STATE OF WISCONSIN
DANE COUNTY BRANCH 9
CIRCUIT COURT

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

For official use

Case No. 19-CV-3418

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

INITIAL BRIEF OF IOWA COUNTY, THE VILLAGE OF MONTFORT AND THE TOWN OF WYOMING

NATURE OF THE CASE

The court is judicially reviewing the PSC's September 26, 2019 decision ("Decision" or "Final Decision" [R. 19. PSC REF#: 376391]) in Docket No. 05-CE-146. The Decision followed a required[1] Wis. Stat. § 227.44 "contested case" hearing, and two petitions for rehearing (R: 77. PSC REF#: 377527 JJI-Petition for Rehearing 10-16-19; R.78. PSC REF#: 377560). The PSC denied the rehearing petitions by allowing time to expire without acting.

The final Decision, under challenge, grants American Transmission Company, LLC (ATC) and ITC Midwest, LLC (ITC) (collectively: "Applicants") a Wis. Stat. § 196.491(3)(a)1 Certificate for Public Convenience and Necessity (CPCN). The CPCN allows the Applicants to build a Wis. Stat. § 196.491 "facility,"[2] specifically a 345-kilovolt ("kV") high voltage transmission line. The transmission line traverses Southwest Wisconsin from a substation in Dane County (Cardinal) to a substation in Dubuque County, Iowa (Hickory Creek), so it is commonly called "Cardinal-Hickory Creek" or "CHC."

Iowa County, the Village of Montfort and the Town of Wyoming need not have participated in the contested case to petition for review. The statute grants them a separate and unqualified statutory right to petition on any basis. Wis. Stat. §

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[1] Wis. Stat. § 196.491(3)(b) requires a contested case hearing "pursuant to s. 227.44."

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

196.491(3)(d)(j). Separately, the County, Village and Town were Parties to the contested case proceeding and qualify to bring a review proceeding on that basis.

I. STANDARD OF REVIEW

Wis. Stat. § 227.57 sets forth the scope of review in agency judicial review. The Court is separately treat: i) issues of agency procedure, ii) interpretations of law, iii) determinations of fact or policy within the agency's exercise of delegated discretion. Wis. Stat. § 227.57(3).

A. Issues of Agency Procedure.

If the "fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure" then the Court is to remand the matter to the Commission. Wis. Stat. 227.57(4). PSC procedural rules for contested case proceedings are set forth in Wis. Admin. Code § PSC 112. The Wis. Stat. § 227.47(1) requirement that the agency separately set forth findings of fact and conclusions of law, is set forth by statute.

B. Interpretations of Law.

This case represents the first time a reviewing Court will apply the ***Tetra Tech EC, Inc. v. Wis. Dep't of Revenue***, 2018 WI 75, 914 N.W.2d 21, 382 Wis.2d 496 guidance on "due weight," or apply revised Wis. Stat. §§ 227.10(2g) and 227.57(11) to determine whether the PSC properly granted a CPCN. In deciding to grant the CPCN the PSC applied law – the criteria indicated in subparts of Wis. Stat. § 196.491(3)(d). That provision sets out distinct requirements in subsections 2, 3, 3m, 3r, 3t, 4, 5, 6, 7, and 8. Subsection, 8 can apply only to generation facilities. The other six

subsections apply here. A CPCN is to be granted "*only if*" a proposed facility satisfies "*all*" applicable legal standards under Wis. Stat. § 196.491(3)(d). (Emphasis provided).

Each requirement of the law is separate. Meeting the requirements of one subsection does not establish or imply satisfaction of another. The requirements of one subpart cannot be ignored because the PSC found some other subpart was met "really well". The meaning of words within each subsection are defined by caselaw, rules or common industry usage. Compliance with each subsection is a legal determination. The PSC cannot seek, and Court cannot give, deference to the PSC on those determinations. Wis. Stat. §§ 227.10(2g) & 227.57(11).

