

**BEFORE THE**  
**PUBLIC SERVICE COMMISSION OF WISCONSIN**

Joint Application of Dairyland Power Cooperative,  
Northern States Power Company-Wisconsin, and  
Wisconsin Public Power, Inc. , for Authority to  
Construct and Place in Service 345 kV Electric  
Transmission Lines and Electric Substation  
Facilities for the CapX Twin Cities-Rochester-  
La Crosse Project, Located in Buffalo, Trempealeau,  
and La Crosse Counties, Wisconsin

Docket No. 05-CE-136

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**DAIRYLAND’S RESPONSE TO INTERVENOR PATRICIA CONWAY’S  
FORMAL REQUEST FOR ISSUE TO BE INCLUDED IN PROCEEDING**

Co-applicant Dairyland Power Cooperative (“Dairyland”), by counsel, hereby submits the following response to Intervenor Patricia Conway’s untimely “Formal Request for Issue to be Including in Proceeding.” Dairyland objects to the inclusion of Ms. Conway’s proposed issue because the Public Service Commission of Wisconsin (the “Commission”) does not have jurisdiction to make findings of fact and conclusions of law on the proposed issue, her request is untimely, the proposed issue is immaterial to the proceedings, and alternatively, that the uncontested public record makes it perfectly clear that Dairyland’s corporate powers are not limited as Ms. Conway argues.

**I. INTRODUCTION**

Co-applicants Northern States Power Company-Wisconsin, Dairyland Power Cooperative, and Wisconsin Public Power, Inc. (now known as WPPI Energy, Inc.) submitted an application for a Certificate of Public Convenience and Necessity (“CPCN”) in the above captioned matter on December 21, 2010.

On November 16, 2011, the Commission provided notice (the “Notice”) to all parties of a prehearing conference scheduled for December 5, 2011. The Notice required existing parties,

including Ms. Conway, to meet and confer before December 2, 2011 in order to “either come to an agreement, or be prepared to discuss any disagreement, with respect to the schedule and issues.”

On November 27, 2011, Ms. Conway emailed Commission counsel (with copies emailed to the parties) a proposed issue essentially asking for Commission determination of Dairyland’s cooperative authority. Before the December 2, 2011 meet and confer deadline, the parties did not agree that this issue should be included for consideration by the Commission, as counsel for Dairyland advised Ms. Conway by email.

On December 4, 2011, Ms. Conway emailed Commission counsel and the parties notifying that she would be unable to attend the prehearing conference. Counsel for Dairyland responded early on December 5, 2011 to inform Ms. Conway that Dairyland would formally object to the inclusion of the issue at the prehearing conference. Ms. Conway did not appear at the prehearing conference, and no other party proposed the inclusion of Ms. Conway’s issue. Therefore, the issue was not included in the order contained in the Prehearing Conference Memorandum on December 6, 2011.

Following the prehearing conference, counsel for Dairyland again advised that he would be happy to review with her the entire “Purposes” provision in Dairyland’s Articles of Incorporation and not just the isolated phrase she was focused on, but outside of the context of this proceeding since the matter could not be properly raised in this proceeding. Ms. Conway subsequently electronically filed a “Formal Request for Issue to be Included in Proceeding” on December 12, 2011.

## II. DISCUSSION

### A. The Commission Lacks Jurisdiction to Entertain the Issue

The Commission's authority to regulate utilities is limited to the power bestowed on it by the legislature. Wisconsin courts have held that "[a]s a creature of the legislature, the commission has only such powers as the legislature expressly confers upon it or those that are 'necessarily implied'" by Wis. Stat. Chapter 196. *PSC v. Wis. Bell*, 211 Wis.2d 751, 754 (Wis. App. 1997) (quoting *Wis. Power & Light Co. v. PSC*, 181 Wis.2d 385, 392 (Wis. 1994)). When the question is "whether a power not specifically granted to an agency may nonetheless be implied, [the] inquiry is guided by the rule . . . that '[a]ny reasonable doubt as to the existence of an implied power in an agency should be resolved against the exercise of such authority.'" *Wis. Bell*, 211 Wis.2d at 756 (quoting *Kimberly-Clark Corp. v. PSC*, 110 Wis.2d 455, 462 (Wis. 1983)). Finally, since the Commission's authority is conferred only by statute, it has no inherent or common law powers.

