STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

CLEAN WISCONSIN, INC. AND SIERRA CLUB,

Petitioners-Appellants,

v. Appeal No. 22-AP-1106

PUBLIC SERVICE COMMISSION
OF WISCONSIN,

Respondent-Respondent,

SOUTH SHORE ENERGY LLC AND DAIRYLAND
POWER COOPERATIVE,

Interested Parties-Respondents,

v.

MICHAEL HUEBSCH,

Other Party.

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

BRIEF OF RESPONDENT-RESPONDENT PUBLIC SERVICE COMMISSION OF WISCONSIN

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ISSUES PRESENTED

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Circuit Court answered: N.A.

2. Whether the Public Service Commission of Wisconsin ("Commission") applied the appropriate burden and standard of proof in its issuance of a Certificate of Public Convenience and Necessity ("CPCN")?

Circuit Court answered: Yes.

3. Whether the Commission's findings of fact sufficiently support its determination that public convenience and necessity require the Nemadji Trail Energy Center ("NTEC") Project?

Circuit Court answered: Yes.

4. Whether the Public Service Commission complied with Wis. Stat. § 1.12 in its issuance of a CPCN?

Circuit Court answered: Yes.

5. Whether the Commission's Environmental Impact Statement satisfied Wis. Stat. § 1.11?

Circuit Court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument on the appeal of Petitioners-Appellants Clean Wisconsin, Inc. and Sierra Club is unnecessary. See Wis. Stat. § 809.22(2)(a)1., (2)(a)2., (2)(a)3., and (2)(b). The appeal of Petitioners-Appellants Clean Wisconsin, Inc. and Sierra Club satisfies none of the criteria for publication under. Wis. Stat. § 809.23(1)(a), and should not be published pursuant to Wis. Stat. § 809.23(1)(b)1., (1)(b)2., and (1)(b)3.

STATEMENT OF THE CASE

This appeal by Clean Wisconsin, Inc. and the Sierra Club (collectively, "Clean-Sierra") is for review of a case decided in favor of the Public Service Commission of Wisconsin ("Commission") by the Dane County Circuit Court, and involves the decision made by the Commission regarding a proposed 550 megawatt natural gas electric generation facility, to be located in the City of Superior, Douglas County, Wisconsin, the Nemadji Trail Energy Center ("NTEC Project" or "Project").

As the extensive record developed in this case details, the Commission's decisions related to the Project were supported by substantial evidence and afforded all due process. The circuit court correctly recognized that the Commission's determination in this case was supported by ample facts in the record and was well within its statutorily delegated discretion. The challenges Clean-Sierra now bring must be denied, as those challenges are not supported by the facts of this case or well-established law.

The factual and procedural background summarized below sets forth the relevant history and context necessary for this Court to evaluate the appeal.

I. PROCEEDINGS BEFORE THE COMMISSION

The Commission is an independent state agency that the Legislature has charged, since 1907, with the jurisdiction to regulate every public utility in the state. Wis. Stat. § 196.02. The Commission has special expertise in reviewing technical and complex projects, such as the one at issue in this case, and the Commission's particular expertise in administering Wis. Stat. § 196.491 has long been recognized by Wisconsin courts. See, e.g., *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin,* 2005 WI 93, ¶ 45, 282 Wis. 2d 250, 309, 700 N.W.2d 768, 796 ("*Clean Wisconsin*"); *Town of Holland v. Pub. Serv. Comm'n of Wis.*, 2018 WI App 38, ¶ 27, 382 Wis. 2d 799, 815, 913 N.W.2d 914, 923.

On January 8, 2019, pursuant to Wis. Stat. § 196.491 and Wis. Admin. Code chs. PSC 4 and 111, South Shore Energy, LLC and Dairyland Power Cooperative (collectively, "Applicants") filed an application with the Commission for a Certificate of Public Convenience and Necessity ("CPCN") to construct the Project. (R.66.)[1] The Administrative Law Judge

[1]"R" denotes a Record Item, followed by a number indicating the item number on the Record List filed by the Commission and provided in Clean-Sierra's Appendix.

granted Clean-Sierra and four other parties full party status as intervenors in the Commission's proceeding.[2]

After contested case hearings, by Final Decision dated January 30, 2020, the Commission granted Applicants' application. The Commission found that the proposed Project met the criteria for issuance of a CPCN, and was in the public interest, and included a number of conditions. Among those conditions on the Commission's approval was the requirement that "[a]ll necessary federal, state and local permits shall be secured by the applicants prior to commencement of construction." (See R.22 at 61, Order Point 7.) The Commission's approval was further conditioned on the Applicants working with Commission staff and the Wisconsin Department of Natural Resources ("DNR") to address some specific issues raised during the proceeding. (See R.66 at 66-67, Order Points 10-12 and 14.)

II. PROCEEDINGS BEFORE THE CIRCUIT COURT

On February 28, 2020, Clean-Sierra requested judicial review of the Commission's Final Decision, pursuant to Wis. Stat. § 227.53. Clean-Sierra challenged the Commission's factual determinations that the Project satisfied the statutory criteria found at Wis. Stat. § 196.491(3)(d)3. and 4.; that the Project complied with Wis. Stat. § 30.025; that the Project satisfied Wisconsin's Energy Priorities Law (EPL), Wis. Stat.

[2] The other intervenors in the proceeding were American Transmission Company, Citizens Utility Board, the Wisconsin Legislative Black Caucus, and WI Senator Janet Bewley.

§ 1.12(4); and that the EIS prepared for the Project satisfied Wisconsin's Energy Policy (WEPA), Wis. Stat. § 1.11.

Clean-Sierra unsuccessfully attempted to expand the scope of the circuit court's review beyond the record of the proceeding that was before the Commission at the time the Commission deliberated and issued its Final Decision. First, Clean-Sierra asked the circuit court to consider information about the post-decision DNR permitting process, relating to events occurring after the Final Decision was issued. (Dkts. 50 & 74.) After that attempt failed, Clean-Sierra subsequently moved the circuit court to supplement the record of the Commission's proceedings with additional information related to claims of bias in those proceedings, and also moved to amend their petition for review to incorporate those bias claims. On March 23, 2021, the circuit court granted Clean-Sierra's motion to amend the pleadings to add their contention that the CPCN proceedings presented a risk of bias and a due process violation due to new information they had received regarding one of the Commissioners who voted in favor of the Project.

At an evidentiary hearing on July 9, 2021, the circuit court ruled that the merits and the bias issue would be briefed separately. On November 30, 2021, the circuit court granted the Commission's motion to stay bias proceedings while cases addressing the same underlying facts were being adjudicated by the Wisconsin Supreme Court.[3]

[3] Case Nos. 2021AP1321 and 2021AP1325.

