STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY
BRANCH 3

TOWN OF HOLLAND,

Petitioner,

vs.

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

PUBLIC SERVICE COMMISSION
OF WISCONSIN

REPLY BRIEF OF THE TOWN OF HOLLAND

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A. RESPONDENTS BRIEFS OBSCURE THE MOST CRTICAL INFORMATION.

Respondents' briefs communicate a number of incomplete assertions or references that could lead a reader to inaccurate conclusions.

1. The value of claimed reliability benefits identified is only about a third the cost of this "solution."

The Applicants and MISO incorrectly indicate that the Town (Holland's Initial Brief, 18-19) left something out when it quoted the entire summary of the PSC's "needs" reasoning – i.e., that the project was not needed to resolve an existing or looming service problem, but was justified under the notion that it provided generalized reliability benefits and economic benefits under the Applicants' presumptions. (APPLICANTS Br. 25-29; MISO Br. 6-9.)

Holland did not leave out anything. The Project's claimed reliability benefits, as calculated by Project sponsors, only amount to ~ $190 million – the cost of the reliability upgrades that the Project allegedly avoids. Manifestly, it is foolish to spend ~ $600 million to avoid ~ $190 million (Applicants' Br. 27) of potential costs which may

never materialize.[1] That leaves economic benefits calculated under the same kind of "strategic flexibility" analysis used to justify the Paddock-Rockdale decision, which has damaged ratepayers because the projected growth failed to materialize. (*See* R. 78-80 REHEARING PETITION.)

2. The renewable energy benefits claimed for the Project are irrelevant to Wisconsin.

The Respondents repeatedly reference renewable energy or related standards. (*E.g.*, PSC Br. 14, 33, 34, referencing the "RPS" or Renewable Portfolio Standard; Applicants' Br. 13, 24, 26-27, 34, referencing renewable energy requirements). The references are general, incomplete, and leave out the most important information. Nowhere in the record is it established that Wisconsin will buy more renewable energy from Western wind farms because of the Project, or that it will need to. "Access" to those facilities – what the Respondents emphasize – is worthless if Wisconsin doesn't need it, and it doesn't. The Respondents' references to Wisconsin's Renewable Portfolio Standard ("RPS"), Wis. Stat. § 196.378(2)(a)2, neglect to disclose that the standard, which the PSC said had to be met by 2015 (PSC, 34) is

[1] Overloads are based on MISO modeling in the future, see MISO Brief, p. 7, R. 318, pp. 42-24

fully satisfied, and, indeed, exceeded. It has been for years.[2] The PSC certified that the RPS was met three months before the PSC submitted its brief.[3] Nor is there any evidence that, if further limitations on greenhouse gases were to be imposed, Wisconsin would be required to go out of state to acquire substitute power supplies. Our state just lifted its moratorium on new nuclear power plants and placed "advanced nuclear energy" into the state's priority list. 2015 Wisconsin Act 344; Wis. Stat. § 1.12(4)(cm). High priority, renewable energy is available in Wisconsin. Uncontested record testimony indicated distributed solar generation produced in-state is cost-competitive, better matches retail consumption patterns, and has the potential to alleviate potential congestion created by relying on remote wind energy facilities.[4]

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[2] PUBLIC SERVICE COMMISSION OF WISCONSIN, Electric Provider Renewable Portfolio Standard Compliance for CY 2014, Docket No. 5-GF-258, July 20, 2015, PSC REF#:272140; PUBLIC SERVICE COMMISSION OF WISCONSIN, Electric Provider Renewable Portfolio Standard Compliance for CY 2014, Docket No. 5-GF-243, June 23, 2014, PSC REF#:206807;

[3] PUBLIC SERVICE COMMISSION OF WISCONSIN, Electric Provider Renewable Portfolio Standard Compliance for CY 2015, Docket No. 5-GF-260, ORDER, May 6, 2016. PSC REF#:285746. See also R:217 Ex.-CETF/SOUL-Lanzalotta-5 (PSC Ref. 226777) pg. 43: "As of 2013, just under 10.8 percent of all electrical energy sold in Wisconsin, including RPS and voluntary green pricing retail sales, was generated from renewable resources. As a result, 2013 marks the first year the 10 percent statewide goal was achieved – two years ahead of schedule. "

[4] See Tr. vol. 10 (PSC Ref. 230601).

3. Applicants' argument that congestion triggers costs that must implicate a Wis. Stat. § 196.491(3)(b)2 "need" only raises questions as to why, if congestion is the driving consideration, the PSC used this process at all.

Arguing that solving potential congestion problems must constitute meeting a need under the Wis. Stat. § 196.491(3)(d)2. "need-adequacy of supply" criterion, Applicants posits a hypothetical circumstance in which congestion caused by a lot of energy on the wires drives up prices, but without creating an "adequacy of supply" issue of the type emphasized by the Town. (Applicants Br. 21.)

Applicants then argues that the "need" criterion, if the Town's analysis were correct, would leave the PSC unable to approve transmission facilities to resolve the hypothesized condition of high congestion. (Applicants Br. 21.) Applicants reasons PSC must have authority to solve its hypothesized congestion problem, so the PSC must have the ability to base a finding of "need" on economic considerations alone. (Applicants Br. 21-22.)

First, the hypothetical Applicants poses is not this case. Congestion problems of the extreme type hypothesized by Applicants were not before the PSC here.

Second, the hypothetical Applicants poses is unlikely to be the case. If there are problems in getting remote energy facilities' power to market, then sellers won't enter the market. Whether they are built may be a general policy objective of MISO, but there is no evidence it will benefit Wisconsin ratepayers. The Respondents imply that more wind power, notionally made available because of this facility, will be sold in Wisconsin (See, e.g., MISO Br., 8) but show no evidence that it would be. As noted, Wisconsin has already met and exceeded its Renewable Portfolio Standard, so that is not an issue and Respondents do not establish that Wisconsin would look out-of-state to address hypothetical greenhouse gas restraints.

Third, Applicants' argument presumes that energy laws as they exist today must be inferred to be structured to effectively resolve every possible hypothetical problem a litigant can propose. There is no reason this would necessarily be the case, and, history indicates it never has been. The energy landscape changes. New problems, constraints and opportunities develop. Laws change. In Responsible

Use of Rural & Agric. Land v. PSC, 2000 WI 129, 239 Wis. 2d 660, 619 N.W.2d 888, the Wisconsin Supreme Court interpreted 1997 Wisconsin Act 204, a law that significantly changed energy regulation, including developing non-statutory provisions designed to address an exigent situation comparable to the seriousness of the problem posited in Applicants's hypothetical. Notably, that Act exempted "wholesale merchant plants" from the need limitation of Wis. Stat. § 196.491(3)(d)2. While the legislature could have also added language exempting particular kinds of transmission additions from Wis. Stat. 196.491(3)(d)2., it did not do so.

Fourth, and perhaps most importantly, another statute prescribes a specific legal process – unmentioned by the Respondents – for the PSC to use to address congestion problems. It was not the process used here.

If congestion is the issue, Wis. Stat § 196.494(3) requires the PSC, i.e., *the public body itself*, to develop and specify the solution. It does not contemplate the kind of process used here, where the public agency simply reacts to the single proposal presented by Applicants.

In sum, the legislative process contemplated for power lines addressing congestion is different from the one that produced the

result challenged here. It is much more open. It assigns central responsibility for development of the solution to the Commission. For the incumbents – the Applicants here – it poses more risk, as the process for developing a solution is assigned directly to the Commission.

