

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

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

DAIRYLAND POWER COOPERATIVE,
Interested Party-Cross-Respondent,

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

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

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

CALPINE CORPORATION,
Petitioner,

v.

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

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

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

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
Respondent,

WISCONSIN PUBLIC POWER, INC.,
CITY OF OAK CREEK, DAIRYLAND
POWER COOPERATIVE, MADISON
GAS & ELECTRIC COMPANY,
WISCONSIN ELECTRIC POWER
COMPANY, WISCONSIN ENERGY
CORPORATION and W.E. POWER, LLC,
Interested Parties.

CALPINE CORPORATION,
Petitioner,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
Respondent,

CITY OF OAK CREEK, DAIRYLAND
POWER COOPERATIVE, MADISON GAS
& ELECTRIC COMPANY, WISCONSIN
PUBLIC POWER, WISCONSIN ELECTRIC
POWER COMPANY, WISCONSIN ENERGY
CORPORATION and W.E. POWER, LLC,
Interested Parties.

CITY OF OAK CREEK,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN,
Respondent.

TOWN OF CALEDONIA,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN,

Respondent,

WISCONSIN ELECTRIC POWER
COMPANY, WISCONSIN ENERGY
CORPORATION, W.E. POWER, LLC,
DAIRYLAND POWER COOPERATIVE,
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INTRODUCTION

Wisconsin faces increasing electrical needs with aging generation facilities. *Final Dec.* at 13, 20-21. As the Legislative Council recognized, “new electric generation capacity, including base load facilities, must be built” (State’s App. 249.) The Commission in this case determined “public convenience and necessity require” ERGS be constructed, and directed that steps be taken “now to ensure these facilities are in service in 2009 and 2010.” *Final Dec.* at 5, 20. Unless the Commission’s ruling is promptly reinstated, ERGS cannot be operational at that time.

Although Respondents SCJ/CW and Calpine strain to cast the issues before the Court as legal, the Commission’s factual findings and judgments are at the core of this case:

- “[N]ew baseload supply” is needed. *Id.* at 13;
- Under *all* scenarios, coal-fired generation “is needed during the forecasting period” and other energy priorities, “alone or in combination, cannot replace the need for new baseload, coal-fired units.” *Id.* at 20, 24;
- The question is not “whether” Wisconsin requires ERGS, but “when it should be installed.” *Id.* at 24.
- To “maintain a reliable electric system” the first ERGS units should be operating in 2009. *Id.* at 25.
- The selected site is “in the public interest”; indeed, Oak Creek—a city fully aware of the positives and negatives of hosting a coal-based generation facility (having done so for 50 years)—*favours* the site. *Id.* at 5, 47.

The Commission determined ERGS is an essential component of a broader initiative to address future energy needs. The comprehensive plan submitted by WE, known as Power the Future (“PTF”), includes new gas-fired plants for

intermediate load, retirement of older coal facilities, and commitments to renewable generation and efficiency measures. *Final Dec.* at 21-22; WE App. 136-137. ERGS is a necessary element of a broader pattern of energy decisions being made by the Commission. *Final Dec.* at 23.

Differences of opinion on ERGS are expected. Vigorous dispute on such proposals, as in this case, is an essential component of the regulatory process. Unfounded *ad hominem* attacks on the integrity of Commissioners and the good faith of agency staff are not. Accusations that Chairperson Bridge followed “her own predilections,” “Commissioner Bie made plain her disdain” for the law, SCJ/CW Resp. at 39, or PSC sought “to justify its approval of WEC’s business plan,” Calpine Resp. at 33, are not only inappropriate, they reflect fundamental weakness in Respondents’ arguments.

Respondents’ differences with the Commission’s judgments and factual determinations offer no basis for judicial reversal of the thorough regulatory process here. The deference properly accorded agencies on matters delegated to their expertise is well-established and codified. *See* § 227.57, Wis. Stats.; *Town of Ashwaubenon v. Highway Commission*, 17 Wis. 2d 120, 130-31, 115 N.W.2d 498 (1962). This is particularly true in the complex realm of the Commission’s responsibility to oversee long-term energy needs for the State, as the Legislature has recognized. *See* § 196.02(9), Wis. Stats. The Commission fully understood and discharged its responsibilities under the law.