The merits of the Final Decision were briefed and argued by the parties, and the Final Decision was affirmed by the circuit court on May 17, 2022. The bias issue remained stayed, and the May 17, 2022 order expressly noted that Clean-Sierra's procedural challenge regarding alleged bias was "not part of [that] decision." Dkt. 237 at 4.

Clean-Sierra filed their Notice of Appeal in this Court on June 30, 2022, characterizing the circuit court's May 17, 2022 decision as a "final judgment or order." However, the bias issue remained undecided by the circuit court while the related cases on bias were still pending before the Wisconsin Supreme Court.

An opinion in those Supreme Court cases was issued on July 7, 2022. *County of Dane v. Pub. Serv. Comm'n*, 2022 WI 61, 403 Wis. 2d 306, 976 N.W.2d 790. On September 23, 2022, the Commission filed in the circuit court proceedings a Motion for Reconsideration of the circuit court's order permitting expansion of the record to consider bias and requesting that the court dismiss those remaining claims.

Clean-Sierra's initial brief in this appeal was filed three days later, on September 26, 2022. On October 25, 2022, the circuit court issued its Final Order granting the Commission's Motion for Reconsideration—nearly four months after Clean-Sierra filed the extant Notice of Appeal. (Dkt. 294.) That October 26, 2022 order resolved all remaining issues in the case.

STANDARD OF REVIEW

Appellate review of a decision by an administrative agency requires this court to review the decision of the agency, and not that of the circuit court. *Town of Holland v. Pub. Serv. Comm'n of Wisconsin*, 2018 WI App 38, ¶ 21, 382 Wis. 2d 799, 812, 913 N.W.2d 914, 922. An appellate court's scope of review is the same as that of the circuit court. *Id.*

The legislation authorizing Clean-Sierra's suit against the Commission is Chapter 227 of the Wisconsin Statutes, which provides a narrow scope and prescribed procedure for judicial review of the Commission's Final Decision. The scope of this Court's review is limited to whether the Commission's decision to grant a CPCN for the NTEC Project is supported by a rational basis and is not arbitrary or capricious. Wis. Stat. § 227.57. The Commission's orders are "prima facie valid, and to be upset [they] must be shown to be otherwise by clear and satisfactory evidence." *Wisconsin Power & Light Co. v. Pub. Serv. Comm'n of Wisconsin*, 148 Wis. 2d 881, 888, 437 N.W.2d 888, 891 (Ct. App. 1989). And the Commission's "expertise and special competence in administering [the CPCN law] as that statute requires it to determine what proposed projects are appropriate additions to an electric utility's generating and transmission facilities" has long been recognized by Wisconsin courts. *Id.*

It is true that the Commission's conclusions of law are no longer entitled to judicial deference pursuant to the Wisconsin Supreme Court's decision in *Tetra Tech EC, Inc. v. Wisconsin Dept. of Revenue*, 2018 WI 75, ¶107, 382 Wis. 2d

496, 582, 914 N.W.2d 21, 63. However, both the courts and Wis. Stat. § 227.57(10) accord due weight to the experience, technical competence, and specialized knowledge of the Commission, as well as the discretionary authority conferred upon the Commission by statute. *Id.*

The Commission's assessment of whether a CPCN is in the public interest "is a matter of public policy and statecraft[,] and not in any sense a judicial question." *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 2005 WI 93, ¶¶ 133-40, 282 Wis. 2d 250, 349-53, 700 N.W.2d 768, 816-17; see also *Robertson Transp. Co. v. Pub. Serv. Comm'n*, 39 Wis. 2d 653, 659, 159 N.W.2d 636, 639 (1968) (recognizing that the determination of what constitutes "public interest" has uniformly been held to be a legislative function). Accordingly, this Court "cannot substitute its judgment for that of the [Commission] determining a legislative matter within its province." *Clean Wisconsin*, 2005 WI 93 at ¶ 35 (citation omitted).

The Commission's factual findings "must be upheld on review if there is any credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings." *Currie v. State Dep't of Indus., Labor & Human Relations, Equal Rights Div.*, 210 Wis. 2d 380, 386-87, 565 N.W.2d 253, 256-57 (Ct. App. 1997).

It is important to note that ch. 227 limits this Court's analysis to the record on review. *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, ¶ 26, 335 Wis. 2d 47, 65, 799 N.W.2d 73, 82. The record on review is "the original or a certified copy of the entire record of the proceedings in which

the decision under review was made" that the agency submitted to the circuit court. Wis. Stat. § 227.55; *Lake Beulah Mgmt. Dist.*, 2011 WI 54 at ¶ 52. But in determining whether the Commission's conclusions were reasonable, this Court must take into account all of the evidence in the record—not just that evidence cited specifically in the Final Decision itself. See *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5, 252 Wis. 2d 561, 569, 644 N.W.2d 649, 652.

ARGUMENT

Power plants are, as Clean-Sierra correctly assert, "costly endeavors." They are complex, expensive facilities upon which customers rely to heat and cool their homes, prepare meals for their families, and operate essential medical equipment. The availability, safety, and reliability of the energy power plants deliver are necessities. Nobody is more cognizant of this than the Commission.

For decades, the Commission has been entrusted by the state legislature with the task of ensuring that utilities provide reasonably adequate service and facilities. Wis. Stat. § 196.03(1). During that time, the Commission and its staff have developed substantial expertise in determining whether proposed power plants meet the statutory criteria for Commission approval. See Wis. Stat. § 196.491(3)(d)2.-8.

The process for issuing a CPCN requires a lengthy and rigorous inter-agency review involving both the Commission and the DNR. The proceedings allow intervenors like Clean-Sierra to participate fully as parties in order to present exhibits and testimony, and to challenge every aspect of a utility's

application. By the time a determination is made to grant or deny a CPCN, the Commission has a voluminous record before it comprised of information provided by intervenors, the utility, and impartial Commission staff.

The Commission approved the application for a CPCN to construct the Nemadji Trail Energy Center ("NTEC" or "Project") based on substantial evidence in the record before it, which was developed over five months of testimony, more than fifty public comments, an extensive environmental impact statement, and technical and public hearings. Parties, including six intervenors, offered witnesses who in turn sponsored around fifty exhibits. Altogether, the Commission received and reviewed a total of nine briefs regarding the project.

At the culmination of that process, the Commission announced its decision to approve the Project. It issued a detailed 76-page decision articulating many of the reasons it found the statutory criteria for approval of the CPCN to have been met ("Final Decision"). The Final Decision also included approximately seventy conditions on Project approval, to ensure that environmental interests, among others, would be protected. The circuit court reviewed that decision and the considerable record that preceded it, and agreed that the Commission's determinations were all supported by substantial evidence.

As a threshold matter, this appeal should be dismissed as prematurely filed pursuant to Wis. Stat. § 808.03(1).[4] Even absent that flaw, this Court's review of a final order of the Commission is limited to the bases, established by Wis. Stat. § 227.57, upon which this court may overturn or remand a Commission decision. None of those bases apply in this case.