Cooperatives like Dairyland are organized pursuant to Wis. Stat. Chapter 185. Nowhere in the statutes is the Commission expressly given the authority to examine a cooperative's authority provided by Wis. Stat. Chapter 185. In this proceeding, the Commission's express powers are limited to approving or denying a CPCN based on defined criteria set in Wis. Stat. § 196.491(3)(d)1.-8. Noticeably absent from the defined criteria is the power to examine cooperative or corporate authority of any applicant.

Because there is no express grant of authority for the Commission to determine matters regarding a cooperative's authority, whatever authority the Commission has to do so would have to be "necessarily implied" by Wis. Stat. Chapter 196. The Commission has, on occasion, broadened its authority over *public utilities*, based on express statutory authority in Wis. Stat. § 196.02. See, e.g. *Wis. Bell v. PSC*, 2003 WI App. 193, ¶ 10. Wis. Stat. § 196.02(1) provides that

“[t]he commission has jurisdiction to supervise and regulate every *public utility* in this state and to do all things necessary and convenient to its jurisdiction.” (emphasis added). However, cooperatives like Dairyland are explicitly excluded from the definition of “public utility.” Wis. Stat. § 196.01(5)(b)1. Therefore, the Commission’s general jurisdiction over public utilities cannot “necessarily imply” the ability to examine Dairyland’s cooperative powers pursuant to Wis. Stat. Chapter 185.

In fact, Wis. Stat. Chapter 185 provides for *judicial* action for a cooperative member’s derivative complaint (where there is a legitimate legal basis for the complaint). Wis. Stat. § 185.93. Since the legislature did not confer express or implicit authority on the Commission and instead designates judicial review as the appropriate forum, the Commission cannot entertain Ms. Conway’s proposed issue.

**B. Ms. Conway’s Request is Untimely**

Ms. Conway’s request is untimely and should be denied. The Notice stated, “[p]arties will be bound by the designation of issues and the schedule adopted at the prehearing conference.” Ms. Conway was properly informed that the prehearing conference on December 5, 2011, was the only forum in which disagreements between the parties as to the issue list would be determined.

Ms. Conway has not provided good cause why her request is appropriate after the prehearing conference other than that she incorrectly believed her email communications with the parties was sufficient. This ignores the plain language of the Notice, which expressly required the parties to meet and confer before December 2, 2011 in order to “either come to an agreement, or be prepared to discuss any disagreement, with respect to the schedule and issues.” Since Ms. Conway did not discuss the disagreement regarding her request to include her issue at the prehearing conference at the prehearing conference itself, her request after the prehearing

conference is untimely. It was clearly not Staff's or any party's duty to argue for inclusion of Ms. Conway's issue in her absence.

**C. The Proposed Issue is Immaterial to the Proceedings**

Wis. Stat. § 196.491(3)(a) provides that “no person may commence the construction of a facility” without applying for and receiving a CPCN. Dairyland is a “person” as defined in Wis. Stat. § 990.01(26). The proposed issue has no bearing on the defined criteria for Commission determination in Wis. Stat. § 196.491(3)(d), and the Commission may approve a CPCN application by Dairyland. Whether or not Dairyland's actions are *ultra vires* (and they are not) is immaterial to the Commission's general and specific authority. Therefore, Ms. Conway's request should be denied.

**D. Dairyland May Participate in this Project**

While the principal purpose of Dairyland's formation was to furnish energy to its members, the same paragraph in its Articles of Incorporation empowers Dairyland to acquire, own, maintain and operate any generating plants and transmission lines “necessary, convenient or useful for carrying out or accomplishing” the goal of serving its members. See Exh. A, Art. IV, ¶ 1. Dairyland could not effectively serve its members isolated from other utilities. It is necessary, convenient, and useful – operationally, business-wise, and legally – for Dairyland to co-own generation and transmission that incidentally serves utilities and consumers other than Dairyland's members.

Dairyland's Articles of Incorporation also give Dairyland any and all powers permitted under Wis. Stat. Chapter 185. See Exh. A at Art. IV, ¶ 7. There is nothing in Chapter 185 or in the Articles that prohibits Dairyland from co-owning facilities with other utilities or being interconnected with other utilities.

Because Dairyland's Articles of Incorporation unambiguously give Dairyland the ability to participate in this project, there is no factual or legal basis for Ms. Conway's argument – a further reason for denying Ms. Conway's request.

