STATE OF WISCONSIN CIRCUIT COURT Branch ___ DANE COUNTY

WISCONSIN INDUSTRIAL ENERGY GROUP, INC.
10 E. Doty Street, Suite 800
Madison, Wisconsin 53703

and

CITIZENS UTILITY BOARD
16 N. Carroll Street, Suite 530
Madison, Wisconsin 53703

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707

Respondent.

Case No. 09CV4313

Case Code: 30607
Administrative Agency Review

PETITION FOR REVIEW

NOW COME the above-named Petitioners, by their attorneys, and, pursuant to Wis. Stat. §§ 196.41 and 227.52, hereby petition the Court for review of the Interim Order of the Public Service Commission of Wisconsin (the "Commission") in Docket No. 6680-CE-173 (the "Bent Tree Proceeding") mailed November 6, 2008 (the "Interim Order"), a true and correct copy of which is attached as Exhibit A, and the Final Decision of the Commission in the Bent Tree Proceeding, mailed July 30, 2009 (the "Final Decision"), a true and correct copy of which is attached as Exhibit B (together, the "CA Authorization"). In support of their petition, Petitioners state the following:

PARTIES

1. Petitioner, Wisconsin Industrial Energy Group, Inc. ("WIEG"), is a member organization of large businesses whose operations in Wisconsin require the purchase of large amounts of electricity. Its principal place of business is located at 10 E. Doty Street, Suite 800, Madison, Wisconsin. WIEG intervened as a party in the Bent Tree Proceeding to protect the interests of its members.

2. Petitioner, Citizens Utility Board ("CUB"), was established and incorporated pursuant to Wisconsin's non-stock corporation law Wis. Stat. ch. 181. A non-profit, non-stock corporation, CUB is a voluntary membership organization of Wisconsin residential, farm, and small-business utility ratepayers. Its principal place of business is located at 16 N. Carroll Street, Suite 530, Madison, Wisconsin. CUB intervened as a party in the Bent Tree Proceeding to protect the interests of its members.

3. Respondent, Public Service Commission of Wisconsin, is an administrative agency of the State of Wisconsin with its offices located at 610 North Whitney Way, Madison, Wisconsin. The Commission is charged with administering laws regulating public utilities in Wisconsin.

STANDING

4. Wisconsin Power and Light Company ("WP&L") is a public utility, as defined in Wis. Stat. § 196.01, and is engaged in the generation, distribution and sale of electric energy to customers in service areas in central and southern Wisconsin. It is a monopoly regulated by the Commission under Wis. Stat. ch. 196.

5. In the Bent Tree Proceeding, WP&L sought Commission approval for its construction of the Bent Tree Wind Farm to be located in Freeborn County, Minnesota and to

have a generation capacity of approximately 200 megawatts ("MW") at a cost of nearly one-half billion dollars, which amount WP&L will seek to recover from its Wisconsin ratepayers.

6. Among WIEG members are customers of WP&L who have a substantial interest in the rates the Commission authorizes and in the construction projects it approves for WP&L.

7. Among CUB members are customers of WP&L who have a substantial interest in the rates the Commission authorizes and the construction projects it approves for WP&L.

8. These Petitioners' substantial interests are adversely affected by the Commission's issuance of a Certificate of Authority ("CA"), under Wis. Stat. § 196.49 because the Commission erroneously and unlawfully authorized WP&L to commence construction on the Bent Tree Wind Farm without reviewing WP&L's application, and without issuing a Certificate of Public Convenience and Necessity ("CPCN"), under Wis. Stat. § 196.491, which exclusively applies to all projects of the size and scale of the Bent Tree Wind Farm.

9. Thus, Petitioners are aggrieved by the CA Authorization and have standing to bring this Petition for Review.

VENUE

10. Venue for this action properly lies in Dane County pursuant to Wis. Stat. § 227.53(1)(a)3, as WIEG's and CUB's principal offices are located in Dane County.

BACKGROUND

11. On June 6, 2008, WP&L filed with the Commission under Wis. Stat. § 196.491 an application for issuance of a CPCN that would authorize it to construct, own, and operate a new wind generation facility to be known as the Bent Tree Wind Farm. WP&L's CPCN application was docketed with the Commission as 6680-CE-173.

12. In WP&L's CPCN application, WP&L proposed that the Bent Tree Wind Farm be located in Freeborn County, Minnesota with generation capacity of approximately 200 MW.

13. On June 20, 2008, on its own motion, the Commission requested comments from WP&L, intervenors, and others as to whether a CPCN or CA should govern applications to construct large generation plants outside of Wisconsin.

14. On July 3, 2008, WIEG and CUB filed comments in which they argued that review of a project the size and scale of the Bent Tree Wind Farm must be made under standards for granting a CPCN.

15. On November 6, 2008, the Commission issued an Interim Order in which the Commission concluded that it would review WP&L's application to construct the Bent Tree Wind Farm as one seeking a CA pursuant to Wis. Stat. § 196.49, and not as one seeking a CPCN pursuant to Wis. Stat. § 196.491.

16. On April 29, 2009 the Commission held a technical and public hearing on WP&L's application.

17. On July 30, 2009, the Commission issued its Final Decision granting WP&L a CA, pursuant to Wis. Stat. § 196.49 and Wis. Admin. Code ch. PSC 112, and authorizing WP&L to construct, own and operate the 200 MW Bent Tree Wind Farm which is expected to cost Wisconsin ratepayers $497,370,500.

THE CPCN STATUTE

18. Requirements for obtaining a CPCN are provided by statute in Wis. Stat. § 196.491.

19. Wis. Stat. § 196.491(3)(a)1 holds that "no person may commence the construction of a facility unless the person has applied for and obtained a certificate of convenience and necessity under this subsection."

20. A "facility" is defined under this statute as "a large electric generating facility or a high-voltage transmission line." Wis. Stat. § 196.491(1)(e).

21. A "large electric generating facility" is defined as one that is "designed for nominal operation at a capacity of 100 megawatts or more." Wis. Stat. § 196.491(1)(f).

22. Before it may approve an application under Wis. Stat. § 196.491 for an electric generating facility of more than 100 MW, the Commission must first find, among other things, the following to be true:

- The proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy. Wis. Stat. § 196.491(3)(d)2.
- The 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. Wis. Stat. § 196.491(3)(d)3.
- The proposed facility 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. Wis. Stat. § 196.491(3)(d)4.
- The proposed facility complies with the criteria under s. 196.49 (3) (b) if the application is by a public utility as defined in s. 196.01. Wis. Stat. § 196.491(3)(d)5.
- The proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved. Wis. Stat. § 196.491(3)(d)6.
- The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market. Wis. Stat. § 196.491(3)(d)7.
- For a large electric generating facility, brownfields, as defined in s. 560.13 (1) (a), are used to the extent practicable. Wis. Stat. § 196.491(3)(d)8.

23. In its review of a utility's application for a CPCN, the Commission must hold a public hearing. Wis. Stat. § 196.491(3)(b).

THE CA STATUTE

24. Requirements for obtaining a CA are provided by statute in Wis. Stat. § 196.49 and are considerably less stringent than the requirements for obtaining a CPCN.

25. Wis. Stat. § 196.49(2) provides that "[n]o public utility may begin the construction, installation or operation of any new plant, equipment, property or facility, nor the construction or installation of any extension, improvement or addition to its existing plant, equipment, property, apparatus or facilities unless the public utility has complied with any applicable rule or order of the commission."

26. Under this statute, a "project" means construction of any new plant, equipment, property or facility, or extension, improvement or addition to its existing plant, equipment, property, apparatus or facilities. Wis. Stat. § 196.49(3)(a).

27. The Commission's rules establish two alternative procedures to approving a CA. Wis. Admin. Code PSC § 112.07. The Commission may authorize the project without holding a public hearing if the Commission "finds that the public convenience and necessity require the project as proposed and the project complies with s. 196.49(3)(b), Stats." Wis. Admin. Code PSC § 112.07(1). Alternatively, the Commission "shall hold a public hearing on the application and grant or deny the application, in whole or in part, subject to any conditions the commission finds are necessary to protect the public interest or promote the public convenience and necessity." Wis. Admin. Code PSC § 112.07(2).

28. If the Commission chooses to review the application subject to Wis. Stat. § 196.49(3)(b), the Commission "may require by rule or special order under par. (a) that no

project may proceed until the commission has certified that public convenience and necessity require the project." Additionally the Commission "may refuse to certify a project if it appears that the completion of the project will do any of the following:

- Substantially impair the efficiency of the service of the public utility.
- Provide facilities unreasonably in excess of the probable future requirements.
- When placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service unless the public utility waives consideration by the commission, in the fixation of rates, of such consequent increase of cost of service.

Id.

29. The CA statute requires the Commission to investigate local siting issues. The Commission "may not issue a certificate under sub. (1), (2), or (3) for the construction of electric generating equipment and associated facilities unless the commission determines that brownfields, as defined in s. 560.13 (1) (a), are used to the extent practicable." Wis. Stat. § 196.49(4).