Neither the PSC decision, nor the Respondents briefs include any reference to Wis. Stat. § 196.494, or its procedures or standards. If congestion is a real issue, then Wis. Stat. § 196.494(3) specifies the procedure to follow in crafting a solution. Congestion was not the impetus here, nor was Wis. Stat. § 196.494(3) the procedure followed by PSC in this case.

Applicants further hypothesizes that, under the Town's analysis, the "need" criterion prevent the PSC from approving a power plant in the event of high energy costs due to "a lack of affordable, cost-effective generation resources. (Applicants Br. 21.) The Applicants do not describe how this hypothetical could arise. The condition defies logic: price tends increase when supply is *low* relative to demand, i.e., the thing people want to buy is scarce. Further, lack of supply obviously implicates the "adequacy of supply" criterion, so it is hard to see how

construction of additional facilities would be precluded under that criterion.

Indeed an "adequate supply" of electricity requires a reserve margin.[5] It is a mystery how a power plant could not be "needed" – within the historical and common-sense meaning of the "need–adequacy of supply" criterion – if there is a shortage of electricity.

In any case, if prices are unreasonably high, then "wholesale merchant plants"[6] can be constructed. Such plants are explicitly exempted from CPCN "need" requirement. Wis. Stat. § 196.491(3)(d)2. To re-emphasize: the legislature *could* have specified specific kinds of transmission lines to *also* be exempt from the CPCN need requirement. But it did not.

4. The Respondents' presentation of data implies inaccurate conclusions about growth.

It is critical that an administrative agency charged with protection of the consuming public be as rigorously objective as it can

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[5] The reserve margin was discussed in the case cited to provide the historical understanding of what "adequate supply" meant with respect to the electrical system. Madison Gas & Elec. Co. v. Pub. Serv. Com., 105 Wis. 2d 385, 388 n.4, 313 N.W.2d 847 (Ct. App. 1981).
[6] Wis. Stat. § 196.491(1)(w).

be.[7] The PSC does not appear to be. In its decision and in its brief here it repeats that over a short period, energy use growth in the La Crosse area was 3.44% per year (PSC Br. 38). Elsewhere the PSC notes:

> If load in the La Crosse Area grows at the same rate that it did between 2010 and 2012, this 750 MW limit will be reached, and a new 345 kV transmission source is needed, by 2026.

(PSC Br. 9).

Yes, and if it grows at the rate it grew between 2006 and 2012, it will *not have grown at all by 2026*. (*See* R. 365(31) REVISED DIRECT TESTIMONY OF WILLIAM POWERS IN OPPOSITION TO THE APPLICATION, P. 16, PSC REF# 229030.) In selecting just a couple of years, the PSC reproduces the cherry-picking done by the Applicants. It is manifestly unreasonable to forecast the future for 10-15 years based on a couple of years of data – particularly when determining whether to saddle people you are tasked with protecting with a $600 million investment.

Ascertaining the level of growth over a more suitable period can be done, and was done by another witness. It is a matter of simple math, not opinion:

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[7] The primary purpose of public utility law is protection of the consuming public. Wisconsin Power and Light Co. v. Beloit, 45 Wis. 2d 253, 259, 172 N.W.2d 639 (1969).

> Had the Applicants compared non-coincident peak load in 2006 and 2011, 465 MW and 465 MW respectively, it would have concluded that there was no peak load growth in the LaCrosse/Winona area over time instead of 3.44 percent per year. Had the Applicants compared the LaCrosse/Winona area non-coincident peak load in 2006 to 2012, 465 MW and 481 MW, it would have determined that the rate of peak load growth was less than 0.5 percent per year, not 3.44 percent.

R., 365(31) REVISED DIRECT TESTIMONY OF WILLIAM POWERS IN OPPOSITION TO THE APPLICATION, p. 16, PSC Ref#:229030

No growth or very low growth was reaffirmed as the most likely future when petitioners presented Energy Information Administration data to the PSC in their Petition for Rehearing. (R.78, pp. 2-4)

B. RESPONDENTS' CONTENTIONS CONCERNING NEED IGNORE CONSUMERS NEEDS FOR ELECTRICAL ENERGY, THE HISTORY OF WHAT "ADEQUATE SUPPLY" HAS MEANT, AND THE STRUCTURE OF THE CPCN LAW.

Consumers needs for electricity encompass the things they use electricity for, e.g., to power lights, motors, refrigerators, provide motive power, etc. The ability to meet these needs is indifferent to the way in which the charged particles – the physical phenomena that make up useful electricity – are created. The end uses to which consumers apply electricity are also indifferent to the path those charged particles follow – the wires used – on their way to a consumer.

An "adequate supply" of electricity (or "electrical energy" in the language of Wis. Stat. § 196.491(3)(d)2.) has long been recognized to be a supply that enables consumers to use it for their various end use purposes. (*See* § B.2, below.) Not more than that, and not less.

The Respondents contend that "needs for an adequate supply of electrical energy" are defined by characteristics of the electrical supply system extraneous to safely supplying customers with sufficient electricity for customers' purposes ("needs"). Respondents contend, for example, that the "need-adequacy of supply" requirement includes whether the electricity is "cleanly" produced. (See, e.g. PSC Br., 23-25)

The kinds of considerations emphasized by the Respondents are important, but they are addressed in statutory provisions *other than* Wis. Stat. § 196.491(3)(b)2.

If meeting requirements of *other independent* and *separate* statutory provisions constituted compliance with the threshold "need–adequate supply" requirement, then that "needs" requirement – which the PSC itself recognized as a "threshold" requirement[8] – would

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[8] *See* 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"]), *available at* http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=12112. (Note: discussed in Holland's Initial Brief, 15.)

become surplusage. "Statutes are interpreted to give effect to each word and to avoid surplusage." Klemm v. Am. Transmission Co., LLC, 2011 WI 37, ¶18, 333 Wis. 2d 580, 798 N.W.2d 223.

Correspondingly, if an obligation to satisfy other statutory criteria, which are embodied in distinct and separate subsections, were "built into" Wis. Stat. § 196.491(3)(d)2, then those *other* provisions – independent distinct and separate subparts of the CPCN law, would be rendered purposeless.

1. **Consumers' "needs" for an adequate supply of electricity are defined by how *consumers themselves* use electricity, not by extraneous characteristics of the electrical supply system.**

The Respondents' theory of "need" here is that customers' "needs" under Wis. Stat. § 196.491(3)(d)2 are defined not by customers' own particularized and varying uses for electricity – i.e., what *customers* decide *they* need it for. Instead, the Respondents define "needs" based on other characteristics of the electrical supply system. They are wrong to do so.[9]

[9] To develop this theory, the PSC parses out different words from the unified phrase "adequate supply of electrical energy." No linguistic gymnastics are required to decipher the phrase.

Consumers' needs certainly vary between individual customers and customer classes (e.g., industrial, commercial, household), but they have a common characteristic: consumer needs all involve *what consumers want to do with supplied electricity*.

2. **Whether consumers are receiving "an adequate supply of electrical energy" turns on whether consumers have sufficient electricity, safely supplied.**

An "adequate supply of electrical energy" is recognized to be the supply required "to maintain adequate electric service in the event of unexpected demand surges or the temporary loss of a portion of generating capacity . . ." Madison Gas & Elec. Co. v. Pub. Serv. Com., 105 Wis. 2d 385, 388 n.4, 313 N.W.2d 847 (Ct. App. 1981). This is basically a "keep the lights on" criterion, i.e., the kind of criterion not addressed by this Project. (Holland's Initial Brief, 18), but addressed by the earlier CAPX Project.

