FILED
12-19-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

Appeal Nos. 2022AP1106
2023AP120

CLEAN WISCONSIN, INC. AND SIERRA CLUB,

Petitioners-Appellants-Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent-Respondent,

SOUTH SHORE ENERGY LLC AND DAIRYLAND POWER COOPERATIVE,

Interested Parties-Respondents,

v.

MICHAEL HUEBSCH,

Other Party.

RESPONSE BRIEF OF INTERESTED PARTIES-RESPONDENTS SOUTH SHORE ENERGY LLC AND DAIRYLAND POWER COOPERATIVE

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INTRODUCTION

Clean Wisconsin, Inc. and Sierra Club ("Petitioners") seek review of the *unpublished* court of appeals' decision in *Clean Wisconsin, Inc. v. Public Service Commission of Wisconsin*, consolidated appeals Nos. 2022AP1106 and 2023AP120 (Wis. Ct. App. Oct. 8, 2024), affirming the decision of the Public Service Commission of Wisconsin (PSCW or "Commission") to grant a Certificate of Public Convenience and Necessity (CPCN) for the Nemadji Trail Energy Center (NTEC), a proposed gas-fired combined-cycle energy generation facility in Superior, Wisconsin. Contrary to the allegations set forth in the Petition for Review ("Petition"), the Court of Appeals decision ("Decision") reflects nothing more than a routine application of well-established law. The Decision is correct in every respect and raises no constitutional question. Petitioners present issues regarding burden of proof and statutory interpretation, but as both the Court of Appeals and Circuit Court found, the ultimate question upon judicial review of a PSCW decision is simply whether the decision was supported by substantial evidence. It was.

In seeking to invent constitutional questions where none exist, the Petition mischaracterizes, both by omission and commission, the breadth of testimony considered during the proceeding, the PSCW's decision, and the Court of Appeals Decision. In fact, Petitioners had every opportunity to convince the PSCW that their positions should carry the day, that their witnesses were credible, and that their legal

positions were well founded. Their failure to do so was not a violation of the nondelegation doctrine or more general principles of due process. Rather, it was the result of the PSCW considering the entirety of the record and determining that, with conditions, the CPCN should be granted. Pet-App-101.

Petitioners first argue that the court of appeals decision amounts to a violation of the nondelegation doctrine by failing to impose a burden of proof on CPCN applicants. Petitioner's suggestion that this issue necessitates review of Wisconsin's highest court should be taken with a serious grain of salt. Whether or not the CPCN law explicitly assigns a specific burden of proof was a primary issue in the CPCN proceeding. Despite extensive briefing on the issue before the PSCW, the Circuit Court, and the Court of Appeals, Petitioners never once raised the question in constitutional terms during regular briefing. The argument first appeared in Petitioner's motion for reconsideration before the Court of appeals, nearly five years after the CPCN was issued. *See* Pet-App-140. The argument has been waived. Moreover, the existence or non-existence of a specific standard of proof to obtain a governmental approval is not a constitutional issue.

Petitioners next contend that the court of appeals misconstrued Wis. Stat. § 196.491(3)(e), when it found that the CPCN does not impose a specific evidentiary standard on the applicant. However, the Court of Appeals correctly interpreted the CPCN law and relevant

authority and found that there is no proscribed standard of proof. The Decision was correct and further review by this Court is not required.

PROCEDURAL BACKGROUND

In January 2019, Dairyland Power Cooperative and South Shore Energy, LLC (collectively, "Co-Owners") filed an Application for a CPCN to construct NTEC. Pet-App-063. The Application, which was several hundred pages long, included information about nearly every aspect of the proposed facility, including fuel and water consumption, air pollution control equipment, connections to the transmission system, and community, cultural, and natural resource impacts. *See* R. 66–106.[1]

