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STATE OF WISCONSIN
SUPREME COURT

CLEAN WISCONSIN, INC.
AND SIERRA CLUB,

Petitioners-Appellants-
Petitioners,

v. Case No. 2022AP1106
2023AP120

PUBLIC SERVICE COMMISSION
OF WISCONSIN,

Respondent-Respondent.

SOUTH SHORE ENERGY LLC
AND DAIRYLAND POWER
COOPERATIVE,

Interested Parties-
Respondents,

v.

MICHAEL HUEBSCH

Other Party.

PUBLIC SERVICE COMMISSION OF WISCONSIN'S RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The petition for review (Petition) should be denied. This case does not raise statewide issues of policy or other importance that warrant this Court's review. Clean Wisconsin, Inc. and Sierra Club (Petitioners) allege that the court of appeals' decision relies on *Clean Wisconsin, Inc. vs. Public Service Comm'n of Wisconsin*, 2005 WI 93, 282 Wis. 2d 250, 700 N.W.2d 768, but is contrary to *Clean Wisconsin, Inc.*, in finding that the Public Service Commission of Wisconsin's (Commission) written final decisions need not address every statutory provision of Wis. Stat. § 196.491 and that there is no burden of proof within Wis. Stat. § 196.491. However, the court of appeals' findings in its decision are directly in line with *Clean Wisconsin, Inc.* and supported by well-settled Wisconsin law regarding the Commission's routine application of an unambiguous statute.

The court of appeals' decision correctly found that Wis. Stat. § 196.491 "does not explicitly assign a burden of proof or standard of proof for the Commission to apply when reviewing a CPCN application," and correctly refused to insert Petitioners' preferred standard of proof into that statute. Pet-App-3. Petitioners allege that the court of appeals, in refusing to insert such language into the statute, "eliminat[ed] the safeguards

included by the Legislature in [Wis. Stat. § 196.491] that ensure the Commission's authority does not violate the constitutional nondelegation doctrine." Pet. at 8.

In making such sweeping allegations, Petitioners misconstrue the actual safeguards within Wis. Stat. § 196.491—which clearly limit the legislative power delegated to the Commission. Those safeguards include prescribed time limits within which the Commission must take action, and a default granting of a CPCN by operation of law, with no conditions on such approval, if the Commission fails to act. Petitioners additionally fail to confront the fact that the Commission, as an administrative agency, is a creation of the legislature, and subject to the Legislature's power to create, repeal, or otherwise change statutes.

Petitioners also misrepresent the court of appeals' decision, which, in fact, does not find that the Commission need not address each statutory requirement in Wis. Stat. § 196.491. To the contrary, the court of appeals found that the Commission's written final decisions, in line with the well-settled requirements of Wisconsin law, need not be elaborate, nor must it contain every fact or conclusion of law upon which the Commission makes

its determinations. *See* Pet-App-14, 19 (quoting *Clean Wisconsin, Inc.*, 2005 WI 93 at ¶ 145).

No clarification or expansion of the law is required in this case. The Legislature made clear its intentions in the language of Wis. Stat. §196.491 as it presently exists. There is no burden or standard of proof in that statute, and the constitutionality of that statute and its application by the Commission are not in question in light of well-settled Wisconsin law and the procedural safeguards that the statute contains. The legal requirements of a Commission final decision are also well-established under Wisconsin law, and Petitioners simply misconstrue the court of appeals' recitation of those requirements. Finally, the court of appeals' decision in this matter is not contrary to any controlling precedent of this or any other Court.

This Petition does not satisfy any of the criteria warranting review. As demonstrated below, this case involves merely the application of well-settled principles to a unique factual situation. For these reasons, as further explained below, the Petition should be denied.

ISSUES PRESENTED

Petitioners state that this case presents two issues for this Court to review:

1. Must applicants seeking a Certificate of Public Convenience and Necessity show they are entitled to the CPCN by any recognized standard and burden of proof, when the CPCN is decided in a Class 1 contested case proceeding, for consistency with the constitutional nondelegation doctrine?
2. Does Wis. Stat. § 196.491(3)(e) allow the Commission to approve an application for a Certificate of Public Convenience and Necessity regardless of whether the statutory requirements of the Plant Siting Law are met?

