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VIA FEDERAL EXPRESS

August 11, 2016

Pamela Radtke, Clerk of Courts
LEC – Rm. 1200
333 Vine Street
La Crosse, Wisconsin 54601

RE: *Town of Holland v. Pub. Serv. Comm'n of Wis.*
La Crosse County Circuit Court Case No. 15-CV-0219

Dear Ms. Radtke:

Please find enclosed for filing in the above-referenced matter the following:

1. Respondent Public Service Commission of Wisconsin's Brief Opposing Petition for Judicial Review; and
2. Certificate of Service.

By cover of this letter, copies of the enclosed are being served on counsel of record via First Class Mail. Thank you for your consideration.

Sincerely,

Cynthia E. Smith
Chief Legal Counsel
Alex G. Mahfood
Assistant General Counsel

Enclosures

cc: The Honorable Todd W. Bjerke (w/ enclosures) (via Federal Express)
Service List (w/ enclosures) (via First Class Mail)

AGM:mc: DL: 01420381

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

LA CROSSE COUNTY

TOWN OF HOLLAND,

Petitioner,

v.

Case No. 15-CV-0219

PUBLIC SERVICE COMMISSION
OF WISCONSIN,

Respondent.

**RESPONDENT PUBLIC SERVICE COMMISSION OF WISCONSIN'S
BRIEF OPPOSING PETITION FOR JUDICIAL REVIEW**

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INTRODUCTION

Respondent Public Service Commission of Wisconsin (the “Commission”) opposes the petition for judicial review and initial brief of Petitioner Town of Holland (“Holland”) that challenge the following decisions in *Joint App. of Am. Transmission Co. LLC and N. States Power Co. – Wis., as Elec. Pub. Util., for Auth. to Construct and Operate a New Badger-Coulee 345 kV Transmission Line from the La Crosse Area, in La Crosse Cnty., to the Greater Madison, Area in Dane Cnty., Wis.*, Docket No. 5-CE-142: (1) the Commission’s April 23, 2015 Final Decision, (R.91) (the “Final Decision”); and (2) the Commission’s June 15, 2015 Order on Petitions for Rehearing and Request for Clarification, (R.107) (the “Clarification Order”).

The Final Decision granted a Certificate of Public Convenience and Necessity (“CPCN”) to American Transmission Company LLC (“ATC”), Northern States Power Company – Wisconsin (“NSPW”), Dairyland Power Cooperative (“Dairyland”), SMMPA Wisconsin, LLC and WPPI Energy (collectively, the “Applicants”) to construct and operate a 345 kilovolt (“kV”) high-voltage transmission line known as the Badger Coulee Project (the “Badger Coulee Project” or the “Project”). The Clarification Order, as relevant to this case, denied a petition for rehearing that attempted to challenge multiple findings underlying the Final Decision.¹

Wisconsin utilities must provide “reasonably adequate service and facilities” to the public. Wis. Stat. § 196.03(1). Pursuant to this fundamental principle and the Legislature’s clear directive to implement the state’s energy policy, the Commission properly granted a CPCN for the Badger Coulee Project under Wis. Stat. § 196.491(3) (the “CPCN Law”), Wis. Stat. §§ 1.12(4) and

¹ On February 23, 2016, the Court denied the Commission’s motion to dismiss *Town of Holland v. Pub. Serv. Comm’n of Wis.*, Case No. 15-CV-0379 (Wis. Cir. Ct. La Crosse Cnty.) (“*Holland I*”), which the Court consolidated with the matter captioned above. Consistent with the Court’s decision, and simply for purposes of this brief, the Commission treats the Clarification Order as having denied the petitions for rehearing that it discussed. However, as noted in the Commission’s withdrawn April 1, 2016 amended petition for leave to appeal non-final order, the Commission reserves the right to appeal the denial of its motion to dismiss *Holland II* in any appeal as of right.

196.025(1)(ar) (the “Energy Priorities Law”), Wis. Stat. §§ 1.12(6) and 196.025(1m) (the “Siting Priorities Law”), and Wis. Stat. § 1.11 (the “Wisconsin Environmental Policy Act” or “WEPA”) based on a voluminous record developed by numerous parties and the public. Recognizing the difference in “comparative institutional qualifications and capabilities of the court and the administrative agency,” *MercyCare Ins. Co. v. Wis. Comm’r of Ins.*, 2010 WI 87, ¶ 28, 328 Wis. 2d 110, 786 N.W.2d 785, the Legislature requires, under Wis. Stat. § 227.57, that this Court defer to the Commission, which has specialized knowledge in the complex field of energy regulation. The Court should thus uphold the Final Decision for three key reasons.

First, the Project’s need is supported by substantial evidence and garnered widespread support from various entities.² 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.

Holland’s entire challenge to the Project’s need hinges on an impermissibly narrow interpretation of Wis. Stat. § 196.491(3)(d)2., and a selective misreading of the Final Decision. Holland asserts, for the first time on judicial review, that the only way that the Commission can find that a project satisfies Wis. Stat. § 196.491(3)(d)2., which requires that a project satisfy the reasonable need of the public for an adequate supply of electric energy, is where the project addresses the reliability of the transmission system. (*See, e.g.*, Holland’s Br. at 15-21). Despite

² For instance, in addition to the Applicants, MISO, the Clean Energy Intervenors, and the Wisconsin Business and Labor Intervenor testified in support of the Project’s need. (R.365(39); R.365(72); R.365(53)). Further, RENEW Wisconsin, the Greater Madison Chamber of Commerce, and the Municipal Electric Utilities of Wisconsin expressed support for the Project. (R.338(134); R.338(88); R.338(35)).

Holland's assertions, Wis. Stat. § 196.491(3)(d)2. does not state that a CPCN can only be granted if the Commission finds that a project addresses the reliability of the transmission system. Holland's belated claim contravenes the plain language of Wis. Stat. § 196.491(3)(d)2., other provisions in the CPCN Law, and the substantial evidence in the record.

Holland inconsistently asserts that the Commission did not consider the "need" issue in the Final Decision. (*See* Holland's Br. at 16-17). Even a cursory review of the Final Decision confirms that the Commission clearly made numerous need-related Findings of Fact, including that the Project "will adequately address the present needs of the [A]pplicants' electric systems and are necessary to satisfy the reasonable needs of the public for an adequate supply of electrical energy." (R.91:5 ¶ 5). The Final Decision devoted nearly 10 pages to discussing the need issue. *Id.* at 10-19. Holland's assertions that the Commission ignored the need issue are simply without merit. Similarly, the Final Decision never confirmed that the Project is not needed to ensure adequate supply. (*See* Holland's Br. at 18, 21). The passage from the Final Decision Holland quotes in support of this assertion simply recognizes, as discussed more thoroughly below, that the Project satisfies the reasonable needs of the public for an adequate supply of electric energy in several different ways. (*See id.* at 18-19 (quoting R.91:16)).

Second, the Commission properly sited the Project after weighing and balancing a host of evidence concerning potential impacts to the human and natural environments and reliability concerns. The Commission selected a route in the La Crosse Area that: (1) shares a tremendous amount of high quality existing utility or road rights-of-way by length and area; (2) minimizes impacts to agricultural land and forested area; (3) and contains fewer homes and apartment buildings within 300 feet of the Project's centerline than the competing alternative. In addition to drawing upon these superior characteristics, the Commission imposed conditions requiring the

Applicants to avoid sensitive parts of the community that the Project would have otherwise impacted. As such, Holland's fleeting assertion that the Project will negatively impact it and interfere with its land use plan is completely unsupported by the record. Similarly, Holland's assertion that the Project should be co-located with another 345 kV high-voltage transmission line for 8 miles ignores binding standards that ensure the reliability of the transmission system.

Last, in compliance with its WEPA obligations, the Commission utilized a host of permissible sources, including its own independent professional judgment, to prepare a comprehensive, multi-volume Environmental Impact Statement (the "EIS"). The EIS more than adequately described the need for and numerous alternatives to the Project. Holland's challenges to the EIS ignore the fact that the EIS objectively developed and described, in meticulous detail, "no action" and other alternatives to the Project. As such, in challenging the EIS, Holland misapprehends WEPA and misconstrues the EIS itself.

In sum, Holland is absolutely correct in asserting that "this is not a close case." (Holland's Br. at 15). Unfortunately for Holland, however, this means that the Court should dismiss Holland's petition for judicial review with prejudice and affirm the Final Decision in its entirety. The Legislature has specifically charged the Commission with reviewing CPCN applications. Indeed, in granting a CPCN for the Badger Coulee Project, the Commission soundly employed its specialized knowledge and expertise. It made Findings of Fact supported by substantial evidence that was introduced in a comprehensive contested case proceeding that afforded all parties and members of the public a full and fair opportunity to review and challenge the evidence. The Commission applied these Findings of Fact to the applicable law in a reasoned and thoughtful manner. *See Freedland v. Wis. Dep't of Natural Resources*, Case No. 15-CV-0117 (Wis. Cir. Ct. La Crosse Cnty. May 18, 2016) ("The court's role is not to determine whether it would strike the

same balance as [Commission] but to determine whether the [Commission] properly applied [the law] in its review and whether there was substantial evidence to support the [Commission's] determination, regardless whether the court would make that same determination.”). The Court should thus defer to the Commission and not substitute its own judgment. *Id.* (“[T]he courts are to give wide latitude to state agencies in their decisionmaking[.]”).

STATEMENT OF FACTS³

I. GENERAL OVERVIEW OF THE COMMISSION AND THE CPCN LAW.

The Commission is an independent state agency made up of three full-time, fixed term Commissioners and charged with “jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient to its jurisdiction.” Wis. Stat. §§ 15.79 and 196.02(1). The Commission was originally created in 1905 as the Railroad Commission, which was charged with regulating railroad rates. *Clean Wis., Inc. v. Pub. Serv. Comm’n of Wis.*, 2005 WI 93, ¶ 5, 282 Wis. 2d 250, 700 N.W.2d 768. Two years later, the Legislature expanded the Commission’s powers to include regulating public utilities. *Id.* ¶ 6. Amidst the Great Depression and the electrification of rural Wisconsin in the early 1930s, the Legislature expanded the Commission’s ratemaking authority and renamed it the Public Service Commission of Wisconsin. *Id.* ¶ 8. In the late 1970s, the Commission’s functions related to transportation were assigned to other agencies, making the Commission’s primary focus the regulation of public utilities. *Id.* ¶ 10. Today, the Commission is aided by more than 140 staff members consisting of auditors, accountants, engineers, rate analysts, attorneys, planners, research analysts, economists, consumer analysts, consumer specialists, and paraprofessional and administrative support personnel. These

³ The Commission will develop additional facts in the Argument section below.

subject matter experts objectively advise the Commissioners, who retain the authority to make decisions on behalf of the Commission.⁴ *See also* Wis. Admin. Code § PSC 2.03.

The prevailing purpose of the Commission “is to ensure that public utilities’ actions are in the public interest.” *Wis. Indus. Energy Grp., Inc. v. Pub. Serv. Comm’n of Wis.*, 2012 WI 89, ¶ 26, 342 Wis. 2d 576, 819 N.W.2d 240 (“*WIEG*”). The Commission currently regulates approximately 1,100 public utilities that furnish electric, natural gas, and water service to the public. *See* Wis. Stat. § 196.01(5). If the Commission determines that a public utility’s service is inadequate or not being provided, the Commission is authorized to order the public utility to furnish reasonable service in the future. *Id.* § 196.37. Further, public utilities must obtain the Commission’s approval before setting new rates for service, issuing securities, and as implicated in this case, constructing large electric projects. *Id.* § 196.20, 201.03, and 196.491.

The Commission is authorized to review and approve applications to construct large electric projects under the CPCN Law. Wis. Stat. § 196.491(3). As a threshold matter, the CPCN Law is not implicated unless the proposed project meets the statutory definition of a “facility.” *Id.* § 196.491(3)(a)1. The definition of “facility” includes a “high-voltage transmission line” like the one at issue in this proceeding. *Id.* § 196.491(1)(e). Upon receiving an application for a CPCN, the Commission must hold a public hearing in the area affected in accordance with the contested case procedures set forth in Wis. Stat. § 227.44. *Id.* § 196.491(3)(b). After reviewing the record compiled in the contested case proceeding, the Commission must determine whether the project serves the public convenience and necessity based on a number of factors relating to the need for and impacts of the project based upon the criteria outlined in the CPCN Law and related statutes.

⁴ *See* Public Service Commission of Wisconsin, PSC Overview, available at <http://psc.wi.gov/aboutUs/organization/PSCoverview.htm> (last visited Aug. 1, 2016).

WIEG, 2012 WI 89, ¶¶ 33, 35. The Commission has issued no fewer than 134 CPCNs. Indeed, the Supreme Court of Wisconsin has recently affirmed two Commission decisions interpreting the CPCN Law, in part, based on the Commission’s thirty years’ worth of experience in reviewing and approving CPCN applications. *Id.* ¶¶ 2, 24; *Clean Wis., Inc.*, 2005 WI 93, ¶¶ 2, 137.

II. GENERAL OVERVIEW OF THE PROJECT.

On October 22, 2013 the Applicants filed an application for a CPCN to construct the Badger Coulee Project under the CPCN Law and Wis. Admin. Code § PSC 111.53.⁵ (R.155(1)). On November 21, 2013, the Commission deemed the application incomplete and requested additional information.⁶ (R.156(1)). After receiving this additional information, the Commission deemed the application complete on April 30, 2014. (R.156(1.1)). The application states that the Project will: (1) improve electric system reliability locally and regionally; (2) deliver economic benefits for Wisconsin utilities and electric consumers; and (3) expand infrastructure to support the public policy of greater use of renewable energy. (R.155(2):6).