The PSCW determined that the Application was complete on February 15, 2019, and issued a Notice of Proceeding on April 1, 2019. Pet-App-064. Petitioners were both admitted as intervenor parties to the proceeding. *Id.* All parties, including Petitioners, participated in discovery and submitted multiple rounds of written testimony. *Id.* at 064– 65. Co-Owners sponsored testimony from seven experts in various fields including electric generation resource planning, hydrogeology, environmental science, and engineering. *See* R. 44–47, 58–60, 62–63. The Wisconsin Department of Natural Resources (DNR) provided expert testimony from a hydrogeologist, water resource specialist, licensed Professional Engineer, wastewater specialist,

[1] For the sake of consistency, Interested Parties-Respondents will use the same record citation conventions as employed by Petitioners.

endangered species expert, and a wetlands and waterway expert. *See* R. 51–56. PSCW provided expert testimony from internal environmental experts and a Professional Engineer. *See* R. 49–60. Petitioner Clean Wisconsin sponsored expert testimony from an ecologist and Petitioner Sierra Club sponsored testimony from a renewable energy integration and transmission issues expert and a digital strategist. *See* R. 57, 61, 64. In addition to testimony provided relative to the Application itself, the parties provided input and comments during scoping, and on the draft and final Environmental Impact Statements[2] developed by PSCW and DNR staff. Pet-App-095–096.

On October 28 and 29, 2019, the Administrative Law Judge (ALJ) held technical and public hearings on the Application. Pet-App-065. The technical hearing involved testimony from party witnesses and provided an opportunity for examination and cross examination. After the hearings, the parties all filed briefs in support of their positions. *Id.* The PSCW held an open meeting on January 16, 2020, where they discussed the Application and voted to approve the CPCN by a 2-1 vote. The written Final Decision was released on January 30, 2020. In a 68-page opinion, the PSCW weighed the evidence provided by the

[2] Petitioners incorrectly assert that the PSCW must prepare an Environmental Impact Statement (EIS) for all CPCNs. In reality, the PSC and the DNR jointly determine whether preparation of an EIS or an Environmental Assessment is required based on the potential impacts of a given project. Wis. Stat. § 1.11.

various parties and determined conditional approval of the CPCN was appropriate. *See* Pet-App-101.

Petitioners sought judicial review of the CPCN decision, arguing, among other things, that applicants had the burden to prove they satisfied the CPCN criteria by a preponderance of the evidence. *See* Pet-App-042 et seq. On review, the parties again provided briefings and participated in hearings before the Dane County Circuit Court. After considering the parties' arguments and the administrative record, the circuit court affirmed the PSCW's decision on May 17, 2022. Pet-App-042. The circuit court denied Petitioners' motion for reconsideration, and Petitioners then appealed the circuit court's decision. The parties briefed their positions, with Petitioners again asserting that the PSCW erroneously failed to establish and enforce a standard of proof for review of the CPCN Application. When the court of appeals affirmed the PSCW decision, Petitioners filed a motion for reconsideration where they raised, for the first time, the argument that the PSCW violated the nondelegation doctrine by failing to enforce a burden and standard of proof for the CPCN. Pet-App-140. The appellate court denied their motion and Petitioners filed this Petition for Review.

ARGUMENT

The Court should decline to revisit the Decision in this case because neither question raised by Petitioners warrants review. The

unpublished Decision is correct in all respects and raises no unique or compelling constitutional issue.

As a threshold matter, Petitioners have waived any constitutional arguments because they failed to raise the issue of nondelegation in any prior administrative or judicial proceeding or pleading in this matter until its Motion for Reconsideration by the court of appeals. Moreover, the court of appeals clearly and correctly addressed Petitioners' underlying "burden of proof" argument and this Court should allow its reasoning to stand.

