STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 22-AP-1106

CLEAN WISCONSIN, INC. AND SIERRA CLUB,

Petitioners-Appellants,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent-Respondent,

SOUTH SHORE ENERGY LLC AND DAIRYLAND POWER COOPERATIVE,

Interested Parties-Respondents,

v.

MICHAEL HUEBSCH,

Other Party.

On Review from Dane County Circuit Court Case No. 20-CV-585,
the Hon. Jacob B. Frost, Presiding

BRIEF OF CLEAN WISCONSIN, INC. AND SIERRA CLUB

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Answered by the Public Service Commission: The Public Service Commission did not directly answer the burden of proof issue, and applied no recognized standard of proof

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Answered by the Circuit Court: Yes
Answered by the Public Service Commission: Yes

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Answered by the Circuit Court: Yes
Answered by the Public Service Commission: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary for the legal issues presented in this matter, as Clean Wisconsin and the Sierra Club anticipate the briefs will fully present and meet the issues on appeal. Wis. Stat. §809.22(2)(b). Publication is warranted under Wis. Stat. §809.23(1)(a)5. as this is a case of substantial and continuing public interest, and under Wis. Stat. §809.23(1)(a)1. to clarify the application of Wis. Stat. §196.491(3)(d)3. and 4. in light of *Tetra Tech EC, Inc. v. Department of Natural Resources*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21, and to establish the burden and standard of proof that applies to the applicant for a certificate of public and convenience and necessity.

INTRODUCTION

Power plants are costly endeavors—financially, environmentally, and socially. State law accordingly requires that the Public Service Commission of Wisconsin ("Commission") issue a certificate of public convenience and necessity ("CPCN") before large power plants may be built. The Commission's decision to issue such a CPCN must also satisfy the Energy Priorities Law under Wis. Stat. §1.12 and be accompanied by an Environmental Impact Statement that satisfies the Wisconsin Environmental Policy Act, Wis. Stat. §1.11.

The Nemadji Trail Energy Center would be a new, natural-gas fired power plant owned and operated by Dairyland Power Cooperative and South Shore Energy, LLC ("Applicants") in Superior, Wisconsin. At 550-625 megawatts ("MW"), the plant would emit up to 2.7 million tons per year of carbon dioxide-equivalent and over 200 tons per year of pollutants like nitrogen oxide and volatile organic compounds. It would have unique environmental impacts at the Applicants' chosen location on the side of a

steep hill with highly erodible soils, overlooking the Nemadji River and dotted with wetlands. Its total cost is estimated at $700 million.

Clean Wisconsin, Inc. and Sierra Club ("Environmental Petitioners") challenged the Commission's decision to issue a CPCN for the facility through a petition for judicial review under Wis. Stat. §227.52, based on the incomplete environmental record and failure of the Commission to apply a burden or recognized standard of proof to the Applicants. The circuit court affirmed the agency's decision based on a highly deferential view of Commission authority that found the standards for granting a CPCN to be so "squishy" that they evaded normal evidentiary principles and agency review standards. This is not and cannot be the law.

The Commission erred in granting the CPCN and the circuit court erred in affirming it. Robust judicial review must be available for agency decisions, especially those as consequential as the CPCN here. The circuit court and Commission decisions should be reversed.

STATEMENT OF THE CASE

Regulatory Background

No large (over 100 megawatts) generating facilities may be constructed in Wisconsin without a CPCN issued by the Commission. Application requirements and standards for approval are set forth, *inter alia*, in Wis. Stat. §196.491(3), a/k/a the "Plant Siting Law." *See Clean Wis. v. PSC*, 2005 WI 93, ¶33, 282 Wis. 2d 250, 700 N.W.2d 768.

Among the standards for approval are Wis. Stat. §196.491(3)(d)3. and 4., which provide in relevant part:

> 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…
>
> 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…

(emphasis added); *see also* Wis. Admin. Code ch. PSC 111. Additionally, the application must satisfy the Energy Priorities Law in Wis. Stat. §1.12, which gives preference to efficiency and renewable sources of energy over non-renewable sources.

Because the issuance of CPCNs is a major action that significantly affects the quality of the human environment, the Commission, in conjunction with the Wisconsin Department of Natural Resources ("DNR"), must also prepare an Environmental Impact Statement ("EIS") under the Wisconsin Environmental Policy Act, Wis. Stat. §1.11, as implemented through Wis. Admin. Code chs. PSC 4 and DNR 150. Pursuant to Wis. Stat. §30.025, those who need DNR approvals for waterway, wetland, and stormwater permits for a large electric generating facility file a unified application for these approvals with the CPCN application. Staff from DNR participate in the Commission proceedings and provide relevant information about environmental and other issues. Applicable DNR approvals must be issued within 30 days of the Commission's CPCN decision. Wis. Stat. §30.025(4)(b).

The NTEC Project

On January 8, 2019, South Shore Energy, LLC, and Dairyland Power Cooperative (collectively, "Applicants") filed with the Commission an application for a CPCN to construct a new, natural gas-powered

generating facility in Superior, Wisconsin. (R.67, Ex.-Applicants-Application.)[1] The facility would be called the Nemadji Trail Energy Center ("NTEC"), a 550-625 MW merchant natural gas plant. (R.164 at 182:5-22 (McCourtney).) It would emit up to 2.7 million tons per year of carbon dioxide equivalent and over 200 tons per year of pollutions such as nitrogen oxide and volatile organic compounds. (R.138, Ex.-PSC-FEIS-§3.2.1.2.)

Because applications for CPCNs must include site-related information for two proposed locations, Wis. Admin. Code §PSC 111.53(1)(f), the NTEC application identified a "Preferred" and "Alternate" site. The sites are undeveloped greenfields in an industrial and residential area of the city, within two miles of Lake Superior. (R.67, Ex.-Applicants-Application-Vol. 1:1-6, 1-8, 1-35.) Both sites have unique environmental challenges, but the Preferred Site, which is owned by a parent company of

[1] R.__ refers to the record number item as listed by the Commission in their list of items in the agency record (Doc.28, A-App-102), followed by the name of the document and, where hearing testimony is cited, the name of the witness. Documents in the circuit court record index are referred to as "Doc.__."

South Shore Energy, LLC, was the site ultimately authorized by the Commission. (*Id*. §§1.0, 6.2; R.22 at 60, A-App-081.).

The Preferred Site is largely wooded, containing wetland and upland habitats, a small existing detention pond, riparian and floodplain habitats associated with the Nemadji River, and a steep, 46-foot slope as a transition between the upland and Nemadji River terrace. (R.48, Direct-CW-Mosca-3 to -4; R.67, Ex-Applicants-Application-Vol. 1:1-7 to 1-8.) Slopes at the Preferred Site are characterized by highly erodible clay soils, creating a risk of slope failure. (R.48, Direct-CW-Mosca-3; R.128, Ex.-CW-Mosca-3 at 45.) The Superior area has experienced large, intense rainfalls in recent years, some of which have caused significant damage to infrastructure, and these rainfalls are expected to continue in the future under current climate predictions. (R.48, Direct-CW-Mosca-8 to -9.) The NTEC plant will have a stormwater pond at the top of the slope. (R.164 at 199:25-201:18.)

The Preferred Site is undersized and requires a large sheet pile wall, i.e. a giant retaining wall, to reclaim enough of the site to build the facility.

(R.48, Direct-CW-Mosca-5 to -6; R.164 at 173:9-16 (Coughlin).) The wall would take an entire construction season to build and would require significant excavation and fill activities. (*Id.*; R.45, Direct-Applicants-Coughlin-2.)

There are wetlands on the Preferred Site containing diverse native plants. (R.48, Direct-CW-Mosca-13; R.55, Direct-WDNR-Rowe-5 to -6.) Wetlands in this area also perform floodwater storage services, a significant benefit in this area of highly erodible soils and frequent heavy rains. (R.56, Direct-WDNR-Tekler-6; R.67 at 402:23-403:6, 409:9-16 (Tekler); R.48, Direct-CW-Mosca-16; R.136, Ex.-CW-Mosca-11.) The Preferred Site will have at least 4.36 acres of permanent wetland fill and 14.8 acres of temporary fill in an adjacent laydown/staging area that may last up to 3.5 years. (R.48, Direct-CW-Mosca-11 to -12, -16.) These are large wetland impacts for a single project. (*Id*. at 12.) The project would also cause secondary impacts to unfilled wetlands, or impacts caused by changes in hydrologic sources to wetlands or streams, an influx of invasive species,

water quality impacts due to stormwater inputs, and other perturbations. (*Id*. at 14.)