C. *Tetra Tech*.

Before the Supreme Court's 2018 decision in *Tetra Tech*, administrative agencies' interpretations of law were deemed "entitled to one of the following three levels of deference: great weight deference, due weight deference or no deference." ***County of Dane v. LIRC***, 2009 WI 9, ¶14, 315 Wis. 2d 293, 759 N.W.2d 571. The level of deference depended on the perceived institutional qualifications of the agency. ***Racine Harley-Davidson v. State***, 2006 WI 86, PP 12-20, 292 Wis. 2d 549, 717 N.W.2d 184.

> "Great weight" deference had "…developed into a decision-avoidance doctrine that left to the administrative agencies the job of statutory interpretation and application…" Tetra Tech ¶ 18.

Tetra Tech swept that framework away:

> We have also decided to end our practice of deferring to administrative agencies' conclusions of law. However, pursuant to Wis. Stat. § 227.57(10), we will give "due weight" to the experience, technical competence, and

> specialized knowledge of an administrative agency as we consider its arguments.
>
> *Tetra Tech*, ¶ 3, 914 N.W.2d 29.

D. Revised 227.57(11)

The 2018 Tetra Tech decision referenced and discussed a version of Wis. Stat. §227.57(11) that is no longer in force. (*Tetra Tech*, ¶ 80). Wis. Stat. § 227.57(11) was revised to preclude deference to an agency's legal interpretation.[3] Separately, the same Act specifically precluded agencies were from claiming deference for their legal interpretations.[4] Wis. Stat. § 227.10(2g). While "due weight" no longer applies to agency legal interpretations a reviewing court accords an agency that weight as it is determining if agency findings are supported by "substantial evidence".

E. Determinations of Fact

The court is not to substitute its judgment for that of the agency on a fact determined in a contested case. At the same time, a reviewing court is to a) set aside the agency action or b) remand to the agency if "any finding of fact is not supported by "substantial evidence in the record." Wis. Stat. § 227.57(6). "Weighing" disputed evidence differs from determining the "ultimate facts."

To weigh evidence is to determine the relative credibility of competing evidence. For fact witnesses this means determining what assertions of fact are both based on reliable perceptions, and accurately reported. For expert evidence, this means determining whether expert opinion is based on suitable data, whether the

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[3] 2017 Wis. Act 369, § 80.
[4] 2017 Wis. Act 369, § 35.

analytical methodology was the right one to use on the data, and whether the methodology was competently employed.

With one – unexplained – exception,[5] the PSC did not deem evidence non-credible. It did not, for example, determine PSC staff had used problematic data or methods when staff ran the PROMOD computer model to determine the consequences of reconstructing old transmission lines with today's materials instead of building the project.[6] Likewise, the PSC did not generally indicate interveners facts or data problematic *per se*, but instead rejected the analysis asserted to support alternatives to the project.

Once evidence has been "weighed," the agency is to use credible facts to reason its way to "ultimate findings of fact." Wis. Stat. § 227.47(1) required the PSC to prepare and separately set-forth such ultimate findings.

Ultimate findings are subject to review to determine whether they are based on "substantial evidence." E.g., if an ultimate finding of fact depended on the fact-finder having determined that there were "X" acres of affected habitat when the only record evidence indicated there were "Y" acres of such habitat, the finding would not be based on substantial evidence. Holding such a finding to lack "substantial evidence" would not interfere with the agency's Wis. Stat. § 227.57(6) prerogative to "weigh" evidence. Similarly, if an agency's fact-finding is so skewed as to reflect its "will and not its judgment," then a court is not "substituting" its judgment when it

[5] Decision 70-71.
[6] This option was labeled the "base with asset renewal alternative."

disallows such arbitrariness. Even before *Tetra Tech* and the statutory recent reforms, courts recognized that unless it provides "sound reasons," an agency has not done an adequate job:

