

STATE OF WISCONSIN
SUPREME COURT

CLEAN WISCONSIN, INC.
p/k/a Wisconsin's Environmental
Decade Institute, Inc.,
SC JOHNSON & SON, INC. and
CALPINE CORPORATION
Petitioners-Respondents-Cross-
Appellants-Cross-Respondents,

Appeal No. 04-3179

TOWN OF CALEDONIA,
Petitioner-Cross-Respondent,

Circuit Court Case Nos.
03CV003478, 03CV003731,
04CV000133, 04CV000149,
04CV000530, 04CV000533

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN and WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,
Respondents-Co-Appellants-
Cross-Respondents,

WISCONSIN ELECTRIC POWER
COMPANY, W.E. POWER, LLC and
WISCONSIN ENERGY CORPORATION,
Interested Parties-Appellants-
Cross Respondents,

(Caption continued on following pages)

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

**BRIEF OF INTERESTED PARTIES-APPELLANTS-CROSS
RESPONDENTS WISCONSIN ELECTRIC POWER COMPANY, W.E.
POWER, LLC AND WISCONSIN ENERGY CORPORATION**

DAIRYLAND POWER COOPERATIVE,
Interested Party-Cross-Respondent,

MADISON GAS & ELECTRIC COMPANY
AND WISCONSIN PUBLIC POWER, INC.,
Interested Parties-Co-Appellants-
Cross-Respondents,

CITY OF OAK CREEK,
Interested Party-Respondent-
Cross-Appellant,

ROBERT H. OWEN,
Interested Party-Respondent-
Cross-Respondent.

CALPINE CORPORATION,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN and WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,
Respondents,

WISCONSIN ELECTRIC POWER
COMPANY, W.E. POWER, LLC and
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DAIRYLAND POWER COOPERATIVE,
MADISON GAS & ELECTRIC COMPANY,
ROBERT H. OWEN, JR., and
CITY OF OAK CREEK,
Interested Parties.

CLEAN WISCONSIN, INC.
p/k/a Wisconsin's Environmental
Decade Institute, Inc.,
SC JOHNSON & SON, INC. and
CALPINE CORPORATION,
Petitioners,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
Respondent,

WISCONSIN PUBLIC POWER, INC.,
CITY OF OAK CREEK, DAIRYLAND
POWER COOPERATIVE, MADISON
GAS & ELECTRIC COMPANY,
WISCONSIN ELECTRIC POWER
COMPANY, WISCONSIN ENERGY
CORPORATION and W.E. POWER, LLC,
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CALPINE CORPORATION,
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POWER COOPERATIVE, MADISON GAS
& ELECTRIC COMPANY, WISCONSIN
PUBLIC POWER, WISCONSIN ELECTRIC
POWER COMPANY, WISCONSIN ENERGY
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CORPORATION, W.E. POWER, LLC,
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ISSUES PRESENTED FOR REVIEW

1. Does Wis. Admin. Code § PSC 111.53(1)(f) require an applicant for a Certificate of Public Convenience and Necessity (“CPCN”) to obtain all regulatory permits before an application can be accepted for review?

Answered by the Circuit Court: Yes

2. Does Wis. Admin. Code § PSC 111.53(1)(f) require an applicant for a CPCN to enter into final transmission agreements before an application can be accepted for review?

Answered by the Circuit Court: Yes.

3. Does the requirement of Wis. Admin. Code § PSC 111.53 that an application for a CPCN contain information regarding “at least two proposed sites” preclude alternative sites on the same large parcel of property?

Answered by the Circuit Court: Yes.

4. Did the Public Service Commission (“Commission”) violate the Energy Priorities Law, §§ 1.12 and 196.025(1), Wis. Stats., when it concluded that coal was the appropriate fuel source to meet the identified baseload energy needs?

Answered by the Circuit Court: Yes.

5. Does § 196.491(3)(d)3, Wis. Stats., require the Commission, before it can issue a CPCN, to “determine” the “design, cost and location” of transmission facilities?

Answered by the Circuit Court: Yes.

6. Did the Commission violate § 196.491(3)(e), Wis. Stats., by rendering a Final Decision and Order stating that the CPCN is not effective until the Department of Natural Resources (“DNR”) issues all permits identified as required prior to construction?

Answered by the Circuit Court: Yes.

7. Did the Commission err in authorizing the applicants to build certain “common facilities” large enough to accommodate future expansion at an approved site?

Answered by the Circuit Court: Yes.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument has been scheduled for March 30, 2005. Publication of the opinion is appropriate because the decision will clarify Wisconsin law regarding the regulatory process for approval of a CPCN and the discretion appropriately accorded the technical expertise of the Wisconsin Public Service Commission with respect to that highly complex process.

INTRODUCTION

“Concerns over electric reliability are paramount today.” PSC Final Decision (“*Final Dec.*”) at 22. The Legislative Council observed in 2001 that “[t]here is a general consensus that a substantial amount of new electric generation capacity, including base load facilities, must be built in the next 10 years to meet the projected demand for power.” (State’s App. 249).

Consistent with “the requirement that it must maintain a reliable electric system,” the Public Service Commission (“Commission”) approved on November 10, 2003, the construction of two major electric generating units necessary to meet this State’s baseload energy needs for the next decade. *Final Dec.* at 25. The Commission’s approval of this \$2.15 billion project followed a lengthy review process, involving extensive submissions and thorough technical and community hearings. In light of the complete record, and given both the needs of the Wisconsin energy system and the period necessary for construction of the units, the Commission determined that approval was necessary “now to ensure these facilities are in service in 2009 and 2010.” *Id.* at 20, 25. The Final Decision and Order of the Commission is set forth in a comprehensive 65-page opinion addressing its statutory responsibilities. (State’s App. 101-165).

On November 29, 2004, however, the Circuit Court, based on errors of law and a failure to accord proper deference to the Commission, vacated the Final Decision and held that the entire administrative process must start over. If the Commission’s Final Decision is not promptly reinstated, the Circuit Court’s erroneous ruling will undercut the ability to meet Wisconsin’s future power needs and obstruct the Legislature’s intent for efficient and timely approval of power plant development through appropriate deference to the Commission’s exercise of its delegated authority and expertise.

STATEMENT OF THE CASE

This case arises from the Final Decision of the Commission — then consisting of Burneatta Bridge, Ave Bie and Robert Garvin — approving a Certificate of Public Convenience and Necessity (“CPCN”), pursuant to § 196.491(3), Wis. Stats. (the “CPCN statute”)¹, for the construction of two electric generating units in Oak Creek. The proposed facility is referred to as the Elm Road Generating Station (“ERGS”).

Wisconsin Energy Corporation, Wisconsin Electric Power Company (“WEPCO”), and W.E. Power, LLC (collectively “WE”) filed the CPCN application on January 31, 2002. (WE App. 101-161). The Final Decision approving the CPCN, with certain modifications and conditions, was entered November 10, 2003. (State’s App. 101-165).

Challenges pursuant to Chapter 227 were consolidated before Dane County Circuit Court Judge David Flanagan. (R.33). Judge Flanagan issued an Order vacating the Commission’s decision on November 29, 2004 (“Order”) (State’s App. 172-226).

The Commission and WE timely filed Notices of Appeal. (R.85, 86). Other appeals and cross appeals have been filed. The Commission and WE petitioned this Court for bypass and expedited appeal. The petitions were granted by Order dated January 5, 2005.

¹ For the Court’s convenience, copies of the relevant statutes and administrative rule are appended to this brief at pages 46-51. Unless otherwise specified, all statutory references are to the 2002 statutes applicable to this CPCN proceeding.

STATEMENT OF FACTS

The Application

On January 31, 2002, WE applied for a CPCN authorizing construction of power plants under its multi-faceted “Power the Future” (“PTF”) Proposal. (R.18-1).² The PTF Proposal included plans to construct two natural gas-fired units in Port Washington and three advanced coal technology units in Oak Creek, to retire an older coal-fired facility, to undertake environmental upgrades at other existing facilities, and a commitment to various renewable resources and efficiency measures. (WE App. 120-122, 136-137).

The Commission divided the PTF proceeding into two phases. In Phase I, the Commission approved construction of the gas-fired units in Port Washington. *Final Dec.* at 2. Those facilities are under construction.

The generating units in Phase II included two 615 MW Super-Critical Pulverized Coal (“SCPC”) units. *Final Dec.* at 1, 7-8 (a third “IGCC” unit was rejected by the Commission). Unlike gas-fired units designed to address intermediate load needs, coal-fired units are designed to provide “baseload” power. “A utility’s baseload energy demand is driven by high load factor customer needs, i.e. electric uses such as commercial lighting, refrigeration, and industrial loads that run constantly.” *Final Dec.* at 7 n.4.

The Commission deemed the initial ERGS application incomplete and requested additional information on more than 200 topics. (R.18-34, 18-38, 18-46, 18-67). WE submitted four separate additional volumes of information. (R.18-12, 18-27, 18-41, 18-47). The Commission accepted the application on November 15, 2002. *Final Dec.* at 2.

² Record references are to Case No. 03-CV-3478, which includes the full administrative record at item 18. References to the administrative record are denoted “R.18-__:__” and include the PSC record number and page.

The Environmental Impact Statement

The Commission and DNR jointly prepared a draft Environmental Impact Statement (“EIS”), which was submitted for public comment. *Final Dec.* at 3. The agencies received written comments from over 270 individuals. (R.18-119:Vol. 3, at 1). The agencies thereafter issued a final EIS comprised of three volumes and over 900 pages, reflecting the work of 38 PSC and DNR staff members. (R.18-119:Vol. 1, at xv-xvi).³

The EIS addressed numerous topics, including:

- Regulatory Requirements (Ch. 1)
- PTF Costs and Financing Mechanism (Ch. 2)
- Need for Baseload Capacity in Southeastern Wisconsin (Ch. 3)
- Alternatives to the Proposed Project (Ch. 4)
- Fuels Diversity Perspectives (Ch. 5)
- Proposed Sites and Technologies (Ch. 6)
- Air Emissions (Ch. 7)
- Water Resources (Ch. 8)
- Solid and Hazardous Waste Disposal and Remediation (Ch. 9)
- Land Resources (Ch. 10)
- Community Impacts (Ch. 11)

(WE App. 163-167).

Contested Case Proceedings

The contested hearing phase introduced substantial information, from various sources, beyond that originally set forth in the CPCN application and addressed in the final EIS. During technical hearings, the Commission heard from 68 witnesses. (R.18-157, R.18-158). Much of that testimony was by technical experts addressing engineering, financial,

³ The EIS is available on the PSC website, <http://psc.wi.gov/electric/cases/ptfElmRd/ind-ptfElm.htm>. Relevant portions of the EIS are included in WE’s Appendix at 162-243.

conservation, and environmental matters. The Commission also considered an alternative proposal by Calpine Corporation to construct gas-fired generation facilities in Fond du Lac, Kaukana, and elsewhere. *Final Dec.* at 30-31.