The Badger Coulee Project originates at the Briggs Road Substation in La Crosse County, extends to the North Madison Substation, and terminates at the Cardinal Substation, both in Dane County. (R.337(2):1). The Applicants proposed route alternatives for the Commission’s consideration in several different segments. *Id.* at 46-47. For instance, between the Briggs Road Substation and Lyndon Station, the segment implicated in this case, the Applicants proposed

⁵ Through this application, ATC and NSPW also applied to the Wisconsin Department of Natural Resources (the “DNR”) for a Utility Permit under Wis. Stat. ch. 283 and §§ 30.025(1s), 30.19, 30.123, and 281.36 and Wis. Admin. Code chs. NR 103, 216, 299, and 320. (R.155(2):8).

⁶ “An application [for a CPCN] shall be in the form and contain the information required by Commission rules and shall be filed not less than 6 months prior to the commencement of construction of the facility.” Wis. Stat. § 196.491(3)(a)1. The Commission “shall determine whether an application . . . is complete, and no later than 30 days after the application is filed, notify the applicant about the determination.” *Id.* § 196.491(3)(a)2. “If the [C]ommission determines that the application is incomplete, the notice shall state the reason for the determination. An applicant may supplement and refile an application that the [C]ommission has determined to be incomplete.” *Id.*

alternative Segments P-N or O. *Id.* Segment P-N generally travels north and east and is approximately 110 miles in length, whereas Segment O generally travels south and east and is approximately 85 miles in length.⁷ *Id.* at 136-45. For all but three segments, the Applicants proposed two route alternatives. *Id.* The route alternatives ranged in length from approximately 159 miles to 182 miles,⁸ and ranged in cost from approximately \$540 million to \$580 million in 2018 dollars, the projected in-service year for the Project. *Id.* at 46-47, 40.

III. THE RELEVANT PROJECT AREA.

Western Wisconsin has unique transmission system characteristics. (R.155(90):Ex. 1 at 125). It includes several areas of high electric demand and interconnects the transmission systems in Minnesota, Wisconsin, and Iowa. *Id.* A robust transmission system in western Wisconsin is needed to reliably serve the upper Midwest. *Id.* However, the number of 345 kV transmission lines between Minnesota and Wisconsin is limited, which constrains movement and affects efficiency and reliability. (R.155(90):Ex. 2 at 8). The transmission system in western Wisconsin is further impacted by flows of electric energy in various directions. (R.155(90):Ex. 1 at 125). In particular, flows of electric energy from west to east cause stress on the transmission system in western Wisconsin. This west to east flow is also limited due to voltage stability and recovery limitations. *Id.* Additions of wind-powered generation will only increase this west to east flow and contribute to expected overloads. *Id.* at 88, 125; (R.365(39):27r).

One important load center within western Wisconsin is the La Crosse Area, where the Badger Coulee Project originates. (R.337(2):1). The La Crosse Area “has been experiencing

⁷ The Appendix contains a figure depicting the Badger Coulee Project route alternatives between the Briggs Road Substation and Lyndon Station.

⁸ The “Northern Route” was 181.7 miles in length and comprised Segments P, N, M, K, J, H, G, E, and D. (R.155(2):46). The “Southern Route” was 159.4 miles in length and comprised Segments O, M, L, J, I, G, F, C, and B. *Id.* The Applicants generally preferred the Northern Route. *Id.* at 46-47.

population and business growth and associated increased demand for power.” (R.155(90):Ex. 2 at 3). Holland concedes that the La Crosse Area is “fast-developing.” (Holland’s Br. at 42). The La Crosse Area has reached a new peak demand for power each year since 2008. (R.155(90):Ex.2 at 3). Between 2010 and 2012, total load grew 3.44 percent, which was considerably higher than the average load growth in the rest of the NSPW and Dairyland service areas. *Id.* The La Crosse Area reached a new coincident peak demand of 481 megawatts (“MW”) in 2012.⁹ *Id.*

Prior to 2015, however, only four 161 kV transmission lines delivered power to the La Crosse Area. *Id.* at 4. In 2015, NSPW, Dairyland, and WPPI Energy placed into service a new 345 kV transmission line that spans between Hampton, Minnesota, Rochester, Minnesota, and the La Crosse Area (the “CapX Project”) to support the growing demand.¹⁰ *Id.* at 3-4. While the CapX Project provides a strong 345 kV transmission line into the La Crosse Area, it was generally designed to address reliability issues when load exceeds 430 MW, which has since occurred. (R.365(19):4). Further, the CapX Project only supports up to 750 MW of load in the La Crosse Area. (R.155(90):Ex.2 at 3). 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. *Id.* at 3, 7. To ensure that an electric utility satisfies its statutory requirement to provide reasonably adequate service, it must plan ahead. *Clean Wis., Inc.*, 2005 WI 93, ¶ 12. Due to the long lead time associated with constructing new facilities, the Commission recommends planning years into the future. *Id.*

⁹ The phrase “coincident peak” refers to the demand level a particular component of the system reaches at the time when the entire system reaches its peak demand. (See R.365(19):9).

¹⁰ The Commission approved the CapX Project in *Joint App. of Dairyland Power Coop., N. States Power Co. – Wis., and Wis. Pub. Power, Inc., for Auth. to Construct and Place in Service 345 kV Elec. Transmission Lines and Elec. Substation Facilities for the CapX Twin Cities-Rochester-La Crosse Project, Located in Buffalo, Trempealeau, and La Crosse Cnties., Wis.*, Docket No. 5-CE-136, 2012 WL 1979070 (Pub. Serv. Comm’n of Wis. May 30, 2012) (“CapX”).

IV. HISTORY OF THE PROJECT.

Planning for the Badger Coulee Project began as early as 2004, in a proceeding before the Commission known as ATC's Access Initiative. (R.365(13):9). ATC's Access Initiative examined six transmission alternatives to evaluate the value of expanding the ATC transmission system to reduce congestion costs and improve access to generation sources outside of the ATC system. *Id.* ATC's Access Initiative ultimately developed general principles to apply in evaluating economic access transmission projects. *Id.* During the proceeding, Dairyland suggested connecting the La Crosse Area to the Madison area with a 345 kV transmission line. *Id.*

In 2008, the governors of five states in the upper Midwest formed the Upper Midwest Transmission Development Initiative (the "UMTDI"). *Id.* at 11. The UMTDI studied regional electric transmission investment and cost sharing to support cost-effective renewable generation while maintaining the reliability of the transmission system in the Midcontinent Independent System Operator ("MISO").¹¹ *See id.* In 2010, the UMTDI identified the need for a transmission line between, among other areas, the La Crosse Area and the Madison area, which the Applicants have proposed as the Badger Coulee Project. (R.153:9).

Also in 2010, ATC, NSPW, and MISO, in collaboration with other neighboring transmission owners, conducted a study assessing reliability needs in western Wisconsin, known as the Western Wisconsin Transmission Reliability Study (the "WWTRS"). (R.365(13):9-10). The WWTRS evaluated how different transmission options would meet reliability needs in the

¹¹ "MISO is a not-for-profit, member-based organization that administers the wholesale electricity market in the mid-continental U.S. MISO is responsible for providing transmission service, coordinating daily operations of generating and transmission facilities, administering bulk energy markets, and transmission system planning." (R.337(2):39; R.365(39):3r-4r (describing MISO and its responsibilities)); Wis. Stat. § 196.485(1m)(c) (MISO has the "exclusive duty to provide transmission service in the transmission area and shall ensure that each transmission facility in the transmission area that is under its operational control is planned, constructed, operated, maintained and controlled as part of a single transmission system.").

eight to ten-year timeframe. *Id.* The WWTRS demonstrated that the Badger Coulee Project resolved a number of reliability issues in western Wisconsin, thereby eliminating the need for several other reliability based projects.¹² (R.155(90):Ex. 1 at 79-90).

MISO has also studied the Badger Coulee Project as part of its Transmission Expansion Plan (the “MTEP”) process, which is an open and transparent regional transmission planning process that results in recommendations for transmission expansion. (R.365(39):9r-12r). The MTEP process is intended to identify transmission system expansions that will: (1) ensure reliability; (2) support the reliable and competitive supply of electric power; and (3) support energy policy mandates. *Id.* at 12r-13r. It “examines congestion that may limit access to the most efficient resources, and considers improvements that may be needed to meet forecasted energy requirements.” *Id.* at 13r. MISO stakeholders¹³ assist in the development of a wide range of future system scenarios and state and federal energy policies that “form the basis for forecasts of resources and load that would be economical and consistent with [those policies].” *Id.* at 13r-14r. Once MISO has developed an MTEP, which consists of many transmission projects, it presents the recommendations to MISO’s Board of Directors for certification. *Id.* at 14r.

In the 2011 MTEP process, MISO’s Board of Directors certified a set of projects known as the Multi Value Project (“MVP”) Portfolio.¹⁴ *Id.* at 17r. An MVP is an individual project that is part of a portfolio that addresses needs and provides benefits across the entire MISO footprint

¹² Several other studies conducted by either the Applicants or their affiliates have established the need for a transmission line between the La Crosse Area and the Madison area, including the Minnesota Renewable Energy Standard Upgrade Study, the Capacity Validation Study, and the Strategic Midwest Area Renewable Transmission Study. (R.365(13):10-11; R.151; R.152; R.154).

¹³ These MISO stakeholders include transmission owners, regulatory authorities, public consumer advocates, environmental representatives, end-use customers, and independent power producers. (R.365(39):12r-13r).

¹⁴ The Federal Energy Regulatory Commission (“FERC”) also approved MISO’s MVP Tariff in 2010 and 2011. (R.365(13):12; R.365(39):15r, n.9). The MVP Portfolio approved in 2011 contained 17 MVPs, three of which included two distinct lines. (R.365(13):13). Thus, practically speaking, there were 20 MVPs approved. *Id.* Some have already started or completed construction, while others have received construction approval. *Id.* at 13-14.

to meet one of the following criteria: (1) the MVP reliably and economically delivers energy as mandated by renewable energy legislation or other requirements documented by energy policy mandates or laws; (2) the MVP provides multiple types of economic value to multiple pricing zones within MISO and the total economic benefits are greater than the cost; or (3) the MVP addresses at least one projected violation of standards established by the North American Electric Reliability Corporation (“NERC”) or a regional entity like MISO and at least one economic based transmission issue that provides value across multiple pricing zones. *Id.* at 15r-17r.

The Badger Coulee Project is part of the MVP Portfolio. *Id.* at 17r. “MISO’s analyses demonstrate that the [Project] will be needed to ensure the continued reliable operation of the regional transmission system, including the NSPW and ATC transmission systems, while meeting the renewable energy mandates of the MISO footprint.” *Id.* at 20r. MISO’s analyses also demonstrate that while the MVP Portfolio collectively provides economic and public policy benefits, each MVP individually satisfies reliability needs. *Id.* at 21r.

MVPs are eligible for regional cost sharing, meaning the vast majority of their costs will be paid for by all of MISO’s members. (R.365(13):12-13). Based on this regional cost sharing arrangement, the Wisconsin customers of ATC and NSPW will only be required to pay \$5.05 million for the Badger Coulee Project, on a net present value revenue requirement (“NPVRR”) basis. *Id.* at 13. As discussed more thoroughly below, this means that as long as the Project provides benefits to Wisconsin in excess of \$5.05 million on an NPVRR basis, the Project will provide “net economic benefits.”¹⁵ *Id.*

¹⁵ Importantly, the phrase “net economic benefits” refers to “the Project’s overall economic benefits to ratepayers even when considering the cost to those ratepayers.” (R.365(13):6).

V. NEED FOR THE PROJECT.

In addition to the planning history described above, the Applicants independently conducted rigorous analyses establishing the need for the Badger Coulee Project. (*See, e.g.*, R.365(13); R.365(19)). Commission staff, MISO, and other parties to the contested case proceeding corroborated the Applicants' analyses. (R.365(42); R.365(43); R.365(46); R.365(47); R.365(39); R.365(72)). These analyses demonstrate that the Project satisfies three major categories of need: (1) reliability; (2) economic; and (3) public policy. (R.365(13):6).

First, the Project resolves regional and local reliability concerns that would otherwise require the construction of new or expanded facilities in the future. *Id.* at 7. The Project provides regional reliability by connecting the 345 kV transmission systems in Wisconsin and Minnesota. *Id.* The Project provides local reliability by providing the benefits of a second 345 kV transmission line to the rapidly growing La Crosse Area. *Id.* Accordingly, the Project obviates the need to construct 16 reliability projects in ATC's service territory, at an estimated avoided cost of \$92.6 million; and 13 reliability projects outside of ATC's service territory, at an estimated avoided cost of \$98.3 million. *Id.* These estimated avoided costs are separate and apart from the Project's net economic benefits. *Id.*

Second, the Project reduces the cost ATC and NSPW customers pay for electricity in an amount significantly greater than the Project's cost. *Id.* at 6. The Applicants evaluated the Project through 126 models, "all with separate and varied assumptions for critical inputs like load growth, natural gas prices, generation retirements, [and] [carbon dioxide] prices." *Id.* In every model, the benefits of the Project exceed its cost. *Id.* The Project's cumulative net economic benefits range from \$118 million to \$702 million. *Id.* at 7.