Second, the Petition mischaracterizes the Decision in an attempt to establish an error where none exists. In fact, there has been no suggestion from the PSCW or lower courts that a decision to issue a CPCN need not ultimately meet the requirements of Wis. Stat. § 196.491(3)(d) ("the Plant Siting Law"). As purported evidence to the contrary, Petitioners point to the statement in the appellate decision that the PSCW "is expressly allowed to conditionally approve a CPCN application regardless of whether the statutory requirements are met." *See* Pet. for Rev. at 25 (citing Pet-App-012 ¶24). It is clear within the context of the paragraph in question and the opinion more generally that the court of appeals was simply recognizing that a conditional approval is one way the PSCW can reach the determinations required by the Plant Siting Law. Pet-App-012 ¶24, 014 ¶27. This is consistent with prior decisions from this Court on conditional approvals by the PSCW. *See, e.g.*, *Clean Wisconsin, Inc. v. P.S.C.*, 2005 WI 93, 282 Wis. 2d

250, 700 N.W.2d 768. Petitioners, however, ignore that context in favor of an erroneous assertion that the court of appeals misconstrued the statute.

I. The Court Need Not Address the Applicability of the Nondelegation Doctrine

The Court need not address the applicability of the nondelegation doctrine for two reasons. First, Petitioners have waived the issue through their failure to timely raise it before the lower courts. Second, the nondelegation question is a mere reframing of the burden of proof issue that they have unsuccessfully argued in this and other cases. In fact, their position ironically seeks to have the Court *create* standards that are not supported by statute or rule.

A. Petitioners Have Waived the Question of Whether the Nondelegation Doctrine Applies

Petitioners had multiple opportunities to raise this issue, including before the PSCW, the circuit court, and on appeal. They failed to advance any arguments regarding the nondelegation doctrine until their Motion for Reconsideration to the court of appeals. By so doing, they have waived the issue.

"The general rule is that issues not presented to the [lower] court will not be considered for the first time on appeal." *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). "This court has frequently stated that even the claim of a constitutional right will be deemed waived unless timely raised in the [lower] court." *Id.* "Arguments

raised for the first time on appeal are generally deemed forfeited." *Northbrook Wis., LLC v. City of Niagara*, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851.

Here, Petitioners first presented the constitutional arguments as part of their motion for reconsideration of the Decision and, even then, only as support for its quixotic effort to create a specific standard and burden of proof for CPCN reviews. Specifically, Petitioners argue that, "[b]y adopting the Commissioner's position that there is no burden of proof applicable in a contested case proceeding for a CPCN, the Opinion sanctions an overreach by the Commission, well past the safeguards included by the Legislature in the Plant Siting Law that protect the Legislature's exclusive lawmaking authority." Pet. for Rev. at 3.

However, the nondelegation doctrine theory was available to Petitioners from the beginning of their involvement in the contested case process, but they did not raise it during those proceedings. Nor did they raise it at later opportunities—either in their request for judicial review of the CPCN decision or during their initial appeal of the circuit court decision. Although they have consistently promoted the burden of proof issue, the nondelegation doctrine is a new argument that Petitioners have forfeited by failing to raise in earlier proceedings. *Northbrook Wis., LLC*, 2014 WI App 22, ¶20. Consistent with long-standing practice, this Court should find that Petitioners' have waived any claim that the nondelegation doctrine applies.

B. The Nondelegation Doctrine Theory is Without Merit

Petitioners assert that "the court of appeals ran afoul of the nondelegation doctrine by construing the Plant Siting Law to give the PSCW total discretion as to siting decisions without regard to any substantive direction as to *how* they should make such decisions." Pet. for Rev. at 21 (emphasis in original). In additional to being waived, this argument is without merit because the PSCW acted within its authority in this case.

"When . . . the Legislature has laid down [the] fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose." *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 59, 158 N.W.2d 306 (1968) (quoting *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928)). With regard to nondelegation questions, the court "normally review[s] both the nature of delegated power and the presence of adequate procedural safeguards, giving less emphasis to the former when the latter is present. . . . A delegation of legislative power to a subordinate agency will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose." *Panzer v. Doyle*, 2004 WI 52, ¶55, 271 Wis. 2d 295, 680 N.W.2d 666 (quotations omitted).

