STATE OF WISCONSIN | CIRCUIT COURT BRANCH 3 | LA CROSSE COUNTY

TOWN OF HOLLAND,

Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF WISCONSIN

Case No.: 15-CV-219
Including former La Crosse County *Case* Case *No.: 15-CV-379*

INITIAL BRIEF OF THE TOWN OF HOLLAND

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INTRODUCTION

A high voltage transmission line imposes heavy impacts. Costs are high. The Applicants here can expect to spend nearly $640 million before they have to notify the Public Service Commission ("PSC" or "Commission") of any "possible change or cost increase."[1] The lines inevitably blight the landscape.[2] Acquiring land rights to build such lines entails burdening property rights of constitutional dimension[3] by forcing[4] landowners to host transmission lines they never wanted. Land use plans that communities adopt to protect aesthetic beauty and environmental amenities are pushed aside.[5]

Unsurprisingly, proposals that entail such costs and impacts are controversial, and the law limits Certificates of Convenience and Necessity ("CPCNs" or "Certificates") that authorize such Projects to circumstances

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[1] The approval cites a cost of $581,433,000.00; Applicants can expect to exceed that amount by 10%, more than $58 million, before having notify the Commission of the cost overrun. (Decision, pp. 56-57, Order Points 1 and 2)

[2] The State makes special efforts to control and limit such blight in areas where aesthetics are recognized to be important, e.g., along the scenic lower Wisconsin River (Wis. Stat. § 196.491(3)(d)3m)

[3] Wis. Const., Art. I, Sec, 13 US Const. Amend V.

[4] The certificate challenged here allows the private entities building the Project to exercise the "extraordinary" government power of eminent domain. Wis. Stat. § 32.07(1). *TFJ Nominee Trust v. DOT*, 2001 WI App 116, P10, 244 Wis. 2d 242, 629 N.W.2d 57 (citing *Miesen v. DOT*, 226 Wis. 2d 298, 304, 594 N.W.2d 821 (Ct. App. 1999)); see also *Shepherd Legan Aldrian Ltd. v. Vill. of Shorewood*, 182 Wis. 2d 472, 478, 513 N.W.2d 686 (Ct. App. 1994).

[5] Wis. Stat. § 196.491(3)(i) over-rides local ordinances. (" . . . in Wis. Stat. § 196.491(3)(i) the legislature has expressly withdrawn the power of municipalities to act, once the PSC has issued a certificate of public convenience and necessity, on any matter that the PSC has addressed or could have addressed in that administrative proceeding." *Am. Transmission Co., LLC v. Dane Cty.*, 2009 WI App 126, ¶2, 321 Wis. 2d 138, 140, 772 N.W.2d 731, 733

where "need"[6] has been demonstrated after the proposal has undergone a "rigorous"[7] review of impacts.

There is no need for the Project. "Need" exists when a transmission line must be constructed to provide an "adequate supply" of electricity. Wis. Stat. § 196.491(3)(d)2. Adequate means "sufficient" or "enough." Under the CPCN law, need is measured by the whether the proposed Project is required to maintain service under reasonably foreseeable, albeit unusual, problematic conditions. The standards that embody those conditions were not implicated here.

The Project was never even *presented* as needed to provide an adequate supply of electric energy. Instead, the record of this case reflects intense disagreement as to whether the Project is a good idea for reasons *other than* providing an adequate supply. Some of those other reasons have to do with additional criteria in the CPCN law. Irrespective, "scoring well" on other criteria does not obviate the pivotal statutory requirement that the proposed Project must be needed to provide an adequate supply of electric energy.

The PSC explicitly acknowledged that this project is not needed to solve an "adequacy of supply" problem. In approving it anyway, the PSC had

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[6] See, e.g., *Clean Wis., Inc. v. PSC of Wis.*, 2005 WI 93, ¶124, 282 Wis. 2d 250, 345, 700 N.W.2d 768, 814, describing the procedures that come into play when a facility " . . . is 'in the public interest' and is *necessary* to 'satisf[y] the reasonable needs of the public for an adequate supply of electric energy,' . . ." (Emphasis supplied).

[7] *Wis. Indus. Energy Grp. v. PSC of Wis.*, 2012 WI 89, ¶80, 342 Wis. 2d 576, 618, 819 N.W.2d 240, 260

to ignore both the English language works, and plain logic.

Compelling objective information, derived from a source that is not an applicant, nor an advocate, nor an opponent, also indicates the Project is not economically beneficial to ratepayers.

The Environmental Impact Statement developed for the Docket is insufficient. It does not facilitate informed decision-making and informed public participation, both of which are required functions of the document. Its insufficiency flows partly from failing categorical imperatives. It did not comparatively analyze the "no action" or "do nothing," alternative – which would have left the electrical system adequate under the law while avoiding the Project's costs and impacts; it did not designate, or "study, develop and describe" the "environmentally preferable" alternative; and it did not create a "record of decision. The EIS's insufficiency flows also, in part, from deferring to the Project's Applicants with respect to key issues. The Applicants have a vested financial and institutional interest in the outcome. They are not, and should not be expected to be, an objective source of information.

Failing to develop and describe alternatives led to failures to sharply define the issues with objective information so that the public and decision makers would be confronted with a clear choice in considering whether to make the irretrievable commitment of economic, community and environmental resources embodied in the Project.

If the Project, which aims to increase energy imports, were to be built, the law requires it to be co-located with other transmission lines to the

degree “practicable.” The approved Project falls far short of this requirement, with the result being unwarranted impacts on the Town of Holland.

NATURE OF THE CASE

The court is judicially reviewing the PSC's decision ("Decision" or "Final Decision" [Record No. 91]) to grant a Certificate for Public Convenience and Necessity ("CPCN") in PSC Docket No. 5-CE-142 following a required contested case proceeding, and the PSC's decision to deny a petition for rehearing. (Record No. 107)

This case involves a 345-kilovolt ("kV") high voltage transmission line, a "facility"[8] within the meaning of the CPCN law (Wis. Stat. § 196.491). As a "facility" it could not be built without a CPCN:

> Except as provided in sub. (3b), no person may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity under this subsection." Wis. Stat. § 196.491(3)(a)1

Facilities requiring a CPCN can only be approved after a Wis. Stat. § 227.44 "contested case" hearing: Wis. Stat. § 196.491(3)(b). Parties are allowed to seek rehearing (Wis. Stat. § 227.49), which occurred in this case. Parties can obtain review of both the contested case decision and the rehearing decision. Wis. Stat. § 227.53. The court's review is guided by Wis. Stat. §§ 227.52 to 227.57, and related cases. Scrutiny varies with the type of issue and the nature of the PSC's experience with it. The court's review of the

[8] (e) "Facility" means * * * a *high–voltage transmission line*. * * * (f) Except as provided in subs. (2) (b) 8. and (3) (d) 3m., "high– voltage transmission line" means a conductor of electric energy exceeding one mile in length designed for operation at a nominal voltage of 100 kilovolts or more, together with associated facilities, and does not include transmission line relocations that the commission determines are necessary to facilitate highway or airport projects. Wis. Stat. § 196.491(1) (e) and (f)

EIS is guided by the “rule of reason.”

STANDARD OF REVIEW

Wis. Stat. § 227.57 sets forth the scope of review in agency judicial review. Factual and legal questions are treated separately. Wis. Stat. § 227.57(3). If the PSC erroneously interpreted or applied the law, the court must set aside, modify or remand the action for further proceedings under a correct interpretation of law. Wis. Stat. § 227.57(5). The court must reverse or remand the PSC's action if the PSC's exercise of discretion is outside the range of discretion delegated to the agency. Wis. Stat. § 227.57(8). It must do the same if the fairness of the proceedings or correctness of the action was impaired by a material error in procedure, or a failure to follow prescribed procedure, *id*. § 227.57(4).

The PSC, like all agencies, is a "creature of the legislature" and is bound by the limits of its statutory authority. *Wis. Power & Light Co. v. PSC*, 181 Wis.2d 385, 392, 511 N.W.2d 291 (1994). See also:

> "As 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 the statutes under which it operates, specifically, chapter 196 Stats." *State Public Service Commission v. Wisconsin Bell, Inc*., 211 Wis.2d 751 at 754, 566 N.W.2d 496 at 498 (Ct. App. 1997).
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> * * *
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> 'Any reasonable doubt as to the existence of an implied power in an agency should be resolved against the exercise of such authority.' " Id. 211 Wis.2d at 756, 566 N.W.2d at 499.