Last, the Project enables the development of renewable wind resources in the states west of Wisconsin, where there are favorable generation conditions, and the delivery of the resulting energy to customers in Wisconsin, where there are less favorable generation conditions. *Id.* at 8. This is especially important where Wisconsin has adopted a Renewable Portfolio Standard (the “RPS”), which requires a certain percentage of electricity to be generated from renewable resources. *Id.*; Wis. Stat. § 196.378. Similarly, expanding regulation of greenhouse gas emissions under the Clean Air Act increases the costs of fossil fuel-fired generation and thus the demand for economic and renewable wind resources. (R.365(13):32); 42 U.S.C. § 7401 *et seq.*

VI. THE CONTESTED CASE PROCEEDING BEFORE THE COMMISSION.

After the Commission deemed the voluminous application complete on April 30, 2014, the Commission issued a Notice of Proceeding on May 7, 2014. (R.93). The Commission held prehearing conferences on August 5 and November 25, 2014, and January 5, 2015. (R.363; R.364; R.371). At the August 5, 2014 prehearing conference, the Commission granted 27 requests to intervene and established the following general issue for hearing: “Does the Badger Coulee Project comply with applicable standards under Wis. Stat. §§ 1.11, 1.12, 196.025, 196.49, and 196.491 and Wis. Admin. Code chs. PSC 4 and PSC 111.” (R.363:1-2; R.91:App.A).

In accordance with WEPA, Commission staff and the DNR prepared a draft EIS for the Project, issuing it on August 18, 2014. The draft EIS was available for comment for 45 days after its release, that is, through October 3, 2014. (R.337(2):9-10). The Commission received hundreds of comments on the draft EIS. *Id.* at Table F.1-1. On November 4, 2014, after incorporating some of these comments into the EIS where appropriate, Commission staff and the DNR issued the final EIS for the Project. (*See* R.337(1)). As further discussed below, the final EIS was multi-volume

document of over 600 pages that contained detailed descriptions of the need for, alternatives to, and environmental impacts of the Project. *See id.*

The Commission conducted the proceeding as a Class 1 contested case proceeding under Wis. Stat. §§ 196.491(3)(b), 227.01(3)(a), and 227.44. (R.95:2). In addition to the voluminous application and the final EIS, over 40 party witnesses submitted thousands of pages of written pre-filed direct, rebuttal, sur-rebuttal, and sur-sur-rebuttal testimony and accompanying exhibits. (*See* R.365). Not one of these party witnesses, however, testified on behalf of Holland. Further, Commission and DNR staff conducted extensive written discovery, issuing hundreds of discovery requests to the Applicants concerning the Project's need and routing. (R.156).

The Commission held a four-day hearing in Madison, from January 6 to January 9, 2015, primarily for the parties to cross-examine those witnesses who submitted pre-filed written testimony and exhibits.¹⁶ (R.95:2; R.372; R.373; R.374; R.375). The Commission held five hearings for public comment on December 8, 9, 10, 11, and 15, 2014 in Waunakee, Holland, the Village of Cashton, Warrens, and Wisconsin Dells, respectively. (R.366; R.367; R.368; R.369; R.370). The Commission received thousands of pages of public comments and exhibits at these hearings, through the mail, and on the Commission's website. (R.338).

After the party and public hearings, the parties filed a total of nearly 40 initial and reply briefs. (R.1 – R.39). Nowhere in its initial or reply briefs, however, did Holland assert the Commission may only grant a CPCN for a project that addresses reliability. (R.37; R.39). Nor did Holland challenge the adequacy of the EIS. (R.37; R.39). Commission staff also prepared a 70-page Decision Matrix that summarized the issues for the Commission's decision and the

¹⁶ Given the complexities of utility regulation, the Commission's proceedings involve multiple rounds of written testimony, as opposed to live direct testimony, to identify the contested issues and streamline the hearing.

parties' positions, with record citations, on each of those Decision Matrix issues. (R.81; R.82). The Commission discussed the massive record at its open meeting of March 26, 2015. (R.87).

VII. THE FINAL DECISION AND THE CLARIFICATION ORDER.

The Commission issued the Final Decision on April 23, 2015. (R.91:1). The Commission granted a CPCN for the Badger Coulee Project, with conditions. *Id.* In relevant part, the Commission found that the Applicants demonstrated the need for the Project, introduced above and discussed more thoroughly below, through rigorous modeling and analyses. *Id.* at 10-19. The Commission rejected arguments criticizing the Applicants for not evaluating the Project's economic benefits using a flat or negative load growth and not calculating the Project's economic benefits on a per-retail customer basis. *Id.* at 13-14. The Commission similarly rejected arguments that the Applicants overstated load growth in the La Crosse Area and that energy efficiency and conservation were viable alternatives to the Project. *Id.* at 14-16, 18-19. The Commission lastly approved Segments P-N, with P-east, and required the Badger Coulee Project and the CapX Project to be double-circuited for a cumulative distance of no more than 1 mile. *Id.* at 23-24. The Commission rejected arguments that the Badger Coulee Project would unreasonably interfere with local land use plans and that the Badger Coulee Project and the CapX Project should be double-circuited for 8 miles, citing reliability standards issued by NERC. *Id.*

On May 13, 2015, the Commission received two petitions for rehearing under Wis. Stat. § 227.49 and one minor request for clarification under Wis. Stat. § 196.39. (R.107:1). The petition for rehearing relevant to this case asserted that newly discovered evidence substantiates the likelihood of flat or negative load growth. *Id.* at 2. The Clarification Order denied the two petitions

for rehearing where they failed to satisfy the stringent standards in Wis. Stat. § 227.49, but granted the minor request for clarification that is not relevant to this proceeding.¹⁷ *Id.* at 2-3.

ARGUMENT¹⁸

I. HOLLAND HAS WAIVED NEARLY ALL OF ITS ARGUMENTS, AND THE COURT LACKS JURISDICTION OVER THE CLARIFICATION ORDER.

As a threshold matter, the Court should dismiss Holland’s allegations concerning the Badger Coulee Project’s need, the adequacy of the EIS, and the Clarification Order. Holland has waived its arguments concerning the Project’s need and the adequacy of the EIS by not raising them before the Commission, and the Court lacks jurisdiction over the Clarification Order because it is not a decision subject to judicial review under Wis. Stat. ch. 227.

First, the Court should dismiss Holland’s arguments concerning the Project’s need and the adequacy of the EIS because “[i]t is well settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency.” *Bunker v. Labor & Indus. Rev. Comm’n*, 2002 WI App 216, ¶ 15, 257 Wis. 2d 255, 650 N.W.2d 864 (citation omitted). “Ordinarily a reviewing court will not consider issues beyond those properly raised before the administrative agency, and the failure to raise an issue generally constitutes a waiver of the right to raise the issue before the reviewing court.” *Id.* (citation omitted).

In this case, neither Holland nor any other party to the Project’s contested case proceeding argued that the phrase “adequate supply of electric energy” in Wis. Stat. § 196.491(3)(d)2. is limited to projects that address reliability. In fact, as more thoroughly discussed below, Holland

¹⁷ Specifically, the Commission corrected the inadvertent omission of conditions from the Final Decision regarding the siting of the Badger Coulee Project around an intervening landowner’s property. (*See* R.107:3).

¹⁸ In its initial brief to this Court, Holland did not address numerous allegations plead in its petition for judicial review. The Commission therefore does not address those abandoned allegations, but reserves the right to file a sur-reply brief to the extent Holland raises them in its reply brief. *See Heideman v. Am. Family Ins. Grp.*, 163 Wis. 2d 847, 860-61, 473 N.W. 2d 14 (Ct. App. 1991) (holding that when a party raises an issue in a pleading but does not pursue the issue at trial such that the claim is not litigated, the issue is deemed abandoned).

effectively conceded that the Commission may issue a CPCN for a project that provided net economic benefits where it argued that the Badger Coulee Project failed to meet the standard applicable in evaluating such projects. (See R.39:1 (asserting that the Project’s “justification is economic. It *must meet the standard* set out in the Paddock-Rockdale decision[.]”) (emphasis added) (citation omitted)). Similarly, Holland’s only mention of the final EIS¹⁹ appeared in its reply brief, which merely stated in passing that Holland “endorses the analysis of [two other parties to the Project’s contested case proceeding] respecting the asserted ‘need’ for the [P]roject and the appropriateness and necessity for the Applicants to have provided information on alternatives. The alternatives should have then been identified, developed and described in the Final [EIS].” *Id.* at 4. Such a vague and undeveloped statement constitutes waiver. *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1997). Holland’s attempts to bootstrap onto the arguments of other parties cannot salvage its arguments concerning the final EIS before this Court.

Second, the Court lacks jurisdiction over the Clarification Order because “[a] petition for rehearing pursuant to Wis. Stat. § 227.49 is addressed to the agency’s discretion.” *Schwartz v. Wis. Dep’t of Revenue*, 2002 WI App 255, ¶ 40, 258 Wis. 2d 112, 653 N.W.2d 150. Circuit courts lack jurisdiction to review discretionary decisions denying petitions for rehearing. *Vill. of Prentice v. Transp. Comm’n of Wis.*, 123 Wis. 2d 113, 121, 365 N.W.2d 899 (Ct. App. 1985). Wisconsin Stat. § 227.52 only authorizes judicial review of administrative “decisions,” and no jurisdiction exists to review an order that is not a “decision” within the meaning of that statute. *Wis. Envtl. Decade v. Pub. Serv. Comm’n of Wis.*, 93 Wis. 2d 650, 657, 287 N.W.2d 737 (1980). Rather, Wis.

¹⁹ Holland did submit comments on the *draft* EIS. (See R.337(2):App.F). While *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 655-56 (D.C. Cir. 2011), held that a party who submitted comments on a draft EIS had not waived its challenge to the EIS on judicial review, the public comment period on the draft EIS was the “one formal opportunity for comment” in the administrative proceeding at issue there. In this case, however, Holland did not faithfully pursue arguments concerning the *final* EIS either during the hearing or in its post-hearing briefs, despite the availability of those opportunities. This *final* EIS is the document subject to judicial review here.

Stat. § 227.52 only “envisions review of a decision which must be supported by a record and be based upon findings of fact and conclusions of law as required by [Wis. Stat. § 227.47].” *Id.* (citation omitted). Because a decision on a petition for rehearing is not based on a record or factual or legal findings, it is not judicially reviewable. *Vill. of Prentice*, 123 Wis. 2d at 121. Thus, Holland’s allegation that evidence submitted in support of the petitions for rehearing undermines the Commission’s findings regarding the Project’s need should be plainly dismissed. While the Court should dismiss Holland’s allegations concerning the Project’s need, the adequacy of the EIS, and the Clarification Order, the Commission nevertheless addresses their merits below.

II. THE COMMISSION PROPERLY GRANTED A CPCN FOR THE PROJECT.

A. The Commission’s granting of the CPCN is entitled to great weight deference.

The scope of this Court’s review is limited, under Wis. Stat. § 227.57, to whether the Commission properly granted a CPCN for the Badger Coulee Project. The Commission’s granting of the CPCN involved the interpretation and application of several statutes and intertwined numerous factual, value, and policy determinations. Under well-established principles of administrative law, this Court must therefore defer to the Commission’s legal and factual determinations in granting the CPCN and not substitute its own judgment.

Under Wis. Stat. § 227.57(8), “the [C]ourt shall not substitute its judgment for that of the agency on an issue of discretion.” Similarly, under Wis. Stat. § 227.57(10), the Court must defer to “the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.” As such, “[i]t is not the function of this [C]ourt to determine this state’s energy policy. Nor is it this [C]ourt’s place to decide whether the construction of the [Badger Coulee Project] is in the public interest. These are legislative determinations that the legislature has assigned to the [Commission].” *Clean Wis., Inc.*, 2005 WI

93, ¶ 35 (citation omitted). Whether the Commission’s granting of a CPCN is in the public interest “is a matter of public policy and statecraft and not in any sense a judicial question.” *Id.* (citation omitted). Accordingly, this Court “cannot substitute its judgment for that of [the Commission] determining a legislative matter within its province.” *Id.* (citation omitted).

With these principals in mind, courts grant an administrative agency’s conclusions of law and statutory interpretations one of three levels of deference: (1) great weight; (2) due weight; or (3) no deference, *i.e.*, *de novo* review. *WIEG*, 2012 WI 89, ¶ 19. The applicable level of deference depends upon multiple considerations, including “the extent to which the administrative agency’s experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute and the comparative institutional capabilities and qualifications of the court and the administrative agency.” *Clean Wis., Inc.*, 2005 WI 93, ¶ 38. As such, Holland’s assertion that “[f]or questions of law and interpretation, the Court ordinarily exercises *de novo* review” is an incomplete description of the case on which it relies. (*See* Holland’s Br. at 7-8 (citing *Racine Harley-Davidson Inc. v. Div. of Hearings and Appeals*, 2006 WI 86, ¶ 11, 292 Wis. 2d 549, 818 N.W.2d 184 (“Although statutory interpretation is ordinarily a question of law determined independently by a court, *a court may accord an agency’s interpretation of a statute great weight deference or due weight deference.*” (emphasis added)))).

Courts grant great weight deference when: (1) the legislature charged the agency with administering the statute; (2) the agency’s interpretation is long-standing; (3) the administrative agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the administrative agency’s interpretation will provide uniformity and consistency in the application of the statute. *WIEG*, 2012 WI 89, ¶ 20. These factors do not require the agency to have examined the statute under the precise facts presented in the case. *Id.* ¶ 21. Rather, great weight deference

may be appropriate for a court to grant when the agency has substantial experience interpreting the statutory scheme at issue. *Id.* Additionally, courts grant great weight deference to an agency's conclusions of law and statutory interpretations if they are "intertwined with value and policy determinations inherent in the agency's statutory decisionmaking function." *City of Oak Creek ex rel. Water and Sewer Util. Comm'n v. Pub. Serv. Comm'n of Wis.*, 2006 WI App 83, ¶ 14, 292 Wis. 2d 119, 716 N.W.2d 152. "Where a reviewing court determines that great weight deference is proper, the court will uphold the agency's interpretation if the interpretation is reasonable, even if a more reasonable interpretation exists." *WIEG*, 2012 WI 89, ¶ 21.

