

STATE OF WISCONSIN  
SUPREME COURT

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

Appeal No. 04-3179

Town of Caledonia,  
Petitioner,

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

v.

Public Service Commission of Wisconsin  
Respondent-Co-Appellant,  
Wisconsin Department of Natural Resources,  
Respondent,  
Wisconsin Electric Power Company, W.E.  
Power, LLC and Wisconsin Energy Corporation,  
Interested Parties-Appellants,  
Dairyland Power Cooperative, City of Oak  
Creek, Madison Gas & Electric Company and  
Wisconsin Public Power, Inc.,  
Interested Parties,  
Robert H. Owen,  
Interested Party-Respondent

**MOTION FOR DIRECT,  
EXPEDITED APPEAL  
PURSUANT TO §§ 808.05(3)  
AND 809.61, WIS. STATS.**

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Calpine Corporation,  
Petitioner,

v.

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

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

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

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

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

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

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Attorneys for Interested Parties-Appellants Wisconsin Energy Corporation,  
Wisconsin Electric Power Company, and W.E. Power, LLC

Wisconsin Electric Power Company, Wisconsin Energy Corporation and W.E. Power, LLC (collectively, “WE”), respectfully petition this Court to take direct jurisdiction over this appeal on its own motion (i.e., without certification by the Court of Appeals) in accordance with §§ 808.05(3) and 809.61, Wis. Stats., and to set the case for expedited consideration. For the reasons set forth below, this appeal presents a clear and exigent need for prompt, ultimate judicial resolution of matters involving substantial public importance to Wisconsin.<sup>1</sup>

### INTRODUCTION

Following comprehensive administrative proceedings that spanned a 20-month period, the Public Service Commission of Wisconsin (“Commission” or “PSC”) issued a certificate of public convenience and necessity (“CPCN”) authorizing WE to build two new electric generating units deemed necessary to meet the fundamental needs this State for reliable electric power. *See* November 10, 2003 PSC Order. As stated by the Commission in its Order:

[T]he 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

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<sup>1</sup> Notice of Appeal was filed with the Court of Appeals, District IV, on December 6, 2004. Petitioners are also filing a motion with the Court of Appeals under § 809.20, Wis. Stats., for expedited appeal. However, for the exigent reasons set forth herein, immediate expedited Supreme Court review is warranted.

facilities are in service in 2009 and 2010.<sup>2</sup>

*Id.* at 20 (emphasis supplied). Applying its expertise and exercising the responsibility delegated to it by the legislature, the Commission emphasized that timely completion of these major generation facilities is necessary to “meet the requirement that [the PSC] must maintain a reliable electric system” for the State. *Id.* at 25.

Consistent with the Commission’s directives, WE has undertaken substantial measures and contractual commitments to ensure that the necessary facilities will be in service by the peak summer periods in 2009 and 2010. On November 29, 2004, however, the Dane County Circuit Court, acting on Chapter 227 petitions for review of the Commission’s CPCN approval, issued an unprecedented ruling in which the Court vacated the Commission’s order and mandated the draconian result that the entire regulatory process return to square one – requiring that WE submit a new application for a CPCN and that the administrative review process begin anew. If permitted to stand without expeditious correction, the Circuit Court’s order precludes all possibility that these facilities will be in service within the time frame deemed necessary by the Commission and will cause a staggering increase in the costs associated with the

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<sup>2</sup> “Generally, electric generating plants that are cost effective when running at least 70% of the time are considered ‘baseload’ units.” See *Decision* at 7 n.4 (“A utility’s baseload energy demand is driven by high load factor customer needs, *i.e.* electric uses such as commercial lighting, refrigeration, and industrial loads that run constantly.”); accord § 79.005, Wis. Stats. (“‘Baseload electric generating facility’ means an electric generating facility that has a capacity factor that is greater than 60%, as determined by the public service commission.”).

construction of the facilities, costs borne by Wisconsin households and businesses.

In short, if construction does not commence by April 30, 2005, the necessary power plants cannot be in service on the schedule prescribed by the PSC and the costs of constructing the facilities will increase, perhaps by hundreds of millions of dollars. Moreover, if the appellate process is not expedited to allow a decision on this appeal before April 30, 2005, these harms to the public will occur *regardless* of the ultimate decision on the appeal.

These substantial public harms resulting from a failure to promptly address the Circuit Court ruling are exacerbated by the fact that the Circuit Court's erroneous and unprecedented interpretation of the Commission's own rules undermines not just the timely and cost-effective development of these essential generating units (the largest and most significant energy generation project in the State), but also debilitates other ongoing (and future) regulatory actions before the Commission that address this State's energy needs. The regulatory impasse created by the Court's manifestly erroneous re-writing of regulatory procedure -- which, *inter alia*, requires that *all* permits for the operation and construction of the facilities at the proposed site *and* alternative sites be final and in-hand before an application for a CPCN can even be deemed sufficiently "complete" to trigger Commission consideration under Section 196.491(3) -- necessitates immediate correction.