For questions of law and interpretation, the Court ordinarily exercises

de novo review. *Racine Harley-Davidson, Inc. v. DHA*, 2006 WI 86, ¶11, 292 Wis. 2d 549, 717 N.W.2d 184. When an administrative agency has misinterpreted a statute, it is owed no deference because such misinterpretation is an erroneous exercise of discretion:

> "A tribunal abuses its discretion when it proceeds on an erroneous view of the law."
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> *DOR v. Sentry Fin. Servs. Corp.,* 161 Wis.2d 902, 910 n. 7, 469 N.W.2d 235 (Ct.App.1991)

Reviewing courts independently decide issues having to do with the extent of the agency's authority:

> "The extent of [an] agency's statutory authority is a question of law which we review independently and without deference to the agency's determination." *Andersen v. DNR*, 2011 WI 19, ¶25, 332 Wis. 2d 41, 796 N.W.2d 1.
>
> *Andersen v. DNR*, 2011 WI 19, ¶25, 332 Wis. 2d 41, 796 N.W.2d 1

See also: *Wis. Bell, Inc. v. PSC*, 2004 WI App 8, ¶38, 269 Wis. 2d 409, 675 N.W.2d 242 ("we give no deference to the Commission's determination of its own authority"), *aff'd*, 2005 WI 23, 279 Wis. 2d 1, 693 N.W.2d 301, *reconsid. denied*, 2005 WI 134, 282 Wis.2d 724, 700 N.W.2d 276, *Wis. Ass'n of Manf. & Commerce, Inc. v. Pub. Serv. Comm'n of Wis.*, 100 Wis. 2d 300, 309-10, 301 N.W.2d 247 (1981) (If the agency has insufficiently explained its decision or the basis for its decision, the court affords no deference and should remand the matter.)

Challenged agency holdings are "entitled to one of the following three levels of deference: great weight deference, due weight deference or no

deference." *County of Dane v. LIRC*, 2009 WI 9, ¶14, 315 Wis. 2d 293, 759 N.W.2d 571. Levels of deference have been summarized thus by the Supreme Court:

> Because statutory interpretation is a question of law, a court is never bound by an agency's interpretation of a statute. Hutson v. State Personnel Com'n, 2003 WI 97, P31, 263 Wis. 2d 612, 665 N.W.2d 212. Nevertheless, a court will under certain circumstances give deference to an agency's statutory interpretation. Id.; Racine Harley-Davidson v. State, 2006 WI 86, P11, 292 Wis. 2d 549, 717 N.W.2d 184.
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> [P28] In Racine Harley-Davidson, we clarified the three levels of deference to be accorded to an agency's interpretation of a statute: no deference, due weight deference, and great weight deference. 292 Wis. 2d 549, PP12-20. These three levels take into account the comparative institutional qualifications and capabilities of the court and the administrative agency. Id., PP13-14.
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> [P29] A reviewing court accords an agency's statutory interpretation no deference when the issue is one of first impression, when the agency has no experience or expertise in deciding the legal issue presented, or when the agency's position on the issue has been so inconsistent as to provide no real guidance. Id., P19. When no deference to the agency decision is warranted, the court interprets the statute independently and adopts the interpretation that it deems most reasonable. Id.
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> [P30] A reviewing court accords due weight deference when the agency has some experience in an area but has not developed the expertise that places it in a better position than the court to make judgments regarding the interpretation of the statute. Id., P18. When applying due weight deference, the court sustains an agency's interpretation if it is not contrary to the clear meaning of the statute--unless the court determines that a more reasonable interpretation exists. Id.
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> [P31] Finally, a reviewing court accords great weight deference when each of four requirements are met: (1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency's interpretation is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. Id., P16. When applying great weight deference, the court will sustain an agency's reasonable statutory interpretation even if the court

> concludes that another interpretation is equally or more reasonable. Id., P17. The court will reverse the agency's interpretation if it is unreasonable--if it directly contravenes the statute or the state or federal constitutions, if it is contrary to the legislative intent, history, or purpose of the statute, or if it is without a rational basis. Id.
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> [P32] Whichever level of deference is granted, the reviewing court does not abdicate its own authority and responsibility to interpret the statute. Id., P14; Hutson, 2003 WI 97, 263 Wis. 2d 612, P31, 665 N.W.2d 212. In assessing the agency's interpretation, the court must itself interpret the statute to determine whether the agency's interpretation is reasonable. Racine Harley-Davidson, 2006 WI 86, 292 Wis. 2d 549, P15, 717 N.W.2d 184. It is only under the great weight deference standard that the agency's specialization and expertise is so extensive that the court views the agency's interpretation as the one to adopt even if it is not the most reasonable one.
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> *MercyCare Ins. Co. v. Wis. Comm'r of Ins.,* 2010 WI 87, ¶¶27-32, 328 Wis. 2d 110, 126-28, 786 N.W.2d 785, 793-94

The difference between the "due weight" and great weight standards has been explained as follows:

> ". . . a more reasonable interpretation overcomes an agency's interpretation under due weight deference, while under great weight deference, a more reasonable interpretation will not overcome an agency's interpretation, as long as the agency's interpretation falls within a range of reasonableness.
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> *UFE Inc. v. Labor and Industry Review Com'n* 548 N.W.2d 57, 201 Wis.2d 274, FN 3 (1996)

To fall within a range of reasonableness, the interpretation, it is fundamentally necessary that an agency interpretation comport with the objective of the law:

> "…this court has the power in the first instance to determine whether the standard or policy choice used by the agency is consistent with the purpose of the statute. If upon consideration, we determine that a particular rule is inconsistent with legislative purpose, we must reject alternative rules regardless of whether they are 'reasonable' or grounded in administrative expertise."

> *Milwaukee Transformer Co. v. Industrial Commission* 22 Wis.2d 502, at 511, 126 N.W.2d 6, at 11 (1964).

When reviewing factual determinations, courts apply the "substantial" evidence" test, i.e., if the record reflects evidence that is "relevant, probative, and credible, and which is in a quantum that will permit a reasonable factfinder to base a conclusion upon it" then the factual findings will be upheld. *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54, 330 N.W.2d 169 (1983). Aware of the deference accorded to factual determinations, agencies may try to characterize legal conclusions or mere preferences as factual findings in order to evade meaningful review. However:

> "[A] mislabeled [agency] finding [of fact or law] will be treated by the reviewing court as what it is rather than what it is called." *Connecticut General Life Insurance Co. v. DILHR*, 86 Wis. 2d 393, 405, 273 N.W.2d 206 (1979) (footnote omitted).
>
> "The mere fact that it is denominated a finding of fact does not make it such or prevent its being found to be a conclusion of law." *Voswinkel v. Industrial Commission*, 229 Wis. 589, 597, 282 N.W. 62 (1939)

The petition also challenges the sufficiency of the Environmental Impact Statement ("EIS"). Wis. Stat. § 1.11. Like the statute itself, PSC rules incorporate-by-reference the federal standards known as "CEQ (Council on Environmental Quality") Guidelines:

> The environmental analysis shall be consistent with the regulations issued by the U.S. council on environmental quality, 40 CFR Parts 1500 to 1508.
>
> PSC 4.30(1)(a) Wis. Admin. Code.

The law governing how-to-review the sufficiency of an EIS is

complicated, but, basically, the court has to determine whether the agency has sufficiently complied with relevant guidance criteria so as to have clearly delineated the comparable environmental costs and impacts of the Project *in comparison with alternatives*. Although review of the PSC's conclusion that the EIS is sufficient is reviewed under the "great weight deference" standard,[9] the court must make an analysis of the reasonableness of the PSC conclusion, taking into consideration the purpose of the law. The law has been well-summarized recently by the Eastern District of Wisconsin. The federal district summary is relevant to state law:

> Because WEPA was patterned after the National Environmental Policy Act (NEPA), federal cases interpreting NEPA are persuasive authority for the interpretation of WEPA.[10]
>
> Wis.'s Envtl. Decade, Inc. v. Pub. Serv. Com., 105 Wis. 2d 457, 464, 313 N.W.2d 863, 866 (Ct. App. 1981)

The Eastern District's summary is as follows:

> The Supreme Court has noted that the National Environmental Policy Act has "twin aims." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983). First, NEPA forces government agencies to "consider every significant aspect of the environmental impact of a proposed action." *Id.* (internal quotation marks omitted). Second, NEPA mandates that government agencies inform the public of the

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[9] "The PSC's determination of EIS adequacy will be sustained if it is "merely ... reasonable," and the burden of proof is on CUB to show that the PSC's determination of adequacy is unreasonable.[Citation omitted]. An interpretation is unreasonable only if it directly contravenes the words of a statute, if it is clearly contrary to legislative intent or it is without a rational basis.