Petitioners contend that the PSCW's unwillingness to make CPCN applicants prove compliance with the statute under Petitioners'

preferred standards "eliminates the safeguards of legislative power included by the Legislature in its delegation of authority." Pet. for Rev. at 22. According to Petitioners, the court of appeals' decision allows the PSCW to "disregard one or more of the criteria for approving a project set forth by the Legislature entirely." *Id.* Therefore, Petitioners argue, affirming the PSCW was contrary to *Clean Wisconsin,* in violation of the nondelegation doctrine, and "raise[s] serious constitutional concerns." *Id.*

The suggestion that the laws governing consideration and issuance of a CPCN are devoid of either procedural safeguards or discernible purpose is absurd. As the Petition recognizes, at least to some small degree, the PSCW is required to comply with the Wisconsin Environmental Protection Act (WEPA), Wis. Stat. § 1.11, the Energy Priorities Law, Wis. Stat. § 1.12, the Plant Siting Law, and subchapter 2 of Chapter 227 of the Wisconsin Statutes, Wis. Stat. § 227.10 et seq. Those statutes individually, and in the aggregate, clearly demonstrate the process by which PSCW decisions are to be made and the factors that the PSCW is required to consider. The PSCW was required to (and did) hold a contested case proceeding. The PSCW was required to (and did) comply with WEPA by, in this particular instance, preparing an Environmental Impact Statement. The PSCW was required to (and did) consider the various public interest factors set forth in the Plant Siting Law in making both discrete findings and an overall determination that issuing the CPCN was in the public

interest. Petitioner's argument that such a statutory scheme is unconstitutional unless a standard of proof is applied is so poorly developed, it should be rejected without further consideration. Petitioners cite to no case, even by generous analogy, that supports the notion that this type of permitting process is unconstitutional.

Petitioners claim that because that PSCW must "comply with *all* of the requirements" in the Plant Siting Law and "make certain express findings regarding a project," Pet. for Rev. at 23 (quoting *Clean Wisconsin*, 2005 WI 93, ¶16), the PSCW must force an applicant to *prove* that it meets each particular factor listed in the law. But *Clean Wisconsin* creates no such requirement. In fact, rather than focus on an applicant's burden, *Clean Wisconsin* again and again looks only to whether there was substantial evidence and/or a rational basis to support the PSCW's determinations. *See e.g.* Clean Wisconsin, 2005 WI 93, ¶166.

Here, the court of appeals correctly found the Plant Siting Law "does not expressly assign a burden of proof to any party, and it does not specify a standard of proof with respect to determinations the Commission must make to approve a CPCN application."[1] Pet-App-011 ¶22. It points out that the only "burden" on the applicant is to provide sufficient evidence to allow the PSCW to make the necessary determinations under the law. Pet-App-013 ¶26.

Petitioners have failed to show how, in their view, the Decision unlawfully gives the PSCW "total discretion as to siting decisions without regard to any substantive direction as to *how* they should

make such decisions." Pet. for Rev. at 21. Their claim ignores both the substance of the law and its application by the PSCW. In reality, Wis. Stat. § 196.491(3) creates a framework for granting a CPCN and puts the onus on the PSCW to gather sufficient information and conduct whatever analyses are needed—or, in other words, "fill up the details"—to make the various required determinations and meet the various associated statutory requirements within that framework. *See Schmidt*, 39 Wis. 2d at 59. As evidenced by the complex review process and lengthy Final Decision issued by the PSCW in this case, the law establishes sufficient procedural safeguards to ensure that the PSCW's actions meet the law's purpose, and the PSCW fully complied with that law in granting the CPCN.

C. Due Process Does Not Require Court a Burden of Proof

Citing *Bracegirdle v. Board of Nursing*, 159 Wis. 2d 402, 416, 464 N.W.2d 111 (Ct. App. 1990), Petitioners contend that administrative proceedings, such as those held for review of CPCN applications, involve "due process rights, which do not apply to legislative decision-making." Pet. for Rev. at 23. According to Petitioners, due process therefore requires the PSCW to explicitly assign evidentiary burdens to the applicants. This argument fails as well.