The sweeping public importance of this matter, and the need for this Court to invoke its direct authority to address this appeal within the necessary time-frame, is further demonstrated by the broad array of affidavits submitted in support of this motion, including the following:

- Utility Workers Coalition
- Milwaukee Building and Construction Trades Council
- Metropolitan Milwaukee Association of Commerce
- Fox Cities Chamber
- African American Chamber of Commerce
- Chicago Regional Council of Carpenters
- Milwaukee Urban League
- Wisconsin Builders Assoc.
- Metropolitan Builders Assoc.
- Bucyrus International
- Aurora Health Care
- Municipal Electric Utilities of Wis.
- Charter Manufacturing
- Wisconsin Community Advocates
- Hispanic Chamber of Commerce
- International Production Specialists, Inc.
- Georgetown Markets
- Allegra Print and Imaging
- Edgerton Contractors
- Havenwood Homes
- Maynard Steel Casting
- Miller Brewing
- Miller Compressing Company
- Ace Hardware
- Wisconsin Merchants Federation
- Wisconsin Center District
- Wisconsin Federation of Cooperative
- Richlonn's Tire & Service<sup>3</sup>

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<sup>3</sup> Affidavits from the listed parties are included in the appendix to this motion. As additional affidavits from other concerned parties are received, we will forward them to the Court.

As this Court has recognized, “[a]t times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.” Supreme Court Internal Operating Procedures, § II(B)2. As set forth in detail below, this appeal falls squarely within the limited category of cases for which there is a “clear need” that this Court exercise direct review. *See, e.g., RURAL v. Public Service Commission of Wisconsin*, 2000 WI 129, 239 Wis. 2d 660, ¶ 19, 619 N.W.2d 888, 898 (2000) (granting motion to this Court for exercise of direct bypass authority in analogous context). Moreover, absent expeditious treatment of this appeal, the effects of the Circuit Court’s decision, in both the short term and the long term, will be profound. Accordingly, Petitioners request that the Court exercise its discretion under §§ 808.05(3) and 809.61, Wis. Stats., to take jurisdiction of the appeal directly and implement an accelerated briefing and argument schedule that will permit a final decision before April 30, 2005.

In sum, the following paramount public interests warrant the direct and expeditious consideration of this appeal:

- Absent expeditious and ultimate resolution, these necessary energy facilities cannot and will not be operational within the time frame deemed essential by the PSC.
- Absent expeditious and ultimate resolution, construction costs associated with the facilities will increase drastically, resulting in increased costs that could reach hundreds of millions of dollars for Wisconsin households and businesses.

- Absent expeditious and ultimate resolution, the Circuit Court's novel and erroneous re-writing of PSC regulations regarding the CPCN application process will undermine the ongoing review process for other energy projects in Wisconsin, resulting in crippling delays and saddling the regulatory agencies with excessive and needless burdens.
- Absent expeditious and ultimate resolution, Petitioners will be left to simultaneously pursue an expensive and burdensome new CPCN application process, thereby nullifying, by the sheer consequences of delay, any ability to obtain meaningful appellate relief from the Circuit Court's erroneous ruling.

In contrast to these enormous harms from delay, there is no cognizable prejudice to the Respondents from an expedited review process. If Respondents truly believe the Circuit Court's ruling is correct, a speedy decision affirming is no worse for Respondents than a decision that would affirm the Circuit Court under the ordinary appellate time-frames. Likewise, achieving finality on the important questions presented by the Circuit Court's unprecedented re-writing of the procedures governing CPCN application and review will ensure that already strained government agencies are not subject to further, needless burdens and that the energy needs of the citizens and businesses of this State can be met in a timely and cost-effective manner.

Although not required in a motion for the exercise by this Court of direct appellate jurisdiction, we will further demonstrate that the Circuit Court's ruling contains manifest errors that warrant immediate correction. By way of example,

the Circuit Court's unprecedented holding that, as a matter of law, an application for a CPCN cannot be considered "complete" unless the applicant has *already obtained* all necessary permits for construction and operation constitutes plain error on multiple independent grounds: (1) the holding is contrary to the plain language of the administrative rule in question; (2) the holding is incongruent with the structure of Section 196.491(3) itself; (3) the holding is improperly founded on an after-the-fact argument never presented in the administrative proceedings; and (4) the holding applies an incorrect standard of review and fails to even address, let alone accord deference to, the agency's construction of its own rule. It bears note that the record in this case and similar cases demonstrates that it takes years to obtain all operating permits from the DNR, U.S. Army Corps of Engineers and other permitting bodies for a single proposed facility. Requiring, as the Circuit Court would, that an applicant have all permits in its pocket for the proposed site, as well as for an alternative site, before even applying for a CPCN, rewrites the regulatory framework into an unworkable, inefficient process that frustrates ongoing regulatory activity and imposes excessive burdens on agencies and applicants alike.

As a practical matter, Petitioners understand that seeking bypass at this juncture is unusual. However, as set forth in greater detail below, if Petitioners wait until the filing of Respondents' briefs to seek bypass pursuant to § 809.60, Wis. Stats. (which would be mid-January 2005 at the earliest, assuming there are

no procedural delays), it will be more difficult to obtain a timely decision from this Court. This Court has commonly granted bypass in the past based on the *publici juris* nature of appeals involving regulatory disputes over major construction projects. Petitioners here ask only that the Court make this determination now, at a time when a proper schedule for meaningful and timely appellate relief is still available.

A stay of the Circuit Court's decision so that work can go forward on the facilities while the appeal is pending is not a satisfactory option. Given the scope of the project and the enormous financial commitment necessary to authorize the contractor to commence construction by April 30, 2005, WE could not responsibly go forward under the threat that a subsequent appellate decision could send the entire project back to the drawing board. Simply put, there is a "clear need to hasten the ultimate appellate decision" in order to avoid irreparable and substantial harm to the public.