Clean-Sierra characterize the Commission's Final Decision as a paper-thin determination based on insubstantial evidence—one in which the Commission shrugged off its statutory responsibility onto other agencies, in particular the DNR. Clean-Sierra would have this Court view the CPCN application process here as a rubber-stamp operation conducted by an agency unconcerned with the ramifications of the Project on the public and the environment.

Of course, nothing could be further from the truth. Applicants were required to engage in a lengthy, rigorous, and costly proceeding prior to the issuance of the Commission's Final Order. Clean-Sierra's brief paints a picture that is not only inaccurate, but also unfairly minimizes the substantial effort, expenditure, and thoughtful participation by the Applicants, by the six Intervenors in the docket, by Commission staff, by the DNR, and by the numerous members

[4] Wis. Stat. § 808.03(2) provides that orders not appealable as of right (such as nonfinal orders) may be appealed "upon leave granted by the court" if the court determines that an appeal will:

(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;

(b) Protect the petitioner from substantial or irreparable injury; or

Clarify an issue of general importance in the administration of justice. Clean-Sierra have not, however, requested leave for a permissive appeal under Wis. Stat. § 808.03(2); they request an appeal as of right from a final order. Moreover, they do not address the permissive appeal criteria established by Wis. Stat. § 808.03(2).

of the public whose voices were heard and considered during the proceedings. Clean-Sierra themselves took advantage of ample opportunities to submit evidence into the record on a wide range of subjects, resulting in a voluminous record fully representing the interests of all parties. Clean-Sierra's brief also unfairly minimizes the careful deliberation of the Commission itself, as well as that of the circuit court in its affirmation of the result.

The Final Decision in this case was based on that record, the entirety of which was carefully weighed by the Commission. That decision rests, as this brief will discuss below, on substantial evidence presented by the parties in this case, and its determinations were well within the discretion granted to the Commission by the legislature in assessing CPCN applications.

Additionally, Clean-Sierra allege that the Commission erred in determining that the Project complies with Wisconsin's Energy Priorities Law (EPL), Wis. Stat. § 1.12(4), as implemented by Wis. Admin. Code ch. PSC 4. Their argument in this regard relies again on a subjective assessment of the evidence and testimony presented by the Applicants, Clean-Sierra, and Commission staff—precisely the type of fact-intensive determination that is uniquely within the Commission's expertise. As with the rest of Clean-Sierra's sufficiency-of-the-evidence arguments, this represents no more than an attempt to present again the same evidence that was in the record before the Commission, and to ask this Court to second-guess the Commission's factual determinations after

they already attempted, and failed, to persuade the circuit court to do the same.

Clean-Sierra's challenge to the Environmental Impact Statement (EIS) underlying the Final Decision is also unavailing. The 265-page EIS provided a thorough, detailed, and independent analysis of all the environmental factors that state agencies are required to consider pursuant to Wis. Stat. § 1.11(2)(c). The EIS examined, among other things, the Project's potential impact on wetlands, its impacts on nearby natural resources resulting from construction on soils that are susceptible to erosion, concerns about water supply, and the presence of rare and protected animal and plant species. The Commission's decision considered the environmental impacts of the extraction of natural gas—the Project's proposed fuel source—as discussed in detail by the EIS. (R.138 at 46-47.) The Commission imposed numerous conditions and mitigation measures on the Project in its Final Decision to minimize, to the greatest extent practicable, any environmental impacts.

Because Clean-Sierra's appeal is prematurely filed, this Court should dismiss it without reaching the issues presented. Moreover, even if the appeal was appropriate, because Clean-Sierra do not show that the Commission's Final Decision was arbitrary and capricious, and because the record instead demonstrates that the Commission had a rational basis for approving the Applicants' CPCN, this Court should affirm the circuit court's decision to affirm the Commission's Final Decision.

I. CLEAN-SIERRA'S APPEAL IS PREMATURELY FILED.

As a threshold matter, this Court's appellate jurisdiction is statutorily defined, and it may not consider Clean-Sierra's appeal unless it complies with Wis. Stat. § 808.03, which states that "[a] final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law." Wis. Stat. § 808.03(1). The statute goes on to define a "final judgment or a final order" as one which "disposes of the entire matter in litigation as to one or more of the parties," Wis. Stat. § 808.03(1), and is also "filed in the office of the clerk of court." Wis. Stat. §§ 808.06(1)(b) and 807.11(2).[5]

Case law on the finality of judgments in the appellate context is well-developed. "Finality is central to the jurisdiction of the court of appeals." *Appellate Practice & Procedure in Wisconsin*, § 4.4. Wisconsin courts "strictly adhere to the concept of finality to carry out legislative policies promoting the integrity of circuit court proceedings." *Id.*

The requirement that a judgment or order must dispose of the entire matter in litigation, rather than just a part, is no small matter. Its purpose is twofold: (1) to protect trial proceedings by avoiding unnecessary interruptions and delay caused by multiple appeals and (2) to reduce the burden on the Court of Appeals by limiting the number of appeals to one per case and allowing piecemeal appeals only under the special circumstances set forth in Wis. Stat. § 808.03(2). *State v.*

[5] Other provisions of Wis. Stat. § 808.03(1)(b)-(d) apply to other types of cases, and are not relevant here.

Jendusa, 2021 WI 24, ¶ 20, 396 Wis. 2d 34, 49, 955 N.W.2d 777, 784.

Whether a judgment or order "dispose[s] of the entire matter in litigation as to one or more of the parties" is a "commonsense interpretation." *Appellate Practice & Procedure in Wisconsin*, § 4.6. Wisconsin Stat. § 808.03(1) "speaks of 'final' not in terms of final resolution of an issue but in terms of a final resolution of the entire matter in litigation." *Heaton v. Larsen*, 97 Wis. 2d 379, 396, 294 N.W.2d 15, 24 (1980).[6] Wisconsin case law establishes that a final order must, in addition to disposing of the entire matter pursuant to § 808.03(1), also "contain[] explicit language dismissing the entire matter as to one or more parties." *Wamboldt v. Illinois Farmers Ins. Co.*, 2007 WI 35, ¶ 29, 299 Wis. 2d 723, 728 N.W.2d 670.

Neither the circuit court's order of May 17, 2022, nor its Notice of Entry of Order of May 23, 2022 (Dkt. 237) passes this test of finality. The order itself acknowledges that the case is not over. It states that Clean-Sierra's procedural challenge regarding alleged bias was "not part of [the] decision." (Dkt. 237 at 4.) It did not dispose of the entire matter in litigation; it did not resolve the dispute; it did not preclude further hearing; it did not completely settle the rights of the parties. See *id.* The effect of the order was to continue the litigation, not to end it. Had the circuit court ruled in favor of Clean-Sierra on the merits, it would have had no need to address the bias issue at all. And it contains no explicit language stating that it is final

[6] While Wis. Stat. § 808.03(1) has been amended since 1980, it remains substantively identical in all respects relevant to this appeal.

for the purposes of appeal, as required by *Wamboldt*, 2007 WI 35, ¶¶ 4, 45, 49.