Citizens' Util. Bd. v. PSC, 211 Wis. 2d 537, 552-53, 565 N.W.2d 554, 562 (Ct. App. 1997)

[10] "WEPA" refers to the Wisconsin Environmental Policy Act, Wis. Stat. § 1.11.

potential environmental impacts of proposed actions and explain how their decisions address those impacts. *Id.*; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989) (observing that NEPA "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision"). *Citizens' Comm. to Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1021-22 (10th Cir. 2002)

Before proceeding further, it is important to identify the standards that a court must apply when determining whether an EIS satisfies NEPA. The Supreme Court and Seventh Circuit have stated that "the only role for a court [in the NEPA context] is to insure that the agency has taken a 'hard look' at environmental consequences." Kleppe, 427 U.S. at 410 n.21; Environmental Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm'n, 470 F.3d 676, 682 (7th Cir. 2006); Highway J, 349 F.3d at 953. However, "[w]hat constitutes a 'hard look' cannot be outlined with rule-like precision," Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174, 185 (4th Cir. 2005), and it is a standard that "is not susceptible to refined calibration," Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001) (internal quotation marks and citation omitted). Rather than apply a rigid standard, a court must make a "pragmatic judgment" as to whether the agency has fostered the two principal purposes of an EIS: "informed decision-making and informed public participation." Id. In making its pragmatic judgment, a court must be careful not to "'flyspeck' an agency's environmental analysis, looking for any deficiency, no matter how minor." Nat'l Audubon Soc'y, 422 F.3d at 186. With a document as complicated and mired in technical detail as an EIS, it will always be possible to point out some potential defect or shortcoming, or to suggest some additional step that the agency could have taken to improve its environmental analysis. An EIS is unlikely to be perfect, and setting aside an EIS based on minor flaws that have little or no impact on informed decision-making or informed public participation would defy common sense. Thus, rather than getting bogged down in possible technical flaws, a court must "take a holistic view of what the agency has done to assess environmental impact." Id. Further, courts must remember that it is the agency, and not the court, that has the technical expertise required to perform the environmental analysis in the first place. This means that judicial review of an EIS must be deferential, especially when it comes to the scientific and technical details that make up the heart of the analysis. Citizens for Alternatives to Radioactive Dumping v. Dep't of Energy, 485 F.3d 1091, 1098 (10th Cir. 2007) (judicial deference is "especially strong" where decision involves technical or scientific matters within agency's area of expertise). Of course, deferential review does not mean no review, and courts must ensure that agencies carry out their duties under NEPA, make reasoned choices, and provide a discussion that fully

and frankly explains the environmental consequences of a proposed action. However, to strike a [1026] proper balance between deference and a "searching and careful" inquiry, Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989), a court may invalidate an EIS only if, after first learning what is going on so that it does not decide on the basis of superficial beliefs and assumptions, the court is firmly convinced that an error or omission in the EIS has defeated the goals of informed decision-making and informed public participation. Cf. Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 803 (7th Cir. 1987). Again, this standard of review is not precise, but requires that the court exercise good judgment.

Habitat Educ. Ctr., Inc. v. United States Forest Serv., 593 F. Supp. 2d 1019, 1025-26 (E.D. Wis. 2009)

ANALYSIS

A. The Project is not needed.

This is not a close case. The threshold question is whether there is a need. Need is defined by statute. The PSC recognized, and then independently reconfirmed, that the proposed Project did not meet the statutory criterion for need.

Need is a lynchpin consideration.

A Project warranting a Certificate under the CPCN statute must demonstrate that it is required in order to "satisf[y]" the need for an "adequate supply of electric energy." Wis. Stat. § 196.491(3)(d)2. The PSC has acknowledged this requirement to be an "important threshold determination:"

> An important threshold determination the Commission must decide is whether or not there is a need for the generation facilities proposed by WEC and its subsidiaries. Wisconsin's Power Plant Siting Law requires that a proposed facility satisfy "the reasonable needs of the public for an adequate supply of electric energy" in order to receive a CPCN. Wis. Stat. § 196.491(3)(d)2.
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> 2003 Wisc. PUC LEXIS 693, *18, 228 P.U.R.4th 444, 228 P.U.R.4th 444 (PSC Docket No's. 05-CE-130; 05-AE-118, November 10, 2003 ["ERGS"]).

Courts also acknowledge the singular importance of the "need – adequate supply" criterion:

> Under Wis. Stat. § 196.491(3)(d)2.-3., the PSC can approve an application for a CPCN filed by a public utility only if "the proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy"

> *Clean Wis., Inc. v. PSC of Wis.,* 2005 WI 93, ¶141, 282 Wis. 2d 250, 352, 700 N.W.2d 768, 817

If a proposed Project is not required for the system to be "adequate" with respect to "supply," then it does not qualify under the CPCN law. This requirement is unique to the CPCN statute.[11]

For a transmission line proposed under the CPCN law,[12] PSC rules indicate that assertions of "need" are to be tested by considering factors that bear on "adequate supply:"

A CPCN application for a high-voltage transmission line is not complete until the applicant has filed all of the following information with the commission:

> 1) Need. The need for the proposed project, including all planning criteria, assumptions, historical outage data, stability, and power-flow studies that address need.
>
> PSC 111.55 Wis. Admin. Code

In the case of a *different* recent transmission proposal under the CPCN law - a Project that also addressed the La Crosse area and that is generally referenced as "CapX" - the Commission, in its decision, acknowledged the

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[11] Noting that it was superfluous to make findings with respect to "need" in a decision under Wis. Stat. § 196.49, Commissioner Azar, in a concurrence, noted the difference:

> This finding of fact identifies that the project "satisfies the reasonable needs of the public for an adequate supply of electric energy. " Final Decision at 2. This is not a requirement under the CA statute, but rather it is a requirement under the CPCN statute, Wis. Stat. § 196.491(3)(d)2.
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> 2009 Wisc. PUC LEXIS 403, *25, FINAL DECISION, PSC Docket No.: 6680-CE-173, June 30, 2009.

[12] The PSC has chosen to also issue CPCNs under the "CA" statute (Wis. Stat. § 196.49), but the Statute does not subject those Certificates to the same criteria.

primacy of the question of whether the proposed Project was needed in order to provide "adequate supply":

> The issues for hearing, as determined during the December 5, 2012, prehearing conference, were:
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> 1. Is a 345 kV transmission line needed to satisfy the reasonable needs of the public for an adequate supply of electric energy?
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> 2012 Wisc. PUC LEXIS 168, *4, FINAL DECISION, PSC Docket No. 5-CE-135, May 30, 2012, p. 3 ("CapX")

By way of contrast, no such issue was acknowledged in the "Badger-Coulee" decision challenged here.

The CapX decision, unlike the one under challenge here, reflected analysis undertaken to analyze whether the proposed Project is "needed" to ensure an "adequate supply of electrical energy:"

> Normal transmission system operation requires that an outage of a single transmission element or equipment component (transformer, transmission line, or generator) not imperil the transmission system. This operating mode is based on the N-1 criterion, or the ability of the transmission system to sustain operation with the failing of one element. The sudden unplanned failure of a transmission system element is called a contingency event. NERC Operating System Guidelines require that an area transmission system continue to operate successfully in the event of the failure of two transmission system elements. Such a failure of two elements is called an N-2 contingency. The applicants identified an N-2 critical contingency that limits load serving capability to 430 megawatts (MW) in the La Crosse local area. The applicants state that additional electric infrastructure is needed to provide local area load serving capability for local area customer loads greater than 430 MW.
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> 2012 Wisc. PUC LEXIS 168, *14 (FINAL DECISION, Public Service Commission of Wisconsin Docket No. 5-CE-136, May 30, 2012, pp. 9-10)

In CapX, load growth verified independently by PSC staff indicated that

failing to add transmission would likely lead to a violation of transmission system standards within the ordinary planning time frame. Consequently, the PSC, in that case, noted that:

> " . . . it is undisputed that the La Crosse local area needs require additional electric infrastructure to *provide adequate system reliability*."
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> 2012 Wisc. PUC LEXIS 168, *20, FINAL DECISION, Public Service Commission of Wisconsin Docket No. 5-CE-136, May 30, 2012, p. 14).

By way of contrast, in *this* case, "adequate system reliability," i.e., "adequate supply" under the law, was never in question.

1. The PSC explicitly recognized there exists no need for the Project.

The Final Decision challenged here includes no reference to potential N-2 contingencies or other "adequate supply" problems because the Project does not resolve, and was never directed at such problems. As the Final Environmental Impact Statement ("EIS" or "FEIS" Record No. _____) notes with respect to this project:

> "[T]he applicants are not proposing the Badger Coulee project 'as a reliability project to address identified concerns that violate system planning criteria.'" (FEIS, p. 70, quoting from the Revised Application, p. 28)

The PSC decision confirms that the project is not needed to ensure "adequate supply:"

> Although *the record does not support the need for the proposed Badger-Coulee project* solely on the basis of the La Crosse area load serving needs, the record clearly establishes that the proposed project will provide substantial reliability benefits to the La Crosse area electric grid. These *reliability benefits, coupled with the other benefits* identified in this Final Decision, more than *substantiate the*

> *need* for this project. (Emphasis provided)
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> 2015 Wisc. PUC LEXIS 199, 321 P.U.R.4th 291, 321 P.U.R.4th 291, FINAL DECISION, PSC Docket No. 05-CE-142, April 23, 2015, p. 16.

This statement amounts to an admission, by the PSC, that substantial evidence does not support a conclusion that the project "satisfies the reasonable needs of the public for an adequate supply of electric energy." (Wis. Stat. § 196.491(3)(d)(2), Wis. Stat. § 227.57(6)). Lacking such evidence, the PSC nonetheless posits that "need" can be "substantiated" by "benefits." The proposition is untenable. Retrospectively imputing "need" because a project will create a "benefit" is a result of confused, or perhaps wishful, thinking, and well beyond the field of discretion allowed to the PSC. Wis. Stat. § 227.57(8).

2. The rationalization the PSC constructed to approve the Project is logically untenable.

The PSC's says that "benefits" "substantiate" need. This formulation does not work logically. In the English language, a benefit, i.e., an advantage, by definition, *cannot*, in itself, "substantiate" a "need."

To "substantiate" means to "prove."

Need" can be "substantiated" only by *proving* that a "need" exists. Under the CPCN standard, a transmission project can only be needed to ensure "adequate supply" if facts demonstrate "supply" to be "inadequate." If "supply" is "adequate," then its "adequate," and you cannot "need" more. Whether supply is inadequate turns on whether there exist problems that require additional transmission in order to ensure adequate supply. The

existence of such problems is tested by investigating questions such as "what transpires in the case of an N-2 contingency."

