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CIRCUIT COURT
DANE COUNTY, WI
2019CV003418

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

County of Dane,
Driftless Area Land Conservancy,
Wisconsin Wildlife Federation,
Iowa County,
Town of Wyoming,
Village of Monfort,
Petitioners,

Chris Klopp,
Gloria and LeRoy Belkin
S.O.U.L of Wisconsin
Intervenor-Petitioners

Case No. 19-CV-3418

v.

Public Service Commission of Wisconsin
Respondent,

American Transmission Company, LLC
ITC Midwest, LLC
Dairyland Power Cooperative
Midcontinent Independent System Operator, Inc.
Clean Grid Alliance,
Fresh Energy
Minnesota Center for Environmental Advocacy
Intervenor-Respondents

PETITIONER DANE COUNTY'S INITIAL BRIEF

Petitioner Dane County ("County") respectfully requests this Court to reverse, set aside, vacate, or remand the final decision of the Public Service Commission ("Commission") approving a certificate of public convenience and necessity for the construction and operation of a new transmission line called the Cardinal-Hickory

Transmission Line ("Final Decision"). *See In re CPCN Issued to ATC, ITC Midwest LLC and Dairyland Power Cooperative*, PSC Docket No. 5-CE-146 (Pub. Serv. Comm'n of Wis. Sep. 26, 2019)(R.19). The Commission's Final Decision authorized the construction of a 345kV high-voltage transmission line that will tear through Dane County's landscape and create irreversible impacts to the environment, even though the record demonstrated insufficient evidence that the Cardinal-Hickory Transmission Line is needed.

In reaching its decision, the Commission erred by disregarding evidence that the Cardinal-Hickory Transmission Line would not benefit Wisconsin ratepayers, unlawfully shifting the burden of proof, and violating the prescribed statutory provisions governing the issuance of a certificate of public convenience and necessity. The Commission's Final Decision must be reversed or, in the alternative, remanded.

STATEMENT OF FACTS

American Transmission Company LLC, by its corporate manager, ATC Management, Inc., ITC Midwest, and Dairyland Power Cooperative ("Transmission Companies") submitted an application to the Commission to receive a certificate of public convenience and necessity ("CPCN") for the construction and operation of the Cardinal-Hickory Transmission Line ("Line"), a new 345kV transmission line that would span a number of counties and two states. (R. 356, "Ex.-Applicants-Application-r3" at 1-2.) According to the Transmission Companies, such a high-voltage transmission line was the subject of study for over a decade, and was ultimately classified as being eligible for regional cost sharing by the Midcontinent Independent System Operator ("MISO")

(R.1033, "Direct-Applicants-Dagenais" at 15.) MISO is a not-for-profit, regional transmission organization made up of members, some of whom are transmission companies, that assist with planning of the transmission systems of its member transmission owners. (R.1039, "Direct-MISO-Ellis" at 1-2.)

The Cardinal-Hickory Creek Transmission Line was designed to extend from the Hickory-Creek Substation in Dubuque County, Iowa to the Cardinal Substation in Dane County, Wisconsin. (R.356, "Ex.-Applicants-Application-r3, PSC 352698" at 1.) The total length of the Line approximately measures 102 miles, with the Wisconsin portion of the Line measuring 87 miles. (*Id*. at 5.) Of note, the Line was designed to run through what is commonly known as Wisconsin's Driftless Area. (*Id*. at 14.) The Driftless Area is recognized as consisting of a unique terrain and ecology that cannot be found elsewhere in Wisconsin. (R. 1193, "Ex.-PSC-FEIS-r" at § XXXIII.) It contains "steep forested ridges and deeply dissected river valleys," and holds significant social and economic importance to those individuals who live and recreate in the area. (*Id*.) In addition, the Line was also designed to cut through the Dane County geographic area and run along the Black Earth Creek Wildlife Area Sunnyside Unit ("Wildlife Area"). (R.1193, "Ex.-PSC-FEIS-r" at § 9.1.)