Wis. Stat. § 808.04(8) states that "[i]f the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of that entry." This provision "provides that entry of a final order after the one erroneously appealed from corrects any jurisdictional defects." *Appellate Practice and Procedure in Wisconsin*, § 4.15. However, that statute is not applicable here; it is intended to address the concern that "it can be difficult to determine whether a circuit court will, or should, issue another document to express its final disposition." *Id.* Wis. Stat. § 808.04(8) was created to rectify "[t]he confusion with identifying the final disposition in such cases." *Id.*

This is not such a case. Only the circuit court's Order on Motion to Reconsider and for Final Resolution in 20-CV-585 (Dkt. 294) states, on its face, that it is a final and appealable decision. The circuit court did not "issue several documents that express[ed] its decision" that blurred the distinctions as to which one represented the final decision. See *Appellate Practice and Procedure in Wisconsin*, § 4.15.[7]

Clean-Sierra did not file a petition for leave to appeal by permission in this case pursuant to Wis. Stat. § 808.03(2). Nor did they refrain from filing their notice of appeal until the

[7] *Appellate Practice and Procedure in Wisconsin* provides, as an illustrative example, a single case in which a circuit court issues "a memorandum decision, findings of fact and conclusions of law, an order for judgment, and a judgment." § 4.15. In this case, only a single document was issued prior to Clean-Sierra's appeal.

entire matter in the circuit court case had been disposed of, as required by § 808.03(2). They appealed an order that, by its own terms, and by Clean-Sierra's own description in their appellate brief, was by no means the conclusion of the circuit court review of the Commission's Final Decision.[8] For that reason, this Court is not only permitted to dismiss this appeal; it is this Court's "duty ... to take notice of its jurisdiction and dismiss an appeal if taken from a nonappealable order." *McConley v. T.C.Visions, Inc.*, 2016 WI App 74, ¶ 4, 371 Wis. 2d 658, 661-62, 885 N.W.2d 816, 817-18. Thus, this appeal must be dismissed.[9]

In any event, even if the Court were to address the merits of this appeal, this brief demonstrates below that the challenge to the circuit court's decision should fail.

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[8] See Clean-Sierra Brief, p. 15 n.2: "A different motion . . . was later heard and granted, relating to potential bias....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."

[9] Clean-Sierra have not requested leave for permissive appeal under Wis. Stat. § 808.03(2), and have made no argument that any of the reasons for which such an appeal may be granted are applicable here. See *ABKA Ltd. P'ship v. Board of Rev.*, 231 Wis.2d 328, 349 n.9, 603 N.W.2d 217 (1999) ("This court will not address undeveloped arguments."). Granting this appeal will not "materially advance the termination of . . . or clarify further proceedings in the litigation" under Wis. Stat. § 808.03(2)(a)—a final order in the litigation was entered on October 25, 2022 (Dkt. 294) and there will be no further proceedings. Clean-Sierra will suffer no substantial or irreparable injury pursuant to § 808.03(2)(b) by this Court's requiring them to appeal the final order; the deadline for appealing that order has not yet lapsed. Lastly, this appeal presents no issues "of general importance in the administration of justice" under § 808.03(2)(c); its issues are confined solely to the Commission's permit proceedings for a single Project.

II. THE COMMISSION APPLIED THE APPROPRIATE BURDEN AND STANDARD OF PROOF.

Clean-Sierra assert that the Commission ascribed neither a burden nor a standard of proof to the Applicants in its conditional approval of the CPCN application here. Their argument ignores the fact that the CPCN law, unlike other provisions of Wis. Stat. ch. 196, assigns no burden of proof to any party with respect to any determination that the Commission must make.[10] And while other sections of ch. 196 require certain determinations to be made only upon "clear and convincing evidence" or "a preponderance of the evidence,"[11] the CPCN statute itself does not specify a standard of proof the Commission must find in order to approve or deny a CPCN application.

The CPCN law states that the Commission "shall approve an application [for a CPCN] only if [it] determines" that a proposed project will be free of specified adverse impacts and will be in the public interest. Wis. Stat. § 196.491(3)(d). These are fact-intensive determinations. The Commission's decision in approving or denying a CPCN depends on the facts the Commission finds. The applicable standard of proof is necessarily derived from Wis. Stat. § 227.57(6), which requires a court to remand a CPCN back to the Commission if its decision "depends on any finding of fact that is not supported by substantial evidence in the record."

[10] See, e.g., Wis. Stat. §§ 196.499(5)(am), 196.504(8), 196.54(2).
[11] See, e.g., Wis. Stat. §§ 196.499(5)(d), 196.64(2), 196.54(2).

This substantial-evidence test "is not weighing the evidence to determine whether a burden of proof is met. Such tests are not applicable to administrative decisions." *Wisconsin Ass'n of Mfrs. & Commerce, Inc. v. Pub. Serv. Comm'n*, 94 Wis. 2d 314, 321, 287 N.W.2d 844, 847 (Ct. App. 1979). This test requires only that there be enough evidence for a finding to be reasonable. *Kitten*, 2002 WI 54 at ¶5 ("Because this is a review of an administrative hearing, we will uphold the hearing examiner's findings of fact as long as they are supported by substantial evidence in the record. Wis. Stat. § 227.57(6)."). In other words, this Court must determine whether the Commission made reasonable factual findings, affording due weight to the Commission's technical competence and specialized knowledge, based on substantial evidence. See *Wisconsin Ass'n of Mfrs. & Commerce*, 94 Wis. 2d at 322 ("When the issues basically involve a dispute over conflicting testimony and a reasonable [person] could be convinced by either side, it is within the administrative agency's province to weigh it and accept that which it finds more credible.") (citations omitted).

Clean-Sierra contend in their brief that the Commission should have applied a "preponderance of the evidence" standard in its CPCN proceeding. However, the cases they cite in support of this contention are inapposite. *Reinke v. Personnel Bd.* is a 1971 case involving the discharge of a civil service employee, in which the court looked to the Charter of the City of Milwaukee to guide its assessment of the burden of proof applicable in a Personnel Board proceeding. *Reinke* stated that "the substantial evidence rule is limited to judicial

review of administrative decisions," i.e., not the type of decision that case addressed. Further, their citation to *Wisconsin Association of Manufacturers and Commerce* is simply incorrect. 94 Wis. 2d 314, 321, 287 N.W.2d 844, 847 (stating "[t]he substantial evidence test is not weighing the evidence to determine whether a burden of proof is met or whether a view is supported by a preponderance of the evidence. Such tests are not applicable to administrative decisions.").