THE INTERIM ORDER

30. In the Interim Order, the Commission by a 2-1 vote concluded that it would review WP&L's application for a CPCN for the Bent Tree Wind Farm as an application, instead, as one seeking a CA pursuant to Wis. Stat. § 196.49. It appears from the Interim Order, that the Commission's decision to reject the CPCN procedure in favor of the CA procedure is grounded exclusively in the fact that the Bent Tree Wind Farm would be located in Minnesota.

31. The Commission found that neither the CPCN nor the CA statutes "explicitly addresses the question of whether a project proposed to be constructed outside the state of Wisconsin requires a CA or a CPCN." Interim Order at 4.

32. The Commission concluded that "applying **some portions** of the CPCN law to out-of-state projects, to regulate local siting impacts, would conflict with statutory limits on Wisconsin's sovereignty jurisdiction," Interim Order at 10 (emphasis added), violating Wis. Stat. § 1.01 that limits sovereignty and jurisdiction to the constitutional boundaries of the State. Specifically, the Commission found that Wis. Stat. §§ 196.491(3)(d)3., 4., and 6. that require the Commission to examine "local siting impacts" would require the Commission to "assert jurisdiction over matters within the regulatory province of the host state." Interim Order at 5.

33. The Commission further concluded that "applying **other portions** of the CPCN law to [out-of-state] projects would be unreasonable or absurd, and that the legislature intended the CPCN law to apply only to projects in [Wisconsin]." Interim Order at 10 (emphasis added). Specifically, the Commission found that requiring the Commission to hold hearings in another state, Wis. Stat. § 196.491(3)(b), and to mail its decision to out-of-state libraries would be unreasonable, Wis. Stat. § 196.491(3)(a)1. Interim Order at 8 (citing *Lake City Corp. v. Mequon*, 207 Wis. 2d 155 (1997)). In addition, the Commission concluded that applying Wis. Stat. § 196.491(3)(i)[1] to an out-of-state project would produce an absurd result of asking a Wisconsin CPCN to preempt another state's local ordinances. Interim Order at 8. Finally, the Commission concluded that application of the provisions of the CPCN statute that apply to wholesale merchant plants would produce absurd results if applied to out-of-state projects. Interim Order at 8-9.

34. The Commission did not address application to out-of-state projects of the portions of the CPCN statute relevant to the cost of electricity to Wisconsin ratepayers; namely Wis. Stat. §§196.491(3)(d)2., 5, & 7.

[1] "If installation or utilization of a facility for which a certificate of convenience and necessity has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility may nevertheless proceed." Wis. Stat. §196.491(3)(i).

35. The Commission's Interim Order is subject to judicial review upon judicial review of the Final Order. *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 282 Wis. 2d 250, 700 N.W. 768, ¶ 58 (2005) (citing, *Friends of the Earth v. Pub. Serv. Comm'n of Wisconsin*, 78 Wis. 2d 388, 410, 254 N.W. 299 (1977)).

FIRST CAUSE OF ACTION

THE COMMISSION LEGALLY ERRED IN CONCLUDING THAT A WISCONSIN PUBLIC UTILITY SEEKING TO CONSTRUCT A GENERATING FACILITY OF 100 MW OR GREATER MAY NOT OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY BECAUSE THE PROPOSED FACILITY IS LOCATED OUTSIDE OF WISCONSIN.

36. A plain reading of the CPCN law requires that the Commission review WP&L's application for a CPCN to construct the Bent Tree Wind Farm under the standards and procedure for issuance of a CPCN.

37. The statute expressly provides that "[n]o person may commence the construction of a facility unless the person has applied for and received a certificate of public convenience and necessity under this subsection." Wis. Stat. § 196.491(3)(a)1.

38. There is no dispute that WP&L is among those groups of "persons" to which Wis. Stat. § 196.491(3)(a)1. is directed. WP&L is a public electric utility "involved in the generation, distribution and sale of electric energy . . . which owns or operates . . . facilities in the state." Wis. Stat. § 196.491(1)(d).

39. There is no dispute that WP&L's CPCN application sought approval to construct electric generating equipment and associated facilities designed for nominal operation at a capacity of 100 megawatts or more. Wis. Stat. §§ 196.491(1)(e) and (g).

40. Authorization of construction of the Bent Tree Wind Farm, therefore, requires a CPCN.

41. In making the CA Authorization, the Commission erroneously interpreted Wis. Stat. § 196.491(3) when it concluded that it could not review WP&L's application for a CPCN to construct the Bent Tree Wind Farm under the CPCN law, Wis. Stat. §196.491(3), and failed to do so.

SECOND CAUSE OF ACTION

THE COMMISSION LEGALLY ERRED IN ISSUING WP&L A CERTIFICATE OF AUTHORITY TO CONSTRUCT THE BENT TREE WIND FARM.

42. In its Final Order, by reviewing WP&L's application for a CPCN to construct the Bent Tree Wind Farm under the CA law pursuant to Wis. Stat. §196.49, and in issuing WPL a CA to construct the facility in its Final Decision, the Commission failed to follow the procedure prescribed by law for authorization of a Wisconsin public utility to construct electric generating facilities of capacity of 100 megawatts or more as laid out in Wis. Stat. § 196.491(3).

THIRD CAUSE OF ACTION

WHEN IT CHOSE TO ISSUE WP&L A CERTIFICATE OF AUTHORITY TO CONSTRUCT THE BENT TREE WIND FARM, THE COMMISSION EXERCISED DISCRETION OUTSIDE THE RANGE OF DISCRETION DELEGATED TO IT BY LAW.

43. Wis. Stat. §196.491(3) leaves the Commission no discretion to choose whether to review an application from a Wisconsin utility to construct electric generating equipment designed for nominal operation at a capacity of 100 megawatts or more.

44. In choosing to authorize WP&L to construct the Bent Tree Wind Farm under the CA law pursuant to Wis. Stat. §196.49 rather than as it is required to do pursuant to Wis. Stat. §196.491(3), the Commission exercised discretion outside the range of discretion delegated to the Commission by law.

RELIEF REQUESTED

WHEREFORE, the Petitioners request that the Court grant the following relief pursuant to Wis. Stat. §§ 227.57(4), (5), (8) and (9):

1. That the Court set aside the Commission's November 6, 2008 Interim Order choosing to review WP&L's application for a CPCN to construct the Bent Tree Wind Farm under the CA law pursuant to Wis. Stat. §196.49.

2. That the Court set aside the Commission's July 30, 2009 Final Decision issuing a CA authorizing WP&L to construction the Bent Tree Wind Farm.

3. That the Court remand the case to the Commission for further proceedings consistent with the law and established Commission procedure.

4. That the Court provide whatever additional relief is appropriate, irrespective of the form of this petition, pursuant to § 225.57(9), Stats.

Dated this 28th day of August 2009.

GODFREY & KAHN, S.C.

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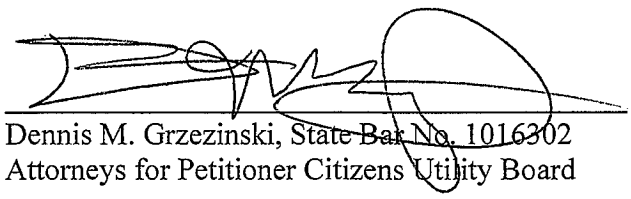
By: 

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BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota — 6680-CE-173

INTERIM ORDER

Introduction

This Interim Order addresses the question of whether the Commission should review Wisconsin Power and Light Company's (WP&L) Bent Tree Wind Project, to be located in the state of Minnesota, as a Certificate of Authority (CA) project under Wis. Stat. § 196.49 or as a Certificate of Public Convenience and Necessity (CPCN) project under Wis. Stat. § 196.491. WP&L intends to construct its Bent Tree Wind Project as a 200 megawatt (MW) facility, and it filed a CPCN application with the Commission. In the Notice of Proceeding, however, the Commission requested comments regarding whether an out-of-state project such as this should be reviewed as a CA application or a CPCN application. The Commission set July 3, 2008, as the deadline for receiving comments.

The Commission accepted comments and legal analyses from numerous entities, and deliberated on the issue at its open meeting on September 25, 2008. The Commission concludes that it will review the Bent Tree Wind Project as a CA application, not a CPCN application. Commissioner Azar dissents.

Exhibit A

Legal Background

The CA law and the Commission's administrative rules that interpret this law require prior Commission approval of a variety of public utility projects. The CA law states:

> 196.49(2) **No public utility may begin the construction, installation or operation of any new plant, equipment, property or facility**, nor the construction or installation of any extension, improvement or addition to its existing plant, equipment, property, apparatus or facilities unless the public utility has complied with any applicable rule or order of the commission.
>
> (3)(a) In this subsection, **"project" means construction of any new plant, equipment, property or facility, or extension, improvement or addition** to its existing plant, equipment, property, apparatus or facilities. The commission may require by rule or special order that a public utility submit, periodically or at such times as the commission specifies and in such detail as the commission requires, plans, specifications and estimated costs of any proposed project which the commission finds will materially affect the public interest.
>
> (b) Except as provided in par. (d), **the commission may require by rule or special order under par. (a) that no project may proceed until the commission has certified that public convenience and necessity require the project**. The commission may refuse to certify a project if it appears that the completion of the project will do any of the following:
>
> 1. Substantially impair the efficiency of the service of the public utility.
> 2. Provide facilities unreasonably in excess of the probable future requirements.
> 3. When placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service unless the public utility waives consideration by the commission, in the fixation of rates, of such consequent increase of cost of service.