#### **STATEMENT OF FACTS AND PROCEDURAL BACKGROUND**

This case arises from a final decision of the PSC authorizing a Certificate of Public Convenience and Necessity ("CPCN"), pursuant to § 196.491(3), Wis. Stats., for the construction of two baseload electric generation units on a brownfield location in Oak Creek, where WE has operated generating facilities for over 50 years. The proposed facility is commonly referred to as the Elm Road Generating Station ("ERGS").

The two new generating units are Super-Critical Pulverized Coal (“SCPC”) units, each capable of producing 615 megawatts (MW) of electricity. The units are designed to provide “baseload” power for WE’s customers, meaning electricity that is needed to serve demands such as commercial lighting, refrigeration and industrial loads that run constantly. The total approved cost of the ERGS construction project is \$2.15 billion.

On February 1, 2002, WE submitted to the PSC a CPCN Application pursuant to § 196.491(3), Wis. Stats., for a set of projects referred to as “Power the Future,” or “PTF.” The original PTF Application sought approval for the construction of five new generating units, including two natural gas-fired units, and three coal-fired units. WE’s PTF plans also included environmental upgrades to many of its existing generation facilities, and the decommissioning of existing coal-fired units in Port Washington.

The PSC ultimately separated the PTF Application into two phases. Phase I, involving the natural gas-fired units at Port Washington, was approved and the units are under construction. Phase II involved the proposed ERGS units. In response to requests from PSC staff for additional information, four supplements to the original Application were filed and the CPCN was deemed complete on November 15, 2002. The final application for Phase II included proposed alternative locations in and around a large 1000 acre brownfield parcel mostly owned by WE; one of these locations was in the City of Oak Creek in

Milwaukee County and the other was in the Town of Caledonia in Racine County.

The PSC's "completeness" determination triggered statutory review procedure under § 196.491(3), Wis. Stats. That statute requires that the PSC complete its review of a CPCN application within 180 days, at which time, if the PSC has failed to issue a final decision, the CPCN will be deemed issued. *See* Section 196.491(3)(g).<sup>4</sup> In the case of ERGS, during the review period the PSC considered thousands of pages of material, held 11 days of contested case hearings regarding various technical and environmental issues, and held three days of public hearings for the citizens of the communities where the facilities were proposed to be located.

On November 10, 2003, the PSC issued its final decision approving, subject to certain conditions, construction of two SCPC coal-fired units at an Oak Creek site proposed by WE. The PSC's decision further provided that the first unit should begin commercial operation by May 1, 2009, and the second unit should begin commercial operation by May 1, 2010.

Various parties sought review of the PSC's Decision under Chapter 227 of the Wisconsin Statutes. Five separate challenges were ultimately consolidated into a single proceeding before Judge David Flanagan in Dane County. Pursuant to Judge Flanagan's scheduling order, all briefs were filed by September, 2004.

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<sup>4</sup> The statute provides that an extension of the review period of up to another 180 days may be had upon application to the Dane County Circuit Court. If the PSC fails to act by the end of the extended review period, the CPCN is deemed issued.

The matter was argued on October 8, 2004, and Judge Flanagan issued his Final Decision on November 29, 2004.

The PSC and WE filed separate Notices of Appeal on December 6, 2004.

### **SUMMARY OF CIRCUIT COURT'S DECISION**

The Circuit Court assessed the challenges to the PSC's decision under two general categories: (1) challenges to the PSC's November 15, 2002, determination that WE's CPCN application was "complete"; and (2) challenges to the PSC's November 10, 2003, Final Decision approving a CPCN under § 196.491(3), Wis. Stats.

With respect to the PSC's "completeness" decision, the Circuit Court accorded no deference to the agency and held the CPCN application to be deficient as a matter of law for three reasons, only the first of which was raised by any party during the proceedings at the PSC:

- (1) The application did not include sufficiently "distinct locations," despite the PSC's express ruling to the contrary, and despite the fact that the two proposed locations were in different communities in different counties and had different environmental impacts;
- (2) WE had not "obtained" all regulatory approvals required for construction and operation of the plant prior to submitting its CPCN application; and
- (3) The application did not include finalized agreements for the use of transmission lines.

*Decision*, at 11, 14, 19-20.<sup>5</sup> Based on its conclusion that the CPCN application had been incomplete in these three respects, the Circuit Court vacated the CPCN order and instructed that the regulatory process begin again from scratch, starting with the submission of a new application consistent with the Circuit Court's *Decision*.

With respect to the PSC's Final Decision authorizing the issuance of a CPCN, the Circuit Court held that there were four fatal flaws:

- (1) The PSC erred in its interpretation of the Wisconsin Energy Priorities Law, §§ 1.12 and 196.025(1), Wis. Stats., by failing to expressly consider the use of oil or low sulfur coal to power the new generating units;
- (2) The PSC failed to adequately consider the impacts of related transmission improvements;
- (3) The PSC violated § 196.491(3)(e), Wis. Stats., by issuing a CPCN prior to WE obtaining all necessary DNR permits; and
- (4) The PSC erred by approving the construction of common systems of a size appropriate for possible future expansion at the Oak Creek site.