Technical hearings lasted 11 days, with nearly 6,000 pages of transcript and 302 exhibits. (R.18-157; R.18-158; R.18-160). Community hearings were held in Oak Creek and Racine. *Final Dec.* at 4. Interested parties submitted briefs to the Commission. *Id.* The Commission also addressed the matter in oral deliberations at an open meeting on October 29, 2003. *Id.*

Final Decision and Order

On November 10, 2003, the Commission rendered a Final Decision approving, in part, the CPCN application, subject to various specified conditions. (State's App. 101-171).

The Commission concluded, *inter alia*, that “[t]he public convenience and necessity require WEC to construct the two SCPC units,” and that “[t]he North Site-CUP⁴ alternative is in the public interest after considering alternative locations, individual hardships, engineering, economic, safety, reliability, and environmental factors.” *Final Dec.* at 5. This site was developed in conjunction with Oak Creek and is designed to mitigate environmental and local impacts. *Id.* at 12. The Commission further determined that, in order to meet future baseload energy needs, the first unit shall begin operation by May 1, 2009, and the second unit by May 1, 2010. *Id.* at 4. The approved construction cost is \$2.15 billion. *Id.* at 32.

The Final Decision summarizes the Commission's technical, legal, and policy determinations in light of the record developed through the EIS and contested case proceedings. As the Commission noted,

⁴ “CUP” refers to the Conditional Use Permit proceedings from which this site alternative was developed. (WE App. 170).

the crux of this case is really about the appropriate timing to construct new baseload generation. A fundamental policy choice presented in this case is whether the Commission believes that WEPCO needs to take steps now to address needs for new baseload facilities over the next decade. The Commission believes that the applicants should take those steps now to ensure these facilities are in service in 2009 and 2010.

Id. at 20. The Commission also determined that, “[b]ased on a number of qualitative and quantitative factors, . . . coal-fired generation provides the most cost-effective, prudent and practical means of meeting WEPCO’s baseload capacity needs over the next decade.” *Id.* at 22.

The Order accompanying the Final Decision specified that the CPCN “only takes effect when the DNR issues all permits and approvals that it identified, pursuant to Wis. Stat. § 196.491(3)(a)3.a., as being required prior to construction of the facility.” *Id.* at 62.

SUMMARY OF THE CIRCUIT COURT DECISION

The Circuit Court assessed the decision under two categories: (1) challenges to the “completeness” of the application; and (2) challenges to the Final Decision and Order.

As to “completeness” of the application, the Court accorded no deference to the Commission’s interpretation of its own rule or its factual findings and held the application deficient as a matter of law for three reasons:

- (1) the application did not contain all regulatory permits required for construction and operation of the plant;
- (2) the application did not include finalized agreements for the use of transmission lines; and

- (3) the application did not present sufficiently “distinct locations” to constitute “two proposed sites.”

Order at 11, 14, 19-20. Based upon these findings, the Court vacated the Final Decision, requiring that the entire process begin anew.

As to the Final Decision and Order approving the facilities under § 196.491(3), the Court found three fatal flaws:

- (1) the Commission violated the Energy Priorities Law by failing to explain adequately why coal was selected over natural gas and failing to specifically discuss oil or low sulfur coal;
- (2) the Commission failed to “determine” the design, cost, and location of related transmission line improvements; and
- (3) the Commission violated § 196.491(3)(e) by issuing a CPCN before DNR issued all required construction permits.

Order at 30-45, 53. Based upon these findings, the Court vacated the Final Decision and remanded to the Commission.

The Circuit Court also held the Commission erred by approving the sizing of common systems to accommodate possible future expansion. *Order* at 41-43. This issue is addressed in Section II(D). The Court rejected other challenges which are the subject of the cross-appeal. *Id.* at 25, 45-46.

STANDARDS OF REVIEW

A. The Commission’s Final Decision Is Reviewed Directly With No Deference To The Circuit Court.

“In an appeal following an administrative agency decision, we review the decision of the agency, not that of the circuit court.” *Zip Sort, Inc. v. DOR*, 2001 WI App 185, ¶ 11, 247 Wis. 2d 295, 304, 634 N.W.2d 99. *See also Esparza v. DILHR*, 132 Wis. 2d 402, 405, 393 N.W.2d 98 (Ct. App. 1986) (“This court owes no deference to the decision of the circuit court.”).

B. The Commission’s Findings Of Fact Are Reviewed Under The “Substantial Evidence” Standard.

An agency’s findings of fact are reviewed under the “substantial evidence” standard. § 227.57(6), Wis. Stats. “[T]he test is whether, taking into account all the evidence in the record, ‘reasonable minds could arrive at the same conclusion as the agency.’” *Madison Gas & Elec. Co. v. PSC*, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982) (citation omitted).

A reviewing court may not overturn an agency’s finding of fact “even if it may be against the great weight and clear preponderance of the evidence.” *Holtz & Krause, Inc. v. DNR*, 85 Wis. 2d 198, 204, 270 N.W.2d 409 (1978). Consistent with the “due weight [that] shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it,” a reviewing court “shall not substitute its judgment for that of the agency” on questions of fact. *See* §§ 227.57(6) and (10), Wis. Stats.

C. The Commission’s Interpretation And Application Of The Statutory Requirements At Issue Are Entitled To Great Weight Deference.

An agency’s interpretation and application of statutory requirements are generally given “great weight.” *Sauk County v. WERC*, 165 Wis. 2d 406, 413, 477 N.W.2d 267

(1991). Under this standard, an agency's interpretation is upheld as long as it is "rational." *Id.* at 415. Such deference reflects the "comparative institutional capabilities and qualifications of the court and the administrative agency." *State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 699, 517 N.W.2d 449 (1994).

The test for applying the great weight standard focuses on whether the agency "was charged by the legislature with the duty of administering the statute," whether the agency "employed its expertise or specialized knowledge" in reaching its conclusion, and whether the agency's interpretation is "one of long-standing" that will promote "uniformity and consistency." *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660, 539 N.W.2d 98 (1995).

Each factor is met with respect to the Commission's interpretation of the CPCN statute. "DNR and PSC are charged with, and have substantial experience in, processing certificate applications," and their "interpretation of the provisions governing the substantive review of certificate applications in Wis. Stat. § 196.491(3) is long-standing." *RURAL v. PSC*, 2000 WI 129, ¶ 23-24, 239 Wis. 2d 660, 677, 619 N.W.2d 888. "[A]ccording great weight deference to PSC determinations . . . promote[s] greater uniformity and consistency in the future than if we were to accord a lesser level of deference that would invite ad hoc court determinations of adequacy." *Citizens' Utility Bd. v. PSC*, 211 Wis. 2d 537, 552, 565 N.W.2d 554 (Ct. App. 1997).

D. The Commission's Interpretation And Application Of Its Own Rule Is Accorded Great Weight.

"This court has frequently held that great weight should be given to the administrative agency's interpretation and application of its own rules, unless plainly erroneous or inconsistent with the regulation so interpreted. . . . This is especially so in an area calling for special expertise." *Vonasek v. Hirsch & Stevens, Inc.*, 65 Wis. 2d 1, 7, 221 N.W.2d 815 (1974) (citation omitted).

ARGUMENT

Before a utility can construct a generating facility, it must request and obtain a CPCN from the Commission. The Legislature expressly delegated to the Commission discretionary authority to specify the content of a CPCN application. § 196.491(3)(a)1.-2. Following acceptance of the application, the Commission must conduct a public review process and determine whether the proposed facility “satisfies the reasonable needs of the public” for electricity, and whether the design and location of the facility is “in the public interest” after considering an array of factors, including “alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors.” § 196.491(3)(b) and (d). The Commission must take final action on the application within 360 days. § 196.491(3)(g).

WE’s CPCN application comprised over 2,400 pages, including detailed engineering plans, environmental studies, transmission studies, site descriptions, energy consumption forecasts, energy priorities analyses, fuel price forecasting and construction cost estimates. (R.18-1, 18-12, 18-27, 18-41, 18-47).

Following acceptance of the application, statutory review was comprehensive and involved highly technical matters. The Commission and DNR jointly prepared a detailed EIS that addressed the statutory factors guiding the Commission’s decision under § 196.491(3)(d), as well as various environmental issues relevant to DNR’s permitting authority with respect to wetlands, lakebed, navigable waterways, stormwater, wastewater, water withdrawal, and air. (R.18-119).

The Commission held extensive hearings over 11 days, generating a record that includes nearly 6,000 pages of testimony from 68 witnesses, and 302 exhibits. (R.18-157, 18-158, 18-159, 18-160). Based on its technical competence, specialized knowledge and discretionary authority, the

Commission concluded that the proposal satisfied the statutory criteria of § 196.491(3)(d) in that:

- the facilities will satisfy the reasonable needs of the public for electric energy;
- the design and location of the facilities are in the public interest;
- the facilities will not have an undue adverse impact on the environment; and
- bituminous coal is the appropriate fuel source for the identified baseload needs, in accordance with the Energy Priorities Law.

Final Dec. at 4-6 (“Findings of Fact”). The Commission thus approved the application, in part, but specified in its Order that the CPCN “only takes effect” after DNR issues all permits identified as “required prior to construction of the facility.” *Id.* at 62.

The Circuit Court did not accord proper deference to the Commission’s delegated authority and expertise, or to the Commission’s findings of fact and conclusions of law. As set forth below, the Commission’s determinations under § 196.491(3)(d) and the Energy Priorities Law are consistent with the statutes and fully supported by the extensive administrative record developed by the Commission. Likewise, the Commission’s procedural decisions accepting the application and rendering a conditional Order were well reasoned and consistent with the applicable statutes and rules. When appropriate deference is given to the Commission’s thorough decision making, and the full underlying record is considered, it is clear the Commission’s Final Decision should be reinstated.

I. There Is No Valid Basis To Vacate The Final Decision Based Upon The Commission’s Threshold Decision To Accept The Application And Commence The Statutory Review Process.

The Circuit Court held the Commission erred in accepting the CPCN application as “complete,” citing three alleged deficiencies in the content of the application. *Order* at 11-22. This was plain error. The content and form of a CPCN application is a preliminary matter expressly delegated by the Legislature to the Commission. Pursuant to this delegation, the Commission has enacted an administrative rule listing the information required in an application. Applying its own rule, the Commission determined the application was satisfactory and thus the statutory review process could commence. That interpretation of the rule was correct and consistent with long-standing practice. Regardless, even were there any deficiency in the application itself, this preliminary matter did not undermine the correctness of the Final Decision that followed the EIS and contested hearings and, thus, is no basis for vacating the Final Decision.