> Although judicial review of an agency decision is limited, a court is not relieved of the responsibility of determining whether the agency's ultimate decision is based on and reasoned from findings of fact that are supported by substantial evidence in the record. *Voight v. Washington Island Ferry Line, Inc.*, 79 Wis.2d 333, 255 N.W.2d 545 (1977). An agency must give sound reasons for its determination in order to make meaningful judicial review possible. *Transport Oil Inc. v. Cummings*, 54 Wis.2d 256, 195 N.W.2d 649 (1972). Although we must accept agency findings of fact if they are supported by substantial evidence, *Sanitary Transfer and Landfill, Inc. v. DNR* 85 Wis.2d 1, 270 N.W.2d 144 (1978), if the agency findings are not supported by the record, then the agency has not provided an adequate explanation for its decision.
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> ***Wisconsin Ass'n of Mfrs. and Commerce, Inc. v. Public Service Commission***, 287 N.W.2d 844, 94 Wis.2d 314 (Wis. App. 1979)

In determining whether "substantial evidence" exists to support ultimate factual findings, the court is to accord "due weight" to "the experience, technical competence, and specialized knowledge of the agency." Wis. Stat. § 227.10. ***Madison Gas and Elec. Co. v. Public Service Com'n of Wisconsin***, 109 Wis.2d 127, 133, 325 N.W.2d 339, 342-43 (Wis. 1982). "Due weight" requires the court only to accord "respectful, appropriate consideration to the agency's views." (*Tetra Tech*, ¶ 78). When according "due weight," the court still reviews the propriety of the agency's methods and the substantiality of the evidence. (*See:* ***Wis. Bell, Inc. v. Labor & Indus. Review Comm'n***, 2018 WI 76, 382 Wis.2d 624, 914 N.W.2d 1 – agency decision reversed after appellate review of record evidence determined the ultimate finding to be unsupported by substantial evidence, in part because of the agency's use of unsound method to evaluate evidence).

According "due weight" to an agency's application of expertise is problematic for the Decision under review here. The "experience, technical competence, and specialized knowledge" of the PSC reside not in the Commissioners – the political appointees who issued the Decision – but in the agency's technical staff.

Ultimate findings based on substantial evidence are necessary predicates to legal conclusions; they provide grounds from which to *proceed to* legal conclusions, but they are not the same as legal conclusions. Ultimate findings on an array of environmental and community issues, for example, would be required to make legal conclusions under statutes that include environmental criteria, e.g., Wis. Stat. §§ 1.12, 1.12(6), 196.025, 196.491(3)(d)3, 196.491(3)(d)3r, and 196.491(3)(d)4.

Once facts are established based on "substantial evidence," the application of law to the facts is a question of law. ***Wisconsin Elec. Power Co. v. Labor and Industry Review Com'n***, 595 N.W.2d 23, 27, 226 Wis.2d 778 (Wis. 1999); ***Secor v. LIRC***, 2000 WI App 11, ¶8, 232 Wis. 2d 519, 606 N.W.2d 175. There is no deference on that application.

The lessons of *Tetra Tech* and the requirements of Wis. Stat. § 227.10(2g) and revised Wis. Stat. §§ 227.10(2g) & 227.57(11) also govern this Court's review of the Environmental Impact Statement (EIS). The proposed facility is a "Type 1" action requiring an Environmental Impact Statement Wis. Admin. Code § PSC 4.10(1). An EIS is reviewed under Wis. Stat. § 227.57.[7] This means that, under the changes in

[7] ***Wisconsin's Environmental Decade, Inc. v. PSC***, 98 Wis. 2d 682, 298 N.W.2d 205 (Ct. App. 1980). The referenced statute in the case, Wis. Stat. § 227.20 was renumbered to Wis. Stat. § 227.57.

the law, review of the EIS's factual analysis is under the "due weight" standards of *Tetra Tech* for factual determinations, and the PSC cannot seek, and the determination of the sufficiency of the EIS is reviewed under Wis. Stat. § 227.57(11)'s "no deference" standard.

II. ARGUMENT

A. The legal framework under which the PSC could issue a CPCN for an interstate transmission line does not exist.

The PSC is a creature of the legislature. Powers not granted or necessarily implied cannot be presumed. Any doubt about the existence of an implied power in the Commission is to be resolved against it. ***State Public Service Commission v. Wisconsin Bell, Inc.***, 211 Wis.2d 751, 754-56, 566 N.W.2d 496, 498-99 (Ct. App. 1997).