Pet. at 8. It is the Commission's position that Petitioners' statement of issues mischaracterizes the issues before this Court on this petition for review, which are more properly stated as follows:

1. Does the court of appeals' decision present a real and significant question of constitutional law pursuant to Wis. Stat. § 809.62(1r)(a)?
2. Is this Court's review of the court of appeals' decision necessary in order to clarify, develop, or harmonize the law pursuant to Wis. Stat. § 809.61(1r)(c)?
3. Does the court of appeals' decision conflict with controlling opinions of this or any other Court?

This Court should exercise its discretion and deny the Petition.

ARGUMENT

Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. *See* Wis. Stat. § 809.62(1r). Petitioners have provided no such reasons to review the court of appeals' decision, and their petition makes no colorable argument that any of the statutory criteria this Court considers in its determination whether to take up a matter are present. Those statutory criteria are found in Wis. Stat. § 809.62(1r):

> **(1r)** CRITERIA FOR GRANTING REVIEW. Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:
>
> **(a)** A real and significant question of federal or state constitutional law is presented.
>
> **(b)** The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.
>
> **(c)** A decision by the supreme court will help develop, clarify or harmonize the law, and
>
> > **1.** The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
> >
> > **2.** The question presented is a novel one, the resolution of which will have statewide impact; or
> >
> > **3.** The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

> **(d)** The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.
> **(e)** The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

However, the Petition is a thinly veiled attempt to ask yet another court to weigh evidence, make factual determinations, and usurp the Commission's role under Wis. Stat. § 196.491. Petitioners' request of this Court falls far short of the statutory criteria this Court looks to when determining to take a case for review, and calls upon it to exceed the role of any court, let alone this one. The court of appeals correctly recognized and rejected Petitioners' tactics previously, finding that Petitioners asked the court of appeals to "reweigh and reach a different conclusion than the Commission, which we cannot do. *See* Wis. Stat. § 227.57(6)." Pet-App-21.

Petitioners contend that review in this case is needed because the court of appeals "overlooked the constitutional implications of its decision authorizing the Commission to approve applications for a CPCN without ascribing a burden of proof or a standard of proof in a contested case proceeding," and "misconstrued a key provision in [Wis. Stat. § 196.491] to support its conclusion that there is no standard of proof applicable to the

Commission's determination on an application for a CPCN." Pet. at 20-21. Additionally, Petitioners contend that the court of appeals misapplied Wisconsin law, including a prior decision by this Court, in making its determinations.

However, Petitioners misunderstand and misrepresent Wisconsin law in the Petition. Their contentions create out of whole cloth conflicts in the law that only exist when statements in the court of appeals' order are taken out of context. To be clear, there are no conflicts between the court of appeals' order and the unambiguous Wisconsin law governing the application of Wis. Stat. § 196.491. Further, Petitioners' newly-raised contentions involving constitutional separation of powers concerns misconstrue the limitations and direction put forth by the Legislature that are already present in Wis. Stat. § 196.491.

I. THE COURT OF APPEALS' DECISION DOES NOT PRESENT A REAL OR SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

Wisconsin Stat. § 809.62(1r)(a) states that this Court may consider whether a "real and significant question of federal or state constitutional law is presented" in determining whether to exercise its discretionary review.

Petitioners, in a new argument not previously raised before any court, contend that "the court of appeals overlooked the constitutional implications of its decision authorizing the Commission to approve applications for a CPCN without ascribing a burden of proof or a standard of proof in a contested case proceeding." Pet. at 20. Specifically, Petitioners argue that the application of a "substantial evidence" standard, and not a stricter standard of proof, "implicates the constitutional nondelegation doctrine applicable to agency decision-making by removing the strictures under which the Legislature had placed on the Commission's board discretion in utility regulation." *Id.* at 7. Such allegations ignore the actual safeguards the Legislature put in place within the delegation of legislative power present in Wis. Stat. § 196.491. Petitioners' argument necessarily questions the constitutionality of Wis. Stat. § 196.491, yet the petition fails to develop a cogent argument in support of that contention.