Benefits are *not* what you look at to determine the answer to the binary question of whether a proposed Project is, or is not, needed to ensure "adequate supply." You look at whether "supply" is "inadequate." When the PSC looked at that question, it identified no inadequacy.

If you were to decide that, though there is no "need – adequate supply" issue, you will nonetheless add transmission, then that transmission might create "benefits." It might, e.g., make the system even more resilient than needed under reliability criteria; it might facilitate more energy transfer. Such benefits, however, neither establish that the system was "inadequate," nor show compliance with the CPCN law's requirement that a proposed Project must be needed to ensure "adequate supply."

By definition, an expected "benefit" does not, and cannot, *prove* a need. A benefit is an "advantage" that is "realized" or "achieved." Whether a benefit is realized or achieved is *irrelevant* to whether the action creating the benefit was undertaken to meet a "need." Meeting a need is always beneficial. But, not every benefit arises as a consequence of meeting a need.[13] The claimed

[13] Suppose a boy posits to his father that there exists a "need" to go to a baseball game because "I can get popcorn there." This is not a need. However, suppose *also* that the boy's mother is being dropped off at the stadium by a work friend, and is planning to meet the father and son at the game to get a ride home. This latter circumstance creates a "need" to go to the baseball game because the boy's mother a) is entitled to the service, and b) is depending on a "reasonable supply of promised spousal transport services," in the form of a ride home. Being able to get popcorn is a "benefit," of going to the game, but the ability to get popcorn does not, in itself, establish a need. Benefits, by themselves, are *categorically incapable* of "substantiating" a need.

benefits of this Project have to do with something other than alleviating an "inadequacy of supply" problem. They cannot, therefore, substantiate the existence of such a problem.

3. During a proceeding that *overlapped the Docket at issue here,* the PSC reconfirmed the lack-of-necessity for the Project

During the pendency of the PSC Docket, the PSC strenuously argued to the Federal Energy Regulatory Commission that the long term needs of the La Crosse area had been wholly addressed by the CapX line. FERC summarized the PSC argument as follows:

> The Wisconsin Commission states that after a contested case process--which involved a voluminous record, three days of technical hearings, and two days of public hearings in the project areas--it granted the Twin Cities -- La Crosse Line a Certificate of Public Convenience and Necessity, authorizing construction of the project as a single project. In doing so, the Wisconsin Commission states that it considered and balanced numerous concerns raised by Complainants regarding the public need of the project. The Wisconsin Commission notes that its final decision discusses at length the local reliability needs of the La Crosse area that justified a 345 kV line as "the best alternative to address the long-term needs of the La Crosse area, while also providing regional benefits."
>
> Citizens Energy Task Force v. Midwest Reliability Org., 144 F.E.R.C. P61,006, 61022, 2013 FERC LEXIS 1130, *29, 2013 WL 3962217, 2013 FERC LEXIS 1130, 2013 WL 3962217 (F.E.R.C. 2013)

In lieu of need here, the PSC asserts this Project provides reliability "benefits," beyond what is needed, and provides other benefits. This is not the same as identifying a need for the Project in order to ensure "adequate supply."

4. The CPCN law precludes Project approval.

When the PSC grants a CPCN it simultaneously decides to require ratepayers to bear the costs of the related Project. Every decision to bind ratepayers to a Project carries risk because the future cannot be predicted with certainty. Growth in energy consumption, for example, may not materialize; technology may change; projects believed-to-be needed may be canceled for other reasons.

The people in whose interest utility law is to be interpreted are the ratepayers:

> "[T]he primary purpose of public utility laws in this state is the protection of the consuming public."
>
> *GTE North Inc. v. Public Serv. Comm'n.*, 176 Wis. 2d 559, 568, 500 N.W.2d 284, 288 (1993).

The consuming public does not need the Project in order to obtain an adequate supply of electric energy. Because the Project, according to the PSC itself, is not needed to provide "adequate supply," the Project cannot qualify for a CPCN.

By tying "need" to "adequacy of supply," the CPCN law limits the conditions under which the PSC is allowed to impose financial risks on ratepayers. For statutory (Wis. Stat. § 196.491) CPCN projects, the law allows the PSC to put ratepayers at risk *only when it has to*, i.e., where there exists an adequacy-of-supply issue. Absent such a need, the PSC cannot impose financial risks on ratepayers, authorize the use of eminent domain that will burden property rights of constitutional dimension, entitle

Companies to over-ride local land use plans, or impose the myriad social, economic and environmental burdens that make transmission line proposals so controversial.

This is not something the PSC can alter without a change to the CPCN law. The law is not ambiguous. Although no deference is owed the PSC, the Project fails under any standard of review. As set out in discussion of the standard of review, *supra*., no standard of review relieves the court of the obligation to interpret a statute, and an agency interpretation has to be reasonable. An agency interpretation that is unreasonable cannot be sustained, irrespective of deference. An agency interpretation will not be accepted when:

> " . . .the agency's interpretation directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis.
>
> *State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 699-700, 517 N.W.2d 449 (1994) (citing *Lisney v. Labor & Industry Review Com.*, 171 Wis. 2d 499, 506, 493 N.W.2d 14 (1992)).

When there is no "need" justification the law does not allow the PSC to conscript ratepayers into what is, at best, a gamble entailing risks that could exceed $600 million, in the hope of securing desired "benefits".

5. Under any standard of review, the CPCN is unwarranted.

No weight is accorded an agency interpretation if any of three conditions are present:

> We give no deference to an agency interpretation when any of the following is true: (1) the issue before the agency is clearly one of first

> impression; (2) a legal question is presented and there is no evidence of any special agency expertise or experience; or (3) the agency's position on an issue has been so inconsistent that it provides no real guidance.
>
> *DaimlerChrysler Servs. N. Am. LLC v. Wis. Dep't of Revenue*, 2006 WI App 265, ¶9, 298 Wis. 2d 119, 126-27, 726 N.W.2d 312, 316 *citing Zip Sort, Inc. v. DOR*, 2001 WI App 185, PP11-14, 247 Wis. 2d 295, 634 N.W.2d 99.

"Due weight" deference is accorded if the agency has some experience. Under "due weight" the court will adopt and apply an interpretation different from the agency's whenever the alternative interpretation is more reasonable than the agency's. id at ¶8.

"Great weight deference," i.e., the highest deference, allows a reasonable agency interpretation to control even when it is not the most reasonable one. To be entitled to such deference, an agency interpretation must meet *all* of four criteria: the agency must 1) be charged with administering the statute; 2) employ its specialized knowledge in formulating the interpretation; 3) and assert a long-standing interpretation that will 4) provide uniformity and consistency in application of the statute. id. at ¶ 7.

6. The PSC is not entitled to deference on its interpretation of the "need - adequate supply" criterion.

The PSC's illogical equation of "benefits" with "need" is so flawed that it does not even seem to qualify as an interpretation of a law. However, if it were to qualify as an interpretation, it would be entitled to no deference.

a. Concluding that a need existed when the PSC had determined the Project was not needed for "adequate supply," did not involve application of special expertise.

The PSC's application of expertise was in its determination that there was no need for the project. There is no evidence of the PSC applying its expertise when it eschewed logic to equate "benefits" with "need." It would not even be possible. Any exercise of the PSC's discretion is bounded by logic:

> The exercise of discretion "contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards."
>
> *Shuput v. Lauer*, 109 Wis.2d 164, 177-78, 325 N.W.2d 321 (1982)

Equating "benefits" with "need" does not entail logic; it is instead a substitute for logic. Thus, the PSC decision is entitled to no deference.

b. The PSC's application of the need statute in transmission cases has been entirely inconsistent and often illogical.

Deference to an interpretation requires that it be longstanding and consistent. The "interpretation" of the CPCN law to the effect that "benefits" can substitute for "need" – if it can be called an interpretation – has no precedent. A review of the PSC's practices in transmission cases over the last eight years shows its application in transmission line cases to be entirely without consistency. Thus, in a transmission case in 2008 the PSC recognized the central importance of the need issue:

> Under Wis. Stat. § 196.491(3)(d)2., in order to grant a CPCN for the project, the Commission must find that the proposed project satisfies the reasonable needs of the public for an adequate supply of electric energy.
>
> 2008 Wisc. PUC LEXIS 44, *7-8, PSC Docket No. 137-CE-146, January 23, 2008 ("Fitchburg-Verona")

However, in a matter contemporaneous to Fitchburg-Verona, known colloquially as "Paddock-Rockdale," the "need – adequate supply" criterion went missing. There, the PSC omitted need for adequate supply from its description of the Project's purposes, instead identifying "access to energy alternatives" and "the ability to energy" as project justifications.