The Decision approves a regional (thus interstate) electric transmission facility under a cost-sharing arrangement. (R. 19. PSC REF#: 376391, pp 12-14 [Decision]). Addressing the potential for such transmission lines, the legislature prescribed a single, very specific, framework for executive agency participation in the development of regional transmission facilities: an interstate compact. Wis. Stat. § 196.494(5). The Governor was authorized to enter into such a compact under the condition that "the compact includes requirements and procedures" for environmental and siting compliance, need determinations and dispute resolution. There is no such compact.

Instead of the compact, the PSC has participated in the Upper Midwest Transmission Development Initiative (UMTDI) which it indicates was created "to

identify and begin to resolve some of the regional transmission design issues and cost allocation issues associated with the delivery of large amounts of new renewable energy from areas with better wind resources…" (R. 19. PSC REF#: 376391, [Decision p. 14]). The UMTDI explicitly addresses "interstate transmission lines", i.e., the same subject matter the legislature mandated to include specific "requirements and procedures."

The UMTDI is not an Interstate Compact. It was nowhere attested to by the Governors, nor indicated to be such. With respect to state law, it does not provide for the "requirements and procedures" specified by the legislature. With respect to federal law, it has not been approved by congress. U.S. CONST. art. I, § 10, cl. 3. Indeed, Congress created an *alternate* mechanism for interstate compacts addressing the same subject matter. In creating that mechanism, Congress reserved its right to specifically approve (or not) such compacts. 16 U.S. Code § 824p(i).

Through the UMTDI the PSC and the executive branch seek to evade their responsibility to organize and approve interstate transmission lines within the legislatively mandated framework of an interstate compact. The hard work of establishing a compact would require the executive and the PSC to figure out how to protect Wisconsin's ratepayers, citizens, environmental, community, and aesthetic amenities, and it's financial interests in a framework that cedes some control. Evading that work, the PSC has instead outsourced the real determination of "need" for a transmission line through the UMTDI process.

Having abdicated its obligation to make an independent decision based on Wisconsin law, the PSC is left to fulfill its role under the UMTDI – approving whatever is selected in that process – by fitting the square pegs of UMTDI selected transmission lines into the round holes of state statutory criteria. Exacerbating the problem in this instance is that the PSC's must force-through a transmission project selected ten years ago – a very long time in the fast-changing world of energy technology. The substantial evidence, and that fact that two of the other states that are notionally benefitted by the transmission project filed briefs against its approval (R.111, PSC REF#: 372726) reflect that the Project's rationale has been overrun by evolving technology options.

So long as the PSC could continuously vary the meaning of legal criteria to match any preferred outcome – as the PSC has been allowed under "great weight" deference – the mismatch between the square pegs and round holes was something courts would not even look at. But under *Tetra Tech*, and the statutory changes, they must.

B. ITC does not qualify for a CPCN.

ITC Midwest LLC ("ITC") is not qualified for a CPCN because it is a "foreign corporation" within the meaning of Wis. Stat. § 196.53. Subject to certain exemptions, "foreign corporations" cannot be issued a CPCN. While ITC previously qualified for an exemption as an "independent transmission owner" within the meaning of Wis. Stat. § 196.485(1)(dm), it no longer meets the requirements. Since February 9, 2016,

ITC has been an affiliated interest of Fortis, Inc. (Fortis) a Canadian Company.[8] As a component part of Fortis, ITC's logo now identifies ITC as "A Fortis Company." (R:1406; PSC REF#: 361938). Fortis and component parts of Fortis own both "electric generation facilities" and "load serving retail entities."[9] One of the component parts

Wisconsin adopted a statutory framework that precludes the kind of affiliation ITC has established with Fortis for reasons readily inferred from the face of the statute: it prevents Wisconsin regulators from having to address potential accumulation of anti-competitive market power by a transmission company that is largely beyond state control. Every other entity with interests in both generation and transmission is regulated by the PSC in ways that ITC is not.