The focus of "adequacy" analysis for electrical supply has long emphasized the importance of avoiding unreasonable interruptions of supply:

> . . . it was the duty of the Gas & Electric Company to furnish reasonably adequate gas, as well as electric, service. This duty did not make the Gas & Electric Company an insurer of continuous service, if conditions over which it had no control caused interruptions in service, provided that the Gas &

> Electric Company at all times exercised reasonable and practicable care, foresight, [464] and diligence in so constructing, maintaining, and operating its plant as to prevent such interruptions so far as practicable.

Waukesha Gas & Elec. Co. v. Waukesha Motor Co., 190 Wis. 462, 463-64, 209 N.W. 590 (1926); *see also* Krier Preserving Co. v. W. Bend Heating & Lighting Co., 198 Wis. 595, 597-98, 225 N.W. 200 (1929) ("It was the duty of the defendant to supply reasonable and adequate electric service. This duty did not make it 'an insurer of continuous service, if conditions over which it had no control caused interruptions in service . . .'").

The issues of cleanliness, affordability and the general reliability of the overall system (as distinct from specific reliability concerns that implicate the ability-to-serve, such as those addressed in the CAPX case) do not implicate consumers' entitlement to an "adequate supply of electrical energy."

They instead implicate other criteria that a proposed Project must *also* satisfy to qualify for a CPCN.

3. Meeting other statutory purposes is insufficient to establish need under Wis. Stat. § 196.491(3)(d)2.

The Respondents depend on the notion that the "need-adequate supply" criterion also encompasses a broad range of policy and other

considerations. (PSC Br. 21-35; Applicants Br. 18-29; MISO Br. 8-9.) Their argument is that the need requirement is like an empty suitcase – they can load into it whatever they think is good about the Project, and then deem it to be "fulfilled."

If the need requirement could be satisfied this way, the PSC would never have described it as a critical "threshold" consideration.[10]

The position that Project proponents advocate here is well-summarized by the PSC, which asserts three general contentions that it claims establish the Project's compliance with the "need – adequate supply" criterion:

> The Project (1) supports load growth in the La Crosse, Wisconsin and Winona, Minnesota area (collectively, the "La Crosse Area") and obviates the construction of 29 other transmission projects; (2) provides net economic benefits to Wisconsin ratepayers; and (3) improves access to, and the importation of, renewable wind generation resources to the west of Wisconsin, thereby helping ensure Wisconsin's compliance with state and federal renewable energy and potential future environmental mandates.

(PSC Br. 2.)

These are all general "public interest" benefits and they all correspond to subsections of the CPCN law *other than* the "needs"

[10] *See* 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"]), *available at* http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=12112.

provision. *See* Wis. Stat. § 196.491(3)(d)3t. (addressing general reliability and economic benefits); Wis. Stat. § 196.491(3)(d)4. (addressing environmental concerns); Wis. Stat. § 196.491(3)(d)5. (referencing further considerations to be taken into account by the PSC). Deeming these to establish need would specifically contradict the PSC's own formulation of the need criterion as a "threshold" in the ERGS case that led to the *Clean Wisconsin* appeal.

a. The need criterion is a key, separate, and threshold requirement.

The "need-adequate supply" criterion is stated in Wis. Stat. § 196.491(3)(d)2.: "The proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy."

The CPCN law recognizes the *separateness* of its criteria, and requires an approved Project to satisfy *all* of them: "Except as provided under par. (e), the commission shall approve an application filed under par. (a) 1. for a certificate of public convenience and necessity *only* if the commission determines *all* of the following: . . .." Wis. Stat. § 196.491(3)(d) (emphasis added).

Respondents miss that the "need – adequate supply" criterion is *independent* and *separate from* other criteria. Their analyses ignore the

structure of the statute. The CPCN law sets forth multiple criteria in separate subsections.

b. Meeting *other* criteria is not the same as meeting the "needs" criterion. If it were, the PSC could never have described the needs criterion as a "threshold."

Respondents argue that meeting general public interest criteria, such as improving general reliability in the La Crosse – Winona area (as opposed to avoiding a violation of reliability standards, as the CAPX line did), and serving claimed policy goals, are sufficient to satisfy the "need-adequacy of supply" criterion. (PSC Br. 21-35; Applicants Br. 18-29.)The lack of need is unmistakable.

A project that is required to meet the "reasonable needs of the public for an adequate supply of electric energy" will *always* have meeting those needs as its "primary purpose" (as it did in CAPX) because *such needs* correspond to the fundamental entitlement of the consuming public – the right to a reliable supply of electricity. This is the irreducible, and most important, function of the electrical system. This is why the PSC in the past has recognized the need criterion as a "threshold." It is the only understanding of the criterion that makes sense, particularly when other criteria in the law address other important considerations.

By indicating it to be un-needed for load-serving[11], the PSC itself recognized the Project to be unrelated to meeting need in the form of an "adequate supply of electric energy" under Wis. Stat. § 196.491(3)(d)2. (R. 90 [Final Order, April 23, 2015 at 16)

The driving justification here is not need. It is instead the same one invoked to justify the Paddock-Rockdale project: putative economic benefits across "a wide range of possible future economic scenarios" (all developed by Applicants who want to own the Project). Unsurprisingly, all of the allowed scenarios indicate the Project will have beneficial cost outcomes. In the case of the Paddock facility, however, no scenario within the "wide range" of predicted futures actually materialized. (Record Nos. 78 -80; CETF-SOUL PETITION FOR REHEARING, May 13, 2015, p. 2; *See also* discussion in Holland's Initial Brief, 26-28, 30–31, 41–42.)

MISO asserts concern about possible grid impacts if Badger Coulee is not built, presenting a list of Projects it says are avoided, and indicating (Br., 7) the list derives from modeling conducted in 2011 in early 2012. (R. 317 PSC REF#:218120; Ex.-MISO-Rauch-1). MISO

[11] 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..

describes not current conditions but conditions as they are modeled (with assumptions that bring them into being, of course) to exist in 2021. (*See, e.g.,* R317 Ex.-MISO-Rauch-1, pp. 43-44: "This analysis was not required to comply with any NERC reliability criteria, but was performed to check the strength of the power system with increased wind generation and transmission under the 2021 conditions.")

Assuming MISO claims value from the Project from "mitigating" overloads on its identified list, it neither cites nor states costs avoided by mitigating the list of overloads it identifies. (MISO Br., 8-9). If these fall within ~ $190 million worth of projects that Applicants emphasize are avoided by the Project (Applicants Br., 27), then it is irrational to undertake the Project to save these costs because the Project's approved is cost is $581,433,000.00 with a "buffer" allowing the Applicants to over-run that limit by 10% before returning to the Commission. (R. 90 Final Decision, pp. 56-57, Order Points 1 and 2). If the associated costs are unknown, the value of avoiding the identified upgrades cannot rationally be considered.

MISO indicates Category B Contingencies potentials are what the Project would mitigate. (MISO Br., 7) Such Contingencies are of the type regularly addressed, and the system is specifically designed to

withstand them without loss of stability, loss of demand or cascading (i.e., "one thing leads to the next") outages:

Standard TPL-003-0b — System Performance Following Loss of Two or More BES Elements

Table I. Transmission System Standards – Normal and Emergency Conditions

Category	Contingencies	System Limits or Impacts		
	Initiating Event(s) and Contingency Element(s)	System Stable and both Thermal and Voltage Limits within Applicable Rating[a]	Loss of Demand or Curtailed Firm Transfers	Cascading[c] Outages
A No Contingencies	All Facilities in Service	Yes	No	No
B Event resulting in the loss of a single element.	Single Line Ground (SLG) or 3-Phase (3Ø) Fault, with Normal Clearing: 1. Generator 2. Transmission Circuit 3. Transformer Loss of an Element without a Fault.	Yes Yes Yes Yes	No[b] No[b] No[b] No[b]	No No No No
	Single Pole Block, Normal Clearing[e]: 4. Single Pole (dc) Line	Yes	No[b]	No

See R. 65 Applicant witness Huffman, Exhibit 2, NERC Standard, Table 1 at "Page 4 of 13" [p. 5 of the PDF document submitted under the Exhibit-designating cover sheet].

