available and include corrections so that land ownership is accurate.

4.1.3.2.2. Provide digital data of all parcel boundaries and ownership.

4.1.3.3. Public Lands - Map of all publicly owned lands inside the project boundary and within 2 miles of the project area (parks, trails national/county/state forests, etc).

4.1.3.4. Flood Insurance Rate Maps (FIRMs) (Within the project boundary) - Provide flood insurance maps if the site is within one-half mile of a floodplain.

4.1.3.5. Soil Survey Maps (within the project boundary)

4.1.3.6. Bedrock Maps (within the project boundary)- Map showing depth to bedrock for the entire project area.

## 4.2 Community Maps

4.2.1. **Zoning Maps** - Provide a map or maps of the project area showing existing zoning (e.g. agriculture, recreation, forest, residential, commercial etc.) Map should show existing zoning out to 0.5 miles beyond the boundaries of the project area.

4.2.2. **Sensitive Sites** - Additional map (if necessary) showing proximity to schools, day care centers, hospitals, and nursing homes up to 0.5 miles from the site.

## 4.3 Photo Simulations

Photo simulations are required. Simulations should seek to provide an accurate representation of what the project area would most likely look like after the project is completed. *In order to be certain that any photo simulations provided in an application will be useful, **please consult with PSC staff before preparing and submitting photos.***

# 5.0 NATURAL AND COMMUNITY RESOURCES, DESCRIPTION AND POTENTIAL IMPACTS

## 5.1 Site Geology

5.1.1. Describe the geology of the project area.

5.1.2. Geotechnical Report on Soil Conditions

5.1.2.1. Provide a summary of conclusions from any geotechnical report or evaluation of soils in the project area including:

5.1.2.1.1. Results of soil borings including a review of soil bearing capacity and soil settlement potential.

5.1.2.1.2. Identify any soil conditions related to site geology that might create circumstances requiring special methods or management during construction.

5.1.2.2. Depth to Bedrock

5.1.2.2.1. Identify any turbine sites where foundation construction must be modified because of the presence of bedrock.

5.1.2.2.2. Describe construction methods and foundation issues associated with situations where bedrock formations are near the surface.

5.1.2.2.3. Discuss the likelihood or potential that construction on bedrock formations may negatively impact private wells within two miles of turbine sites.

## 5.2 Topography

5.2.1. Describe the general topography of the project area.

5.2.2. Describe expected changes to site topography due to grading activities.

## 5.3 Land Cover

### 5.3.1. Vegetative Communities in the Project Area.

List and identify the dominant plants in the following community categories: Provide a GIS map showing the location of each community.

5.3.1.1. Agricultural
- 5.3.1.1.1. Row crops.
- 5.3.1.1.2. Hay/pasture/old fields.
- 5.3.1.1.3. Other.

5.3.1.2. Non-Agricultural Upland
- 5.3.1.2.1. Prairie/Grasslands.
- 5.3.1.2.2. Upland Woods.

5.3.1.3. Wetlands
- 5.3.1.3.1. Wooded Wetlands.
- 5.3.1.3.2. Marshes.
- 5.3.1.3.3. Bogs.
- 5.3.1.3.4. Fens.

### 5.3.2. Acres of Land Cover Categories in Project Area

Estimate of the number of acres within each land cover category listed below. Provide this information in table format and explain what method was used to calculate the areas reported.

5.3.2.1. Agricultural
- 5.3.2.1.1. Row crops.
- 5.3.2.1.2. Hay/pasture/old field.
- 5.3.2.1.3. Other.

5.3.2.2. Non-Agricultural Upland
- 5.3.2.2.1. Prairie/Grasslands.
- 5.3.2.2.2. Upland Woods.

5.3.2.3. Wetlands
- 5.3.2.3.1. Wooded Wetlands.
- 5.3.2.3.2. Marshes.
- 5.3.2.3.3. Bogs.
- 5.3.2.3.4. Fens.

5.3.2.4. Developed Land
- 5.3.2.4.1. Residential.
- 5.3.2.4.2. Commercial/Industrial.

### 5.3.3. Land Cover Impacts

In table format, estimate the number of acres, in each land cover type identified in Section 5.3.3, that will be affected by project construction and or facilities. Breakdown impacts into temporary vs. permanent impacts for the following categories[3].

[3] Temporary impacts are those that are typically recovered after construction is completed. Examples of temporary impacts

5.3.3.1. Turbine Pads.
5.3.3.2. Collector Circuits.
For collector circuits in wooded areas, disclose whether or not a ROW around the cables would be maintained in an open (no tree) condition.
5.3.3.3. Access Roads.
5.3.3.4. Crane Paths.
5.3.3.5. Substation.
5.3.3.6. O&M Building.

**5.4 Wildlife**

5.4.1. Describe existing wildlife resources and estimate expected impacts to plant and animal habitats and populations.
5.4.2. Avian and bat pre-construction surveys
5.4.2.1. Provide a summary of pre-application consultation meetings held with DNR for the purposes of determining whether or not pre-construction bird and bat studies would be required for the project (see Page 3 – Biological Studies).
5.4.2.2. If, after consultation with the DNR, avian and/or bat preconstruction studies are required, provide the following information.
5.4.2.2.1. Description of DNR approved survey methodology and any data collected for pre-construction avian studies (data should be provided using a format acceptable to DNR and PSC staff.)
5.4.2.2.2. Description of DNR approved survey methodology and any data collected for pre-construction bat studies (data should be provided using a format acceptable to DNR and PSC staff.)

**5.5 Public Lands** - List public properties within 10 miles of the project area.

5.5.1. **State Properties, including:**
5.5.1.1. Wildlife Areas.
5.5.1.2. Fisheries Areas.
5.5.1.3. State Parks.
5.5.2. **Federal Properties, including:**
5.5.2.1. Wildlife Refuges.
5.5.2.2. Parks.
5.5.2.3. Scenic Riverways.
5.5.3. **County Parks.**

**5.6 Local Zoning**

5.6.1. Provide copies of any zoning ordinances affecting the project area and within two miles of the project boundary. Provide only the page(s) directly citing ordinance language.
5.6.2. Describe any zoning changes needed for the project.

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include parking lots, lay-down area, crane paths and pads and collector circuits located in farm fields. Permanent impacts are associated with access roads, turbine pads, collector circuits in forested areas were a cleared ROW is maintained, and substations.

5.6.3. Describe zoning changes that the applicant has requested of local government for the proposed project. Include:
- 5.6.3.1. The name of the entity responsible for zoning changes.
- 5.6.3.2. Description of the process required to make the zoning change.
- 5.6.3.3. The outcome or expected outcome for requested zoning changes.

5.7 **Land Use Plans** - Provide a copy of all land-use plans adopted by local governments that pertain to the project area, extending out two miles from the project boundary. (See Reduction of Paper section on Page 4, first bullet point.) Include not only general land-use plans, but also other relevant planning documents such as:
- 5.7.1. County Recreation Plans.
- 5.7.2. Farmland Preservation Plans.
- 5.7.3. Highway Development Plans.
- 5.7.4. Sewer Service Area Plans.

5.8 **Archeological and Historic Resources** - If after consultation with the Wisconsin Historical Society (WHS) and PSC staff, the work of a qualified archeologist is required, reference the archeologist's report in the application.

- 5.8.1. Provide a list of all historic and archeological sites potentially affected by the proposed project.[4]
- 5.8.2. For each proposed site, list the county, town, range, section and ¼, ¼ section in which construction would occur.
- 5.8.3. For each archeological or historical resource identified, describe how the proposed project might affect the resource and how the project could be modified to reduce or eliminate any potential effect on the resource. Modifications to the proposed project could include site modification, route changes (for connecting facilities – transmission lines and pipelines), and construction practices.

5.9 **ER Review** - Endangered, Threatened, and Special Concern Species and Communities

- 5.9.1. Provide a copy of the DNR approved ER review and all supporting materials (see DNR Permits and Reviews – Page 5.).

- 5.9.2. Include a map showing the location of endangered, threatened and special concern species and/or their habitat, and natural communities identified on the ER Review that occur within a minimum of 1-mile of the proposed project area or as agreed to by the DNR.

  ER Reviews, supporting materials, and maps should be filed as confidential

[4] This information is available from the WHS, Wisconsin Historic Preservation database (WHPD), which may require a fee or subscription. Qualified archeologists generally have access to the WHPD database.

documents (See Page 5).

# 6.0 WATERWAY/WETLAND PERMITTING ACTIVITIES

## 6.1 Waterway Permitting Activities

For each access road, collector circuit, crane path, or other facility directly affecting waterways; identify and number all waterway activities, based on Table 1 (Supplement to DNR Form 3500-53). For each stream or waterbody provide site photos, the width at the top of the bank, and the slope of the banks at the proposed activity location. For each stream affected by activities occurring below the ordinary high water mark, note the water and sediment quality and the potential for either to be contaminated. For each activity, note if the waterway is defined as an Area of Special Natural Resource Interest (ASNRI) under the provisions of Ch. NR 1 Wis. Admin. Code. If a temporary bridge is required for construction, identify the type of structure to be used. Use Table 1 as the format for completing this information request. See Figure 1 for information on River Basin location and abbreviations

## 6.2 Wetlands

For each access road, collector circuit, crane path, or any other facility directly affecting wetlands; identify and number all wetland crossings. Insert this information in Table 1 as discussed above in directional order with the waterways.

6.2.1. Identify all wetlands on a map using data from the Wisconsin Wetland Inventory (WWI) and identify any other wetlands or changes to WWI boundaries based on delineations using all forms and information required by and in accordance with the January 1987 Technical Report Y-87-1 entitled, "Corps of Engineers Wetland Delineation Manual," including relevant guidance documents. Wetland delineation reports should be submitted to the DNR as a hardcopy with the application. Electronic copies of wetland delineation reports (in MS Word format, or similar) may be submitted on a CD.

6.2.2. **Wetland Crossings**

6.2.2.1. Describe the length of each wetland crossing.

6.2.2.2. For each crossing, identify wetland type using the WWI classification, and wetland type as identified by plant community type (floodplain forest, hardwood swamp, coniferous bog, coniferous swamp, open bog, calcareous fen, shrub swamp, alder thicket, shrub-carr, sedge meadow, shallow marsh, deep marsh, wet to wet-mesic prairie, fresh (wet) meadow, shallow open water communities, seasonally flooded basin).

6.2.2.3. Based on discussions with DNR staff during pre-application consultations, document the presence and percent cover of key wetland

invasive species at each wetland crossing.

6.2.3. **Sensitive Wetlands**

Determine if any wetlands affected are considered sensitive including any wetlands in or adjacent to an area of special natural resource interest (NR 103.04, Wis. Adm. Code) including:

- 6.2.3.1. Cold Water Community as defined in § NR 102.04(3)(a), Wis. Adm. Code, including trout streams, their tributaries, and trout lakes
- 6.2.3.2. Lakes Michigan and Superior and the Mississippi River.
- 6.2.3.3. State- or federally-designated Wild and Scenic River.
- 6.2.3.4. State-designated riverway.
- 6.2.3.5. State-designated scenic urban waterway.
- 6.2.3.6. Environmentally sensitive area or environmental corridor identified in an area-wide water quality management plan, special area management plan, special wetland inventory study, or an advanced delineation and identification study.
- 6.2.3.7. Calcareous fen.
- 6.2.3.8. State park, forest, trail or recreation area.
- 6.2.3.9. State and federal fish and wildlife refuges and fish and wildlife management area.
- 6.2.3.10. State- or federally-designated wilderness area.
- 6.2.3.11. State-designated or dedicated natural area (SNA).
- 6.2.3.12. Wild rice water listed in § NR 19.09, Wis. Adm. Code.
- 6.2.3.13. Surface water identified as outstanding or exceptional resource water in ch. NR 102, Wis. Adm. Code.
- 6.2.3.14. Other sensitive wetlands are deep marsh, northern or southern sedge meadow not dominated by reed canary grass, wet or wet-mesic prairie not dominated by reed canary grass, fresh wet meadows not dominated by reed canary grass, coastal marsh, interdunal or ridge and swale complex, wild rice-dominated emergent aquatic, open bog, bog relict, muskeg, floodplain forest, and ephemeral ponds in wooded settings.