A. The Form and Content Of An Application Is A Preliminary Matter Delegated To The Commission.

Contested case proceedings for a CPCN commence only after an application is accepted as complete. *See* §§ 196.491(3)(b), 196.491(3)(g), Wis. Stats. The Legislature delegated to the Commission responsibility to define the appropriate form and content of an application. *See* § 196.491(3)(a)1 (“An application for a certificate issued under this subsection shall be in the form and containing the information required by commission rules. . . .”). So too, the Legislature delegated to the Commission the determination of whether an application is “complete.” *See* § 196.491(3)(a)2 (“The commission shall determine whether an application filed under subd. 1 is complete”). The only requirement imposed by statute is that the completeness determination be rendered within 30 days or the application is deemed complete by operation of law. *Id.*

Section 196.491(3)(d) ultimately requires that the Commission determine, *inter alia*:

2. The proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy
3. The design and location . . . is in the public interest considering alternative sources of supply, alternative locations, individual hardships, engineering, economic, safety, reliability and environmental factors

In light of these statutory factors, the Commission promulgated Wis. Admin. Code § PSC 111.53 to define the content of a CPCN application. This administrative rule provides in relevant part:

PSC 111.53 CPCN applications for large electric generating facilities.

(1) CONTENTS OF A CPCN APPLICATION.
[A] CPCN application . . . is not complete until the applicant has filed all of the following *information* with the commission:

. . . .

- (e) At least two proposed sites for the proposed facility, including a description of the siting process and a list of the factors considered in choosing the alternatives.
- (f) *Site-related information* for each proposed power plant site, including all of the following:
 1. The regulatory approvals required for construction and operation of the facility.
 2. The construction schedule and timeline, showing construction activities and permitting expectations

from the beginning of construction to the in-service date.

...

4. Any required transmission line construction, agreements for use of the transmission system to deliver plant power, transmission losses, and effects on system reliability. . . .

(Emphasis added).

This agency rule constitutes the **only** criteria defining the information required in a CPCN application.

After demanding multiple supplemental filings, the Commission — applying its own rule in a manner consistent with long-standing practice — held that the WE application included sufficient information for the agency to commence the statutory CPCN review process. (State’s App. 230-31).

Acceptance of the application marks the **beginning** of contested case proceedings, not final agency action. Thus, judicial review of this preliminary, procedural step is limited. *See generally Waste Management of Wisconsin, Inc. v. DNR*, 128 Wis. 2d 59, 88, 381 N.W.2d 318 (1986) (“[T]he legislative intent was to limit judicial review of administrative agency actions to ‘final orders’ of the agency.”); *Pasch v. DOR*, 58 Wis. 2d 346, 353, 206 N.W.2d 157 (1973). Such procedural matters provide a basis for judicial reversal only to the extent that the **final** action of the agency is undermined. *See* § 227.57(4), Wis. Stats.; *RURAL*, 239 Wis. 2d at 693, ¶¶ 47-48; *accord Seebach v. PSC*, 97 Wis. 2d 712, 724, 295 N.W.2d 753 (Ct. App. 1980).

The Circuit Court erred in vacating the Final Decision based on the Commission’s threshold acceptance of the application. Foremost, there was no error in the Commission’s determination — the application comported with Commission rule and practice and provided sufficient information to commence statutory review. But even were the application somehow deficient, the Final Decision of the

Commission, following the full contested proceedings, was not undermined in any respect.

B. The Commission Correctly Accepted The Application.

The Circuit Court interpreted § PSC 111.53 to require: (1) issued regulatory permits, (2) finalized transmission agreements, and (3) an undefined amount of distance between alternative sites. As to each, the Circuit Court “substitute[d] its judgment” for that of the Commission regarding the agency’s own rule, *see, e.g., Vonasek*, 65 Wis. 2d at 7-8, and rendered a construction of § PSC 111.53 inconsistent with both the plain language and purpose of the rule. If uncorrected, the Court’s erroneous ruling imposes crippling burdens on state agencies and the CPCN process.

1. Permits Need Not Be Obtained And Submitted At The Time Of The Application.

The Circuit Court concluded that the “plain and unambiguous” terms of § PSC 111.53(1)(f)1 require an applicant to *obtain* and submit all construction and operating permits with the application. *See Order* at 19. This novel construction of regulatory requirements, developed *sua sponte* by the Court, is unfounded.

First, this argument was never presented to the Commission. “It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency.” *State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶ 55, 244 Wis. 2d 613, 647, 628 N.W.2d 376.

Second, nothing in § PSC 111.53(1)(f)1 requires an applicant to obtain the myriad permits relating to a large generation facility before submitting an application. Rather, the express terms of the rule require only that the applicant provide “information” regarding the “regulatory approvals required for construction and operation.” Indeed, the very next line of the rule — not discussed by the Court — states that the application should provide “information” regarding

“[t]he construction schedule and timeline, showing construction activities and *permitting expectations* from the beginning of construction to the in-service date.” § PSC 111.53(1)(f)2 (emphasis added). Any “timeline” setting forth “permitting expectations” would be nonsensical if all permits must be issued before the application is submitted.

The Court’s construction is also irreconcilable with § 196.491(3). *See, e.g., State ex rel. WEPCO v. Bardwell*, 71 Wis. 2d 718, 729, 239 N.W.2d 78 (1976) (“Statutory constructions which work unreasonable or absurd results are to be avoided.”). Section 196.491(3)(a)3 delineates the time frame for DNR action on permits required “prior to construction” and expressly contemplates that DNR will “complete action” on the permits *after* the CPCN application has been accepted by the Commission. *Id.* (providing a 120-day period for DNR action).

Finally, the Circuit Court’s construction would place an unworkable and wasteful burden on regulatory bodies. Taken literally and in conjunction with the requirement that an applicant identify an alternative site, it would require applicants to obtain all regulatory permits for at least two separate sites before filing a CPCN application. This would require DNR and other agencies to engage in extensive permitting procedures that by definition would be superfluous, and create intractable burdens for the CPCN process. Such consequences are at direct odds with the intent of § 196.491(3), which was to create an efficient process for the approval of necessary generating facilities. *RURAL*, 239 Wis. 2d at 668-69, ¶ 4.

2. Transmission Agreements Need Not Be Signed At The Time Of The Application.

Under a similarly flawed interpretation of § PSC 111.53(1)(f)4, the Circuit Court (again *sua sponte*) held the application incomplete because it “fails to include the

transmission line agreements required by Wis. Admin. Code sec. 111.53(1)(f)4.” *Order* at 19.⁵

The rule contains no requirement that signed agreements be submitted with the CPCN application; rather, it requires only “information” regarding “transmission line construction, agreements for use . . . [etc.]” *See* § PSC 111.53(1)(f)4. WE’s application presented such information, including a “Generation Interconnection Study Report,” prepared by American Transmission Company (“ATC”)⁶, addressing required transmission system improvements and estimated costs. (R. 18-1:Vol. 3, Appx. Y).

3. The Commission Properly Determined That The Application Contained “Two Proposed Sites For The Proposed Facility.”

The Circuit Court held the application did not set forth “[a]t least two proposed sites for the proposed facility.” § PSC 111.53(1)(f); *see Order* at 16-19. The Court erroneously rejected the Commission’s construction of its own rule and failed to defer appropriately to the findings of fact underlying the Commission’s determination.

a. The Commission’s interpretation of its own rule is reasonable.

Section 196.491 was enacted in 1975. From its inception, the Commission has been responsible for determining whether the “design and location [of the proposed facility] . . . is in the public interest considering alternative sources of supply, alternative locations . . . , individual hardships, engineering, economic, safety, reliability and environmental factors.” § 196.491(3)(d)3, Wis. Stats. (1975). The Commission has nearly three decades of

⁵ This issue was also not presented to the agency and is waived. *Outagamie County*, 244 Wis. 2d at 647, ¶ 55.

⁶ Since January 1, 2001, effectively all transmission assets serving Eastern Wisconsin have been owned by ATC. *See* § 196.485, Wis. Stats.

experience evaluating proposed facilities based on this statutory responsibility.

Consistent with its experience evaluating “alternative locations” under these statutory factors, the Commission has required since 2000 that a CPCN application identify “[a]t least two proposed sites for the proposed facility.” § PSC 111.53(1)(e). To determine whether an applicant has complied with this requirement, the Commission applies the following test: “The Commission determines whether proposed site alternatives are reasonable by applying two standards: the site alternatives must each be feasible locations and they must be sufficiently distinct to offer different packages of costs and benefits.” *Final Dec.* at 45.

The Commission does not impose any rigid distance criteria to determine if two different physical locations are “sufficiently distinct” to satisfy this “two proposed sites” requirement. Rather, under the agency’s practice, “[t]he fact that alternate sites may be geographically close together does not automatically render them unreasonable alternatives. The Commission has accepted CPCN applications *for numerous projects* where the alternate sites have been close together, or even adjacent to each other.” *Id.* (emphasis added).

The Circuit Court held the Commission’s interpretation of its own rule invalid as a matter of law, reasoning:

[T]here is no ambiguity as to what is meant by “alternative locations” in sec. 196.491(3)(d)3, Wis. Stats. Similarly, there is no ambiguity as to what is meant by “at least two proposed sites” in Wis. Admin. Code sec. PSC 111.53(1)(e). The statute and the rule require that not less than two *distinct locations* be submitted as proposed alternate sites.

Order at 14 (emphasis added).

The Court did not define what it meant by “distinct locations” or how its definition of “distinct locations” differed

from the Commission's test. Nonetheless, it went on to hold that these proposed sites were not "distinct," as a matter of law, despite the fact that the proposed sites are geographically different (the sites are approximately ½ mile apart, in different municipalities and counties) and the Commission found that the sites offer different packages of costs and benefits. *Final Dec.* at 47.⁷

The Circuit Court's ruling is incorrect, based both on the deference due an agency's application of its own rule and the findings of fact underlying the application of that rule to this case.

First, nothing in the agency's test or its application here suggests, as the Court apparently believed, that the sites proposed in the application are not "distinct locations" in the literal meaning of the term. To the contrary, the Commission test requires that "the *site alternatives* must *each* be *feasible locations* and they *must be sufficiently distinct* to offer different packages of costs and benefits." *Final Dec.* at 45 (emphasis supplied). A "site" is simply the "space of ground occupied or to be occupied by a building." *Webster's Third New Int'l Dictionary* 2128 (1993). A "location" is "a position or site occupied or available for occupancy (as by a building) or marked by some distinguishing feature." *Id.* at 1327. There can be no dispute that the alternative sites set forth in the application constitute different literal "sites" or "locations." Compare R.18-1:Vol 3, § 1.1, with R.18-1:Vol. 3, § 5.1.1.⁸ Thus, the Circuit Court's rejection of the Commission's test is necessarily based on a different judgment as to what renders two sites sufficiently "distinct," rather than the meaning of the terms "site" or "location."

⁷ Without further explanation, the Circuit Court stated that "the CPCN as to the Fond du Lac Energy Center includes a consideration of two separate, distinct proposed locations." *Order* at 14 n.4. The two sites at issue there were approximately 2 miles apart. (R.18-119:418).

⁸ A map showing the alternative sites is included at WE App. 108.