There is no evidence that the Project is the most cost effective solution for these problems, if they arise.

MISO's 2011 study does not investigate the possibility of using the increasingly applied approach of targeting solar generation, energy efficiency and demand response to ease demand and prolong the lifespan of aging facilities at a lower cost. (R. 365(31) Direct-

CETF/SOUL-Powers-p.47 Line 1, PSC REF#:229030). Such strategies involve the state's highest energy priorities – conservation, efficiency and non-combustion renewable energy. (Wis. Stat. §§ 1.12(4)(a), (b))

Finally, since the kinds of issues MISO highlights, when and if they arise, would be congestion-related, the proper process for resolving them would be for the Commission to initiate a process under Wis. Stat. 196.494(3).

When load growth predictions of parties who make money or increase their institutional power from transmission line investments fail to materialize, it is not the companies making the predictions that get hurt. The burden, as it did in the Paddock-Rockdale case, falls instead on ratepayers, communities and landowners who have to pay the transmission lines' cost and the Applicants' return, and accept the blights, hazards and impositions on property rights. This is why enforcing the need requirement as the threshold obligation is so important.

C. HOLLAND'S NEED ARGUMENT IS PROPERLY BEFORE THIS COURT.

Holland both endorsed the strongly litigated position of other interveners on the need question, who argued there was no need for

many reasons, and itself asserted there exists no need for the facilities. R. 20, pp. 1-2) Holland was not required to repeat the adopted arguments of parties with which it explicitly aligned itself.

The need issue is a purely legal one, involving interpretation of a statute.

Furthermore, the court always possesses the power to decide issues, whether they were raised in the lower court or not – because the waiver rule is one of administration, not of power, Bunker v. Labor and Indus. Review Comm'n, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864 – as was acknowledged by Applicants in its brief (Applicants Br. 17 n.12).

Here, the issue has been fully briefed by the parties. (PSC Br. 21-38; Applicants Br. 18-29; MISO Br. 5-9.) No party disputes its importance to the Respondents, to the Town, and to other communities and landowners. How this legal issue is decided is important both in this case and beyond.

In such circumstances, courts will decide issues even when they might otherwise have been deemed waived:

> One exception to this rule permits consideration of an issue otherwise waived if all the facts are of record and the issue is

> a legal one of great importance. [The issue involves] a question of law that has been briefed in this court by both parties and is an issue of great importance to property owners, the DNR, boards of adjustment and the courts. Accordingly, we will look past the waiver in this case and decide the issue.

State v. Outagamie Cty. Bd. of Adjustment, 2001 WI 78, ¶¶55-56, 244 Wis. 2d 613, 628 N.W.2d 376. "The principle behind this exception to the waiver rule is that the reviewing tribunal decides a legal issue on undisputed facts de novo, and therefore it is not essential to the court's review that the agency had an opportunity to address the issue." Bunker, 257 Wis. 2d 255, ¶ 16.

Not only does the Court have the power to decide the Town's need argument on the merits regardless of waiver, but the Town is not the only party that wants the Court to address this issue on the merits. The Applicants, in their brief, specifically requested that this Court address the Town's need-related arguments "on the merits" even if it found waiver. (Applicants Br. 18 n.13.)

D. THE PSC HAS FORFEITED DEFERENCE THROUGH INCONSISTENCY.

The level of deference emphasized by the Respondents would represent a new apex of judicial deference to an administrative agency. In an effort to claim this deference, they de-link the statutory

"adequate supply of electrical energy" language from its historical and common-sense use and interpretation – i.e., that "an adequate supply of electrical energy" is one that is sufficient and suitable for a customers' purposes. Respondents ask the court to uphold a PSC conclusion directly contrary to the factual conclusion of the PSC itself, and incompatible with the summary of the Project's need in the PSC-approved EIS. (R. 90, Final Decision p. 16; R. 337, EIS, p. 90); *See* Holland's Initial Brief, 18)

If Holland's interpretation of the statute is more persuasive, then what this case presents is an issue of agency authority, as the PSC has arrogated to itself the authority to approve a project that is not needed under the statutory standard, and to over-write the distinctions in the CPCN law's subparts.

The Project proponents would extrapolate an extreme level of deference from some of *Clean Wisconsin*'s expansive language. But expansive characterizations of agency discretion based on "*Clean Wisconsin* deference" have not found further favor. Seeking guidance on how much deference to accord an administrative agency, the Court of Appeals certified to the Supreme Court the case that became MercyCare Ins. Co. v. Wis. Comm'r of Ins., 2010 WI 87, 328 Wis. 2d 110,

786 N.W.2d 785. In its Certification, the Court of Appeals, referencing the competing positions of the parties on the issue of how much deference, specifically identified *Clean Wisconsin* as an example of one extreme:

> We are uncertain which party is correct because both positions find support in the case law. For example, cases frequently repeat the rule that courts should defer to an agency decision only when its interpretation is "one of long-standing." *See, e.g.*, *County of Dane v. LIRC*, 2009 WI 9, P16, 315 Wis. 2d 293, 759 N.W.2d 571 (citation omitted); *National Motorists Ass'n v OCI*, 2002 WI App 308, P11, 259 Wis. 2d 240, 655 N.W.2d 179. The "long-standing" requirement seemingly requires that the agency has previously interpreted the statutory language at issue. However, in at least some recent cases the supreme court has applied great weight deference giving little or no attention to the "long-standing" requirement. *See, e.g., Clean-Wis., Inc. v. PSC*, 2005 WI 93, 1137-43, 112-16, 282 Wis. 2d 250, 700 N.W.2d 768; *Hutchinson Tech., Inc. v. LIRC*, 2004 WI 90, 1122-24, 273 Wis. 2d 394, 682 N.W.2d 343 (citing *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, 1129-30, 264 Wis. 2d 200, 664 N.W.2d 651); *Brown v. LIRC*, 2003 WI 142, PP17-18, 267 Wis. 2d 31, 671 N.W.2d 279; *Kitten v. DWD*, 2002 WI 54, P31, 252 Wis. 2d 561, 644 N.W.2d 649.

Mercycare Ins. Co. v. Wis. Comm'r of Ins., No. 2008AP2937, 2009 Wisc. App. LEXIS 1026, at *4-5 (Ct. App. Sep. 3, 2009).

Clean Wisconsin went unmentioned in the subsequent Supreme Court review. The Town drew from the Supreme Court's *MercyCare* language in explaining the standard of review in its initial brief. (Holland's Initial Brief, 10). To summarize, an agency seeking

deference has to show thoughtfulness (the exercise of discretion[12] instead of will) and consistency. Subsequent to the Supreme Court *MercyCare* decision, the three-levels of deference framework, requiring "consistency and uniformity" on the part of an agency seeking "great weight deference," has been reiterated in J&E Invs. LLC v. Div. of Hearings & Appeals, 2013 WI App 90, ¶12, 349 Wis. 2d 497, 835 N.W.2d 271.