In making such allegations, Petitioners cite no supporting law, citing only a general proposition that "one branch of government may delegate power to another branch, but it may not delegate too much, thereby fusing an overabundance of power in the recipient branch." Pet. at 21 (quoting *Panzer v. Doyle*, 2004 WI 52, ¶ 52, 271 Wis. 2d 295, 680 N.W.2d 666). As

this Court has explained, "[t]he separation of powers doctrine was never intended to be strict and absolute" but is "a system of 'separateness but interdependence, autonomy but reciprocity.'" *State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32 (1995) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)). In *Panzer*, noted by the Petitioners, this Court explained that the nondelegation doctrine prohibits the Legislature from delegating *lawmaking* authority to another branch of government unless the delegating statute has an ascertainable purpose and sufficient procedural safeguards. *Panzer*, 2004 WI 52 at ¶ 55. However, and notably, examples of procedural safeguards include limited duration for the exercise of power or clear standards guiding its exercise. *See*, *e.g., Martinez v. Dep't of Industry, Labor and Human Relations*, 165 Wis. 2d 687, 478 N.W.2d 582 (1991).

Contrary to what Petitioners argue, and correctly noted by the court of appeals, Wis. Stat. § 196.491 assigns *no* burden or standard of proof to any party for the Commission to apply when reviewing CPCN applications. *See* Pet-App-3. The Legislature has explicitly established burdens of proof applicable to other sections of chapter 196, including "clear and convincing

evidence" or "a preponderance of the evidence."[1] Yet, the Legislature purposefully enacted Wis. Stat. § 196.491 without any language imposing a burden or standard of proof. As this Court has "stated time and time again[,] courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 39, 271 Wis. 2d 633, 660, 681 N.W.2d 110, 122.

Petitioners' vague invocation of separation of powers principles implicitly tables the argument that Wis. Stat. § 196.491 is purportedly unconstitutional, without explicitly making that argument as a basis for this Court's review or supporting it in any way. Petitioners are requesting this Court to add words to that statute according to their wishes, rather than applying the law as written.

However, "[t]here is a strong presumption that a legislative enactment is constitutional." *Martinez*, 165 Wis. 2d at 695 (citing *State v. Sher*, 149 Wis. 2d 1, 10, 437 N.W.2d 878 (1989)). The Petitioners would need to "prove that the statute is unconstitutional beyond a reasonable doubt." *Id.* (citing *State v. Tarantino*, 157 Wis. 2d 199, 212-13, 458 N.W.2d 582 (Ct. App. 1990)). "Any doubt must be resolved in favor of upholding

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

the statute." *Id.* (citing *Chappy v. LIRC*, 136 Wis. 2d 172, 185, 401 N.W.2d 568 (1987)).

Petitioners do not expressly challenge the constitutionality of Wis. Stat. § 196.491, instead vaguely attacking its lack of "procedural safeguards" unless this Court adds an assigned burden of proof to the statute. Even if Wis. Stat. §196.491 had no procedural safeguards "[o]n its surface," this Court would still have "an obligation to dig beneath the surface" to look for such safeguards. *See Panzer*, 2004 WI 52 at ¶ 66.

Wisconsin Stat. § 196.491, however, *does* contain a number of procedural safeguards, both implicit and explicit. First and foremost, the Commission is a "creation of the legislature." *See id.* at ¶ 56 (citing *Gilbert v. Med. Examining Bd.*, 119 Wis. 2d 168, 186, 349 N.W.2d 68 (1984); *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 56-57, 158 N.W.2d 306 (1968)). The very existence of the Commission "is dependent upon the will of the legislature and made subject to legislative changes." *Id.* (citing *Gilbert*, 119 Wis. 2d at 186; *Schmidt*, 39 Wis. 2d at 56-57). If the agency is acting outside the bounds of the Legislature's grant of authority, the Legislature "may decline to confirm appointees and refuse to appropriate funds for the agency." *Id.* The Legislature also has the ability to repeal or

amend Wis. Stat. § 196.491. *See id.* at ¶ 71. The fact that the agency is so beholden to the Legislature is the reason why this Court "has adopted a stricter standard when the legislature delegates power directly to another branch of government," as opposed to when the Legislature delegates power to an agency. *Id.* at ¶ 57. What may not be an adequate safeguard when power is delegated directly to another branch of government, may be wholly adequate when power is delegated from the Legislature to an agency. *See id.*