(Emphasis added.)

The CA law prevents a public utility from constructing, installing, or operating new facilities unless it complies with Commission rules. The Commission may also require, by rule or special order, that a project cannot proceed until the Commission certifies that it is required by public convenience and necessity. The Commission has established rules to apply these portions of the CA law. Wisconsin Administrative Code §§ PSC 112.05(1) and (3) identify the facilities

that require advance Commission approval according to the type of project the public utility is proposing and its estimated gross cost. WP&L's Bent Tree Wind Project is such a project. It involves construction of a generating plant, which is a type of public utility project that requires advance Commission approval under Wis. Admin. Code § PSC 112.05(1)(a), and its estimated gross cost exceeds the cost threshold specified in Wis. Admin. Code § PSC 112.05(3). Pursuant to Wis. Admin. Code § PSC 112.07,[1] the Commission's decision about issuing a CA to a facility like the Bent Tree Wind Project depends on whether the public convenience and necessity require the project under review.

The CPCN law applies to fewer types of projects than the CA law. A CPCN is required only for construction of high-voltage transmission lines and large electric generating facilities. The law states:

> 196.491(1)(e) "Facility" means a large electric generating facility or a high-voltage transmission line.
>
> (f) Except as provided in subs. (2) (b) 8. and (3) (d) 3m., "high-voltage transmission line" means a conductor of electric energy exceeding one mile in length designed for operation at a nominal voltage of 100 kilovolts or more, together with associated facilities, and does not include transmission line relocations that the commission determines are necessary to facilitate highway or airport projects.
>
> (g) "Large electric generating facility" means electric generating equipment and associated facilities designed for nominal operation at a capacity of 100 megawatts or more.

[1] **Wis. Admin. Code § PSC 112.07 Processing of applications by the commission.** (1) If upon consideration of the application, together with any supplemental information and objections, the commission finds that the public convenience and necessity require the project as proposed and the project complies with s. 196.49(3)(b), Stats., the commission may authorize the project without public hearing but with modifications and conditions it considers necessary.

(2) Except as provided in sub. (1), the commission shall hold a public hearing on the application and grant or deny the application, in whole or in part, subject to any conditions the commission finds are necessary to protect the public interest or promote the public convenience and necessity.

While the CPCN law covers only two types of facilities, it regulates more project applicants than the CA law. The CPCN law applies to any person[2] who intends to construct a high-voltage transmission line or large electric generating facility, while the CA law only applies to public utility projects. The CPCN law declares:

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

(Emphasis added.)

Discussion

The portions of the CA law and the CPCN law quoted above describe the scope of these statutes. Neither statute explicitly addresses the question of whether a project proposed to be constructed outside the state of Wisconsin requires a CA or a CPCN. Both laws are written broadly enough that, on first impression, they appear to regulate both in-state and out-of-state electric utility construction projects.

Applying the CPCN law to a facility proposed to be built in another state, however, creates problems with Wisconsin's extraterritorial jurisdiction. As the United States Supreme Court succinctly stated over 100 years ago:

> [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

[2] Wisconsin Statute § 990.01(26) broadly defines "person." The definition includes "all partnerships, associations and bodies politic or corporate."

Pennoyer v. Neff, 95 U.S. 714, 722 (1877). Our Legislature expressed this same limitation in Wisconsin law, which provides:

> **1.01 State sovereignty and jurisdiction.** The sovereignty and jurisdiction of this state extend to all places within the boundaries declared in article II of the constitution, subject only to such rights of jurisdiction as have been or shall be acquired by the United States over any places therein; and the governor, and all subordinate officers of the state, shall maintain and defend its sovereignty and jurisdiction. . . .

Several provisions of the CPCN law directly implicate extraterritorial jurisdiction and, if applied to out-of-state projects, would conflict with Wis. Stat. § 1.01. For projects outside Wisconsin, the CPCN law would not only address impacts of the facility that affect Wisconsin, but would also require the Commission to examine impacts that occur in the state where the project would be built. These "local siting impacts" are regulated under Wis. Stat. §§ 196.491(3)(d)3., 4., and 6. Under these provisions of the CPCN law, the Commission must address local siting impacts such as safety, individual hardship, economic effects on property values, environmental protection, and compliance with orderly land use and development plans. One manifestation of this local focus is the requirement that every CPCN application must propose alternative locations or routes for the project.[3]

If the Commission were to address local siting impacts of an out-of-state project by applying these portions of the CPCN law, it would be attempting to assert jurisdiction over matters within the regulatory province of the host state. Overlapping Commission regulation of

[3] *See* Wis. Stat. § 196.491(3)(d)3. This requirement applies only to CPCN projects, not to CA projects. As provided in Wis. Stat. § 196.025(2m)(c), "[T]he commission and the department [of natural resources] are required to consider only the location, site, or route for the project identified in an application for a certificate under s. 196.49 and no more than one alternative location, site, or route; and, for a project identified in an application for a certificate under s. 196.491(3), the commission and the department are required to consider only the location, site, or route for the project identified in the application and one alternative location, site, or route."

these local siting impacts would not advance any legitimate Wisconsin interests and would likely be an unlawful exercise of extraterritorial jurisdiction.

The Commission could attempt to avoid this problem by construing some parts of the CPCN law that regulate local siting impacts as applying only to project impacts on Wisconsin. This means the Commission would apply the CPCN law to facilities whose construction is proposed in another state, but it would interpret the provisions of the law that regulate local siting impacts to mean only those impacts that affect Wisconsin. For example, Wis. Stat. § 196.491(3)(d)4. requires that the Commission, prior to approval, determine that "[t]he proposed facility 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." The Commission could interpret this statutory prohibition on "undue adverse impact on other environmental values" to mean only environmental impacts that affect Wisconsin.

However, such a construction would not correct all of the problems that arise when the CPCN law is applied to out-of-state projects. Under Wis. Stat. § 196.491(3)(a)1., the Commission must send copies of a CPCN application to the clerk of each municipality and town in which the proposed facility is to be located and to the main public library in each such county, while Wis. Stat. § 196.491(3)(b) requires the Commission to hold a public hearing on a CPCN application "in the area affected." Sending copies of the application to municipal clerks and libraries in Minnesota, or holding a Commission hearing in Minnesota to receive testimony from local members of the public, would not help the Commission identify a project's impacts on Wisconsin. Instead, these requirements of the CPCN law would burden local officials and sow

confusion without serving any legitimate Wisconsin purpose. These problems indicate that narrowly construing those parts of the CPCN law that regulate local siting impacts, so they only apply to project impacts inside Wisconsin, would not avoid all of the dilemmas created by applying the law to out-of-state projects.

Even more importantly, the CPCN law's legislative history demonstrates that the Legislature intended to confine the CPCN law to in-state projects. The CPCN law was enacted on September 30, 1975, as ch. 68, laws of 1975. It was introduced as 1975 Assembly Bill 463 and what passed both houses was Assembly Substitute Amendment 2 to Assembly Bill 463. Because the relevant provisions of the CPCN law are identical in both the original Assembly Bill 463 and in the substitute amendment that actually passed, the description of the CPCN law in the Legislative Reference Bureau (LRB) Analysis of Assembly Bill 463 is useful legislative history. The LRB Analysis to Assembly Bill 463 states, "This bill establishes a method whereby the development of major electric generating and transmission facilities **in this state** is subject to scrutiny by the public and all levels of government and to approval by the public service commission (PSC) and the department of natural resources (DNR)." (Emphasis added.) As the supreme court ruled in *Dairyland Greyhound Park v. Doyle*, 2006 WI 107, ¶ 32, 295 Wis. 2d 1, 719 N.W.2d 408, "Because the LRB's analysis of a bill is printed with and displayed on the bill when it is introduced in the legislature, the LRB's analysis is indicative of legislative intent." The LRB Analysis to Assembly Bill 463 is a strong statement of legislative intent that the CPCN law applies not to out-of-state projects, but to in-state projects.

Construing the CPCN law to apply only to in-state projects is also consistent with a fundamental rule of statutory construction, "that any result that is absurd or unreasonable must be avoided." *Lake City Corporation v. Mequon*, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997). None of the provisions of the CPCN law would be unreasonable if the statute is interpreted to apply only to in-state projects. On the other hand, if the CPCN law is interpreted as governing out-of-state proposals like the Bent Tree Wind Project, the Commission would needlessly be required to mail copies of CPCN applications to Minnesota libraries and hold hearings in the local area. This would be an unreasonable interpretation of the law.

Another portion of the CPCN law that would be unreasonable if applied to out-of-state projects is Wis. Stat. § 196.491(3)(i). Under this law, the issuance of a CPCN preempts any local ordinances that would preclude or inhibit the CPCN project's construction or use. Surely the state Legislature did not have the intent or the authority to preempt the ordinances of another state's municipalities.