The Wildlife Area is a public hunting area that is owned by Dane County. (R.1041, "Direct-Dane County-Marsh" at 2.) Currently, the Wildlife Area is encumbered by a Warren Knowles-Gaylord Nelson Stewardship Nonprofit Conservation Organization Habitat Area subprogram grant. (*Id*.) The Stewardship program grant is generally intended to preserve Wisconsin's land and water resources by helping to fund 50 percent of the fair

market value of certain land acquisitions. (R.1063, "Direct-WDNR-Foster-Felt" at 2.) In exchange for the funds, the grant places a permanent encumbrance on the property that consists of certain terms and conditions that are either statutory or regulatory. (*Id.*) In the case of the Wildlife Area, it was purchased by a non-profit that received a grant award of $1,875,416 through the Stewardship Program. (*Id.* at 5.) Ultimately, it was transferred to Dane County, but the Wildlife Area remained subject to the terms and conditions set forth in Wisconsin law. (*Id.*)

Based upon the specific impacts that it would face because of the Line, Dane County was granted intervenor status following a pre-hearing conference held on February 22, 2019, and participated as a party throughout the agency proceedings. Prehearing Conf. Memo, § II.A. (R.11, "PSC Ref. #361296"). On September 26, 2019, the Commission issued the Final Decision. In its Decision the Commission side-stepped many of the Transmission Companies' flaws in their analysis, and determined that the Transmission Companies had proven that the Line would satisfy the needs of the public. (R.19, "Final Decision" at 9.)

STANDARD OF REVIEW

An agency's decision is subject to judicial review under Wis. Stat. Ch. 227, and can be set aside, vacated or remanded for a number of deficiencies. If the agency erroneously interpreted the law, a reviewing court must set aside or modify the agency decision. Wis. Stat. § 227.57(5). If the agency decision adopted factual findings not supported by substantial evidence, the court must set aside or remand the decision. Wis. Stat.

§ 227.57(6). If the agency decision was the result of a material error in procedure, then it must be remanded. Wis. Stat. § 227.57(4). A court must also reverse or remand the decision if the agency exercised its discretion outside the range of discretion delegated to the agency by law, or is otherwise in violation of a constitutional provision. Wis. Stat. § 227.57(8).

In its review, a circuit court owes no deference to an administrative agency's interpretation and application of statutes. Wis. Stat. § 227.57(11) ("[u]pon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law."); *see also Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶3, 382 Wis. 2d 496, 914 N.W.2d 21. In certain circumstances, a circuit court may give "due weight" to the experience, technical competence and specialized knowledge of an agency when evaluating the agency's argument. *See* Wis. Stat. § 227.57(10). However, "due weight is a matter of persuasion, not deference." *Tetra Tech EC, Inc*., 2018 WI 75, ¶78. It is not "a talisman that automatically grants its bearer additional rhetorical power," and does not "oust the court as the ultimate authority or final arbiter" of the law. *Id*. ¶¶ 78-79. Rather, "due weight" simply means providing "respectful, appropriate consideration to the agency's views while the court exercises its independent judgment in deciding questions of law," – nothing more, nothing less. *Id*. ¶78.

A court is not bound by an agency's characterization of whether it is a finding of fact or conclusion of law. *Madison Teachers, Inc. v. WERC*, 218 Wis. 2d 75, 84, 580 N.W.2d 375, 379. An agency's findings of fact are reviewed using the "substantial evidence" standard. *Town of Holland v. Pub. Serv. Comm'n*, 2018 WI App 38, ¶22, 382

Wis. 2d 799,812, 913 N.W.2d 914, 922 (citation omitted). However, "substantial evidence does not mean a preponderance of the evidence." *Madison Gas & Elec. Co. v. Pub. Serv. Comm'n*, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982). The test to determine whether substantial evidence exists is "whether, taking into account all the evidence in the record reasonable minds could arrive at the same conclusion as the agency." *Id.*

ARGUMENT

I. THERE IS NO NEED FOR THE CARDINAL-HICORY TRANSMISSION LINE.

Despite a decade of study, analysis and review, the Transmission Companies were unable to present sufficient evidence that the Line was reasonably needed for the benefit of Wisconsin's ratepayers. Commission's own staff revealed that the Line would not provide an economic benefit, and may even negatively impact the public. Nevertheless, the Commission issued a CPCN based upon a mistaken understanding of Wis. Stat. § 196.491(3)(d), and an intentional disregard of the facts presented. The Commission erred under Wis. Stat. § 227.57 (5), (6) and (8), and its decision should be reversed.