The application called for NTEC's water needs to be supplied solely through groundwater via five high-capacity wells. (R.67, Ex.-Applicants-Application at 3-21.) The pumps would have the capacity to pump up to 5.4 million gallons per day, or 750 gallons per minute (GPM), well over one billion gallons annually. (R.138, Ex-PSC-FEIS-121.)

Procedural History at the Commission

After the Applicants submitted their request for a CPCN, the Commission issued a notice of a Class 1 contested case proceeding. (R.1, Notice.) The issue before the Commission in approving the CPCN was,

> Does the project comply with the applicable standards under Wis. Stat. §§1.11, 1.12, 196.025, and 196.491, and Wis. Admin. Code chs. PSC 4 and 111?

(R.22 at 3, A-App-024) Petitioners and other parties moved to intervene. (R.11.) The Commission scheduled a contested case hearing on the merits of the application for October 29, 2019, to be presided over by an administrative law judge. The hearing was preceded by four rounds of written, pre-filed testimony and exhibits. (R.13.)

Applicants proceeded first, but their testimony did not address many of the standards in Wis. Stat. §196.491(3)(d)3. and 4., and often relied on future DNR permit processes and generic and unspecified best management practices to address environmental concerns. (*E.g.*, R.24 at 8; R.47, Direct-Applicants-McCourtney; R.45, Direct-Applicants-Coughlin.) No witness, including Applicants' witnesses, could identify another 500+ megawatt plant located on a bluff with highly erodible soils overlooking a water body, featuring a stormwater pond at the top of the bluff. (R.164 at 176:17-25 (Coughlin); 185:8-17 (McCourtney); 388:7-18 (Greene).)

Meanwhile, testimony submitted by Clean Wisconsin witness Vince Mosca, who has 30 years of experience as an environmental consultant, demonstrated that the plant presented significant risks to the environment, especially relating to erosion, stormwater, and wetlands. (*E.g.*, R.48, R.64.) As he testified, building the sheet wall and otherwise preparing the site involves a significant amount of engineering, grading, and construction that would be expensive, risky, and easily avoided if a different site was selected. (R.48, Direct-CW-Mosca-1 to -2, -5.) Despite these risks, the

Applicants' stormwater management plans were incomplete or, to the extent presented, insufficient to address the site's unique challenges. (R.48, Direct-CW-Mosca-4 to -11.) Mr. Mosca also testified about the project's significant wetland impacts and the lack of complete information about wetland quality and secondary impacts to wetlands. (*Id*. at 11-16.)

DNR and Sierra Club witnesses testified that the plant lacked sufficient groundwater supply for its expected 30-plus year lifespan or, at least, that the record lacked evidence of sufficient recharge to the aquifer to supply the plant. (R.51, R.65.) Additionally, Sierra Club witness Michael Goggin testified that the proposed plant was being offered to serve a need that could readily have been met by higher priority alternatives under Wisconsin's Energy Priorities Law. (R.61.)

DNR and Commission staff testified about their review of the project and preparation of the project's Environmental Impact Statement. DNR waterway and wetland specialist Lindsay Tekler agreed with Mr. Mosca that the Applicants had homogenized the wetlands by lumping as many as 17 wetlands together on one data sheet, even those that were ecologically

distinct or located in different landscape positions. (R.48, Direct-CW-Mosca-12-13; R.56, Direct-DNR-Tekler-7; R.164 at 401:21-402:5 (Tekler).) Ms. Tekler testified that she would likely require resubmission of individualized wetland data sheets, in addition to conducting her own site visit in the spring to assess wetland quality. (R.16 at 401:3-5-402:22 (Tekler).)

Regarding impacts to waterways, at the time of hearing, the DNR lacked even an engineering plan that would allow it to evaluate whether a Chapter 30 permit is required for direct impacts (i.e., fill). (R.56, Direct-WDNR-Tekler-5; R.164 at 394:22-396:12.) Stormwater plans were not reviewed by DNR staff, despite that agency's ultimate authority to approve an erosion control plan, and no DNR staff testified about stormwater issues. (R.164 at 391:10-23 (Tekler).)

The Commission accepted public comment and held two public hearings on the application. The proposal was controversial, generating hundreds of written and oral comments. (R.140, Ex.-PSC-Public Comment; R.165, R.166.) Opponents raised issues about climate impacts, fracking,

water quality, groundwater, industrial accidents, traffic, noise, and impacts to tribal interests. (*Id*.)

The Commission's Decision

After post-hearing briefing, the Commission announced its decision on January 16, 2020, which it later memorialized in a written final decision dated January 30, 2020 ("Decision"). (R.22, A-App-022.)

By a 2-1 vote, the Commission granted the CPCN. While the Commissioners acknowledged concerns about environmental impacts, the majority determined that both the Preferred and Alternative sites satisfied the standards in Wis. Stat. §196.491(3)(d)3. and 4.—clearing the way for Applicants to proceed with their Preferred site. (R.22 at 26, 28, A-App-047, 049.) The Commission's findings regarding stormwater, waterway, and wetland impacts largely relied on other future permits to determine the standards were satisfied. (*See* R.22 at 40-42, 47-48, A-App-061-063, 068-069.) It required that "all permits be in place before the commencement of construction," a condition it described as "essential to its determination that the project meets the standards for a CPCN." (R.22 at 44, A-App-065.)

The Commission also included in its order several previously used or "commonly-used order conditions" that it said would mitigate environmental impacts. (R.22 at 42, 48-54, A-App-063, 069-073.) The Commission declined to include project-specific conditions suggested by Clean Wisconsin. (R.22 at 57-58, A-App-078-079.) With respect to groundwater, the majority accepted the Applicants' evidence that sufficient groundwater was available to supply the plant. (R.22 at 38, A-App-059.) It did not address the issue of recharge and made the CPCN approval conditional on Applicants obtaining future DNR permits related to groundwater. (*Id*. at 40, A-App-061.)

The dissenting commissioner determined that the record did not support the Commission's findings that Wis. Stat. §196.491(3)(d)3. and .4 were satisfied. The dissent found that reliance on decisions by other agencies, under different and/or narrower standards, did not satisfy the Commission's broader duty to make findings under Wis. Stat. §196.491(3)(d)3. and 4. (R.22 at 69-70, A-App-090-091.) The dissenting commissioner disagreed with the majority's conclusion that groundwater

supply for the plant was sufficient and that there were no issues with soil stability. (*Id*. at 71, A-App-092.)

With respect to the Energy Priorities Law, the Commission found that the NTEC plant complied with the law and rejected the possibility of renewables with battery storage as a basis to find non-compliance. (R.22 at 21-22, A-App-042-043.) The Commission also found, by unanimous vote, that it had complied with the Wisconsin Environmental Policy Act ("WEPA") in reviewing the CPCN application through the preparation of the EIS and related processes. (R.22 at 33, A-App-054.)

Procedural History in the Circuit Court

Clean Wisconsin and the Sierra Club ("Environmental Petitioners") filed a petition for judicial review challenging the Decision on February 28, 2021. (Doc.2.) The Commission and Applicants filed notices of appearance. (Docs.6-8.) Environmental Petitioners attempted to supplement the record under Wis. Stat. §227.57(1) to show that the DNR had not issued its permitting decisions within 30 days of the Commission's decision to grant the CPCN (Docs.50, 61), which the Commission and Applicants opposed

and the Court rejected, finding its review was limited to the Decision and not events occurring afterwards. (Doc.74.)[2]

Briefing on the merits then commenced. Environmental Petitioners argued, *inter alia*, that the Commission had erred in applying no standard or burden of proof to the Applicants' request for a CPCN and that the standard of proof should be at least a preponderance of the evidence, that the Commission had erroneously interpreted its broad authority under Wis. Stat. §196.491(3)(d)3. and 4. and lacked substantial evidence when it granted the CPCN, erroneously determined the NTEC facility would comply with the Energy Priorities Law, and incorrectly determined the EIS prepared for the project satisfied WEPA, Wis. Stat. §1.11. (Docs.199, 228.) The Commission and the Applicants opposed these arguments. (Docs.224, 225.)

