

NOCAPX 2020 AND CITIZENS ENERGY
TASK FORCE,

Petitioners,

v.

Case No. 12-CV-3328

PUBLIC SERVICE COMMISSION
OF WISCONSIN,

Respondent.

**RESPONDENT’S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE THE
PETITION FOR JUDICIAL REVIEW**

Contrary to Petitioners’ offensive and baseless accusations, the Public Service Commission’s (Commission) Motion is not an attempt to limit public participation.¹ It is also not about whether Ms. Overland participated in the administrative proceedings before the Commission or SCR 10.03(4)(d). This Motion is about the mandates of SCR 10.03(4)(b) which prohibit a nonresident lawyer to practice before a circuit court regardless of any prior participation in administrative proceedings without the association and participation of a member of the Wisconsin Bar. Neither the Commission nor this Court can ignore these prohibitions which are designed to protect the public—not prohibit their participation:

¹ Rather than provide any authority supporting her position that SCR 10.03(4)(b) does not apply to her, Ms. Overland instead makes baseless attacks upon counsel for the Commission. Ms. Overland’s affidavit should be stricken from the record pursuant to Wis. Stat. § 802.06(6). The entire affidavit should be stricken because it is entirely immaterial and impertinent. The affidavit is almost entirely about Ms. Overland’s perceptions of a scheme to prevent her participation in this case before the Commission. The person named in that affidavit and brief should not be subject to a public record disparaging her professionalism, particularly when those pleadings are irrelevant to the instant dispute.

“The primary purpose of laws controlling the unauthorized practice of law is to protect the public. Statutes and rules that control the unauthorized practice of law assure that the public is not harmed by inadequate or unethical representation.”

Jadair Inc. v. U.S. Fire Ins. Co., 209 Wis. 2d 187, 201-02, 562 N.W.2d 401, 407 (1997)

(interpreting Wis. Stat. § 757.30) (internal citations omitted).

As to the legal question at issue, Petitioners fail to understand that beyond its own halls, the Commission has no say in who may and who may not practice law. There is no debate before this Court as to whether Ms. Overland was permitted to participate before the Commission. She was so authorized and she did participate. But if counsel for Petitioners wants to practice before this Court, she must follow the rules of the Wisconsin Supreme Court. Those rules do not allow a nonresident lawyer to practice before a circuit court without the association and participation of a member of the Wisconsin State Bar. SCR 10.03(4)(b).

Petitioners go to great lengths to establish that Ms. Overland was allowed to practice before the Commission. That fact has never been in dispute. It is simply irrelevant. As Ms. Overland herself noted in her first letter to this Court, practicing before a circuit court “is another matter.”

Despite noting that practicing in court is distinct from practicing before an agency, Petitioners nevertheless contend that the Commission’s administrative law judge (ALJ) can admit their counsel to do both. But ALJs hold no such power.

Petitioners correctly cite to SCR 10.03(4)(b) as allowing *pro hac vice* admission to carry forth to subsequent appeals, but their quotation to the rule is incomplete. Petitioner’s Response, pg. 5. Petitioners omit, without indicating their omission to the Court, the entire first clause of that paragraph. The complete rule provides:

A court or judge in this state may allow a nonresident counsel to appear and participate in a particular action or proceeding in association with an active member of the state bar of Wisconsin who appears and participates in the

action or proceeding. An order granting nonresident counsel permission to appear and participate in an action or proceeding shall continue through subsequent appellate or circuit court actions or proceedings in the same matter, provided that nonresident counsel files a notice of the order granting permission with the court handling the subsequent appellate or circuit court action or proceeding. SCR 10.03(4)(b). (Emphasis added)

In order for a *pro hac vice* admission to carry forth to subsequent appeals, the admission must be granted by a court or judge, not an ALJ. As noted in the Wisconsin Comments to SCR 10.03:

“SCR 60.01 (8) defines ‘judge’ as ‘a justice of the supreme court, a judge of the court of appeals, a judge of the circuit court, a reserve judge, a municipal judge, a court commissioner, and anyone, whether or not a lawyer, who is an officer of the judicial system and who performs judicial functions.’”

ALJs are not officers of the judicial system, but are agents of the executive branch. *See e.g.* Wis. Stat. § 15.79 (establishing the Public Service Commission as part of the executive branch). Supreme Court Rule 10.03(4), Appendix A, also makes it clear that SCR 10.03(4)(b) is limited to orders issued by officers of the judicial branch. Appendix A is the affidavit that is required to be filed with a court in support of application for admission *pro hac vice* under SCR 10.03(4)(b). It requires the affiant to swear “...I agree to abide by the rules of the relevant division of the Circuit Court of the State of Wisconsin and the Wisconsin Court of Appeals...”. SCR 10.03(4), Appendix A ¶ 7. That draft affidavit does not require the affiant to agree to abide by the rules of an agency, such as Wis. Admin. Code ch. PSC 2, because SCR 10.03(4)(b) does not apply to state agency proceedings.