The statute itself, and its clear direction to the Commission, impose additional checks upon the Commission. Wisconsin Stat. § 196.491 operates under statutory deadlines that the Commission *must* abide by. A CPCN application triggers several statutory deadlines and substantive requirements related to the Commission's review of that application. *Clean Wisconsin, Inc.*, 2005 WI 93 at ¶ 14. As noted above, a provision that limits duration for the exercise of power or imposes clear standards guiding its exercise is one type of procedural safeguard under Wisconsin law. *See, e.g., Martinez*, 165 Wis. 2d 687. No later than 30 days after an application is filed, the Commission is required to determine whether the application is complete—or the application is deemed complete by operation of law. Wis.

Stat. § 196.491(3)(b). Once a completeness determination has been made, the Commission is required by statute to hold a public hearing pursuant to § 196.491(3)(b), to perform an analysis of the project pursuant to § 196.491(3)(d), and to take a final action on a CPCN application within 180 days, or if the deadline is extended, within 360 days pursuant to § 196.491(3)(g)—or, again, the applicant is granted a CPCN by operation of law, without any conditions.

The language used in these statutes is mandatory—"shall," not "may"—and does not appear to grant the Commission discretion or authority to reject or dismiss an application without a hearing or a final determination once it has determined that application is complete. The clear intention of the Legislature within Wis. Stat. § 196.491 is that the default of the statute is approval of a CPCN application without conditions—and such a timeline restriction on the Commission's exercise of power under Wis. Stat. § 196.491 is a stricture clearly placed on the Commission by the Legislature. The court of appeals correctly recognized this very distinction in responding to Petitioners' prior argument regarding a burden of proof within Wis. Stat. § 196.491—noting that "[t]his language . . . expressly approves a CPCN application regardless of whether any requirements are

met . . . [it] does not place the burden of proof on any party . . . it allows for approval based on *the Commission's* failure to act on the application." *See* Pet-App-13. Because the statute as written and enacted by the Legislature defaults to granting a CPCN to an applicant without any conditions at all, it would contradict its explicit intent and create disharmony for that statute to establish any burden of proof at all. Such a strict restriction of the Commission's power to review and condition the approval of such an application for a CPCN is clearly dispositive of any nondelegation argument by the Petitioners.

Finally, Petitioners make a fleeting and unsupported argument regarding due process concerns—contending that the requirement of contested case procedures in a Wis. Stat. § 196.491 proceeding implicates due process rights and that the granting of a CPCN is not, in fact, entirely an exercise of legislative power. This undeveloped argument appears to go against prior rulings of this Court which clearly state that the Commission's public interest determinations under Wis. Stat. § 196.491 are a legislative function. Petitioners also fail to explain why the fairness requirement in Wis. Stat. § 227.57(4) somehow eliminates the establishment of the substantial evidence standard in Wis. Stat. § 227.57(6). *See Clean*

Wisconsin, Inc., 2005 WI 93 at ¶¶ 35, 133-140; *Robertson Transp. Co. v. Pub. Serv. Comm'n*, 39 Wis. 2d 653, 659, 159 N.W.2d 636 (1968). As explained in *Bracegirdle v. Board of Nursing*, cited by Petitioners, "'[d]ue process in an administrative proceeding is really a question of the presence or absence of 'fair play.'" 159 Wis. 2d 402, 416, 464 N.W.2d 111 (Ct. App. 1990) (quoting *Union State Bank v. Galecki*, 142 Wis. 2d 118, 126, 417 N.W.2d 60 (Ct. App. 1987)). Petitioners fail to explain how the requirement of fundamental fairness in proceedings before the Commission in any way dictates or informs the standard by which the Commission makes its final determinations pursuant to statute following the conclusion of those proceedings.