Although it never explained where it might derive authority to bypass the "need – adequate supply" criterion, the PSC, in the Paddock-Rockdale decision, did recognize it was doing something unprecedented:

> The proposed Paddock-Rockdale project is the first project to be considered by the Commission which will be constructed primarily for economic purposes. As such, the standards applied in considering whether to approve, modify, or deny the project must be different than those that would be applied to typical projects that are needed for reliability purposes. In particular, the Commission determines that the following requirements must be met for it to authorize construction of projects for economic purposes:
>
> - The project must clearly have economic benefits.
> - If the project also has reliability benefits, those benefits should be clearly identified in the application.
>
> 2008 Wisc. PUC LEXIS 293, *8-9; FINAL DECISION, PSC Docket No. 137-CE-149, June 13, 2008, p. 6. ("Paddock-Rockdale)

The Paddock-Rockdale holding that asserts the notion that a two-part standard could be used as a substitute for the "need – adequate supply" criterion was not reviewed by a court. *This case, the one before this court now,* is the *first* time that the PSC's authority to substitute some other standard for the statutory "need – adequate supply" has been challenged in judicial review.

The PSC did not adopt its Paddock-Rockdale criteria as a rule.[14] It should have, because the PSC both a) presented the new standard as criteria the PSC would apply in lieu of the statutory "need – adequate supply" criterion, and b) indicated the new standard would apply generally. Adopting this standard as a rule would have given the legislature and the public a statutorily mandated opportunity for input.[15] Wis. Stat. §§ 227.10(1) & 227.01(13) The PSC's novel substitute for the CPCN law's "need-adequate supply" criterion would have been tested to determine whether it "is explicitly required or explicitly permitted by statute . . ." Wis. Stat. § 227.10(2m) (2m). If adopted, it could have been challenged through judicial review. Wis. Stat. § 227.40. That challenge would have involved de novo review of whether the rule was beyond the PSC's authority:

> [W]e apply a de novo standard in "'exceeds statutory authority' cases under Wis. Stat. § 227.40(4)(a)." [citation omitted] Therefore, we will not defer to an agency's interpretation on questions concerning

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[14] "[W]hen the department changed its interpretation of [the legislation], it was engaging in administrative rule making. Those who are or will be affected generally by this interpretation should have the opportunity to be informed as to the manner in which the terms of the statute regulating their operations will be applied.... This is accomplished by the issuance and filing procedures of [Chapter 227, Wisconsin Statutes.]" *Schoolway Transp. Co. v. Div. of Motor Vehicles, Dep't of Transp.*, 72 Wis. 2d 223, 237, 240 N.W.2d 403, 410 (1976). 72 Wis. 2d at 237, 240 N.W.2d at 410.

[15] Under WIS. STAT. § 227.10, any statement of general policy or interpretation of a statute adopted to govern enforcement or administration of that statute must be promulgated as a rule. A "rule" is a standard of "general application" having the "effect of law" that an agency issues to "implement, interpret or enforce specific legislation the agency enforces or administers." Wis. Stat. § 227.01(13). A rule is created when an agency applies newly-announced criterion with future applicability, or changes a standing interpretation. *Frankenthal v. Wis. Real Estate Brokers' Bd.*, 3 Wis. 2d 249, 257, 89 N.W.2d 825, 827 (1958); *State ex rel. Clifton v. Young*, 133 Wis. 2d 193, 200, 394 N.W.2d 769, 772–73 (Ct. App. 1986). Establishing a rule requires a formalized process. See Wis. Stat. §§ 227.10–227.30; *Cholvin v. Wis. Dep't of Health & Family Servs.*, 2008 WI App 127, ¶21, 313 Wis. 2d 749, 759-60, 758 N.W.2d 118, 123

> the scope of the agency's power.
>
> *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't of Nat. Res.,* 2004 WI 40, ¶13, 270 Wis. 2d 318, 334, 677 N.W.2d 612, 620

For the same reason, the PSC's notion that it can substitute some other standard for the statute's "need – adequate supply" criterion is subject to *de novo* review here. Though the PSC did not promulgate the Paddock-Rockdale "rule," it did apply it again, in a case where it again ignored the "need - adequate supply" issue. (See: 2012 Wisc. PUC LEXIS 137, PSCW Docket No. 137-CE-161, May 07, 2012. ("PLP-ZEC").

Then, in the CapX CPCN decision (discussed extensively above), the PSC returned to the "need - adequate supply" criterion.

Then, in this Docket, *neither* the "need – adequate supply" criterion *nor* the Paddock-Rockdale standard is addressed; instead, "benefits" are invoked as adequate to establish need.

While the PSC was ignoring the statutory criterion in *this* case, the PSC addressed the "need – adequate supply" issue at length in a contemporaneous docket, where it highlighted already-experienced outages and other adequacy-of-supply impairments in a decision issued within a month of the decision challenged here. 2015 Wisc. PUC LEXIS 231, Public Service Commission of Wisconsin Docket No. 137-CE-166, May 21, 2015, (Bay Lake).

The statute imposes the CPCN law's "need – adequate supply" criterion for all cases. It is not optional. The statutory requirement cannot exist *only* for those CPCN proceedings where the PSC deems it convenient. Nor can the PSC just make it up alternate criteria as it goes along, generating whatever

criteria seems to go along with what it wants to do, or, as here, eschewing criteria completely, and simply asserting a logically untenable claim that "benefits" equate to a "need."

7. The issue of whether the PSC can approve a Project not needed to provide an "adequate supply" of electricity implicates the PSC's authority; no deference is due on an issue of agency authority.

As noted, asserting some new standard in place of the statutory "need – adequate supply" criterion, or asserting the right to eschew criteria altogether in favor of simple preference, is functionally the same as adopting a new rule. Failing to establish the standard as a rule is a failure to follow a required procedure. Wis. Stat. § 227.57(4). It also raises an issue of agency authority that is reviewed *de novo*.

By granting a CPCN for a Project that does not respond to a "need - adequate supply" issue, the PSC has arrogated to itself power that it does not have - - the power to over-ride an explicit statutory criterion because it thinks it has a good idea on other grounds. It does not have this authority. It possesses neither authority to promulgate an alternative to the "need – adequate supply" criterion of the CPCN statute and nor authority to change the standard without promulgating a rule.

Courts do not accord agencies deference with respect to a question of agency authority:

> The extent of an agency's statutory authority is a question of law. Thus, courts owe no deference to an agency's determination concerning its own statutory authority. [Citations omitted].
>
> *Wis. Power & Light Co. v. Pub. Serv. Comm'n*, 181 Wis. 2d 385, 392-93,

511 N.W.2d 291, 293-94 (1994)

8. The court should vacate the PSC decision; there is no point in remand.

Wis. Stat. 227.57(5) states that:

> The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

The statutory language binding "need" to "adequate supply" is plain. The PSC has recognized that that linkage does not exist for the proposed Project. Under these unique circumstances, no purpose is served by remanding the matter to the PSC. Under a correct interpretation of the law, there is no further action to take. "No need" cannot be transmuted into "need." The court should set aside the PSC CPCN decision, and vacate the decision without remand.

B. Even the insufficient economic rationale for the project was proven untenable by the rehearing filing.

In light of the agency's central obligations to ratepayers, it was an abuse of discretion not to reopen the hearing based on the petition that triggered the second appeal here.

That reopening petition demonstrated to the Commission that the Paddock-Rockdale project, previously approved under an "economic" justification, i.e., without need, was costing ratepayers money, not saving it because energy use fell, instead of grew, in the 2008 – 2013 time frame. (Record Nos. 78 -80; CETF-SOUL PETITION FOR REHEARING, May 13, 2015,

p. 2).

The failure of that "economically justified" transmission upgrade to deliver benefits demonstrates, and reinforces the wisdom of, the statutory limit that prevents the PSC from risking ratepayer money when there exists no "need – adequate supply issue.

The rehearing petition presented data from the only "experts," the Energy Information Administration, who were *both* referenced in the proceeding as authoritative,[16] and who disinterested in the outcome – neither applicants, nor advocates, nor opponents.

In light of the PSC's obligations to ratepayers, it was an abuse of discretion not to grant rehearing.

C. The EIS is insufficient.

The PSC EIS is inadequate because it fails to develop alternatives to a reasonable degree of comparability, fails to comparatively analyze those alternatives and the proposed project against the objectives of relevant environmental laws and policies, is not objective – in that it defers repeatedly to the Project advocates instead of objectively developing its analysis, and completely fails to develop, or even designate, the "environmentally preferred alternative" or the required "record of decision." These failures make EIS deficient to well past the point of unreasonableness.

In 1971, the year after the federal government enacted the National

[16] Final Environmental Impact State ("FEIS") Record No. _____, p. 67.

Environmental Policy Act (NEPA),[17] Wisconsin enacted the Wisconsin Environmental Policy Act (WEPA). Wis. Stat. § 1.11. WEPA is patterned on NEPA. *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 79 Wis.2d 161, 174, 255 N.W.2d 917, 925 (1977) ("*WED II*"). WEPA specifically recognizes that:

> "it is the continuing responsibility of this state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state may:
>
> "(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> "(b) Assure safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
>
> "(c) Attain the widest range of beneficial uses of the environment while attempting to minimize degradation, risk to health or safety, or other undesirable and unintended consequences;

Federal law construing NEPA is persuasive authority on WEPA issues. *WED II*, 79 Wis.2d at 174. The PSC, by rule, requires its analysis to be consistent with the the Federal Council on Environmental Quality's ("CEQ's") "CEQ Guidelines," 40 C.F.R. pts. 1500-1508. As required, the PSC had an Environmental Impact Statement ("EIS" prepared in this matter. WEPA's purposes are broad. An EIS must contain a "detailed statement" addressing:

> The environmental impact of the proposed action;
>
> Any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> Alternatives to the proposed action;

[17] Sec. 102 of the National Environmental Policy Act of 1969, codified at 42 USC § 4331

> The relationship between local short-term uses of the environment and the maintenance and enhancement or long-term productivity;
>
> Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented; and
>
> Details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages and disadvantages of the proposal.
>
> See: Wis. Stat. § 1.11.