A distinct rule, SCR 10.03(4)(d), allows nonresident attorneys to practice before state agencies:

If representing a party before an agency of this state is limited to lawyers, an administrative law judge or hearing examiner for a state agency may, using the same standards and procedures as a court, allow a nonresident counsel who has been retained to appear in a particular agency proceeding to appear and participate

in that proceeding without being in association with an active member of the state bar of Wisconsin. (Emphasis added)

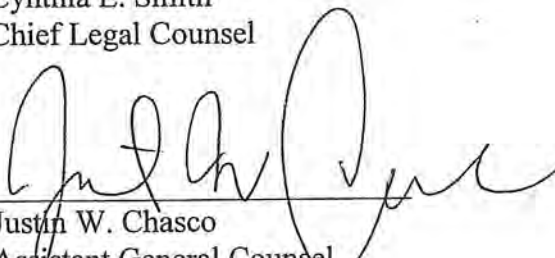
Supreme Court Rule 10.03(4)(d) does not require association with a licensed attorney. Nor does it provide for *pro hac vice* admission to carry forth to circuit courts. *Id.* Petitioners cite no case nor provide any support for their contention that these two distinct rules can be combined. On the other hand, at least one circuit court has found that permission to practice before a state agency is not sufficient to entitle a nonresident lawyer to practice before a circuit court. *SOAR v. DNR*, No. 11-CV-0833 (Wis. Cir. Ct. Marathon County October 10, 2011) (courtesy copy attached).

For all of these reasons, the Commission respectfully requests that the Commission's Motion to Strike the Petition for Judicial Review be granted.

Dated this 17th day of September, 2012.

Respectfully submitted,

Cynthia E. Smith
Chief Legal Counsel



Justin W. Chasco
Assistant General Counsel
State Bar No. 1062709

PUBLIC SERVICE COMMISSION
OF WISCONSIN
610 North Whitney Way (53705-2729)
P.O. Box 7854
Madison, WI 53707-7854
Tel. No.: (608) 266-3708
Fax. No.: (608) 266-3957
E-mail: justin.chasco@wisconsin.gov

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 5

MARATHON COUNTY

SAVE OUR AIR RESOURCES,
PAUL SCHWANTES and
ROBERT HUGHES,

Petitioners,

v.

Case No. 11-CV-0833

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent,

and

WISCONSIN ELECTRIC POWER COMPANY
DOMTAR PAPER COMPANY, LLC, and
LIGNOTECH USA, INC.,

Intervenors.

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ORDER OF DISMISSAL

Petitioners brought this action seeking judicial review of a decision by the Department of Natural Resources not to act on petitioners' request to the Division of Hearings and Appeals for a contested case hearing on an air permit for a renewable energy cogeneration project in Rothschild. Respondent Department of Natural Resources moved to dismiss the petition because the Petition was untimely and it was not signed by an attorney licensed to practice in Wisconsin. The court heard the motion on September 29, 2011.

At the hearing, petitioners appeared by Attorney Dennis M. Grzezinski, with Attorney Margaret E. Sheehan present by telephone; respondent Department of Natural Resources appeared by Assistant Attorney General JoAnne F. Kloppenburg; and intervenors Wisconsin Electric Power Company appeared by Attorney Daniel Conley, Domtar Paper Company, LLC, by Attorney David J. Gilles, and LignoTech USA, Inc., by Attorney Russell Wilson.

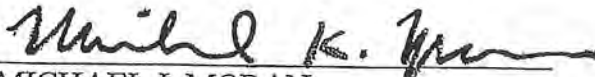
At the hearing, based on all of the parties' pleadings, briefs and submissions, and having reviewed the parties' arguments and the applicable statutes and case law, the Court issued an oral ruling granting the Department's motion to dismiss, finding that petitioners failed to follow strict statutory requirements and that the petition for judicial review was untimely filed and was not signed by an attorney licensed to practice in Wisconsin, thereby depriving the Court of jurisdiction and competency to proceed.

Accordingly, for all the reasons stated by the Court at the September 29, 2011, hearing, IT IS ORDERED that the Department's Motion to Dismiss is GRANTED and that the Petition for Judicial Review is DISMISSED.

This is a final Order under Wis. Stat. § 808.03(1).

Dated this 10th day of October, 2011.

BY THE COURT:


MICHAEL J. MORAN
Circuit Court Judge, Branch 5