The circuit court affirmed the Commission's decision. First, the court agreed that the Applicants had the burden of proof to show they should

[2] A different motion to supplement the record was later heard and granted, relating to potential bias of one of the Commissioners who voted to approve the CPCN. (Doc.90.) That aspect of the case is, as of the date of this brief, proceeding separately in the circuit court and is not a part of this appeal. (*See* Doc.237:4, A-App.04.)

get a CPCN, but it found that "there is no specific standard of proof the applicant must satisfy." (Doc.237:7-237-9, A-App-007-009.) Rather, it accepted the Commission's argument that the caliber of facts offered by the Applicants only needed to satisfy the substantial evidence test applicable when agency decisions are challenged in circuit court. (*Id*.) It based this conclusion on a deferential view of the Commission's authority and its belief that the standards the Commission must apply—such as "unreasonable" and "undue"—"are all squishy" and did not lend themselves to "evidentiary standards meant for findings of fact." (Doc.237:9, A-App-009.)

The circuit court also concluded that the Commission properly interpreted its broad authority under Wis. Stat. §196.491(3)(d)3. and 4. to find that the NTEC plant was in the public interest and would not cause undue environmental harm, though it failed to address the dissenting Commissioner's arguments about the scope of the Commission's duty and the reliance on future environmental permitting by other agencies. (Doc.237:10-13, A-App-010-013.) It also found the Commission had

substantial evidence to support its determination. (Doc.237:13-14, A-App-013-014.)

Finally, the Court found that the Commission's decision complied with the Energy Priorities Law, rejecting Environmental Petitioners' argument that the Commission had improperly shifted the burden to them to show a higher priority renewable resource under the law was available. (Doc.237:15, A-App-015.) It also found that the EIS sufficiently examined the project's environmental and other impacts. (Doc.237:15-20, A-App-015-020.)

Additional facts are discussed as applicable below.

SCOPE AND STANDARD OF REVIEW

"It has long been a fundamental principle of Wisconsin jurisprudence that the actions of administrative bodies are subject to judicial review." *State* ex rel. *Hippler v. City of Baraboo*, 47 Wis. 2d 603, 610, 178 N.W.2d 1 (1970); *State* ex rel. *First Nat. Bank of Wis. Rapids v. M&I Peoples Bank of Coloma*, 82 Wis. 2d 529, 544 & n.10, 263 N.W.2d 196 (1978)

(judicial review of administrative agency actions is one of the "checks and balances" on governmental regulation).

Individual agency decisions are reviewed under Wis. Stat. §§227.52-.58, part of the Wisconsin Administrative Procedures Act. "When an appeal is taken from a circuit court order reviewing an agency decision, we review the decision of the agency, not the circuit court." *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶25, 335 Wis. 2d 47, 799 N.W.2d 73 (internal quotation marks and citation omitted).

The scope and standards of the Court's review are set by Wis. Stat. §227.57.

First, regarding errors of law, Wis. Stat. §227.57(5), provides that "[t]he 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." Although until 2018 courts could give "great weight" to agency interpretations of law in applying this provision, that is no longer the case.

Tetra-Tech EC, Inc. v. DOR, 2018 WI 75, ¶¶3, 84, 382 Wis. 2d 496, 914 N.W.2d 21 (ending the practice of deferring to agency interpretations of law).

This is a notable change in the law considering all prior appellate CPCN cases predate *Tetra-Tech* and ordinarily afforded the Commission "great weight" deference for its legal determinations. *E.g.*, *Town of Holland v. PSC*, 2018 WI App 38, ¶25, 382 Wis. 2d 799, 913 N.W.2d 914 (published approximately one month before *Tetra-Tech*). At most, after *Tetra-Tech*, courts may afford agencies "due weight" to an agency's experience or specialized or technical knowledge, *Tetra-Tech*, 382 Wis. 2d 496, ¶3. "Due weight" means "giving respectful, appropriate consideration to the agency's views," but this "is a matter of persuasion, not deference." *Id.*, ¶78; *see also* Wis. Stat. §227.57(10), (11). Under no circumstances do courts defer to the Commission's interpretation of its own authority. *Wis. Power & Light Co. v. PSC*, 181 Wis. 2d 385, 392, 511 N.W.2d 291 (1994).

Second, alleged defects in the agency's factfinding are reviewed under Wis. Stat. §227.57(6). This section provides,

> 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.

Id. To find an agency decision is supported by substantial evidence, a court looks to "whether, taking into account all the evidence in the record, reasonable minds could arrive at the same conclusion as the agency." *Madison Gas & Electric Co. v. PSC*, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982) (citation and internal quotation marks omitted).

Third, regarding errors of discretion, Wis. Stat. §227.57(8) permits review of decisions that are "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." *Id*. Put another way, under Wis. Stat. §227.57(8), the court reviews "the commission's decision to determine whether it is arbitrary or capricious." *Wis. Pro. Police Assoc. v. PSC*, 205 Wis. 2d 60, 74, 555 N.W.2d 179 (Ct. App. 1996) (citing *Wis. Cent.*

Ltd. v. PSC, 170 Wis.2d 558, 568, 490 N.W.2d 27 (Ct.App.1992)). "Arbitrary or capricious conduct lacks a rational basis and is the result of an unconsidered, willful or irrational choice rather than a 'sifting and winnowing' process." *Id*. (quoting *Robertson Transp. Co. v. PSC*, 39 Wis.2d 653, 661, 159 N.W.2d 636 (1968)). "[T]he court shall not substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. §227.57(8).

ARGUMENT

The Commission made four distinct errors when it issued its Decision.

First, it made an error of law when it ascribed no apparent burden or standard of proof to the Applicants to show why they should obtain a CPCN. This error helped contribute to the other defects in the Commission's analysis, because the Commission failed to make required findings or lacked sufficient evidence from the Applicants on certain statutory elements, or improperly flipped the burden to Environmental Petitioners to show why an element ***wasn't*** satisfied.

Second, the Commission made errors of law and discretion when applying Wis. Stat. §196.491(3)(d)3. and 4., because it failed to make or explain its findings, relied on an insufficient record, and punted to agencies with a narrower scope of authority to address issues later. It ultimately lacked substantial evidence for some of these findings.

Third, the Commission made legal and factual errors when it determined the NTEC project satisfied the Energy Priorities Law, Wis. Stat. §1.12, mainly stemming from the Applicants' failure to meet a recognized standard of proof under this law.

Fourth, the Commission erred when it determined the EIS satisfied the Wisconsin Environmental Policy Act, §1.11, particularly as it related to assessing methane emissions and climate change impacts associated with the NTEC plant.

Respectfully, the circuit court compounded these errors when it applied an overly-deferential view of the Commission's authority and excused it from applying any recognized standard of proof.

The Court should reverse the Decision and, as appropriate, remand the Decision to the agency.

I. The Commission Erred in Ascribing No Burden of Proof or Recognized Standard of Proof to the Applicants.

When considering a CPCN application, the Commission must make numerous determinations as to the consistency of the application with a variety of legal standards. Yet in this case, the Commission ascribed no apparent burden to the Applicants requiring them to show they met these standards, and rather than applying any recognized standard of proof, only required a showing of "substantial evidence" by the Applicants to issue a CPCN. (R.22 at 14-16, A-App-035-037.) This is legal error, and the Court should reverse the Commission's decision to grant the CPCN for this reason alone.