As the Supreme Court determined in *MercyCare*, a court is always required to interpret a statute for itself in evaluating the reasonableness of an agency interpretation:

> Whichever level of deference is granted, the reviewing court does not abdicate its own authority and responsibility to interpret the statute. *Id.*, ¶ 14; *Hutson*, [2003 WI 97,] 263 Wis. 2d 612, ¶ 31, 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, ¶ 15, 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.

MercyCare Ins. Co. v. Wis. Comm'r of Ins., 2010 WI 87, ¶32, 328 Wis. 2d 110, 786 N.W.2d 785.

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[12] 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).

The great weight deference the Respondents seek is not merited. Four criteria must be met for that standard:

> [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.*, ¶ 16. 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.*, ¶ 17. 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.

MercyCare Ins. Co. v. Wis. Comm'r of Ins., 2010 WI 87, ¶31, 328 Wis. 2d 110, 786 N.W.2d 785.

While the PSC is charged with administering the CPCN law, subject to court review, and the first criterion is thus met, the second, third, and fourth are not.

Respecting the second criterion, the PSC's interpretation of the need requirement has been inconsistent, therefore not long-standing.[13] Indeed, it seems to change with each case. The PSC has gone from

[13] *See,* Holland's Initial Brief, 25-29.

defining it, correctly, as a critical "threshold" requirement[14], to substituting, occasionally, an alternative standard of "clear economic benefits"[15], to this matters' "suitcase" theory – that the need criterion is analogous to an empty suitcase that can be packed with whatever seems appealing about a Project and then deemed fulfilled. For Applicants, this inconsistency is itself a form of consistency – repeatedly varying the criterion, in their view, demonstrates that the criterion can "consistently" mean whatever the PSC says in any given case since the PSC is charged with interpreting the law.[16] The problem with this approach to the second criterion is that holding the second criterion to be met on the grounds that these interpretations – even completely inconsistent ones – all flow from an entity with authority-to-interpret, would effectively render the second criterion meaningless. Like the subparts of the CPCN law, the subparts of the

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[14] *See* ERGS, *supra* note 10.

[15] 2008 Wisc. PUC LEXIS 293, *8-9; FINAL DECISION, PSC Docket No. 137-CE-149, June 13, 2008, p. 6. ("Paddock-Rockdale"), available at
http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=79216
; 2012 Wisc. PUC LEXIS 137, PSCW Docket No. 137-CE-161, May 07, 2012. ("PLP-ZEC") Avilable at:
http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=164279

[16] "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean - neither more nor less." Lewis Carroll, Alice in Wonderland.

test for "great weight deference" test – including the consistency requirement – must each have independent meaning.

The third criterion isn't met either. There is no evidence of the PSC employing specialized knowledge to establish a new interpretation of the need requirement as a "suitcase" instead of a "threshold." Evidence of a new interpretation being developed through the application of "specialized knowledge" would require an on-the-record discussion of how a separate "threshold" requirement can be met, *sub silencio*, by meeting other requirements. As discussed in Holland's initial brief, the new interpretation should have been adopted as a rule. (Holland's Initial Brief, 26-28). At least there would have to be some on-the-record analysis to show the PSC had thoughtfully considered how its new standard, or standards, (since the treatment of need is so inconsistent) would comport with the statutory "need" requirement. The closest the PSC came was in Paddock-Rockdale, when it enunciated the "clearly identified economic benefits" theory.[17] However, even there it identified no statute or other authority that would allow it to thus redefine the "need" standard. Similarly, in this case the PSC never explained how some combination of benefits could constitute "need."

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[17] *See* Paddock-Rockdale, *supra*, at pp. 5-6.)

Interpretation requires thought, a benefit of requiring new interpretations to be promulgated as rules. (See: Holland's Initial Brief, p. 27, footnote 19) The changing standards have never been placed into a rule, where they could be reviewed by the legislature and potentially challenged in court.[18] A review of the PSC's penchant to reconfigure the "need" requirement has never happened. That review needs to happen here.

As noted, if the criterion is just a "suitcase" into which Respondents can place anything they like about the Project, and then deem the need requirement met, then the historical and common sense meaning of the requirement has been massively changed. And if "need" can be met by finding that the facts satisfy requirements codified in other subparts of the CPCN statute, then there are statutory construction problems because principles of statutory interpretation require both the "need" requirement and the CPCN law's other subsections to have distinct meaning, and not be "surplusage."

[18] The ApplicantsApplicants' contention that the Town had to participate in the Paddock-Rockdale proceeding more than 150 miles away and that terminated three years before the Town was threatened with the Project at issue here requires a bit too much clairvoyance to be reasonable. (*See* ATC Br. 23 n.15.)

Finally, the PSC does not meet the fourth criterion. A standard that is a moving target provides no uniformity or consistency. (*See* Holland's Initial Brief, 24-30.)

E. THE RESPONDENTS' ARGUMENTS AS TO THE SUFFICIENCY OF THE EIS ARE PREMISED ON AN ERRONEOUS UNDERSTANDING OF THE EIS LAW AND RELATED REGULATIONS.

Holland did not waive its right to challenge the sufficiency of the EIS. It called for alternatives to be studied, developed and described; it also adopted, by reference and endorsement, various proposals and critiques of other entities, such as Clean Wisconsin, CETF and SOUL. (R. 81, Decision Matrix, pp. 2, 3, Holland's [extensive) comments on Draft EIS [omitted from the record].)

The Respondents have no tenable explanation for the failings of the EIS. Their response is that the CEQ Guidelines, cited in the Town's argument (Holland's Initial Brief, 31-42) don't apply, that compliance was good enough, and that the Court should apply a standard of review that will prevent it from reviewing whether the EIS is sufficient. The PSC made a finding as to the sufficiency of the EIS. The legal standard for reviewing a finding is "substantial evidence:"

> (6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight

> of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Wis. Stat. § 227.57(6).

Respondents concede or try to justify that the EIS does not specify an environmentally preferable alternative, or establish a distinct record of decision, and argue it doesn't have to. The PSC, for example, argues it has precluded staff from making a professional judgment as to what an environmentally preferable alternative is, on grounds that they are not tp pursue their own preference. The PSC staff can evaluate which alternative, or alternatives,[19] are considered environmentally preferable even if they might prefer a different one. (PSC, Br.54). Unable to escape precedent recognizing federal law to be persuasive on Wisconsin Environmental Policy Act ("WEPA") questions[20], Respondents argue that the EIS's purposes are met, in substance, by the general discussion of alternatives in the EIS and general references to the EIS in the PSC decision document.

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[19] 40 CFR § 15.02(b)

[20] Wisconsin's Environmental Decade, Inc. v. Public Service Commission, 79 Wis.2d 161, 174, 255 N.W.2d 917 (1977).

The notion that the requirements do not apply is in error. The CEQ Guidelines apply. This is a settled legal question.

The Wisconsin Supreme Court explicitly described CEQ Guidelines as requirements "to be followed:" "The federal regulations referred to are those to be followed pursuant to sec. 1.11(2) (c), Stats., which provides that state agencies shall follow guidelines issued by the United States Council on Environmental Quality (CEQ) in administering WEPA." Wis.'s Envtl. Decade, Inc. v. Wis. Dep't of Nat. Res., 115 Wis. 2d 381, 403, 340 N.W.2d 722 (1983). In that same case the court also noted, without criticism, circuit court language stating that "WEPA specifically states that state agencies are to follow guidelines established by the President's Council on Environmental Quality (CEQ) in implementing the provisions of WEPA. Id. at 397.

The PSC rules specifically incorporate CEQ Guidelines by reference, citing them within the PSC's own rule. Wis. Admin. Code § PSC 4.30(1)(a). In the electronic version, the incorporation by reference directly hyperlinks the CEQ Guidelines into the PSC rule.[21] The PSC rule requires the EIS "environmental analysis" to be

[21] http://docs.legis.wisconsin.gov/code/admin_code/psc/4 Verified September 19, 2016.