ARGUMENT

I. The Commission’s Acceptance of the Application for Review Provides No Grounds for Reversing the Final Decision.

Only SCJ/CW argues the Commission’s *initial* decision to accept the CPCN application for review should invalidate the Final Decision rendered *after* the 360-day review process. SCJ/CW cites no case reversing final agency

action based on grounds the agency should not have accepted an application. No error occurred and SCJ/CW identifies no defect in the *final* Commission action.

A. Permits

Neither Respondent defends the Circuit Court's erroneous construction of § PSC 111.53(1)(f)1 to require DNR permits when submitting a CPCN application. The Circuit Court misinterpreted the rule; it does not require each enumerated item, but rather "information" about each item. *See* WE Brief at 15-17. *See also* Dairyland Brief at 8-12.

B. Transmission Agreements

This same error undermines SCJ/CW's argument that signed "transmission agreements" were required with the CPCN application. SCJ/CW Resp. at 21-23. SCJ/CW does not contest that the Application contained "information" on transmission agreements and the agreements are now in place. WE Brief at 17, 23.

§ PSC 111.53(1)(f)9 does not apply here. SCJ/CW Resp. at 23. The provision applies only where a "CPCN is needed for construction of transmission lines *as part of this application . . .*" WE did not apply to construct transmission lines, nor could it. American Transmission Company controls transmission. *Final Dec.* at 10-12.

Neither Respondent argues the Commission's *Final Decision* fails to appropriately address transmission matters, WE Brief at 33-36, thereby conceding the Circuit Court's ruling was error. *Id.*

C. Completeness Letter

SCJ/CW asserts the Commission erred when it determined the application was complete but purportedly "acknowledged" the "application was incomplete." SCJ/CW Resp. at 20-21. The completeness letter included no such acknowledgement; it accepted the application as "complete"

and requested “additional information.” (State’s App. 227-231.) Nothing precludes the Commission from requiring additional information after accepting an application. SCJ/CW presents an apparent block quote from the letter, but misleadingly redacts. SCJ/CW Resp. at 20. The letter actually states (in the portion redacted): “Substantial amounts of information relative to items 6 and 7 have been provided, and will allow our review of the wetland delineations to begin.” (State’s App. 228.) SCJ/CW’s claim that WE failed to supply the requested materials is false. SCJ/CW Resp. at 21. The materials were timely submitted and discussed in the EIS. *See* EIS at 179-183, 197-200, 216-217, 226, 254, Figures 2-9, 2-10.

D. Two Proposed Sites

SCJ/CW focuses on the “two proposed sites” requirement of § PSC 111.53(1)(e). *Final Dec.* at 5, 11-12, 44-47. Recognizing the fatal flaw in its argument, SCJ/CW asserts this Court need not “substitute its judgment for that of the PSC” to resolve the issue. SCJ/CW Resp. at 9. Its argument demands just that.

SCJ/CW states, as fact, that “the application identified only one location: the OCPP site.” SCJ/CW Resp. at 9. That is incorrect. The application plainly identified the “Oak Creek Site” and “Caledonia Site” as alternatives. (WE App. 107-108; R.18-1:Vol. 3 at 100-106.)

While SCJ/CW points to *similarities* between the sites, the Commission recognized important *differences*, including that the sites were in different municipalities and counties, and involved, *inter alia*, different surface water discharge channels, ash haul roads, air impacts, wetland impacts, excavation requirements, noise impacts, habitat impacts, and aesthetics. (WE Brief at 21-22; EIS at 96, 101-102, 218, 412-415; R.18-157:4374-4375.) The weighing of such evidence is precisely the type of factual assessment for which the Court may not substitute its judgment. *See* § 227.57(6), Wis. Stats. Deference must also be accorded the agency’s interpretation

and application of its own rule. *See Vonasek v. Hirsch & Stevens, Inc.*, 65 Wis. 2d 1, 7, 221 N.W.2d 815 (1974).