Clean-Sierra additionally cite to *Clintonville Transfer Line v. Pub. Serv. Comm'n*, 248 Wis. 59, 21 N.W.2d 5 (1945) to support the proposition that "the burden of proving a public convenience and necessity is upon the applicant." Their citation is not to the opinion in chief, but to a nonbinding separate writing (Pet. Br. p. 24), and the case itself deals with Wis. Stat. § 194.23 concerning the certification of private motor carriers, an entirely different statutory proceeding in a separate chapter which is now administered by the Department of Transportation. The utility CPCN statute that governs these proceedings, Wis. Stat. § 196.491, was not created until thirty years after *Clintonville Transfer Line* and derives its burden of proof, as discussed above, from the current versions of Wis. Stat. § 227.57(6) and ch. 196.

Applying the appropriate standard of proof to each finding the Commission was required by the CPCN law to make, the Commission properly focused on weighing the evidence to make a finding that was supported by substantial evidence. Therefore, although administrative hearings do observe the common-law rule that the moving party has the

burden of proof, this rule is complied with by determining whether the applicants provided substantial evidence to support each of the Commission's findings.

Clean-Sierra allege that the Commission "acknowledged but did not explicitly apply" the applicable standard. This is simply a distinction without a difference, an argument bordering on tautology. They contend that a burden of proof met by substantial evidence "is no burden at all." The drafters of Wis. Stat. § 227.57(7) would certainly beg to differ. For this Court to accept Clean-Sierra's interpretation of this standard would be to render § 227.57(7) a nullity, and essentially declare it an illusory standard that the Legislature nonetheless saw fit to memorialize as law.

The process the Commission followed is a requirement, not a "legal error": it took into account the standards with which its decision must comply in order not to be overturned on judicial review. Failing to acknowledge this standard in its Final Decision would have been at best an oversight, and at worst, poor practice. And it is curious that Clean-Sierra complain about the degree to which the Final Decision "focused" on their objections, when that focus is the best evidence of the attention the Commission paid to addressing those objections, and the detail with which they were considered.

Surveying the entirety of the evidence in the record, as this Court is required to do, it is plain that the Commission had material weighing in favor of acceptance of the CPCN application, and material weighing against acceptance. The Commission found that the evidence did not compel the result

that Clean-Sierra wished for. The argument that the Commission was obligated to view the evidence in the record differently is an effort to engage this Court in a re-examination of that evidence in usurpation of the Commission's statutorily delegated function, and to come to a different result.

III. THE COMMISSION'S FINAL DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Clean-Sierra's sufficiency-of-the-evidence argument is grounded in a fundamental misconception of the requirements for a Final Decision in a CPCN proceeding. There is no requirement that the Commission include separate findings of fact on every fact it relies on in the decision, nor that the Commission list each statutory element as its own separate conclusion of law. Wisconsin courts have instructed that:

> There is no requirement that the agency provide an elaborate opinion. *Wis. Envtl. Decade, Inc. v. PSC*, 98 Wis.2d 682, 701, 298 N.W.2d 205 (Ct.App.1980) (WED IV). All that is required is that the findings of fact and conclusions of law are specific enough to inform the parties and the courts on appeal of the basis of the decision. *Id.* Here the findings of fact and conclusions of law explain the basis of the decision, and the Final Decision includes a 50–page analysis of the issues in the case. Therefore, we are easily able to determine whether the PSC acted appropriately.

Clean Wisconsin, 2005 WI 93, ¶ 145; see also *Hixon v. Pub. Serv. Comm'n*, 32 Wis. 2d 608, 627, 146 N.W.2d 577, 586 (1966) (the findings of fact met the statutory requirements where they stated the ultimate factual determinations that were necessary to support the commission's order, and ultimate facts frequently include a legal conclusion from evidentiary facts).

As in *Clean Wisconsin* and *Hixon*, the Final Decision included the necessary factual findings that were germane to its decision and the statutory and legal requirements for approval as identified in the conclusions of law. (R. 22 at 7-10.) The Commission's Final Decision was a 76-page, extremely thorough analysis of the major contested issues in the case and explained the facts and all necessary legal findings required under Wisconsin law. (R. 66.) No more is required under *Clean Wisconsin*. Contrary to Clean-Sierra's objections, the Final Decision need not address every single fact in the record. The record in this matter, and specifically the Final EIS, goes into detail about the impacts on environmental values under Wis. Stat. § 196.491(3)(d)(4). (R. 138, FEIS at 37-76.) The Commission's decision appropriately summarized how it viewed these impacts and the conditions it included to mitigate such impacts. (R. 22 at 27-58.)

Clean-Sierra contend that the Commission's Final Decision was not supported by substantial evidence in two respects. First, they argue that the Commission's determination that the issuance of the CPCN was in the public interest under Wis. Stat. § 196.491(3)(d)3. lacked sufficient evidentiary support with respect to the applicants' consideration of safety and individual hardships, reliability, and environmental factors. Second, they argue the Commission's finding that the NTEC Project would not have undue adverse environmental impacts under § 196.491(3)(d)4. was unsupported because it failed to address all criteria listed in the statute and because it insufficiently considered those

values it did address. Each of these arguments is addressed in turn below.

A. The Public Interest Determination is Supported by Substantial Evidence.

The CPCN law for construction of a merchant plant requires that the Commission find substantial evidence that "[t]he design and location or route [of the proposed facility] is in the public interest considering . . . individual hardships . . . safety, reliability, and environmental factors." Wis. Stat. § 196.491(3)(d)3.[12] The Commission's Final Decision relied on ample and convincing record evidence demonstrating that the Project is in the public interest as to each of these factors.

Clean-Sierra contend that this Court should adopt their view that the evidence presented by the applicants and Commission staff is insufficient. However, under the applicable standards discussed above, this Court is required to consider the full record that was before the Commission in assessing whether a reasonable person could have come to the same conclusion. It is not for this Court to determine, among conflicting pieces of evidence, which to afford more weight, or to substitute its own judgment for the Commission's in determining which evidence it finds persuasive. It is unclear what level of "meaningful detail" Clean-Sierra would require, short of including the entire record in the Final Decision text.

[12] Because the application in this case is for a merchant plant, the Commission was not permitted to consider alternative sources of supply, engineering, or economic factors. Wis. Stat. § 196.491(3)(d)3.

1. Safety and Individual Hardships

The CPCN statute requires the Commission to "consider" safety and individual hardships in making its public interest determination. Wis. Stat § 196.491(3)(d)3. This is a requirement for the Commission, and does not ascribe a particular burden to the applicant. It does not require the Commission to make a finding that safety and individual hardships are absent. The Commission is required to consider these factors, and it did, focusing in particular on Clean-Sierra's concerns.