However, the degree of “distinct[ness]” necessary to constitute an “alternative” is not a principle that is “unambiguous” as a matter of law. *See generally Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978) (“[A]s should be obvious even upon a moment’s reflection, the term ‘alternatives’ is not self-defining.”). Rather, differentiating “alternatives” requires context-specific assessments of reasonableness and feasibility. *See, e.g., Wisconsin’s Environmental Decade, Inc. v. PSC*, 79 Wis. 2d 161, 177, 255 N.W.2d 917 (1977); *Shoreline Park Preservation, Inc. v. DOA*, 195 Wis. 2d 750, 772, 537 N.W.2d 388 (Ct. App. 1995).⁹

In this light, there is no basis for a Court to find, as a matter of law, that the Commission test is “irrational.” *Sauk County*, 165 Wis. 2d at 413. It is not the province of the judiciary to define factual standards for the requisite “distinctness” of “alternatives” — *e.g.*, crafting rules that would mandate the necessary distance between two “sites” for them to constitute “alternatives” (100 yards? 1 mile? 100 miles?). Such determinations are quintessentially vested in the legislature and the agencies to which the legislature delegates authority. *See generally Wisconsin’s Environmental Decade, Inc. v. DNR*, 115 Wis. 2d 381, 413, 340 N.W.2d 722 (1983) (“[I]t is not the courts that decide whether and to what extent an agency must consider the social and economic impact, as well as environmental implications, of its permit decisions.”).

Given that the Circuit Court’s interpretation and the Commission’s legal test both require “distinct” alternatives, it is evident that the underlying basis of the Circuit Court’s decision is not an “unambiguous” principle of law but simply a disagreement with the *factual* determination of the Commission that the sites were sufficiently distinct.

⁹ Federal law is in accord. *See, e.g., Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991); *Lee v. United States Air Force*, 354 F.3d 1229, 1239-40 (10th Cir. 2004).

b. Substantial evidence supports the Commission’s determination that the application presented “two proposed sites.”

The Commission fully understood that “two proposed sites” must be identified in an application and that the final location of a facility must be assessed under the array of considerations set forth in § 196.491(3)(d)3 in order to approve the location as being “in the public interest.” The Final Decision expressly addresses the issue, as does an interim order of the Commission. *See Final Dec.* at 44-45; *see also Interim Order* (State’s App. 271-76). The Commission concluded, as a factual matter, that the sites proposed in the WE application were sufficient under the Commission’s rule. *Final Dec.* at 44-45.

With respect to the factual basis for the Commission’s determination that the application presented “two proposed sites,” the Circuit Court stated only: “A fair review of the record reflects the clear picture that there is no significant distinction between the costs and benefits offered by each of the three alternatives. These are not alternative sites or locations; they simply are three different configurations or utilizations of a single site.” *Order* at 15-16.

As to such factual inquiries, a reviewing court may not “substitute its judgment for that of the agency” or disregard the “substantial evidence” standard of review. § 227.57(6); *see also RURAL*, 239 Wis. 2d at 675-76, ¶ 20. It appears the Circuit Court may have reasoned that two sites cannot constitute “alternatives” if they are on the same “parcel” (the proposed sites are, in part, within a 1,000-acre property owned by WE).¹⁰ Certainly, however, the ownership of the land (or whether it constitutes a single “parcel”) cannot be a determinative factual issue: no one would dispute that there are alternative “sites” within Devil’s Lake State Park. Thus, the Circuit Court is left simply with a different judgment than the Commission as to whether the proposed sites are “sufficiently distinct to offer different packages of costs and

¹⁰ The “South Site-Exp” alternative actually included property not owned by WEPCO. *See Final Dec.* at 11; WE App. 108, 227.

benefits.” *Final Dec.* at 45. That, however, is an invalid basis to reverse the Commission’s considered judgment under the “substantial evidence” test.

Here, more than adequate evidence in the record supports the Commission’s determination that the sites are “alternatives.” The record establishes various differences in construction requirements for the sites, including differing excavation requirements and effects on wetlands, woodlands, grasslands, and habitat. (R.18-119:412-15; R.18-62:8). An environmental engineer testified on the air pollution advantages of the North Site-CUP over other sites, including: (1) reduced impacts of total suspended particulate matter; and (2) the lowest ambient air concentrations of most pollutants. (WE App. 252-253). The North Site-CUP also has other environmental and aesthetic advantages with respect to noise, availability of sewer services, construction access and traffic control, and surface water management. (WE App. 253-256).

The fact that the sites are also physically located in different municipalities and counties had significant impacts on various of the § 196.491(3)(d)3 factors. For instance, Oak Creek clearly “expressed its willingness to accept the project,” whereas Caledonia did not. *Final Dec.* at 47. Moreover, the North Site-CUP alternative reflects a “compromise and agreement between the city [of Oak Creek] and the applicants regarding the proper means of mitigating municipal concerns, such as noise, traffic and air emissions,” thereby placing Oak Creek in a “stronger position to enforce mitigation measures that protect its citizens from undue impact.” *Id.*

In sum, the Commission properly found, as an issue of fact, that “the site alternatives for ERGS” were “each feasible sites and each provide[d] different packages of costs and benefits, so that the Commission [was] presented with a real choice.” *Final Dec.* at 47.

C. Even Were The Application Somehow Deficient, Threshold Acceptance Of The Application For Review Did Not Undermine The Commission’s Final Decision.

Even assuming *arguendo* that the application was somehow deficient, no showing can be made that the preliminary acceptance of the application invalidated the Final Decision of the Commission. The Commission fully addressed all statutory factors after considering the full body of evidence and argument presented in the contested proceedings. *See* § 227.57(4), Wis. Stats.; *RURAL*, 239 Wis. 2d at 693, ¶¶ 47-48.

Notably, had the Commission done nothing during the 30-day application period in § 196.491(3)(a)2, the application would have been deemed “complete” by statute and *no* argument could be advanced that its “completeness” was subject to challenge.

As to the “permit” and “transmission agreement” issues, no prejudice exists. The Commission’s Order mandates that all permits required “prior to construction” issue before the CPCN becomes effective, and such permits have since issued. *See* WE App. 261-289 (air permit), and WE App. 290-318 (Ch. 30 permits).¹¹ The necessary interconnection and transmission agreements are also in place. *See* ATC FERC Electric Tariff No. 1, Service Agreement No. 222 (FERC Docket No. ER 02-548-000); MISO Transmission Request Nos. 76037796, 76037797.¹²

Similarly, no prejudice exists as to the proposed sites. Even were the application deficient, the Commission fully

¹¹ WE requests that the Court take judicial notice of these final agency orders pursuant to § 902.03(1)(b), Wis. Stats.

¹² WE is a party to the Network Integration Transmission Service Agreement (“NITSA”) with ATC. ATC has assigned the NITSA with Midwest Independent System Operator (“MISO”), such assignment having been accepted through FERC by letter order in Docket No. ER02-1187-000 issued on March 29, 2002. If requested, WE can submit a copy of the NITSA and letter order to the Court.

considered during the statutory review process “alternatives” beyond those identified in the application. For instance, the Commission considered, “as an alternative to the ERGS project,” the Calpine proposal to develop a “natural-gas-fired power plant in the town of Fond du Lac . . . with similar . . . units elsewhere in the state.” *Final Dec.* at 30. *Id.* As the Commission noted, “WEC’s proposed alternatives were only the starting point for the Commission’s review, not its endpoint. The Commission also included locations far away from the city of Oak Creek.” (R.63:7-8).

In this light, the statutory requirement that the agency determine, by its *final* action, that the “design and location” of the proposed facility is “in the public interest” considering “alternative locations,” § 196.491(3)(d)3, was independently satisfied regardless of any deficiencies in the application itself. Importantly, the Circuit Court made *no* finding that the *Final Decision* failed to satisfy the “alternative location” factor of § 196.491(3)(d)3. Nor would there have been any basis in this administrative record to make such a ruling, given the matters addressed by the Commission during the contested proceedings.

Finally, no party has demonstrated that the Commission ultimately erred in determining that the location selected “is in the public interest,” let alone demonstrated that some other location would be superior. *See Seebach*, 97 Wis. 2d at 724; *see generally McCrossen v. Nekoosa-Edwards Paper Co.*, 59 Wis. 2d 245, 263, 208 N.W.2d 148 (1973) (“Trial error is prejudicial only when it reasonably could be expected to affect the outcome of the case.”).¹³

¹³ The Court’s suggestion that application completeness issues were essential to “full participation” by the public is without basis. *Order* at 23-24. The statutory scheme does not contemplate contested proceedings with respect to the *application*, as opposed to the public review process following acceptance of the application. The content of the application is a matter delegated entirely to the discretion of the Commission. Public participation is accorded through the contested proceedings – matters for which full and vigorous participation unquestionably occurred here.

II. The Commission’s Final Decision Approving The CPCN Comported With The Energy Priorities Law And The CPCN Statute.

With respect to the Commission’s Final Decision approving the ERGS facilities under § 196.491(3), the grounds upon which the Circuit Court vacated are also flawed. As demonstrated below, the Circuit Court’s conclusions were premised on erroneous interpretations of the applicable statutes and a disregard of the evidence supporting the Commission’s decision.

A. The Commission’s Final Decision Complies With The Energy Priorities Law.

The Wisconsin Energy Priorities Law (“EPL”) requires that the Commission, in approving a CPCN, consider and implement specified priority fuels “to the extent cost-effective and technically feasible.” *See* §§ 1.12(4) and 196.025(1), Wis. Stats.

The Circuit Court held that the Commission violated the EPL in two respects: (1) failing to identify facts with “sufficient clarity” to support its conclusion that gas was not a cost-effective alternative for these baseload facilities; and (2) failing to make specific findings regarding oil and low sulfur coal. In so ruling, the Circuit Court failed to respect the Commission’s decade-long experience implementing the EPL and its sound explanations as to why alternative fuels, including natural gas, were not appropriate for the identified baseload needs. *See Final Dec.* at 14-23, 29-31. Moreover, the Court’s ruling that § 196.025(1) requires that each priority receive an individual point-by-point discussion in the Commission’s final decision is without basis.

1. The Commission Has Broad Discretion To Determine Whether Priorities Are “Cost-Effective” or “Technically Feasible.”

The primary components of the EPL are set forth in §§ 1.12(4) and 196.025(1).

§ 1.12(4), Wis. Stats.

In meeting energy demands, the policy of the state is that, *to the extent cost-effective and technically feasible*, options be considered based on the following priorities, in the order listed:

- (a) Energy conservation and efficiency.
- (b) Noncombustible renewable energy resources.
- (c) Combustible renewable energy resources.
- (d) Nonrenewable combustible energy resources, in the order listed:
 - 1. Natural gas.
 - 2. Oil or coal with a sulfur content of less than 1%.
 - 3. All other carbon-based fuels.

§ 196.025(1), Wis. Stats.

To the extent cost-effective, technically feasible and environmentally sound, the commission shall implement the priorities under s. 1.12(4) in making all energy related decisions and orders, including advance plan, rate setting and rule-making orders.