*Decision*, at 30-45, 53. Based on these conclusions, the Circuit Court vacated the November 10, 2003, Order and remanded the matter for further proceedings

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<sup>5</sup> The Circuit Court also rejected the PSC's argument, based on the express statutory authority under § 196.02(9), Wis. Stats., that there was "substantial compliance" with the PSC's regulations and that the CPCN application could be deemed complete on that basis. *Decision*, at 23-24.

before the PSC.<sup>6</sup>

## REASONS SUPPORTING IMMEDIATE BYPASS

- I. This Court has exercised its authority to take direct jurisdiction when, as here, the case involves matters of substantial public importance and there is a clear need for expeditious review.**

This Court has broad authority to accept a case on bypass either on motion of a party, certification by the Court of Appeals, or on its own motion. Petitioners request that the Court immediately take this case pursuant to §§ 808.05(3) and 809.61, Wis. Stats., which provide:

### **§ 808.05(3). Bypass**

The supreme court may take jurisdiction of an appeal or any other proceeding pending in the court of appeals if . . . [i]t, on its own motion, decides the matter directly.

### **§ 809.61. Bypass by certification of court of appeals or upon motion of supreme court**

The supreme court may take jurisdiction of an appeal or other proceeding in the court of appeals upon certification by the court of appeals or upon the supreme court's own motion.

While this Court has indicated that the exercise of its authority to take a

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<sup>6</sup> The Circuit Court rejected the other challenges asserted by the Respondents, including a challenge to the adequacy of the joint environmental impact statement (“EIS”) prepared by the PSC and DNR and a challenge to WE’s projections of future energy needs in Wisconsin. *Decision*, at 25 (giving “great deference” to PSC’s finding that “more generation capacity will be needed both to replace aging facilities and to respond to increasing demand”); and 45-46 (EIS complied with § 1.11(2)(c), Wis. Stats.). Petitioners anticipate that Respondents will cross-appeal on these and perhaps other issues, further supporting the need for this Court to act now rather than later to take the case and put it on an expedited briefing and argument track.

case on its own motion is limited to “unusual circumstances,” *In re J.S.R.*, 111 Wis. 2d 261, 263, 330 N.W.2d 217 (1983), it has exercised such powers when important issues are presented or there is a clear need for expeditious review. *See State ex rel. Chiarkis v. Skow*, 160 Wis. 2d 123, 128, 465 N.W.2d 625 (1991) (“We recognize the importance of the *publici juris* nature of this case and the need for a prompt resolution of this case.”); *see also In re W.P.*, 153 Wis. 2d 50, 449 N.W.2d 615 (1990); *In re Klisurich*, 98 Wis. 2d 274, 296 N.W.2d 742 (1980).<sup>7</sup>

Significantly, this Court has granted bypass on its own motion in a directly analogous context arising out of a regulatory challenge to a power plant construction project. In *RURAL v. Public Service Commission of Wisconsin*, 2000 WI 129, 239 Wis. 2d 660, 619 N.W.2d 888, which arose out of the PSC’s approval of a CPCN for the construction of a 525 MW gas-fired electric generation plant in the Town of Christiana, this Court granted a direct motion requesting bypass. *RURAL*, 2000 WI 129, at ¶ 19, 239 Wis. 2d at 675 (“RockGen moved this court to bypass the court of appeals. We granted the motion for bypass.”). The Court recognized the importance of making certain that the PSC was positioned to effectively address the State’s energy needs by allowing

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<sup>7</sup> In a similar vein, the Court has exercised its original jurisdiction under § 809.71, Wis. Stats., to resolve questions of paramount public importance. *See, e.g., State v. City of Oak Creek*, 2000 WI 9, ¶ 108, 232 Wis. 2d 612, 666, 605 N.W.2d 526 (2000) (Abrahamson, dissenting) (“[T]he court allows an original action to proceed when the matter is *publici juris* (of importance for the state as a whole). But there are criteria other than *publici juris* for this court granting leave to bring an original action: the need for speedy resolution is one; no adequate remedy in the circuit court or disputed facts are others.”).

necessary and appropriate power plant construction to be undertaken in a timely manner that would ensure reliable energy for Wisconsin citizens. *Id.* at ¶ 73 (noting that the Court’s conclusion supporting the PSC’s determination “is not only reasonable and consistent with the legislature’s intent, but is also cognizant of an unmet need for which the citizens will pay dearly if it is not immediately addressed.”)

General bypass procedures have also been used in numerous other circumstances involving challenges to regulatory approvals of major construction projects. *See, e.g., Wisconsin’s Environmental Decade, Inc. v. Wisconsin Dept. of Natural Resources*, 115 Wis. 2d 381, 340 N.W.2d 722 (1983) (bypass granted in review of DNR decision not to require EIS in connection with construction of shopping mall); *Milwaukee Brewers Baseball Club v. Wisconsin Dept. of Health and Social Services*, 130 Wis.2d 56, 387 N.W.2d 245 (1986) (bypass granted in Brewers’ challenge to EIS concerning the proposed construction of a prison near stadium); *Fox v. Wisconsin Dept. of Health and Social Services*, 112 Wis. 2d 514, 334 N.W.2d 532 (1983) (bypass granted in challenge to EIS for proposed maximum security prison in Portage); *Wisconsin’s Environmental Decade, Inc. v. DILHR*, 104 Wis. 2d 640, 312 N.W.2d 749 (1981) (bypass granted in agency appeal from successful WEPA challenge to construction of condominium project

in Door County).<sup>8</sup>

“A matter appropriate for bypass is usually one which meets one or more of the criteria for review . . . [under § 809.62(1), Wis. Stats.]” Supreme Court Internal Operating Procedures, § II(B)(2). This case readily satisfies the § 809.62(1) criteria given the “novel” legal issues at hand and the obvious “statewide impact” of those issues on this and other public utility construction projects. The Circuit Court’s ruling is predicated on numerous legal determinations never addressed by this Court, such as the novel imposition of a requirement that all permits be in-hand and all transmission agreements signed before a CPCN application may be deemed complete. Moreover, the errors of law created by the Circuit Court’s fundamental alteration of the regulatory process will pose recurring legal difficulties. Until corrected, the Circuit Court’s ruling radically transforms long-standing regulatory practice and alters the requirements for ongoing and future CPCN activities. Given the substantial public importance of these matters, there is a plain need for this Court to “develop, clarify, and harmonize the law.” See § 809.62(1)(c); see also *RURAL*, 2000 WI 129, at ¶¶ 19, 73, 239 Wis. 2d at 675, 707 (granting bypass).