6.3 **Mapping Wetland and Waterway Crossings**

For each facility (access road, crane path, collector circuit etc) in or adjacent to wetlands or waterways, provide three (3) maps, as described in Subsections 6..3.1 – 6..3.3, for each location on 11x17 inch paper, each with the same scale.

- 6.3.1. Recent air photo showing only the proposed facility (access road, crane path, collector circuit, substation etc.) crossing or adjacent to wetlands or waterways.
- 6.3.2. Topographic map showing the facility (road, crane path, collector circuit etc.) crossing or adjacent to wetlands or waterways.
- 6.3.3. Recent air photos showing the locations of the following items:
  - 6.3.3.1. Facility crossing or adjacent to wetland or waterway.
  - 6.3.3.2. Waterways.
  - 6.3.3.3. WWI (as a transpicuous layer).
  - 6.3.3.4. Delineated Wetlands (clearly marked).

6.3.3.5. Hydric soils- (as a transpicuous layer) indicated faintly to be used as secondary review, if needed.
6.3.3.6. Proposed temporary bridge locations (labeled to correlate with Table 1).
6.3.3.7. Locations for other Chapter 30 activities such as grading or riprap (labeled to correlate with Table 1).

## 6.4 Waterway/Wetland Construction Methods

### 6.4.1. Waterway Crossings – Construction Methods

6.4.1.1. Describe specific methods to be used for crossings of any streams marked as perennial or intermittent on USGS topographic maps, including location and methods of construction for:
6.4.1.1.1. Access Roads
6.4.1.1.2. Crane Paths.
6.4.1.1.3. Collector Circuits
6.4.1.2. Describe the method of crossing including structure type if applicable.
6.4.1.3. Describe cleaning of machinery to prevent spread of invasive species.
6.4.1.4. Describe the proposed area of land clearance and disturbance at waterway crossings and the types of equipment proposed for the work.
6.4.1.5. In the case of underground construction for collector circuits, describe the proposed method for crossing the stream or river. For boring operations, provide the size, depth and location of boring pits and the estimated amount of excavated materials that will result.
6.4.1.5.1. Describe methods for de-watering of boring pit or structure foundations. Include a discussion of discharge locations and suspended solids standards for discharge water.
6.4.1.5.2. Identify contingency plans for bore refusal and frac-outs if directional boring is proposed. Provide scaled pre and post-project diagrams for all crossings including top view and cross section or side views.

### 6.4.2. Wetland Crossings – Construction Methods

6.4.2.1. Describe specific methods to be used for wetland crossings including location and methods of construction for:
6.4.2.1.1. Access Roads.
6.4.2.1.2. Crane Paths.
6.4.2.1.3. Collector Circuits.
6.4.2.2. Describe cleaning of machinery to prevent spread of invasive species.
6.4.2.3. Describe the proposed area of land clearance and disturbance at wetland crossings and the types of equipment proposed for the work.
6.4.2.4. Describe methods and discharge locations for site de-watering, and locations for stockpile of fill materials.

## 6.5 Erosion Control and Storm Water Management Plan

Describe erosion control and storm water management measures to be utilized, as appropriate. If the project will involve land disturbance in excess of 1 acre, the applicant's request for permits must include coverage under the Construction Site Storm Water Runoff Permit from DNR under Wis. Admin. Code § NR 216. The applicant will be required to submit a Construction Project Consolidated Permit Application (i.e., Notice of Intent or NOI) to the DNR to request permit coverage after developing an Erosion Control and Storm Water Management Plan describing the best management practices that will be used on-site for erosion control and post-construction storm water management. The plan, by design, must meet the applicable non-agricultural performance standards of Chapter NR 151, The DNR-approved erosion and sediment control and post-construction technical standards and NOI Form are available on the DNR Storm Water Program web-site at: http://dnr.wi.gov/org/water/wm/nps/stormwater/constrforms.htm

The following checklist serves as guidance in the completion of an Erosion Control and Storm Water Management Plan necessary to meet the requirements of the Chapter 30 and NR 216 permits, and the non-agricultural performance standards of NR 151.. The Erosion Control and Storm Water Management Plan should contain the following components:

### 6.5.1. Erosion Control Methods and Materials

Describe the types of erosion control methods that will be used during project construction to protect disturbed areas. Include where applicable:

- 6.5.1.1. Soil and slope stabilization.
- 6.5.1.2. Seeding and mulching.
- 6.5.1.3. Matting, tracking pads, silt fences, stockpile protection.
- 6.5.1.4. Dewatering-related erosion and sediment control.
- 6.5.1.5. Channel protection.
- 6.5.1.6. Any other appropriate erosion control measures.
- 6.5.1.7. Details and typical section drawings of all the erosion control methods utilized.

### 6.5.2. Erosion Control Measure Site Plan

Include a site plan view and drawings illustrating: (some typical drawings may be appropriate after consultation with the DNR)

- 6.5.2.1. Construction site boundary.
- 6.5.2.2. The location of all erosion control measures.
- 6.5.2.3. Location of stockpiled soil.
- 6.5.2.4. Vehicle and equipment access sites.
- 6.5.2.5. Areas of disturbance.
- 6.5.2.6. The drainage area configuration.
- 6.5.2.7. Surface water diversion measures.
- 6.5.2.8. Topography.
- 6.5.2.9. Existing floodplains and wetlands.
- 6.5.2.10. Location of trees and unique vegetation.

6.5.3. **Sequence of Erosion Control Measures**
List and give a detailed description of the sequence of erosion control measures that will occur (i.e. placed, relocated, and replaced) during all phases of construction including:
- 6.5.3.1. Clearing and grubbing.
- 6.5.3.2. Material installation.
- 6.5.3.3. Channel construction.
- 6.5.3.4. Revegetation processes.
- 6.5.3.5. Seeding and mulching/matting.

6.5.4. **Off-Site Diversion Methods**
- 6.5.4.1. Identify off-site contributions of water affecting project construction sites.
- 6.5.4.2. Methods of controlling off-site water contributions.
- 6.5.4.3. Site plan indicating:
  - 6.5.4.3.1. Where the off-site water is originating from.
  - 6.5.4.3.2. Locations of diversion measures on-site.

6.5.5. **Provisions for Inspection and Maintenance**
Document the provisions for:
- 6.5.5.1. The regular inspection of all erosion control efforts per the requirements of Wis. Admin. Code § NR 216.
  - 6.5.5.1.1. Identify who will perform the inspections.
  - 6.5.5.1.2. Specify when the inspections will occur.
  - 6.5.5.1.3. Any special circumstances initiating an inspection.
- 6.5.5.2. The regular maintenance of all erosion control efforts.
  - 6.5.5.2.1. Identify who is responsible for the maintenance.
  - 6.5.5.2.2. Specify corrective actions, if site is not maintained according to provisions.

6.5.6. **Post Construction Storm Water Management**
- 6.5.6.1. Develop a storm water management plan per the requirements of § NR 216.47, Wis. Admin. Code
  - 6.5.6.1.1. Where applicable, describe and provide details on the best management practices that will be used to meet the performance standards of s. NR 151.12, Wis. Admin. Code

6.6 **Materials Management Plan**
Describe materials management methodology. Applicants may opt to refer to the company's standard Materials Management Plan to meet most of these requirements, though some form of supplemental information on project-specific elements may be required. The following checklist serves as guidance in the completion of a Materials Management Plan necessary to meet the requirements of the Chapter 30 and NR 216 Permits. The Materials Management Plan should contain information on all of the following components, where applicable.

6.6.1. **Haul Routes**

6.6.1.1. Indicate how and where hauled materials will be routed, including:

6.6.1.1.1. Inbound materials

6.6.1.1.2. Outbound materials

6.6.1.1.3. Clean fill materials

6.6.1.1.4. Contaminated materials

6.6.1.1.5. Others

6.6.1.2. Alternate locations if necessary.

6.6.1.3. Include a haul route diagram indicating haul route locations.

6.6.2. **Stockpile Areas**

6.6.2.1. List and describe:

6.6.2.1.1. Material to be stockpiled.

6.6.2.1.2. Where will material be stockpiled on-site.

6.6.2.1.3. Measures to protect stockpiled areas, if applicable.

6.6.2.2. Provide a plan view diagram indicating stockpile area locations.

6.6.3. **Equipment Staging Areas**

6.6.3.1. Where equipment will be stored on-site

6.6.3.2. Include a plan view of equipment storage areas on-site

6.6.3.3. Spill control and kits on-site

6.6.4. **Field Screening Protocol for Contaminant Testing**

If contaminated materials (i.e. soil) are encountered on-site, indicate:

6.6.4.1. How will the materials be screened.

6.6.4.2. Where will the materials be tested.

6.6.4.3. What protocols will be followed.

6.6.4.4. How work will be impacted.

6.6.5. **Estimated Types, Concentrations and Volumes of Contaminated Materials**

If contaminated materials are known to exist on-site, list and describe:

6.6.5.1. The type of contaminant.

6.6.5.2. Where the contaminant is located on-site.

6.6.5.3. Media in which the contaminant is located within (i.e. soil, water, etc.).

6.6.5.4. The estimated concentration of the contaminant.

6.6.5.5. The estimated volumes of the contaminant.

6.6.6. **Methods for Dewatering of Excavated Materials**

If free water is found present in excavated materials, list and describe:

6.6.6.1. What methods will be used to correct the situation (i.e. how will water be removed).

6.6.6.2. Where these methods will take place on-site.

6.6.7. **Estimated Volumes of In-channel and Upland Excavated Materials**

6.6.7.1. Volume of Dredged Materials (cubic yards)

6.6.7.1.1. Excavation from bed and bank of waterway.

6.6.7.1.2. Excavation from wetland.

6.6.7.2. Volume of Upland Materials (cubic yards)

6.6.7.2.1. Excavation from areas outside of waterway and wetlands.

6.6.8. **Estimated Volumes and Location of Re-used In-Channel and Upland Excavated Materials**

6.6.8.1. Reuse of Dredged Materials

6.6.8.1.1. Provide the total volume of reused dredged materials in cubic yards.

6.6.8.1.2. Provide the location either on project plans or provide off-site address, property owner, and site map drawn to scale.

6.6.8.1.3. Provide the purpose of the dredged material usage (i.e. grading, trench backfill, etc.).

6.6.8.2. Reuse of Upland Materials

6.6.8.2.1. Provide the total volume of reused upland materials in cubic yards.

6.6.8.2.2. Provide the location either on project plans or provide off-site address, property owner, and site map drawn to scale.