The Commission's Final Decision explicitly addressed numerous potential individual hardships brought up by Clean-Sierra during the course of the CPCN proceedings for the Project, primarily those that might affect the residents of neighborhoods near the site location. These included increased traffic during construction, noise pollution, and ground fog and rime icing created by the project's cooling tower. With respect to safety, Clean-Sierra referred only to the concerns of neighbors resulting from an accident that previously took place at the nearby Husky oil refinery, a past incident remote in time and place from the Project before the Commission.

The Final Decision considered all of these, with particular emphasis on the Husky oil refinery incident. (R. 22 at 30.) The Commission noted that most of the hardships caused by the Project would be limited to the construction phase, and would be either substantially diminished or eliminated when that phase was complete. *Id.* It further explained that, while sensitive to the distress caused by the

Husky oil refinery incident, it found that concerns about the mere possibility of another industrial accident, unsupported by any evidence that such an accident was likely to occur, did not rise to the level that would justify denial of the CPCN. *Id.* It also considered the numerous mitigation measures upon which the CPCN was issued as significantly diminishing the significance of these factors. Clean-Sierra's argument here essentially asks this Court to re-weigh the safety and individual hardships at issue and come to a different conclusion than the Commission's. As discussed above, that is not the function of a Chapter 227 judicial review.

2. Reliability and Environmental Factors

As with their arguments above regarding safety and individual impacts, Clean-Sierra attempt to persuade this Court to re-weigh the voluminous evidence presented by the parties in the CPCN proceeding and come to a different conclusion than the Commission's regarding reliability and environmental factors. These arguments focus on whether the Commission's consideration of the features of the Nemadji River site in its decision to conditionally approve the CPCN resulted in a decision supported by substantial evidence.

Clean-Sierra characterize the Commission's process regarding reliability and environmental factors as "brush[ing] aside" concerns regarding soil stability, (Pet. Br. at 42), providing "little information" regarding potential stormwater and erosion impacts, (Pet. Br. at 44), and "improperly defer[ing]" matters of erosion and stormwater management to the DNR permitting process. (Pet. Br. at 37.) These

characterizations of the Commission's extensive fact-finding process are belied by the record. The Commission had evidence before it in the form of testimony and exhibits from both Clean-Sierra and the applicants as well as the extensive Final EIS to consider and balance. It then crafted a conditional CPCN tailored to the Project and addressing with specificity the issues raised by Clean-Sierra, including the risk of slope failure, impacts to wetlands, and the adequacy of the aquifer supplying the site.

Additionally, in considering reliability and environmental factors, the Commission took care to acknowledge the provisional nature of the DNR's testimony and noted that it was reviewing all DNR testimony in that context. (R. 22 at 38.) In fact, it found that in some respects the applicants' and Clean-Sierra's testimony was more credible than that of the DNR. This is not a case in which the Commission rubber-stamped the DNR's provisional testimony in the face of countervailing evidence. To the contrary, it engaged in precisely the thoughtful fact-finding process that is the Commission's statutory province.

The contention that the Commission "brushed aside" environmental and reliability concerns represents a fundamental misunderstanding of the nature of a conditional permit. The permit actually approved by the Commission is not valid until and unless the twenty-six pages of conditions contained therein are satisfied. (R.22 at 42-68.) Those conditions address endangered resources, the submission of a final erosion and stormwater control plan, use of best management practices, wetland and waterway impact

mitigation, noise mitigation, and the employment of an independent environmental monitor for the construction project. *Id*. The list of conditions attached to the CPCN here was "exhaustive." (R.22 at 58.) If the Applicants fail to satisfy any of the dozens of conditions listed, the Commission's approval is no longer valid and the Project may no longer proceed.

The length, complexity, and specificity of the conditional permit here reflects the substantial evidence the Commission considered in determining whether and under what circumstances the NTEC Project meets the statutory requirements. By necessity, given the inflexible statutory deadline by which the Commission must make a decision regarding a CPCN application and the ongoing nature of the related DNR permitting proceedings, some of the information required to satisfy the imposed conditions was not available to the Commission at the time of Final Decision issuance. And conditions are inherently forward-looking; it could not be known until sometime in the future whether the Applicants would be able to satisfy them. Issuing a conditional permit allows the Commission to engage in ongoing oversight of the Project to ensure that all requisite measures are taken to avoid and to mitigate environmental and reliability concerns.

B. The Undue Adverse Environmental Impact Determination is Supported by Substantial Evidence.

Wisconsin Stat. § 196.491(3)(d)4. requires the Commission to find that a 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." Clean-Sierra's first contention, that the Commission failed to address all of these criteria, misreads the plain language of the statute. The list of environmental values contained in § 196.491(3)(d)4. is neither mandatory nor complete.

The use of the phrase "such as" indicates that the Legislature, in drafting this law, wished to suggest examples of the types of "other environmental values" the Commission might consider in addition to those implicated by its determination under Wis. Stat. § 196.491(3)(d)3. This list does not require an applicant to present evidence on, or the Commission to consider, any individual value named in the statute, much less each and every value listed.

In fact, the use of "such as" admits the possibility that the Commission might not consider any of the values listed, but instead might address an entirely different selection of factors. The statute contemplates that for some facilities, for example, no historic sites or recreational use may be implicated. It also permits the Commission to take into account environmental values not specifically named in the statute. By its plain language, the statute empowers the Commission to exercise its discretion in determining which "other environmental values" need to be addressed in any given CPCN proceeding. The reading suggested by Clean-Sierra would fail to give meaning to the plain language of Wis.

Stat. § 196.491(3)(d)4., giving it a different meaning entirely: "including but not limited to," and not "such as."[13]

An examination of "other environmental values" is an inquiry that will necessarily have some overlap with, and may be duplicative of, other inquiries the Commission is required to make to satisfy its other statutory burdens. Environmental factors affecting whether the location and design of a facility are in the public interest under Wis. Stat. § 196.491(3)(d)3. will often require consideration under § 196.491(3)(d)4. as well.

Clean-Sierra argue that the Final Decision is "superficial" in its discussion of the wetland and waterway impacts associated with construction of the facility, and that the Commission's finding that those impacts were not "undue" is not supported by substantial evidence. This argument is based on a misunderstanding of what Wisconsin law requires of the Commission in issuing a decision. The Commission spent five full pages of its seventy-six page decision discussing its determinations with regard to wetland and waterway impacts, citing to specific items in the record. (R.22 at 34-39.) The testimony and exhibits cited included contributions from Clean-Sierra, the applicants, and the DNR, all of which were fully considered by the Commission in coming to its determination that the project, subject to the conditions of the CPCN, did not pose an undue adverse impact on environmental values. *Kitten*, 2002 WI 54, ¶ 5 (stating that the test for

[13] It is notable that Clean-Sierra, on page 45 of their brief, quote Wis. Stat. § 196.491(3)(d)4. omitting the phrase "such as" and substituting the phrase "including but not limited," although those phrases have significantly distinct meanings.

whether findings are supported by substantial evidence "tak[es] into account all of the evidence in the record").