There is no need for this Court to review the court of appeals' decision due to a constitutional question, as no real constitutional question has been presented in the Petition. Petitioners seek for this Court to insert words into a statute in pursuit of establishing "procedural safeguards" in a delegation of legislative power to the Commission, while ignoring the clear procedural safeguards already inherent to the statute. Petitioners' nonsensical contentions alleging constitutional violations are baseless and it is unnecessary for this Court to take up review of such contentions.

II. A DECISION FROM THIS COURT IS NOT NECESSARY TO DEVELOP, CLARIFY, OR HARMONIZE THE LAW.

Wisconsin Stat. § 809.62(1r), which provides the criteria for granting supreme court review, states that this Court considers whether "a decision . . . will help develop, clarify, or harmonize the law." Wis. Stat. § 809.62(1r)(c). That consideration is not enough on its own. The statute also requires such a case to satisfy one of the conditions of subsections 1. through 3:

1. The case calls for the application of a new doctrine rather than merely the application of well-settle principles to the factual situation; or
2. The question presented is a novel one, the resolution of which will have statewide impact; or
3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

Wis. Stat. § 809.62(1r)(c).

This Petition does not satisfy any of these criteria. As demonstrated below, this case is merely the application of well-settled principles to a unique factual situation. This is not a novel case. In fact, the Commission's special expertise in administering Wis. Stat. § 196.491, and granting CPCNs, has long been recognized by Wisconsin courts. *See*, *e.g., Clean Wisconsin, Inc.*, 2005 WI 93 at ¶ 45; *Town of Holland v. Pub. Serv. Comm'n of Wis.*, 2018 WI App 38, ¶27, 382 Wis. 2d 799, 913 N.W.2d 914;

Wisconsin Power & Light Co. v. Pub. Serv. Comm'n of Wis., 148 Wis. 2d 881, 888, 437 N.W.2d 888 (Ct. App. 1989). Finally, as indicated by Petitioners' lengthy recitation of a cherry-picked selection of the facts in this matter, it is evident that their dispute relies heavily upon the factual situation. The petition does not simply present a question of law that requires resolution by this Court—particularly as this matter involves well-settled principles this Court has ruled on previously.

A. This Case Involves the Application of Well-settled Principles to a Specific Factual Situation.

The Commission is an independent agency to which the Legislature has granted broad authority "to supervise and regulate every public utility in this state and to do all things necessary and convenient to its jurisdiction." Wis. Stat. § 196.02(1); *Clean Wisconsin, Inc.*, 2005 WI 93 at ¶ 6. As noted above, the Commission has special expertise, recognized by Wisconsin courts, in administering Wis. Stat. § 196.491. The principles relied upon by the Commission in its determinations in the present matter—recognized and affirmed by the court of appeals below—are long-standing interpretations applying Wisconsin law as is routine and customary in proceedings

involving the issuance of a CPCN. The statutes the Commission applied in making its determinations, and the statutes governing the courts' subsequent review of those determinations are unambiguous. Wisconsin case law interpreting those statutes provides additional, consistent support to this textual clarity. The court of appeals correctly interpreted and followed those statutes and case law. No further development, clarification, or harmonization is necessary from this Court.

1. Substantial Evidence is the correct standard of review.

As noted by Petitioners, the court of appeals agreed with the circuit court and the Commission that the Commission's determinations in the underlying docket must only be supported by substantial evidence. As the court of appeals notes, Wis. Stat. § 196.491 does not mention, or assign, a burden or standard of proof for the Commission to apply when reviewing an application for a CPCN. The statute instead requires an applicant to establish, to the Commission's satisfaction, that it should receive a CPCN. Pet-App-3. Upon judicial review, the Commission's determinations are upheld as long as they are reasonable and supported by substantial evidence. *See* Wis. Stat. § 227.57(6). Notably, as mentioned above, other provisions

in Chapter 196 do explicitly assign both a burden and a standard of proof—which are absent from both Wis. Stat. § 196.491 and the related Wis. Stat. § 196.49.[2]

Wisconsin Stat. § 196.491 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."