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<sup>8</sup> As a procedural matter, the Court could construe the instant petition as a petition for bypass pursuant to § 809.60, Wis. Stats., and grant the bypass on Petitioners’ request rather than on its own motion. Petitioners’ primary concern in relying solely on the procedure in § 809.60 is the Court’s practice of dismissing as premature petitions for bypass filed before the respondent’s brief has been filed. See Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, § 24.3 (“Supreme Court orders have stated a policy, not reflected in any rule, that a petition for bypass filed before the respondent’s brief is filed will be dismissed as premature.”). Given the realities of the Court’s calendar and potential delays in briefing schedules, waiting until such time to seek bypass could prevent the expeditious resolution sought herein.

Aside from the demonstration of a “clear need to hasten the ultimate appellate decision,” *see* Supreme Court Internal Operating Procedures, § II(B)(2), concern for judicial efficiency also guides this Court’s consideration of bypass when, as here, the Court is likely to ultimately review the matter in any event:

One reason this court grants parties’ motions to bypass or grants certifications by the court of appeals is that a case raises issues we believe we would ultimately consider on a petition for review of a decision of the court of appeals. This court’s hearing the case, whether through bypass or certification, accords the parties a speedier decision and reduces the burden and expense on both the parties and the judicial system.

*Wisconsin Public Service Corp. v. Public Service Comm’n of Wisconsin*, 176 Wis. 2d 955, 958 n.1, 501 N.W.2d 36 (1993) (Abrahamson, J., dissenting); *accord* Supreme Court Internal Operating Procedures, § II(B)(2). Given the substantial public importance of the issues presented by this appeal, there is little doubt that ultimate review by this Court will be warranted in any event.

In addition, direct review on bypass is further facilitated in this case by the fact that a reviewing court looks directly at the administrative agency’s decision itself, and not at the decision of any lower reviewing court. *RURAL*, 2000 WI 129, at ¶ 20, 239 Wis. 2d at 675 (“[T]he focus of our review is the PSC’s Order and the DNR’s Record of Decision, not the circuit court’s decision.”).

In sum, the extraordinary circumstances presented by this appeal — where

precedent strongly indicates that this Court would ultimately exercise its bypass authority in any event and where, as detailed below, the ordinary duration of the appellate process will cause significant harm to the public — demonstrate that the Court should act now to exercise direct jurisdiction over this appeal and set an expedited briefing and argument schedule.

**II. Direct and expedited review by this Court is necessary to prevent significant harm to the public.**

The central question on this motion is whether there is a “clear need” to expedite the “ultimate appellate decision.” *See* Supreme Court Internal Operating Procedures, § II(B)(2). For at least four separate but related reasons, an accelerated appellate process, with the appropriate finality that only this Court can provide, is necessary: (1) to enable these electric generating units, that are required to ensure adequate baseload energy for the State, to be constructed and placed in service within the time frame found necessary by the PSC; (2) to prevent the staggering increases in construction costs that will occur if a final decision cannot be obtained before April 30, 2005; (3) to prevent, in ongoing regulatory proceedings, the debilitating delays and wasteful burdens that result from the Circuit Court’s erroneous and unfounded rewriting of long-standing regulatory procedure; and (4) to make certain that the sheer fact of delay does not, in itself, nullify meaningful appellate recourse.

**A. Direct and expedited review is required to ensure these facilities are in service within the time deemed necessary by the PSC.**

The central basis for the PSC's approval of the Power the Future project was a projection of potential power shortages later in this decade if new electric generating facilities are not constructed.<sup>9</sup>

The energy needs of Wisconsin's households and businesses and the importance of the ERGS facilities to ensure that those needs are reliably and economically met, were central, contested issues before the Commission. Based on extensive factual analysis, grounded in the particular expertise and responsibility of the PSC in such matters, the Commission determined that the development of these facilities was necessary to maintain a reliable electrical system in this State. After comparing various different models that forecasted future energy needs and system capacity, the Commission determined: "Given the requirement that *it must maintain a reliable electric system*, the Commission finds it prudent *to construct these units slightly sooner, rather than later.*" Nov. 10, 2003 PSC Final Decision, at 25 (emphasis supplied).