6.6.8.2.3. Provide the purpose of the upland material usage.

6.6.9. **Off-site Disposal Plans for Contaminated Materials and Non-contaminated Materials**

6.6.9.1. Disposal of Dredged Materials

6.6.9.1.1. Total volume of disposed materials (cubic yards).

6.6.9.1.2. Disposal site location.

6.6.9.1.3. Type of disposal Site (i.e. confined disposal facility, landfill, etc.).

6.6.9.1.4. Disposal site name and address.

6.6.9.2. Disposal of Upland Materials

6.6.9.2.1. Total volume of disposed materials (cubic yards).

6.6.9.2.2. Disposal site location.

6.6.9.2.3. Type of disposal site (i.e. confined disposal facility, landfill, etc.).

6.6.9.2.4. Disposal site name and address.

## 6.7 Dewatering Plan

Provide details for pit/trench dewatering for collectors and for dewatering excavation for structure foundations. The following checklist serves as guidance in the completion of the Dewatering Plan necessary to meet the requirements of the Chapter 30 and NR 216 permits. Consider the following items in the Dewatering Plan.

6.7.1. **Dewatering/Diversion of Flow** - Provide detailed plans for the dewatering/diversion of flow/standing water removal consistent with DNR Technical Standard 1061 for dewatering. Include typical dewatering/diversion measure plans with:

6.7.1.1. Specifications for the dewatering/diversion of flow/standing water removal.

6.7.1.2. Methods employed to dewater/divert flow/treat water, if applicable.
6.7.1.3. Details of how methods will be employed.
6.7.1.4. Details of where methods will be employed.
6.7.1.5. Capacities and capabilities.

6.7.2. **Downstream Impact Minimization** - List and describe methods of minimizing downstream impacts during high flow conditions.

6.7.3. **Analysis of Possible System Overload Scenarios** - Provide the following information if the stream is overloaded:
6.7.3.1. Estimated volume of system overload (i.e. what rainfall overloads the system).
6.7.3.2. Estimated frequency of system overload (i.e. how often will the system be overloaded).
6.7.3.3. Actions taken if stream is to be overloaded.

6.7.4. **Impacts of System Overload on Construction Activities and Water Quality** - List and describe:
6.7.4.1. Anticipated number of lost work days.
6.7.4.2. Possible water quality impacts.
6.7.4.3. Methods of deterring adverse changes in water quality.

6.7.5. **Water Discharge Locations** - Provide the following:
6.7.5.1. Where water will be discharged.
6.7.5.2. How water will be discharged.
6.7.5.3. A site map indicating discharge locations.

6.7.6. **Details of a Back-up System** - If a back-up system becomes necessary indicate:
6.7.6.1. What type of back-up system will be used (include backup and standby equipment/power supply).
6.7.6.2. Conditions when the system will be needed.
6.7.6.3. How the back-up system will operate.
6.7.6.4. Where the back-up system will be located.

6.7.7. **High Flow Plan** - When flooding is likely to occur, list and describe the following:
6.7.7.1. How the water will be removed from the site.
6.7.7.2. Methods of water removal (e.g. pumping).
6.7.7.3. Methods of minimizing water contamination (e.g. treatment methods).
6.7.7.4. Protocol for evacuating materials from the flood conveyance channel including:
6.7.7.4.1. List of materials that would require evacuation during high flow periods.
6.7.7.4.2. How will the materials be evacuated from the flood conveyance channel.
6.7.7.4.3. Where will the materials be temporarily placed on-site.

6.7.7.4.4. How will the materials be transported.
6.7.7.4.5. Methods of protecting the materials.
6.7.7.4.6. Include a site map indicating the location of temporary placement.
6.7.7.5. Protocol for evacuating machinery from the flood conveyance channel including
6.7.7.5.1. Type of machinery that would require evacuation during high flow periods.
6.7.7.5.2. How will the machinery be evacuated from the flood conveyance channel.
6.7.7.5.3. Where will the machinery be temporarily placed on-site.
6.7.7.5.4. Include site map indicating possible locations of temporary machinery placement.

6.7.8. **Contaminated Water** - List and describe what measures will be taken if contaminated water is found on site including:
6.7.8.1. Methods of isolating the contaminated water.
6.7.8.2. Methods of analyzing the contaminated water.
6.7.8.3. Where the water will be tested.
6.7.8.4. Methods of removing contaminated water from site.
6.7.8.5. How the water will be treated and disposed.

## 7.0 AGRICULTURAL IMPACTS

7.1 Provide information on any ongoing farming activities on the proposed turbine sites where construction activities will occur.
7.1.1. Identify current cropping patterns.
7.1.2. Identify the location of drainage tile or irrigation systems on the proposed sites.
7.1.3. Provide information on any farmland preservation agreements for the proposed sites.
7.1.4. Provide the location of any Conservation Reserve Program (CRP) lands inside the project boundary and out to a distance of two miles surrounding the project area boundary. Also provide a GIS shapefile showing the locations of these properties.

## 8.0 AIRPORTS AND LANDING STRIPS

8.1 <u>Public Airports</u>
8.1.1. Identify all public airports inside the proposed project boundary.
8.1.2. Identify all public airports within 10 miles of the project boundary and list the distance to the nearest proposed turbine from the end of the runway.
8.1.2.1. Identify separately all public airports within:
8.1.2.1.1. 10,000 feet of the nearest turbine.

8.1.2.1.2. 20,000 feet of the nearest turbine.

8.1.3. Provide a shapefile showing the location and runway/s orientation for all public airports inside and within 10 miles of the proposed project boundary.

**8.2 Private Airports/Grass Landing Strips**

8.2.1. Identify all private airports/landing strips within the proposed project boundary.

8.2.2. Identify all private airports/landing strips within two miles of the project boundary.

8.2.3. Provide the distance from each private airport/landing strip (ends of runway) to the nearest turbines.

8.2.4. Provide a GIS shapefile showing the location and runway/s orientation for all private airports/landing strips inside and within two mile of the proposed project boundary.

**8.3 Commercial Aviation**

Identify all commercial air services operating within the project boundaries (i.e. aerial applications for agricultural purposes, state programs for control of forest diseases and pests (i.e. Gypsy moth control).

**8.4 Federal Aviation Administration – FAA**

8.4.1. Provide copies of all correspondence with the FAA.

8.4.2. Provide copies of all FAA determinations of hazard/no hazard.

8.4.3. Provide a summary of the status of all FAA determinations with details on how any unresolved problems with aircraft safety are being addressed.

8.4.4. Provide a detailed description of any obstruction marking and lighting that will be required by the FAA.

**8.5 Wisconsin Department of Transportation – Bureau of Aeronautics – High Structure Permits**

8.5.1. Provide a list of all turbine sites requiring DOT high structure permits.

8.5.2. List the permit status and conditions for each turbine site requiring high structure permits.

## 9.0 EMF

9.1 Provide an estimate of the magnetic profile created by collector circuits. Estimates should be made using the following criteria:

9.1.1. Show a separate profile for the typical buried collector circuits. If some trenches would support more than one buried circuit, provide a separate estimate for each bundled configuration.

9.1.2. Show a separate profile for any overhead collector circuits.

9.1.3. Assume all turbines are working and project is producing at maximum capacity.

9.1.4. Show EMF profile at 0ft., 25ft., 50ft. and 100ft. from the centerline of each circuit type modeled.

# 10.0 LINE-OF-SIGHT AND BROADCAST COMMUNICATIONS

## 10.1 Microwave Communications:

10.1.1. Provide a line of site analysis showing that turbines, installed at all of the proposed (and alternate) wind turbine sites, will not interfere with microwave communications.

10.1.2. Identify radio towers on a map and show the results of the line of site analysis. Include towers within a 50 mile radius of the project area.

## 10.2 Television interference:

10.2.1. Provide an analysis of the potential for television interference within and adjacent to (within 1 mile) of the project boundary.

10.2.2. Discuss how television interference will be eliminated or mitigated for the project.

## 10.3 Other Communications Systems:

10.3.1. Provide an analysis or supportive data to predict whether or not any aspect of the proposed project will interfere with:

10.3.1.1. Cell phone communications

10.3.1.2. Radio broadcasts

10.3.1.3. Internet (WiFi)

# 11.0 NOISE (Pre and Post construction noise studies are required for all turbine projects. Noise measurement studies must be approved by PSC staff.)

**11.1** Provide existing (ambient) noise measurements and projected noise impacts from the project using the PSC's Noise Measurement Protocol. The PSC Noise Measurement Protocol can be found on the PSC website at:
http://psc.wi.gov/utilityinfo/electric/construction/PowerPlantRequirements.htm

**11.2** Provide copies of any local noise ordinance

**11.3** Provide turbine manufacturer's description of noise attenuating methods and materials used in the construction of proposed turbines.

# 12.0 SHADOW FLICKER

**12.1** Provide an analysis showing the potential for shadow flicker in the area of a typical wind turbine site. Include contours for 100, 50, and 25 hours per year of potential shadow flicker. (The analysis should list the basic assumptions used and the methodology/software used for creating the shadow flicker analysis.)

**12.2** Describe mitigation available to reduce shadow flicker

**12.3** In the event of an inquiry or complaint by a resident in or near the project area, describe what modeling or other analysis would be used to evaluate the possibility of shadow flicker at the residence. If the likelihood were high that the resident would experience shadow flicker, describe what measures would be used to reduce the impacts on the resident.

## 13.0 LOCAL GOVERNMENT IMPACTS

**13.1** **Joint Development and other agreements**

13.1.1. Provide a copy of all agreements with local communities (e.g. Joint Development Agreements (JDA))

13.1.2. Provide a summary of major agreement items agreed upon in any JDA or other type of agreement including:

13.1.2.1. All services to be provided by the city, town, and/or county during construction and when the plant is in operation (e.g. water, fire, EMS, police, security measures, and traffic control).

13.1.2.2. Specifically, address community and facility readiness for incidents such as fires, boiler implosions/explosions, coal dust explosions and critical piping failures.

**13.2** **Infrastructure and Service Improvements**

13.2.1. Identify any local government infrastructure and facility improvements required (e.g. sewer, water lines, railroad, police, and fire).

13.2.2. Describe the effects of the proposed project on city, village, town and/or county budgets for these items.

13.2.3. For each site provide an estimate of any revenue to the local community (i.e. city, village, town, county) resulting from the project in terms of taxes, shared revenue, or payments in lieu of taxes.

13.2.4. Describe any other benefits to the community (e.g. employment, reduced production costs, goodwill gestures).

## 14.0 LANDOWNERS AFFECTED AND PUBLIC OUTREACH

**14.1** Provide a separate alphabetized list (names and addresses) in Microsoft excel for each of the groups described below:

14.1.1. Property owners and residents within the project boundary and a separate list of property owners and residents from the project boundary out to distance of 0.5 miles. It is strongly recommended that applicants consult with PSC staff in order to ensure that the format and coverage are appropriate considering the project type, surrounding land use, etc.

14.1.2. Public property, such as schools or other government land.

14.1.3. Clerks of cities, villages, townships, counties, and Regional Planning Commissions (RPC) directly affected.

**14.2** List and describe all attempts made to communicate with and provide information to the public. Describe efforts to date and any planned public information activities. Provide copies of public outreach mailings.

**14.3** Describe plans and schedules for maintaining communication with the public (e.g. public advisory board, open houses, suggestion boxes, and newsletters).

**14.4** Identify all local media that have been informed about the project. The list of local media should include at least one print and one broadcast.