(Emphasis added).

Nothing in either statute specifies how the Commission must evaluate “cost-effective[ness]” or technical feasib[ility].” However, the Prefatory Note to the Act that created the EPL explains that the inclusion of this language is intended to give the Commission “substantial discretion” in implementing the law:

[T]he bill attempts to ensure implementation of the priority list through a combination of directives and encouragement, while *reserving substantial discretionary authority to the decision maker*.

* * *

By using the phrase, “to the extent cost-effective and technically feasible,” the Bill provides *a large element of discretion to state agencies* and local governmental units in following the priority list to meet their own energy needs.

1993 Wis. Act 414, Prefatory Note (emphasis added).

It is important to recognize that in exercising its “substantial discretionary authority” in this case, the Commission appropriately addressed not only the immediate question of the ERGS facilities, but also the role of these facilities within the overall pattern of energy generation for the State.

First, the Commission evaluated the proposed baseload facilities within the context of the entire PTF application, which included two new gas-fired plants, the retirement of an existing coal facility, and a commitment to renewable generation and efficiency measures ultimately mandated in the Final Decision. *Final Dec.* at 21-22. As the Commission recognized, approval of these facilities to fulfill baseload needs was an integral part of a comprehensive plan implementing energy priorities.

Second, the Commission considered the ERGS proposal within the broader history of its prior decisions and the overall energy needs of Wisconsin. The Commission had authorized multiple facilities involving over 6,900 MW of natural gas-fired generation since enactment of the EPL, while the last new coal-fired generation was approved in 1980 and completed in 1985. *Final Dec.* at 21-23. The Commission explained that, to implement energy priorities in a manner consistent with the need for a cost-effective and reliable energy system, it must maintain a reasonable “mix of energy sources,” including coal-fired generation. *Id.* at 23. This is squarely consistent with the purpose of the law:

[C]ompliance with the directive that the agencies follow the priority list [and] the success of implementing the priority list will

be reflected in the overall pattern of energy generation and use, across the state and through time.

1993 Wis. Act 414, Prefatory Note.

Each energy-related decision is part of a broader *pattern* of agency responsibility to oversee the energy needs of the State and system-wide reliability. Given the importance of this “overall pattern” of decision making, a reviewing court should not substitute its judgment for the specialized expertise of the Commission when, as here, the agency was attentive to its responsibilities under the EPL. *See, e.g., Wisconsin Bell, Inc. v. PSC*, 2004 WI App 8, ¶ 22, 269 Wis. 2d 409, 423, 675 N.W.2d 242 (“Without being facetious, we can be humble enough, in a case like this one, to respect that an agency, far better than a court, has the experience, expertise, and fact-finding opportunity that allow for fair and consistent decision making in areas of complex regulation.”).

2. The Commission Properly Determined That Coal Was The Appropriate Fuel To Meet The Identified Baseload Power Needs.

The first Finding of Fact in the Final Decision addresses the EPL:

Energy conservation, renewable resources, or other energy priorities listed in Wis. Stats. §§ 1.12 and 196.025, or their combination, are not cost-effective or technically feasible alternatives to the projects proposed in this docket.

Final Dec. at 4. The record fully supports this finding.

The Commission’s analysis addresses the propriety of priority fuels in light of the “baseload” needs at issue. The Circuit Court criticized this attention to “baseload” needs, suggesting the concept was not established. *See Order* at 34-35. To the contrary, the distinction between “baseload

facilities” and “peak load units” was discussed by this Court over 25 years ago. *Falkner v. Northern States Power Co.*, 75 Wis. 2d 116, 136, 248 N.W.2d 885 (1977). Moreover, the need for new “baseload facilities” was a fundamental concern expressed by the Legislature in 2001 and led to the enactment of the Leased Generation Law that authorized the financing mechanism approved in this case. Noting “considerable concern about the adequacy of the electric power supply,” the Legislative Council stated:

[N]o new baseload power plants (large power plants that are designed to run full-time) have been built in Wisconsin since 1985, in spite of significant growth in demand for power since then. There is a general consensus that a substantial amount of new electric generation capacity, including baseload facilities, must be built in the next 10 years to meet the projected demand for power.

(State’s App. 249.). Chapter 3 of the EIS in this case also examined the “Need for Baseload Capacity in Southeastern Wisconsin.” (WE App. 180-198). The Commission concluded there is a “need for new baseload and intermediate generating capacity for WEPCO and Wisconsin,” and that “new baseload power plants” are needed “in the period after 2006.” (WE App. 198). In sum, the Commission’s emphasis on the need for “baseload” generation capacity was well founded.

Addressing the priorities listed in § 1.12(4), the Commission first discussed whether energy conservation and efficiency (the top priority) could meet these baseload needs. *Final Dec.* at 16-17. While concluding they could not, the Commission ordered WE to implement various conservation measures. *Final Dec.* at 17-18.

The Commission next analyzed renewable energy resources. Focusing on wind and biomass combustion, the Commission noted that while WE has taken steps to obtain 5% of its energy from renewable resources by 2011 (twice the

statutory requirement under § 196.378), such resources are not “cost-effective or technically feasible to meet . . . baseload needs.” *Id.* at 18-19.

The Commission then considered whether gas-fired generation was appropriate. Based upon both qualitative and quantitative analyses, the Commission concluded that natural gas was not “cost-effective or technically feasible” to meet these baseload needs. *Final Dec.* at 19.

The Commission employed extensive computer modeling (“EGEAS runs”)¹⁴ to assess the appropriateness of natural gas on a cost basis. *Id.* The computer modeling demonstrated that a “gas only” option would cost billions more to operate. (WE App. 203, 245). The EIS explained that “natural gas prices were 237 percent higher than coal prices” in recent years, and EGEAS runs demonstrated that “an expansion plan over the next 30 years relying exclusively on natural gas would cost ratepayers \$1.9 billion more than a balanced plan using optimally timed gas- and coal-fired electric generation, as well as some wind generation development.” (WE App. 199, 203). EGEAS modeling also demonstrated that Calpine’s proposal “would not replace the need for additional coal-fired, baseload generation.” *Final Dec.* at 30-31. A reviewing court, lacking the same institutional expertise, is particularly ill-suited to second-guess the Commission’s analysis of this evidence. *See, e.g., City of New Richmond v. DNR*, 145 Wis. 2d 535, 552, 428 N.W.2d 279 (Ct. App. 1988) (“The complexities of such assertions and the validity of their scientific underpinning are eloquent testimony of the need to defer to the [agency’s] expertise in reviewing its conclusions in terms of their reasonableness.”).

The Commission also noted that “qualitative” factors support the use of coal over natural gas for these baseload

¹⁴ “EGEAS” stands for “Electric Generation Expansion Analysis System.” (R.18-119:Vol. 1, at 66). EGEAS has been used for years by the Commission and utilities to help determine the “least-cost generation system expansion plans by comparing all combinations of multiple generation options to meet forecasted system load.” *Id.*

needs. *Final Dec.* at 21. The EIS discussed two such concerns in detail – reliability and price volatility. The EIS identifies four “reliability concerns” associated with natural gas transmission: (1) “interruptions of the natural gas system . . . [d]uring extremely cold weather” that “could last for three days or more;” (2) “[p]ressure problems on the pipelines;” (3) the need for “substantial expansion of the interstate pipeline system serving the state” if large-scale generators are to be built; and (4) “the inability of generator owners to store natural gas on-site.” (WE App. 211-213). Additionally, the Commission observed that the “extreme volatility of natural gas prices” is “not desirable for consumers.” (WE App. 199, 214). Over-reliance on natural gas would thus “exacerbate budget problems currently faced by retail natural gas consumers.” (WE App. 214).

Finally, the Commission noted that the decision to approve new coal facilities was consistent with its historical approach to fuel prioritization and that the “total mix of energy sources that the Commission has approved over this time period shows a pattern of decisions for baseload, intermediate and peaking generating facilities that complies with the State’s energy policy.” *Final Dec.* at 23. In this vein, the Commission noted that “relying upon natural gas to meet WEPCO’s baseload needs as well as its intermediate and peaking requirements would raise the risk of not properly diversifying the utility’s fuel mix.” *Id.* at 31.

Based upon this evidence, the Commission properly concluded that other alternatives were neither cost-effective nor technically feasible to meet Wisconsin’s baseload energy needs. *Final Dec.* at 4, 21. Given the evidence supporting the “advantages of using cleaner burning coal technologies like SCPC as a baseload resource,” the Commission found that “the key question in this docket is not whether additional coal-fired baseload generation should be approved, but when it should be installed.” *Id.* at 21, 24.

3. The Record Reflects That The Commission Properly Rejected Oil and Low Sulfur Coal.

The Circuit Court ruled that there was “no basis” to “infer that the Commission considered in any degree two of the higher priority fuels, oil and low sulfur coal.” *Order* at 40. The record demonstrates otherwise.

No party to the administrative proceedings contended that oil or low sulfur coal were feasible or appropriate alternatives for the baseload generation at issue. Thus, this undisputed issue did not warrant specific discussion in the Final Decision. *See Wisconsin’s Environmental Decade, Inc. v. PSC*, 98 Wis. 2d 682, 701, 298 N.W.2d 205 (1980) (“There is no requirement . . . that the agency provide an elaborate opinion. It is sufficient if the findings of fact and conclusions of law are specific enough to inform the parties and the courts on appeal of the basis of the decision.”). The Commission’s Finding of Fact that the “other energy priorities . . . are not cost-effective or technically feasible alternatives,” *Final Dec.* at 4, is adequate notice that the Commission considered all of the statutory priorities.

The Circuit Court’s suggestion that failing to specifically discuss every priority fuel in the Final Decision was “directly contrary to the plain meaning” of § 196.025(1), *Order* at 40, finds no support in the statute. Section 196.025(1) provides:

To the extent cost-effective, technically feasible and environmentally sound, the commission shall implement the priorities under s. 1.12(4) in making all energy-related decisions and orders, including advance plan, rate setting and rule-making orders.

Nothing directs the Commission to engage in a rote discussion of each of the various alternatives, particularly where it is undisputed that a fuel source is not a feasible alternative.

Nonetheless, the record fully supports the Commission's determination that low sulfur coal and oil were not appropriate for the proposed facilities.

WE's witness Allan Mihm explained several reasons why WE's proposed bituminous coal is preferable to low sulfur ("subbituminous") coal, including:

- (1) improved generating unit efficiency (meaning less coal is burned);
- (2) 50% greater heating value;
- (3) lower emission rates; and
- (4) higher levels of mercury capture.

(WE App. 248-250). The EIS observed that bituminous coal offers distinct "advantages" over subbituminous coal, including "improved mercury collection," "less CO₂ production" and "higher heating values." (WE App. 178-179).

Uncontradicted hearing testimony also established that "oil as a combustion turbine fuel is not cost effective and probably not permissible from an air permit perspective, except as a backup fuel to natural gas." (WE App. 247).