Wisconsin's recent history of power shortages was well-documented in the *RURAL* decision. There the Court discussed the "unprecedented power supply problems" in 1997 resulting from "unexpected generating plant outages, a delay

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<sup>9</sup> A secondary but equally fundamental purpose behind the PTF proposal was to update the overall operational and environmental efficiency of WE's statewide generation facilities.

in the on-line availability of a new power plant, and a seriously constrained transmission system.” *RURAL*, 2000 WI 129, at ¶ 5, 239 Wis. 2d at 669. In rendering its ultimate decision the Court acknowledged the “potential electric generation crisis facing the citizens of Wisconsin,” and expressed its cognizance of “an unmet need for which the citizens will pay dearly if it is not immediately addressed.” *Id.* at ¶ 73, 239 Wis. 2d at 707.<sup>10</sup>

The Commission here expressly found that “concerns over reliability” were similarly fundamental in necessitating the timely construction of the ERGS baseload facilities. “The Commission believes that it is in the public interest to have more reliable baseload generation in place sooner rather than later as a matter of public policy. *Concerns over reliability are paramount today . . .*” Nov. 10, 2003, PSC Final Decision, at 25 (emphasis supplied). Indeed, the Commission emphasized that “the crux of this case is really about the appropriate timing to construct new baseload generation.” *Id.* at 20. Applying its well-developed expertise to this central issue of profound importance to the State, the Commission concluded that WE should “take those steps *now* to ensure these facilities are in service in 2009 and 2010.” *Id.* at 20 (emphasis supplied). These factual determinations by the PSC, the agency vested with responsibility to ensure

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<sup>10</sup> Concerns over the reliability and upgrading of electrical facilities were similarly brought to national attention in the summer of 2003, when the northeastern United States suffered the largest blackout in U.S. history. See U.S.-Canada Power Systems Outage Task Force, “November 2003 Interim Report: Causes of the August 14, 2003 Blackout in the United States and Canada,” <https://reports.energy.gov/814BlackoutReport.pdf>.

the reliability of this State's energy supply, are appropriately accorded the highest level of deference. *See, e.g.*, § 227.56(6); *Madison Gas & Electric Co. v. Public Service Commission*, 109 Wis. 2d 127, 133, 325 N.W. 2d 339 (1982).<sup>11</sup>

As the supporting affidavits of Tom Metcalfe and Kristine Krause establish, there is no feasible means by which the ERGS facilities can be constructed and placed in operation within the time period deemed necessary by the PSC unless the Circuit Court's erroneous ruling is promptly corrected. Mr. Metcalfe explains that construction of unit 1, which the PSC said is needed by May 1, 2009, is anticipated to take 50 months. Metcalfe Affidavit at ¶ 9. Mr. Metcalfe further explains that if Bechtel Power Corporation (Bechtel), with whom WE has a contract (EPC Contract) to design and construct the ERGS units, can not begin construction by March 1, 2005, it is not obligated to have the facilities on line by May 1, 2009 or May 1, 2010. *Id.* More importantly, if Bechtel is not notified by May 1, 2005, that it can proceed with construction, the new units could be as much as 9 to 18 months late depending on whether Bechtel can maintain, through the period of delay caused by the Circuit Court's action, the subcontracts which it has in place with the vendors of the major systems. Metcalfe Affidavit at ¶ 15. Under these circumstances it would not be possible to have the first unit in service by 2009 and it is uncertain whether it could be placed

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<sup>11</sup> Although Respondents will undoubtedly assert that there are various alternatives available to satisfy the future energy needs of the State, these are precisely the same fact-based assertions that the Commission fully addressed in the course of the administrative process and which, applying its expertise, the Commission rejected. *See* Order at 12-27.

in service in 2010. *Id.*

Without any appellate relief from the Circuit Court's ruling that all environmental permits for the primary and alternate sites must be obtained before the CPCN review process can even begin, Ms. Krause explains that it will take roughly 3 years to reach again the point that applicants and the PSC thought had been reached in November 2002 (namely, a complete CPCN application). Krause Affidavit at ¶ 3. As this Court recognized when it exercised direct review in *RURAL*, such delays pose inappropriate risks for the citizens of this State "if . . . not immediately addressed." *Id.* at ¶ 73, 239 Wis. 2d at 707.

**B. Direct and expedited review is necessary to prevent drastic increases in the cost to Wisconsin's energy consumers of constructing the ERGS facilities.**

Unless the Circuit Court's ruling is corrected by April 30, 2005, the costs of constructing these facilities (and the resultant energy costs borne by Wisconsin citizens) will increase by significant amounts – perhaps by hundreds of millions of dollars. *See Metcalfe Affidavit* at ¶ 14. Without direct and expedited review by this Court, such drastic cost increases cannot be avoided. The only question is how big the increase will be.

If Bechtel maintains its existing subcontracts with the vendors of all the major systems, Bechtel's Vice President and Project Director for ERGS, Eddy Liu, places the delay costs at between \$70,000,000 and \$260,000,000, depending on the length of the delay. If Bechtel is unable to maintain these contracts until

appellate resolution, WE will essentially have to start over and negotiate a new EPC contract. This process will be lengthy and the price escalation for all commodities necessary to build ERGS, from April 2004 when the Bechtel EPC contract was originally signed to the date a new EPC contract can be signed, will be reflected in the price. Metcalfe Affidavit at ¶ 15. As Mr. Metcalfe says, the cost of delay under this scenario is likely to be significantly greater than reflected in Mr. Liu's Affidavit. *Id.*

Whatever the increased costs, they will, subject to PSC approval, be borne by the ratepayers of Wisconsin. An expedited appeal, with a final decision rendered before April 30, 2005, would prevent this substantial, and needless, cost increase to Wisconsin's energy users.

**C. Direct and expedited review is necessary to prevent debilitating delay and wasteful burdens in ongoing and recurring regulatory proceedings.**

The Wisconsin legislature has consistently recognized the need for efficient regulatory processes to ensure that the PSC is able to effectively discharge its responsibility to maintain a reliable electric system for the citizens of this State. As this Court noted in *RURAL*, the legislature in 1997 "modified the application process for certificates of public convenience and necessity" in an effort to expedite and streamline the CPCN process under § 196.491(3). *Id.*, 2000 WI 129, at ¶ 4, 239 Wis. 2d at 668. The Circuit Court's unfounded re-writing of the regulatory process turns this legislative purpose on its head, imposing novel

regulatory requirements that are not only without basis in either the statute or the implementing rules of the PSC, but also create an intractably inefficient, substantially more lengthy, and ultimately unworkable regulatory process. Absent immediate correction, the Circuit Court's ruling will debilitate ongoing regulatory matters and impose substantial, wasteful burdens on already strained government resources.