Furthermore, applying the CPCN law to out-of-state wholesale merchant plants would lead to absurd results. The CPCN law defines a "wholesale merchant plant" as an electric generating unit not owned by a Wisconsin public utility, not providing retail electric service, and "located in this state." Wis. Stat. § 196.491(1)(w)1. Because such a project is not part of a Wisconsin utility's rate base and ratepayers are not liable for its construction costs, a wholesale merchant plant is exempt from some of the CPCN law's approval criteria. When the Commission reviews a wholesale merchant plant CPCN project, Wis. Stat. §§ 196.491(3)(d)2.

and 3. prevent it from considering whether the public needs the plant's power, alternative sources of supply or engineering, and from considering the economics of the project. Yet, if the CPCN law were applied to out-of-state projects, a proposal that meets most of the elements of a wholesale merchant plant but is located beyond the borders of Wisconsin would not qualify for these exemptions from the CPCN law's approval criteria. In other words, the Commission would review more completely a wholesale merchant plant to be built outside Wisconsin than one to be built inside Wisconsin. This would be an absurd interpretation of the CPCN law.

Unlike the CPCN law, the CA law can be applied to out-of-state projects. The CA law's legislative history does not show that the Legislature intended to confine the CA law only to in-state projects. In addition, requiring a CA for out-of-state projects does not conflict with Wis. Stat. § 1.01 or with principles of extraterritorial jurisdiction. This is because the CA law applies only to Wisconsin utilities, while the CPCN law regulates "any person," and because no part of the CA law compels the Commission to consider out-of-state local siting impacts.

Interpreting the CA law to apply to out-of-state projects is consistent with the Commission's prior interpretation of this law. As Wis. Admin. Code § PSC 112.05(2) provides, electric utilities must notify the Commission of CA projects that they intend to construct in other states and the Commission may require that the utility submit a CA application of such a project for the Commission's prior approval. The rule states:

> PSC 112.05(2) A Wisconsin electric utility proposing to construct, install or place in operation any of the utility facilities listed in sub. (1) in another state in which it serves shall notify the commission at least 60 days before beginning construction. The notification shall include a description of the project, its location, the estimated cost, a discussion of need, permits or approvals required

> by the other state or local governments, and the approximate jurisdictional allocation of the cost between Wisconsin and the other state. Notwithstanding sub. (3), if a significant portion of the cost of the project will be allocated to Wisconsin for ratemaking purposes, the commission may require that the utility submit an application under s. PSC 112.06, for commission authorization prior to construction, installation or operation.

Based on this rule, the Commission has reviewed CA applications for projects proposed to be built outside Wisconsin.[4] The Commission has no equivalent rule concerning the CPCN law.

Some of those who filed comments argued that the Commission would lose jurisdiction over environmental impacts if it reviewed out-of-state projects only under the CA law. The Commission disagrees. As provided in Wis. Stat. § 196.49(3)(b) and Wis. Admin. Code § PSC 112.07, the Commission must determine whether a CA project will promote the public convenience and necessity, and the Commission may impose any condition it finds necessary to protect the public interest. When applied to an out-of-state CA project, these standards are broad enough to address environmental issues that affect the state of Wisconsin.

The Commission concludes that applying some portions of the CPCN law to out-of-state projects, to regulate local siting impacts, would conflict with statutory limits on Wisconsin's sovereign jurisdiction. The Commission further concludes that applying other portions of the CPCN law to such projects would be unreasonable or absurd, and that the Legislature intended the CPCN law to apply only to projects in this state.

[4] For example, *see Application of Wisconsin Electric Power Company for Authority to Construct a TOXECON Baghouse for Units 7, 8, and 9 at the Presque Isle Power Plant, Located in the City of Marquette, Marquette County, Michigan*, docket 6630-CE-287 (March 12, 2004) and *Application of Wisconsin Electric Power Company for Authority to Construct a Particulate Control Baghouse for Units 5 and 6 at the Presque Isle Power Plant, Located in the City of Marquette, Marquette County, Michigan*, docket 6630-CE-290 (July 30, 2004).

Order

For these reasons, the Commission concludes that it must review the Bent Tree Wind Project, which WP&L intends to construct in Minnesota, pursuant to the CA law rather than the CPCN law.

Dated at Madison, Wisconsin, November 6, 2008

By the Commission:

Sandra J. Paske
Secretary to the Commission

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See attached Notice of Rights

Docket 6680-CE-173

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.[1] The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised July 3, 2008

[1] *See State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota — 6680-CE-173

COMMISSIONER AZAR'S DISSENT

This is one of the most significant decisions made by the Commission during my tenure here and, I believe, the majority decision errs on both policy and the law, and sets the stage to run afoul of our rich tradition for public utility regulation. The following hypothetical is an example of what the majority decision could lead to:

> The Division Administrator[1] could approve the construction of a two billion dollar 600 megawatt (MW) out-of-state coal plant that would be paid for by Wisconsin ratepayers. This would be possible even if that plant: (1) was unnecessary,[2] and/or (2) was not cost effective,[3] and/or (3) would impair the service of the utility.[4,5] The Commission would neither see the application nor the final decision.

To any Wisconsin ratepayer or policymaker, this scenario should be cause for alarm. My concern does not arise from the current staff or Commission, for I have the utmost trust in the current Division Administrator and my fellow Commissioners to act appropriately. However,

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[1]The Division Administrator or Acting Division Administrator is empowered to make decisions on applications for "electric construction orders which do not require a CPCN under 196.491." See Minutes of Open Meeting of Thursday, May 5, 1995, Commission Delegation No. 4, Attachment B, Item No. 8.

[2]"[U]nreasonably in excess of the probable future requirements." Wis. Stat. § 196.49(3)(b)2.

[3]"[A]dd to the cost of service without proportionately increasing the value . . . of service." Wis. Stat. § 196.49(3)(b)3.

[4]"Substantially impair the efficiency of the service of the public utility." Wis. Stat. § 196.49(3)(b)1.

[5]The majority opinion contends that, under the Commission's rules, to approve the project the Commission must first certify that the public convenience and necessity require the project. (See page 10.) However, this is only true if a hearing is not held. Wis. Admin. Code § PSC 112.07(1). If a hearing is held, the rule does not mandate a finding of public convenience and necessity. Wis. Admin. Code § PSC 112.07(2).

our actions in the present could have ramifications in the future, and we must consider that future with our decision today.

The foundation of our democratic system is a system of checks and balances that helps to ensure that the decisions of government are scrutinized, subject to public input and review. When the Legislature and Governor enacted the current Certificate of Public Convenience and Necessity (CPCN) statute, I believe that they clearly intended for a rigorous review of large utility projects to ensure that the interests of Wisconsin ratepayers would be adequately safeguarded. Because I feel today's decision threatens this system of checks and balances, I intend to seek a statutory clarification to ensure that large utility projects paid for by Wisconsin ratepayers are subject to sufficient review by this Commission. I ask my colleagues to join me in seeking this important clarification.

The applicant before us here seeks to construct a 200 MW generation facility with a proposed cost of $495 million. Because Wisconsin Power & Light Company's (WP&L) application is for 200 MW, it triggers the threshold limits in the CPCN statute. Wis. Stat. § 196.491(1)(e) and (g). In turn, the Commission is legally obligated to apply the CPCN statute. Wis. Stat. § 196.491(3)(a)1. The only way to avoid application of that statute is if the Commission is somehow legally barred from applying the CPCN statute.[6]

The majority believes the Commission is prevented from applying the CPCN statute because the proposed project would be located in Minnesota rather than Wisconsin. The CPCN

[6]The majority misapplies the requirements of the CPCN statute by empowering the Commission with the discretion to choose between the CPCN and the Certificate of Authority (CA) statute, depending on the facts before it. I find no legal basis for concluding that the Legislature provided us with such discretion.

statute, on its face, is not limited to in-state projects.[7] A plain reading of the statute requires that the CPCN statute apply to any major construction project proposed by Wisconsin public utilities, regardless of where the facility would be located.

Legislative History

The majority opinion relies heavily on legislative intent, arguing that the drafting documents for the 1975 CPCN law clearly state the Legislature intended for the law only to apply to "in-state projects." (Page 7.) However, looking only at the legislative intent of the CPCN law, and then simply applying the in-state/out-of-state distinction, is misleading.

Legislative Intent of Both the CPCN and CA Laws Regarding the In-State/Out-of-State Distinction

Unlike the majority, I do not find the fact that the Legislature's writing of the CPCN law for in-state projects to be particularly enlightening. Given the historical context within which the CPCN law was written, it is clear that the Legislature was considering only in-state projects in the law. The CPCN statute was written in 1975 during the "old" utility world, before the Public Utility Regulatory Policies Act, Energy Policy Act of 1992 and Federal Energy Regulatory Commission Order 888 – events that have dramatically reshaped the electric industry. Specifically, the CPCN statute was created when utilities were generally expected to build generation within their own service territories. The thought of wheeling power across state lines was unnecessary unless a utility service territory happened to span between neighboring states. Beginning in 1996, the "new" energy world saw the creation of the open access transmission

[7]The one exception, which is discussed later, is that the CPCN statute defines a "wholesale merchant plant" as "facilities located in this state." Wis. Stat. § 196.491(1)(w)1.

grid, allowing public utilities to begin building generation facilities far away from their service territories, indeed, even in other states because they knew they would have the opportunity to transmit the energy back to their service territory. Hence, it was only after 1996, twenty-one years after the passage of the CPCN law, that the wheeling of power across state lines became common place.