The alleged similarities do not undermine the Commission's finding. That two proposed sites are geographically close or share common features is neither unusual nor determinative. Calpine's Fond du Lac proposal, which SCJ/CW touts as including distinct alternatives, SCJ/CW Resp. at 17, also involved two sites ½ mile apart, each using the same water intake and discharge system. EIS at 65, 418. The suggested distinction that Calpine involved "separate parcels" is meaningless. No legal standard supports a rule that would base the "alternatives" inquiry on ownership or "parcel" boundaries. Under such an unfounded theory, an alternative ½ mile north (on a parcel not owned by WE) would meet the test, but the alternative ½ mile south (on the 1,000 acre property) would not. Regardless, the Caledonia site *did* involve, in part, a separately owned parcel. EIS at 102.

The sites were not mere "alternative configurations," SCJ/CW at 9, but involved geographically different locations. Indeed, different municipalities would receive shared-revenue and control zoning depending on the site selected. *See Final Dec.* at 47; EIS at 96; § 79.04(7)(b), Wis. Stats.

SCJ/CW's claim that environmental differences are "inconsequential," SCJ/CW Resp. at 12, is belied by the evidence it cites. SCJ/CW selectively cites testimony of a DNR Engineer, but ignores his continued testimony confirming that the North Site—CUP site would have 50% lower SO₂ impacts and 15% lower PM₁₀ impacts than Caledonia. (R.18-157:4374-4375; R.18-158:Exh. 155). SCJ/CW claims no "significant differences in wetland impacts," SCJ/CW Resp. at 12, but the cited chart demonstrates a 26.6% difference. EIS at 217. SCJ/CW's characterization of a 36% difference in excavation (2.7 million cubic yards) as "modest," *id.* at 18 n.2, is revealing. *See* EIS at 96 (recognizing "significant" excavation differences).

The Commission correctly found the Application provided “two proposed sites.” Regardless, the *statutory* “alternative locations” standard was also independently satisfied. *See* § 196.491(3)(d)3, Wis. Stats. Although SCJ/CW asserts “PSC cannot fulfill its statutory directive” unless the applicant submits appropriate alternative sites, SCJ/CW Resp. at 24, this is incorrect. The Commission fulfilled the statutory “alternative locations” analysis for over two decades before § PSC 111.53(1)(e) was promulgated. SCJ/CW does not dispute the Commission here ultimately considered “alternative locations” *beyond* the application—Calpine’s proposal to provide energy from Kaukauna and elsewhere. *Final Dec.* at 30-31; EIS 65-66, 417-422. The suggestion this was “*post hoc* rationalization,” SCJ/CW Resp. at 13-14, is wrong. Calpine expressly submitted its proposal as an “alternative” to ERGS. EIS at 65; *Final Dec.* at 30; R.18-158:Exh. 202.

E. Prejudice

SCJ/CW can articulate no prejudice. Indeed, it does not claim prejudice based on the sites identified in the application, but instead argues there was insufficient “wetlands and aquatic impacts information.” SCJ/CW Resp. at 24. Aside from presenting a different issue, the argument is wrong. WE timely submitted all requested information, and the EIS addresses wetlands and aquatic impacts. *See* EIS at 179-183, 197-200, 216-17, 226, 254. DNR has found wetlands issues satisfied. (WE App. 299).

The final location is appropriate: It is a “brownfield,” with necessary infrastructure, involving no undue adverse environmental consequences, in a municipality that desires the facility.

II. The Commission and DNR Properly Coordinated Their Respective Regulatory Duties.

SCJ/CW claims the form of order rendered by the Commission violates § 196.491(3)(e) and DNR failed to

fulfill independent responsibilities to the public. SCJ/CW Resp. at 25-36. Neither assertion is correct.

DNR and PSC worked on an interdependent, coordinated basis throughout the ERGS review. DNR informed the Commission's review of the CPCN application. (R.18-34, 38, 46.) DNR and PSC staff jointly prepared a comprehensive EIS. DNR witnesses testified in the CPCN hearings. (R.18-157:4360-4392; 4394-4451; 4453-4457; 4459-4504.) During the period of CPCN review, DNR determined it "did not consider any of the sites to be unpermittable" for Chapter 30 purposes, (WE App. 299), and the North Site-CUP site should meet air permit requirements. *Final Dec.* at 51. DNR issued both permits following contested case proceedings, and found ERGS does not pose undue adverse environmental impacts. (WE App. 261-318.)