Applying these standards, the Supreme Court of Wisconsin has held, *as a matter of law*, that the Commission's application of the CPCN Law is entitled to great weight deference. *Clean Wis., Inc.*, 2005 WI 93, ¶¶ 135-40. Great weight deference is appropriate for two key reasons. "[T]here can be no doubt the decision to issue a CPCN for a specific [project] at a specific location calls for the [Commission] to utilize its expertise and make a variety of factual findings." *Id.* ¶ 137. More importantly, however, "the [Commission's] interpretation and application of [the CPCN Law] inherently calls for a variety of policy determinations. Even a cursory review of [the CPCN Law] reveals that the [Commission] is charged with making a number of legislative-type policy determinations when determining if a CPCN should be issued." *Id.* ¶ 138.

B. The Commission correctly interpreted the CPCN Law.

Holland's assertions that the Commission's interpretation of the CPCN Law deserves no deference contravene the plain language of the CPCN Law, well-established deference principles, and the substantial evidence in the record. Indeed, Holland provides neither authority nor persuasive reasoning in support of its assertions.

Holland first asserts that the Commission erred in interpreting the CPCN Law in finding that the Project “satisfies the reasonable needs of the public for an adequate supply of electric energy.” Wis. Stat. § 196.491(3)(d)2.; (see Holland’s Br. at 15-23). The court in *Clean Wis., Inc.* held that the Commission’s determinations under Wis. Stat. § 196.491(3)(d)2. are “legislative-type policy determinations.” 2005 WI 93, ¶ 138. Nevertheless, Holland narrowly asserts that the phrase adequate supply in Wis. Stat. § 196.491(3)(d)2., refers only to high-voltage transmission lines that address reliability. Thus, according to Holland, high-voltage transmission lines that address reliability needs *and* provide net economic and public policy benefits, like the Badger Coulee Project, cannot satisfy Wis. Stat. § 196.491(3)(d)2. This contention is not supported by the plain language of the CPCN Law or prior Commission decisions granting CPCNs for high-voltage transmission lines that provide net economic benefits.

The CPCN Law does not define the phrase adequate supply in Wis. Stat. § 196.491(3)(d)2. at all, let alone in the narrow manner Holland asserts. The word adequate means “satisfactory or acceptable in terms of quality or quantity.”²⁰ See *Clean Wis., Inc.*, 2005 WI 93 ¶ 67 (applying dictionary definition of undefined words); *Dittman v. Nagel*, 43 Wis. 2d 155, 161, 168 N.W.2d 190 (1969) (holding that warranty to provide “an adequate supply of water for human consumption” warranted both the quantity and quality of well water). No reasonable reading of this definition could lead one to believe that the phrase adequate supply in Wis. Stat. § 196.491(3)(d)2. only refers to high-voltage transmission lines that address reliability. Rather, the reliable, affordable, and clean energy delivered by the Badger Coulee Project, as discussed more thoroughly below, is satisfactory and acceptable in terms of quality or quantity. See n.20,

²⁰ Oxford Dictionaries, Oxford University Press, “adequate[.]” available at http://www.oxforddictionaries.com/us/definition/american_english/adequate (last visited June 30, 2016).

supra. The Project therefore provides an adequate supply of electric energy. *See* Wis. Stat. § 196.491(3)(d)2.; *Clean Wis., Inc.*, 2005 WI 93, ¶ 140 (when great weight deference is appropriate, court only evaluates whether the Commission’s determination had a rational basis and was consistent with the statutory language) (citations omitted).

Similarly, by including the flexible word reasonable to modify the word needs in Wis. Stat. § 196.491(3)(d)2., the Legislature expects the Commission to grant CPCNs for projects that do not address reliability. *Cf. State v. Vincent*, 171 Wis. 2d 124, 128, 490 N.W.2d 761 (Ct. App. 1992) (“ ‘Reasonable,’ as used in the statute, modifies the word ‘opportunity’. . . . The agency’s responsibility to provide a ‘reasonable opportunity’ is limited to *not frustrating* the accused’s request” (emphasis original)). Had the Legislature intended for the Commission to grant CPCNs only for projects that address reliability, it would have used a more restrictive word like critical to modify the word needs in Wis. Stat. § 196.491(3)(d)2. Access to reliable, affordable, and clean energy are clearly reasonable needs of the public. *See id.*

Other provisions in the CPCN Law confirm the Commission’s interpretation. For instance, when the Legislature intends to expressly address reliability, it knows how to do so. Under Wis. Stat. § 196.491(3)(d)3., the Commission must find that “the design and location or route is in the public interest considering . . . *reliability*.” (Emphasis added). Further, the Legislature knows how to expressly identify projects that do not address reliability. Under Wis. Stat. § 196.491(3)(d)3r., the Commission has specific siting obligations for high-voltage transmission lines that, like the Badger Coulee Project, are “proposed to increase the transmission import capability into this state.” (R.365(8)). Indeed, Holland even concedes Wis. Stat. § 196.491(3)(d)3r. applies to the Project. (*See* Holland’s Br. at 43). Similarly, under Wis. Stat. § 196.491(3)(d)3t., the Commission can only approve a high-voltage transmission line if it “*provides usage, service or increased*

regional reliability *benefits* to the wholesale and retail customers or members in this state and the *benefits* of the high-voltage transmission line are reasonable in relation to the cost of the high-voltage transmission line.” (Emphasis added). Clearly, Wis. Stat. § 196.491(3)(d)3t. contemplates projects that provide benefits other than reliability benefits. In sum, if the Legislature intended for the Commission to grant CPCNs only for high-voltage transmission lines that address reliability, it would not have enacted Wis. Stat. § 196.491(3)(d)3r. or 3t.

In essence, Holland’s first assertion requests that the Court substitute its judgment for that of the Commission and determine the types of projects that satisfy the reasonable needs of the public for an adequate supply of electric energy. *See* Wis. Stat. § 196.491(3)(d)2. The Court, however, should decline Holland’s fundamentally flawed request. The Commission has on at least three prior occasions granted CPCNs for high-voltage transmission lines that, like the Badger Coulee Project, provide net economic benefits. *See CapX*, 2012 WL 1979070; *App. by Am. Transmission Co. to Construct a New 5.8-Mile 345 kV Transmission Line from the Existing Pleasant Prairie Switchyard in the Vill. of Pleasant Prairie, Kenosha Cnty., Wis., to the Existing Zion Energy Ctr. in the City of Zion, Lake Cnty., Ill.*, Docket No. 137-CE-161, 2012 WL 1655328 (Pub. Serv. Comm’n of Wis. May 7, 2012) (“*Pleasant Prairie-Zion*”); *App. of Am. Transmission Co., as an Elec. Pub. Util., to Construct a New 345 kV Transmission Line from the Rockdale Substation, Dane Cnty., Wis., to the Paddock Substation, in Rock Cnty., Wis.*, Docket No. 137-CE-149, 2008 WL 2917747 (Pub. Serv. Comm’n of Wis. June 13, 2008) (“*Paddock-Rockdale*”). Contrary to Holland’s assertion, the fact that this is the first time a court has reviewed a CPCN for a high-voltage transmission line that provides net economic benefits is irrelevant. (*See* Holland’s Br. at 26-27); *Wis. Dep’t of Revenue v. Orbitz L.L.C.*, 2016 WI App 22, ¶¶ 13-14, 367 Wis. 2d

593, 877 N.W.2d 372 (holding that if agency has previously interpreted the particular statute in any manner, the issue is not one of first impression).

In fact, Holland asserted in the contested case proceeding before the Commission that the Badger Coulee Project needed to satisfy the standard established in *Paddock-Rockdale*. (R.39:1). The Court should thus defer to the Commission's prior determinations under the CPCN Law in *CapX*, *Pleasant Prairie-Zion*, and *Paddock-Rockdale* notwithstanding Holland's inconsistent assertions to the contrary. Holland impermissibly asks the Court to do exactly the opposite, however, and find fault with the Commission's decisions in *CapX*, *Pleasant Prairie-Zion*, and *Paddock-Rockdale*. Relying on these decisions, Holland next asserts that the Commission's interpretation of the CPCN Law has been inconsistent over the years. (See Holland's Br. at 25-29). Holland, however, has failed to identify any inconsistency in the Commission's application of the CPCN Law to different sets of facts presented by different projects. See *Orbitz L.L.C.*, 2016 WI App 22, ¶¶ 15-16 (finding that agency's application of statute to different sets of facts to reach different results did not give rise to an inconsistent interpretation that is entitled to no deference).

High-voltage transmission line projects can satisfy the reasonable needs of the public for an adequate supply of electric energy in different ways. See Wis. Stat. § 196.491(3)(d)2. Simply because one project may satisfy Wis. Stat. § 196.491(3)(d)2. by addressing reliability concerns does not foreclose a different project from satisfying Wis. Stat. § 196.491(3)(d)2. by providing reliable, affordable, and clean electric energy. See *CapX*, 2012 WL 1979070; *Pleasant Prairie-Zion*, 2012 WL 1655328; *Paddock-Rockdale*, 2008 WL 2917747. By using the plural word needs in Wis. Stat. § 196.491(3)(d)2., the Legislature recognized that the public has different energy needs that may be satisfied by different types of projects. Cf. *Gold v. City of Adams*, 2002 WI App 45, ¶ 12, 251 Wis. 2d 312, 641 N.W.2d 446 (“[T]he legislative choice of the plural form of the

noun, salary, could indicate the legislature’s acknowledgement that a police chief may receive several types of cash payments[.]”).

Holland further contends that that the Commission’s interpretation of the CPCN Law has been inconsistent because the Commission failed to promulgate the standard established in *Paddock-Rockdale* as an administrative rule. (*See* Holland’s Br. at 27-28). The Legislature, however, has recognized that administrative agencies must apply and interpret laws to distinct sets of facts. In particular, the Legislature exempted from the definition of the word rule in Wis. Stat. § 227.01(13) a decision or order in a contested case, even if it would otherwise meet the definition.

Holland lastly asserts that the Commission’s approval of the Project’s CPCN exceeded the scope of the Commission’s authority. (*See, e.g.,* Holland’s Br. at 29). Clearly, the Commission has authority to grant CPCNs. Wis. Stat. § 196.491(3)(a)1. (no person may commence the construction of a facility unless the person has applied for and received a CPCN); *id.* § 196.491(3)(d) (the Commission can only approve an application for a CPCN after making certain determinations); *WIEG*, 2012 WI 89, ¶ 33 (the Commission is authorized to review and approve applications for construction of electric generating facilities under the CPCN Law). Holland, however, conflates the Commission’s authority to grant CPCNs with the Commission’s implementation of that authority in reviewing CPCN applications. *Cf. City of Oak Creek*, 2006 WI App 83, ¶¶ 27-28 (rejecting argument that the Commission lacked authority because it would “fly in the face of the plain meaning of the statutory authority conferred upon [the Commission] by the legislature” and instead focusing “on whether the [Commission’s] final decision conformed to the authority granted to it and existing standards utilized to implement that authority.”).

In sum, the Court should reject Holland’s impermissibly narrow and unsupported assertions regarding the applicable standard of review and the Commission’s interpretation of the

CPCN Law. The Commission's application of the CPCN Law is consistent with its plain language and prior Commission decisions. There is nothing unprecedented about the Commission's Final Decision in this proceeding.

C. The Commission's findings that the Project satisfies the need-related criteria in the CPCN Law are supported by substantial evidence.

Before granting a CPCN, the Commission must find that a proposed project is needed. Under the CPCN Law, the Commission must make the following need-related determinations for a proposed high-voltage transmission line project: (1) the proposed project satisfies the reasonable needs of the public for an adequate supply of electric energy; (2) the proposed project's design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors; (3) the proposed project provides usage, service, or increased reliability benefits to the wholesale and retail customers or members in this state and the benefits are reasonable in relation to the cost; (4) the proposed project will not substantially impair the efficiency of service, provide facilities unreasonably in excess of probable future requirements, or, when placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service; and (5) the proposed project will not have a material adverse impact on competition in the relevant wholesale electric service market.²¹ See Wis. Stat. § 196.491(3)(d)2., 3., 3t., 5., and 7.

²¹ In making these need-related determinations, the Commission must comply with the Energy Priorities Law. Wis. Stat. § 196.025(1)(ar). This law requires that, in meeting energy demands, the following options be considered, in the order listed, to the extent cost effective and technically feasible: (1) energy efficiency and conservation; (2) non-combustible renewable energy resources; (3) combustible renewable energy resources; and (4) non-renewable, combustible energy resources in the following order: natural gas, oil or coal with a Sulphur content of less than 1 percent, and all other carbon based fuels. *Id.* § 1.12(4). To the extent the Energy Priorities Law is implicated by Holland's assertions, the Commission's application of, and determination of compliance with it is entitled to great weight deference. *Clean Wis., Inc.*, 2005 WI 93, ¶¶ 111-25. Great weight deference is appropriate because, in principal part, the Commission has substantial experience and expertise applying the Energy Priorities Law in processing CPCN applications. *See id.*

The Commission's Findings of Fact with respect to these need-related criteria in the CPCN Law are all supported by substantial evidence. Besides one undeveloped and unsupported assertion refuted below, Holland does not and cannot contest the substantial evidence on which the Commission relied in finding that the Project was needed.²² This Court must therefore defer to the Commission as the trier of fact and not reassess the credibility of the evidence.