"The customary common-law rule that the moving party has the burden of proof, including not only the burden of going forward but also the burden of persuasion, is generally observed in administrative hearings." *Sterlingworth Condo. Ass'n, Inc. v. DNR*, 205 Wis. 2d 710, 726, 556 N.W.2d 791 (Ct. App. 1996) (citations omitted); *Vill. Of Menomonee Falls v.*

DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Ct. App. 1987) (affirming that "the applicant, or moving party[] in these proceedings . . . bore the burden of proof in general"). In other words, "[a] party seeking judicial process to advance his position carries the burden of proof." *Loeb v. Bd. of Regents of Univ. of Wis.*, 29 Wis. 2d 159, 164 (1965) (citation omitted). Conversely, it is not the respondents' burden to prove the negative of a perquisite when the applicant has failed to show evidence in support. *Clintonville Transfer Line v. PSC*, 248 Wis. 59, 83, 21 N.W.2d 5 (1945) ("But the burden of proving a public convenience and necessity is upon the applicant. The burden is not on the objector to show by evidence that the public convenience and necessity does not require the issuing of the certificate.") (Fairchild, J., concurring and dissenting).

The Commission nominally acknowledged this common-law rule but did not explicitly apply it. (R.22 at 16, A-App-037.) It then went on to claim that "observing this rule is fulfilled by weighing the evidence to determine whether a finding is supported by substantial evidence." (*Id.)* The Commission inexplicably asserted that application of the "substantial

evidence" standard of judicial review (applied as the "standard of proof" in this proceeding) "renders the applicable burden of proof a subordinate consideration." (*Id*.)

The Commission's reasoning is both muddled and critically flawed. The "substantial evidence" test is only used on judicial review of administrative agency fact-finding; the point of the test is *not* to re-weigh the evidence. It is error for an agency to use this standard to evaluate facts in the first instance. *Reinke v. Personnel Bd*., 53 Wis. 2d 123, 134, 191 N.W.2d 833 (1971) ("The substantial-evidence test is applicable only on judicial review; and, therefore, the Board misinterpreted its function, when it found that there was substantial evidence to support the action of the appointing authority."). Indeed, elsewhere in its Decision the Commission recognized this. (R.22 at 15, A-App-036.)

Moreover, a "burden of proof" met by substantial evidence is no burden at all. The "substantial evidence" standard of review is generally applied when a decision will be upheld even if there is more evidence in support of the contrary conclusion. *See DOR v. A. Gagliano Co*., 2005 WI

App 170, ¶32, 284 Wis. 2d 741, 702 N.W.2d 834 ("We will not reverse an agency finding of fact even if the finding is against the great weight and clear preponderance of the evidence so long as there is substantial evidence to sustain the finding."); *see also Kitten v. DWD*, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649. The Commission's failure to apply any standard of proof is evident throughout the Decision, which seldom describes any affirmative evidence Applicants supplied on any issue and was instead focused on rebutting the objections of Environmental Petitioners. (*E.g.*, R.22 at 31-40, A-App-052-061.)

Applying the substantial evidence test as the standard for the Commission's own fact-finding allows the issuance of CPCNs on very minimal factual information. "Substantial evidence… is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gagliano*, 284 Wis. 2d 741, ¶32 (citation omitted). The Commission could grant a CPCN as long as there was something arguably supportive in the record. It would be an absurd interpretation of statute and common law to allow the Commission to permit monopoly utilities to

build plants that cost ratepayers millions of dollars and cause significant environmental impact on such a minimal record.

The fact that the Plant Siting law does not explicitly assign either a burden or standard of proof to any party does not give the Commission license to excuse applicants from complying with the common law burden of proof. In *Reinke*, there was also no burden of proof "set forth in either the statutes or case law" for the personnel matter in that case. *Reinke*, 53 Wis. 2d at 136. Under those circumstances, the court looked to other closely related statutes "to conclude that the standard to be used by the Personnel Board in making its findings should be that used in ordinary civil actions, to a reasonable certainty, by the greater-weight-of-the-credible-evidence-standard." *Id*. at 137 (footnote omitted).

Here, the Commission should have likewise determined the standard of proof was at least a preponderance of the evidence, 2 Am. Jur. 2d *Admin*. Law §344 (2022) ("The general standard of proof for administrative hearings is by a preponderance, that is, the greater weight of the evidence"), i.e., the ordinary civil burden of proof in Wisconsin, Wis.

JI-Civil (2004) ("[T]he greater weight of the credible evidence, to a reasonable certainty"). This standard is supported by *Reinke*, 53 Wis. 2d at 137, and *Wisconsin Association of Manufacturers and Commerce v. PSC*, 94 Wis. 2d 314, 321, 287 N.W.2d 844 (Ct. App. 1979).

For its part, the circuit court found that "there is no specific standard of proof the applicants must satisfy" and instead stated "the substantial evidence test applies and controls." (Doc.237:7-9, A-App-007-009.) The circuit court's reasoning is no more persuasive than the Commission's. The circuit court surmised that "many if not most of the findings the [Commission] must make simply are not subject to evidentiary standards meant for findings of fact." (Doc.237:9, A-App-009.) As illustrations, the circuit court cited statutory language "like 'reasonable', 'unreasonable', 'undue' and 'minimizes'" and described them as "squishy." *Id*. But courts apply language and legal standards like these all the time, such as whether there was "undue" influence in making a will, *e.g.*, *In Re Slinger*, 72 Wis. 22, 37 N.W. 236, 238 (1888), or whether searches or seizures are "unreasonable" under the Fourth Amendment, *e.g.*, *State v. Dumstrey*, 2016

WI 3, ¶12, 366 Wis. 2d 64, 873 N.W.2d 502. In fact, the substantial evidence standard applicable to this Court's review of the Commission's decision hinges on determining "whether, after considering all the evidence of record, *reasonable* minds could arrive at the same conclusion reached by the trier of facts." *Milwaukee Symphony Orchestra, Inc., v. DOR*, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674 (footnotes omitted, emphasis added). The Commission and circuit court erred in applying no recognized standard of proof to the Applicants' request for a CPCN.

Even if there was no standard of proof that applied under Wis. Stat. §196.491(3)(d)3. and 4., this is not the end of the story, because the Plant Siting law is not the only statute relevant to this proceeding. Also at issue was whether the Applicants satisfied the Energy Priorities Law, Wis. Stat. §1.12, and the Wisconsin Environmental Policy Act, Wis. Stat. §1.11. (R.22 at 3, A-App-024.) The Commission (and circuit court) should have found that Applicants have the burden to show the project meets the Energy Priorities law for the same reasons listed above, and by a preponderance of the evidence. Similarly, the burden of WEPA compliance lies with the

Commission in this proceeding, if not below. *Wisconsin's Envtl. Decade v. PSC*, 79 Wis. 2d 409, 430, 256 N.W.2d 149 (1977).

Because the Commission failed to assign the burden of proof to the Applicants, or apply the correct (or any) standard of proof, the Court should set aside the Commission's decision. Wis. Stat. §227.57(5); See also *Eklund v. Koenig & Assocs., Inc.*, 153 Wis. 2d 374, 379–80, 451 N.W.2d 150 (Ct. App. 1989) (reversing decision where circuit court instructed the jury on the wrong standard of proof). At a minimum, the Court should remand the Decision to the Commission with instructions that the Applicant has the burden of proof, and must show it meets this burden by a preponderance of the evidence. Wis. Stat. §227.57(5).

II. The Commission Erred in Finding that the NTEC Project Satisfied Wis. Stat. §196.491(3)(d)3. and 4.

The Commission incorrectly interpreted Wis. Stat. §196.491(3)(d)3. and 4. when it approved the CPCN, and failed to sufficiently explain its decision in an error of discretion. These errors can be explained in part by

its failure to ascribe any standard of proof to the Applicants. The Court should set aside or remand the Decision. Wis. Stat. §227.57(5), (8).

A. The Commission Erroneously Interpreted Wis. Stat. §196.491(3)(d)3. and 4.

The Commission made at least two errors of law and discretion when it found the CPCN application satisfied Wis. Stat. §196.491(3)(d)3. and 4. (R.22 at 9-10, A-App-030-031).