Through these coordinated regulatory activities, PSC understood DNR was addressing environmental concerns, was advised of environmental considerations, and was aware air and Chapter 30 permits would not be issued at the time a Final Decision was required. Consistent with the plain purpose of § 196.491(3)(e), the Commission rendered a form of order ensuring the CPCN could not have legal effect until those permits issued. (State's App. 62.) That order was proper and a sound regulatory decision given the coordinated agency requirements at issue. *See RURAL v. PSC*, 2000 WI 129, ¶¶ 60-61, 239 Wis. 2d 660, 700, 619 N.W.2d 888.

While SCJ/CW characterizes the form of order as "sophistry," SCJ/CW Resp. at 29, its argument would ascribe **no** legal meaning to the explicit ruling that the CPCN "only takes effect when the DNR issues" the requisite permits.

SCJ/CW asserts § 196.491(3)(a) "requires that DNR make its completeness determination" before the Commission can accept a CPCN application. SCJ/CW Resp. at 28. Nothing in the statute imposes any such requirement. To the contrary, each agency has discretion to adjudge the information needed in permit applications. *Compare* § 196.491(3)(a)2 and § 196.491(3)(a)3.b.

SCJ/CW strains to conjure prejudice from the regulatory proceedings and form of order. There is none. The Commission found that ERGS “will not have undue adverse impact on [] environmental values,” *Final Dec.* at 5, and DNR has thoroughly considered environmental issues. By its permits, DNR concluded that environmental concerns have been appropriately addressed. *See* WE App. 261-318.

To suggest prejudice, SCJ/CW claims DNR impermissibly limited its “practicable alternatives” wetlands analysis and failed to consider “health effects” from air impacts. SCJ/CW Resp. at 33-35. Both assertions are wrong. As Judge Boldt found, DNR’s decision to coordinate its wetlands review with the site determination by PSC was an appropriate exercise of “scoping” discretion under § NR 103.08(1). (WE App. 299, 303-304). Contrary to SCJ/CW’s sinister suggestion this was done in dark of night, SCJ/CW Resp. at 32, it was a matter of public notice. (R.18-130.) The assertion that this sound exercise of DNR discretion (and efficient use of limited DNR resources) “prejudiced the public” is false, and proven so by the fact that the Legislature now *mandates* this approach. *See* § 30.025, Wis. Stats. (effective Dec. 18, 2003). DNR’s discretionary scoping decision could not have adversely impacted *the CPCN* decision, as DNR had identified no reason why any of the sites would fail to meet Chapter 30 standards (WE App. 299), and the Commission’s site selection process requires consideration of numerous other “public interest” factors. *See* § 196.491(3)(d)3.

SCJ/CW’s claim that DNR did not address health impacts misstates the record. Total air emissions, from *both* the existing Oak Creek facilities *and* ERGS, will not exceed the actual emissions from the Oak Creek facility in 2000. EIS at App. E. “[P]ast DNR analyses” of such emissions demonstrate “the risks resulting from well-controlled facilities with tall stacks are low.” EIS at 20. DNR expressly found that “ERGS would not likely pose a significant inhalation risk if operated according to required standards.” (WE App. 272.) DNR independently rejected SCJ/CW’s “health impact

quantification” arguments because they are speculative and unaccepted. (WE App. 285-286.)

No environmental considerations have been short-changed and no prejudice arises from the interrelated DNR/PSC process in this case. Both agencies, given the specific circumstances in this complex and dynamic regulatory process, fulfilled the inter-agency cooperation the Legislature intended and the Commission’s order ensured the CPCN did not have legal effect until DNR completed its review. *See* Wisconsin Legislative Council Information Memorandum 75-8, at 1 (October 20, 1975).