While there is no question in my mind that the Legislature was only considering in-state projects when it wrote the CPCN law, that is even more emphatically true for the Certificate of Authority (CA) law which was created over four decades earlier in 1931. In 1931, the concept of transmitting power across state lines would have been the subject of science fiction, not legislation.[8]

Given the historical context of both the CPCN and CA statutes, the Legislature had to have assumed that it was writing both laws for facilities that would be built in Wisconsin. Hence, if one relies on legislative intent, neither the CPCN nor the CA law could apply to out-of-state projects. From this, one must conclude that looking at the legislative intent as to the in-state/out-of-state distinction is not helpful in determining whether the CPCN law applies to WP&L's application. It also reminds us that the plain language of the statute is always the first place to look for legislative intent. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Here, the CPCN statute is silent on the issue of in-state versus out-of-state projects.

[8]In 1931, the electricity industry was still in its infancy. Transmitting power to the next service territory would have been considered a technological marvel, and the thought of building a generator in another state and transmitting its power into Wisconsin would have been inconceivable.

Legislative Intent on the Size of the Project

However, the CPCN statute is not silent on what type of projects fall within its scope. The plain and unambiguous language of Wis. Stat. § 196.491(1)(g) demonstrates that the Legislature clearly intended the rigorous CPCN law to apply to the construction of any facility "designed for nominal operation at a capacity of 100 megawatts or more." In contrast, the CA law applies its less rigorous standards to a much broader set of projects; it applies to "any new plant" that meets the threshold requirements set forth in the Commission rules. Wis. Stat. § 196.49(2). Again, the Supreme Court requires us to begin statutory interpretation "with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Kalal*, 271 Wis. 2d 633, ¶ 45. Here, the meaning is clear: applications for generation over 100 MW are subject to the rigorous standards found in the CPCN law.

Severing Invalid Provisions of the CPCN Law

The majority's concern with out-of-state projects arises from the few CPCN provisions that require the Commission to render decisions on siting issues. Because of those provisions, the majority concludes that none of the rigorous standards found in the CPCN statute should be applied to WP&L's application. I agree that siting decisions for projects outside of Wisconsin could not be rendered by this Commission since, among other things, Wis. Const. art. II, § 1, and Wis. Stat. § 1.01 limit the state's jurisdiction to our state boundaries. However, I do not agree with the majority that, when dealing with out-of-state projects, the siting provisions require us to jettison the entirety of the CPCN statute.

Our world is constantly changing. The rules of statutory interpretation empower the administrators of the law to interpret statutes through the lens of today's world. The

Commission continually administers public utility laws within the framework of new facts. And, that is what we are tasked with today. Both the CPCN and CA statutes were created during the old utility world, so neither of them perfectly fits the current fact scenarios with stand alone transmission owners, a regional transmission operator and energy markets.

To accommodate these new facts that were not even imaginable when the statutes were written, I turn to Wis. Stat. § 990.001(11) on severability. This section provides that:

> [I]f any provision of the statutes is invalid . . . or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications, which can be given effect without the invalid provision or application.

According to case law, there is a presumption that invalid provisions will be severed. One can overcome that presumption only by showing the Legislature, intending the statute to be effective only as an entirety, would not have enacted the valid part of the statute by itself. *Nankin v. Village of Shorewood*, 2001 WI 92, ¶ 49, 245 Wis. 2d 86, 630 N.W.2d 141.

Here Wis. Const. art. II, § 1, specifies the boundaries of the state of Wisconsin and establishes a state government that will work within those boundaries. The Commission is part of the state government that is subject to the state boundaries set forth in Wis. Const. art. II, § 1. Accordingly, the following provisions of the CPCN law that would require the Commission to act outside the state boundaries as set by the Constitution are invalid and are severable:

- Wis. Stat. § 196.491(2r) – overriding local ordinances in another state;
- Wis. Stat. § 196.491(3)(a)1 – sending the application to out-of-state clerks and libraries;
- Wis. Stat. § 196.491(3)(a)3 – filing an engineering plan with the Wisconsin Department of Natural Resources (WDNR) over which the WDNR would have no authority;
- Wis. Stat. § 196.491(3)(b) – holding a hearing in the out-of-state affected area;

- Part of Wis. Stat. § 196.491(3)(d)(3) – relating to out-of-state "individual hardships" and "environmental factors;" note that the remainder of this subparagraph and individual hardships and environmental factors affecting Wisconsin are valid;

- Part of Wis. Stat. § 196.491(3)(d)4 – relating to out-of-state "environmental values;" note that environmental values that affect Wisconsin are valid; and

- Wis. Stat. § 196.491(3)(d)6 – interfering with orderly land use and development plans for the out-of-state area involved.

There is nothing in the statute to suggest that the overall intent of the CPCN law would be harmed by severing the above provisions. Equally as important, the remaining statutory provisions of the CPCN law can stand independent of the severed portions. The following are examples of what remains valid in the CPCN law after the invalid portions are severed:

- Contested case hearing – a hearing must be held.[9]

- The standard for project approval – the Commission (not the Division Administrator) must make certain findings in order to issue a CPCN. If such findings are missing, then the Commission cannot issue a CPCN. Wis. Stat. § 196.491(3)(e). The necessary findings for an out-of-state project would include the following:

    - Wis. Stat. § 196.491(3)(d)2 - The facility satisfies the reasonable needs of the public for an adequate supply of electric energy;

    - Wis. Stat. § 196.49(3)(d)3 - The design and location is in the public interest considering alternative sources of supply, engineering, economics, safety, and reliability as well as individual hardships and environmental factors affecting Wisconsin;

    - Wis. Stat. § 196.49(3)(d)4 - The facility will not have undue adverse impact on other environmental values affecting Wisconsin;

[9]While a hearing must be held under the CPCN law, the CA law does not require one. In the case before us, once the majority selected the CA standard for this half-billion dollar application, I immediately requested that a contested hearing be held. One of the Commissioners did not want to hold a hearing in spite of my request for one. 2-1 decision dated June 20, 2008. Whether to hold a contested case hearing for a half-billion dollar project that will be billed to the ratepayers should not be at the discretion of the Commission. This is another reason that the CPCN law should be applied to large utility projects regardless of whether they are located in or out-of-state.

- Wis. Stat. § 196.49(3)(d)5 - The project is necessary, cost effective and will not impair the service of the utility; and

- Wis. Stat. § 196.49(3)(d)7 - The project will not have a material adverse impact on competition in the relevant wholesale electric service market.

The clear and unambiguous intent of the CPCN statute is to address economic and reliability issues affecting Wisconsin ratepayers. Retaining these valid provisions empowers the Commission to carry out the clear legislative intent of rigorously reviewing large generation facilities being built with Wisconsin ratepayer funds. By applying the severability statute,[10] the Commission can fulfill its legislative mandate of applying the CPCN statute in all cases involving a 200 MW generation facility, regardless of where those activities take place. [11]

Absurdity

The majority opinion also argues that applying the CPCN statute to out-of-state projects creates an absurdity as to merchant plants. (Pages 8-9.) However, the CPCN law specifically limits the term "wholesale merchant plants" to those plants that are "located in this state." Wis. Stat. § 196.491(3)(a)1. Statutory provisions must be interpreted within the context of all other provisions. *State v. Schaefer*, 2008 WI 25, ¶ 55, 308 Wis. 2d 279, 746 N.W.2d 457.

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[10]In addition to the severability provisions of Wis. Stat. § 990.001(11), there are two other rules of statutory interpretation that require application of the CPCN law to WP&L's application: when statutes appear to conflict, the Supreme Court mandates that those provisions be harmonized. *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 184, 532 N.W.2d 690 (1995); and, statutes must be interpreted so as to not create absurd results. *Kalal,* 271 Wis. 2d 633, ¶ 45. Here, we must harmonize the Wis. Stat. § 196.491, the CPCN statute, with Wis. Stat. § 1.01, the state jurisdiction statute. I believe that the majority position both fails to adequately harmonize the statutes and creates an absurd result.

The CPCN and state jurisdictional statutes can be harmonized by focusing on the CPCN provisions that pertain to protection of the Wisconsin ratepayers and ignoring the provisions that pertain to issues outside of the state's jurisdictional boundaries. Further, by focusing on provisions that impact Wisconsin ratepayers, we also avoid the potential absurd result of eliminating Commissioner review of proposed "large electric generating facilities" simply because the facility would be located outside of the state's borders.

[11]I fear that the majority is sending precisely the wrong signal to our public utilities by refusing to apply the CPCN statute to out-of-state projects. The majority opinion could encourage Wisconsin utilities to focus their generation priorities outside our borders where regulatory approvals may be easier to obtain and where regulatory and environmental oversight is less stringent. In turn, this decision may lead to a "race to the bottom" for generation projects, a "race" that may frustrate our collective goal of reducing carbon emissions and global warming.