"consistent" with the CEQ Guidelines. Wis. Admin. Code § PSC 4.30(1)(a).

A state case involving the PSC described the Guidelines to be as applicable to state EIS' as to federal ones, referring to them simply as: "the WEPA and CEQ Guidelines." Wis.'s Envtl. Decade, Inc. v. Pub. Serv. Com., 79 Wis. 2d 409, 434 n.20, 256 N.W.2d 149 (1977) ("see the WEPA and CEQ Guidelines, note 17, supra").

Neither the PSC, nor the Applicants on the agency's behalf, can invoke some lesser test to evade the PSC's own rules. "[A]n administrative agency is bound by the rules which it itself has promulgated, and may not proceed without regard to its own rules." Larsen v. Munz Corp., 166 Wis. 2d 751, 760, 480 N.W.2d 800 (Ct. App. 1992), rev'd on other grounds, 167 Wis. 2d 583, 482 N.W.2d 332 (1992) (internal citations omitted); *see also* State v. Griffin, 126 Wis. 2d 183, 197, 376 N.W.2d 62 (Ct. App. 1985). An "agency must be rigorously held to the standards by which it professes its action to be judged." Vitarelli v. Seaton, 359 U.S. 535, 546 (1959) (Frankfurter, J., concurring and dissenting in part) (citing Securities & Exchange Commission v. Chenery Corp., 318 U.S. 80, 87-88 (1943)).

A record of decision is to identify the alternatives, specify the environmentally preferable one(s), discuss the agency's preferences *among the alternatives*, and discuss the factors (including the ones addressed in the EIS) involved in coming its decision. *See* 40 CFR 1505.2.

The PSC Decision document does not come close to substituting for a "Record of Decision" of the type contemplated by the CEQ Guidelines. It barely addresses the EIS. It notes that draft and final versions were issued (Decision, 3); that Applicants' proposal is described in the EIS (Decision, 4); that the EIS discussed the potential for an independent environmental monitor for the Project, if approved, (Decision, 45); that changes authorized during construction cannot be so significant as to trigger environmental issues not discussed in the EIS (Decision, 48, 58); that intervenors contended the EIS did not sufficiently address socio-economic impacts, a contention the Commission briefly rebuts, but only by noting only that discussing such costs would also require a discussion of benefits (Decision, 54, 55). The remaining references to the EIS are conclusory – concluding, without discussion, that it met its WEPA obligations; noting DNR's participation; and indicating, in the portion of the order issuing

Applicants the Certificate, that the Project is described in the EIS. (Decision, 55- 57.)

That's it.

These passing references do not amount to a “Record of Decision,” a viable substitute for a “Record of Decision,” or “substantial compliance” with WEPA.

Fundamentally, the EIS law is meant to require the agency decision-makers engage with the relevant environmental issues, and discuss and weigh them – to force environmental considerations into decision-making. 40 CFR § 1502.1. The law does not exist to mandate creation of a reference booklet.

Because Respondents were arguing from an incorrect premise, their arguments disputing the Town’s analysis[22] of the EIS’s and Decision’s shortcomings fail.

Without contest, the EIS failed any obligation to develop alternatives to a reasonable degree of comparability. Without contest, it deferred to the Applicants’ analysis – the analysis of parties who want to build and financially gain from construction of the facility – on

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[22] Holland’s Initial Brief, 31-42

the issue of non-transmission alternatives, devoting just one page to discussing them, and presenting the description as "The *Applicants'* evaluation non-transmission system alternatives." (R. 337 EIS, p. 39)Substituting the Applicants' evaluation for the required independent agency analysis is not an of "objective evaluation." *See* 40 CFR § 1502.14(a). The EIS did not even identify the point of low growth at which the proposed Project would fail its economic justification.

To facilitate the intended engagement and sharpen issues for the public and decision-makers, a reasonable range of alternatives has to be developed to a level of comparability so as to present a choice. 40 CFR § 1502.14(b). The document needed to be developed to the point where interested members of the public could understand the choice being made. The PSC then needed to engage and consider the environmental consequences, comparatively weigh the options, and explain its decision.

WEPA is a procedural statute. It only works if: (a) the agency objectively and rigorously develops environmental information and comparative analysis of alternatives for the public, and (b) those analyses are weighed in the decision-making process. The EIS here

does not suffice – the Decision's cursory treatment of environmental issues only confirms its insufficiency and the PSC's unfortunate lack of attention to environmental consequences and to potential alternatives.

F. THE REHEARING DECISION IS REVIEWABLE; AND ITS EVIDENCE IS UNCONTESTED RECORD EVIDENCE.

The PSC was asked to rehear certain issues, pursuant to Wis. Stat. § 227.49(3)(c), because new evidence was discovered that was not available during the contested case proceedings.

The new evidence involved a key issue in the Docket: the propriety of the assumptions the Applicants used to conduct what their analysis positing the potential developments (e.g., future energy facility development, electrical use growth, environmental constraints) that would inform a projected range of futures. The Project is then modeled with the projected futures to test how it works out. It is straightforward to construct a series of plausible scenarios that all support a preferred outcome by defining the range of potential developments to support the desired outcome. What goes in controls what comes out.

A vital decision-making issue for the PSC is whether projected scenarios correspond to the best available information. The expected

level of growth in electrical use is critically important information in this regard.

In its Final Decision – in accepting the range of futures offered by the Applicants – the Commission declared that: "The opposing intervenors did not provide credible evidence that a near-zero or negative load growth scenario would be a reasonable future for the Applicants to consider. (R.90, Final Decision, 16).

After the close of the hearing, the United States Energy Information Administration ("EIA")[23] issued a new publication and released new data documenting flat or falling electrical energy use, and indicating that Wisconsin electrical sales across all sectors had fallen to below the level of 2005. (R. 78-80; CETF-SOUL PETITION FOR REHEARING, May 13, 2015, p. 2) Essentially, the nation's authoritative and independent source on electrical energy usage, which had not been involved in the hearing and had no stake in it, had determined that the range of assumptions that the Applicants presented and the PSC approved were unsupported by actual real-world developments.

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[23]The EIA is within the Department of Energy, but independent ". . . from the rest of DOE with respect to data collection, and from the whole Government with respect to the content of EIA reports." http://www.eia.gov/about/legislative_timeline.cfm. Verified September 20, 2016.

Petitioners presented the EIA information to the PSC in their rehearing petition. To emphasize the information's significance and implications, petitioners also showed the PSC that, in approving the Paddock-Rockdale Project in 2009 – based on (for the first time) the same "strategic flexibility" methodology used in this case by the Applicants – the agency had conscripted ratepayers into a what turned out to be a failed investment. (R. 78 - 80; CETF-SOUL PETITION FOR REHEARING, May 13, 2015, p. 4-5). The Petition quoted from PSC staff analysis describing the "strong upward pressure on rates" created by the construction cycle and the associated "adverse economic development" consequences. (R. 78 - 80 at p. 6). It asked the PSC for rehearing and to require Applicants to analyze "a range of growth rates at which the Project would no longer produce positive net present value for Wisconsin ratepayers." (R. 78 - 80 at p. 6).

The court can review the PSC's decision not to rehear. The petition for rehearing, and the related PSC Order, are integral parts of a single, contested-case Docket. The initial Final Order specifically notified the parties of rights to rehearing. (R. 90, p. 63)

The petitioners' rehearing request had to be served on contested case parties. Wis. Stat. § 227.49(4). If the rehearing petition had been

granted, the same, already-existing contested case Docket, involving the same parties would have proceeded to another phase. The PSC Order denying the petition for rehearing is an Order *in the underlying Docket*. It says so on its face.