SUPREME COURT OF WISCONSIN

Appeal No. 2010AP002762

WISCONSIN INDUSTRIAL ENERGY GROUP, INC.
and CITIZENS UTILITY BOARD,
Petitioners-Appellants,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
Respondent-Respondent,

WISCONSIN ELECTRIC POWER COMPANY, and
WISCONSIN POWER AND LIGHT COMPANY,
Intervenors-Respondents,
WISCONSIN PUBLIC SERVICE CORPORATION
Intervenor.

# BRIEF OF INTERVENOR-RESPONDENT WISCONSIN POWER AND LIGHT COMPANY

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Dated: February 10, 2012

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## STATEMENT OF THE ISSUE

Does Wis. Stat. § 196.491(3) apply to the construction of large electric generating facilities outside of the State of Wisconsin?

**Circuit Court: No.**

**Court of Appeals: Deferred judgment in favor of certification to this Court.**

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Wisconsin Power and Light Company submits that oral arguments will provide added clarity to the issue in this case, and understands that the Court will set a hearing date and time.

Wisconsin Power and Light Company requests that the Court's decision be published as there is little, if any, case history on the distinction between Wis. Stat. §§ 196.49 and 196.491(3) (2009-2010) relative to out-of-state projects, and the issue is likely to recur.

## STATEMENT OF THE CASE

### I. Procedural History.

This case stems from a Petition for Judicial Review filed by the Citizens Utility Board ("CUB") and Wisconsin Industrial Energy Group ("WIEG") of the Public Service Commission of Wisconsin's ( "Commission") review and approval under Wis. Stat. § 196.49 of an application by Wisconsin Power and Light Company ("WPL") to construct the Bent Tree Wind Project ("Bent Tree"), a 200 mega-Watt ("MW") electric generating facility, in Freeborn County, Minnesota. (R: 1.) The Circuit Court for Dane County issued a Decision and Order on the Petition for Review, on September 22, 2010, in favor of the Commission. (R: 35.) CUB and WIEG appealed the Circuit Court's decision to the Court of Appeals. (R: 38.) On November 23, 2011, the Court of Appeals deferred issuing a judgment and instead recommended certification of the case to the Supreme Court of Wisconsin. This Court granted certification on December 14, 2011.

## II. Factual Background

WPL filed an application with the Commission in June 2008 requesting authority to construct Bent Tree, a nominal 200 MW wind project, in Freeborn County, Minnesota ("Bent Tree Application"). (R: 9; PSC R: 1 at 1.) WPL filed the application "pursuant to the requirements of Wis. Stat. §§ 196.49, 196.491, and 196.52 and Wis. Admin. Code §§ PSC 111.51, 111.53, 112.05, 112.06, 4.10, and any other rule or law deemed applicable by the [Commission]." (R: 9; PSC R: 1 at 1.)

The Commission requested comments regarding whether application for out-of-state projects, such as WPL's Bent Tree Application, should be reviewed under the Certificate of Authority Statute, Wis. Stat. § 196.49 (2009-2010) ("CA Statute"), or under the Certificate of Public Convenience and Necessity Statute, Wis. Stat. § 196.491(3) ("CPCN Statute"). (R: 9, PSC R: 2.) Following a review of comments, the Commission concluded, on a two to one majority, that the CPCN Statute only applied to the

construction of projects within the State of Wisconsin, and determined that the Bent Tree Application should be reviewed under the CA Statute. (R: 9, PSC R: 3.) A hearing was held on April 29, 2009; present at the hearing was WPL, Commission Staff, and CUB. (R: 9, PSC R: 5; Hearing Vol. 3 at i.) On July 30, 2009, the Commission unanimously approved the construction of Bent Tree. (R: 9, PSC R: 4.) The Commission did not, in that order, authorize cost recovery from WPL's customers through rates. (See *id.*)

WPL subsequently filed for approval to increase its electric rates, in part, to recover the costs associated with Bent Tree. , *Application of Wisconsin Power and Light for Authority to Adjust Electric and Natural Gas Rates*, No. 6680-UR-117, *Final Decision,* p.1 (Wis. PSC Dec. 3, 2010) (PSC REF#: 142283). After a contested case proceeding, the Commission approved, with the exception of $3,235,000, recovery of the costs associated with the construction of Bent Tree. *Id* at 10-14. Bent Tree has been constructed. *See id.*

## III. Legal Background

This case involves two Wisconsin statutes: the CA Statute, Wis. Stat. § 196.49, which was enacted in 1931, and the CPCN Statute, Wis. Stat. § 196.491(3), which was enacted in 1975.

The CA Statute requires public utilities to receive authorization from the Commission prior to constructing new plant or equipment, and allows the Commission to reject such applications when certain public interest criteria are not met. Wis. Stat. §§ 196.49(2) & (3). The CA Statute provides in relevant part that:

> (2) ***No public utility*** may begin the construction, installation or operation of any new plant, equipment, property or facility … unless the public utility has complied with any applicable rule or order of the commission. …
> (3)(a) In this subsection, "project" means construction of any new plant, equipment, property or facility, or extension, improvement or addition to its existing plant, equipment, property, apparatus or facilities. …
> (b) The commission may require by rule or special order under par. (a) that no project may proceed until the commission has certified that public convenience and necessity require the project. The commission may refuse to certify a project if it appears that the completion of the project will 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 ….

Wis. Stat. § 196.49 (emphasis added).

Unlike the CA Statute, the CPCN Statute applies to persons, and not just public utilities. The CPCN Statute provides, in part, that: "***no person*** may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity under this subsection." Wis. Stat. § 196.491(3) (emphasis added). A facility is defined as "a large electric generating facility or a high-voltage transmission line." Wis. Stat. § 196.491(1)(e). A large electric generating facility is, in turn, defined as "electric generating equipment and associated facilities designed for nominal operation at a capacity of 100 megawatts or more." Wis. Stat. § 196.491(1)(g).

## ARGUMENT

### I. Introduction.

When presented with the issue of whether the CPCN Statute applied to the construction by a public utility of a large electric generating facility outside of Wisconsin, the

Commission concluded that the CPCN Statute did not apply, but that the CA Statute did. The Commission's conclusion is correct.

Interpreting the CPCN Statute to apply to out-of-state projects is wrought with problems, including: issues of extraterritoriality; absurd and unreasonable results stemming from the requirements of the CPCN Statute; and violation of the dormant Commerce Clause. In contrast, interpreting the CPCN Statute to apply solely to projects is consistent with the state's powers, does not cause absurd or unreasonable results, and comports with tenets of statutory interpretation. Additionally, the CA Statute is tailored to govern activities by Wisconsin public utilities, while the CPCN Statute broadly applies to persons; this distinction is significant when interpreting which of the two statutes applies to projects outside of the state.

## II. When Read in Context, the CPCN Statute is Properly Interpreted to Apply Solely to the Construction of Facilities within the State.

"[S]tatutory interpretation begins with the language of the statute, and if the meaning there is plain, the inquiry ordinarily ends." *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 12, 293 Wis.2d 123, 717 N.W.2d 258 (2006) (emphasis in original). The language of the statute, though, must be read in context:

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

*Kalal v. Circuit Court for Dane Co.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (2004). When the CA Statute and CPCN Statutes are read in context, it is clear and unambiguous as to which statute applies to the construction of large electric generating facilities outside of Wisconsin: the CA Statute applies to the construction by a Wisconsin public utility of out-of-state projects, and the CPCN Statute only

applies to the construction of in-state projects (by a public utility or otherwise).

### A. **The CPCN Statute is Properly Read to Have Exclusively Domestic Application.**

When interpreting state statutes, it is important to consider the limits of the state's powers. Wisconsin's sovereignty extends to its borders, *see* Wis. Stat. § 1.01 ("The sovereignty and jurisdiction of this state extend to all places within the boundaries declared in article II of the constitution…"), and is limited by the sovereignty of sister states. As the U.S. Supreme Court recognized, "The sovereignty of each State, in turn, implie[s] a limitation on the sovereignty of all of its sister States-a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293, 100 S.Ct. 559, 565 (1980).

This limitation helps to define the reach of a state's legislative authority.

> The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction

> of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."

*Edgar v. MITE Corp.*, 457 U.S. 624, 643, 102 S.Ct. 2629, 2641 (1982) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197, 97 S.Ct. 2569, 2576, 53 L.Ed.2d 683 (1977)). Simply stated: the extraterritoriality principle clarifies that no state may legislate but for reference to its own jurisdiction. *Dean Foods Company v. Brancel*, 187 F.3d 609, 614-15 (7th Cir. 1999) (*quoting Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881)).

A general tenet of federal statutory interpretation is that a federal law applies only within the United States, unless Congress makes the statute explicitly broader. Given that "States lack any comparable power to reach outside their borders, … the presumption of exclusive domestic application [is] even stronger." *K-S Pharmacies, Inc. v. American Home Products Corp.*, 962 F.2d 728, 730 (7th Cir. 1992). The U.S. Court of Appeals for the Seventh Circuit has directly applied this presumption when interpreting Wisconsin statutes. *See*

*e.g. K-S Pharmacies, Inc.*, 962 F.2d at 730; *Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373, 378-79 (1998); *see also Crave v. Tracy*, 955 F.Supp. 1047, 1062-62 (E.D.Wis. 1996). In *K-S Pharmacies, Inc.*, the Seventh Circuit reviewed a Wisconsin statute (Wis. Stat. §101.31(2)), which prohibited price discrimination in wholesale transactions of prescription drugs and required a seller to offer each purchaser the same deal as the seller does to its "most favored purchaser." That court analyzed whether the statute would extend to a "most favored purchaser" outside of Wisconsin and concluded that it would not. The court stated, "It is all but certain that the Supreme Court of Wisconsin, if given the chance, would interpret 'most favored purchaser' to mean 'most favored purchaser in Wisconsin.'" *K-S Pharmacies*, 962 F.2d at 730-31.

Interpreting the CPCN Statute to apply to projects outside of Wisconsin would violate the extraterritoriality principle and exceed the state's constitutional limits. Such a result must be avoided where a reasonable interpretation

exists that is consistent with the limits of the state's authority. *Am. Fam. Ins. Co. v. Dep't of Revenue*, 222 Wis. 2d 650, ¶ 44, 586 N.W.2d 872 (1998) ("A court should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional."); *see also Consolidated Freightways Corp. of Delaware v. Wisconsin Dept. of Revenue*, 164 Wis.2d 764, 477 N.W.2d 44 (1991) (discussing the constitutional jurisdictional limits on state tax statute that had potential application outside of Wisconsin). Such an interpretation exists. Interpreting the CPCN Statute in light of the presumption of exclusive domestic application of state statutes avoids extraterritoriality issues and is consistent with the language of the statute. Consequently, the reasonable interpretation of the CPCN Statute is that it applies to the construction of large electric generating facilities within the State of Wisconsin.

Contrary to CUB and WIEG's contention, this interpretation does not improperly read the words "in this

state" into the CPCN Statute. (*See* CUB & WIEG Br. at 31-33.) Rather, it is simply an appropriate application of a tenet of statutory interpretation—state statutes are presumed to apply exclusively within the jurisdiction of the state.