The substantial evidence test "is not weighing the evidence to determine whether a burden of proof test 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, 321-22, 287 N.W.2d 844 (Ct. App. 1979) (emphasis added). Nor does substantial evidence mean

[2] *See*, *e.g.,* Wis. Stat. §§ 196.499(5)(am), 196.499(5)(d), 196.504(8), 196.54(2), 196.64(2); *see also* Wis. Stat. § 196.49.

a preponderance of the evidence. *Town of Holland v. PSC*, 2018 WI App 38 at ¶ 22. The substantial evidence test requires only that there be enough evidence for a finding to be reasonable. *Kitten v. State of Wis. Dept. of Workforce Dev.*, 2002 WI 54, ¶ 5, 252 Wis. 2d 561, 644 N.W.2d 649 ("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.").

A 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 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). There is no legal basis, in statutory or case law, to suggest that the standard by which a court reviews the Commission's determinations differs from the standard by which the Commission makes those determinations.

Petitioners, however, argue just that as a basis for their Petition—that the court of appeals erred, and this Court must correct, when it did not insert a standard of proof into Wis. Stat. § 196.491 by which the Commission must make its determinations. Such a standard would then be inapplicable in a subsequent court's review of those determinations.

Petitioners allege that *Reinke v. Personnel Bd.*, 53 Wis. 2d 123, 191 N.W.2d (1971), supports their position as the court in that matter found that a "preponderance of the evidence" standard was appropriate even though the statute at issue did not set forth a burden of proof. *See* Pet. at 24. However, *Reinke* is inapplicable to the current matter as the Commission has previously explained and the court of appeals previously, and correctly, recognized. *Reinke* involved the discharge of a civil service employee and a subsequent Personnel Board proceeding. 53 Wis. 2d at 126-30. While Petitioners allege that the *Reinke* court "looked to other closely related statutes" to determine an applicable burden of proof, that court actually reviewed the Charter of the City of Milwaukee, and the description for the applicable burden for dismissal of a civil service employee in that document, to inform the burden it set forth in *Reinke*. *See id.* at 137.

The *Reinke* court found that the substantial evidence test is limited to judicial review of administrative determinations, but in making such a finding it relied upon, and quoted, *Robertson Transp. Co. v. Pub. Ser. Comm'n*, 39 Wis. 2d 653, 159 N.W.2d 636 (1968), which states that preponderance of the evidence "tests are not applicable to administrative findings and decisions." *See Reinke*, 53 Wis. 2d at 134-36 (quoting *Robertson Transp. Co.*, 39 Wis. 2d at 658). The court of appeals in this matter explained that "*Reinke* is materially distinguishable" as "the Commission is not functioning as a quasi-judicial review board" and is instead "making an initial, legislative-type determination that requires it to consider all of the evidence submitted before it and then decide whether approving a CPCN is in the public interest." Pet-App-14-15.

Such public interest determinations are, as held by this Court, "a matter of public policy and statecraft and not in any sense a judicial question." *Clean Wisconsin, Inc.*, 2005 WI 93 at ¶ 35 (citation omitted). As the court of appeals explained, the personnel board in *Reinke* was not acting in a legislative role, or even acting in the first instance, as the Commission was in this matter. Petitioners seem to allege that the use of a contested case hearing procedure to create a record for the Commission's review in making

its determinations somehow transforms the Commission's determinations regarding public interest into something other than a legislative function. Petitioners do not develop this argument to any convincing degree. But to the extent this Court considers it, there is no basis under Wisconsin law for such a contention. In fact, such a contention is contrary to precedent from this very Court.