NEPA and WEPA exist to force environmentally protective action by ensuring well-developed environmental evidence is part of the decision making process:

> "The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government." 40 CFR § 1502.1
>
> "The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's 'action-forcing' purpose in two important respects. See *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97, 103 S.Ct. 2246, 2252, 76 L.Ed.2d 437 (1983); *Weinberger v. Catholic Action of Hawaii/Peace Education Project,* 454 U.S. 139, 143, 102 S.Ct. 197, 201, 70 L.Ed.2d 298 (1981). It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."
>
> *Robertson v. Methow Valley Citizens Council* 490 U.S. 332, 349, 109 S.Ct. 1835, 1845 (1989)

To ensure environmental impact information is developed, and the environmental considerations are properly addressed, the CEQ guidelines, and thus the PSC rules, required the PSC to prepare a "record of decision"

which: (i) identifies "all alternatives considered by the agency in reaching its decision," (ii) indicates the "environmentally preferable," alternative(s), and (iii) states "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted" and if not, why not. 40 C.F.R. § 1505.2(b) and (c).

The comparative analysis of alternatives, including the "no action" alternative and the "environmentally preferable alternative(s)" are key, because they enable the public and the decision maker to understand what is at stake:

> Several courts have found the description of alternatives to be the heart of the environmental impact statement. *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 350 (8th Cir. 1972); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972); *I-291 Why? Association v. Burns*, 372 F. Supp. 223, 247 (D. Conn. 1974), aff'd, 517 F.2d 1077; *see also*, 40 CFR sec. 1502.14.
>
> *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Soc. Services*, 130 Wis. 2d 56, 73, 387 N.W.2d 245, 252 (1986)

Identifying the environmentally preferable alternative, developing it to a point of reasonable comparability, and presenting the "sharp" comparison are not optional. All alternatives, including the "environmentally preferable" alternative(s), the "no action" alternative, and other viable alternatives have to developed to a point of comparability so that the public and decision makers have a clear understanding of the choices:

> [The EIS] should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. Guidelines, §15.02(14)

> The purposes of this "study, develop and describe" requirement is to assure that alternatives are adequately explored in the initial decision-making process, to provide an opportunity for those removed from that process to evaluate the alternatives, and to provide evidence that the mandated decision-making process has taken place. [Citations Omitted]
>
> *Wisconsin's Environmental Decade, Inc. v. Public Service Commission* 79 Wis.2d 161, 175 - 176, 255 N.W.2d 917, 926 (1977) (WED II)

Alternatives must be "*rigorously explore(d)* and *objectively evaluate(d)*." (Guidelines, §1502.14(a)). Alternatives have to be *explored in enough detail* "so that reviewers may evaluate their comparative merits." (Guidelines, §1502.14(a)). Alternatives that must be analyzed within EIS include "alternatives not within the jurisdiction of the lead agency." (Guidelines, §1502.14(c)).

Within a decade of NEPA's passage, courts had adopted the notion that the "purpose and need" of the proposal itself influences the range of alternatives that have to be considered beyond the "no action" or "do nothing" alternative. Such a framework, of course, incentivizes advocates of a proposal to ensure that the "purpose and need" is defined to be indistinguishable from the characteristics of the proposal itself - thus effectively precluding the kind of meaningful analysis of alternatives called for by the law and the CEQ Guidelines.

In *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058 (9th Cir. 2010) the court addressed the question of whether the "purpose and need" - - which defines the range alternatives to be analyzed - - is appropriately delimited by the private objectives of the proposal's proponent:

> Agencies enjoy "considerable discretion" to define the purpose and need of a project *Friends of Southeast's Future v Morrison*, 153 F.3d 1059, 1066 (9th Cir 1998) However, "an agency cannot define its objectives in unreasonably narrow terms" *City of Carmel-By-The-Sea v. United States Dep't of Transp*, 123 F.3d 1142, 1155 (9th Cir 1997) As the Friends court stated, "An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Friends*, 153 F.3d at 1066 (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196, 290 U.S. App. D.C. 371 (D.C. Cir. 1991), cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991)) (correction in original). We evaluate an agency's statement of purpose under a reasonableness standard. Id. at 1066-67.
>
> Nat'l Parks & Conservation Ass'n v. BLM, 606 F.3d 1058, 1070 (9th Cir. 2010)

The court noted that the majority of the goals identified in the "purpose and need" segment of the challenged EIS were those of the private entity applicant. *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1063 (9th Cir. 2010). This circumstance is reproduced here, where need, as defined by the statutory requirement of adequate supply, was not analyzed *at all* in the FEIS, and the summary of purposes instead reflects the interests of the Applicant:

> Commission staff's analysis of project need is ongoing. The need for the proposed Badger Coulee project is and will continue to be a subject of scrutiny throughout the Commission's review process including during the public and technical hearings.
>
> The applicants' stated purposes for the Badger Coulee transmission line project are to: 1) improve electric system reliability locally and regionally; 2) deliver economic savings for Wisconsin utilities and electric consumers; and 3) expand infrastructure to support the public policy of greater use of renewables. The analysis of need provided in the project application relied heavily on the planning process of the Midcontinent Independent System Operator (MISO).
>
> FEIS, p. XIX

In *Nat'l Parks* the court addressed whether the agency had identified a proper scope of alternatives to be developed. The court noted that the challenged agency " . . . has promulgated no regulations emphasizing the primacy of private interests." *Id.,* 606 F.3d 1058, 1071 (9th Cir. 2010). Correspondingly, the primary purpose of public utility law, and the PSC's central obligation, is protection of the consuming public.[18]

In determining whether the "purpose and need" definition, and thus the range of alternatives subject to review, private interests, in the form of the character of the proposal, are taken into account, but do not control:

> Our task is to determine whether the BLM's purpose and need statement properly states the BLM's purpose and need, against the background of a private need, in a manner broad enough to allow consideration of a reasonable range of alternatives.
>
> *Id.,* 606 F.3d at 1071

An agency's "purpose and need" obligations are shaped by its charge from the legislature, not just the parameters asserted by a private interest applicant:

> Friends and Carmel-By-The-Sea forbid the BLM to define its objectives in unreasonably narrow terms. The BLM may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives, yet that was the result of the process here.
>
> *Id.,* 606 F.3d at 1072.

Paraphrasing from another case, the court noted that purpose and

[18] *GTE North Inc. v. Public Serv. Comm'n.*, 176 Wis. 2d 559, 568, 500 N.W.2d 284, 288 (1993).

need have to take into account the responsibilities assigned to the agency by the legislature:

> [A]gencies must look hard at the factors relevant to the definition of purpose. . . . Perhaps more importantly [than the need to take private interests into account], an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives.
>
> *Id.,* 606 F.3d at 1070.

The PSC's obligations, in addition to placing the consuming public first, include environmental obligations. The legislature has precluded the PSC from approving any CPCN facility that will "have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use." Wis. Stat. § 196.491(3)(d)4. It has also charged the PSC, uniquely, with implementing the State's energy priorities, which emphasize, as a first option, energy efficiency and conservation. Wis. Stat. § 1.12(4). Wis. Stat. § 196.025.

The EIS fails the rule of reason.

It devotes just one page ["*rigorously explore*" in "*enough detail*"] to evaluating "non-transmission system alternatives" that incorporate options emphasized in the state's priority list. It does so under the heading: "The *applicants'* evaluation of non-transmission system alternatives." [compare, the obligation to "*objectively evaluate"*]. (FEIS, p. 76, emphasis supplied; bracketed italicized phrases are drawn from Guidelines, §1502.14(a)).

Indeed, the first sentence of the need section of the FEIS explicitly states that the focus is not on comparison of alternatives, but on identifying the applicants' rationale:

> Thee following discussion of the need for the proposed Badger Coulee project focuses on the applicants' justification of the project, as described in the project application.
>
> FEIS, p. 39

"Purpose and need" are thus constrained to the objectives of the applicants.

Instead of acknowledging the agency obligation to develop alternatives to a point of reasonable comparability, the PSC Decision appears to repudiate the very notion that the agency has any such obligation. The Decision makes a point of demeaning project opponents, who are vested with neither the resources nor the obligation to develop alternatives to a point of reasonable comparability, for failing to adequately do the very thing that WEPA requires the PSC itself to do:

> Intervenors opposing the project offered only conjecture and did not analyze what they believe would be viable alternatives to the project.
>
> Decision, p. 19 (Record No. 91)

Nor can the EIS claim objectivity. A brief review of Chapter 3 of the FEIS is representative. Respecting the existing transmission system in the Badger Coulee area, the FEIS three times uses the phrase "the applicants state" (FEIS, p. 55) to discuss the system. The EIS discussion of "need" *never*

discusses the significance accorded to the CapX line as a strategy that addressed the "need – adequate supply," issue for well into the future, even though the PSC, *during the pendency of this proceeding*, argued this was "the best alternative to address the long-term needs of the La Crosse area, while also providing regional benefits." (144 F.E.R.C. P61,006, 61022, 2013 FERC LEXIS 1130, *29, 2013 WL 3962217, 2013 FERC LEXIS 1130, 2013 WL 3962217 (F.E.R.C. 2013, cited above). The FEIS presents no objective analysis of whether claimed benefits in the form of transmission upgrades that notionally would not have to be done if the Project were completed could reasonably be expected to materialize. , e.g., no summary of conditions under which it would fail the economic justification. Instead, the EIS deferred to the applicants. (See: "According to the applicants' analysis . . ." FEIS, p. 56).