### B. **Interpreting the CPCN Statute to Apply to Out-of-State Projects Would Result in an Impermissibly Broad Application of the Statute.**

CUB and WIEG focus narrowly on the 100 MW threshold contained in the CPCN Statute. (CUB & WIEG Br. at 25.) However, it is insufficient to end an inquiry into these statutes at whether the proposed facility is greater than 100 MW; rather, one must read the whole of the statutes. *Landis v. Physicians Ins. Co. of Wis., Inc.*, 2001 WI 86, ¶ 16, 245 Wis.2d 1, 628 N.W.2d 893 (2001) (quoting *Alberte v. Anew Health Care Serv.*, 2000 WI 7, ¶ 10, 232 Wis.2d 587, 605 N.W.2d 515) (Noting that it is not sufficient to read isolated parts or portions of a statute.). A significant component of the CPCN Statute is to whom the statute applies: videlicet, persons.

So, if the CPCN Statute, which regulates the activities of persons, is interpreted to apply to projects outside of Wisconsin, whom does the statute govern? If a Wisconsin registered corporation that is not a public utility chooses to build a wind farm in Minnesota would the CPCN Statute apply? The answer is yes. Strictly applied, this interpretation would even impose the CPCN Statute on a company in another state (e.g. Illinois) proposing to construct a new large electric generating facility within that state. Not only is this absurd, but Wisconsin has no legitimate interest to justify the imposition of such a regulatory requirement on out-of-state projects.

CUB and WIEG ostensibly agree. In their reply brief submitted to the Court of Appeals, they argued that,

> [I]t is absurd to conclude … that because the CPCN statute uses the term "person" the Commission would or could reach a Texas corporation wishing to build a facility in Utah. … Applying [this] reasoning … to Wisconsin law regulating chiropractors, for instance, would require any person, wherever located, who wishes to work as a chiropractor to first receive a license from the State of Wisconsin. See, e.g., Wis. Stat. § 446.02(1) ('no person may engage in the practice of chiropractic or attempt to do so or hold himself out as authorized to do so' unless such

> person is licensed by the Wisconsin Chiropractic Examining Board).

(CUB & WIEG Reply Br. before Ct. of Appeals at 17.) Wisconsin's licensing requirement for a chiropractor (Wis. Stat. § 446.02(1)) does not apply outside of the state's boundaries if, and only if, you conclude that the statute only applies to persons practicing chiropractic in Wisconsin. Such a conclusion is appropriate, because applying such a licensing requirement on a person practicing outside of Wisconsin is beyond the state's power. The chiropractor statute, as with the CPCN Statute, applies to persons, but not all persons, only those who are performing the regulated activity—be it adjusting spines or constructing 200 MW wind farms—within the state of Wisconsin.

Instead of discussing the legislature's use of "person" in the CPCN Statute and not "public utility," CUB and WIEG attempt to distinguish the CPCN Statute by simply noting that the state has a legitimate interest in regulating public utilities. (CUB & WIEG Reply Br. before Ct. of Appeals at 17.) The state does have an interest in regulating public utilities.

CUB and WIEG's argument, though, avoids the issue: the CPCN Statute applies to persons, and not just public utilities. In fact, with very limited exception, CUB and WIEG discuss the CPCN Statute throughout their brief without reference to the term "person." (*See* CUB & WIEG Br. at 11, 24 & 26.) Rather, CUB and WIEG discuss the statute as though it solely applies to public utilities. (*See e.g.* CUB & WIEG Br. at 27-29.)

Moreover, the terms "person" and "public utility" are not synonymous. *Compare* Wis. Stat. § 196.01(5)(a) (defining "public utility") *with* Wis. Stat. § 990.01(26) (defining "person"). If the legislature intended the CPCN Statute to simply apply to public utilities, it would have used the term "public utility" in lieu of "person," just as it did in the CA Statute. *Compare* Wis. Stat. § 196.49 *with* Wis. Stat. § 196.491(3). It did not. Likewise, if the legislature intended the CPCN Statute to apply to all persons seeking to construct a large electric generating facility in Wisconsin and to public

utilities regardless of location, it could have made that distinction. It did not.

### C. Interpreting the CPCN Statute to Apply Outside of the State would Cause Absurd, Unreasonable, and Unconstitutional Results.

Another tenet of statutory interpretation lends clarity to the exclusively domestic application of the CPCN Statute: "Statutes must be interpreted reasonably, to avoid absurd or unreasonable results." *State v. Jensen*, 2010 WI 38, ¶ 14, 782 N.W.2d 415 (2010) (citing *Kalal*, 2004 WI 58, ¶ 46). CUB and WIEG's interpretation of the CPCN Statute—i.e. that it applies to projects outside of Wisconsin—would not avoid, but rather cause absurd, unreasonable, and unconstitutional results.

A primary issue with CUB and WIEG's interpretation of the CPCN Statute is that, when applied to an out-of-state project, it would require positive actions by Wisconsin agencies outside of the state's boundaries. For example, the CPCN Statute mandates that the Commission review projects for local siting impacts. Specifically, the Commission must

determine whether the proposed facility (a) is in the public interest given, among others, individual hardships, economic, safety and reliability factors; (b) will have undue adverse impacts on "environmental values such as … ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use;" and (c) will unreasonably interfere "with the orderly land use and development plans for the area involved." Wis. Stat. §§ 196.491(3)(d)3., 4. & 6. Having a Wisconsin agency review and comment on the local siting effects of a facility in another state is unreasonable. Not only would such a review be outside of the agency's jurisdiction; the Wisconsin agency would not have the local expertise and authority to provide a review of the impact of the out-of-state project site. Such review and comment is appropriately the role of the host state's regulatory agencies. As the Commission succinctly stated, "[i]f the Commission were to address local siting impacts of an out-of-state project by applying these portions of the CPCN law, it would be attempting to assert jurisdiction

over matters within the regulatory province of the host state." (R: 9, PSC R: 4 at 5.)

Other provisions would similarly require an imposition on the host state by Wisconsin, leading to absurd and unreasonable results. Wis. Stat. § 196.491(3)(a)3 requires the person proposing a new facility to file an engineering plan with the Wisconsin Department of Natural Resources ("WDNR"), including a discussion of "the anticipated effects of the facility" on natural resources. Additionally, the WDNR is required to identify each "[WDNR] permit and approval which … appears to be required for the construction or operation of the facility," and the person must accordingly file the appropriate applications for those WDNR permits. *Id.* The WDNR has no jurisdiction over out-of-state projects; nonetheless, if the CPCN Statute is interpreted to apply to out-of-state projects, the person proposing the project and the WDNR would be required to undertake specified actions related to WDNR permits and approvals. *See* Wis. Stat. § 1.01.

Wis. Stat. § 196.491(3)(b) requires that the Commission hold a public hearing in the "area affected." In the context of a project proposed for construction in Minnesota, this would necessitate that a Wisconsin agency (specifically, the Commission) conduct a public hearing in its neighboring state, outside of Wisconsin's territorial jurisdiction.[1]

The application of Wis. Stat. § 196.491(3)(i) to an out-of-state project would have the most egregious result. That provision enables projects for which the Commission has granted a CPCN to overcome local ordinances which would otherwise preclude or inhibit the installation or utilization of a project. *Responsible Use of Rural and Agr. Land (RURAL) v. Public Service Comm'n of Wis.*, 2000 WI 129 ¶ 65, 239 Wis.2d 660, 619 N.W.2d 888 ("The purpose of [Wis. Stat. § 196.491(3)(i)] is clear on its face. Local ordinances, such as zoning ordinances, cannot impede what has been determined to be of public convenience and necessity.") Applied to a

[1] The Commission is also required to send copies of CPCN applications to the clerk of each municipality and town that a proposed facility would be located and to the main county library. Wis. Stat. § 196.491(3)(a)1.

project in Minnesota, this provision would enable a person who has received a CPCN from the Commission to construct and operate the facility even if an ordinance of a Minnesota locality would otherwise preclude or inhibit such construction or operation. The application of this provision outside of the State of Wisconsin would clearly be beyond the State's powers and would violate the sovereignty of the host state. *See* Wis. Stat. § 1.01; *see also Edgar*, 457 U.S. at 643, 102 S.Ct. at 2641 (1982).

While interpreting the CPCN Statute to projects outside of Wisconsin, as CUB and WIEG do, would cause absurd, unreasonable, and unconstitutional results, interpreting the CPCN Statute to solely apply to projects within the state, as the Commission did, avoids such infirmities. Consequently, the tenets of statutory interpretation require that CUB and WIEG's interpretation give way to the Commission's reasonable interpretation. *See Jensen*, 2010 WI 38, ¶ 14 (citing *Kalal*, 2004 WI 58, ¶ 46) ("Statutes must be interpreted reasonably, to avoid absurd or unreasonable results."); *Am.*

*Fam. Ins. Co. v. Dep't of Revenue*, 222 Wis. 2d 650, ¶ 44, 586 N.W.2d 872 (1998) ("A court should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional.").

### D. Interpreting the CPCN Statute to Apply to Out-of-State Projects Would Result in a Violation of the Dormant Commerce Clause.

The application of the CPCN Statute to out-of-state construction projects would also run afoul of the dormant Commerce Clause. The Commerce Clause, Article, I, Section 8, clause 3 of the United States Constitution, grants Congress authority "[t]o regulate commerce … among the several states…." The dormant Commerce Clause, which is the negative implication of the Commerce Clause, restricts states from benefiting "in-state economic interests by burdening out-of-state competitors." *Northwest Airlines, Inc. v. Wisconsin Dept. of Revenue*, 2006 WI 88, ¶ 27, 293 Wis. 2d 209, 717 N.W.2d 280, (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996)). Where a state statute even-handedly

regulates to effectuate a local public interest and the effect on interstate commerce is only incidental, a court will uphold the statute unless the burden imposed on interstate commerce is excessive in relation to the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The CPCN Statute requires the Commission to consider various local siting impacts, including the effect on land and water, aesthetics, historic sites, and geological formations. Wis. Stat. §§ 196.491(3)(d)3 & 4. If the CPCN Statute is applied to projects to be constructed outside of Wisconsin, these local siting considerations would burden out-of-state projects with little or no benefit to the in-state interests, violating the dormant Commerce Clause. *See Alliant Energy Corp. v. Bie*, 330 F.3d 904, 914 (7th Cir. 2003) (The *Pike* balancing test is "fairly effortless" where "no legitimate local interest has been presented to justify the burden … on interstate commerce."); *see also Morley-Murphy Co.*, 142 F.3d at 379 (7th Cir. 1998) ("State Courts are no more in the habit of construing state legislation in a way that would violate constitutional

limitations than federal courts, and they are well aware that the Supreme Court has held that certain assertions of extraterritorial jurisdiction violate the dormant Commerce Clause.")

### E. Legislative History Confirms that the CPCN Statute Applies Solely to Projects within the State.

While the CPCN Statute clearly applies solely to intrastate projects, it is appropriate to look to the legislative history to confirm that plain meaning. *Kalal*, 2004 WI 58 ¶ 51 (recognizing that a court may review legislative history to confirm a plain-meaning of a statute). This Court has done just that when reviewing a provision of the CPCN Statute. *RURAL*, 2000 WI 129 ¶ 66 (legislative history confirmed the plain meaning of Wis. Stat. § 196.491(3)(i) – that it would "abrogate those local zoning ordinances that would impede the construction of a facility").