Accordingly, when one is applying the term "person" in Wis. Stat. § 196.491(1)(w)1 to the owner of a merchant plant, one should do so in the context of the definition provided by subparagraph (3)(a)1, namely the owner of a merchant plant located in this state. By doing so, the absurdity created in the majority opinion is avoided.

Moreover, the absurdity discussed in the majority opinion is a red herring. The issue of the Commission's regulation over out-of-state merchant plants is not currently before us and will probably never be before us. I sincerely doubt that the Commission will ever receive a single application for the construction of a merchant plant located outside of Wisconsin.

Conclusion

For over 100 years, the Public Service Commission of Wisconsin has been a recognized leader and innovator in the regulation of public utilities. With this decision, however, I fear that we could be placing Wisconsin's ratepayers at significant risk.

I want to be clear: I am not attacking the ideals of my colleagues. Today's decision involves a wind generation project that is likely to bring the benefits of clean energy to the market, a goal that we have been rightly directed by law to achieve. I am cognizant of the need and desire to bring renewable energy to market as quickly as possible. I suspect that my colleagues are taking today's action in order to allow and encourage the development of this renewable energy resource. Of course, I join in that commitment. However, I fear that today's decision seeks to achieve a laudable outcome by forsaking the process that has made us leaders in the field of utility regulation.

Today's decision would have been far simpler had the Commission been working from statutes designed for today's energy world. Working with the Legislature and other

stakeholders, I am confident that we can update these statutes and find the proper balance to allow renewable energy to come to market quickly without compromising the oversight that protects ratepayers. I am committed to working with the Legislature and Governor Doyle to ensure that future projects proposed by Wisconsin utilities, to be paid for with Wisconsin ratepayers' dollars, are subject to proper checks and balances regardless of where those projects may be constructed. I sincerely hope that my colleagues will both support me and join me in this important endeavor.

Dated at Madison, Wisconsin, this 6TH day of November, 2008.

By Commissioner Lauren L. Azar

Lauren Azar
Commissioner

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BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota	6680-CE-173

FINAL DECISION

On June 6, 2008, Wisconsin Power and Light Company (WP&L) filed an application with the Public Service Commission (Commission) to construct, own, and operate a new wind electric generation facility. The facility, which would be known as the Bent Tree Wind Farm (Bent Tree), would be located in the townships of Hartland, Manchester, Bath, and Bancroft, Freeborn County, Minnesota, and have a generating capacity of approximately 200 megawatts (MW).

The application is APPROVED, subject to conditions and as modified by this Final Decision.

Findings of Fact

1. WP&L is a public utility, as defined in Wis. Stat. § 196.01(5)(a), engaged in rendering electric service in Wisconsin. WP&L is proposing to construct a wind-powered electric generating facility, to be known as the Bent Tree Wind Farm, as described in its application and as modified by this Final Decision. WP&L estimates the total capital cost of the project to be $497,370,500, based on a commercial operation date of 2010 and current return on construction work in progress (CWIP).

Exhibit B

2. Conservation or other renewable resources, as listed in Wis. Stat. §§ 1.12 and 196.025, or their combination, are not cost-effective alternatives to WP&L's proposed facility.

3. The WP&L project, as modified by this Final Decision, satisfies the reasonable needs of the public for an adequate supply of electric energy.

4. The WP&L project, as modified by this Final Decision, will not substantially impair WP&L's efficiency of service or provide facilities unreasonably in excess of probable future requirements. In addition, when placed in operation, the project will increase the value or available quantity of WP&L's electric service in proportion to its cost of service.

5. The WP&L project, as modified by this Final Decision, assists WP&L in complying with its Renewable Portfolio Standard obligations under Wis. Stat. § 196.378.

6. A brownfield site for the project is not practicable.

7. The public interest and public convenience and necessity require completion of the WP&L project.

Conclusions of Law

The Commission has jurisdiction under Wis. Stat. §§ 1.11, 1.12, 196.02, 196.025, 196.395, 196.40, and 196.49, and Wis. Admin. Code chs. PSC 4 and 112, to issue a Final Decision authorizing WP&L, as an electric public utility, to construct and place in operation a wind-powered electric generation facility with a capacity of approximately 200 MW and to impose the conditions specified in this Final Decision.

Discussion

WP&L is a public utility, as defined in Wis. Stat. § 196.01(5)(a), engaged in rendering electric service in Wisconsin. It is proposing to construct Bent Tree with a generating capacity

of approximately 200 MW. The project is being developed by Wind Capital Group, and will be acquired by WP&L from Bent Tree LLC. Wind Capital Group is responsible for site development, and WP&L will be responsible for equipment procurement, engineering, and construction. WP&L states that Bent Tree is an out-of-state project that will receive all approvals applicable in Minnesota.

WP&L will develop the project in phases, and WP&L's application in this docket covers the first 200 MW based on a 2010 commercial operation date. WP&L has not made final turbine selections for the project. The conceptual array for the site represents 400 MW, modeled using a representative turbine model. Associated facilities include access roads, an operations and maintenance building, permanent meteorological towers, an electrical collection system, and a radial interconnection to a transmission substation. Equipment selection, site layout, and spacing are designed to make the most efficient use of land and wind resources, while complying with all applicable rules and regulations related to Minnesota Rules Chapter 7836. WP&L estimates that the project will have an operational life of 25 years.

This Final Decision is the Commission's final action on WP&L's application for authority under Wis. Stat. § 196.49 and Wis. Admin. Code ch. PSC 112 to construct, own, and operate a wind electric generating facility to be known as the Bent Tree Wind Farm. This Final Decision does not exempt WP&L from any required affiliated interest approval associated with this project and/or the acquisition of the project, if required under Wis. Stat. § 196.52.

While Bent Tree is located in Minnesota and will receive all approvals applicable in Minnesota, WP&L, as a public utility, is required to obtain construction authority for the project under Wis. Stat. § 196.49 and Wis. Admin. Code ch. PSC 112. As a result, WP&L is required to

obtain authorization to construct the project from the Commission as the cost of the project exceeds the construction cost filing threshold listed in Wis. Admin. Code § PSC 112.05(3)(a)3.

WP&L is in the process of securing the rights to interconnect Bent Tree to the transmission grid.

Initially, WP&L filed its application under Wis. Stat. § 196.491 and other applicable requirements as an application for a Certificate of Public Convenience and Necessity (CPCN). At its open meeting on September 25, 2008, the Commission ruled that the application is for a Certificate of Authority and must be reviewed under Wis. Stat. § 196.49 and Wis. Admin. Code § PSC 112. The Commission made this determination after considering comments filed in this docket in response to the Commission's June 20, 2008, Notice of Proceeding and Request for Comments about the scope of its authority over out-of-state electric utility construction projects. The Commission's decision regarding the level of the review is included in its Interim Order dated November 6, 2008, in this docket.

The Commission held hearings in this docket in Madison on April 29, 2009. Comments on the proposed project were requested from members of the public in the Commission's January 22, 2009, Notice of Hearing in this docket. No public comments were received.

In its June 20, 2008, Notice of Proceeding and Request for Comments in this docket, the Commission gave notice that this is a Type III action under Wis. Admin. Code § PSC 4.10(3). Type III actions normally do not require the preparation of an environmental impact statement (EIS) or an environmental assessment (EA) under Wis. Stat. § 1.11. The Commission investigated the potential for significant environmental effects that would occur as a result of WP&L's ownership and operation of Bent Tree and determined that preparation of neither an EIS nor an EA is required.

Project Need

Results of Commission staff's Electric Generation and Expansion Analysis System (EGEAS) modeling for the proposed project show that Bent Tree is the least-cost option in all modeling scenarios, except in the unlikely no-CO_2, no-RPS requirement scenario with a 20-year depreciation schedule.

While modeling is an important analytical tool available to the Commission as it conducts its needs determination, it is only one factor to be considered. A Renewable Portfolio Standard (RPS) exists in Wisconsin, and the Commission must consider the utility's obligation to increase the amount of renewable energy resources in its system to meet the RPS. The RPS in 2005 Wisconsin Act 141 (Act 141) and Wis. Stat. § 196.378, which took effect on April 1, 2006, built upon state policy to aggressively increase the level of renewable resources in the electric supply mix. Under these requirements, each Wisconsin electric provider must increase its renewable energy levels by 2 percentage points by 2010 and by 6 percentage points by 2015, above its 2001 to 2003 baseline average. With the addition of Bent Tree, WP&L will add approximately 666,000 megawatt hours (MWh) of renewable energy beginning in 2011 toward meeting its and its wholesale customers' obligations under Act 141 for 2010 through 2014. WP&L's renewable energy obligation under the RPS will increase to approximately 1,130,000 MWh in 2015. Assuming commercial operation by the end of 2010 as planned, this project, along with banked renewable resource credits (RRC) and other purchases, will allow WP&L to meet its 2010 through 2014 obligations under the RPS.

In docket 6680-CE-170, and as supported by evidence in the application and testimony in this case, the applicant needs energy. Placing a wind farm in operation in 2010 to support energy needed at that time and as required by statute in 2015 is consistent with Wis. Stat. § 196.49 and

sound planning principles and not unreasonably in excess of WP&L's probable future requirements. The capacity factors and turbine construction costs make the cost of the project commensurate with the value of service being provided.