IV. THE COMMISSION PROPERLY APPLIED WIS. STAT. § 196.491(3)(D)3. AND 4.

Clean-Sierra allege that the Commission made errors of law in applying Wis. Stat. § 196.491(3)(d)3. and 4. in granting the NTEC Project CPCN. They contend that the Commission impermissibly abdicated its responsibilities under these two subsections by issuing a CPCN subject to certain conditions including, but not limited to, the Applicants obtaining certain additional permits from other agencies. The crux of this argument is the notion that the Commission has a freestanding responsibility to consider both the public interest and the environmental impacts of a Project that is entirely independent of the role of other agencies in the permitting process, and that under that premise, the Commission's actions in issuing the CPCN here fell short.

Wisconsin Stat. § 196.491(3)(d) enumerates the criteria an application must satisfy for the Commission to approve a CPCN for a facility. Relevant to Clean-Sierra's arguments in this case, § 196.491(3)(d)3. requires the Commission to determine that:

> 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…. 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.[14]

Section 196.491(3)(d)4. requires the Commission to further determine that:

> The proposed facility will not have an 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 values. 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.[15]

Contrary to Clean-Sierra's assertions, the Wisconsin legislature contemplated the issuance of a CPCN under precisely the conditions presented by the NTEC application here. Wisconsin Stat. § 196.491(3)(e) states that, if a CPCN application "does not meet the criteria under par. (d)," the Commission may choose either of two options: rejection of the application, or approval "with such modifications are necessary for an affirmative finding under par. (d)." It is this second option that the Commission chose here, as it has done with countless prior CPCN applications.[16]

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[14] Clean-Sierra's brief refers to the determination required by Wis. Stat. § 196.491(3)(d)3. as "the public interest determination," and for consistency, this brief will follow suit.

[15] Clean-Sierra's brief refers to the determination required by Wis. Stat. § 196.491(3)(d)4. as "the undue adverse impact determination," and for consistency this brief will follow suit.

[16] See, e.g., *Application for a Certificate of Public Convenience and Necessity of Darien Solar Energy Center, LLC to Construct a Solar Electric Generation Facility in the Town of Bradford, Rock County, and the Town of Darien, Walworth County, Wisconsin*, Docket No. 9806-CE-100 (August 5, 2021) (WL 3518696) (conditioning a CPCN on, among other things, the completion of pre- and post-construction noise study

Clean-Sierra argue that the Commission "shirked its responsibility" by making its CPCN conditional on, among numerous other requirements, the applicants' obtaining requisite DNR permits. This statement mischaracterizes and oversimplifies the network of overlapping authority and regulation involved in the Commission's issuance of a CPCN, which is only one piece of the process applicants like South Shore Energy and Dairyland Cooperative must navigate in order to construct a facility. The Commission does not operate in a vacuum.

In making the determinations required by Wis. Stat. § 196.491(3)(d), the Commission considers information from state and federal agencies and local officials. It coordinates its review with the Department of Natural Resources (DNR) to assess wetland, waterway, and endangered resource impacts and requests that some applicants incorporate recommendations made by the DNR into their projects. As Clean-Sierra acknowledge, an applicant for a CPCN that requires DNR approval under Wis. Stat. ch. 30 must submit a single application at the same time with both the DNR and the Commission. Wis. Stat. § 30.025(1s). The Commission requires applicant project facilities to comply with the National Electric Code (NEC) or the National Electric Safety Code (NESC) to ensure public safety. And it routinely conditions its CPCN orders on the applicants' obtaining all necessary federal, state, and local permits prior to construction.

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reports and stray voltage testing and the provision of final detailed engineering plans for a battery energy storage system (BESS) that would be part of the proposed facility).

In fact, it is well-established practice for the Commission to issue, as it did here, a CPCN contingent on the future issuance of DNR permits to mitigate the environmental impacts of a utility project. The Wisconsin Supreme Court "has previously concluded that an agency may assume that any environmental consequences will be controlled through compliance with the applicable administrative code provisions." *Clean Wisconsin*, 2005 WI 93 at ¶167 (quoted source omitted). In light of the DNR's special expertise on environmental matters, "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." *Id.* at ¶ 168. The Commission's conditioning of the NTEC CPCN on the future issuance of permits by the DNR was not error; it is a practice established, and permitted, by Wisconsin case law and is not a basis upon which to overturn the Commission's decision here.

V. THE COMMISSION COMPLIED WITH WISCONSIN'S ENERGY PRIORITIES LAW.

In its review of a CPCN application, the Commission is required to consider Wis. Stat. §§ 1.12, and 196.025, known as the Energy Priorities Law (EPL). This law "calls for state attention to be given to energy efficiency and [renewable energy] development and deployment." Sanya Carleyolsen, *Tangled in the Wires: An Assessment of the Existing U.S. Renewable Energy Legal Framework*, 46 Nat. Resources J.

759, 780 (2006).[17] The EPL prioritizes renewable generation, but charges the Commission with determining whether renewable energy resources are both cost-effective and technically feasible when examining CPCN applications for new facilities. *Clean Wisconsin, Inc.*, 2005 WI 93 at ¶ 100. The Commission must apply the EPL in conjunction with its own CPCN law: Wis. Stat. § 196.491(3) and the procedures prescribed therein.

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[17] The relevant part of the EPL, found at Wis. Stat. § 1.12, states:

> (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.
>
> (cm) Advanced nuclear energy using a reactor design or amended reactor design approved after December 31, 2020, by the U.S. Nuclear Regulatory Commission.
>
> (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 . . . 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).

Because the application here is for a merchant plant, the Commission did not consider whether the NTEC facility would satisfy the reasonable need of the public for an adequate supply of energy; nor did it consider alternative sources of supply, engineering, or economic factors. Wis. Stat. § 196.491(3)(d)2.-3. Regardless, it did comply with its statutory obligation to consider the EPL priorities in its Final Decision.

The Commission recognized that the EPL was applicable to its decision, stating that it was "appropriate for the Commission to assess how the proposed project fits within the state's preferred means of meeting Wisconsin's energy needs, which is laid out in the [EPL]." (R.22 at 19.) It noted that the purpose of the project here is to "facilitate the deployment of renewable resources and overall system reliability by providing energy when intermittent renewable resources cannot." (R.22 at 20.) The Commission cited expert testimony in the record that the Project will provide dispatchable generation to support the integration of those renewable resources. *Id.* In its application of the EPL to the project before it, the Commission discussed battery storage, wind and solar energy resources, and energy conservation and efficiency, finding that adequate battery storage technology is not yet available to provide support for renewables equivalent to that provided by the Project. It also concluded that the reliability benefits produced by the Project will in fact facilitate the deployment of non-combustible renewable energy and "accommodate greater proliferation of [these] resources." (R.22 at 21.)