Additionally, when a statute is ambiguous, courts will turn to external sources, like legislative history, to assist in interpreting the meaning of the statute. *Kalal*, 2004 WI 58,

¶ 48. Therefore, even if the Court does not conclude that the CPCN Statute is plainly limited to the construction of large electric generating facilities within Wisconsin, the CPCN Statute is then, at best, ambiguous, and it is appropriate to turn to legislative history. *See Kalal*, 2004 WI 58, ¶ 47 ("[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses.")

The Legislative Reference Bureau's ("LRB") analysis of the original CPCN act (1975 Assembly Bill 463, enacted as Chapter 68, Laws of 1975) confirms that the CPCN Statute applies exclusively within the state. That analysis states:

> This bill establishes a method whereby the development of major electric generating and transmission facilities ***in this state*** is subject to the scrutiny by the public and all levels of government and to the approval by the public service commission (PSC) and the department of natural resources (DNR).

(R: 27, Ex. A at 1 (emphasis added).) This is a clear and unequivocal statement, which evidences that the legislative intent was for the CPCN Statute to apply solely to projects "in this state." *See Dairyland Greyhound Park v. Doyle*, 2006 WI

107, ¶ 32, 295 Wis.2d 1, 719 N.W.2d 408 (citing *Schilling v. Wis. Crime Victims Rights Bd.*, 2005 WI 17, ¶ 25 n. 9, 278 Wis. 2d 216, 692 N.W.2d 623) ("Because the LRB's analysis of a bill is printed with and displayed on the bill when it is introduced in the legislature, the LRB's analysis is indicative of legislative intent.") As the circuit court stated, "Not only is the 'in this state' language an expression of legislative intent, it complements the intrastate nature of the § 196.491(3) elements." (R: 35 at 6.)

CUB and WIEG advocate ignoring the phrase "in this state" when reading the legislative history by presuming that "neither the LRB nor the legislature gave any thought at all to that phrase." (CUB & WIEG Br. at 35.) In their appellate brief CUB and WIEG argued that

> …because open access to transmission that would allow wheeling power across state lines was not available in 1975, it simply is not reasonable to conclude that the LRB or the legislature was thinking one way or the other about in-state versus out-of-state requirements when the LRB wrote those words.

(CUB & WIEG Br. before Ct. of Appeals at 28.) CUB and WIEG have since dropped the argument that energy was not transmitted across state lines, but continue to seek to dismiss the LRB's clear statement as "casual" and thoughtless. While the LRB's legislative history does not carry the same weight as the language of a statute, it cannot be dismissed out of hand as thoughtless. CUB and WIEG encourage the Court, should it look to the LRB's analysis, to speculate as to what the LRB and the legislature were thinking (or, more accurately, not thinking) instead of actually relying on the legislative history. This is unsupported by the tenets of statutory interpretation.

CUB and WIEG counter by contending that now repealed Wis. Stat. § 196.491(3)(g)1m does not support the interpretation that the CPCN Statute only applies within the state, and imply that it is evidence that the CPCN applies to out-of-state projects. (CUB & WIEG Br. at 37.) Wis. Stat. § 196.491(3)(g)1m allowed the Commission to disregard the statutory time constraints for review of a CPCN application if

an application related to the Commission's CPCN application is being reviewed by another state. *See* Wis. Stat. § 196.491(3)(g)1m. (1997-1998). That provision is not informative regarding whether the CPCN Statute applies only to projects within the state or also to projects outside of the state. At best, it implies that another state has an interest in the project, just as the Commission was interested in WPL's applications with the Minnesota Public Utilities Commission for Bent Tree. For example, that provision would apply if a Minnesota public utility was seeking to construct a large electric generating facility within Wisconsin, was therefore subject to the CPCN Statute, and was also required to seek approval of the Minnesota Public Utilities Commission. Moreover, the statute was repealed just five years after it was created. 2003 Wis. Act 89.

### F. The CPCN Statute Should Not and Need Not Be Severed.

CUB and WIEG argue that this court or the Commission should sever the "invalid" provisions of Wis. Stat. § 196.491

pursuant to Wis. Stat. § 990.001(11), and only apply the remaining provisions. (CUB & WIEG. Br. at 41-43.) Wis. Stat. § 990.001(11) cannot and should not be indiscriminately applied. A determination that statutes can be whittled down to what conveniently fits the set of facts at hand would turn the Wisconsin Constitution on its head, destroy the separation of power it creates, and make a court or an agency the *de facto* legislator. This is a completely erroneous application of Wis. Stat. § 990.001(11), and is merely a way of fitting a square peg in a round hole. As the Supreme Court of Wisconsin has recognized:

> Section 990.001(11) is a legislatively adopted canon of statutory interpretation relating to severability. The canon provides that an unconstitutional provision or an unconstitutional application of a statute may be severed from the constitutional provisions or constitutional applications.

*Schultz v. Natwick*, 2002 WI 125, ¶ 33, 257 Wis.2d 19, 36, 653 N.W.2d 266 (2002). Accordingly, Courts have generally limited the severance to unconstitutional statutory provisions or clauses. S*ee e.g. Alliant Energy Corp.*, 330 F.3d at 914-15 (provision requiring in-state incorporation of public utility

holding companies violated the commerce clause, but was severable); *Nankin v. Village of Shorewood*, 2001 WI 92, ¶¶ 46-51, 245 Wis.2d 86, 115-17, 630 N.W.2d 141, 155-56 (2001) (concluding that a provision which caused disparate treatment between property owners in populous and non-populous counties violated equal protection and was severable). Courts will not sever a statute, even when it is unconstitutional, where such action will go against the legislative intent. *See .e.g. Burlington Northern, Inc. v. City of Superior*, 131 Wis.2d 564, 584, 388 N.W.2d 916, 922-23, 925 (Wis. 1986) (finding that a tax exemption discriminated against taconite mined outside of the state, but that the legislative intent of the statute precluded severance); *see also State v. Janssen*, 219 Wis.2d 362, 388 at ¶ 52, 580 N.W.2d 260, 271 (1998) (invalidating an overbroad and unconstitutional flag desecration statute "[b]ecause the State has not satisfied its burden of proving that a limiting construction or severance of the statute's terms can preserve the statute in a constitutional form….").

First, CUB and WIEG require the severing of clauses that simply do not fit when the CPCN Statute is applied to an out-of-state project, but would are completely appropriate when applied to in-state-projects. (CUB & WIEG. Br. at 41-43.) Creating a situation where various provisions of a statute need to be severed to allow for application of the law is trying to fit the square peg in a round hole. CUB and WIEG's request is not only inappropriate under Wis. Stat. § 990.001(11), it is also unnecessary as there is a reasonable interpretation of the CPCN statute that does not cause absurd, unreasonable or potentially unconstitutional results; namely, that the CPCN statute applies only to projects within the State of Wisconsin (i.e. the Commission's interpretation). *See Am. Fam. Ins. Co.*, 222 Wis. 2d 650, ¶ 44, 586 N.W.2d 872 ("A court should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional.") None of the "misfit" provisions are unconstitutional when appropriately applied within the state.

Second, even if the CPCN Statute applies outside of Wisconsin, a number (but not all) of the misfit provisions in the CPCN Statute would still not be unconstitutional and therefore would not be severable. As noted above, to sever a statute would require that it be unconstitutional not just inconvenient, such as, holding a hearing outside of the state. Wis. Stat. 196.491(3)(b)

Third, those provisions that would be unconstitutional (e.g. Wis. Stat. § 196.49(3)(i)) still may not be able to be severed. *See Janssen*, 219 Wis.2d at ¶ 52, 580 N.W.2d 260. CUB and WIEG's request to sever some provisions from the statute, and not others, will lead to an arbitrary slicing-and-dicing of the CPCN Statute, supplanting the legislative intent that the statute apply as a whole.

## III. The CA Statute Protects Ratepayers.

### A. The CA Statute Enables the Commission to Comprehensively Review a Wisconsin Public Utility's Out-of-State Project.

For over eighty years, the CA Statute has enabled the Commission to investigate whether the proposed construction

of a new facility by a Wisconsin public utility is in the public interest. The CA Statute provides that "No public utility may begin the construction, installation or operation of any new plant, equipment, property or facility … unless the public utility has complied with any applicable rule or order of the commission…." Wis. Stat. § 196.49. "Public Utility" is defined as:

> every corporation, company, individual, association, their lessees, trustees or receivers appointed by any court … that may own, operate, manage or control … any part of a plant or equipment, ***within the state***, for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public.

Wis. Stat. § 196.01(5)(a) (emphasis added). The definition of public utility effectively limits the applicability of the CA Statute to entities which have plants or equipment in Wisconsin and that provide power (directly or indirectly) to the public.

The CA Statute provides significant ratepayer protections. For example, the Commission has broad investigative authority, including the authority to hold

hearings on CA applications, Wis. Stat. §§ 196.02(5) & 196.49; Wis. Admin. Code PSC § 112.07; in fact, this is precisely what the Commission did during its review of the Bent Tree Application (R: 9, PSC R: 4 at 4.) The Commission is able to attach conditions to certificates "to protect the public interest or promote the public convenience or necessity." Wis. Admin. Code PSC § 112.07(2); *see also* Wis. Stat. § 196.49(3)(c). Most significantly, though, the CA Statute authorizes the Commission to deny a utility's application under the CA Statute if the project will:

> 1. Substantially impair the efficiency of the service of the public utility[;]
>
> 2. Provide facilities unreasonably in excess of the probable future requirements[; or]
>
> 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).

### B. Unlike the CA Statute, A Certificate Can Issue Under the CPCN Statute without Any Review.

CUB and WIEG tout a worst-case scenario in order to claim that the application of the CA Statute to the construction of large electric generating facilities outside of Wisconsin would lead to absurd and unreasonable results. CUB and WIEG contend that, under the CA Statute, the Commission's Gas and Energy Division Administrator could approve a Wisconsin public utility's application to construct a large electric generating facility just outside of Wisconsin, without the Commission ever seeing the application, even if the utility provided no evidence of need, cost-effectiveness, or the effect of the facility on the efficiency of the utility's service. (CUB & WIEG Br. at 29-30.) CUB and WIEG argue that, in contrast, if the project was constructed just inside Wisconsin's borders, the utility would have to make each of those showings, and that the Commission would decide whether to approve the project. (*Id.* at 30.)

Concern that the Division Administrator could approve the construction of a large electric generating facility outside of Wisconsin under the CA Statute is not an appropriate basis for interpreting the CPCN statute (as opposed to the CA Statute) to apply to such construction projects. (*See* CUB & WIEG Br. at 12, 24; *see also* R: 9, PSC R: 3, Commissioner Azar's Dissent, p. 8 n. 10.) The delegation by the Commission to the Division Administrator occurred in 1995 (R: 9, PSC R: 3, Commissioner Azar Dissent at 1 n.1), two decades after the enactment of the CPCN Statute. As such, that delegation could not have informed the legislative debate surrounding the creation of the CPCN Statute, and should not be relied upon when interpreting the meaning of and trying to determine the legislative intent behind the CPCN Statute. Regardless, even if that situation were to occur, any resulting rate increase would be subject to a contested rate case proceeding. Wis. Stat. § 196.20(2m)

The outcome contemplated in CUB and WIEG's hypothetical—approval of an out-of-state generation facility

without review by Commissioners—is not unique to the CA Statute; it could also arise under the CPCN Statute. Under the CPCN Statute, the Commission is required to determine whether a CPCN application is complete within 30 days of the application being filed. Wis. Stat. § 196.491(3)(a)2. If the Commission does not make such a determination within 30 days, the application is deemed complete. *Id.* Furthermore, the Commission is considered to have issued a CPCN if the Commission does not take final action on a CPCN application within 180 days of finding that the application is complete.[2] Wis. Stat. § 196.491(3)(g). Consequently, even if the CPCN Statute did apply to the construction of large electric generating facilities outside of Wisconsin, a CPCN could issue for such a unit without the Commissioners ever reviewing the application for completeness, or without reviewing the project for need, cost-effectiveness, the effect on the efficiency of the

[2] The Circuit Court for Dane County can grant the Commission an extension of up to 180 days, but a CPCN considered issued if the Commission does not act within the extended timeframe. Wis. Stat. § 196.491(3)(g).

utility's service, or any other required factors. *See* Wis. Stat. §§ 196.491(3)(a)2 and (g).