### **III. CONCLUSION**

For the reasons discussed above, Ms. Conway's request should be denied.

**Respectfully submitted this 22nd day of December, 2011.**

/s/ Jeffrey L Landsman

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**EXHIBIT A**

**Dairyland's Articles of Incorporation Article IV – Purposes  
(2 pages)**

ARTICLES OF INCORPORATION  
OF  
DAIRYLAND POWER COOPERATIVE  
(hereinafter called the "Cooperative")

ARTICLE I

Name

The name shall be Dairyland Power Cooperative, and it shall be a membership, nonstock cooperative association.

ARTICLE II

Principal Office

The principal office of the Cooperative in Wisconsin shall be located in the City and County of La Crosse, P.O. Address, 3200 East Avenue South, P.O. Box 817, La Crosse, Wisconsin 54602-0817, and its principal office in the State of Minnesota shall be at the office of its member cooperative Tri-County Electric Cooperative located in the Village of Rushford in the County of Fillmore, P.O. Address, 31110 Cooperative Way, P.O. Box 626, Rushford, Minnesota 55971-0626.

ARTICLE III

Duration

The duration of the Cooperative shall be perpetual.

ARTICLE IV

Purposes

The conduct of the business of the Cooperative shall be upon the cooperative plan and the purposes for which it is formed are:

(1) To generate, manufacture, purchase, acquire, and accumulate electric energy for its members and to transmit, distribute, furnish, sell, and dispose of such electric energy to its members only, in the states of Wisconsin, Minnesota, Iowa, and Illinois, and to construct, erect, purchase, lease as lessee, and in any manner acquire, own, hold, maintain, operate, sell, dispose of, lease as lessor, exchange, and mortgage plants, buildings, works, machinery, supplies, apparatus, equipment, and electric transmission and distribution lines or systems necessary, convenient or useful for carrying out and accomplishing any or all of the foregoing purposes;



(2) to acquire hold, own, use, exercise, and to the extent permitted by law, to sell, mortgage, pledge, hypothecate, and in any manner dispose of franchises, rights, privileges, licenses, rights of way, and easements necessary, useful, or appropriate to accomplish any or all of the purposes of the Cooperative;

(3) to purchase, receive, lease as lessee, or in any other manner acquire, own, hold, maintain, use, convey, sell, lease as lessor, exchange, mortgage, pledge, or otherwise dispose of any and all real and personal property or any interest therein necessary, useful, or appropriate to enable the Cooperative to accomplish any or all of its purposes;

(4) to furnish under contract with any person, partnership, firm, municipality, corporation, or association technical services, including, without limitation because of enumeration, engineering, bookkeeping, auditing, construction, line, and communication equipment repair, and maintenance of distribution systems, meter reading, billing, collecting, financing, and any and all other specialized management or operation services for electrical distribution or transmission firms or companies;

(5) to borrow money, to make and issue bonds, notes, and other evidences of indebtedness, secured or unsecured, for moneys borrowed or in payment for property acquired, or for any of the other objects or purposes of the Cooperative; to secure the payment of such bonds, notes, or other evidences of indebtedness by mortgages, or deeds of trust upon, or by the pledge of or other lien upon, any or all of the property, rights, privileges, or permits of the Cooperative, wheresoever situated, acquired or to be acquired; and

(6) to assist members and members of its member cooperatives to wire their premises and install therein electrical and plumbing appliances, fixtures, machinery, supplies, apparatus and equipment of any and all kinds and character (including without limiting the generality of the foregoing, such as are applicable to water supply and sewage disposal) and, in connection therewith and for such purposes, to purchase, acquire, lease, sell, distribute, install, and repair electrical and plumbing appliances, fixtures, machinery, supplies, apparatus, and equipment of any and all kinds and character (including, without limiting the generality of the foregoing, such as are applicable to water supply and sewage disposal) and to receive, acquire, endorse, pledge, guarantee, hypothecate, transfer, or otherwise dispose of notes and other evidences of indebtedness and all security therefor and to make loans to members to assist them in the construction of their facilities and in the furnishing of their services;

(7) to do and perform, either for itself or its members, any and all acts and things, and to have and exercise any and all powers, as may be necessary or convenient to accomplish any or all of the foregoing purposes, or as may be incidental thereto, or as may be permitted by the Act under which the Cooperative is formed.