In relevant part, Wis. Stat. § 227.57(6) states that “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.” (Emphasis added). Accordingly, “pursuant to Wis. Stat. § 227.57(6), a court *will not disturb* an agency’s factual findings unless they are not supported by ‘substantial evidence.’ An agency’s findings are supported by substantial evidence if a reasonable person *could* arrive at the same conclusion as the agency, taking into account all the evidence in the record.” *Clean Wis., Inc.*, 2005 WI 93 ¶ 46 (quotation omitted) (emphasis added). This Court “must examine the record for credible and substantial evidence which supports the agency’s determination.” *Currie v. Wis. Dep’t of Labor, Indus. & Human Relations*, 210 Wis. 2d 380, 386-87, 565 N.W.2d 253 (Ct. App. 1997).

Thus, “an agency’s findings of fact may be set aside *only* when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence.” *Volvo Trucks N.A. v. Wis. Dep’t of Transp.*, 2010 WI 15, ¶ 19, 323 Wis. 2d 294, 779 N.W.2d 426 (emphasis added). Indeed, substantial evidence does not mean a preponderance of the evidence. *Crystal Lake Cheese Factory v. Labor & Indus. Review Comm’n*, 2003 WI 106, ¶ 27, 264 Wis. 2d 200, 664 N.W.2d 651 (citation omitted).

²² Where Holland only challenges the Commission’s findings under Wis. Stat. § 196.491(3)(d)2., the following discussion of the record evidence refers specifically to Wis. Stat. § 196.491(3)(d)2. However, this record evidence also demonstrates compliance with the other “need-related” criteria in the CPCN Law that Holland does not cite.

1. The Project satisfies the reasonable needs of the public for a reliable supply of electric energy.

Substantial evidence clearly establishes that the Project is needed for the reliability of the transmission system in western Wisconsin and the La Crosse Area. The transmission system in western Wisconsin is not robust. (R.365(13):28; R.365(19):14; R.365(39):26r-27r). It consists of lower voltage 69 kV and 138 kV facilities intended to serve local load. (R.365(13):29; R.365(39):25r-27r). The WWTRS determined that the Project solved a number of thermal, voltage, and system stability needs in this geographic area. (R.365(13):29; R.155(90):Ex. 1 at 79, 179-80). Using data from the 2013 MTEP process, the Applicants further determined that the Project will ameliorate overloads that are expected to occur between now and 2023. (R.365(13):29; R.365(39):26r-27r; R.155(90):Ex. 1 at 100). As discussed previously, the Project will obviate the need to construct approximately \$190 million worth of other reliability-related transmission projects. (R.365(13):29; R.156(124)).

The CapX Project, placed into service in the fall of 2015, ties into and terminates at the Briggs Road Substation, the origin point for the Badger Coulee Project. (R.365(19):2-8; R.155(90); Ex. 1 at 125, Ex. 2 at 3). However, the load serving capability of the transmission system in the La Crosse Area even with the CapX Project is only 750 MW. (R.365(19):9; R.155(90):Ex. 2 at 3; R.156(147)). To serve load above 750 MW, the La Crosse Area requires another transmission line, such as the Badger Coulee Project. (R.365(19):10; R.155(90):Ex. 2 at 3, 6-10; R.155(2):28-29; R.156(147)). The Badger Coulee Project increases load serving capability in the La Crosse area to 791 MW. (R.155(90):Ex. 1 at 90).

In determining when load in the La Crosse Area will reach 750 MW, the Applicants first reviewed historical levels. (R.365(19):9-10). NSPW's load in the La Crosse Area reached a new

non-coincident peak²³ in 2009, 2010, 2011, 2012, and 2013, which reached 491 MW. *Id.* at 10; (R.156(93):17-21; R.156(96)). NSPW's load in the La Crosse Area grew 8.8 percent between 2010 and 2013.²⁴ (R.365(19):10; R.156(93):17-21). After reviewing these historical levels, the Applicants estimated future load using 481 MW from 2012 as the base year and growth rates of 1 percent, 1.24 percent, 2 percent, and 3.44 percent. (R.365(19):11; R.155(90):Ex. 2 at 9-10). Assuming a 3 percent growth rate, a new 345 kV transmission source will be needed as soon as 2026. (R.365(19):10; R.155(90):Ex. 2 at 10). The Applicants updated this analysis using 490 MW from 2013 as the base year and a growth rate of 2.79 percent, which was the average growth rate from 2010 to 2013. (R.365(19):11-12; R.156(93):17-21). Under this updated analysis, a new 345 kV transmission source will be needed by 2028. (R.365(19):12).

The Applicants further determined that the Badger Coulee Project will improve the capability to transfer power between Minnesota and Wisconsin. *Id.* at 14-15; (R.155(90):Ex. 1 at 56-57, Ex. 2 at 10-16). There are only two high voltage transmission lines between the Twin Cities and western Wisconsin. (R.365(19):14-15). The Applicants conducted a transfer analysis which simulated an increase in the flow of power from the west to the east until the system overloaded. *Id.*; (R.155(90):Ex. 2 at 10-16) The simulation showed that the Project enables the transfer of 360 MW and improves efficiency and reliability. (R.365(19):14-15; R.155(90):Ex. 2 at 10-16).

This substantial evidence clearly supports the Commission's finding that the Badger Coulee Project resolves reliability concerns. *See* Wis. Stat. § 227.57(6). Holland nevertheless latches onto the Final Decision's statement that the "record does not support the need for the [Project] *solely on the basis of the La Crosse Area load serving needs.*" (*See* Holland's Br. at 18-

²³ The phrase "non-coincident peak" refers to the "summation of the maximum load that each substation in the area reached in that year, not necessarily the load at the time of system peak (coincident)." (R.365(19):9).

²⁴ In particular, load grew 3 percent in 2011, 3.44 percent in 2012, and 1.95 percent in 2013. (R.365(19):10).

19 (quoting R.91:16) (emphasis altered)). However, there can be no doubt that the Project also ameliorates overloads, obviates other construction projects, addresses load growth, and, enables the transfer of energy. Satisfying all these reliability needs served as a key consideration in the Commission's decision to grant a CPCN for the Project. (R.91:16 (“*These reliability benefits, coupled with the other benefits identified in this Final Decision, more than substantiate the need for this Project.*” (emphasis added))).

2. The Project satisfies the reasonable needs of the public for an economically adequate supply of electric energy.

Holland does not challenge the substantial evidence demonstrating that the Badger Coulee Project's net economic benefits of \$118 million to \$702 million satisfy the public's reasonable needs for affordable and cost-effective electric energy. The Project's substantial net economic benefits comprise four different components: (1) energy cost savings; (2) Renewable Investment Benefit (the “RIB”); (3) transmission line loss savings; and (4) insurance value. (R.365(13):17; R.155(90):Ex. 1 at 6, 31).

First, ATC used PROMOD²⁵ to assess whether the Badger Coulee Project lowered energy costs across ATC's footprint. (R.365(13):18; R.155(2):27; R.155(90):Ex. 1 at 17). Second, the RIB examines “the value created by constructing wind generation in higher capacity wind production areas when there is sufficient transfer capability to deliver wind energy to load centers.” (R.365(13):18; R.155(2):31; R.155(90):Ex. 1 at 17). Third, when electricity flows across a transmission line, a small percentage of that electricity is lost as heat. (R.365(13):18; 155(2):34-35; R.155(90):Ex. 1 at 17, 51-52). ATC quantified the economic savings of the Project's reduction

²⁵ “PROMOD is a model that provides a fundamental electric market simulation which incorporates extensive details in generating unit operating characteristics, transmission grid topology and constraints, and market system operations to support economic transmission planning. PROMOD is recognized as a standard tool in economic system planning for utilities and has long been used by ATC, with the approval of the Commission, in assessing the merits of potential transmission projects.” (R.155(2):27).

of these losses. (R.365(13):19; R.155(90):Ex. 1 at 52). Fourth, “[t]ransmission enhancements reduce the likelihood and extent of loss of load by improving the stability of the system and/or increasing access to additional resources.” (R.365(13):19; R.155(90):Ex. 1 at 31).

In evaluating the Project’s cumulative net economic benefits, the Applicants compared not building the Project with the Project’s economic benefits under the following six plausible future scenarios of how the electric industry will look in 2020 and 2026: (1) Robust Economy; (2) Green Economy; (3) Slow Growth; (4) Regional Wind; (5) Limited Investment; and (6) Carbon Constrained.²⁶ (R.365(13):19; R.155(2):27; R.155(90):Ex. 1 at 30). These future scenarios were based on key inputs such as load and energy levels, generation retirement and expansion, fossil-fuel costs, use of renewable energy, and increased environmental regulation. (R.365(13):20; R.155(2):27; R.155(90):Ex. 1 at 30). These key inputs bounded the range of plausible outcomes and were based on data available at the time, data from MISO’s 2009 MTEP process. (R.365(13):20-21; R.155(2):27; R.155(90):30). The Applicants confirmed the results of their economic benefits analysis using the most conservative future scenario developed from MISO’s 2011 MTEP process,²⁷ and data and three future scenarios from MISO’s 2013 MTEP process.²⁸ (R.365(13):25-26; R.155(90):40; R.156(86)). MISO also conducted a Triennial MVP Review in 2014, which showed that the MVP Portfolio will produce economic benefits at a greater level than originally calculated. (R.365(39):37r-38r; R.319).

²⁶ Holland’s unsupported assertion that the Badger Coulee Project is “at best, a gamble entailing risks” ignores the fact that the Applicants used these six plausible future scenarios to in fact address the possibilities that “[g]rowth in energy consumption . . . may not materialize” or that “technology may change[.]” (*See* Holland’s Br. at 22-23).

²⁷ This analysis only evaluated the Project’s energy cost savings and did not include a calculation of the RIB, transmission loss savings, or insurance value benefits. (R.365(13):25).

²⁸ This analysis evaluated the Project’s energy cost savings, the RIB, and the transmission loss savings, but not the insurance value savings. (R.365(13):26).

The substantial evidence demonstrating the Project's net economic benefits alone satisfies the need-related criteria in the CPCN Law. *See* Wis. Stat. § 227.57(6); *Clean Wis., Inc.*, 2005 WI 93, ¶ 151 (“It is not the function of a reviewing court to dictate the economic analysis to be employed in a decision [that] is based upon the expertise and lies within the discretion of the [Commission].” (citations omitted)); *Pleasant Prairie-Zion*, 2012 WL 1655328; *Paddock-Rockdale*, 2008 WL 2917747. The Project will save ratepayers hundreds of millions of dollars.

3. The Project satisfies the reasonable needs of the public for an environmentally adequate supply of electric energy.

Like with the Badger Coulee Project's net economic benefits, Holland does not challenge the substantial evidence demonstrating that the Project assists in satisfying the public's reasonable needs for renewable energy under the RPS and expanding regulations of greenhouse gas emissions. “States west of Wisconsin have some of the best wind resources in the nation, and those resources must be utilized if states are to cost-effectively meet their renewable energy *needs*.” (R.365(28):3 (emphasis added)); Wis. Stat. § 196.491(3)(d)2. (project must satisfy reasonable *needs*); (R.365(39):34r). Wind resources have no fuel costs and thus have one of the lowest marginal costs among generator types. (R.365(28):4; R.365(13):32). As more expensive generation is displaced by wind, the market price for energy decreases. (R.365(28):4). Unfortunately, the transmission system between western states and Wisconsin is congested, thereby limiting the potential market. (R.365(13):31; R.365(39):28r). The Badger Coulee Project, however, enables the transmission of low cost wind resources to Wisconsin and throughout MISO. (R.365(28):13; R.365(13):31; R.365(39):34r). The Project is “essential both for allowing wind resources to be developed and enabling future and existing wind plants to not have their wind energy output curtailed” when there is not sufficient transmission capacity to deliver the wind energy to customers. (R.365(28):17,

24). Indeed, there is “approximately 2,750 MW of wind generation that is contingent on [the Project] being built.” *Id.* at 3; (R.365(13):31).

The availability of low cost, renewable wind resources in Wisconsin is especially needed considering the mandate imposing renewable energy generation under the RPS and potential future regulation of air emissions under the Clean Air Act. (R.365(28):4-6; R.365(13):31-32; R.365(39)34r-35r). Electric providers comply with the RPS in a particular year by either selling renewable energy to retail customers in Wisconsin or retiring excess renewable resource credits that have been banked or purchased. Wis. Stat. § 196.378(1)(fm), (1)(o), and (3)(a)1. In 2015, the RPS required electric providers to increase their renewable energy percentage by 6 percentage points above their baseline average renewable energy percentage for 2001, 2002, and 2003. *Id.* § 196.378(1)(ag), (1)(c), (1)(fm), and (2)(a)2.d. For each year after 2015, the RPS generally prohibits electric providers from decreasing their renewable energy percentage below the renewable energy percentage required in 2015. *Id.* § 196.378(2)(a)2.e. and (2)(a)2.f. The Badger Coulee Project is a “critical component” to compliance with the RPS and similar legislation in other states within MISO. (R.365(28):17; R.365(39):38r-39r; R.155(90):Ex. 1 at 11.).