First, the Commission failed to consider or make proper findings on all the required statutory elements. As noted above, the CPCN process is governed by, among other provisions, Wis. Stat. §196.491(3)(d)3. and 4. The Commission can only issue a CPCN for large electric generating facilities, including a merchant plant, if it finds, among other requirements, that "[t]he design and location… is in the public interest considering… alternative locations…, individual hardships…, safety, reliability and environmental factors…." Wis. Stat. §196.491(3)(d)3. ("the public interest determination"). When granting a CPCN, the Commission is also tasked with determining that a "proposed facility will not have an undue environmental impact on other environmental values such as, but not

limited to, ecological balance, public health and welfare, historic sites, geological formations the aesthetics of the land and water and recreational uses…." *Id*. §196.491(3)(d)4. ("the undue adverse impact determination").

For either determination, the Commission is not free to ignore any of the enumerated statutory elements. Each element within Wis. Stat. §196.491(3)(d)3. and 4. must have a distinct meaning, or else they would be improper surplusage. *State* ex rel. *Kalal v. Cir. Ct. for Dane Cnty*., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Moreover, the statutes connect the terms with the conjunctive "and," indicating they all must be considered. *See State v. Braunschweig*, 2018 WI 113, ¶24, 384 Wis. 2d 742, 921 N.W.2d 199. Wis. Stat. §196.491(3)(d)4. additionally introduces its enumerated factors by stating "such as, but not limited to . . .", indicating that at least these terms must be considered. *See Beaver Dam Cmty. Hosps., Inc. v. City of Beaver Dam*, 2012 WI App 102, ¶14, 344 Wis. 2d 278, 822 N.W.2d 491.

The Wisconsin Supreme Court has also explained that "[t]he central purpose of the CPCN law is to ensure that the [Commission] gives due

consideration to the environmental impact of large-scale facilities on the locales in which they will be sited." *Wis. Indus. Energy Group v. PSC*, 2012 WI 89, ¶49, n.15, 342 Wis. 2d 576, 819 N.W.2d 240 ("*WIEG*"). Thus, while it is true that the public interest finding in Wis. Stat. §196.491(3)(d)3. has been described as "legislative determination that the legislature has assigned to the [Commission]" and "'a matter of public policy and statecraft'" *Clean Wis.*, 282 Wis. 2d 250, ¶35 (quoting *Westring v. James*, 71 Wis. 2d 462, 238 N.W.2d 695 (1976)), the Commission must, at a minimum, consider the factors the Legislature has specifically listed in Wis. Stat. §196.491(3)(d)3. and .4. when it makes this determination. What is more, the Commission must do so through a contested case hearing, with all the process and standards for decision-making that such hearings entail.

Here, the Commission improperly interpreted Wis. Stat. §196.491(3)(d)4., because it did not discuss or interpret all of the statutory factors. The Decision does not contain any discussion on several of the "undue adverse impact on environmental values" identified in the statute, including "ecological balance," "public health and welfare," "historic

sites," "geological formations," and "the aesthetics of land and water and recreational use." Wis. Stat. §196.491(3)(d)4. At best, the Decision recites these standards without any description as to how they are satisfied and conflates the discussion of Wis. Stat. §196.491(3)(d)4. with the agency's discussion of WEPA and the public interest determination. (R.22 at 8, 31, A-App-029, 052.)[3] The Commission thus made an error of law in its interpretation of the statute. *See Rickaby v. Dep't of Health & Soc. Servs*., 98 Wis. 2d 456, 462, 297 N.W.2d 36 (Ct. App. 1980) (holding agency did not apply the proper legal standard when it failed to consider and make findings on certain requirements). This is perhaps not surprising since the error might have been avoided if it had applied a burden or recognized standard of proof to the Applicants to show they satisfied these factors.

Even if the Commission's conclusory statement could be construed to be a finding as to all factors under Wis. Stat. §196.491(3)(d)3. and 4 and thus not an error of law (R.22 at 8, A-App-029), the Commission's

[3] Similarly, the circuit court did not analyze whether the Commission had failed to follow the law on this point, explaining only that the Commission had made findings as to Wis. Stat. § 196.491(3)(d)3. and 4. without noting the findings were conclusory. (Doc.237 at 10, A-App-010.)

discussion of these factors was inadequate—a failure of discretion under Wis. Stat. §227.57(8). *Rutherford v. Lab. & Indus. Rev. Comm'n*, 2008 WI App 66, ¶24, 309 Wis. 2d 498, 752 N.W.2d 897 (holding that agency's failure to analyze information was a failure of discretion and an act "beyond the authority given by the legislature").

Here, the record demonstrates significant impacts to surface water, wetlands, and groundwater resources, all of which are relevant to environmental factors, Wis. Stat. §196.491(3)(d)3., and ecological balance, Wis. Stat. §196.491(3)(d)4. (*E.g.*, R.48, Direct-CW-Mosca-5, -12 to-14; R.51, Direct-WDNR-Anderson-6; R.55, Direct-WDNR-Rowe-6.) Yet the Commission did not discuss these impacts in any meaningful detail or describe the affirmative evidence it was relying on to make its determination. At most, it made conclusory statements that cited few facts and focused on just two of Environmental Petitioners' concerns—a major slope failure and groundwater supply—rather than any of the multiple other environmental issues the Preferred Site presented, such as wetland and stormwater impacts. (*See* R.22 at 37-38, A-App-058-059.) It also relied

on conditions in the Decision and future permitting processes, conducted by other local, state, and federal agencies, to "mitigate the impacts associated with construction and thereby prevent the project from having an undue adverse environmental impact." (R.22 at 37-38; *see also id*. at 40, 44 ("The Commission finds the conditions requiring that all permits be in place before the commencement of construction to be essential to its determination that the project meets the standards **for issuance of a CPCN**.") (emphasis added).) The circuit court echoed this approach. (R.237 at 4-5, A-App-004-005.)

Courts have rejected a similar lack of analysis of required statutory factors:

> The PSC gave no rationale for its action beyond that it was "just and reasonable to adjust for [MG&E's] cost of excess generating capacity...." This is not sufficient to convince this court that the PSC made a reasoned determination that MG&E's ratepayers should not bear the cost of the utility's excess capacity.… **There is nothing in the PSC order which shows this court that the PSC gave any consideration whatsoever to the legal standards which should govern excess capacity problems**. The arbitrary adjustment made by the PSC in order to shift part of the cost of MG&E's excess capacity to MG&E's shareholders is outside of the discretionary authority conferred upon the PSC.

Madison Gas & Elec., 109 Wis. 2d at 136-37 (footnote omitted) (emphasis added); *see also Transp. Oil Inc. v. Cummings*, 54 Wis. 2d 256, 265, 195 N.W.2d 649 (1972).

This leads to the Commission's ***second*** error of law and discretion. As an error of law, it interpreted its authority to make the broad public interest and undue adverse impact findings too narrowly, improperly deferring to future administrative decisions that would be made by other agencies with different and more constrained authority. The public interest determination in Wis. Stat. §196.491(3)(d)3. is delegated by the Legislature to the Commission and the Commission alone. *See Clean Wis.*, 282 Wis. 2d 250, ¶35. But by abdicating its own responsibility to consider environmental impacts and instead relying on generic conditions and future permitting processes under the jurisdiction of other agencies, the Commission piecemealed the approval process and allowed the facility to evade the "more thorough review of local site-specific factors" that the legislature intended the CPCN law to address. *WIEG*, 342 Wis. 2d 576, ¶49.

As the dissenting commissioner explained:

> While I understand that certain environmental permitting authority rests with the DNR, the larger question of whether a generating facility taken as a whole is in the public interest rests solely with us. The Legislature assigned this duty to the Commission because it wants all of these factors considered together, not in isolation, and the Commission is the only entity with the expertise to do so.
>
> The Commission has a unique responsibility to comprehensively evaluate the potential benefits and potential disadvantages of proposed power plants because we are required by law to determine whether the adverse impacts of a proposal are "undue." (Wis. Stat. §196.491(4)(d)4.) This is different from DNR's reviews, which are focused on particular impacts of individual parts of a project, not the project as a whole.