A subsequent reviewing court in a petition for judicial review of a Commission decision reviews the Commission's determinations for support by "substantial evidence in the record." Wis. Stat. § 227.57(6). It does not make sense to require the Commission to employ a preponderance of the evidence standard where the reviewing court looks for substantial evidence. Because Commission acts in the first instance, noted by the court of appeals, such a subsequent review by the courts would essentially require the court to reweigh the evidence in the record before the Commission in order to review determinations made under a preponderance of the evidence standard. Such a reweighing of the evidence before the Commission is explicitly precluded by Wis. Stat. § 227.57, which, again, requires review under a substantial-evidence standard.

Unless Petitioners argue for the inapplicability of Wis. Stat. § 227.57(6) to a subsequent court's review of a Commission decision, which they do not, Petitioners' contentions that the Commission should employ a preponderance of the evidence standard, and that this Court should insert such language into Wis. Stat. §196.491, do not make sense under well-settled Wisconsin law. The court of appeals correctly recognized these well-settled principles of Wisconsin law, and correctly refused to insert a standard of proof into Wis. Stat. §196.491, and this Court does not need to review this matter any further.

2. Petitioners misconstrue, and misrepresent, the court of appeals' decision regarding conditional approvals and the legal requirements of a written final decision.

Petitioners take issue with the court of appeals' statement that the Commission "need not address every statutory factor or fully explain why it believes the proposed project meets the standards under the law." Pet. at 22; Pet-App-14. Petitioners allege that the court of appeals misconstrued Wis. Stat. § 196.491(3)(e) in finding that the Commission is allowed to "conditionally approve a CPCN regardless of whether the statutory requirements were met." Pet. at 25; Pet-App-12-13. Petitioners state,

misleadingly, t that the court of appeals found that the Commission can ignore statutory criteria found in Wis. Stat. § 196.491 when approving a CPCN. This argument removes the court of appeals' statements from their context to somehow support this Court adding a standard of proof of "preponderance of the evidence" to Wis. Stat. § 196.491.

The court of appeals' statements regarding conditional approval of an application for a CPCN refer to the approval of an application following the issuance of a number of conditions in a final decision by the agency. —This fact, and the exact wording used, have been previously recognized by this Court. *See*, *e.g., Clean Wisconsin, Inc.*, 2005 WI 93 at ¶ 167. The court of appeals' statements regarding the Commission not needing to address every statutory factor refers to the legal requirements of a written final decision issued by the Commission. The court of appeals explained that "the Commission found that the record supported conditional approval of the CPCN . . . [a]ccordingly, the Commission imposed multiple conditions—approximately seventy in total—that the Applicants were required to meet before they could begin constructing the NTEC." Pet-App-8. It was exactly this type of approval, with conditions issued by the Commission imposing specific requirements on the construction of the applicant's project, that the

court of appeals refers to when it uses the term "conditionally approve." *See* Pet-App-12-13.

The court of appeals also explained that "the Commission is still tasked with weighing the evidence presented to it by the applicant and making findings that are reasonably supported by that evidence" but that "it need not address every statutory factor or fully explain why it believes the proposed project meets the standards under the law." Pet-App-14. The court of appeals went on to state that "[t]here need only be enough evidence in the record and analysis by the Commission such that courts can discern the basis for its decision and reasonableness of it. *Id.* (citing *Clean Wisconsin, Inc.*, 282 Wis. 2d 250 at ¶ 145). These requirements are more fully explained later in the court of appeals' decision when it cites to the same provision of *Clean Wisconsin, Inc.*, stating that "'[t]here is no requirement that the agency provide an elaborate opinion . . . [a]ll 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." Pet-App-19 (quoting *Clean Wisconsin, Inc.*, 2005 WI 93 at ¶ 145).

Petitioners are aware that the court of appeals explained its statements in paragraph 27 of its decision as applying to the written final decision of the agency. Petitioners remove those statements from their greater context to support baseless allegations that the court of appeals found that the Commission can ignore parts of the Wis. Stat. § 196.491. In doing so, Petitioners attempt to transform the court of appeals' application of a well-settled standard into the heedless elimination of all guardrails from the Commission's decision making, but an attentive reading of its decision demonstrates otherwise.