Similar to the RPS, the United States Environmental Protection Agency (the “EPA”) has promulgated rules under Section 111(d) of the Clean Air Act that regulate carbon dioxide emissions from existing electric generating units (the “Clean Power Plan”).²⁹ 42 U.S.C. § 7411(d)(1); 42 C.F.R. § 60.5700 *et seq.* In the Clean Power Plan, the EPA determined that the best system of emission reduction for carbon dioxide includes, among other things, “[s]ubstituting increased generation from new zero-emitting renewable energy generating capacity for generation

²⁹ The Supreme Court of the United States has stayed the implementation of the Clean Power Plan pending final disposition of legal challenges. *See, e.g., W. Virginia v. EPA*, 136 S.Ct. 1000, 194 L.Ed.2d 17 (2016).

from affected fossil fuel-fired generating units.” 80 Fed. Reg. 64,662-01, 64,667, 2015 WL 6384905 (Oct. 23, 2015). This substitution is known as a “generation shift.” *See, e.g., id.* at 64,725. Should the Clean Power Plan withstand legal challenge and if Wisconsin must reduce its carbon dioxide emissions by 34.2 percent under the Clean Power Plan as currently proposed, the renewable wind resources the Project provides can assist Wisconsin in achieving any required reduction and generation shift. (R.365(28):5-6; R.365(13):32).

Substantial evidence clearly demonstrates that the Badger Coulee Project satisfies the public’s reasonable needs for renewable energy under federal and state regulatory programs. *See* Wis. Stat. §§ 227.57(6) and 196.378; 42 U.S.C. § 7411(d)(1); 42 C.F.R. § 60.5700 *et seq.* Holland does not address these needs besides its unsupported assertion that the ability to transfer energy is a mere benefit. (*See* Holland’s Br. at 20). Compliance with the law is not merely a benefit, but rather a legally mandated need.

4. The alternatives to the Project do not satisfy the reasonable needs of the public for an adequate supply of electric energy.

Substantial evidence demonstrates that the Applicants studied various transmission, generation, and energy efficiency and conservation alternatives to the Badger Coulee Project. (R.155(2):29-33; R.155(90):Ex. 1 at 18-28, 102-09). As discussed below, the Commission used this information, as well as its own independent, professional judgment, to prepare the EIS that described the need for and alternatives to the Project. Importantly, no alternative obviates the need for the Project.

First, the Applicants studied the following transmission alternatives using the same future scenarios as they did with the Badger Coulee Project:

1. The Spring Green 345 kV Project: A 345 kV transmission line originating in the La Crosse Area, extending to Spring Green, Wisconsin, and terminating in Middleton, Wisconsin.

2. The 345 kV to Iowa Project: A 345 kV transmission line originating in Middleton, Wisconsin, extending to Spring Green, Wisconsin, and terminating in Dubuque, Iowa.

3. The Combination 345 kV Project: A 345 kV transmission line consisting of a combination of the Badger Coulee Project and the 345 kV to Iowa Project.

4. The 765 kV Project: A combination of four 345 kV and one 765 kV transmission lines that ultimately connect multiple points in western Wisconsin and Minnesota to multiple points farther east in south central Wisconsin. This project includes: (1) two new 345 kV transmission lines originating in the La Crosse Area and Adams, Minnesota and terminating in Genoa, Wisconsin; (2) one new 765 transmission line originating in Genoa, Wisconsin and terminating in Monroe, Wisconsin; and (3) two new 345 kV transmission lines originating in Monroe, Wisconsin and terminating in Beloit, Wisconsin.

5. The Low Voltage Project: A large number of transmission upgrades, consisting of 69 kV, 115 kV, 138 kV, and 161 kV facilities located in Wisconsin, Iowa, Illinois, and Minnesota that would address various NERC reliability concerns.

(R.365(13):16-17; R.155(90):Ex. 1 at 107).

In all six future scenarios, the Badger Coulee Project outperformed the Low Voltage Project and the 765 kV Project. (R.365(13):23; R.155(90):Ex. 1 at 107). The Badger Coulee Project provided similar net economic benefits to the Spring Green 345 kV Project, but the Spring Green 345 kV Project presented significant routing and siting difficulties. (R.365(13):24; R.155(90):Ex. 1 at 107; R.365(18):8-9). While the 345 kV to Iowa Project outperformed the Badger Coulee Project, the Combination 345 kV Project outperformed both the Badger Coulee Project and the 345 kV to Iowa Project. (R.365(13):23; R.155(90):Ex. 1 at 107). This means that the 345 kV to Iowa Project does not provide all the benefits of the Badger Coulee Project.

(R.365(13):23-24). Using data and three future scenarios from MISO's 2013 MTEP process, the Applicants confirmed that the 345kV to Iowa Project would not obviate the net economic benefits of the Badger Coulee Project. *Id.* at 25-28; (R.365(46):7-8; R.331). Similarly, the Badger Coulee Project avoids significantly more, and different, reliability projects than the 345kV to Iowa Project. (R.365(13):30-31; R.156(124):1-7). This substantial evidence of transmission alternatives thus shows that the Badger Coulee Project is needed to solve long-term energy issues in MISO.

Next, the Applicants studied conventional and renewable generation and energy efficiency and conservation alternatives by including certain assumptions in the six future scenarios analyzed.³⁰ (R.365(13):34; R.155(2):31-33; R.155(90):Ex. 1 at 12, 102-05; R.156(108):7-8). Importantly, the Carbon Constrained future scenario assumed 1,790 MW of new wind generation, 200 MW of new biomass generation, and 150 MW of new solar photovoltaic generation. (R.365(13):34-35; R.155(90):Ex. 1 at 37-38). The Carbon Constrained future scenario also assumed 0.2 percent load growth due to increases in energy efficiency and conservation. (R.365(13):35; R.155(90): Ex. 1 at 102). Even in this scenario, the Badger Coulee Project provided \$508.65 million in net economic benefits. (R.365(13):35; R.155(90):Ex. 1 at 107). Further, in all six future scenarios, the Applicants included a simulated dispatch of distributed resource technologies that served to offset load. (R.365(13):35; R.155(90):Ex. 1 at 102). As noted above, the Badger Coulee Project provides net economic benefits in all six future scenarios notwithstanding the inclusion of distributed resource technologies. (R.365(13):36; R.155(90):Ex. 1 at 107). Thus, conventional and renewable generation and energy efficiency and conservation

³⁰ These six future scenarios "included low, middle, and high levels for coal retirements within ATC and various generation additions of gas, coal and renewable generation." (R.365(13):34).

are not viable alternatives to the Project. Rather, the Project provides significant net economic benefits even when these alternatives are aggressively deployed.

In sum, substantial evidence demonstrates that the “no-build,” transmission, and non-transmission alternatives fail to provide the same adequate supply of electric energy that the Badger Coulee Project provides. *See* Wis. Stat. §§ 227.57(6) and 196.491(3)(d)2. The Applicants conducted rigorous analyses that Commission staff reviewed and confirmed. Substantial evidence unequivocally demonstrates the Commission’s finding that the Project is needed.

5. Holland’s only challenge to the substantial evidence demonstrating the Project’s need fails procedurally and substantively.

Holland’s only attempt to refute the substantial evidence demonstrating the need for the Badger Coulee Project is its unsupported assertion that the Commission abused its discretion by not reopening the contested case proceeding. In particular, Holland asserts that evidence submitted in support of a petition for rehearing asserting that energy use fell, instead of grew, in the 2008 – 2013 time frame undermined the Commission’s finding that the Badger Coulee Project is needed. (*See* Holland’s Br. at 30.) As discussed previously, this argument is procedurally improper because the Court lacks jurisdiction to review the Commission’s discretionary determinations to deny the petitions for rehearing in the Clarification Order. It also fails on the merits and inappropriately asks the Court to assess the credibility of the evidence.

For instance, under Wis. Stat. § 227.49(3)(c), the Commission may grant rehearing based on the discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence. The Clarification Order properly held that this new evidence failed to negate the Commission’s factual findings in the Final Decision that: (1) the La Crosse Area has reached a new peak each year since 2008; and (2) between 2010 and 2012, the total load in the La Crosse Area has grown 3.44 percent, a rate considerably higher

than the average load growth of about 1.0 percent for the NSPW and Dairyland areas over the same time period. (R.107:17 (citing R.91:15-16)). This new evidence also failed to negate the Commission’s findings that, based on the Applicants’ analysis, “an additional transmission source could be required as early as 2026 (with load growth greater than 3 percent annually) or after 2050 (with load growth below 1.24 percent annually).” (R.107:17 (quoting R.91:15)). Further, the Commission found that its approval of the Badger Coulee Project was premised on more than La Crosse Area load growth and reliability needs. (R.107:17 (citing R.91:16)). The Commission lastly found that the Project provided net economic benefits in a variety of futures, including a Slow Growth future that estimated growth at 0.2 percent, and provided public policy benefits. (R.107:17 (citing R.91:13-17)). In sum, the Commission properly found that this evidence was not “sufficiently strong enough to reverse or modify” the Final Decision. Wis. Stat. § 227.49(3)(c).

D. The Commission’s findings that the Project satisfies the siting-related criteria in the CPCN Law and the Siting Priorities Law are supported by substantial evidence.

Before granting a CPCN, the Commission must find that a proposed project is sited appropriately. Under the CPCN Law, the Commission must make the following siting-related determinations for a proposed transmission project: (1) the proposed project’s design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors; (2) the proposed project uses existing rights-of-way to the extent practicable and its routing and design minimizes environmental impacts in a manner that is consistent with achieving reasonable electric rates; (3) the proposed project will not 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; and (4) the proposed

project will not unreasonably interfere with the orderly land use and development plans for the area involved. *See* Wis. Stat. § 196.491(3)(d)3., 3r., 4., and 6.

In making these determinations, the Commission must comply with the Siting Priorities Law. *Id.* § 196.025(1m). This law requires that the following corridors be utilized, in the order listed, to the greatest extent feasible that is consistent with economic and engineering considerations, reliability of the electric system, and protection of the environment: (1) existing utility corridors; (2) highway and railway corridors; (3) recreational trails, to the extent that the facilities may be constructed below ground and that the facilities do not significantly impact environmentally sensitive areas; and (4) new corridors. *Id.* § 1.12(6).

Like with the need-related criteria, substantial evidence satisfies all the requirements of the siting-related criteria in the CPCN Law and the Siting Priorities Law. *See* Wis. Stat. § 227.57(6); *Clean Wis., Inc.*, 2005 WI 93 ¶ 46; *Currie*, 210 Wis. 2d at 386-87; *Volvo Trucks N.A.*, 2010 WI 15, ¶ 19; *Crystal Lake Cheese Factory*, 2003 WI 106, ¶ 27. Holland's assertions concerning the Project's impacts and purported interference with Holland's land use plan are unsupported by the record. (*See* Holland's Br. at 42). Similarly, Holland's desire for the Badger Coulee Project and the CapX Project to be triple circuited for 8 miles contravenes binding NERC reliability standards and is thus neither feasible nor practicable under the CPCN Law and the Siting Priorities Law. *Id.* at 43; Wis. Stat. §§ 196.491(3)(d)3r. and 1.12(6). Holland's arguments rest on a misunderstanding of these standards and the record. (*See* Holland's Br. at 46-52).

1. The Commission properly selected Segments P, with P-east, and N and imposed conditions that addressed Holland's concerns.

Holland does not expressly challenge the Commission's correct selection of route Segments P, with P-east, and N between the Briggs Road Substation and Lyndon Station. To the extent Holland's assertions that the Project will negatively impact it and interfere with its land use

plan implicitly challenge such selection, it fails on the merits. Substantial evidence demonstrates that Segments P, with P-east, and N are superior to the other route alternative under the siting-related criteria and the Siting Priorities Law.³¹ Segments P, with P-east, and N share approximately 93.5 percent of the right-of-way with existing utility or road rights-of-way by length and 71.9 percent by area. (R.337(2):388-89; 365(24):7). Segment O only shares 59.2 percent of the right-of-way with existing utility or road rights-of-way by length and 35.1 percent by area. (R.337(2):388-89; 365(24):7). Not only do Segments P, with P-east, and N share more corridors than Segment O, they share *higher quality* corridors than Segment O as well. (R.337(2):388). Segments P, with P-east, and N minimize impacts on private properties by overlapping a portion of its rights-of-way with prominent corridors such as existing high-voltage transmission line and interstate rights-of-way. *Id.* Segment O, however, only shares the first third of its length with these prominent corridors. *Id.* The remaining few portions where Segment O shares corridor are narrow, low-voltage transmission line, rural county highway, and local road rights-of-way. *Id.*

In addition to traversing more challenging terrain for construction, the amount of new right-of-way Segment O requires in turn impacts more agricultural land and forested area. (R.365(18):22; R.337(2):389-90). Segment O impacts 503.7 agricultural acres, representing 37.2 percent of the right-of-way in agricultural land. (R.337(2):390). Segments P, with P-east, and N, however, impact 339.1 agricultural acres, representing 21.4 percent of the right-of-way in agricultural land. *Id.* Segment O requires the clearing of 333.9 total forested acres, while

³¹ It is important to note at the outset of this discussion that the Badger Coulee Project was required to originate at the Briggs Road Substation. (R.365(19):13). If the Project were to originate at a different substation in the La Crosse Area, the Project “would provide limited community reliability benefits.” *Id.* The Briggs Road Substation already includes a 345 kV transmission line connection for the CapX Project. *Id.* Originating the Badger Coulee Project at a different substation would require additional high voltage transmission lines, either two 161 kV transmission lines or another 345 kV transmission line, to connect the Project with the Briggs Road Substation and thereby serve La Crosse Area load above 750 MW. *Id.* Otherwise, the transmission system in the La Crosse Area would not function properly under certain planning contingencies. *Id.*

Segments P, with P-east, and N require the clearing of 303.2 total forested acres. *Id.* The overriding concern in these forested acres is “the potential for impacts to rare species that have not been surveyed or documented in resources such as the NHI database.” *Id.* at 391.