Co-Owners do not contest that due process was required, but it is clear from the record that sufficient due process was provided to all parties during the contested case. Petitioners were allowed to intervene in the contested case proceeding, where they submitted

expert testimony, conducted discovery, cross-examined witnesses, submitted written briefs, and participated in the various hearings. They were also able to request judicial review and further appeal judicial decisions not in their favor. Petitioners' attempt to invoke due process to create additional requirements on the PSCW and applicants is entirely without basis.

"The minimum procedural protections required by the Due Process Clause vary depending on the context." *Miller v. Zoning Bd. of Appeals of Vill. of Lyndon Station*, 2023 WI 46, ¶12, 407 Wis. 2d 678, 91 N.W.2d 380. "When legislative actions are at issue, . . . those affected by legislation are not entitled to *any* process beyond that provided by the legislative process." *Id.* ¶14 (quotations omitted; emphasis in original). This Court has previously addressed due process requirements in contested case hearings. For example, in reviewing a DNR contested case proceeding in *Daly v. Natural Resources Board*, 60 Wis. 2d 208, 208 N.W.2d 839 (1973), the Court rejected appellants' claim that "they were not afforded due process or fair play in the hearing as required in a contested case by ch. 227," finding:

> The appellants had notice of hearing, they did appear in person and by counsel, they knew the nature of [the] application, and the statute set forth the standards to be applied. They were permitted reasonable cross-examination and the right to be heard personally and by counsel as to the particulars of their opposition. The DNR did make and file extensive written findings of fact and conclusions of law, together with a specific order. This procedure complies with fair play and due process.

Id. at 218.

Those findings apply exactly to this situation. Petitioners had notice, appeared as intervenors through counsel in person and in writing, were familiar with the Application and applicable legal standards, and were heard at every stage. The PSCW also issued a specific order that included extensive written findings of fact and conclusions of law—many of which explicitly addressed Petitioners' concerns. The contested case process fully satisfied the requirements for such proceedings as outlined and/or approved by the Legislature. Therefore, although the PSCW perhaps did not weigh Petitioners' evidence as favorably as they wanted, due process was satisfied without assigning a specific burden of proof.

D. *Reinke* Does Not Create a Burden of Proof in Contested Cases

As they did before the lower courts, Petitioners point to *Reinke v. Personnel* Board, 53 Wis. 2d 123, 191 N.W.2d 833 (1971), as requiring the PSCW to specifically assign to applicants "the common law burden of proof" in CPCN proceedings. Pet. for Rev. at 24.

Their claims fall flat for several reasons. First, there are multiple rationale set forth by the Decision (and ignored by the Petitioners) for the Court of Appeals finding regarding a burden of proof. In other words, while the Decision addresses *Reineke,* the primary basis for the Decisions' determination that no burden of proof is assigned by the Plant Siting Rule was not reliant upon or controlled by *Reineke*. The

Decision wholistically evaluates the text of the Plant Siting Law, which itself is sufficient to resolve the burden question.

As the Decision correctly notes, you cannot reasonably interpret the text of the law to require a burden of proof because the plain language of the law allows the PSCW to grant a CPCN by (1) passive review; or (2) despite an explicit finding that an application does not meet the criteria of the Plant Siting Law. Decision, ¶ 24-25. A summary review of the plain language of this particular statute is more than enough to conclusively determine that such a statute does not assign a burden of proof.

Moreover, even if the foundation of the Decision rested upon *Reinke,* the Decision properly distinguishes it. In *Reinke*, the State Personnel Board held a hearing to determine whether a state employee was unjustly fired from her position. *Reinke*, 53 Wis. 2d at 125. During the hearing, the Board placed the burden of proof on the employee and found that there was substantial evidence to support the state's decision. *Id.* at 131–134. This Court ultimately overturned the decision, holding that the Board erred by using the substantial evidence test in its review because it "is applicable only on judicial review." *Id.* at 134.