B. The Commission Properly Considered The Potential Impacts Of Related Transmission Facilities.

The Circuit Court held that the Final Decision violated § 196.491(3)(d)3 because the Commission did not "determine" the "design, cost, and location" of related transmission facilities. *See Order* at 30-32. The Court concluded the Commission "essentially elect[ed] not to address the issue." *Id.* at 31. This ruling is plainly erroneous.

1. Section 196.491(3)(d)3 Does Not Require The Commission To Determine The Specific Design, Cost And Location Of Related Transmission Facilities.

Section 196.491(3)(d)3 provides:

[T]he commission shall approve an application . . . for a [CPCN] only if the commission determines . . .

3. [that] [t]he design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors

According to the Circuit Court, this provision, as a matter of law, requires the Commission to “determine” the *actual* design, cost, and location of transmission facilities prior to approving a CPCN. *Order* at 32. Although the Court acknowledged that the statute “does not expressly compel the inclusion of transmission facilities,” the Court nonetheless held that failure to render such detailed findings was “without rational basis.” *Id.*

Nothing in the text of § 196.491(3)(d)3 supports this imposition of substantive requirements. Indeed, this subsection requires only that the Commission determine that the design and location of the generating facility is in the public interest “considering” such factors as “engineering, economic . . . and environmental factors.” The Commission has broad authority to determine the salient facts that should be assessed to determine whether the proposal is in the public interest under the statutory criteria. The Circuit Court’s attempt to impose its own judgment regarding which facts must be considered by the agency, without any foundation in the express language of the statute, constitutes an impermissible substitution of the Court’s judgment for the rational interpretation of the agency. *See, e.g., Sauk County*, 165 Wis. 2d at 413; § 227.57(10), Wis. Stats.

2. The Record Includes Sufficient Information Concerning Transmission Matters.

The Circuit Court's contention that the Commission failed to properly "address" the issue of transmission facilities, and "does not know what the cost or design of the required transmission facilities will be," is likewise unsupported. *Order* at 31. The Commission considered substantial evidence regarding the design, cost, location and potential environmental impacts of ERGS-related transmission. This evidence was more than adequate to support the agency's approval of the CPCN under § 196.491(3)(d)3.

Chapter 6 of the EIS explains that units at ERGS will produce power at approximately 20 KV and adjacent transformers will step up voltage to 345 KV. (WE App. 228-230). The EIS further explains that interconnection will consist of three circuits, each approximately 4,000 feet long, and contains diagrams of possible routes. (R.18-119:Vol. 2, Figures 2-1, 2-2, 2-4). The EIS examines possible system-wide transmission impacts and the work expected to accommodate the generating units. (WE App. 229-234). The EIS further addresses the design, location and potential environmental impacts of a new four-mile 345 KV line, as well as a 345 KV transmission line potentially resulting from ATC's "10-year Transmission System Assessment." (WE App. 235-243).

The Commission also considered extensive information on the expected cost of transmission improvements. ATC conducted "several studies to determine the cost of interconnecting ERGS to the transmission system and the cost of upgrading the transmission system." *Final Dec.* at 10. The most recent estimate was a total cost of \$166 million. *Id.* In addition, the Commission heard testimony from John Ratajczyk of ATC and PSC staff economist Randel Pilo. (R.18-157:3101-73; R.18-157:3906).

The Commission addressed transmission-related matters in its Final Decision, *see, e.g., Final Dec.* at 10-11, acknowledging that ATC’s final resolution of the specific interconnection system requirements is “quite complex, depends upon the site chosen, and requires several months of sequential computer model runs.” *Id.*

In sum, the administrative record contains substantial evidence supporting the Commission’s consideration of the “engineering,” “environmental” and “economic” ramifications of the transmission facilities required to transmit energy generated at ERGS. That is all that the “public interest” provision of § 196.491(3)(d) requires.

C. The Commission’s Final Decision And Order Satisfies § 196.491(3)(e) And Makes Clear That The CPCN “Takes Effect” Only After The DNR Permits Required “Prior To Construction” Have Issued.

The Circuit Court held that the Commission violated § 196.491(3)(e) by “issu[ing] the CPCN before the regulatory permits have been obtained.” *Order* at 45. The Circuit Court thus “vacated” the “PSC Order” and “remanded to the Commission to permit the applicant to demonstrate that the required regulatory permits have been obtained.” *Id.* The ruling is inconsistent with the structure and purpose of § 196.491(3) and fails to acknowledge the legal effect of the Commission’s Order. Ultimately, however, the issue has little practical impact, as DNR has since issued the permits. (WE App. 261-318).

1. The Final Decision And Order Is Consistent With § 196.491(3)(e).

Section 196.491(3)(e) provides that the Commission “may not issue a [CPCN] until the [DNR] has issued all permits and approvals identified in the listing specified in par. (a)3.a. that are required prior to construction.” Consistent with the overall structure of § 196.491(3), provision (3)(e) addresses the specific subset of permits deemed by DNR to be “required prior to the construction of the facility,” (as opposed

to operational permits or permits relating to more specific activities that are otherwise listed by DNR pursuant to par. (a)3.a.). This subset of permits, in turn, are subject to the time strictures of § 196.491(3)(a)3.b. (requiring that the DNR “complete action” on such permits “within 120 days” after the DNR application is complete).¹⁵

“The primary DNR approval needed before power plant construction may begin is the construction permit for a new source emitting significant quantities of air pollutants” (“air permit”). WE App. 172; *see also Final Dec.* at 51. In this case, DNR also designated certain Chapter 30 permits as “pre-construction approvals,” *see* WE App. 172, *Final Dec.* at 53;¹⁶ however, for these permits the DNR subsequently determined that contested case hearings should not take place until after a Final Decision approving the ERGS application was rendered by the Commission. (WE App. 257-260, 298-299, ¶¶ 28-31).¹⁷

¹⁵ Section 196.491(3c) expressly contemplates that there may be various “federal and state permits . . . required prior to commencement of construction” that will be obtained *after* an electric utility “has received a [CPCN].”

¹⁶ These included “the permit for grading work,” the “NR 103/NR 299 analysis and certification for wetland fill,” the “stormwater runoff” approval, and the “threatened/endangered species review.” (R.18-119:5). The first three are part of the Chapter 30 permits issued on November 22, 2004 (WE App. 290-318); the endangered species permit was later determined to be unnecessary. *Final Dec.* at 54.

¹⁷ This decision by DNR is consistent with the manner by which the Legislature has stated the process should operate. In enacting 2003 Act 89, which addressed the interrelationship between Chapter 30 permits and the CPCN process, the Legislative Council stated as follows:

Note that there are a number of other DNR permits that may be required for construction of a new utility facility. These include air and water pollution permits, solid waste disposal approvals for ash, and permits for withdrawal of cooling water from either surface water or groundwater. An air pollution construction permit must be issued before the PSC may issue a CPCN for the project. The remaining approvals usually are issued at

Although both permits have now issued, *see* WE App. 261-289 (air permit), 290-318 (Ch. 30 permits), neither the air permit nor the Chapter 30 permits had issued as of the time the Commission was required to render its final decision pursuant to § 196.491(3)(g) (mandating “final action on an application” within 360 days or the CPCN is deemed to “have issued”).

The deadline for the Commission to take “final action” approving or denying this application was November 10, 2003. Over the course of the preceding 360-day review period, the Commission conducted exhaustive inquiry regarding the statutorily mandated factors for consideration, received and evaluated thousands of pages of analysis and argument, worked in conjunction with DNR to issue a 900-page final EIS addressing environmental matters, and completed comprehensive public hearings and contested proceedings. During this period, DNR also determined that: (1) “both the North Site and North Site-CUP location should meet applicable criteria for [air] permit approval,” *Final Dec.* at 51; and (2) it “did not consider any of the sites to be unpermissible” from a Chapter 30 perspective. *See* WE App.299, ¶ 29.

Thus, the Commission was left with three options as of November 10, 2003: (1) not render a decision — in which case the CPCN would “issue” by operation of law without restriction; (2) deny the application — in which case the Commission’s determination that these facilities were needed by 2009 and 2010 to meet Wisconsin’s energy needs would be negated; or (3) render a final decision and order imposing conditions necessary to satisfy the requirements of

some point during the construction process before the permitted activity commences.

Wisconsin Legislative Council Information Memorandum 2004-5, at 3. Although the amended § 30.025, Wis. Stats., does not apply here given its effective date of December 18, 2003, that amendment clarifies that the Chapter 30 permitting should, in fact, come *after* issuance of a CPCN.

§ 196.491(3) and ensure that construction would not commence until required DNR permits issued.

In light of these alternatives, the Commission reached the only reasonable conclusion and rendered a carefully defined Final Decision and Order in full accord with the fundamental purposes of § 196.491(3). To this end, the Commission set forth a Final Decision that “approves the PTF application in part, denies it in part, and modifies it,” *Final Dec.* at 4, and rendered an Order that specified, in plain and unambiguous language, the effective date of both that Final Decision and the CPCN itself:

This Final Decision takes effect on the day after it is mailed. The CPCN for the ERGS facility only takes effect when the DNR issues all permits and approvals that it identified, pursuant to Wis. Stat. § 196.491(3)(a)3.a., as being required prior to construction of the facility.

Final Dec. at 62.

Given the factual circumstances of this administrative proceeding — in which the Commission had completed its analysis of the CPCN application, but DNR had not yet concluded its own permit procedures — this Final Decision and conditional Order constitutes “a reasonable agency decision that comports with the purpose of the statute.” *RURAL*, 239 Wis. 2d at 693, ¶ 46. (quoting *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 286-87, 548 N.W.2d 57 (1996)). The Commission’s Order made certain WE is not authorized to “proceed with construction until both agencies had taken favorable action on the application.” See Wisconsin Legislative Council Information Memorandum 75-8, at 1 (October 20, 1975).

In *RURAL* this Court stated that “[w]here the PSC has before it an application to process according to the longer timeline in Wis. Stat. § 196.491(3), the PSC should, and could, comply with subdivision (e).” 239 Wis. 2d at 699, ¶ 59. Such a position, however, presumed (as does the

statute) that DNR would complete its review within the time frame accorded under § 196.491(3)(a)3.b. Here, given that DNR was not in a position to issue the permits prior to the Commission's statutory deadline to render its final decision, the Commission faced the same set of choices presented in *RURAL*:

The PSC was faced with three choices: one, issue the permit with the condition that RockGen must obtain all necessary permits; two, allow the pocket provision to operate and have a certificate issue on the application without any conditions; or, three, reject RockGen's certificate application because one permit had not yet been issued.

239 Wis. 2d at 700, ¶ 60.

In these circumstances the Commission appropriately gave “full effect” to the purpose of § 196.491(3) by entering the type of conditional order found to be within its authority in *RURAL*. *Id.* at 700, ¶ 61.