A. The Commission Erred by Disregarding Flaws with The Transmission Companies' Analysis.

1. Law Governing the Issuance of a CPCN.

It is axiomatic that the predominant purpose of all public utility law is to protect the consuming public. *Wisconsin Power & Light Co. v. Pub. Serv. Comm'n*, 45 Wis. 2d 253, 259, 172 N.W.2d 639, 641–42 (1969) (emphasis added). A clear expression of such a

purpose is codified in the statutory and regulatory framework that the Commission must follow when deciding whether or not to issue a CPCN.

The Commission must ensure that the proposed transmission line meets the requirements set forth in Wis. Stat. § 196.491(3)(d), otherwise known as the Siting Law. Under the statute, the Commission can only issue a CPCN if it makes specific findings. *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n*, 2005 WI 93, ¶16, 282 Wis. 2d 250, 299, 700 N.W.2d 768, 791. Among them are that: (a) the proposed transmission line satisfies the reasonable needs of the public for an adequate supply of electric energy; (b) that the design is "in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors;" and (c) that "the benefits of the high-voltage transmission line are reasonable in relation to the cost of the high-voltage line." Wis. Stat. § 196.491(3)(d)2, (3)(d)3 and (3)(d)3t. Said another way, a CPCN is only appropriate when there is sufficient evidence that the transmission line is needed when one evaluates all of the factors listed in the statute.

In order to facilitate the production of evidence responsive to the question of need, the Commission's rules require that those seeking a CPCN submit an application with specific information. Wis. Admin. Code § PSC 111.55. An applicant is to provide "the need for the proposed project, including all planning criteria, assumptions, historical outage data, stability and power-flow studies that address need." Wis. Admin. Code § PSC 111.55(1). An applicant is also to provide "any additional information the commission may request, including information necessary for it to make the determination listed in s. 196.491(3)(d), Stat." Wis. Admin. Code § PSC 111.55(8).

After obtaining and reviewing this information, the Commission has to decide whether a CPCN ought to be issued. Ultimately, the Commission must ensure that its decision reflects the public interest, rather than the interest or convenience of few individuals. *City of Princeton v. Public Service Comm'n,* 268 Wis. 542, 555, 68 N.W.2d 420, 427 (1955).

2. The Transmission Companies' Analysis Failed to Withstand Commission Staff's Scrutiny.

In its application, the Transmission Companies tried to demonstrate a need for the Line by including a number of different justifications, such as it would:

- Provide net economic benefits to Wisconsin customers (even after accounting for the [Line's] cost to Wisconsin customers) of between $23.5 million and $350.1 million over its 40-year expected life;
- Avoid the need to spend between $87.2 million and $98.8 million on reliability projects and asset renewal projects over the 40-year life of the [Line] that would otherwise be needed if the [Line] were not constructed;
- Increase the transfer capability of the electric system between Iowa and southwest and southcentral Wisconsin by approximately 1,300 MW, thereby easing congestion, increasing generator competition, and allowing the transfer of additional low-cost wind energy into the state;
- Allow low-cost wind energy that is trapped in areas to the west of Wisconsin to be released to the system by allowing more than a dozen new low-cost wind facilities to fully interconnect to the electric system and deliver their full output;

(R.356, "Ex.-Applicants-Application-r3, PSC 352698" at 30.) The Transmission Companies also submitted a planning analysis that contained three different alternatives for the Commission to consider, one of which was the construction and operation of the Line. (R.19, "Final Decision" at 18.) For each option, the Transmission Companies then calculated the net benefits and costs for each alternative under eight different future

scenarios. (*Id*. at 18-19.) Under this rubric, the net benefits available to Wisconsin's ratepayers was defined as:

> reduced energy costs derived from a reduction in congestion on the transmission lines between Iowa and Wisconsin that would otherwise compel the dispatch of higher cost-fuel resources east of the congestion, or the reliability benefits generated by the project, whichever is greater.