Last, Segments P, with P-east, and N impact fewer homes and apartment buildings than Segment O. *Id.* at 389. There are 133 homes and 11 apartment buildings within 300 feet of the centerline of Segments P, with P-east, and N. *Id.* However, there are 151 homes and 59 apartment buildings within 300 feet of the centerline of Segment O. *Id.* In addition to these impacts, Segment O crosses some of the most densely populated areas of the City of Onalaska and several unique community resources, including an Amish community and a Buddhist retreat. *Id.* at 389-90.

It is worth reiterating that the CPCN Law only requires the Commission to find that a project does not *unreasonably* interfere with land use and development plans for the area involved, not that there is *no* interference whatsoever. *See* Wis. Stat. § 196.491(3)(d)6.; *Clean Wis., Inc.*, 2005 WI 93, ¶ 138 (holding that determination of whether project *unreasonably* interferes is entitled to great weight deference); (R.91:25; R.107:9). To *minimize* a project’s interference, the Commission has authority to impose conditions under Wis. Stat. §§ 196.491(3)(d) and 196.395.

In approving Segments P, with P-east, and N, the Commission imposed two conditions that further minimize impacts. (R.91:25-26). First, the Commission required that the Applicants to triple-circuit the Badger Coulee Project, the CapX Project, and an existing 161 kV transmission line for less than 1 cumulative mile to avoid impacts to the Prairie View Elementary School on Subsegment P14 and the apartments at the southern end of Subsegment P12. *Id.* The Commission also required the Applicants to minimize the distance between the Badger Coulee Project and the CapX Project on Subsegment P13, where they would run parallel along the east side of USH 53.

Id. As will be discussed below, NERC reliability standards prevent co-locating the Badger Coulee Project and the CapX Project for more than a cumulative distance of 1 mile. (R.365(19):18-19).

Commission staff witness Kathleen Zuelsdorff, an environmental analyst and one of the authors of the EIS, testified that co-locating the Badger Coulee Project and the CapX Project for a cumulative distance of 1 mile addresses “many of the environmental and community concerns associated with Segments P-east and P-west.” (R.365(49):2; R.365(90):5 (citing R.365(23):5-6; R.156(142))). Ms. Zuelsdorff also testified that minimizing the distance between the Badger Coulee Project and the CapX Project along Subsegment P13, where they are not co-located, “would further alleviate some future development concerns.” (R.365(90):5 (citing R.365(69):8)).

2. The Badger Coulee Project and the CapX Project can only be co-located for a cumulative distance of 1 mile or less.

Holland’s assertion that the Commission should have co-located the Badger Coulee Project and the CapX Project for 8 miles ignores NERC reliability standards and the record. Under 16 U.S.C. § 824o(d), NERC must file reliability standards with FERC, which may approve them, by rule or order, if they are just, reasonable, not unduly discriminatory or preferential, and in the public interest. Under 16 U.S.C. § 824o(e), NERC may impose a penalty on any transmission owner who violates a reliability standard FERC has approved.

Accordingly, transmission owners, including the Applicants, are required to plan their transmission system in compliance with NERC planning criteria. (R.365(19):18). NERC reliability standards require that the transmission system reliably meets customer demands under a variety of conditions, including contingency conditions. *See id.* “Contingency conditions are those where elements of the system, such as transmission lines, are out-of-service because of planned maintenance or catastrophic events, such as storm damage.” (R.337(2):150).

In planning the transmission system, transmission owners must strictly account for, under NERC reliability standards, the contingency condition where any two circuits on a multi-circuit line are taken out-of-service by storm damage (a “Category C Contingency”). (R.365(19):18; R.165:4). Accordingly, transmission owners must ensure that if any combination of two circuits on a triple circuit line are taken out-of-service, the transmission system remains reliable.³²

In this case, the Applicants analyzed the reliability of the transmission system when the Badger Coulee Project and the CapX Project, if co-located, were taken out of service under a Category C Contingency. (R.156(108):5-6; R.156(142); R.156(146):3-4; R.337(2):150). Co-locating the Badger Coulee Project and the CapX Project, either on a double-circuit line or a triple-circuit line, would require a plan to interrupt service to customers in the event of a Category C Contingency to maintain acceptable system loadings and voltages. (R.156(108):6). Given the significant existing and expected load growth in the La Crosse Area, and the limited areas available for new future transmission infrastructure, this risk of loss of load that the co-location option presents is not an acceptable risk. *Id.* In other words, if co-located with the CapX Project, the new 345 kV connection that the Badger Coulee Project provides would not be treated as an independent second source in all circumstances. *Id.* Accordingly, co-locating the Badger Coulee Project and the CapX Project for 8 miles is neither feasible nor practicable under the CPCN Law and the Siting Priorities Law. *See* Wis. Stat. §§ 196.491(3)(d)3r. and 1.12(6). Such co-location would obviate

³² On the other hand, transmission planners must also “*evaluate* for risks and consequences[.]” but not strictly account for, the contingency condition that all circuits on a multi-circuit line are taken out-of-service by storm damage (a “Category D Contingency”). (R.165:5 (emphasis added)). Thus, transmission owners need only evaluate, but not necessarily plan for, all three circuits on a triple circuit line being taken out-of-service. At the hearing, NSPW witness Amanda King-Huffman confirmed this distinction between planning for a Category C Contingency and merely evaluating a Category D Contingency, testifying that “[f]or this triple-circuit configuration, the bigger concern to me as a transmission planner due to NERC criteria is the Category C, which we are required to study[.]” (R.372:176).

the reliability benefits the Badger Coulee Project provides to the La Crosse Area and greatly diminish the reliability of the transmission system. (R.156(108):6).

Nevertheless, 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.” (R.166:3). Therefore, the Badger Coulee Project and the CapX Project may be co-located, either on a double-circuit line or a triple-circuit line, for 1 cumulative mile or less without implicating NERC reliability standards. (R.372:176-77). Thus, the Commission correctly determined that the Badger Coulee Project, the CapX Project, and an existing 161 kV transmission line could only be triple-circuited for 1 cumulative mile or less. (R.91:25-26). Conversely, the Commission correctly rejected Holland’s request that the Badger Coulee Project, the CapX Project, and an existing 161 kV transmission line be triple-circuited for 8 miles. *Id.*

Holland asserts that the current double-circuiting of the CapX Project and the existing 161 kV transmission line already triggered the annual obligation to study a Category C Contingency. (*See* Holland’s Br. at 49). However, Holland ignores that the current double-circuiting of the CapX Project and the existing 161 kV transmission line do not involve two 345 kV high-voltage transmission lines. The Badger Coulee Project and the CapX Project, on the other hand, are both 345 kV high-voltage transmission lines. The Applicants’ analysis demonstrates that, as applied to the La Crosse Area, there is a difference in reliability when two 345 kV high-voltage transmission lines are taken out-of-service and when one 345 kV high-voltage transmission line and one 161 kV transmission line are taken out-of-service. (*See* R.372:178 (“[T]he 161 [kV transmission line] and 345 [kV transmission line] can be outaged at the same time. That does not cause any reliability concerns.”)). Even the sentence in the EIS on which Holland relies confirms this, stating that the

Applicants “noted that to avoid the requirements 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.” (See Holland’s Br. at 49 (quoting R.337(2):150 (emphasis added))). Therefore, the problem is not, as Holland argues, the need to study a Category C Contingency if the Badger Coulee Project and the CapX Project were co-located for 8 miles. The problem is ensuring the reliability of the transmission system if a Category C Contingency were to occur in such a situation.

Holland’s assertion was flawed from the outset where Holland states that interpretation of NERC criteria is a question of law. (See Holland’s Br. at 46). The question whether to co-locate two 345 kV high-voltage transmission lines in the La Crosse Area for 8 miles involved more than interpreting NERC reliability standards. It involved analyzing transmission system reliability in the La Crosse Area and applying the results to NERC reliability standards to arrive at a reasoned determination that should be granted deference. See, e.g., *Michels Pipeline Const. Inc. v. Labor & Indus. Review Comm’n*, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995) (whether application of a statute embraces a set of facts is a mixed question of law and fact).

III. THE COMMISSION COMPLIED WITH WEPA.

A. The Commission’s finding that the EIS was adequate is entitled to great weight deference.

WEPA requires that all state agencies include in every recommendation or report on Type I Actions a detailed statement including the following: (1) the environmental impact of the proposed project; (2) any adverse environmental impacts which cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; and (6) 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(2)(c); *see also* Wis. Admin. Code § PSC 4.30.

WEPA's purpose is to ensure that administrative agencies consider environmental impacts during their decision-making process and includes effecting an across-the-board adjustment of priorities. *Clean Wis., Inc.*, 2005 WI 93, ¶ 188 (citations omitted). While WEPA requires that agencies consider the environmental impacts of alternatives, WEPA does not directly control agency discretion. *Id.* Rather, WEPA "represents an important procedural step agencies must take during their decision-making process." *Id.* Indeed, agencies must take a "hard look" at the environmental consequences of a proposed action. *Id.* ¶ 189 (citation omitted). But if the agency adequately evaluates environmental consequences, WEPA does not prevent an agency from determining that other values outweigh these environmental consequences. *Id.* ¶ 188.

This Court's review of an EIS is not, as Holland asserts, complicated. (*See* Holland's Br. at 12). Rather, "[t]his [C]ourt's review of an EIS is narrow. The [Commission's] determination that an EIS is adequate is a conclusion of law to which this [C]ourt accords great weight deference." *Clean Wis., Inc.*, 2005 WI 93, ¶ 190 (citation omitted). It is not this Court's role to determine whether the EIS was adequate. *Id.* Instead, this Court evaluates "whether the Commission's determination that the EIS was reasonable was adequate." *Id.* Holland bears the burden of demonstrating that the Commission's determination that the EIS was reasonable lacked a rational basis. *Id.* Holland undoubtedly fails to meet this high burden, however.

"No matter how exhaustive the discussion of environmental impacts in a particular EIS might be, a challenger can always point to a potentiality that was not addressed." *Id.* ¶ 191. As such, the agency's duty to prepare an EIS "does not require it to engage in remote and speculative analysis." *Id.* "[E]very potentiality need not be evaluated." *Id.* Instead, courts review an EIS in

light of the “rule of reason,” which requires an EIS to “furnish only such information as appears reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible.” *Id.* (citation omitted).

B. The Commission properly found that the EIS was adequate.

The final EIS was a comprehensive, multi-volume document containing detailed information regarding the need for, alternatives to, and environmental impacts of the Project. (R.337(1)). It properly defined the purpose and need for the Project and objectively evaluated alternatives to the Project. (*Cf.* Holland’s Br. at 31-41).

At least 30 days before even filing an application, applicants are required to consult with the Commission and the DNR. Any person intending to file an application for a major action that significantly affects the quality of the human environment (a “Type I Action”) must contact the Commission to, among other things, seek a preliminary determination from the Commission on alternatives to the proposed action that must be evaluated and what information is necessary to complete the environmental review. Wis. Admin. Code § PSC 4.70(1)(b).

A CPCN application is not complete until the applicant has filed with the Commission, as relevant to this case, the need for the project and any additional information the Commission may need to make any determinations under the CPCN Law or to prepare an EIS under WEPA. *Id.* § PSC 111.55. Indeed, an application must describe the project in sufficient detail so that the Commission can prepare an EIS under WEPA. *Id.* § PSC 4.70(2)(a). In particular, each application for a Type I Action must identify, develop, and evaluate reasonable alternatives to the proposed project. *Id.* § PSC 4.70(2)(b)1.; *see also id.* § PSC 4.30(3)(c) (EIS must include an “evaluation of the reasonable alternatives to the proposed action and significant environmental

consequences of the alternatives, including those alternatives that could avoid some or all of the proposed action's adverse environmental effects and the alternative of taking no action.") In sum, no application for a Type I Action "is complete until the information necessary for the [C]ommission to complete an environmental review is provided." *Id.* § PSC 4.70(2)(c). As such, Holland's assertion that the EIS impermissibly relied on information from the Applicants, further refuted below, is legally incorrect. (*See* Holland's Br. at 31, 39).

In this case, the Applicants originally filed the Project's application on October 22, 2013. (R.155(1)). On November 21, 2013, the Commission deemed the application incomplete and requested, in the form of 153 discovery requests, a host of additional information. (R.156(1)). Of these 153 discovery requests, several specifically addressed the very issues Holland complains of now: the Project's need and various alternatives to the Project. *See id.* at 9, 14-15.

In particular, discovery request 01.90 required the Applicants to revise and expand the application section addressing the need for and alternatives to the Project to specifically include: (1) local and regional load serving capability; (2) regional benefits; alternatives including energy efficiency and other alternative sources of supply; and (3) other areas as appropriate. *Id.* at 9 (emphasis added). Similarly, discovery request 01.136 required the Applicants to revise and clarify the modeling they conducted to establish the need for the Project by including a summary of energy efficiency, demand side management, renewables, natural gas, coal, nuclear, and other appropriate resources. *Id.* at 14; *see also id.* (requiring the Applicants, under discovery request 01.138, to provide a summary table listing the estimated energy efficiency and demand side management reductions for peak load and energy requirements beyond those efforts already included in the 2012 actual peak load and energy needs).

After receiving this and more information in the form of a revised application, the Commission properly deemed the application complete on April 30, 2014.³³ (R.156(1.1)). In relevant part, the revised application included a 346 page planning analysis, (R.155(90):Ex. 1), which the Applicants distilled into a plain-language version accessible to the public, (R.155(2):24-36). As discussed above, the revised application compared the Badger Coulee Project and 5 different transmission alternatives to a “no-build” alternative under six different, plausible future scenarios of how the electric industry will look in 2020 and 2026. *Id.* These future scenarios incorporated the use of non-transmission alternatives as well. (R.155(90):Ex. 1 at 12).