(R.22 at 70, A-App-091.) The dissenting Commissioner correctly noted, for example, that DNR permitting only addresses direct (fill) impacts to wetlands, and not secondary impacts like hydrology changes that can nonetheless cause significant wetland damage. (*Id*. at 71, A-App-092; *see also* R.48, Direct-CW-Mosca-15 to -16.) Other gaps in DNR permitting are secondary impacts to rivers and streams, protection of rare plants, and designing stormwater systems in excess of regulatory requirements to account for unique site conditions and heavier rains caused by climate change. (R.22 at 71, A-App-092; R.164 at 416:13-22, 422:3-8 (Tekler.)) The DNR permit process is not a delegated public policy consideration akin to granting a CPCN; it is a decision made under specific standards that are strictly construed against the agency. Wis. Stat. §227.10(2m).

It is true that the Supreme Court has stated, "it is not error for the [Commission] to rely on the DNR's expertise and regulatory approval process when making its finding under Wis. Stat. §196.491(3)(d)4., even if those determinations are forthcoming." *Clean Wis.*, 282 Wis. 2d 250, ¶168. But here, the Commission's environmental record was incomplete, *see* Facts, *supra*, begging the question of how the Commission could know what or how the DNR would resolve critical issues like stormwater impacts. The Commission failed to at least acknowledge the applicable standards and explain the basis for why it believed the more limited DNR permits would address outstanding issues and environmental impacts within the Commission's broader purview. *See Madison Gas & Elec.*, 109 Wis. 2d at 136-37. Its failure to do so is an improper application of the legal standard and exercise of the Commission's discretion.

By failing to analyze the project with respect to the required statutory factors, and improperly deferring environmental issues raised in the CPCN proceeding to other agencies, the Commission shirked its responsibility to make a policy determination regarding the

appropriateness of this proposed facility on this proposed site under Wis. Stat. §§196.491(3)(d)3. and 4. and erred as a matter of law and discretion.

B. The Commission's Decision that Wis. Stat. §196.491(3) Was Satisfied Was Not Supported by Substantial Evidence.

Next, the Commission's findings that the CPCN satisfied Wis. Stat. §196.491(3)(d)3. and 4. (R.22 at 8) were not supported by substantial evidence under Wis. Stat. §227.57(6). The record contains large evidentiary gaps that did not allow the Commission to find the statutes were satisfied, or that generic permit conditions and future permit processes would address them.

1. The Commission's Public Interest Determination Under Wis. Stat. §196.491(3)(d)3. Was Not Supported by Substantial Evidence.

a. Safety and Individual Hardships

One element of the public interest determination concerns "safety and individual hardships," but neither the Commission nor the Applicants cited any affirmative evidence to show this element was satisfied. (R.22 at 29-30, A-App-050-051; R.23, Applicants' Initial Brief; R.24, Applicants' Reply Brief.) Rather, the Commission focused solely on rejecting Clean

Wisconsin's explication of individual hardships—from the massive numbers of heavy trucks that will traverse residential streets during the years-long construction, to the 135 hours of ground fog and rime ice the plant would create, to the noise from plant operations, and concerns of neighbors regarding an industrial accident, similar to what occurred at the nearby Husky Refinery in 2018. (*See* R.26, CW Initial Brief, at 12-15; R.48, Direct-CW-Mosca-5; R.67, Ex.-Applicants-Application-Vol. 1:6-18 to 6-19, 6-26, 6-29; R.140, Public Comment of Randall and Karen Nevala.) The Commission inappropriately flipped the burden to Petitioners to show this factor was *not* satisfied. The Commission's finding lacks substantial evidence or, at a minimum, is not adequately explained. *Madison Gas & Elec.*, 109 Wis. 2d at 136-37.

b. Reliability and Environmental Factors.

Another element of the public interest determination concerns electric reliability and environmental factors. The Commission did not consider how site limitations—like soil stability and groundwater—affected reliability. Instead, its finding on this matter focused solely on the

whether the plant would increase the supply of electric generation in the state. (R.22 at 29, A-App-050.) Meanwhile, as the dissenting commissioner pointed out, soil stability and groundwater raised questions about reliability, not to mention environmental impacts overall. (R.22 at 70-71, A-App-091-092.)

As previously described, the Preferred Site presents the perfect storm of highly erodible soils, a steep slope, wetlands, rare plants, proximity to the Nemadji River, and high rainfalls. (Facts, *supra*; R.48, Direct-CW-Mosca-4 to -6.) Despite these challenges, Applicants still wished to shoehorn the plant into the small site through extraordinary engineering measures like the planned sheet pile wall and importing thousands of cubic yards of fill. (*Id*.) Improper construction and operation of the site could lead to slope failure, which would negatively impact water quality in the Nemadji River and even result in the loss of site infrastructure. (R.48, Direct-CW-Mosca-5.)

The Commission brushed aside these concerns, stating the risk of slope failure was "too conjectural to be given credence" and stating "the

applicants have submitted substantial evidence that the proposed retaining wall at the Nemadji River Site will be designed and constructed in accordance with professional standards, and Clean Wisconsin failed to convincingly demonstrate that the design entails deficiencies that would present an actual risk of slope failure." (R.22 at 37, A-App-058.) It did not cite any evidence for these conclusions, and in fact, the sheet pile wall was not designed at the time of the Commission's decision. (R.164 at 174:4-25 (Coughlin)). Simple facts like wall height (both above and below gradient) were not even known. (*Id.* at 174:22-175:3 (Coughlin); 399:16-18 (Tekler).) The Applicants' witnesses appearing at the hearing lacked knowledge about how basic site features would be safely constructed and operated, such as a road located in front of the sheet pile wall (R.164 at 175:4-10 (Coughlin)) or emergency overflow at the stormwater pond (R.164 at 200:9-21 (McCourtney)).

Moreover, stormwater must be safely conveyed from the developed site down to the Nemadji River. Excess stormwater flow down the slope will create slope stability and erosion issues. (R.48, Direct-CW-Mosca-6.)

While Applicants presented a preliminary stormwater plan designed to the 25-year, 24-hour storm event, (R.96, Ex.-Applicants-Application-Vol. 2, Appx. J, §4.0; R.48, Direct-CW-Mosca-6), the region has been hit with extremely large and intense rainfall events of late, necessitating design standards in excess of regulatory requirements. (R.48, Direct-CW-Mosca-7.)

Despite this, the Commission stated it was "persuaded by the applicants" and "DNR witnesses that sufficient mitigation measures can be implemented to minimize and mitigate" stormwater and erosion impacts. (R.22 at 47-48, A-App-068-069.) It required as a condition that the Applicants provide a final stormwater erosion and stormwater control plan to the Commission before construction, and after it is approved by DNR. (R.22 at 47-48, A-App-068-069.) But the application contained little information about these issues and whether they could even properly be addressed by such a plan, and no DNR witnesses testified regarding stormwater mitigation measures.

In short, the Commission lacked substantial evidence to support its finding with respect to reliability and other environmental factors under Wis. Stat. §196.491(3)(d)3., and Applicants failed to provide basic information about these issues, especially in the face of the area's major rainfall. Rather than make the required findings, the Commission unreasonably deferred to future DNR permit proceedings that were not remotely complete at the time of the Commission's decision.

2. The Commission's "Undue Adverse Environmental Impact" Determination Under Wis. Stat. §196.491(3)(d)4. Was Not Supported by Substantial Evidence.

The Commission's finding that the project "will not have undue adverse impacts on environmental values" is also unsupported by substantial evidence and should be reversed. (R.22 at 8, A-App-029.)

a. The Commission Lacks Substantial Evidence to Support all "Undue Impact" Criteria

As discussed, the Legislature directed the Commission to consider specific factors in deciding whether a project will have "undue adverse environmental impact[s]," including but not limited to: "ecological balance, public health and welfare, historic sites, geological formations, the

aesthetics of land and water and recreational use." Wis. Stat. §196.491(3)(d)4. Beyond quoting this list, the Commission does not address these factors, and fails to cite any evidence relating to historic sites, geological formation, recreational use, or public health. (R.22 at 31-39, A-App-052-060) Nor is there any evidence in the record to support the Commission's favorable determination despite this lack of discussion: Applicants presented no testimony or argument that addressed impacts to "public health and welfare," "aesthetics of land and water, or recreational uses" (*e.g.*, R.23 at 11, Applicants' Initial Br.; R.24, Applicants' Reply Br.)—again, a failing of any burden or standard of proof imposed on Applicants. The Commission's failure to address these indicates a lack of substantial evidence and misuse of the Commission's discretion. *Madison Gas & Elec.*, 109 Wis. 2d at 136-37.

b. Insufficient Consideration of Other Environmental Values

The Commission did superficially discuss adverse impacts to other environmental values, like wetlands and waterway impacts. However, its

finding that these were not undue is not supported by substantial evidence.