(R. 19, "Final Decision" at 19.) The costs, on the other hand, were relatively straightforward: approximately $67 million dollars to the Wisconsin taxpayer. (*Id*. at 16.) The Transmission Companies then used a software modeling program named PROMOD to determine the energy cost savings for Wisconsin customers in each of the eight future scenarios. (*Id*. at 20.) According to the Transmission Companies, the modeling program revealed that a net benefit would result under any scenario, and could range from $33.6 million to $407.8 million. (R.356, "Ex.-Applicants-Application-r3, PSC 352698" Appx. D at 45, Table 4.)

Once submitted, Commission staff began their review of the Transmission Companies' information in support of the Line. During CPCN proceedings, staff's role is clear. They are to analyze and provide objective impartial evidence related to the need for the Line, and participate "neither in support of nor in opposition…" Wis. Admin. Code § PSC 2.03; *see also* (R.38, "Hr'g Tr." at 1481:12 to 21.) That is what occurred in this case.

After reviewing the information, Commission staff determined that contrary to many of the Transmission Companies expected economic benefits listed in the Application, the Line would have negative net benefits in all but two of the eight future scenarios. (R.1048, "Direct PSC Vedvik" at 30, 31.) In fact, Commission staff's analysis resulted in

an almost point by point repudiation of a number of the expected benefits that Transmission Companies listed in their application:

- Rather than providing net economic benefits to Wisconsin customers of between $23.5 million and $350.1 million over its 40-year expected life, Commission staff determined that it was more likely that Wisconsin consumers would ultimately shoulder the costs of the Line. (R.1048, "Direct PSC Vedvik" at 30 -31.)

- Rather than obtaining a benefit by avoiding the need to spend between $87.2 million and $98.8 million on reliability projects and asset renewal projects over the 40-year life of the Line, Commission staff determined that the Line would "actually sacrifice the remaining useful life of these assets to Wisconsin customers," and as a result would slash these benefits significantly. (R.1048, "Direct PSC Vedvik" at 21; R.711, "Ex.-PSC-Vedvik" at 3.)

- Rather than being necessary to increase the transfer capability of the electric system between Iowa and southwest and southcentral Wisconsin and ease congestion, Commission staff determined that renewing much of the current transmission line would provide comparable benefits. (R.1048, "Direct PSC Vedvik" at 15-16.)

In the end, Commission staff uncovered that a two-year delay of the operation of the Line would actually result in an economic benefit to the Wisconsin ratepayer. (R.944, "Ex.-PSC-Verdvik 7p" at 6.)

3. The Commission Erred When It Rejected Staff's Concerns.

Nevertheless, the Commission accepted the Transmission Companies' analysis. (R.19 "Final Decision" at 21-26.) In doing so, the Commission shrugged off the concerns of the other parties that were based upon the issues raised by staff. The Commission dismissed these concerns wholesale because these parties did not run a separate PROMOD model to further support their positions. (*Id.* at 22) (stating that the failure to run the software "must be considered when assessing critiques"); (R.19, "Final Decision" at 26

)("[t]he Commission also finds important that while a number of party witnesses raised questions about assumptions and data…none….actually performed independent modeling…).

The Commission's treatment of PROMOD modeling software as a litmus test for accepting the veracity of a party's contrary analysis is not supported by Wisconsin Law. It is true that computer modeling has been recognized as a useful tool by providing estimates of various factors related to the state's future energy needs. *See Clean Wisconsin*, 2005 WI 93, ¶141-142 (acknowledging the efficacy of using a different computer modeling program to determine whether a CPCN should be issued for a coal-fired facility.) However, it has not been elevated to the only piece of contrary evidence that the Commission is allowed to consider. The requirement of running PROMOD modeling does not appear in any of the statutory provisions governing the issuance of a CPCN. *See* Wis. Stat. § 196.491(3). Nor is there a perquisite for parties against the issuance of CPCN to run PROMOD modeling program. Rather than focus on the statutory CPCN requirements, the Commission instead just based its decision on the use of PROMOD modeling. In short, the Commission erroneously interpreted Wis. Stat. § 196.491(3) to require the software program before assessing any evidence in opposition to the Line and applying it to the statutory factors.