Based upon the CPCN Statute's required review and approval timeframes, a CPCN has issued for Bent Tree. As noted above, WPL filed the Bent Tree Application under the CA Statute, the CPCN Statute, and other statutory and regulatory provisions. While the Commission issued a notice of investigation, the Commission never issued a completeness determination on the Bent Tree Application. Accordingly, the Bent Tree Application was deemed complete 30 days after it was filed. Wis. Stat. § 196.491(3)(a)2. Moreover, the CPCN issued 180 days later, as the Commission neither took a final action within that timeframe nor requested an extension of that timeframe. Wis. Stat. § 196.491(3)(g).

### C. The CA Statute Does Not Leave Ratepayers' Money to Chance.

CUB and WIEG's implication that ratepayers' money is "left to chance" under the CA Statute is without merit. (CUB & WIEG Br. at 30.) The Commission only grants approval for

construction (or improvement) of a generating facility under the CA or CPCN Statutes; the Commission does not approve rate recovery for a construction project under either of those statutes. A public utility can only increase rates to recover costs for the construction of a generating facility following an investigation by the Commission and an opportunity for a hearing. Wis. Stat. § 196.20(2m). During rate case hearings, rate increases are subject to review for justness and reasonableness. This is what occurred in regards to Bent Tree. While the Commission granted WPL a certificate of authority to construct Bent Tree in Docket No. 6680-CE-173, the Commission's order did not authorize inclusion in rates. (*See generally*, R: 9, PSC R: 4.) WPL requested rate recovery for Bent Tree in a subsequent rate case, and following a hearing, the Commission authorized the inclusion of the costs of the project, save a portion that the Commission found unreasonable. *See Final Decision*, at 1, 2 & 19, PSC Docket No. 6680-UR-117. Thus, the legislature did not leave the ratepayers money to chance, but ensured that rates do not

increase without a full contested hearing, a fact ignored by CUB and WIEG.

### D. The Legislature Did Not Intend Cost to Differentiate between Projects Subject to the CA Statute and the CPCN Statute.

CUB and WIEG imply that the Legislature's intent on setting a 100 MW threshold was that expensive projects should only be approved under the CPCN Statute. (*See* CUB & WIEG Br. at 8 & 28.) The 100 MW threshold, though, does not plainly distinguish between low cost projects and high cost projects. The construction of generating facilities over 100 MW is not necessarily more expensive than other construction projects controlled by the CA Statute.[3]

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[3] Compare *Certificate and Order*, pp. 1, 15, PSC Docket No. 6630-CE-299, *Application of Wisconsin Electric Power Company for Authority to Construct Wet Flue Gas Desulfurization and Selective Catalytic Reduction Facilities and Associated Equipment for Control of Sulfur Dioxide and Nitrogen Oxide Emissions at its Oak Creek Power Plant Units 5, 6, 7, and 8* (July 10, 2008), *available at* http://psc.wi.gov/apps/erf_share/view/viewdoc.aspx?docid=97457 PSC Ref#: 97457 (granting a CA under Wis. Stat. § 196.49 to construct emission controls at four existing generating units at an estimated cost of $830 million), with *Final Decision*, pp. 1-3, 35-38, PSC Docket No. 6690-CE-187, *Application for a Certificate of Public Convenience and Necessity for Construction of a Large Electric Generating Plant in Marathon County* (October 7, 2004), *available at*

Moreover, the construction of generating facilities as small as 12 MW were governed by the CPCN Statute when it was first created.

> (g) "Large electric generating facility" means electric generating equipment and associated facilities designed for nominal operation at a capacity of between 12,000 and 300,000 kilowatts.

Wis. Stat. § 196.491(1)(g) (1975-1976) (Chapter 68, Laws of 1975). While larger generating facilities will naturally cost more than smaller facilities, there is no indication that the legislature distinguished projects based on cost and Court should not now infer a cost distinction between the statutes. The plain language of the statutes distinguish based on size (100 MW and greater for CPCN) and to whom they apply (person for the CPCN and public utility for the CA).

**CONCLUSION.**

CUB and WIEG's interpretation that the CPCN Statute, Wis. Stat. § 196.491(3), applies to the construction of large

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http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=22652 PSC Ref#: 22652 (granting a CPCN under Wis. Stat. § 196.491 to construct a large electric generating facility at an estimated cost of approximately $752 million).

electric generating facilities outside of Wisconsin would cause absurd, unreasonable, and potentially unconstitutional results. In contrast, the Commission's conclusion that the CA Statute, Wis. Stat. § 196.49, (and not the CPCN Statute) applies to the construction of out-of-state generation facilities avoids such results and is consistent with the legislative intent behind the CPCN Statute. Consequently, the court should affirm the circuit court's decision upholding the Commission's interpretation.

Dated this 10th day of February, 2012.

Respectfully submitted,

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**FORM AND LENGTH 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 7,093 words.

Dated this 10th day of February, 2012.

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**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of February, 2012.

___/s/ Arshia Javaherian_____
Arshia Javaherian
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SUPREME COURT OF WISCONSIN

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Appeal No. 2010AP2762

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WISCONSIN INDUSTRIAL ENERGY GROUP, INC.
and CITIZENS UTILITY BOARD,
Petitioners-Appellants,
v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
Respondent-Respondent,

WISCONSIN ELECTRIC POWER COMPANY and
WISCONSIN POWER AND LIGHT COMPANY,
Intervenors-Respondents,
WISCONSIN PUBLIC SERVICE CORPORATION
Intervenor.

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# REPLY BRIEF OF WISCONSIN INDUSTRIAL ENERGY GROUP, INC. AND CITIZENS UTILITY BOARD

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## INTRODUCTION

The Commission and Intervenor-Respondents (collectively "Respondents") ignore the plain language in Chapter 196 differentiating between new electric generating facilities based on size. Respondents do not dispute that Wisconsin ratepayers will be asked to pay for any public utility's large electric generating facilities, regardless of its location. Yet, Respondents insist that even though the CPCN statute does not distinguish between in-state and out-of-state projects, fewer ratepayer protections should be provided for large public utility projects sited over the state's border than for ones sited within the border.

This Court should reject Respondents' arguments because they are not supported by the plain language of the statute or the legislative history. This Court should also deny the Commission's request for deference and conclude that *de novo* review is appropriate.

## ARGUMENT

### I. *DE NOVO* REVIEW IS APPROPRIATE.

There should be little doubt that this Court's review of the Commission's decision is *de novo*, as detailed in Wisconsin Ratepayers' initial brief. CUB/WIEG Brief, pp. 17-19. The circuit court found that *de novo* review is appropriate because the legal question is novel and the Commission has not exercised sufficient expertise in interpreting the scope of the statute. (R: 35, pp. 4-5) Neither WEPCO nor WPL question the circuit court's ruling regarding *de novo* review, and WEPCO even acknowledges that the issue in this case is one of first impression. WEPCO Brief, p. 1. Only the Commission disagrees that *de novo* review is appropriate and seeks due weight deference instead. PSC Brief, pp. 21-22.

In asking this Court to apply due weight deference, the Commission errs both in its characterization of the legal question and in its application of this Court's decision in *MercyCare*. *See MercyCare Ins. Co. v. Wisconsin Comm'r of Ins.*,

2010 WI 87, 328 Wis. 2d 110, 786 N.W.2d 785. First, the Commission is simply wrong that "the legal question at issue in this case has ***infrequently*** arisen." PSC Brief, p. 22 (emphasis added). As argued by Wisconsin Ratepayers, recognized by the circuit court, and conceded by WEPCO, the legal question at issue in this case has ***never*** arisen.

Second, in *MercyCare*, the court gave due weight deference to an agency's examination of a statutory provision involving mandatory coverage under an insurance policy because that examination involved the agency's specialized expertise relating to interpreting insurance policies. *MercyCare,* 2010 WI 87, at ¶¶ 36-37. The *MercyCare* case is distinguishable from this case because the Commission has no specialized expertise in determining whether the legislature intended that the CPCN requirements apply to out-of-state projects.

The Commission does not meet the requirements for due weight deference, and the requirements for *de novo* review are met. Thus, the Court should interpret the CPCN statute

independently and should adopt the interpretation it deems most reasonable. *Id.* at ¶ 29.

## II. THE COMMISSION'S EFFORT TO DOWNPLAY THE RATEPAYER PROTECTIONS IN THE CPCN STATUTE CANNOT BE SUPPORTED.

Respondents do not, and cannot, dispute that the only stated criteria for differentiating between application of the CA statute and the CPCN statute is the size of a new electric generating facility. Indeed, they largely ignore the express statutory language that a CPCN is required for an electric generating facility with a capacity of 100 megawatts (MW) or more. Instead, Respondents create a variety of ancillary arguments to distract from that clear distinction.

The most remarkable argument is the Commission's new[1] insistence that it should not matter whether the CA statute or the CPCN statute applies since "the CPCN law does not protect ratepayers better than the CA law." PSC Brief, p. 7.

[1] The Commission did not offer this argument before the circuit court or the Court of Appeals.

The Commission's argument is simply wrong, and, indeed, would effectively mean that the ratepayer protections in the CPCN statute are superfluous. Like its argument that the CPCN statute does not apply to a 200 MW project like Bent Tree, the Commission's argument that the CA statute provides the same ratepayer protections as the CPCN statute is belied by the plain language of the statutes.

The Court of Appeals, in its certification to this Court, articulated well the substantial differences between the CPCN statute and the CA statute. Noting that the CPCN statute is "more demanding" than the CA statute, the Court of Appeals elaborated:

> Although both [the CA and CPCN] statutes allow consideration of the effect on ratepayers, the CPCN statute appears to contain more meaningful ratepayer protections. For example, the CPCN statute *requires* the PSC to apply ratepayer protection criteria. *See* Wis. Stat. § 196.491(3)(d)2. (allowing approval "only if," for example, "[t]he proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy"); *cf.* Wis. Stat. § 196.49(3) (in the CA statute, providing that the PSC "may refuse to certify a project" if criteria are not met). The CPCN statute also requires a public hearing, § 196.491(3)(b), whereas the CA statute does not.

> Third, and as we explain in more detail below, the CPCN statute incorporates the CA statute's criteria, and then adds significant additional criteria….
>
> Although both statutes have ratepayer-protection criteria, **application of the ratepayer-protection criteria is mandatory only in the CPCN statute**.

(App. 3-4, 6; italics emphasis in original, bold emphasis added)

When explaining the positions of the parties in this proceeding, the Court of Appeals added:

> [Wisconsin Ratepayers'] view would treat similar facilities the same way for purposes of ratepayer protection, regardless of a facility's locations. [Respondents'] view would avoid misfits in the CPCN statute's subsections, but would ***deprive ratepayers of mandatory protections*** and would produce a seemingly illogical distinction based on the location of a facility.