In discussing wetlands, the Decision stated only that it was "sensitive to the wetland impacts associated with developing the sites," but continued without explanation that "the conditions recommended by DNR staff and incorporated into this decision . . . will mitigate the impacts associated with construction and thereby prevent the project from having an undue adverse environmental impact." (R.22 at 37-38, A-App-058-059.) The Decision contains a list of these conditions. (R.22 at 49-51, A-App-070-072.) But the Commission does not explain what impacts each condition will mitigate. (R.22 at 48, A-App-069.) Worse yet, the conditions fail to include criteria for success that would make them enforceable; Applicants are directed to implement "all practicable mitigation methods" and avoid certain practices "when possible." (*Id*. at 49, A-App-070.)

There is no substantial evidence showing that impacts to wetlands are not "undue," or that the mitigation measures proposed by the Commission would offset these impacts to the point that they are no

longer "undue." Indeed, the Commission lacked sufficient information to make these findings.

There is considerable uncertainty as to the adequacy of permitting requirements to address adverse impacts identified in this proceeding. As explained above, *see* Facts, *supra*, both the Preferred and Alternate sites, and the supporting laydown areas for these sites, contain extensive wetlands that perform valuable services, like floodwater storage. Applicants incorrectly homogenized the wetlands by lumping as many as 17 wetlands together on one data sheet, which leads to undervaluing of the ecosystem services provided by the individual wetlands and the amount of compensatory mitigation if impacted. (R.48, Direct-CW-Mosca-12.) The DNR witness stated she would likely require resubmission of individualized wetland data sheets, in addition to conducting her own site visit in the spring. (R.164 at 401:3-5- 402:22 (Tekler).) The DNR also did not fully understand, at the time of hearing, secondary impacts to wetlands, like changes to wetland water supply. (*Id*.; R.164 at 399:5-400:9.) The Commission issued a decision without identifying *what* compensatory

mitigation for the direct fill of wetlands would be required, or whether the acres of "temporary" impact at the laydown sites will be subject to any mitigation requirement or whether full restoration would be possible. (R.48, Direct-CW-Mosca-16; R.164 at 409:17-21 (Tekler).)

The record also lacked evidence to identify or assess the impacts due to diverting the water supply for a navigable waterway in the northwestern corner of the Preferred Site, including indirect impacts that are unregulated by DNR. (R.48, Direct-CW-Mosca-15; R.164 at 422:3-8 (Tekler).) At the time of hearing, the DNR lacked even an engineering plan that would allow it to evaluate whether a waterway permit under Wis. Stat. ch. 30 is required for direct impacts. (R.56, Direct-WDNR-Tekler-5; R.164 at 394:22-396:12.) The Decision purported to identify mitigation conditions sufficient to avoid "adverse undue" impacts, but if the agency does not know what the impacts are, it is impossible to say that permit conditions will address them. (*See* R.22 at 51, A-App-072.)

In short, the Commission either ignored the specific values listed in Wis. Stat. §196.491(3)(d)4., or made a finding that acknowledged adverse

impacts to wetlands and waterways were not "undue" based on a list of general mitigation practices without any findings as to the specific impacts these practices were supposed to address, much less whether they would. The Commission's determination that issuing the CPCN is in the public interest and will not cause undue environmental impacts is not supported by substantial evidence in the record and should be reversed or remanded.

III. The Commission Erred in Finding the CPCN Satisfied the Energy Priorities Law.

To approve any CPCN application, the Commission must determine the proposed project is consistent with Wisconsin's Energy Priorities Law, Wis. Stat. §1.12 ("EPL"). This is a major consideration for the NTEC plant because it is a nonrenewable combustible resource, and other alternatives are preferred by statute. The Commission made errors of law and fact when it found that the CPCN satisfied the Energy Priorities Law.

A. The Energy Priorities Law Requires the Commission to Prioritize Conservation and Renewables Over Nonrenewable Combustible Resources.

The EPL establishes as "the policy of the state" that:

> [T]o the extent cost-effective and technically feasible, options [to meet energy demands must] 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.

Wis. Stat §1.12(4). This law then requires that "[t]o 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[se] priorities…." Wis. Stat. §1.12(5)(b). The Commission is specifically tasked with implementing this priority list: "to the extent cost-effective, technically feasible and environmentally sound… in making all energy-related decisions and orders." Wis. Stat. §196.025(1)(ar).

"When the PSC makes a determination on a CPCN under the Plant Siting Law, it applies the EPL in the context of determining whether to approve the requested plant siting." *Clean Wis.*, 282 Wis. 2d 250, ¶122. In other words, "[g]iven the requirements of the Plant Siting Law, what is the highest priority energy option that is also cost effective and technically feasible?" *Id.*; *see also id*. ¶131 (describing this analysis as "binding"). The Commission cannot approve a CPCN for a facility that is not the highest-

priority project alternative that is both cost effective and technically feasible. *Id*.

B. The Commission Made a Legal Error When it Determined the NTEC Project Complied with the Energy Priorities Law.

The Commission's finding that the NTEC Project complies with the EPL is at odds with the Wisconsin Supreme Court's direction. Applicant witness Tom Coughlin testified before the Commission that "[t]he fundamental purposes [sic] of the Project is to 'provide energy [to customers] when intermittent renewables are not." (R.45, Direct-Applicants-Coughlin 2:20-21.) To fulfill the EPL's requirements, the Commission should thus have determined whether higher priority resources could meet the identified purpose of the NTEC project—providing energy when renewables are not.

The Commission failed to adequately examine higher priority resources that might satisfy this purpose, including energy conservation and battery storage. Instead, the Commission relied on conclusory statements by the Applicants that attempted to side-step the EPL by focusing only on alternatives that could provide the exact amount of

energy contemplated by the entire NTEC Project. (*E.g.*, R.45, Direct-Applicants-Coughlin-3:2-3.) But providing the exact amount of energy as the NTEC project is not its stated purpose and does not achieve the EPL's objective of finding the highest priority option to meet this purpose. *See Clean Wis.*, 282 Wis. 2d 250 250, ¶122. The Applicants failed to present, and the Commission failed to consider, other options that could meet the project's purpose of "provid[ing] energy when intermittent renewables are not." (R.45, Direct-Applicants-Coughlin 3:2-3.)

The Commission incorrectly framed its EPL analysis and thus made an error of law requiring reversal.

C. *The Commission Made Factual Errors When Determining the NTEC Project Complied with the Energy Priorities Law.*

The Commission made three key factual errors in its EPL analysis. First, when addressing the EPL's top priority of energy conservation and efficiency under Wis. Stat. §1.12(4)(a), the Commission offered only the conclusory statement that "no substantive evidence was presented to

demonstrate how the energy and capacity from the proposed project could be replaced by energy conservation and efficiency." (R.22 at 21, A-App-042.) The circuit court thought this was sufficient, reasoning that if opponents did not show why the Applicants failed on this factor, Applicants would have to present an endless number of hypotheticals about why the factor was met. (Doc.237:15, A-App-015.) But this assumes Applicants submitted evidence on energy conservation and efficiency in the first place, which they did not. The court thus got it exactly backwards: the Applicants have an affirmative duty to show they satisfy this factor, especially if they have the burden to show it is met by a preponderance of the evidence, and it is not opponents' job to prove a negative.