Similarly, the Commission erred by finding that the Transmission Companies "demonstrated substantial evidence that the project is likely to provide total net economic benefits greater than its costs" because the other parties did not use the PROMOD modeling program. (R.19, "Final Decision" at 20.) Under the substantial evidence standard, the agency's conclusion must be reasonable. *Madison Gas & Elec. Co.*, 109 Wis. 2d 127 at

133. In this case, the Commission's finding is based solely on the evidence presented by the Transmission Companies despite contrary evidence that it was probable that the Line would have negative economic benefits. (*Id*. at 23; *see also*, R.1048, "Direct PSC Vedvik" at 30, 31.)

The Commission's reason for rejecting the contrary evidence is based upon the unsubstantiated notion that the other parties' failure to run a PROMOD model invalidated their concerns. (R.19, "Final Decision" at 22, 26.) No reasonable person would adopt such a position, especially since the staff critiques were based, in part, on the PROMOD modeling completed by the Transmission Companies. (R.944, "Ex.-PSC-Verdvik 7p" at 6.) Taking into account all of the evidence, a reasonable mind would not conclude that the Line is likely to produce an economic benefit to the Wisconsin's ratepayers because of the analysis provided by Commission staff. The Commission's decision to ignore the analysis undermines their claim that there was substantial evidence in support of the Line. *Madison Gas & Elec. Co.,* 109 Wis. 2d 127 at 134-135 (holding that there was not substantial evidence supporting the Commission's conclusion because the Commission disregarded "a detailed analysis" that contradicted such conclusion.)

Finally, the Commission's insistence that any critique of the Transmission Companies' analysis must be accompanied by a separate new PROMOD model was arbitrary. An agency does not act in an arbitrary manner if there is a rational basis for the agency's decision. *Robertson Transportation Co., v. Pub. Serv. Comm'n*, 39 Wis. 2d 653, 661, 159 N.W.2d 636, 640 (1968). Here, the Commission did not use a process of reasoning to explain why Commission staff's concerns were not sufficient enough to rebut

the Transmission Companies' claims. Instead, it simply stated that the "[c]omission staff developed scenarios that tested several assumptions, but these did not provide a conclusive basis" to find that the Line should not proceed. (R.19, "Final Decision" at 23.) Without any further explanation, one must assume that the Commission's belief was based upon the fact that there was no PROMOD modeling completed. The Commission's belief is not an example of a 'sifting and winnowing' process, but rather of the Commission's willful decision to cast off any critique that does not have a PROMOD model behind it. Accordingly, the Court should find that the Commission's decision to reject its staff's concerns was arbitrary and capricious.

B. In Assessing Need, the Commission Erroneously Relied Upon the Transmission Companies' Application Rather Than What the Statute Requires.

The Commission erred when evaluating the proposed need for the Cardinal-Hickory Transmission line in other ways as well. As part of its assessment, the Commission must determine if the Line is needed when compared to alternatives to a 365kV transmission line. Wis. Stat. § 196.491(3)(d)3; *see also, Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 161, 175 (1977). The Commission's review of such alternatives need not be exhaustive, but it must be thorough. *Wisconsin's Envtl. Decade, Inc.*, 79 Wis. 2d at 175. Here, the Commission did not perform a thorough review when evaluating the comparison of the alternatives to the proposed high-voltage transmission line. Rather than rely on the statutory factors, the Commission simply adopted the Transmissions Companies' own justification.