2. The Final Decision Approving The Application Was Proper Even If The Form Of The Order Was Incorrect.

Section 196.491(3)(e) does not preclude the Commission from rendering a final decision on an application before DNR has “issued” permits required prior to construction. Rather, the express terms of § 196.491(3)(e) and (3)(g) distinguish between “final action,” “approv[al]” of the application, and “issu[ance]” of the CPCN. Although a CPCN may not “issue” until the requisite construction permits are in place, no such statutory restriction exists with respect to the Commission's authority to render a final decision and order that conditionally “approve[s] the application” within the time frame required by law.

Because nothing in § 196.491(3)(e) renders the Commission's Final Decision to “approve the application with such modifications as are necessary for an affirmative

finding under par. (d)” erroneous, the limited error, if any, arising from the form of Order rendered by the Commission would be that the CPCN itself was prematurely “issued” prior to the required DNR permits.

In legal effect, the form of Order entered here does not constitute “issuance” of the CPCN within the meaning of § 196.491(3)(e), given that the CPCN does not, by the express terms of the Order, authorize construction until DNR permits have issued. *See, e.g., Georgia-Pacific Corp. v. EPA*, 671 F.2d 1235, 1240 (9th Cir. 1982) (noting that, during the same time period § 196.491 was enacted, EPA regulations defined the “date of issuance” of a permit to be “synonymous” with the permit’s “effective date”). However, even were the CPCN deemed to have improperly “issued” as of the Final Decision and Order, judicial correction of this procedural error would require only that the matter be remanded to the Commission to ensure that the CPCN not “issue” until the requisite DNR permits have been issued. DNR has issued those permits. (WE App. 261-318).

Finally, the Legislature has instructed that “[s]ubstantial compliance with the requirements of the statutes shall be sufficient to make effective any rule, regulation, order or action of the commission.” § 196.02(9), Wis. Stats. This comports with the “reasonableness” standard long applied to Commission actions. *RURAL*, 239 Wis. 2d at 691, ¶ 44. The form of order used here effected substantial compliance with § 196.491(3)(e), and at most represented a “harmless procedural error” that in no manner impairs the “fairness of the proceedings or the correctness of the action.” *Id.* at 701-02, ¶ 63.

D. The Commission Did Not Err In Allowing WE To Build “Common Facilities” Large Enough To Accommodate Possible Future Expansion At The ERGS Site.

In its Final Decision the Commission authorized WE to construct certain “common facilities” to support 3,000 MW of generation, 600 more than currently authorized, in order to

“afford[] future planning flexibility.” *Final Dec.* at 32. The Commission noted that the \$20 million cost of this work “is a modest amount to pay” to provide such flexibility. *Id.*

The Circuit Court ruled that this finding was error because no CPCN was authorized for an extra 600 MW and “[t]here is no suggestion that the Commission has ever before interpreted its authority to include the power to permit partial construction of a facility for which CPCN has not been determined, let alone a facility as to which CPCN has been expressly denied.” *Order* at 42-43. This ruling is based on a misunderstanding of the Final Decision.

The Commission did not permit “partial construction” of a facility. Rather, the Commission – exercising its experience, technical competence, and specialized knowledge – assessed the appropriate parameters of construction activity for the facilities that *were* approved. The existing generating units at Oak Creek and the two new units will make use of certain “site common systems.” (R.18-157:1202). WE presented the Commission with two options: WE could size the common systems to accommodate the existing and new units, or it could “oversize” them to accommodate possible future generation at the site. While the cost of such oversizing was estimated at \$20 million if done now, it would be substantially greater in the future. (R.18-157:1225). The limited question facing the Commission, therefore, was whether it was prudent to do the work now in order to avoid potentially significantly higher costs in the future if additional generating capacity is needed. Future generating capacity would be subject to full Commission review and approval.

The question was not one of agency authority. Rather, it was a factual question as to the scope and manner of construction that should be authorized with respect to the CPCN at issue.

CONCLUSION

For the foregoing reasons, WE respectfully requests that the Court reverse the Circuit Court and reinstate the Commission's November 10, 2003 Final Decision and Order.

WE further requests that, for the reasons set forth in WE's petition for a direct, expedited appeal, the Court issue a final decision as expeditiously as possible.

Dated this _____ day of February, 2005.

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**CERTIFICATION PURSUANT TO
§ 809.19(8)(b), WIS. STATS.**

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,998 words.

Dated at Milwaukee, Wisconsin this _____ day of February, 2005.

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CPCN Statute - § 196.491(3), Wis. Stats. (2002)

(3) CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY. (a) 1. No person may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity from the commission as provided in this section. An application in the form and containing the information required by commission rules for such certificate shall be filed with the commission not less than 6 months prior to the commencement of construction of a facility. Within 10 days after filing the application, the commission shall send a copy of the application to the clerk of each municipality and town in which the proposed facility is to be located and to the main public library in each such county.

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

3. a. At least 60 days before a person files an application under subd. 1., the person shall provide the department with an engineering plan showing the location of the facility, a description of the facility, including the major components of the facility that have a significant air, water or solid waste pollution potential, and a description of the anticipated effects of the facility on air and water quality. Within 30 days after a person provides an engineering plan, the department shall provide the person with a listing of each department permit or approval which, on the basis of the information contained in the engineering plan, appears to be required for the construction or operation of the facility.

b. Within 20 days after the department provides a listing specified in subd. 3. a. to a person, the person shall apply for the permits and approvals identified in the listing. The department shall determine whether an application under this subd. 3. b. is complete and, no later than 30 days after the application is filed, notify the applicant about the determination. If the department determines that the application is incomplete, the notice shall state the reason for the determination. An applicant may supplement and refile an application that the department has determined to be incomplete. There is no limit on the number of times that an applicant may refile an application under this subd. 3. b. If the department fails to determine whether an application is complete within 30 days after the application is filed, the application shall be considered to be complete. The department shall complete action on an application under this subd. 3. b. for any permit or approval that is required prior to construction of a facility within 120 days after the date on which the application is determined or considered to be complete.

(b) The commission shall hold a public hearing on an application that is determined or considered to be complete in the area affected pursuant to s. 227.44. A class 1 notice, under ch. 985, shall be given at least 30 days prior to the hearing.

(d) Except as provided under par. (e) and s. 196.493, the commission shall approve an application for a certificate of public convenience and necessity only if the commission determines all of the following:

2. The proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy. This subdivision does not apply to a wholesale merchant plant.

3. The design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors, except that the commission may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant. In its consideration of environmental factors, the commission may not determine that the design and location or route is not in the public interest because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285.

3m. For a high-voltage transmission line, as defined in s. 30.40 (3r), that is to be located in the lower Wisconsin state riverway, as defined in s. 30.40 (15), the high-voltage transmission line will not impair, to the extent practicable, the scenic beauty or the natural value of the riverway. The commission may not require that a high-voltage transmission line, as defined in s. 30.40 (3r), be placed underground in order for it to approve an application.

3r. For a high-voltage transmission line that is proposed to increase the transmission import capability into this state, existing rights-of-way are used to the extent practicable and the routing and design of the high-voltage transmission line minimizes environmental impacts in a manner that is consistent with achieving reasonable electric rates.

3t. For a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more, the high-voltage transmission line provides usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state and the benefits of the high-voltage transmission line are reasonable in relation to the cost of the high-voltage transmission line.

4. The proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use. In its consideration of the impact on other environmental values, the commission may not determine that the proposed facility will have an undue adverse impact on these values because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285.

5. The proposed facility complies with the criteria under s. 196.49 (3) (b) if the application is by a public utility as defined in s. 196.01.

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

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

(dm) In making a determination required under par. (d), the commission may not consider a factual conclusion in a strategic energy assessment unless the conclusion is independently corroborated in the hearing under par. (b).

(e) If the application does not meet the criteria under par. (d), the commission shall reject the application or approve the application with such modifications as are necessary for an affirmative finding under par. (d). The commission may not issue a certificate of public convenience and necessity until the department has issued all permits and approvals identified in the listing specified in par. (a) 3. a. that are required prior to construction.

(g)1. The commission shall take final action on an application within 180 days after the application is determined or considered to be complete under par. (a) 2. If the commission fails to take final action within the 180-day period, the commission is considered to have issued a certificate of public convenience and necessity with respect to the application, unless the commission, within the 180-day period, petitions the circuit court for Dane County for an extension of time for taking final action on the application and the court grants an extension. Upon a showing of good cause, the court may extend the 180-day period for no more than an additional 180 days. If the commission fails to take final action within the extended period, the commission is considered to have issued a certificate of public convenience and necessity with respect to the application.

1m. Subdivision 1. does not apply to an application for a certificate of public convenience and necessity if another state is also taking action on the same or a related application.

(gm) The commission may not approve an application filed after October 29, 1999, under this section for a certificate of public convenience and necessity for a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more unless the approval includes the condition that the applicant shall pay the fees specified in sub. (3g)(a). If the commission has approved an application under this section for a certificate of public convenience and necessity for a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more that was filed after April 1, 1999, and before October 29, 1999, the commission shall require the applicant to pay the fees specified in sub. (3g)(a). For any application subject to this paragraph, the commission shall determine the cost of the high-voltage transmission line, identify the counties, towns, villages and cities through which the high-voltage transmission line is routed and allocate the amount of investment associated with the high-voltage transmission line to each such county, town, village and city.

(h) The commission may waive compliance with any requirement of this section to the extent necessary to restore service which has been substantially interrupted by a natural catastrophe, accident, sabotage or act of God.

(i) If installation or utilization of a facility for which a certificate of convenience and necessity has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility may nevertheless proceed.

(j) Any person whose substantial rights may be adversely affected or any county, municipality or town having jurisdiction over land affected by a certificate of public convenience and necessity may petition for judicial review, under ch. 227, of any decision of the commission regarding the certificate.

(k) No person may purchase, or acquire an option to purchase, any interest in real property knowing that such property is being purchased to be used for the construction of a high-voltage transmission line unless the person gives written notice to the prospective seller of the size, maximum voltage and structure type of any transmission line planned to be constructed thereon and the person by whom it will be operated. Contracts made in violation of this paragraph are subject to rescission by the seller at any time prior to the issuance of a certificate of public convenience and necessity for the high-- voltage transmission line by the commission.

(3c) COMMENCEMENT OF CONSTRUCTION OF LARGE ELECTRIC GENERATING FACILITIES. (a) Except as provided in par. (b), an electric utility that has received a certificate of public convenience and necessity under sub. (3) for constructing a large electric generating facility shall commence construction no later than one year after the latest of the following:

1. The date on which the commission issues the certificate of public convenience and necessity.

2. The date on which the electric utility has been issued every federal and state permit, approval, and license that is required prior to commencement of construction.

3. The date on which every deadline has expired for requesting administrative review or reconsideration of every federal and state permit, approval, and license that is required prior to commencement of construction.

4. The date on which the electric utility has received the final decision, after exhaustion of judicial review, in every proceeding for judicial review described in sub. (3)(j).