III. The Commission Properly Construed and Applied the Energy Priorities Law.

Respondents want the Court to believe this case presents a choice between coal and natural gas. That is false. As the Commission conclusively found, there is *no* scenario by which natural gas, “alone or in combination” with other priorities, can displace the need for new coal-fired facilities in Wisconsin. *Final Dec.* at 20, 24. The Commission specifically found that Calpine’s proposal “would not replace the need for additional coal-fired, baseload generation.” *Id.* at 30-31.

SCJ/CW states, without record cite, that “the evidence shows that natural gas generation is cheaper than the PSC-approved ERGS.” SCJ/CW Resp. at 35. The evidence is squarely to the contrary: a “gas-only” option is nearly \$2 billion more expensive. EIS at 73. Reliance on gas-fired facilities for these energy needs also presents various feasibility and reliability concerns. (R.18-157:4529-4530; EIS at 45; Wisconsin Energy Customers Amicus Brief at 9-16.) No Respondent argues low sulfur coal or oil is feasible. They are not. WE Brief at 32-33.

Calpine’s assertion that the “only way for PSC to have met its obligations under the Energy Priorities Law was to include Calpine’s Fond du Lac Energy Center in the chosen resource supply option,” Calpine Resp. at 8, is confused at

best. The Fond du Lac facility has already been approved. It does not eliminate the need for ERGS. *Final Dec.* at 31-32.

The issue was *timing*. Although Calpine would prefer that PSC mandate that WE purchase energy from it, the Commission's prudent decision that reliability concerns necessitate ERGS be operational "sooner, rather than later," *id.* at 25, is a judgment well within the Commission's discretion once it determined that new coal-fired facilities are necessary.

Respondents suggest the Commission believed it could *ignore* the Energy Priorities Law. SCJ/CW Resp. at 36-40; Calpine Resp. at 28-34. SCJ/CW even impugns each Commissioner personally, claiming Chairperson Bridge follows "her own predilections," Commissioner Bie has "disdain" for the law, and Commissioner Garvin does not understand the law. SCJ/CW Resp. at 38-40. The thoughtful treatment of the Energy Priorities Law in the Final Decision states all that is necessary regarding the baselessness of such accusations. *Final Dec.* at 14-23.

Respondents also improperly minimize the broader scope of the Commission's implementation of the Energy Priorities Law. *See* 1993 Wis. Act 414, Prefatory Note. The Commission properly considered ERGS within the context of the multi-faceted PTF initiative, the Commission's history of generation facility decision-making, and the need for fuel diversity. *Final Dec.* at 23.

IV. The Commission Did Not Predetermine Future Action.

SCJ/CW asserts that the prudent decision to construct facilities with a potential for future capacity "predetermined" future approval. SCJ/CW Resp. at 48-50. It did not. Future expansion, if any, will be subject to independent review and approval.

CONCLUSION

PSC and DNR have exhaustively analyzed ERGS through sharply contested administrative proceedings. They faithfully fulfilled their responsibilities and rendered sound judgments after weighing the competing evidence: ERGS is required for an adequate and reliable future supply of energy, coal is the correct fuel, Oak Creek is the appropriate location, and environmental concerns are satisfied. DNR has issued the requisite air and Chapter 30 permits.

Judicial review of matters squarely within the expertise and delegated authority of agencies is appropriately limited. There is no reversible error in the Commission's Final Decision and Order.

ERGS is an essential component of Wisconsin's long-term ability to meet this State's energy needs. Construction must begin if ERGS is to be operational by 2009 as the Commission directed in order to ensure a reliable electrical system. As set forth more fully in the petition for direct, expedited appeal, prompt reinstatement is thus needed.

Wherefore, WE respectfully requests that this Court reverse the Circuit Court and reinstate the Final Decision and Order.

Dated this 7th day of March, 2005.

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

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,991 words.

Dated at Milwaukee, Wisconsin this 7th day of March, 2005.

Larry J. Martin
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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 -- § 196.02, Wis. Stats. (2002)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Scope of Review -- § 227.57, Wis. Stats. (2002)

§ 227.57. Scope of review.

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

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

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

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

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

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

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

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

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

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