Clean-Sierra cite to *Clean Wisconsin* in support of the proposition that the EPL prevents the Commission from approving a CPCN for a facility "that is not the highest-priority project alternative that is both cost effective and technically feasible." (Pet. Br. at 33.) However, *Clean Wisconsin* holds that the Commission may, in applying the EPL, simply come to a conclusion favoring a lower-priority project over a higher-priority one, depending on the aforementioned cost-effectiveness and technical feasibility factors as well as what type of need is to be met by the project. *Id.*

That is precisely what the Commission did here. It considered the highest-priority energy option that was both cost-effective and technically feasible to meet energy demands. In doing so, it is not required to mechanically choose from the top of the listed statutory priorities in every circumstance. Rather, it must consider the context of the public's need for an adequate supply of electric energy. *Id.* at ¶ 124. Under the currently available technology, the Commission determined that noncombustible renewable energy sources are intermittent, and that more-reliable but lower-priority energy sources are needed to complement and sustain them. (R.22 at 20.)[18]

[18] Clean-Sierra aver that the Final Decision "misrepresented" Sierra Club witness Goggin's testimony that battery storage technology is not currently available, by pointing out that Goggin testified to the existence of utility scale battery projects available in other states. However, the existence of a resource somewhere outside of Wisconsin does not mean that it is currently available to Wisconsin utility customers.

VI. THE EIS COMPLIED WITH THE WISCONSIN ENVIRONMENTAL POLICY ACT.

The Commission prepared a 265-page EIS that thoroughly analyzed the application, alternative sites, proposed routes, and potential environmental and other impacts of the NTEC Project as required under Wis. Stat. § 1.11 and Wis. Admin. Code § PSC 4.30(1), also known as the Wisconsin Environmental Protection Act (WEPA). The adequacy of an EIS is a conclusion of law. *Clean Wisconsin,* 2005 WI 93 at ¶ 190. The court reviews the determination of EIS adequacy in the Commission order, and not the EIS itself. *Citizens' Util. Bd. v. Pub. Serv. Comm'n of Wisconsin,* 211 Wis. 2d 537, 543, 565 N.W.2d 554, 558 (Ct. App. 1997). While the standard of review of an agency's conclusion of law is *de novo*, courts "benefit from the administrative agency's analysis, particularly when [it is] supplemented by the 'due weight' considerations" that result from that agency's legislatively delegated responsibility, its experience applying the statute, and its expertise and specialized knowledge. *Tetra Tech E.C. Inc. v. Wisconsin Dept. of Revenue,* 2018 WI 75, ¶¶ 79, 84, 382 Wis. 2d 496, 561-62, 564-65, 914 N.W.2d 21, 53-55.

WEPA requires that state agencies include in every recommendation or report on Type 1 actions, such as this one, a detailed statement including the following: (1) the environmental impact of the proposed project; (2) any adverse environmental impacts which cannot be avoided if the proposal is implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-

term productivity; (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented; and (6) the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal. See Wis. Stat. § 1.11(2)(c); see also Wis. Admin. Code § PSC 4.30. The Final EIS in the record here discussed all of these subjects to an extent amply sufficient to satisfy WEPA. (R. 138.)

An EIS is not required to address every possible impact of a project, whether direct or indirect. "No matter how exhaustive the discussion of environmental impacts in a particular EIS might be, a challenger can always point to a potentiality that was not addressed." *Clean Wisconsin*, 2005 WI 93 at ¶ 19. Instead, courts review an EIS in light of "the rule of reason," which requires an EIS to "furnish only such information as appears reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible." *Id.* (citation omitted).

Clean-Sierra's assertions that the EIS did not contain a sufficient discussion of indirect and cumulative impacts do not withstand scrutiny. Clean-Sierra do not find fault with the EIS for ignoring any of the requisite factors. Their citation to the EIS in their own brief demonstrates that the factors they complain of were, in fact, addressed. Rather, they argue that the EIS's consideration of factors such as the climate effects of upstream gas extraction and the secondary and cumulative

impacts of the NTEC Project on the existing landscape was not "sufficient" but rather, "failed to fully address" those impacts. (Pet. Br. 59.)

Clean-Sierra's citation to *Applegate-Bader Farm, LLC v. Dep't of Revenue*, 2021 WI 26, 396 Wis. 2d 69, 955 N.W.2d 793, in support of the proposition that an EIS must "explicitly include indirect impacts" is misplaced. (Pet. Br. 58.) *Applegate-Bader* did not review the adequacy of an EIS; rather, as Clean-Sierra's citation points out, its holding dealt with an agency's determination whether to prepare an EIS at all. See *id.* at ¶ 19.

Here, the Commission did order the preparation of an EIS, and that EIS discussed all of the factors detailed in Clean-Sierra's brief. (R. 138.) The upstream effects of natural gas extraction are discussed in the EIS, which outlines the current practices and concludes that "[m]ore distant adverse impacts to air, lands and waters as a result of fracking to obtain natural gas would continue to be related at least indirectly to the construction and operation of any new, large natural gas consumer such as the proposed NTEC project." (R.138 at 47.) The EIS referred to the soil erosion conditions mentioned by Clean-Sierra; in its discussion of these considerations, the EIS noted that "[f]or this project, the applicants have developed a planning document that addresses both erosion and stormwater control" and incorporated that document by reference. *Id.* The cumulative impacts of the Project were discussed throughout the EIS, in the section where each of those types of impacts were considered. *Id.* at 6. Lastly, Clean-Sierra ignore the statutory requirement, specific to the Commission, that it may

not consider the impacts on air pollution in its determination under Wis. Stat. 196.491(3)(d)4. In sum, in none of the respects argued by Clean-Sierra did the EIS here fail to comply with WEPA.

CONCLUSION

Clean-Sierra's attempted appeal of a non-final order must be dismissed pursuant to Wis. Stat. § 808.03(1). If and when Clean-Sierra bring a valid appeal from the circuit court, this Court must affirm the circuit court's order upholding the Final Decision in this case. The Commission has expertise and experience adjudicating applications for CPCNs, and substantial evidence supports each of the contested findings of fact. Further, the Commission did not misapply the law in making its determinations in this case. The Commission was reasonable in its exercise of discretion and Clean-Sierra were given every opportunity to present evidence and argument on the relevant issues. Simply because the Commission ultimately did not share Clean-Sierra's view of that evidence does not mean that the Commission's Final Decision should not stand.

Respectfully submitted this 28th day of November, 2022,

By: *Electronically signed by Stephanie Bedford*

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis.Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,032 words.

Dated this 28th day of November, 2022.

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