As explained by the court of appeals, *Reinke* involved the actions of the State Personnel Board, a quasi-judicial body that was not functioning in a legislative-type role—unlike the PSCW, so its holdings are generally inapposite to this case. Pet-App-014 ¶29. Moreover, the primary holding of *Reinke* on the burden of proof was

not that one always exists as Petitioners contend. It is that determining whether a burden exists for a particular situation requires interpreting the statute at issue. That is exactly what the Decision does. Pet-App-076–077. It found that there was not.

Consequently, *Reinke* "does not require the imposition of a standard of proof on the Commission when deciding whether it should approve or deny a CPCN application." Pet-App-014 ¶29. To the extent that any part of *Reinke does* apply, it is simply that the Court found no general burden of proof on the "movant" or applicant in an action. In fact, rather than identify a "common law" burden of proof on applicants as Petitioners claim, the *Reinke* court instead found that the state bore the burden of proving that the appellant's discharge was for just cause. *Reinke*, 53 Wis. 2d at 133.

Although Petitioners find it "impossible to square" having a CPCN contested case without assigning applicants a burden of proof, there is no support for its position in statute or legal precedent.

II. The Court of Appeals Correctly Construed Wis. Stat. § 196.491(3)(e)

The second issue Petitioners have requested this Court review is premised on another cherry-picked statement from the court of appeals' decision. Specifically, Petitioners take the statement, "the Commission is expressly allowed to conditionally approve a CPCN application regardless of whether the statutory requirements are met," out of context and use it to claim that the court of appeals misconstrued

Wis. Stat. § 196.491(3)(e). Petitioners go on to assert that the statute instead requires applicants to meet "the requirements of the Plant Siting Law . . . by a preponderance of evidence." Pet. for Rev. at 26. Logical leaps aside, the court of appeals made no error that requires correction.

The court of appeals correctly interpreted and applied Wis. Stat. § 196.491(3)(e). Section (3)(e) gives the PSCW two options when an application does not meet the criteria under Section (3)(d). The first is to reject the application. The second option allows the PSCW to approve CPCN applications "with such modifications as are necessary for an affirmative finding" under Section (3)(d). Wis. Stat. § 196.491(3)(e). In such an instance, the court is correct that the PSCW may *conditionally approve* an application that has not met the requirements by including order points that modify or set conditions on the project to ensure that it meets the requirements of Section (3)(d) prior to being implemented. *See* Pet-App-013 ¶24. Therefore, the PSCW's "conditional issuance" of CPCN approvals is a permissible way under Section (3)(e) that the PSCW may uphold legislative priorities while ultimately ensuring compliance with CPCN requirements. *See Clean Wisconsin*, 2005 WI 93, ¶¶257–61.

Petitioners interpret Wis. Stat. § 196.491(3)(e) as simultaneously prohibiting conditional approval of applications before all statutory requirements are met *and* requiring that the PSCW apply an evidentiary standard to CPCN applications. But the very brief

language of that section lends no support for Petitioners' interpretation, and Petitioners cite to no caselaw that bolsters their claim. By contrast, the court of appeals' opinion carefully analyzes Section (3)(e) in the context of the CPCN law as a whole, and draws from prior decisions, like *Clean Wisconsin*, to reach its conclusions. There is no error that requires review.

CONCLUSION

The court of appeals correctly affirmed the PSCW's decision in the underlying case. Petitioners have not only waived review of whether the case implicates the nondelegation doctrine, they have failed to identify any errors of law in the appellate court's decision. Consequently, this Court should conserve judicial resources and decline additional review.

Dated this 19th day of December, 2024.

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Electronically signed by Justin W. Chasco

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FORM AND LENGTH 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 filed with the Wisconsin Supreme Court. The length of this brief is 4,148 words.

Dated this 19th day of December, 2024.

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