As part of its application, the Transmission Companies introduced a number of alternatives to the Line. (R.356, "Ex.-Applicants-Application-r3, PSC 352698" Appx. D at 31-34). These alternatives were then analyzed by Commission staff. During this review, Commission staff identified shortcomings in one of the Transmission Companies' alternatives, and suggested changes to it. (R.1047, "Direct-PSC-Rohanker" at 11-13; *see also*, R.1048, "Direct-PSC Vedvik" at 13.) Commission staff then analyzed the modified alternative, otherwise known as the base with asset renewal alternative. Essentially, this alternative option would have necessitated the renewal of current transmission lines, rather than provided for the construction of the Line. (R.1048, "Direct-PSC Vedvik" at 14.) Staff analysis further revealed that the alternative would have resolved many of the congestion problems that the Transmission Companies used to justify the Line but at a lower cost. (R.1048, "Direct-PSC Vedvik" at 13-14.)

Despite this finding, the Commission rejected the alternative as not an "approvable, feasible or robust alternative" to the Line. (R.19, "Final Decision" at 33.) The Commission agreed that it would provide similar benefits to the Line, but that this alone was not enough to deny a CPCN. (*Id*. at 32-33.) Instead, the Commission posited that the need identified for the Line was broader than just resolving potential congestion problems. (*Id.)* According to the Commission, the identified need for the Line was to "ensure low cost delivery of new wind generation resources west of Wisconsin, reduce[s] congestion costs, improve[s], the flexibility of the transmission system, and avoid[s] the cost to rebuild certain existing transmission lines." (*Id.* at 33.) The Commission's rationale, however, is significantly flawed for one major reason: in rejecting the alternative, the Commission used the

Transmission Companies' definition of "need" in their application as the benchmark, rather than what Wis. Stat. § 196.491(3)(d) required.

The CPCN statute is clear. The Commission must find that the proposed transmission line meets the "reasonable needs of the public for an adequate supply of electric energy" before granting a CPCN. Wis. Stat. § 196.41(3)(d)(2). To do so, the Commission reviews an application to determine if there is an adequate supply of electricity in the area, and then whether the proposed line would result in increased reliability, economic benefits and meets public policy considerations. *Town of Holland v. Pub. Serv. Comm'n of Wis*, 2018 WI App 38, ¶¶31-32, 382 Wis. 2d 799, 817-18, 913 N.W.2d 914, 924-25. Yet, in this case, the Commission did not engage in such an analysis, and just referenced the Transmission Companies' CPCN Application.

In their CPCN application, the Transmission Companies state that the Line would ease congestion, increase flexibility, and allow "the transfer of additional low-cost wind energy" that is trapped in areas west of Wisconsin. (R.356, "Ex.-Applicants-Application-r3" at 30.) The Transmission Companies repeated this justification in its brief to the Commission. (R.88, "Applicants Initial Post-Hearing Br." at 5.) Instead of using the staff analysis behind the base asset with renewal alternative to determine whether the underpinnings of the Transmission Companies' justification was sufficient under Wis. Stat. § 196.491(3)(d), the Commission compared the base asset with renewal alternative to the justification on the application. After doing so, the Commission just simply repeated what the application stated as the need for the Line. (R.19, "Final Decision" at 33.) Contrary to the required in-depth analysis of the proposed alternative, the Commission was content to

just rely on what the Transmission Companies had previously proposed. *Wisconsin's Envtl. Decade, Inc*., 79 Wis. 2d at 175 (acknowledging that the Commission's consideration of alternatives must be thorough.) As a result, the Commission erroneously interpreted Wis. Stat. § 196.491(3)(d) by relying on non-statutory factors when determining whether an alternative to the Line sufficiently met the need.

One can imagine the chaos that would arise if the Commission is permitted to find that there is a need for a high-voltage transmission line by simply adopting the proposed need that is already listed in a CPCN application. Rather than remaining tethered to the statutory factors in the CPCN law, the Commission could just rely on a transmission company's self-serving justification and then see if any proposed alternative could match it. Transmission companies would then be able to design a line based upon a manufactured need that only they can meet.

For the reasons set forth above, the record demonstrates that the Commission's finding of need in this case was based on insufficient evidence, an erroneously interpretation of Wis. Stat. § 196.491(3), and was arbitrary. The decision should be reversed, or in the alternative, remanded.

II. THE COMMISSION UNLAWFULLY SHIFTED THE BURDEN OF PROOF TO THE OTHER PARTIES.

The burden of proof to show that a CPCN is warranted falls squarely on the party that is seeking one. Under Wis. Stat. § 196.491(3), any party that wants to construct a high-voltage transmission line must first apply for and receive a CPCN before doing so.