To be an "independent transmission owner" pursuant to Wis. Stat. § 196.485(1)(dm)1m., a person must satisfy each of the following:

> a. The person does not own electric generation facilities or does not sell electric generation capacity or energy in a market within the geographic area that, on December 31, 1997, was served by the Mid-American Interconnected Network, Inc., Mid-Continent Area Power Pool, East Central Area Reliability Coordination Agreement or Southwest Power Pool reliability council of the North American Electric Reliability Council.
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> b. The person is not an affiliated interest of a person specified in subd. 1m. a.

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[8] *See*: https://www.fortisinc.com/docs/default-source/finance-regulatory-reports/business-acquition-reports/material-change-report-(feb).pdf https://www.fortisinc.com/docs/default-source/finance-regulatory-reports/business-acquition-reports/material-change-report-(feb).pdf

[9] "Load serving entities" are utility companies that provide retail electrical service to homes and businesses.

Wis. Stat. § 196.485(1)(dm)1m. Consequently, to qualify as an "independent transmission owner," an entity *cannot* be an "affiliated interest" of an entity that owns electric generation facilities.

An "affiliated interest" exists when any of the conditions set out under Wis. Stat. § 196.52(1) are met. ITC became an affiliated interest of Fortis, Inc. (Fortis) in 2016. Fortis owns electrical generation facilities. Fortis entirely owns ITC and controls ITC's Board. Thus, ITC is "affiliated" with Fortis under subsections (a), (b), (c), (d), and (e) of Wis. Stat. 196.52(1). By establishing its affiliation with Fortis, ITC took itself outside the definition of an "independent transmission owner" and put itself back into the Wis. Stat. § 196.53 category of entities that do not qualify for a CPCN.

Separately, in the Docket underlying the Decision under review here, the Environmental Impact Statement (FEIS or EIS) specifically "called out" a related question, i.e., that the PSC had not held ITC to qualify as a "foreign transmission provider" under Wis. Stat. § 32.02(5), despite ITC's request for such a holding:

> In docket 2707-NC-100 approving ITC Midwest as an electric utility, the Commission declined to determine that ITC was a "foreign transmission provider" under Wis. Stat. § 32.02(5). Under this section of Wisconsin's Eminent Domain statutes, condemnation rights for public utilities are limited to Wisconsin corporations and foreign transmission providers. It is unclear whether ITC can use eminent domain to acquire easements on their section of the proposed Cardinal-Hickory Creek project. In docket 2707-NC-100 approving ITC Midwest as an electric utility, the Commission declined to determine that ITC was a "foreign transmission provider" under Wis. Stat. § 32.02(5). Under this section of Wisconsin's Eminent Domain statutes, condemnation rights for public utilities are limited to Wisconsin corporations and foreign transmission providers. It is unclear whether ITC can use eminent domain to acquire easements on their section of the proposed Cardinal-Hickory Creek project.
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> (R.1193. REF#s: 366195 (Final EIS), p. 5 [p. 50 of PDF]; see fn. 10)

Without being qualified as a "foreign transmission provider," ITC cannot exercise eminent domain and cannot build the project. If different words in statutes are to mean different things, then some criteria separates an "independent transmission owner" under Wis. Stat. § 196.485(1)(dm)1m. from a Wis. Stat. § 32.02(5) "independent transmission provider." The PSC again ignored the issue – Wis. Stat. § 32.02(5) is not mentioned in the PSC decision. Irrespective of some criterion that might disqualify ITC from the category of "foreign transmission provider," it is clear that ITC must at least first qualify as an "independent transmission owner." ITC's affiliation with Fortis has changed its status, leaving ITC unqualified for a CPCN, and granting it one was a legal error.

C. The Project will have a material adverse impact on the relevant wholesale electric service market.

Wis. Stat. § 196.491(3)(d)7 requires a legal conclusion about whether a proposed transmission line project will have a material adverse impact on the relevant wholesale electric service market. In a claimed "Finding of Fact" (R.19. PSC REF#: 376391 [Decision, p. 8]) the Commission stated its conclusion that the project meets this requirement. The Commission statement, which essentially restates the words of the statute, is a conclusion of law, not a finding of fact.