Under Wis. Stat. § 196.49(3)(b), at its discretion, the Commission may refuse to authorize a construction project if the project will do any of the following:

1. Substantially impair the efficiency of the service of the public utility.
2. Provide facilities unreasonably in excess of the probable future requirements.
3. When placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service unless the public utility waives consideration by the commission, in the fixation of rates, of such consequent increase of cost of service.

Because of the requirements of the RPS, WP&L requires more renewable resource generating facilities than it currently owns or has under contract. Based on WP&L's application, this project is a means of complying with WP&L's renewable resource requirements and the project meets the criteria specified in Wis. Stat. § 196.49(3)(b). The project will not result in unreasonable excess facilities and will satisfy the reasonable needs of the public for an adequate supply of electric energy.

The Commission must implement a state energy policy when reviewing any application. The Energy Priorities Law establishes the preferred means of meeting Wisconsin's energy demands as listed in Wis. Stat. §§ 1.12 and 196.025(1).

The Energy Priorities Law, Wis. Stat. § 1.12, creates the following priorities:

> **1.12 State energy policy.** (4) PRIORITIES. In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
> (a) Energy conservation and efficiency.
> (b) Noncombustible renewable energy resources.
> (c) Combustible renewable energy resources.
> (d) Nonrenewable combustible energy resources, in the order listed:
> 1. Natural gas.

2. Oil or coal with a sulphur content of less than 1%.
3. All other carbon-based fuels.

In addition, Wis. Stat. § 196.025(1) declares, "To the extent cost-effective, technically feasible and environmentally sound, the commission shall implement the priorities under s. 1.12(4) in making all energy-related decisions . . . ." Because wind is a noncombustible renewable resource, WP&L's proposed electric facility fits within the second-highest statutory priority.

While each of these statutes is applicable to the project at hand, there is a certain degree of friction that exists between them that must be reconciled. Wisconsin Statute § 196.49 requires the Commission to consider whether a proposed project "provide[s] facilities unreasonably in excess of probable future requirements." The RPS law under Wis. Stat. § 196.378(2) requires the utility to build to meet its 2010 benchmark regardless of whether new generation is needed. It should be noted that Wis. Stat. § 196.49 does not prohibit the construction of unnecessary generation, but gives the Commission the discretion to reject or approve the application for generation that is "in excess of future probable requirements."

The second area to consider is the competing directives on the cost of the proposed generation. Wisconsin Statute § 196.49 requires the Commission to consider whether the proposed project "add[s] to the cost of service without proportionately increasing the value or available quantity of service." In contrast, the RPS statute requires utilities to increase their renewable energy percentage and, under Wis. Stat. § 196.378(2)(d), the Commission shall allow a utility to recover the cost of renewable energy from the ratepayer.[1] While the modeling in this case suggests that WP&L's proposed project is the least-cost option in all relevant scenarios,

Wis. Stat. § 196.49(3)(b) gives the Commission the discretion to reject or approve an application for a project that disproportionately adds to the cost of service when considering the value or available quantity of service.

The third area of overlap arises between the RPS and the Energy Priorities Statute, Wis. Stat. § 1.12. The Energy Priorities Statute lists energy conservation and efficiency as a higher priority than renewable generation, such as wind. Here, the applicant does not propose any conservation or efficiency measures. WP&L states the project was designed to meet the RPS requirement and energy conservation cannot be substituted under the energy priorities law.

When construing Wis. Stat § 196.49 and Wis. Stat. § 196.378, it is important to apply two rules of statutory construction:

1. Where two statutes relate to the same subject matter, it is the specific statute that controls the general statute. *Kramer v. City of Hayward,* 57 Wis. 2d 302, 311, 203 N.W.2d 871 (1973).

2. "It is a cardinal rule of statutory construction that conflicts between statutes are not favored and will be held not to exist if the statutes may otherwise be reasonably construed." *State v. Delaney,* 259 Wis. 2d 77, 84 658 N.W.2d 416 (2003). When statutes on the same subject conflict or are inconsistent with one another, courts must attempt to harmonize them in order to effectuate the legislature's intent. The statutory construction doctrine of *in pari materia* requires a court to read, apply and construe statutes relating to the same subject matter in a manner that harmonizes them in order to effectuate the legislature's intent. *Turner v. City of Milwaukee,* 193 Wis. 2d 412, 420, 535 N.W.2d 15 (Ct. App. 1995).

Reviewing these statutes in light of the rules of construction, the Commission construes the RPS statute as more specific than Wis. Stat. § 196.49. Therefore, to the extent there is a conflict between the statutes, the requirements of the RPS statute control.

[1] The RPS law creates an off-ramp if a utility finds that compliance with the RPS will "result in unreasonable increases in rates." Wis. Stat. § 196.378(2)(e)2.

Moreover, the Commission balances competing interests and approves this project to address WP&L's need for energy as well as to implement the RPS. To the extent there is any concern that this project may be providing energy sooner than demand indicates, the need to develop renewable energy sources, a priority established by the legislature, outweighs any such concern.

Similarly, for the Commission to implement energy priorities, it must determine and balance whether any higher priority alternatives to a proposed project would be cost-effective, technically feasible, and environmentally sound while meeting the objectives the proposed project is intended to address. Regarding other noncombustible renewable energy resources, no other form of currently available renewable generation is as cost-effective and technically feasible as wind. For these reasons, the Commission concludes that the WP&L project complies with the Energy Priorities Law.

Impact on Locational Marginal Prices and Congestion

To project the hourly locational marginal price (LMP) differences between the Minnesota node where Bent Tree will interconnect with the electric transmission system and the WP&L load node, WP&L performed a review of 2006 and 2007 congestion charges. WP&L found that the LMP in the Bent Tree area tended to be between $2 and $4 per MWh higher than in the WP&L load node. WP&L states that, because the LMP price in the Bent Tree area is higher than in the WP&L load zone, energy generated by the project will be paid a premium that not only compensates WP&L for the cost of the load, put produces surplus revenue that would reduce the cost paid by customers.

Commission staff testified that while historical data suggests that the LMP in the Bent Tree area may be higher than the WP&L load node, a 2010 PROMOD simulation suggests that

the LMP at the WP&L load node may actually be higher than the LMP for the Bent Tree area. This would result in a cost to move energy from Bent Tree to the WP&L load node that could be as high as $10 per MWh. Commission staff used a $5 per MWh cost to move energy from Bent Tree to the WP&L load zone in its EGEAS modeling. The results of Commission staff's EGEAS modeling suggest that, even with a cost to move energy of $5 per MWh, Bent Tree is the least-cost option in all likely modeling scenarios.

Environmental Factors

The proposed project would require no environmental permits from any governmental agency in Wisconsin. Appropriate permit applications for the project are proceeding through the Minnesota Public Utilities Commission (MPUC) process, and applications for other local, state, and federal permits are proceeding through the appropriate agencies.

WP&L's project will have a number of positive environmental effects. The energy produced by the project will avoid many of the impacts that fossil fuel and nuclear electric generation create. The operation of this wind farm will produce none of the air pollutants that are regulated under the federal Clean Air Act. It will release no greenhouse gases, which are the electric industry's principal contribution to global warming and climate change, and it will emit no hazardous air pollutants such as sulfuric acid, hydrochloric acid, ammonia, benzene, arsenic, lead, formaldehyde, or mercury. Furthermore, it will generate power without using any significant amount of water or producing any solid waste.

This project will support Wisconsin's goal of increasing its reliance upon renewable resources. It fits well with existing land uses, will help preserve the agricultural nature of the project area, will impose no reliability, safety, or engineering problems upon the electric system, and will have no undue adverse impacts on environmental values. After weighing all the

elements of WP&L's project, including the conditions imposed by this Final Decision, the Commission finds that authorizing the project will promote the public health and welfare and is in the public interest.

Brownfield Siting

Under Wis. Stat. § 196.49(4), the Commission may not issue a certificate for the construction of electric generating equipment unless it determines that brownfields are used to "the extent practicable." However, Wisconsin does not have a single brownfield site, or set of contiguous sites, that would be of sufficient size and would meet the siting criteria of available wind resources, land, and electric infrastructure. WP&L's project complies with Wis. Stat. § 196.49(4).

Compliance with the Wisconsin Environmental Policy Act

Wisconsin Statute § 1.11 requires all state agencies to consider the environmental impacts of "major actions" that could significantly affect the quality of the human environment. In Wis. Admin. Code ch. PSC 4, the Commission has categorized the types of actions it undertakes for purposes of complying with this law. As provided by this rule, and due to the fact that this project, which was planned, developed, and permitted for construction in a state other than Wisconsin, the Commission categorized this project as a Type III action, which normally requires the preparation of neither an EIS nor an EA. The Commission's review of the application and environmental permitting requirements concluded that the project is unlikely to have a significant impact upon the quality of the human environment. The Commission finds that the requirements of Wis. Stat. § 1.11 and Wis. Admin. Code ch. PSC 4 have been met.