In drafting the EIS, the Commission generally relied on information in the completed CPCN application for the Project, as well as responses to discovery requests the Commission and the DNR issued. (R.365(48):3). These discovery request responses included maps, photographs, data, and modeling results for the Commission’s analysis and verification. *Id.* Further, the Commission employed its own professional expertise and judgment, where needed and appropriate. *Id.* The Commission lastly benefited from significant public and stakeholder input, which the final EIS described and incorporated, where needed and appropriate. *Id.* at 3-4; (R.337(2):App. E – App. G). There can be no serious dispute that the final EIS satisfied the requirements in WEPA and its implementing regulations.

The final EIS devoted an entire chapter, nearly 50 pages, to describing the need for the Badger Coulee Project in a manner the public could understand. (R.337(2):39-82). Holland

³³ To the extent Holland’s challenges to the adequacy of the EIS implicitly challenge the Commission’s determination that the Project’s application was complete, this challenge fails as well. Courts have “frequently held that great weight [deference] should be given to the administrative agency’s interpretation and application of its own rules, unless plainly erroneous or inconsistent with the regulation so interpreted. This is especially so in an area calling for special expertise.” *Clean Wis., Inc.*, 2005 WI 93, ¶ 45. Indeed, the Commission’s determination that a CPCN application is complete “represents its conclusion that the requirements in [Wis. Admin. Code ch. PSC 111] have been met on the facts before it with respect to the application under consideration. It is thus an application or interpretation of law . . . entitled to great weight deference from a reviewing court.” *Id.* ¶ 62 (citation omitted). “No one disputes that the [Commission] has special expertise in determining whether a CPCN application is complete.” *Id.* ¶ 61.

asserts, however, that the summary of the Badger Coulee Project's need in the EIS inappropriately reflects the interests of the Applicants. (See Holland's Br. at 36). In support, Holland relies exclusively on *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058 (9th Cir. 2010). In *Nat'l Parks*, a private landfill developer sought to exchange certain private land parcels for several parcels owned by the Bureau of Land Management. *Id.* at 1062. The draft EIS for the land exchange included a purpose statement that impermissibly emphasized the private economic interests of the landfill developer, rather than the public interests of the Bureau of Land Management, thereby unreasonably narrowing the alternatives considered. *Id.* at 1070-72.

The Badger Coulee Project's three public purpose justifications are easily distinguishable from the private purpose justifications of the landfill project at issue in *Nat'l Parks*. The three justifications for the Project, as Holland oddly quotes in support of its assertion, are: (1) to improve electric system reliability locally and regionally; (2) to deliver economic savings for Wisconsin utilities and electric consumers; and (3) to expand infrastructure to support the public policy of greater use of renewables. (See Holland's Br. at 36 (quoting R.337(2):XIX)). These three justifications clearly support the public interest rather than any private interest of the Applicants. See *GTE North Inc. v. Pub. Serv. Comm'n of Wis.*, 176 Wis. 2d 559, 568, 500 N.W.2d 284 (1993) ("The primary purpose of the public utility laws in this state is the protection of the consuming public."). As previously discussed, these three public purpose justifications plainly address the requirement in Wis. Stat. § 196.491(3)(d)2. that the Project satisfies the reasonable needs of the public for an adequate supply of electric energy. Nowhere does Holland explain its summary assertion that the EIS's discussion of the purpose and need for the Badger Coulee Project are constrained to the objectives of the Applicants. (See Holland Br. at 39).

For instance, while Holland attempts to support its summary assertion by quoting a sentence from the EIS, Holland conveniently omits the remainder of the relevant paragraph. Holland quotes the EIS as simply stating that “[t]he following discussion of the need for the proposed Badger Coulee [P]roject focuses on the [A]pplicants’ justification of the project, as described in the [P]roject application.” (*See* Holland’s Br. at 39 (quoting R.337(2):39)). However, the remainder of the relevant paragraph states that “[s]everal sections have been updated with additional information recently submitted by the applicants *in response to Commission staff data requests*. Also, new sections have been *added*, including a discussion of the current status of *Commission staff’s analysis of the*” Project. (R.337(2):39 (emphasis added)). The full context of the relevant paragraph makes clear that the Commission objectively analyzed the Project’s need and did not simply acquiesce to the Applicants’ private interests, whatever those may be. Indeed, Holland clearly confuses the Applicants’ stated justifications for the Project and the Applicants’ private interests, the latter of which are completely absent from the EIS.

Within the chapter describing the need for the Badger Coulee Project, the final EIS included a section entitled “Alternatives to the Proposed Project.” (R.337(2):74-82). In asserting that this section of the EIS was deficient, Holland offers nothing more than rhetoric. (*See* Holland’s Br. at 38-41). Clearly, however, this section more than adequately described alternatives to the proposed action. *See* Wis. Stat. § 1.11(1)(c)3.

This section first identified and described in significant detail the non-transmission alternatives to the Project, which include, as described above: (1) energy efficiency and load reduction; (2) generation; (3) distributed resources; and (4) not building the Project, *i.e.*, the “no-build” alternative. (R.337(2):74-75). This section described how the Applicants modeled these

alternatives in PROMOD both within ATC's transmission system and throughout MISO.³⁴ *Id.* at 74. This section then explained the six reasons why the Applicants pursued the Project instead of the non-transmission alternatives. *Id.* at 76. Of particular importance, these non-transmission alternatives, regardless of the level at which they are deployed, cannot provide the same energy cost savings for Wisconsin customers as the Project and cannot provide the increased transfer capability as the Project. *Id.*; see *Clean Wis., Inc.*, 2005 WI 93, ¶ 210 (“Alternatives that do not accomplish the purpose of an action are not reasonable.” (quotation omitted)). This section then described the five transmission system alternatives to the Project, also described above. (R.337(2):76-77). This section lastly described the host of quantitative and qualitative benefits and costs evaluated for each transmission alternative and included a comparison of the monetized benefits and costs resulting from that evaluation. *Id.* at 78-81.

Addressing a challenge similar to Holland's, the court in *Clean Wis., Inc.*, approved the Commission's interpretation of “alternative” as meaning to “offer different packages of costs and benefits, and thus present the Commission with a choice.” 2005 WI 93 ¶ 67. The court applied the dictionary definition of alternative, which is “allowing or necessitating a choice between two or more things.” *Id.* ¶ 68. Here, the EIS provided the Commission with a choice between, not two or more different packages of costs and benefits, but a multitude of them.

Within its alternatives argument, Holland asserts that the Commission violated the requirement to specify the environmentally preferable alternative in the EIS. (*See, e.g.*, Holland's Br. at 41). This requirement however, does not apply to an EIS, but rather a record of decision, which is the agency's decision regarding the proposal that is the subject of the EIS. *See* 40 C.F.R.

³⁴ This section also provided hyperlinks and citations to the section of the Applicants' planning analysis that discussed non-transmission alternatives. (R. 337(2):74 n.125 (citing R.155(90):Ex. 1 at 102-05)).

§ 1505.2. The federal regulations that guide the preparation of the EIS pursuant to Wis. Stat. § 1.11(2)(c) and Wis. Admin. Code § PSC 4.30(1)(a) require agencies to identify their preferred alternative or alternatives, if one or more exists, in the draft EIS and identify such alternative in the final EIS “*unless another law prohibits the expression of such a preference.*” 40 C.F.R. § 1502.14(e) (emphasis added). Indeed, where Commission staff prepared the EIS, *see* Wis. Admin. Code § PSC 4.80(1), another law does in fact prohibit the expression of such a preference. In relevant part, Wis. Admin. Code § PSC 2.03 states that “members of [C]ommission staff appear neither in support of nor in opposition to any cause, but solely to discover and present, if necessary, information pertinent to the docket.” Thus, the EIS need not and cannot specify any preference for any alternative, and Holland’s undeveloped assertions in this regard are clearly misplaced.

Holland’s illogical assertions that the EIS failed to include a summary of conditions under which the Project would fail to provide net economic benefits pervert the purpose of the EIS. (*See* Holland’s Br. at 40). Holland’s results-oriented assertions would have required the EIS to evaluate unreasonable load growth rates simply to find the rate at which the Project’s net economic benefits cease to exist. Holland’s only justification for such an evaluation is the “strong indications” from the evidence submitted in support of one of the petitions for rehearing refuted above. *Id.* However, as testimony at the hearing confirmed, using flat or negative load growth for planning purposes is not reasonable. (R.365(93):6-7; R.374:167-68; R.373:39). As the EIS states, and as substantial evidence demonstrates, the Project provides net economic benefits even when the Applicants modeled extremely modest load growth. (R.337(2):75-76).

The purpose of the EIS is to present decision-makers with reasonable alternatives to a project. *Clean Wis., Inc.*, 2005 WI 93, ¶ 188. It is not, as Holland would have this Court believe, to embark on a never-ending search for alternatives, no matter how unreasonable, to substitute for


the Project. *Wis. Envtl. Decade v. Pub. Serv. Comm'n of Wis.*, 79 Wis. 2d 161, 175, 255 N.W.2d 917 (1977) (“The range of alternatives that must be considered need not include those whose effect cannot be reasonably ascertained, whose implementation is deemed remote or speculative, or which are not reasonably related to the purposes of the proposed agency action.”).

In sum, Holland’s challenges to the EIS fail as a matter of fact and law. The EIS adequately and objectively described the need for, alternatives to, and environmental impacts of the Badger Coulee Project. The Commission undoubtedly complied with WEPA.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court dismiss Holland’s petition for judicial review with prejudice and affirm the Final Decision in its entirety.

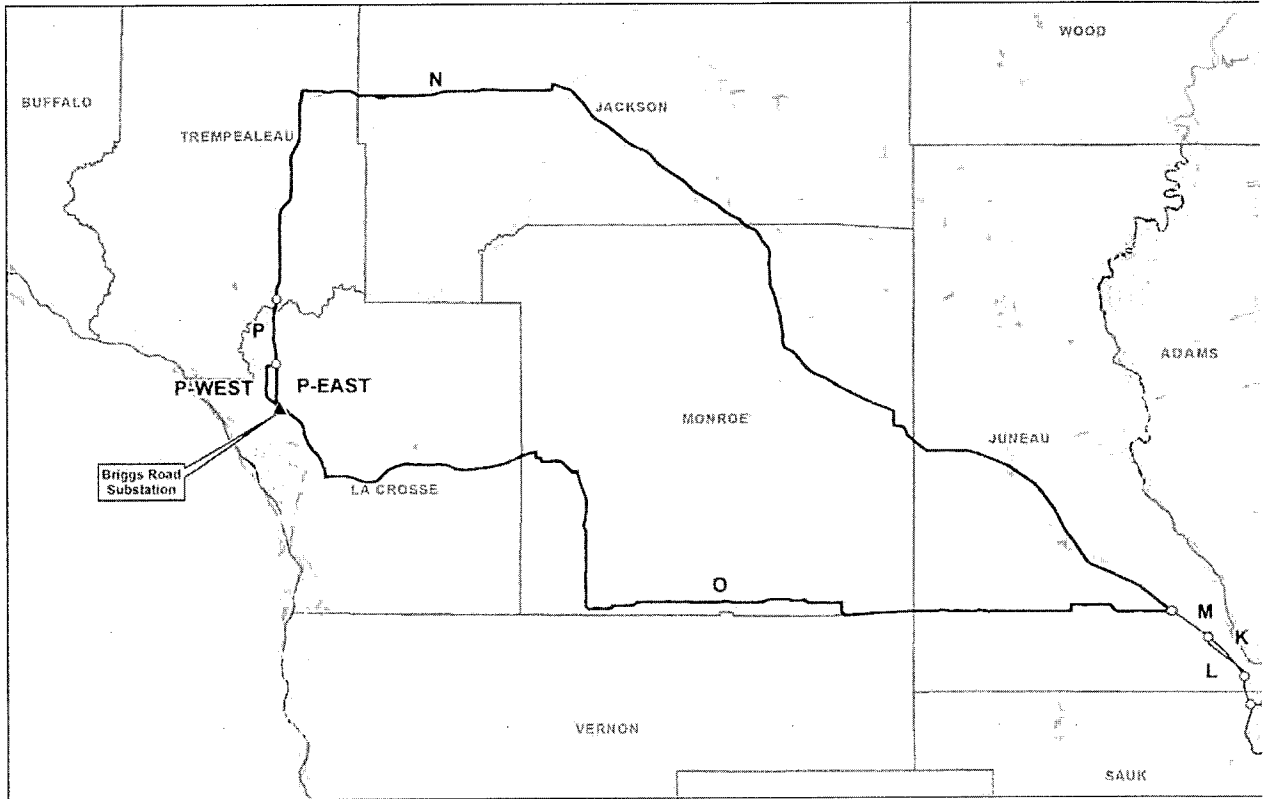
Dated: August 11, 2016.

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APPENDIX

EIS Figure 6.1-1: Badger Coulee Project Segments P, N, and O. (R.337(2):135).



TOWN OF HOLLAND,

Petitioner,

v.

Case No. 15-CV-0219

PUBLIC SERVICE COMMISSION
OF WISCONSIN,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2016, I caused to be mailed a true and correct copy of Respondent Public Service Commission of Wisconsin’s Brief Opposing Petition for Judicial Review, to the following:

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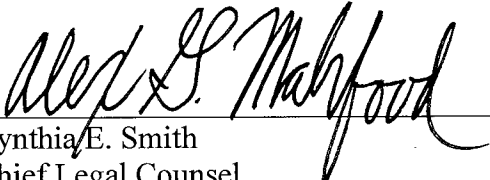
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