The "adverse impacts" to which the statute refers are constituted of higher prices within the "relevant market." Whether a transmission project will lead to higher prices in the relevant market is predicted by modeling the project's market impact. Modeling aggregates the effect of the prices to come up with overall costs. Costs are expressed in *numbers*.

An ultimate finding of fact by the Commission – as opposed to a conclusion of law – would have been drawn from the statement in the EIS excerpted below, which summarizes a result of conducting such modeling using the "experience, technical competence, and specialized knowledge" that resides within the Commission:

> Finally, based on the applicants' PROMOD modeling, the proposed Cardinal-Hickory Creek project appears to only provide net benefits to the whole MISO market in the AAT future. *Various sensitivities of the PR future, the future deemed to be the most likely scenario by MISO stakeholders and the applicants, show negative net 40-year economic benefits as compared to the costs of the proposed project of from $266.7 million to $318.5 million.*
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> (R.1193. REF#: 366195, FEIS, p. 104; See also: R.1048. PSC REF#: 365153, p. 32) [Emphasis supplied])[10]

Unless the PSC found, based on substantial evidence, that the AAT future was most likely – it didn't[11] – the Decision's holding that the project satisfies the Wis. Stat. § 196.491(3)(d)7 requirement is unsupportable.

The Decision seems to be written to try to deflect attention from the evidence problem.

First, the Decision states the Commission "finds that the addition of the project by the applicants will not have a material adverse impact on competition in the relevant wholesale electric service market *in that* it will increase access to lower cost generation from outside of the project area." Decision, p. 37 [Emphasis]). This statement implies a connection between things that are not linked.

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[10] The FEIS is not separately identified in the PSC Return of Record, Court Document 113. The document identified as R.1193. PSC REF#: 370355 is not the FEIS, but a list of Records associated with the FEIS – although the FEIS is referenced within R.1193. PSC REF#: 370355 The Record number of the FEIS in the PSC electronic record system is 366195.

[11] The Decision mentions the AAT future once, in passing, at p. 21.

Impacts on the relevant wholesale market are defined by modeling price impacts and figuring out what those impacts total-out to be, i.e., figuring out the costs. A qualitative assertion about increasing access for "the project area" says nothing about cumulative costs.

In other words, the PSC's *qualitative* assertion that the "project area" gains "increased access" does not address the requirement in this statute. Whether a project meets the statute's requirements can only be determined through analyses that use *numbers*. The Commission's claim is akin to disputing the average rain measured across the upper Midwest within in a set period – a numeric value – by pointing out it was sunny in Southwest Wisconsin the whole time – a qualitative observation. Both can be true at the same time because they are unrelated.[12] And because they are unrelated, the qualitative observation cannot falsify, negate or over-ride the quantified measurement.

Second, the Decision tellingly omits disclosure of the evidence summarized in the EIS. The Decision omits the fact that the future scenarios that advocates for the project deem most likely – and that they rely-on in analysis of other issues – show this statutory requirement is not satisfied.

Third, the Decision relies on irrelevant conjecture, specifically MISO's contention that, if you ignore the evidence about this *particular* project and instead consider the project only in combination with a *larger set* of transmission projects –

[12] The boundaries of the "project area" are not contiguous with those of the "relevant wholesale market."

of which this project is the last component – the *combined set* will, in *aggregate*, satisfy the statutory requirement. (R.19. PSC REF#: 376391 [Decision pp. 37-38]). This is just another way of saying that, although the project's impacts are adverse with respect to the relevant wholesale market, they are not so adverse as to wipe out the benefits gained from *other* projects in the *combined set*. None of those *other* projects were presented for consideration in this proceeding. The *combined set* of projects was not presented for consideration in this proceeding. The CPCN was not issued for a *set* of transmission projects. It was issued for this project. Alone.