The court of appeals' statements are grounded in Wisconsin law, as well. There is no legal requirement under Wisconsin law that the Commission include separate findings of fact for every fact it relies on in the final decision, nor that the Commission list each statutory element as its own separate conclusion of law. The statement relied on by the court of appeals, in full, issued by this Court, is as follows:

> 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). 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, Inc., 2005 WI 93 at ¶ 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 legal conclusions from evidentiary facts).

It is unclear, and ultimately must be unavailing to this Court, how Petitioners' out-of-context presentation of the court of appeals' statements apply to or support the alleged need for a preponderance of the evidence standard of proof in Wis. Stat. § 196.491. Further, it is readily apparent that Petitioners took the court of appeals' statements regarding the legal requirements for a written final decision, and its statements regarding issuance of an approval with conditions, out of context to allege that such statements constituted a finding that the Commission could freely ignore portions of Wis. Stat. § 196.491. The legal basis for the Commission issuing its final decisions with conditions, including important environmental conditions, and the legal requirements of an agency's written final decisions are well-settled Wisconsin law. That law has been recognized by this Court previously, and is routinely applied by the Commission—the agency with expertise in such matters. The court of appeals, when its statements are read in the context intended in its

decision, ruled based on the correct interpretations of this law and there is no need for this Court to review this matter further.

III. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH CONTROLLING OPINIONS OF THIS OR ANY OTHER COURT.

Petitioners' only contention of conflicting precedent states that "[r]eview is necessary to correct the appellate court's mistaken application of *Clean Wisconsin*, *Inc.*, 2005 WI 93,] to the question of whether applicants seeking a CPCN have a burden of proof to show they are entitled to the permit by a preponderance of the evidence." Pet. at 9. At no point, however, does the *Clean Wisconsin, Inc.* decision assign a burden of proof to Commission proceedings, procedures, or determinations. Instead, it states that the Commission's public interest determinations made under Wis. Stat. § 196.491 are "a matter of public policy and statecraft and not in any sense a judicial question." *Clean Wisconsin, Inc.*, 2005 WI 93 at ¶ 35.

Petitioners further allege that the court of appeals' decision is in conflict with *Clean Wisconsin, Inc.* because *Clean Wisconsin, Inc.* requires that "the [Commission] must comply with *all* of the requirements expressed in . . . [Wis. Stat. § 196.491]." 2005 WI 93 at ¶ 16; *see also* Pet. at 23. As

explained above, Petitioners misconstrue and misrepresent the court of appeals' statement that every statutory factor in Wis. Stat. § 196.491 needs to be addressed—a statement clearly, and correctly, explaining the legal requirements of the Commission's written final decisions. Further, any alleged conflict regarding the court of appeals affirming the Commission's conditions in this matter is also disposed of by *Clean Wisconsin, Inc.* itself, which states that, in that case, the "[Commission] noted that certain [environmental concerns] still required regulatory approvals from the DNR, and therefore, the PSC only conditionally issued the CPCN . . . . 'an agency may assume that any environmental consequences will be controlled through compliance with the applicable administrative code provisions.'" *Clean Wisconsin, Inc.*, 2005 WI 93 at ¶ 167 (citing *State ex rel. Boehm v. DNR*, 174 Wis. 2d 657, 676, 497 N.W.2d 445 (1993)).

Petitioners allege no other conflicts under the law and there is no need for this Court to review the court of appeals' decision to correct any conflict or to bring that decision in line with the law—the court of appeals' decision directly aligns with this Court's controlling precedent.

CONCLUSION

For the foregoing reasons, review and a decision by this Court are not necessary. The Petition here presents no significant questions of administrative law or statutory interpretation, no conflict between the court of appeals' opinion and any binding case law, and no unresolved questions regarding agency procedure or core tenets of separation of powers. This Court should exercise its discretion and deny this Petition.

Dated: December 19, 2024

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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 (8g) and 809.62(4) for a brief produced with a proportional serif font. The length of this brief is 6362 words.

Dated this 19th of December, 2024.

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