(App. 6-7, emphasis added) In addition to the differences between the statutes quoted above, the CPCN statute also requires the Commission to determine that sufficient information is provided in a CPCN statute to deem it "complete," and the CA statute does not have that requirement. *See* Wis. Stat. § 196.491(3)(a)2; *see also Clean Wisconsin, Inc. v. Pub. Serv. Comm'n*, 2005 WI 93, ¶¶ 48-96, 282 Wis. 2d 250, 700 N.W.2d 768 (discussing ability for judicial review of

completeness determinations and analysis of Commission's completeness determination in a CPCN proceeding).

The Commission glosses over these differences and tries to minimize them by asserting that it ***could*** make the mandatory findings required by the CPCN statute when faced with a CA application. That argument misses the point. It could, but it is not ***required to***. It is only required to follow the mandates in the CPCN law when faced with an application for a project sized at 100 MW or larger. The CA statute, by its plain terms, expressly allows the Commission to approve a project with no completeness determination, without holding a contested case hearing, and even if the project will impair the efficiency of the service of a utility, will provide facilities in excess of a utility's probable future requirements, and will add to the cost of service without increasing the value. *See* Wis. Stat. § 196.49(3)(b). It is that level of discretion, coupled with the potential for review of incomplete applications and the fact that ratepayers do not even have a right to have their views

heard through an evidentiary hearing, that limits the level of ratepayer protection under the CA statute.

Thus, it is clear that the CPCN law provides significantly more ratepayer protections than the CA law. Moreover, such protections are important to this Court's analysis because it is undisputed that the primary purpose of the public utility laws is the protection of the consuming public. *See, e.g.*, *GTE North Inc. v. Pub. Serv. Comm'n*, 176 Wis. 2d 559, 568, 500 N.W. 2d. 284 (1993). As Wisconsin Ratepayers explained in their initial brief, they will pay regardless of whether the public utility's large electric generating facility is approved for construction inside or outside the state. *See, e.g.,* CUB/WIEG Brief, pp. 4, 28-29. Interpreting the more stringent ratepayer protections in the CPCN statute to only apply to large electric generating facilities that are located inside the state frustrates the consumer protection purpose of the state's public utility laws.

## III. THE CPCN STATUTE UNAMBIGUOUSLY APPLIES TO BENT TREE.

Continuing its perfunctory dismissal of the threshold requirement for determining whether the CPCN statute applies to Bent Tree; i.e., the size of the project, the Commission also argues that the CPCN law is ambiguous with respect to its application to Bent Tree. PSC Brief, p. 11. To arrive at this conclusion, the Commission leaps over the fact that the CPCN statute applies to new electric generating facilities sized at 100 MW or greater and declares the CPCN statute ambiguous because of the *absence of* statutory language regarding geographic location. By ignoring the actual language in the statute, the Commission strays from the Wisconsin Supreme Court's test for determining ambiguity:

> The test for ambiguity generally keeps the focus on the statutory language: a statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses. It is not enough that there is a disagreement about the statutory meaning.

*State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 47, 271 Wis. 2d 633, 681 N.W.2d 110 (internal citations omitted).

The *Kalal* case makes clear that the plain language of a statute cannot be glossed over or ignored in a search for ambiguity. There is nothing ambiguous about the language applying the CPCN statute to projects sized at 100 MW or greater. Because Bent Tree is sized at 200 MW, the CPCN statute unambiguously applies to it.

## IV. EVEN IF THE CPCN STATUTE IS AMBIGUOUS IT APPLIES TO BENT TREE.

Even if the CPCN statute is found to be ambiguous and legislative history is consulted, that history will not reveal any discussion at all regarding any in-state versus out-of-state distinction for either the CPCN statute or the CA statute. The Commission and WPL continue to focus on three words in a 1975 LRB summary in the CPCN statute's legislative history that they argue supports the Commission's decision to forgo application of the CPCN statute to Bent Tree. PSC Brief, pp. 17-18; WPL Brief, pp. 24-27. However, as CUB's and WIEG's initial brief explained, the 1975 summary's use of the words "in

this state" does not transform the plain language of the statute differentiating use of the CPCN and CA statutes based on a project's size. CUB/WIEG Brief, pp. 33-37. When the legislature, through actual statutory language, has clearly manifested an intent to treat large projects differently from small projects, it takes more than three words in a decades-old LRB summary to overrule that manifest intent.

## V. THE "MISFITS" IN THE CPCN STATUTE DO NOT PROHIBIT APPLICATION OF THE REMAINDER OF THE CPCN STATUTE TO BENT TREE.

The Commission and WPL argue that the CPCN statute should not be applied to Bent Tree, or other applications for public utility construction of out-of-state large electric generating facilities, because it is not possible to resolve the "misfits" in the CPCN statute to out-of-state projects. PSC Brief, pp. 13-15; WPL Brief, pp. 28-32. That assertion is not correct.

As Wisconsin Ratepayers explained in their initial brief, those provisions in the CPCN statute that conflict with the

sovereignty of the host state can be severed pursuant to Wis. Stat. § 990.001(11). CUB/WIEG Brief, pp. 41-44. The first step is to apply the CPCN statute to those public utility large electric generating facilities (to be paid for by Wisconsin ratepayers) that will be constructed out of state. The second step is to determine whether any provisions of the CPCN statute should be severable in that situation. As former Commissioner Azar noted in her dissent:

> The following provisions of the CPCN law that would require the Commission to act outside the state boundaries as set by the Constitution are invalid and are severable:
>
> - Wis. Stat. § 196.491(2r) - overriding local ordinances in another state;
> - Wis. Stat. § 196.491 (3)(a)l - sending the application to out-of-state clerks and libraries;
> - Wis. Stat. § 196.491(3)(a)3 - filing an engineering plan with the Wisconsin Department of Natural Resources (WDNR) over which the WDNR would have no authority;
> - Wis. Stat. § 196.491(3)(b) - holding a hearing in the out-of-state affected area;
> - Part of Wis. Stat. § 196.491(3)(d)3 - relating to out-of-state "individual hardships" and "environmental factors;" note that the remainder of this subparagraph and individual hardships and environmental factors affecting Wisconsin are valid;

- Part of Wis. Stat. § 196.491(3)(d)4 - relating to out-of-state "environmental values;" note that environmental values that affect Wisconsin are valid; and

- Wis. Stat. § 196.491(3)(d)6 - interfering with orderly land use and development plans for the out-of-state area involved.

(R: 9, PSC R: 3, App. 36-37) Thus, the Commission need not "ignore key parts of the law" in order to apply the CPCN statute to out-of-state public utility projects. *See* PSC Brief, p. 15. Harmonizing the CPCN statute with Wis. Stat. § 1.01 (the state jurisdiction statute discussed by the Commission and WPL) will allow ratepayers to be sufficiently protected for expensive projects that they will be asked to fund while ensuring that the Commission acts only within its territorial jurisdiction. *See City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 184, 532 N.W.2d 690 (1995) (discussing duty to harmonize conflicting statutes).

## VI. THE DORMANT COMMERCE CLAUSE DOES NOT PROHIBIT APPLICATION OF THE CPCN STATUTE TO BENT TREE.

Wisconsin Ratepayers explained in their initial brief why the dormant commerce clause does not prohibit application of the CPCN statute to Bent Tree. CUB/WIEG Brief, pp. 37-41. WEPCO and WPL continue to press this argument even though the only impact on interstate commerce they have been able to identify is that applying either the CA or the CPCN statute to out-of-state projects will "make it more difficult for Wisconsin utilities to build those facilities." WEPCO Brief, pp. 4-5. Even assuming that "burden" somehow restricts interstate trade, the fact that Wisconsin utilities will ask their ratepayers to pay for those out-of-state large electric generating facilities means that the CPCN statute's ratepayer protections outweigh any "difficulties" Wisconsin utilities may encounter constructing those facilities. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Such minimal "burden" is not clearly excessive in relation to the significant ratepayer protections. Thus, the

dormant Commerce Clause does not prohibit application of the CPCN statute to Bent Tree.

## VII. RESPONDENTS' ANCILLARY ARGUMENTS SHOULD BE REJECTED.

Respondents' half-hearted handful of additional arguments should also be rejected. For instance, the Commission is simply wrong when it states that its decision was harmless error because CUB and WIEG "received the same process in this case as they would have if the PSC applied the CPCN law." PSC Brief, p. 22. CUB and WIEG did not receive the same process in this case. For example, an important safeguard that was lost when the Commission converted WPL's CPCN application to a CA application was the requirement that the application be deemed complete under Wis. Stat. § 196.491(3)(a)2. The Commission's decision was not harmless error.

In addition, WEPCO and WPL argue that the CPCN law should not apply to out-of-state projects because it applies to

any "person," which could include a Texas utility seeking to build a large electric generating facility in Utah. WEPCO Brief, p. 11; WPL Brief, pp. 14-15. Of course, those are not the facts of this case. In this case, a Wisconsin public utility filed an application with the Commission for permission to build an out-of-state large electric generating facility to be paid for by Wisconsin ratepayers.

Moreover, it is absurd to conclude, as WEPCO does, that because the CPCN statute uses the term "person" the Commission would or could reach a Texas corporation wishing to build a facility in Utah. Similarly, it is absurd to conclude that any other entity would or could sue a Texas utility seeking to build a large electric generating facility in Utah for failing to receive a CPCN from the Wisconsin Commission. Such far-fetched flight of fancy should not detract from the central question in this case, namely, when faced with an application for approval to construct a large electric generating facility to

be paid for by Wisconsin ratepayers, can the Commission ignore the CPCN statute?

In addition, WPL and the Commission argue that Bent Tree already has a CPCN because the time periods in the CPCN statute for Commission decisionmaking elapsed, and a CPCN was deemed granted by law. PSC Brief, p. 11; WPL Brief, p. 38. While novel, this argument fails for the reasons also identified by the Commission and WPL, namely that the Commission affirmatively found that the CPCN law did not apply to WPL's Bent Tree application. PSC Brief, p. 11; WPL Brief, pp. 3-4. The Commission cannot both find that the CPCN law does not apply to Bent Tree and then rely on application of that law to say that a CPCN for Bent Tree was granted.

Finally, WPL argues that the legislature did not intend cost to differentiate between projects subject to the CA statute and the CPCN statute because the threshold determination for applying either of the two statutes is the size of the project. WPL Brief, p. 40. Specifically, WPL states:

> The plain language of the statutes distinguish based on size (100 MW and greater for CPCN) and to whom they apply (person for the CPCN and public utility for the CA).

WPL Brief, p. 41. Wisconsin Ratepayers agree. When faced with an application for approval of a project sized 100 MW or greater (i.e., Bent Tree) by a person (i.e., WPL) the plain language of the statutes requires the Commission to apply the CPCN statute, and not the CA statute.

## CONCLUSION

This Court should uphold the circuit court's determination regarding *de novo* review of the Commission's decisions, reverse the circuit court's denial of Wisconsin Ratepayers' petition for review, and find that the Commission erred when it failed to apply the CPCN statute to Bent Tree.

Dated: February 27, 2012.

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## FORM AND LENGTH 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 2,981 words.

Dated this 27th date of February, 2012.

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Kira E. Loehr

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stats. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of February, 2012.

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