Project Purpose, Capital Cost, and Schedule

As noted previously, Bent Tree is necessary for WP&L to meet its RPS requirements for the period 2010 to 2014. WP&L anticipates that additional renewable capacity will be required to meet its entire RPS obligations for 2015, but specific projects that comprise that additional capacity have not yet been identified.

WP&L estimates that the total cost of the project is between $470,000,000 and $497,000,000, depending on which turbine model is selected for the project. WP&L's detailed cost estimate is $497,370,500, based on a commercial operation date of 2010 and current return on CWIP. The detailed cost estimate by plant account is as follows:

Description	**Amount**
Account 340 – Land	$100,000
Account 341 – Surfaced Areas, Operations Building	$16,734,410
Account 344 – Turbine Generators, Engineering, Procurement, Construction Management, Erection	$456,587,974
Account 345 – Met Towers, Electrical Connection, SCADA	$18,970,728
Account 345 – Substation	$4,977,388
Total Project Cost	**$497,370,500**

Certificate

WP&L may construct Bent Tree with a generating capacity of up to 200 MW, as described in its application and subsequent filings and as modified by this Final Decision.

Order

1. WP&L may construct the Bent Tree Wind Farm in conformance with the design specified in its application and subsequent filings, subject to the conditions specified in this Final Decision.

2. The total gross project cost is estimated to be $497,370,500.

3. This authorization is for the specific project as described in the application and subsequent filings and at the stated cost. Should the scope, design, or location of the project change significantly, or if the project cost exceeds $497,370,500 by more than 10 percent, WP&L shall promptly notify the Commission as soon as it becomes aware of the probable change.

4. WP&L shall notify the Commission in writing, within 10 calendar days, of each of the following: the date of commencement of construction of the interconnection substation, the date of commencement of construction of project facilities other than the interconnection substation, and the date that the facilities are placed in service.

5. WP&L shall ensure that all necessary permits have been obtained prior to commencement of construction and operation of the facilities, and it shall submit to the Commission quarterly reports of the status of the environmental permitting process for Bent Tree. The first report is due 90 days after the issuance of this Final Decision and reports shall continue through commencement of operation of the project.

6. WP&L shall submit to the Commission the final actual costs segregated by major accounts within one year after the in-service date. For those accounts or categories where actual costs deviate significantly from those authorized, WP&L shall itemize and explain the reasons for such deviations in the final cost report.

7. Until its facility is fully operational, WP&L shall submit quarterly progress reports to the Commission that summarize the status of construction, the anticipated in-service date, and the overall percent of physical completion. WP&L shall include the date when construction commences in its report for that three-month period. The first report is due for the

quarter ending September 30, 2009, and each report shall be filed within 31 days after the end of the quarter.

8. WP&L shall comply with the requirements of the National Electric Safety Code when constructing, maintaining and operating its facility.

9. WP&L shall notify the Commission in writing within ten days of any decision not to proceed with its project or to enter into any partnership or other arrangement with a third party concerning ownership or operation of the facility.

10. All commitments and conditions of this Final Decision shall apply to WP&L and to its agents, contractors, successors, and assigns.

11. This Final Decision takes effect on the day after it is mailed.

12. Jurisdiction is retained.

Dated at Madison, Wisconsin, July 30, 2009

By the Commission:

Sandra J. Paske
Secretary to the Commission

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See attached Notice of Rights

Docket 6680-CE-173

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.[2] The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: December 17, 2008

[2] *See State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

APPENDIX A
(CONTESTED)

In order to comply with Wis. Stat. § 227.47, the following parties who appeared before the agency are considered parties for purposes of review under Wis. Stat. § 227.53.

Public Service Commission of Wisconsin
(Not a party but must be served)
610 N. Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

WISCONSIN POWER AND LIGHT COMPANY
Jeff Gray
Scott R. Smith
PO Box 77007
Madison, WI 53707-1007

CITIZENS UTILITY BOARD,
CLEAN WISCONSIN, and
RENEW WISCONSIN
Curt F. Pawlisch
Kira E. Loehr
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122 West Washington Avenue, Suite 900
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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 965
Mike Pyne
1602 South Park Street, Room 220
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WISCONSIN ELECTRIC POWER COMPANY
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WISCONSIN PUBLIC SERVICE CORPORATION
Dennis M. Derricks
Integrys Energy Group, Inc.
700 North Adams Street
Green Bay, WI 54301

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota	6680-CE-173

COMMISSIONER AZAR'S CONCURRENCE

It is no secret that I have disagreed with my colleagues on key decisions in this docket. I dissented from the decision to apply the lesser Certificate of Authority (CA) standard to this application rather than the heightened Certificate of Public Convenience and Necessity (CPCN) standard. *See Application by Wisconsin Power and Light Company to Construct up to 200 MW of Wind Generation to be Called Bent Tree Wind Farm, in Freeborn County, in South Central Minnesota*, Public Service Commission of Wisconsin Docket No. 6680-CE-173, *Interim Order, Commissioner Azar's Dissent* (Nov. 6, 2008). While I continue to believe we should apply the CPCN standard in this case (and similar cases in the future), the law of this case requires me to apply the CA standard. Applying the CA standard here, I agree with my colleagues that this project should be approved under the discretionary standard identified in Wis. Stat. § 196.49(3).

In this concurrence, I identify a number of factual findings in the Final Decision that are not based on the elements of the CA statute, but which are based on the requirements of the CPCN statute. I do not make these observations out of a sense of "sour grapes" about the Commission's earlier decision. Instead, I point out that the actual language of this Final Decision provides further evidence of the sound policy reasons for applying the CPCN standard to this, and other projects like it. To the extent we need statutory changes to apply the CPCN standard in the future, the Commission should be seeking those changes.

Also, in this concurrence, I identify that the dispute over the load forecasts used in this docket is a moot point in light of the discretionary standard of the CA statute and the specific requirements of Wisconsin's Renewable Portfolio Standard (RPS).

CPCN Statutory Requirements Identified in the Final Decision

Finding of Fact #3 (Page 2 of Final Decision)

This finding of fact identifies that the project "satisfies the reasonable needs of the public for an adequate supply of electric energy." Final Decision at 2. This is not a requirement under the CA statute, but rather it is a requirement under the CPCN statute, Wis. Stat. § 196.491(3)(d)2. Because this docket proceeded under the CA statute, I do not believe this finding is properly included in the Final Decision.

Finding of Fact #7 (Page 2 of Final Decision)

This finding of fact identifies that the "public interest and public convenience and necessity require the completion" of the project. Final Decision at 2. Again, since the Commission decided to apply the CA statute and not the CPCN statute, this finding of fact is inappropriate for this case.

I recognize that the CA statute provides that the Commission may adopt a rule or special order that requires that CA projects be required by the public convenience and necessity. Wis. Stat. § 196.49(3)(b). However, to date, the Commission's rules only require this finding when the Commission does not hold a hearing on the application, which is not the case here. Wis. Admin. Code § PSC 112.07(1).

Promotion of Public Health and Welfare and the Public Interest (Pages 10-11 of Final Decision)

The Final Decision identifies that "the Commission finds that authorizing the project will promote the public health and welfare and is in the public interest." Final Decision at 10-11. While I agree with this statement, again I do not believe that this is a required finding under the CA statute. This appears to be a standard that the Commission would apply to a CPCN application. *See* Wis. Stat. 196.491(3)(d)3. (establishing a public interest standard with respect to the design and location of proposed facilities); Wis. Stat. § 196.491(3)(d)4. (establishing a public health and welfare standard for proposed facilities).[1] Since we were specifically applying the CA statute, this finding is misplaced and unnecessary in this Final Decision.

Project Need and Renewable Energy Requirements

Project Need (Pages 5-9 of Final Decision)

In this docket, there was a dispute in the record about the applicant's demand projections and whether this project was needed to meet the utility's future demand. I found this dispute to be immaterial in my decision to approve this project under the CA statute.

Under the CA statute, at the Commission's discretion, we may refuse to authorize a project if, among other things, the project will "provide facilities unreasonably in excess or probable future requirements." Wis. Stat. § 196.49(3)(b)2. This discretionary provision does not require that the Commission find there is a specific "need" for the project. Indeed, under this standard, the Commission could still approve the project even if the Commission found that the project was unnecessary from an energy demand perspective. *See* Final Decision at 7.

[1] Pursuant to Wis. Admin. Code § PSC 112.07(2), the Commission can add conditions to a project approval that are "necessary to protect the public interest or promote the public convenience and necessity." However, the CA statute does not require that the Commission find that the proposed project, as a whole, meet these requirements.

As the Final Decision notes, in this case we are operating under the discretionary standard of Wis. Stat. § 196.49(3) and we must consider the RPS requirements of Wis. Stat. § 196.378. Under these facts, the Commission does not need to resolve any dispute about the utility's load forecast. Since WP&L must obtain or generate a certain amount of its energy from renewable sources, this project will not lead to generation "in excess of future probable requirements."

Dated at Madison, Wisconsin, this 30th day of July, 2009.

Lauren Azar
Commissioner

LLA:BR:sp:K:\Azar\Dissenting or concurring opinions\Azar Concurrent in 6680-CE-173 7-30-09