(b) Upon showing of good cause, the commission may grant an extension to the deadline specified in par. (a).

(c) If an electric utility does not commence construction of a large electric generating facility within the deadline specified in par. (a) or extended under par. (b), the certificate of public convenience and necessity is void, and the electric utility may not commence construction of the large electric generating facility.

Wisconsin Admin. Code § PSC 111.53 (2002)

PSC 111.53 CPCN applications for large electric generating facilities. (1) CONTENTS OF A CPCN APPLICATION.

Except as provided in sub. (2), a CPCN application for a large electric generating facility is not complete until the applicant has filed all of the following information with the commission:

(a) The operating characteristics of the proposed facility, including all of the following:

1. The number of generating units to be included in the facility.
2. A description of each generating unit, including type, size, and fuel.
3. The expected hours of operation and lifetime of the facility.
4. The names and addresses of owners and investors and the percent of ownership.
5. The fuel source and availability. If the facility uses fossil fuel, the fuel's heating value and chemical analysis, the type of transportation to be used, and the approximate capacity of on-site storage shall be provided.
6. The facility's estimated capacity factors, for each generating unit, and the basis for the estimates.
7. The estimated rate of discharge of pollutants for appropriate time intervals, as related to applicable regulatory standards.
8. The heat rates over the range of operating capacity for each generating unit.

(b) The need for the proposed facility in terms of demand and energy.

(c) The economic aspects of the proposed facility, including all of the following:

1. The estimated capital cost of the generating facility and all related facilities, broken down by major plant accounts. All cost escalation factors used in the estimate shall be identified.
2. The projected unit fuel cost, in cents per million Btu, both for the first year of operation and levelized in nominal terms over the life of the unit or facility. All cost escalation factors used in the estimate shall be identified.
3. The estimated annual production cost, calculated as operating, maintenance and fuel costs for the first year of operation and levelized in nominal terms over the life of the facility. All cost escalation factors used and other significant supporting data shall be included.
4. The estimated annual total cost, calculated as capital and production costs for the first year of operation, in mills per net kWh generated, and levelized in nominal terms over the life of the facility. All cost escalation factors used and other significant supporting data shall be included.
5. The estimated useful life of facility, based on depreciation rates established by the commission.

(d) The alternative sources of supply considered, including information about all of the following alternatives:

1. Energy conservation and efficiency.
2. Any alternative whose energy source has a higher priority ranking under s. 1.12 (4) (b) to (d), Stats., than the fuel proposed to be used for the facility.
3. For any facility that will use a combustible energy resource but not provide cogeneration, an explanation regarding why cogeneration is not feasible.
4. Purchased power.

(e) At least two proposed sites for the proposed facility, including a description of the siting process and a list of the factors considered in choosing the alternatives.

(f) Site-related information for each proposed power plant site, including all of the following:

1. The regulatory approvals required for construction and operation of the facility.
2. The construction schedule and timeline, showing construction activities and permitting expectations from the beginning of construction to the in-service date.

3. The availability of transportation for fuel delivery and requirements for gas pipeline construction. If a certificate of authority under s. 196.49, Stats., is required to construct the gas pipeline, the location, termini, length in miles, size of pipe, and pressure.

4. Any required transmission line construction, agreements for use of the transmission system to deliver plant power, transmission losses, and effects on system reliability. If a certificate of authority under s. 196.49, Stats., is required to construct the transmission line, the location of termini, length in miles, and voltage for each transmission line.

5. Other auxiliary facilities, including fuel storage and water storage.

6. Natural resources at each site, including all of the following:

- a. Air quality.
- b. General soil associations.
- c. Geology, noting active mines and quarries.
- d. Water, including wetlands, rivers, streams and groundwater.
- e. Vegetative cover, including wildlife habitat.
- f. Endangered, threatened, and special-concern species and communities.

7. Community-related information, including all of the following:

- a. Site history.
- b. Existing and proposed land uses at the sites.
- c. Local infrastructure, including sewer, water, police, and fire protection.
- d. Historical and archeological sites.
- e. Potential health impacts.
- f. Secondary impacts, including effects on revenue, jobs, and development.
- g. Visual and noise impact.
8. Aesthetics.

9. If a CPCN is needed for construction of transmission lines as part of this application, the required information under s. PSC 111.55.

(g) Any additional information the commission may request, including information necessary for it to make the determinations listed in s. 196.491 (3) (d), Stats., or to prepare an environmental assessment or an environmental impact statement under s. 1.11, Stats.

(2) EXCEPTIONS TO FILING REQUIREMENTS. (a) An application for a wholesale merchant plant need not include the information identified in sub. (1) (b) to (d). In addition, an application for a wholesale merchant plant that will be owned, controlled, or operated by an affiliated interest of a public utility, shall include any additional information required by the commission in order to make a determination under s. 196.491 (3m) (a), Stats.

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

2. An application for repowering an existing generating facility may meet the requirement under sub. (1) (e) by filing information on 2 sites that are both located at the existing generating facility site, if none of the needed infrastructure improvements would constitute a major action significantly affecting the quality of the human environment under s. 1.11 (2) (c), Stats.

History: Cr. Register, June, 2000, No. 534, eff. 7-1-00.

Energy Priorities Law -- §§ 1.12 & 196.025, Wis. Stats. (2002)

§ 1.12 State energy policy. (1) DEFINITIONS. In this section:

(a) "Local governmental unit" has the meaning given in s. 19.42(7u).

(b) "State agency" means an office, department, agency, institution of higher education, the legislature, a legislative service agency, the courts, a judicial branch agency, an association, society or other body in state government which is created or authorized to be created by the constitution or by law, for which appropriations are made by law.

(2) CONSERVATION POLICY. A state agency or local governmental unit shall investigate and consider the maximum conservation of energy resources as an important factor when making any major decision that would significantly affect energy usage.

(3) GOALS. (a) *Energy efficiency*. It is the goal of the state to reduce the ratio of energy consumption to economic activity in the state.

(b) *Renewable energy resources*. It is the goal of the state that, to the extent that it is cost-effective and technically feasible, all new installed capacity for electric generation in the state be based on renewable energy resources, including hydroelectric, wood, wind, solar, refuse, agricultural and biomass energy resources.

(c) *Afforestation*. It is the goal of the state to ensure a future supply of wood fuel and reduce atmospheric carbon dioxide by increasing the forested areas of the state.

(4) PRIORITIES. In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:

(a) Energy conservation and efficiency.

(b) Noncombustible renewable energy resources.

(c) Combustible renewable energy resources.

(d) Nonrenewable combustible energy resources, in the order listed:

1. Natural gas.

2. Oil or coal with a sulphur content of less than 1%.

3. All other carbon-based fuels.

(5) MEETING ENERGY DEMANDS. (a) In designing all new and replacement energy projects, a state agency or local governmental unit shall rely to the greatest extent feasible on energy efficiency improvements and renewable energy resources, if the energy efficiency improvements and renewable energy resources are cost-effective and technically feasible and do not have unacceptable environmental impacts.

(b) To the greatest extent cost-effective and technically feasible, a state agency or local governmental unit shall design all new and replacement energy projects following the priorities listed in sub. (4).

§ 196.025 Duties of the commission. (1) To the extent cost-effective, technically feasible and environmentally sound, the commission shall implement the priorities under s. 1.12(4) in making all energy-related decisions and orders, including advance plan, rate setting and rule-making orders.

Commission's Powers -- § 192.09, Wis. Stats. (2002)

§ 196.02. Commission's powers. (1) JURISDICTION. The commission has jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient to its jurisdiction.

(2) DEFINITION; CLASSIFICATION. In this subsection, "public utility" does not include a telecommunications cooperative or a small telecommunications utility except as provided under s. 196.205 or 196.215(2) and does not include an alternative telecommunications utility. The commission shall provide for a comprehensive classification of service for each public utility. The classification may take into account the quantity used, the time when used, the purpose for which used, and any other reasonable consideration. Each public utility shall conform its schedules of rates, tolls and charges to such classification.

(3) RULES. The commission may adopt reasonable rules to govern its proceedings and to regulate the mode and manner of all inspections, tests, audits, investigations and hearings.

(4) INFORMATION REQUIRED; STOCK HOLDERS. (a) The commission may inquire into the management of the business of all public utilities. The commission shall keep itself informed as to the manner and method in which the same is conducted. The commission may obtain from any public utility any information necessary to enable the commission to perform its duties.

(b) Each public utility shall furnish to the commission, in such form and at such times as the commission requires, the following information respecting the identity of the holders of its voting capital stock in order to enable the commission to determine whether the holders constitute an affiliated interest within the meaning of this chapter:

1. The names of each holder of one percent or more of the voting capital stock of the public utility.

2. The nature of the property right or other legal or equitable interest which the holder has in the stock.

3. Any other similarly relevant information which the commission prescribes and directs.

(c) If any public utility fails to furnish the commission with information required of it by the commission, the commission may issue an order directing the delinquent public utility to furnish the information immediately or to show good cause why the information cannot be obtained. Failure of any public utility to comply with the order of the commission is a violation of this chapter within the meaning of s. 196.66.

(5) INSPECT BOOKS. The commission or any commissioner or any person employed by the commission for that purpose may, upon demand, inspect the books, accounts, papers, records and memoranda of any public utility, and examine under oath any officer, agent or employee of the public utility in relation to its business and affairs. Any person, other than one of the commissioners, who makes a demand shall produce his or her authority to make the inspection.

(6) PRODUCTION OF RECORDS. The commission may require, by order or subpoena served on any public utility as a summons is served in circuit court, the production within this state at the time and place the commission designates of any books, accounts, papers or records kept by the public utility outside the state, or verified copies in lieu thereof, if the commission orders. If a public utility fails or refuses to comply with the order or subpoena, for each day of the failure or refusal the public utility shall forfeit not less than \$50 nor more than \$500.

(7) COMMISSION INITIATIVE. In any matter within its jurisdiction, including, but not limited to, chs. 197 and 201 and this chapter, the commission may initiate, investigate and order a hearing at its discretion upon such notice as it deems proper.

(8) EMPLOY COUNSEL. The commission may employ counsel in any proceeding, investigation, hearing or trial had by it or in which it is a party, and the expenses thereby incurred shall be charged to the commission's appropriation.

(9) TECHNICALITIES DISREGARDED. Substantial compliance with the requirements of the statutes shall be sufficient to make effective any rule, regulation, order or action of the commission. No rule, regulation, order or action of the commission is invalid for any omission of a technical nature.

(10) COMMISSION NOTICES; CERTIFICATIONS. Any notice of investigation or hearing or certification to a copy of a record of the commission may be issued or certified by any member of the commission or by its secretary or assistant secretary.

(12) SUE; BE SUED. The commission may sue and be sued in its own name, and may confer with or participate in any proceedings before any regulatory agency of any other state or of the federal government.

§ 227.57, Wis. Stats. (2002)

§ 227.57. Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.

(2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

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

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

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

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

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

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

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