Although there are numerous novel and problematic regulatory requirements created by the Circuit Court's order, its treatment of the interrelationship between environmental permitting and the "completeness" of a CPCN application is illustrative. Undertaking a *de novo* construction of the PSC's own rule, the Circuit Court concluded that Wis. Admin. Code § PSC 111.53(1)(f)1 mandates that an application "must include the regulatory approvals necessary for construction and operation of the proposed new facility." November 29, 2004 Order at 19. The Court cited no judicial precedent supporting its construction of the administrative rule, nor did the Court defer to -- or even consider -- the PSC's own interpretation of its rule. Rather, under the premise that the requirement of the rule was "plain and unambiguous," the Court concluded that "[i]t is error for the PSC to deem the WEC application complete because the application fails to include the regulatory approvals." *Id.* Under the Court's order, regulatory approvals for "construction and operation" must be ***obtained*** and in-hand, for a primary site and alternate sites, before the PSC can

consider an application “complete,” and thereby undertake the review process to determine if building a facility is even warranted.

As set forth in Section III of this motion, the Circuit Court’s ruling in this regard is manifestly erroneous on multiple independent grounds. Importantly, however, immediate correction is necessary to ensure that regulatory processes relating to ongoing and future CPCN proceedings are not undermined and wasteful burdens are not placed on government agencies.

As the Affidavit of Kristine Krause demonstrates, the Circuit Court’s transformation of the regulatory procedures will literally add years to the CPCN process, if compliance with such a process is even feasible at all. Krause Affidavit at ¶ 3. For a project the size and scope of ERGS, a vast array of regulatory permits are required for different aspects of the project (some for basic construction activities, others to operate the plant after it is built, etc.). These permits involve several different governmental bodies, including the DNR, the EPA and the U.S. Army Corps of Engineers. *Id.* at ¶¶ 4, 5. Accordingly, even were it feasible to obtain “all permits” involved in the “construction and operation” of the facility before a CPCN application is submitted to the PSC (as a practical matter it is not), it would require roughly 3 years to accomplish such a task. *Id.* at ¶¶ 7, 8. In point of fact, because of their specific requirements, some permits cannot be obtained until after a CPCN has been applied for. *Id.* at ¶¶ 11, 18c. Moreover, the burdens and costs associated with the preparation,

submission, and approval process for various of the permits are substantial. *Id.* And, of course, all of this involves the permitting of merely a single site. Under the Circuit Court's analysis, a CPCN applicant must also have obtained all necessary permits and transmission agreements for a second site, as well, before its CPCN application can be deemed complete. Order at 11-19.

The wastefulness of the Circuit Court's ruling is self-evident. If the PSC ultimately denies a CPCN for the primary site, because it concludes the proposed facility is unnecessary or too expensive, the entire permitting process will have been a complete waste of both the applicant's resources as well as the extremely limited resources of already overburdened regulatory agencies. Moreover, obtaining permits for any "alternate" site will necessarily be a waste in any event, even if the CPCN is granted.

In addition to the inefficiency and waste that result from the Circuit Court's decision, while this appeal is pending Wisconsin's regulatory bodies and its utilities remain hamstrung by this erroneous construction of the law. Although other avenues may be available to cure this problem, such as emergency legislation or emergency rulemaking, the best remedy is the efficient and expeditious resolution of this appeal. The Circuit Court's error should not, by reason of inherent appellate delay, force the legislature or an agency to disrupt their ordinary functions in order to draft, debate and pass emergency legislation or rules.

**D. Direct and expedited review is necessary to ensure that meaningful appellate relief is available.**

As set forth above, direct and expedited review is necessary to allow timely construction of the ERGS facilities, as well as to prevent drastic cost increases for this project and undue interference with ongoing regulatory activities. It is also important to note that, as a practical matter, direct and expedited review is necessary to ensure that meaningful appellate relief is available.

If direct and expedited review is not ordered by this Court, achieving finality of this appeal, under ordinary appellate processes, would be anticipated to take approximately two years.<sup>12</sup> In that event, it would be impossible for the facilities to be in operation by the time the PSC has determined they are needed, and the costs of the project would sky-rocket. In addition, WE would need to simultaneously begin undertaking -- again -- the CPCN application process so that more time is not lost. As set forth in the affidavit of Kristine Krause, the burden of undertaking this process, including for alternate locations, is daunting.

And while that laborious, expensive process is underway, this appeal will work its way through the system. If WE and the PSC are correct and the Circuit Court's decision is ultimately reversed, all of the work undertaken and costs

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<sup>12</sup> The average time required to obtain a decision in a three-judge appeal in the District IV Court of Appeals is 13 months (the longest of the four districts). *See* Court of Appeals 2003 Annual Report. Both sides would then have the opportunity to petition this Court for review of an adverse decision. This Court generally disposes of an appeal within a year from accepting the case. The likely elapsed time until final disposition would therefore be roughly two years.

incurred in connection with the new CPCN application, by both WE and the regulatory agencies, will have been for nothing.