Once an application is received, the Commission is required to hold a contested case hearing under Wis. Stat. § 227.44. Wis. Stat. § 196.491(3)(b). At this hearing, the applicant shoulders the burden of proof, not any other party who may be opposed to the transmission line. *See Sterlingworth Condominium Ass'n, Inc. v. DNR*, 205 Wis. 2d 710, 726, 556 N.W.2d 791, 796 (Ct. App. 1996).

Despite a clear delineation as to who must prove that a proposed transmission line meets the necessary statutory factors, the Commission in this case ultimately determined that it was not the Transmission Companies' duty to prove the need for the Line. Instead, it was the other parties' obligation to disprove it. Examples of the Commissions erroneous position can be found throughout its decision. In one instance, the Commission's dismissal of the opposing party's critique was based upon that party's failure to produce a specific type of evidence (i.e. the PROMOD modeling) that the Transmission Companies had used. (R.19, "Final Decision" at 22.) Another example: the Commission's rejection of an alternative to the Line was based upon the fact that the alternative did not meet the number of purported benefits that the Transmission Companies believed the Line was supposed to deliver. (*Id*. at 33.) Again and again, the Commission treated those parties who opposed the Line as having the burden to persuade and prove that the Line was not needed.

The consequences of such a procedural error are evident in the agency record. As the applicants in the matter, the Transmission Companies appropriately presented to the Commission their justification for the Line in the first instance. Those parties opposing the Line then exposed the substantive errors in the Transmission Companies' analysis in support of their justification. However, rather than determining whether the Transmission

Companies' justification still warranted a CPCN, the Commission pivoted to determining whether the opposing parties' evidence was sufficient enough to discredit the need for the Line. Because of this unlawful shift in burden, the opposing parties were not aware that they needed to produce their own PROMOD modeling, or that they needed to develop alternatives that produced the same benefits that the Transmission Companies had touted in their application. Allowing the burden of proof to shift onto every other party, other than the Transmission Companies, unfairly prejudiced the proceedings and directly led to the issuance of the CPCN. As such, the Commission's decision was in error and should be remanded in accordance with Wis. Stat. § 227.57(4)

III. THE COMMISSION ABUSED ITS DISCRETION BY RELYING UPON ITS OWN EXPERTISE RATHER THAN THE STATUTORY CPCN REQUIREMENTS.

Throughout its Final Decision, the Commission included citations to court cases that touted the Commission's authority in making decisions related to the issuance of a CPCN. (R.19, "Final Decision" at 11, 17-18.) For example, the Commission began its analysis with a far-reaching statement that its "expertise in administering Wis. Stat. § 196.491…has long been recognized by Wisconsin courts." (Final Decision at 11 citing *Wisconsin Power & Light Co. v. Pub. Serv. Comm'n of Wisconsin*, 148 Wis. 2d 881, 888, 437 N.W.2d 888, 891 (Ct. App. 1989), *and Clean Wisconsin, Inc.,* 2005 WI 93.) Having established the general benchmark of its own authority, the Commission then set forth court decisions that accepted the Commission's interpretation of how to assess whether a transmission line is needed. (*See e.g.,* R.19. "Final Decision" at 17 citing *Town of Holland*, 2018 WI App 38,

¶¶31-32.) Yet, the opinions in all of these cases were based upon the great weight deference that agencies used to enjoy prior to *Tetra Tech*. The result was a decision that failed to apply the evidence in the record to the statutory provisions for issuing a CPCN, and one that simply relied on vague "public policy considerations" in reaching its decisions. Thus, the Commission abused its discretion by adopting a blanket reliance on its own interpretations even though the Wisconsin Supreme Court's *Tetra Tech* decision and subsequent statutory changes eviscerated the notion that an agency could do so.