Wis. Stat. § 196.40, makes any served Order's "lawfulness" and "reasonableness" subject to court review involving application of the Wis. Stat. § 227.57 review criteria:

> After the effective date every order or determination shall be on its face lawful and reasonable unless a court determines otherwise under s. 227.57.

Wis. Stat. § 196.40.

An underlying contested case incorporating rehearing as a component element was not at issue in any of the cases cited by Respondents. The rehearing extended the underlying contested case. The order denying rehearing determines review rights. Pasch v. DOR, 58 Wis. 2d 346, 353 & 355, 206 N.W.2d 157 (1973). Finally, to the degree the Respondents arguments raise ambiguity, the statute must be interpreted to permit review: "This court has held that the review provisions of ch. 227, Stats., are to be liberally construed." Wis.'s Envtl. Decade, Inc. v. Pub. Serv. Com., 69 Wis. 2d 1, 13, 230 N.W.2d 243, 249 (1975).

The PSC's core responsibility is to the consuming public. GTE North Inc. v. Public Serv. Comm'n., 176 Wis. 2d 559, 568, 500 N.W.2d 284 (1993). Under that responsibility, and in light of the objectivity and authority of the sources cited in the rehearing petition, the PSC's failure to grant rehearing was an abuse of discretion. The rehearing petition proved – with evidence drawn from an authoritative source – that the most likely predictable future involves very low, or no, growth, a likelihood that had gone un-modeled in the proceeding here. It demonstrated that ratepayers had already been damaged by the PSC's failure to take such a possibility seriously in an earlier proceeding. In light of the ~ $600 million risk involved in this case, and the community and landowner impacts, these facts compel rehearing.

G. TRIPLE CIRCUITING IS PRACTICABLE, FEASIBLE AND REQUIRED.

No Respondent disputes the impacts imposed by placing another high voltage transmission right-of-way through the Town, which includes a right-of-way easement 255 feet wide, emplacement "near a group of apartments, agricultural fields, small residential lots, a school, and a daycare" (R. 337,EIS, p. 137) and interference with the Town's land use plan that contemplated conversion of the agricultural fields to small residential lots. (R. 344, Zuelsdorff, Ex. 5).

The Project may not unreasonably interfere with the Town's land use plan (Wis. Stat. §196.491(3)(d)6), or have an undue aesthetic impact (Wis. Stat. §196.491(3)(d)6). This facility, because of its purpose, must use existing rights-of-way where "practicable." (Wis. Stat. §196.491(3)(d)3r). For transmission lines, the highest priority existing rights-of-way are those associated with already-existing utility corridors. Wis. Stat. § 1.12(6)(a). The relevant existing utility corridor for the segment eight miles north of the Briggs Road substation is the corridor hosting the double-circuited 354kV/161kV CAPX transmission facility.

If constructed, this facility is already slated to be triple circuited with the CAPX facility for about a mile. The argument is about the other seven miles, an issue of great weight for the Town, which, sparing an adjacent community, is already burdened with the blight of the CAPX facility. If the Project is built, the question for the Town is whether it will be required to accept more blight in the same right-of-way or whether its blight problems will be multiplied by establishing another new high voltage transmission line right-of-way through it.

Respondents urge the court to ignore the issue, contending it is too technical. The issue is legal. The NERC reliability standards are

rules that must be adopted by FERC (the Federal Energy Regulatory Commission) to have binding effect. *See* 16 U.S.C. §§ 824o(a)(2), (3). NERC cannot make the final administrative decision to penalize any entity. FERC, the government agency, can. 16 U.S.C. 824o(e)(3). Because these are rules, a penalty cannot be imposed without due process – notice, hearing, and, if a party desires, review. *See* 16 U.S.C. §§ 824o(e)(1), (2). Courts are qualified to interpret rules, and indeed must do so independently in order to evaluate whether an agency interpretation is reasonable. MercyCare Ins. Co. v. Wis. Comm'r of Ins., 2010 WI 87, ¶32, 328 Wis. 2d 110, 786 N.W.2d 785.

Without dispute, the facility is not being built to resolve any local reliability problem.[24] The Applicants concede this. (See: Applicants' Br., 39: "The recently completed CapX project provides a 345-kV line into the area and can serve the energy needs of the area until peak demand reaches 750 megawatts (MW).")

Though the Project is not needed to "serve the energy needs of the area" now, the Respondents treat the NERC standard as though the

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[24]R. 90 Final Decision April 23, 2015 at 16: "*. . . 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 . . .) 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.

Project were required to serve local load. They invoke the NERC standard *now* seemingly under the theory that this facility will *someday become* a necessary component of the local load serving system. (Applicants' Br. 39: ". . . a new 345-kV line could be needed as soon as 2026.")

The Applicants now concede that the Project only becomes "needed" for local (La Crosse – Winona) reliability when peak demand reaches 750 MW – and not before that benchmark is crossed. (Applicants' Br., 39).

While speculating that breaching the 750 MW threshold "could happen" as early as 2026, Applicants do not disclose that it only occurs in 2026 if the highest period of load growth is cherry-picked and then projected forward as if it would be reproduced continuously. This framework for forecasting is unsupported.[25] No planning standard was cited, or exists, for the proposition that loads are properly projected for the following decade by picking the two fastest-growing of the last decade and simply projecting them forward. If load grows at the rate that it grew between 2006 and 2012 (instead of 2010 and 2012) the

[25] The record presents no evidence that electrical use has ever grown at 3% per year for any years other than the ones selected .

750 MW threshold will *never* be breached, because the net load growth during that period is "none." (R.: 365(31) REVISED DIRECT TESTIMONY OF WILLIAM POWERS IN OPPOSITION TO THE APPLICATION, p. 16, PSC REF#:229030) (referencing growth rates described in). If it grows at the rate that the EIA indicates Wisconsin has been growing, it will *never* happen, as the EIA predicts falling energy use as efficiency improves and the economy becomes less energy-intensive. If it grows at 1.24% per year, it is reached "*sometime* after 2050." (R. April 23, 2015 Order, 15) The EIS concluded that "Experts are predicting demand to fall in the future." (R. 337, EIS, p. 67). Projections of growth that contemplate the Project becoming "needed" to serve local load ignore that the state's highest energy priority is "[e]nergy conservation and efficiency." (Wis. Stat. § 1.12(4)(a)

Applicants sidestep admitting that the Town's analysis of the NERC rule (Holland's Initial Brief, 46-52) is accurate by contending it "misses the mark." They contend that the 161 kV line is immaterial to "this issue," without saying what "this issue" is. (Br. 40). The PSC makes similar assertions, noting "the requirement that a transmission owner strictly account for a Category C Contingency contains an

exception that "excludes transmission circuits where multiple circuit towers are used over a cumulative distance of 1 mile or less in length." (Br., 44) The PSC misses that the set of poles and wires constituting the double-circuited 161/345 kV is *already* on "multiple circuit towers" for eight miles, which is more than one. The fiction that that facility is not "multiple circuit" depends on ignoring that the 161 kV line is also part of the BES (Bulk Electrical System). The cutoff for designation as an element of the BES is 100 kV. FERC establishes that boundary as a "bright line."[26] Thus any planning requirement that arises from having two transmission components of the BES strung on a single set of poles for more than a mile is already breached. Specifically, Category C contingencies involve "Event(s) resulting in the loss of *two or more (multiple*) elements." (R. 165, Applicant witness Huffman, Exhibit 2, NERC Standard, at "Page 4 of 13 [p. 5 of the PDF document]) (Emphasis provided)

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[26] 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.