An objective analysis of this issue would be a natural part of comparatively evaluating the "no build" alternative.

A comparative analysis of the "no build" alternative would also include a "break even analysis," showing when low growth would preclude the claimed economic benefits of this ~$600 million risk. The strong indications that the Project will fail its putative "economic" justification[19] demonstrate the importance of developing the "no build" alternative to a point of comparability. The disinterested expert opinion (coming neither from Project applicants, nor advocates, nor opponents) indicates a high likelihood

[19] See: Rehearing Petition in this docket, Record Nos.: 78 – 80.

that the Project will, like the Paddock-Rockdale project before it, fail to deliver its purported cost advantages:

> The historical average annual growth rate is 0.55 percent. The projected average annual growth rate is almost twice the historical rate. However, there is no reason to expect load growth in the future to be above historical levels since 2001.
>
> Experts are predicting demand to fall in the future. From 1980 to 2000 residential energy demand grew by approximately 2.03 percent per year. From 2000 to 2013, the growth rate slowed to 1.19 percent per year. Over the next ten years, residential demand is expected to fall to 0.46 percent per year. Overall demand, including commercial and industrial uses, is expected to grow by 0.86 percent per year through 2035.
>
> FEIS, p. 67.

Beyond these failures, there are the categorical ones. No "record of decision" exists. The EIS utterly failed to "study, develop and describe" the required "no build" ("no action") alternative. It nowhere identifies, much less develops, the required "environmentally preferred" alternative.

The gaps in the EIS are so great that it fails the rule of reason. Even if the PSC had identified the Project as qualifying under the "need – adequate supply" criterion, the grant of a CPCN would have to vacated and the matter remanded to the agency with instructions directing it to develop an adequate EIS that comparatively develops, at a minimum, the "no build" alternative, and its advantages and potential advantages, and an "environmentally preferred" alternative, which would likely consist of a set of alternative strategies that provide some of the benefits of the Project, while also advancing other purposes the PSC is to serve, such as avoidance of undue

impacts.

D. Because it was practicable to do so, existing transmission right-of-way had to be selected for use for this transmission line if routed through the Town of Holland.

The Town of Holland is located in the fast-developing area north of La Crosse and has committed to preserving its rural character, retaining green space and protecting the visual amenities that imbue its setting with natural beauty. The town's land use plan emphasizes rural character and natural amenities, e.g., green space and visual beauty.[20] Transmission lines are inconsistent with the Town's plan.

One aspect of the particularly noxious impact the Project will have on the Town of Holland, if built as approved by the PSC, is noted in the FEIS (p. 137):

> At one location, the two transmission lines would be constructed side by side on the east side of USH 53requiring a combined ROW easement of approximately 255 feet from the edge of the WisDOT ROW. This configuration would last for a distance of about 0.5 mile (Subsegment P13) through an agricultural field. While crossing these segments pass near a group of apartments, agricultural fields, small residential lots, a school, and a daycare.

Impacts are worse than acknowledged in the FEIS. The FEIS failed to note that all of the agricultural fields in the P-13 area described in the FEIS are slated, under the Town's land use plan, to become small lot residential. (Holland's land use plan is included in the record at Zuelsdorff, Ex. 5, Record No. 344).

[20] Ex.-PSC-Zuelsdorff-5, Record No. 344.

If the Project *had* to be built through the Town, i.e., if it met the "need – adequate supply" criterion, the Project, as approved, would also unreasonably interfere with the Town's land use plan because it fails to mitigate the associated land impacts and visual blight. Those impacts could be mitigated by requiring the Project to be triple-circuited with the transmission facilities that the Town already has to host. Specifically, this would involve triple-circuiting the Project with CapX-approved facilities – that are *already* double-circuited – for a distance of about eight miles northerly out of the Briggs Road substation. The approved plan involves running the new Project, in this area, on the other side of Highway 53 from the double-circuited facility approved in CapX.

The law requires that transmission facilities, like the Project, that are built to increase imports, be sited on existing transmission line rights-of-way whenever "practicable." Wis. Stat. 196.491(3)(d)3r.

The PSC seems to have held, "s*ub silencio*," that such triple-circuiting, as requested by the Town of Holland, is "impracticable." The PSC's rationale is that that this triple-circuiting "would violate NERC reliability criteria."[21] This PSC holding represents a proposition that can be tested with logic against NERC criteria.

It fails the test.

[21] Decision, pp. 25-26 (Record No. 91).

1. The general statutory preference favors use of existing transmission line right of way.

Wisconsin law and state policy, in multiple provisions,[22] recognize that high voltage transmission lines impose undesirable impacts, such as visual blight.

Two statutes are material to whether the facility, if allowed, should, or must, be combined into a pre-existing right-of-way. The first of these is Wis. Stat. § 1.12(6)(a). That provision prioritizes the use of existing utility corridors for new transmission lines.[23] As the PSC admitted in its decision on the rehearing petition, "In relevant part, Wis. Stat. § 1.12(6) grants "*existing* utility corridors" the highest priority among the possible locations of transmission siting. (Emphasis added [by the PSC.)"[24]

In PSC Docket 137-CE-149 (Paddock-Rockdale, discussed above) the PSC applied the transmission siting priorities provision. That case involved another transmission line approved under the notion that the PSC can approve lines not needed (under the statutory "need – adequate supply" criterion) so long as the PSC views them (however erroneously) as "economic."[25] There, the PSC acknowledged that complying with the

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[22] See:, e.g., the reference to provisions protecting the aesthetically valued lower Wisconsin river, referenced in the introduction.

[23] The policy preference for limiting new transmission line corridors is also reflected in Wis. Stat. 196.491(3b), which allows expedited review for projects that re-use existing right-of-way while increasing a facility's ability to conduct electricity.

[24] See: PSC Docket No. 05-CE-142, ORDER ON PETITIONS FOR REHEARING AND REQUEST FOR CLARIFICATION, Date of Service, June 15, 2015, pp. 5-6, Record No. 107).

[25] " . . . the stated purpose of the proposed Badger Coulee project is primarily economic . . ." FEIS, p. 73.

statutory preference requires using already existing right-of-way. Correspondingly, the PSC concluded it proper, under the law, to triple-circuit the new facility on a single set of poles that would also include two pre-existing transmission lines:

> The Commission further finds that of the two routes reviewed, the West Route best meets the siting priorities established in Wis. Stat. 1.12(6), because it uses existing electric utility corridors for its entire length and requires no new transmission corridors.
>
> FINAL DECISION, PSCW Docket No. 137-CE-149, June 13, 2008, p. 14.[26]

2. The specific statutory mandate applicable here requires co-location, i.e., triple-circuiting, where "feasible," for transmission lines built to facilitate electricity imports.

Wis. Stat. 196.491(3)(d)3r specifically addresses lines approved to increase "transmission import capability." For such lines, like the one here, [27] the statute requires use of existing rights-of-way "to the extent practicable." "Practicable" does not mean "preferable to Applicants." Nor does it mean "convenient." It means "capable of being put into practice or of being done or accomplished."[28] The synonym for "practicable" is "feasible." This requirement is in addition to the prioritization already set out in Wis. Stat. § 1.12(6).

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[26] The Commission's comment about application of the priority siting statute was in a context where it selected the all-transmission-line alternative over one that "would, to a large extent, share existing transmission line, road, and railroad ROW." Id. p. 6

[27] Decision, p. 18, (Record No. 91)

[28] http://www.merriam-webster.com/dictionary/practicable?

3. The Commission's implied conclusion that triple-circuiting through the Town of Holland is "impracticable" neither withstands the test of logic, nor is supported in the relevant standards.

The Final Decision challenged here did not make an explicit finding as to the "practicability" of using existing rights-of-way. The Decision limits the triple circuiting requirement it imposed to just under one mile, stating this rationale:

> The one-mile limitation is consistent with North American Electric Reliability Corporation (NERC) reliability criteria and will avoid violations of NERC reliability planning criteria for contingencies involving multi-circuiting of transmission Lines. (Decision, p. 25 [Record No. 91])

Stating that a configuration that limits triple circuiting to one mile "is consistent" with both NERC reliability and NERC reliability planning criteria says *nothing* about whether triple-circuiting for the entire eight miles advocated by the Town is *also* consistent with those criteria. As it turns out, *both* triple circuiting for one mile, *or* triple circuiting for the entire eight miles, are consistent with NERC reliability criteria.

Interpretation of NERC criteria is a question of law.[29] And, even if it weren't, the contention that triple circuiting would violate NERC criteria[30] is unsupportable under any standard, or plain logic. The proposition can be tested through reference to the documents the Decision cites in support.