The Commission went out of its way to stress that its assessment of need is broader than what the statute specifies. The Commission stated that its assessment "may include additional relevant factors such as increased reliability, economic benefits and public policy considerations." (Final Decision at 17 (internal quotations omitted) (*citing Town of Holland v. Pub. Serv. Comm'n of Wis*, 2018 WI App 38, ¶¶31-32, 382 Wis. 2d 799, 817-18, 913 N.W.2d 914, 924-25). As a result, the Commission plainly stated in its decision: "[i]n sum, the Commission's interpretation and application of the CPCN law, including its assessment of need, inherently calls for a variety of policy determinations." (R.19, "Final Decision" at 18) (internal quotations omitted) (*citing Clean Wisconsin*, 2005 WI 93, ¶151.)

The Commission's claim was based upon a series of cases where its interpretation of the CPCN law was challenged, but ultimately affirmed. In *Clean Wisconsin*, the Wisconsin Supreme Court held that the Commission's interpretation of the Siting Law was owed great weight deference. *Id*. ¶ 140. As a result, it limited its review to just a rational basis. *Id*. In *Town of Holland*, the Court of Appeals held that the Commission should "be afforded great weight deference in matters relating to the application of chapter 196 of the

Wisconsin statutes, which includes the guidelines for determining whether there is a reasonable need for a proposed project." 2018 WI App 38, ¶27. As was the case before, the Court of Appeals then limited its review to just whether the Commission had a rational basis for its decision. *Id*. ¶28.

Obviously, *Tetra Tech* and the subsequent adoption of Wis. Stat. §§ 227.57(11) and 227.10(2g) upended all of these cases. 2018 WI 75, ¶3. The Supreme Court made it clear that any court reviewing an agency decision would no longer need to defer to the agency's own interpretation of law, and the legislature codified the decision in chapter 227. Specifically, the passage of section 227.57(11) also signaled the end of great weight deference by stating "the court shall accord no deference to the agency's interpretation of law." Finally, with the passage of Wis. Stat. §227.10(2g) the legislature went so far as to explicitly prohibit an agency from even asking for deference.

In rendering its decision in *Tetra Tech*, the Wisconsin Supreme Court also struggled with the collateral impact on those decisions which affirmed an agency because of great weight deference. *See Tetra Tech*, 2018 WI 75, ¶¶89-93 (J. Kelly & J. R. Bradley's lead opinion), and 2018 WI 75, ¶¶ 124-132 (J. A.W. Bradley & J. Abrahamson's concurring opinion), and 2018 WI 75, ¶¶139- 142 (J. Ziegler & J. Roggensack's concurring opinion). Although the lead opinion stressed that prior judicial review decisions would remain good law, the majority of the Court did not agree. Consequently, to determine whether decisions like the ones that the Commission relied upon should retain their precedential value a court must engage in its own analysis.

In this case, each of the decisions referenced by the Commission were made by appellate courts that were patently constrained by the now unlawful three-tiered deference practice. Rather than allowing these courts to engage in an exacting review of the statutory language at issue, these decisions limited the review to just whether there was a rational basis for the Commission's decision. *See Town of Holland*, 2018 WI App 38, ¶28. Put simply–the Commissions' own interpretation of what it means for a transmission line to be needed is no longer good law. Instead, the circuit court should review the question of need based upon the statute.

The key statutory language requires that the Commission determine the "reasonable needs of the public for an adequate supply of electric energy" first before turning to any of the other statutory factors. Wis. Stat. § 196.41(3)(d)(2). As previously explained, the Commission failed to do that in this instance, and instead used its "expertise" to base its decision on non-statutory factors, including certain policy factors espoused in the Transmission Companies' application. (*See supra*, Dane Co. Br. § I.B.) Whether or not there may be broader public policy considerations that would argue in favor of the Line is irrelevant to the ultimate question of need under Wis. Stat. § 196.41(3)(d)(2). The Commission's decision to eschew the statutory factors in favor of nebulous policy goals renders it an abuse of discretion and should be set aside. Wis. Stat. § 227.57(5)

CONCLUSION

For the reasons set forth above, the County respectfully requests that the Court reverse, set aside and vacate the Commission's Final Decision, or in the alternative, remand to the Commission for further action, pursuant to Wis. Stat. § 227.57(4), (5), and (8).

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