Second, regarding the next-highest priority under the EPL—non-combustible renewable energy resources, Wis. Stat. §1.12(4)(b)—the Commission's Decision misrepresented testimony from Sierra Club witness Michael Goggin demonstrating that the NTEC plant is less equipped to support renewables at higher levels of grid penetration than

storage resources installed in conjunction with higher priority renewable resources like wind and solar. (R.61, Rebuttal-SC-Goggin-10:15 to 12:9.) Specifically, the Decision claims that Mr. Goggin "admitted…that [battery storage] technology is not currently available," and then cites to a section of the Hearing Transcript in which Mr. Goggin did not make that admission. (R.22 at 20-21, A-App-041-042.) In fact, Mr. Goggin testified only that he was unaware of utility scale batteries operating *in Wisconsin* at the time but said he was aware of utility scale battery projects operating or coming on line in other states and provided several examples. (R.164 at 313:14-314:3. 331:14-16.)[4] The circuit court did not consider this discrepancy in the record. (Doc.237 at 14-15, A-App-014-015.)

Third, the Commission relied on factual errors in an analysis by Commission staffer Jennifer Hammill, which vastly overstated the need for the project's energy and artificially limited the ability of higher priority

[4] Mr. Goggin also testified that he was unaware of a single ten-hour duration battery in operation in the United States, not that battery storage technology is unavailable. (R.164 at 313:14-314:3.) Mr. Goggin further testified that there is "not an engineering basis" for requiring batteries to maintain 10-hour storage capabilities in order to support renewable resources. (R.164 at 322:9-323:6.)

resources under the EPL to meet that need. These errors were: 1) overstating the amount of wind and solar resources already connected to the grid and the proportion of planned projects likely to come to fruition; 2) running a simplistic analysis of renewable integration needs that completely excluded meaningful alternatives to the NTEC plant; and 3) ignoring the possibility that battery storage could address any portion of the need identified in the Application. (R.61, Rebuttal-SC-Goggin-3:6 to 5:7, 7:4-8:16; *see generally* R.50, Direct-PSC-Hamill.)

In short, neither Applicants nor Commission staff presented information sufficient to conclude, much less to conclude by a preponderance of the evidence, that the NTEC project was needed for a purpose that could not also have been provided by building more renewable generation and pairing it with storage. This alone should have prevented the Commission from granting the Application.

IV. The Commission Erred by Concluding that the EIS complied with the Wisconsin Environmental Policy Act, Wis. Stat. §1.11.

Separate from, and in addition to the Commission's errors in its decision to grant the CPCN, the Commission erred in finding the EIS a sufficient examination of the environmental impacts of the proposed project. This is because the EIS fails to characterize the direct environmental impacts associated with NTEC's projected greenhouse gas emissions and declines to quantify the greenhouse gas emissions and other indirect adverse environmental impacts that will result from increased fracking to supply the proposed project with its required fuel. The Court should reverse the Decision.

A. The Wisconsin Environmental Policy Act

As this Court has recently stated,

> WEPA embodies "a clear legislative declaration that protection of the environment is among the essential considerations of state policy and as such, is an essential part of the mandate of every state agency." Accordingly, WEPA establishes a process for agencies to follow "to ensure adequate consideration of environmental factors ... before resources are irreversibly and irretrievably committed." Before an agency undertakes any "major action[ ] significantly affecting the quality of the human environment," it must prepare an EIS that evaluates, among other considerations, the environmental impacts of and alternatives to the proposal. WIS. STAT. § 1.11(2)(c).

Friends of the Black River Forest v. DNR, 2021 WI App 54, ¶ 7, __ Wis. 2d __, 964 N.W.2d 342 (internal citations omitted).

The impacts an EIS must review explicitly include indirect impacts:

> To comply with WEPA's directive, agencies must consider direct and indirect environmental effects when determining whether to prepare an EIS. We explicitly so concluded in *WED III*. There, we reject[ed] any intimation ... that because the environmental effects ... are indirect they need not be considered under WEPA. There is nothing in the Act to suggest that only direct environmental consequences need be considered." *Id*. at 428, 256 N.W.2d 149. In so concluding, we reasoned that a construction that limited the Act to direct environmental effects would be contrary to the statute's plain meaning. *Id*. at 430, 256 N.W.2d 149.

Applegate-Bader Farm, LLC v. DOR, 2021 WI 26, ¶ 19, 396 Wis. 2d 69, 955 N.W.2d 793, *reconsid. denied* (June 11, 2021) (reversing agency decision not to prepare an EIS where agency failed to adequately consider indirect impacts). And indirect impacts must include both upstream and downstream impacts. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198-1204 (9th Cir. 2008) (failure to adequately consider greenhouse gas impacts was arbitrary and capricious).[5]

[5] Federal court interpretations of the National Environmental Policy Act are persuasive in interpreting WEPA. *Larsen v. Munz Corp.*, 167 Wis. 2d 583, 606, 482 N.W.2d 332 (1992).

The Commission's determination that an EIS is adequate is a conclusion of law that the Court should review de novo. *Clean Wis.*, 282 Wis. 2d 250, ¶190. On such *de novo* review, the Court should reverse the Commission's erroneous conclusion or remand the decision here. Wis. Stat. § 227.57(5).

B. The EIS fails to quantify, or explain why it cannot quantify, the climate impacts of the proposed project.

The Commission failed to fully address indirect and cumulative impacts of the NTEC plant, particularly associated with the process of extracting fuel to serve the plant. Its determination that the EIS was sufficient was thus in error.

Consistent with statutes and cases interpreting WEPA, Commission regulations direct the agency, as part of an EIS, to provide "[a]n analysis of the probable impact of the proposed action on the environment, including: …the proposed action's direct, indirect and cumulative environmental effects." Wis. Admin. Code §PSC 4.30(3)(b)1. The EIS acknowledges that the proposed plant will be a source of greenhouse gas emissions, and that the trend of recent research is to reveal *more*, not fewer effects of these

emissions. (R.138 at 45, Ex-PSC-FEIS). But beyond offering two estimates for total emissions from the plant (depending on its capacity factor) ranging from 1.5 to 2.7 million tons of carbon-dioxide-equivalent gases, the EIS says nothing else about the relative significance of these emissions, their effects, or whether alternatives exist with smaller emissions.

The EIS also fails to analyze the indirect effects of NTEC's construction and operation as a result of hydraulic fracturing necessary to supply the proposed project with methane gas. Again, the EIS acknowledges that the proposed project would be a large consumer of natural gas, and that "the extraction of natural gas fuel from the earth"– the indirect result of "the construction and operation of any new, large natural gas consumer" such as NTEC–"has potential environmental impacts." (R.138 at 46-47, Ex-PSC-FEIS). The EIS accepts, as it must, that the proposed plant's reliance on natural gas as a fuel will likely increase fracking and this natural gas extraction is an indirect effect of NTEC's construction and operation. But that is where the EIS stops: the EIS makes

no further attempt to characterize these adverse indirect impacts (including the use of sand from Wisconsin for fracking).

This was error. At a minimum, the Commission was obligated to provide a quantitative estimate of the increased greenhouse gas emissions that would result from the increased hydraulic fracturing necessary to fuel the proposed plant. As the D.C. Circuit has held with respect to the parallel National Environmental Policy Act, an agency preparing an EIS must "either give[] a quantitative estimate" of greenhouse gas emissions that are the "reasonably foreseeable" result of a given project, or "explain[] more specifically why it could not have done so." *Sierra Club v. FERC*, 867 F.3d 1357, 1371-72, 1374 (D.C. Cir. 2017); *see also Columbia Riverkeeper v. U.S. Army Corps. Of Eng'r*, Case No.19-6071-RJB, 2020 WL 6874871 at *4 (W.D.Wash. Nov. 23, 2020) (agency acted arbitrarily and capriciously in failing to consider cumulative impact from fracking in declining to prepare EIS for refinery).

The Commission did neither. Nor did the Commission describe what "adverse impacts to air, land and waters" would occur as a result of

the marginal increase in fracking to supply the NTEC facility. (R.138 at 47, Ex-PSC-FEIS). The Commission failed to take a "hard look" at either the direct, or indirect environmental impacts (primarily but not exclusively due to greenhouse gas emissions) associated with the use of natural gas as fuel for the proposed project, and it thus erred in nevertheless accepting the EIS as legally adequate.

CONCLUSION

For the reasons above, Environmental Petitioners respectfully request that the Court reverse the Commission's Decision and remand it to the agency as appropriate.

Respectfully submitted this 26th day of September, 2022.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,993 words.

Dated this 26th day of September, 2022.

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