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[29] *State v. T.J. McQuay, Inc.,* 2008 WI App 177, ¶45, 315 Wis. 2d 214, 240-41, 763 N.W.2d 148, 161.

[30] The PSC Decision does not even identify which reliability criteria or reliability *planning* criteria, if any, are in play. It cites, in a footnote, to the entirety of a ~ 3000 page document of NERC standards. Decision, p. 25 (Record No. 91)

These consist of one page of the FEIS, and NERC standards.

a. The FEIS discussion of the issue, referenced by the PSC in its decision (p. 150 of the EIS) does not establish any violation of NERC reliability criteria or NERC reliability planning criteria.

The references page of the EIS notes an applicant has indicated that the triple circuiting the Town seeks is "unacceptable." The applicant's position is said to be predicated on expected load growth. The unexplained "position" of a party is not evidence of anything.

First, an applicant's statement that a configuration is "unacceptable" to an applicant *has no bearing on whether triple circuiting is "practicable" under the terms of the law*. "Acceptability" or "unacceptability" is simply irrelevant. It could become relevant if unacceptability to the applicant were predicated on unacceptability under NERC standards, but *that is not the case here*. It itself, an unexplained preferences of an applicant has no bearing on the legal question of whether triple-circuiting is "practicable." Here, the legal criterion encompasses an obligation to co-locate transmission lines that, like these, are for importing power, whenever "practicable."

Second, the EIS says the applicant's assertion of "unacceptability" is predicated on some expected level of load growth. What is that level load growth? The applicant *does not say*. The failure to even specify the contingency on which the applicant predicates it assertion of "unacceptability," i.e., to specify the level of load growth that triggers the applicant's assertion is revealing. As the PSC found, there is not even enough

load growth to qualify this Project under the "need – adequate supply" criterion.

Third, what the EIS actually indicates is that triple circuiting would – apparently under the (undisclosed) load growth expectation – *trigger an obligation to develop a contingency plan for what to do in case all three circuits went down*.

An obligation to prepare a contingency plan *cannot* constitute a violation of a "NERC reliability criteria" or a violation of "NERC planning criteria." Instead, any obligation to undertake that study *is itself*, per the applicant, a NERC planning criteria.

Preparing a contingency plan is entirely "practicable" and "feasible." It is what utility companies do, and have to do, all the time, as a matter of course.

b. The NERC reliability criteria and planning requirements that the Applicants put into evidence specifically contradict any contention that triple circuiting would violate those criteria.

As noted, the PSC Decision does not identify the NERC standards notionally violated by triple circuiting for the eight–mile distance sought by the Town. However, the Applicants, in the contested case hearings, placed the relevant NERC standards into evidence. Those standards depict two relevant contingency categories: "Category C" and "Category D."

The already-double-circuited facility approved in the CapX proceeding is the facility with which the Town wants the Project triple-circuited.

The Decision's discussion, though vague and incoherent, appears to conclude that triple circuiting is only permissible under NERC criteria *if done for less than a mile*.

The Applicant's assertion, as reflected in the EIS, is different. It is that combining two 345 kV lines for more than a mile would uniquely require additional planning:

> The applicants noted that to avoid the requirement to have a plan to interrupt service to customers, NERC criteria limit the length of 345/345 kV *double*-circuited line to less than 1.0 mile.
>
> FEIS, p. 150 (Emphasis provided)

The Applicant's assertion that triple circuiting uniquely triggers planning requirements qualitatively different from what they have to do *anyway* is explicitly contradicted by the NERC standards placed into evidence by an Applicant. Elevated planning is already required *anyway* because CapX is *already double circuited* for the entire eight miles. Elevated planning is not uniquely triggered by triple circuiting.

The applicants already have to have a plan that can include interrupting customers because *such plans are part-and-parcel of studying a Category C Contingency*. *The double–circuited facility that comes into being because of the CapX decision already triggered an annual obligation to study a Category C contingency.*

The already-double-circuited facility triggers an obligation to study a "Category C" contingency because that facility can be affected by:

> "Event(s) resulting in the loss of two or more (multiple) elements.

((See: Applicant witness Huffman, Exhibit 2, NERC Standard, Table 1 at "Page 4 of 13 [p. 5 of the .pdf document submitted under the Exhibit-designated cover sheet]; Record No. 165)

The "elements" referred to in the standard are elements of the "Bulk Electrical System" or "BES." The 161 kV and 345 kV lines that are already approved, in the CapX proceeding, to be double circuited along the distance that the Town wants triple circuiting (if the facility is allowed) are *both* elements of the BES.[31]

A "Category C" contingency involves "System Performance Following Loss of *Two or More* Bulk Electric System Elements."[32] (Id., at "Page 1 of 13" [p. 2 of the .pdf document]). (Emphasis provided) Those elements can be "Any two circuits of a multiple circuit towerline." (Id. at "Page 4 of 13 [p. 5 of the .pdf document]) Since the already-approved facility has two circuits, and both circuits are part of the "BES," a Category C contingency is *already* something that has to be studied.

NERC Requirement "R-1" requires, for the double-circuited facility, "a plan to interrupt service to customers" i.e., the very thing that the EIS identified as being raised as problematic by an Applicant:[33]

"The . . . Transmission Planner [must] demonstrate . . . that its

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[31] "CORE DEFINITION: The core definition is used to establish the bright-line of 100 kV, the overall demarcation point between BES and non-BES Elements." FERC Bulk Electric System Definition Reference, Version 2, April 2014, p. 5; http://www.nerc.com/pa/RAPA/BES%20DL/bes_phase2_reference_document_20140325_final_clean.pdf last accessed June 20, 2016.

[32] The 345 kV and 161 kV lines of CapX are two elements of the "Bulk Electric System..

[33] FEIS, p. 150.

> portion of the interconnected transmission systems is planned such that the network can be operated to supply projected customer demands and projected Firm (nonrecallable reserved) Transmission Services, at all demand Levels over the range of forecast system demands, under the contingency conditions as defined in Category C * * * controlled interruption of customer Demand, the planned removal of generators, or the Curtailment of firm (non-recallable reserved) power transfers may be necessary to meet this standard"
>
> Applicant witness Huffman, Exhibit 2, NERC Standard, at "Page 1 of 13 [p. 2 of the .pdf document]; Record No. 165.

These requirements are all imposed because of the double-circuiting *already approved* as part of the CapX project. That *already approved* double-circuited facility *already triggers* an obligation to study a Category C contingency. Studying that contingeny, in turn, entails delineating potential interruptions and removals. *None* of the Category C contingency requirements are uniquely triggered by triple circuiting for more than one mile; Category C contingency requirements are already triggered because of already-approved *double* circuiting of BES elements for more than one mile.

Beyond Category C are Category D contingencies. Which of those contingencies are to be studied is *at the discretion of the transmission planner*:

> d) A number of extreme contingencies that are listed under Category D and judged to be critical *by the transmission planning entity*(ies) will be selected for evaluation. *It is not expected that all possible facility outages under each listed contingency of Category D will be evaluated*.
>
> Id. at "Page 5 of 13" [p. 5 of the .pdf document]; Record. No. 165. (Emphasis provided)

Whether the applicants would actually elect to study a Category D contingency involving outage of the transmission line built pursuant to this Project is uncertain. The Project, as discussed, was not, after all, proposed to

solve a reliability problem.

The potential that Applicants may elect to study such a contingency, or make their study of Category C contingencies more nuanced, cannot categorically render triple circuiting, along an area that is already double circuited, "impracticable." It is therefore, practicable, and, therefore, legally mandated.

CONCLUSION

Since the Project is, according to the PSC's own analysis, not justified under the statutory "need – adequate supply" criterion, the Final Decision granting the CPCN should be vacated. Since this is not a problem that can be cured – until and unless conditions change, such that the Project becomes "needed" under the terms of the statute – there is no point in returning the matter to the PSC.

As demonstrated with the data from the Energy Information Administration, experts who were neither applicants, nor advocates nor opponents of the Project, arrogating power to approve Projects when there is no "need – adequate supply" issue is fraught with risk. Ratepayers, who the PSC is supposed to protect, are already being harmed as a consequence of the PSC doing so. In light of the PSC's obligations to ratepayers, it was an abuse of discretion not to grant that Petition. If the matter were remanded to the PSC, it should be remanded with instructions to grant the Petition, and require development of analyses based on very low growth, low growth, and – what the state has actually experienced – negative "growth."

The Final Environmental Impact Statement is inadequate because it fails explicit obligations imposed on the PSC by law and by the agency itself through its own rules. Some key obligations are ignored in their entirety. If the Project were needed, the Final Decision would have to be vacated and remanded to the agency with instructions to correct the deficiencies.

Finally, no project can be legally routed through the Town without using existing right-of-way. The NERC criteria submitted by the applicants themselves demonstrate that doing so is practicable. At most, it might merit some extra planning of the type that utilities do all the time, and that an Applicant already has to do because of the already approved double-circuiting of "BES" elements north of the Briggs Road substation, and through the Town. Because Wis. Stat. § 196.491(3)(d)3r requires co-location where "practicable," and because it is "practicable," the court should, under Wis. Stat. § 227.57(5), direct the Decision to be modified accordingly if the Decision is not vacated in entirety because of the PSC's legal error in approving a project beyond its power.

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