Applicants assert that if the facility were triple-circuited, NERC criteria would be "violated." They indicate the nature of the violation by stating "if these two 345 kV lines [the CAPX line and this Project's line] were co-located NERC would require a plan to interrupt customers in the event these two lines are out of service . . ." (Br., 40). This statement could mislead a reader into believing that it is a violation of NERC criteria for a transmission provider to have to create a plan to interrupt customers under certain contingencies. It is not.

A requirement to create a plan-to-interrupt is not a violation of NERC criteria, it is a *requirement* of the NERC criteria when certain conditions occur: "The 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."[27] This is the standard cited in Applicants' witness's exhibit on this issue.

Compensating planning allows for two (or more) elements of the Bulk Electrical System to be configured such that they are all at elevated risk of becoming unavailable because of a common cause,

[27] R. 165, Applicant witness Huffman, Exhibit 2, NERC Standard, at "Page 1 of 13 [p. 2 of the .pdf document]

while *simultaneously* enabling the transmission provider to avoid the potential for penalties. This is why the standard is titled "Standard TPL-003-0b — System Performance Following Loss of *Two or More* BES Elements."[28] (Emphasis provided). The standard describes the what has to be done when *two or more* elements of the BES are at elevated risk of being out-of-service at the same time. (R. 165, Applicant witness Huffman, Exhibit 2, NERC Standard, at "Page 1 of 13 [p. 2 of the PDF document]. Applicants nowhere dispute that they already have to have a plan to interrupt customers because such planning is triggered by the potential for: "Event(s) resulting in the loss of two or more (multiple) elements."[29] ((See: R., 165 Applicant witness Huffman, Exhibit 2, NERC Standard, Table 1 at "Page 4 of 13 [p. 5 of the PDF document submitted under the Exhibit-designating cover sheet]).

Two elements of the BES – the 161 kV transmission line and the 345 CAPX transmission line – are *already* co-located.

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[28] R. 165, Applicant witness Huffman, Exhibit 2, NERC Standard, at "Page 1 of 13 [p. 2 of the .pdf document]

[29] Huffman is referring to are elements of the bulk power system. The CAPX 345 kV line, the 161 kV line with which it is double circuited and the 345 are *all* "elements" of the bulk power system because they are all over 100 kV.

Contending, in their brief, that the threat of a "violation" that would expose the Applicants to a "penalty," arises because the Applicants might, or would, have to conduct some extra planning, per NERC requirements, to avoid that potential violation, is nonsensical. The transmission operator controls whether they face a potential violation by doing the compensating planning.

A requirement-to-plan does not equate to an unavoidable violation. The planning is avoids the violation.

Conflating a requirement-to-plan with an unavoidable violation would directly contradict what the Applicants themselves told the PSC staff in response to inquiries concerning triple circuiting, which confirms what Holland has contended and contends here. The Applicants stated that "To be compliant with NERC planning criteria for this Category C condition [triple circuiting], NSPW would have to have a plan to interrupt service to customers in the event of such a contingency as required to maintain acceptable system loadings and voltages." (R. 156(108), Part 2 of the Applicants' Responses to the PSCW Staff's Fourth Set of Data Requests, RESPONSE TO REQUEST NO. 04.04; p. 6 of the un-numbered PDF document.) The document goes on to characterize triple circuiting as "disfavored."

What the Applicants are saying is that it is "OK" to be required to have a plan to interrupt customers *if* that planning obligation flows from an arrangement they endorse – double circuiting of the CAPX 345 kV transmission line with the pre-existing 161 kV transmission line. But if the same class of requirement for additional planning arises because of triple circuiting – something that they would prefer not happen, then they oppose it.

Being "disfavored" or opposed by the project operator that would have to shoulder the burden of additional planning is understandable, but that does not make triple-circuiting "infeasible" or "impracticable." Having to triple circuit would be less than what the Applicants want, and sub-optimal according to transmission experts.[30] But the law does not prioritize their preferences or optimization of other values above co-location, particularly where the purpose of the transmission line is to facilitate power imports.[31] The legislature did the opposite.

[30] Any implication to the effect that NERC violations are unavoidable if the Project is triple circuited is inconsistent with the rule.
[31] R. 90 (Final Order of April 23, 2015): " . . . the proposed project will increase the ability to import wind energy" (at 18, referencing ApplicantsApplicants' justifications); See also pp. 51-52, discussing "transfer capability."

The law prioritizes use of existing utility corridors. Although whether it was "practicable" to triple-circuit was argued to the PSC by Holland using the same kind of analysis presented in the initial brief here,[32] the PSC never made a determination of practicability.[33] The PSC just observed that limiting triple circuiting to one mile would meet NERC criteria. The observation was meaningless because it elided question of whether triple circuiting could also meet NERC criteria.[34] It sidestepped the issue. That is not the same as exercising reasoned discretion. There is no exercise of discretion to defer to.

Under MercyCare the court has an independent obligation to interpret the FERC-NERC rule so it can evaluate the reasonableness of the PSC's *sub silencio* interpretation. As a matter of law, Applicants' preferences cannot overcome a legislative mandate. Their preferences as to when they will, and will not, conduct contingency studies cannot define which multiple circuiting is "practicable," and which is not.

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[32] R. 20, Holland's Initial Brief to PSC, pp. 3-11
[33] R. 90 (Order of April 23, 2015) p. 25.
[34]

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. If the court holds consistent with the Town's legal analysis of the "need" provision, Wis. Stat. § 196.491(3)(b)2., then it should vacate the decision, reversing without remand. Wis. Stat. § 227.57(5). It should also direct the PSC to make orders sufficient to ensure that the cost consequences of terminating the Project are not borne by ratepayers. Wis. Stat. § 227.57(9).

Holland notes that CPCN Order did not require Applicants to begin construction until a year after the exhaustion of legal challenges:

> 28. The CPCN is valid only if construction commences no later than one year after the latest of the following dates: * * *
>
> d. The date when the Applicants receive the Final Decision, after exhaustion of judicial review, in every proceeding for judicial review concerning the CPCN and the permits, approvals, and licenses described in par. (b.)

(R. 90 p. 62.) The Applicants were given further latitude by a provision deferring the "take effect" date of the Order by one year. (R. 90 p. 62, Order Point 29).

There existed no impending provision-of-service problem. The Town's initial Petition for Review in this matter was filed April 27, 2015, within two business days of the service date of the Final Decision (April 23, 2015). (R. 90) Applicants had immediate notice of serious post-hearing opposition.

Under the latitude given them by the Order, the Applicants did not have to establish contracts or incur costs during the pendency of this proceeding. The CPCN exerted no time pressure to initiate construction-related activities, to obtain land rights, or undertake any other activity related to construction.

If the Court does not hold consistent with the Town's analysis of Wis. Stat. § 196.491(3)(d)3, but holds the EIS to be insufficient, or the that the denial of rehearing was improper, then it should vacate the Order and remand for further proceedings consistent with its guidance. Wis. Stat. § 227.57(8).

If the court determines none of the foregoing, but agrees with the Town's analysis of the feasibility of triple circuiting, it should vacate that part of the decision, and remand with instructions to the PSC to re-issue an order that requires triple circuiting with CAPX facilities already approved in 05-CE-136, and to take the administrative actions necessary to accomplish that purpose. Wis. Stat. §§ 227.57(5), (8), (9).

Dated and respectfully submitted September 22, 2016.

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