As such, meaningful appellate review in the context of this action can be provided only if direct and expedited review occurs.

**III. The Circuit Court's Order contains manifest errors requiring immediate correction.**

While likelihood of success is not among the considerations on a motion for bypass, it bears emphasis that the Circuit Court's ruling contains manifest errors that require immediate correction by this Court.

Although the Circuit Court's decision is replete with fundamental errors of law, its ruling regarding permits and the "completeness" of a CPCN application again provides a stark illustration. As previously noted, the Circuit Court concluded, based its own reading and construction of the purportedly "plain and unambiguous" terms of Wis. Admin. Code § PSC 111.53(1)(f)1, that it constitutes *per se* error for a CPCN application to be deemed "complete" unless the applicant has already obtained and included with its application "all regulatory approvals necessary for construction and operation." *See* November 29, 2004 Order at 19. The Court's unprecedented ruling radically rewrites Wisconsin's regulatory requirements and long-standing agency practice and constitutes plain error on multiple, independent grounds.

First, the Court's ruling is flatly inconsistent with the plain language of the

operative administrative rule. The legislature expressly delegated to the PSC sole discretion over the necessary contents of an application for a CPCN, and there is no statutory requirement of any type specifying the information to be contained in any such application. *See* § 196.491(3)(a)1 (“An application for a certificate issued under this subsection shall be in the form and contain the information required by commission rules . . . .”). Pursuant to this expressly delegated authority, the PSC promulgated PSC § 111.53 to address the appropriate contents of a CPCN application. The regulation specifies that the application is to provide “information” regarding “the regulatory approvals required for construction and operation.” PSC § 111.53(f)1. Seizing on this language, and fundamentally misconstruing the provision (which requires “information” regarding the regulatory approvals that will be required, not the approvals themselves), the Circuit Court held that the provision somehow mandates that the actual approvals be in-hand at the time the application is submitted. The rule requires no such thing. Indeed, the Circuit Court curiously disregards the very next sentence of the rule which proves the error. That sentence provides that the application should similarly 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(f)2 (emphasis added). Any such “timeline” of “permitting expectations” would be nonsensical if the requirement was that all permit approvals were already required in order for

the application to be deemed complete in the first instance.

Second, the Circuit Court's construction cannot be reconciled with the very structure of Section 196.491(3) itself. For instance, Section 196.491(3)(a)3 delineates the time frame for DNR action on applications for permits required "prior to construction." The express timeline set forth in the statute provides for such approvals well *after* the time frame by which an application is to be deemed complete by the PSC under Section 196.491(3)(a)2. So too, the requirement in Section 196.491(3)(e) that "[t]he commission may not issue a certificate of public convenience and necessity under this subsection until the department has issued all permits and approvals . . . that are required prior to construction" would be rendered meaningless if all such permits and approvals were, in fact, required before an application was even deemed "complete" in the first instance.

Third, the Circuit Court did not identify, let alone accord appropriate deference to, the PSC's construction of its own rule. *See, e.g., Beal v. First Federal S. & L. Ass'n*, 90 Wis. 2d 171, 183, 279 N.W.2d 693 (1979). The reason for this failure is straightforward. The PSC's decision approving the CPCN never addressed this anomalous argument because it was never presented by any party in the administrative proceeding. "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 Board of Adjustment*, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376.

Fourth, no party has established, or conceivably could establish, any requisite prejudice, even were the Circuit Court correct on this issue. *See, e.g., Rural*, 239 Wis. 2d 660 at ¶¶ 47, 48 (holding that the objector bears the burden of establishing “that a claimed procedural error is prejudicial” and noting that the “error would have been harmless procedural error”). All permits required “prior to construction” have, in fact, been obtained and thus the issue is moot. At best, the appropriate remedy, even were a deficiency found, would be a simple remand to the PSC for a confirmation that the required permits are in place prior to construction, not the Circuit Court’s unfounded, Sisyphean requirement that the entire administrative process begin anew.

Finally, this plain error is one requiring immediate correction. As set forth above, this erroneous judicial re-writing of CPCN procedures has a profound adverse impact not only on the ERGS project, but on all ongoing and future regulatory activities regarding electric generating facilities in this State. If permitted to stand without immediate correction, the legal requirements imposed by the Circuit Court will create substantial regulatory impediments that will frustrate ongoing regulatory activities essential to meeting the energy and environmental needs of this State and will significantly -- and wastefully -- increase the costs of such activities.

As will be set forth in detail in the substantive briefing on appeal, the Circuit Court’s order is predicated on other similar, fundamental errors of law that

necessitate prompt correction. No ground on which the Circuit Court reversed the CPCN approval withstands legal scrutiny and each is subject to similarly straightforward reversal as a matter of law.

#### **IV. Relief Requested**

Accordingly, Petitioner respectfully requests the following relief:

1. An order accepting jurisdiction of this appeal on bypass, on the Court's own motion pursuant to §§ 808.05(3) and 809.61, Wis. Stats., or, in the alternative, an order granting Petitioner's motion to bypass the court of appeals pursuant to § 809.60, Wis. Stats.

2. An order establishing a briefing schedule commencing with Petitioner's brief due no later than December 28, 2005, and scheduling the case for oral argument in March 2005.

3. A final decision on the appeal as expeditiously as possible, and in any case no later than April 30, 2005. If a full opinion or opinions cannot be completed, the Court could issue the mandate with an opinion to follow. *See, e.g., State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 394 N.W.2d 732 (1986).

Dated this \_\_\_\_\_ day of December, 2004.

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