Because the project does not satisfy the statutory requirement, it cannot be issued a CPCN. On this legal conclusion there will never be evidence that the project advocates can exhume and claim-to-be "substantial." The numbers don't work.

D. The Commission's treatment of the CPCN application inappropriately favors the Applicants and falls short of its statutory obligations.

The PSC has an affirmative statutory responsibility to serve the consuming public. ***Wis. Indus. Energy Grp., Inc. v. Pub. Serv. Comm'n of Wis.***, 2012 WI 89, ¶ 49, 342 Wis.2d 576, 819 N.W.2d 240. A few examples show how the Commission failed that responsibility. The Commission's methods as it considered the Application skewed fact-finding in favor of the Applicants by not requiring the Applicants to prove their case, the PSC failed to produce a record with coherent, reviewable findings of fact, it falsely attributed to PSC and WDNR witnesses the conclusion that the project will not have "undue adverse" environmental impacts, and it failed its Environmental Impact Statement (EIS) obligations to develop alternatives to a reasonable degree of comparability.

1. Not requiring Applicants to prove their case.

The Decision reflects limited review and abdication of the PSC's responsibilities. In a CPCN proceeding, it is the Applicants' job to prove its case under the statute by a preponderance of the evidence. The Commission did not require the Applicants to do so. Instead, the Commission applied a "substantial evidence" test to Applicant contentions. Under such a test, as long as the Applicants' factual contentions to fall within a "range of reasonableness," the contentions are "good enough" to merit a CPCN. The limited, "substantial evidence scrutiny is explicitly displayed in Commission determinations on how much renewable energy the project would facilitate (R.19. PSC REF#: 376391 [Decision, p. 31]); on whether the "base with asset renewable alternative" developed by PSC staff would entail "unknown costs" (p. 31); in the determination of whether the project applicants want is preferable to any other transmission alternative (p. 35); and in deference to Applicants' assertions on proposed river crossings (pp. 45-46).

2. Failing to present reviewable decision-making.

The Commission's indicated "findings of fact" are conclusions of law. Only some of these are explained in more than a cursory fashion. Respecting land use plans, for example, the Commission, without summarizing the evidence, e.g., what general values and characteristics are protected in those land use plans) states a legal conclusion in its "Findings of Fact" (R.19. PSC REF#: 376391 [Decision p. 7 - #12]) and later devotes three cursory paragraphs to the issue (Decision, pp. 77-78). Those paragraphs reflect neither consideration nor disclosure of how alternatives to the

project could be more consistent with local land use plans. Instead the Commission simply notes that all big projects have big impacts, and that it requires some mitigation of them.

While findings of fact do not recite the evidence, they need to summarize the evidence on issues in the case. A case like this presents many facts and the statutes identify many issues. Wis. Stat. § 196.491(3)(d)4. alone requires coherent factual findings on "ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use" and other "environmental values." Reading the Decision, one would not know what the Commission thinks these values are, or what the Commission deems a fair summary of the true and credible evidence to with respect to each of these values, or why. With respect to land use plans (Wis. Stat. § 196.491(3)(d)3.) one would not even know if government agencies along the route have plans that emphasize protection and enhancement of the unique beauty and character of the project area. And, of course, there are no findings reflecting a comparison between the impacts of the project against any alternative.

A reviewable decision has to reflect the agency's reasoning on all salient issues in order for the court to be able to evaluate whether factual findings are based on substantial evidence. *Wis. Ass'n of Manf. & Commerce, Inc. v. Pub. Serv. Comm'n of Wis.*, 100 Wis. 2d 300, 309-10, 301 N.W.2d 247 (1981) (If the agency has insufficiently explained its decision or the basis for its decision, the court affords no deference and should remand the matter). This decision fails that requirement.

3. Holding the environmental testimony of WDNR and PSC staff to include conclusions of "no undue adverse environmental impacts" that are neither stated nor implied in that testimony.

The Decision (R.19. PSC REF#: 376391 [p. 50]) holds "substantial evidence" supports a holding of "no undue adverse environmental impacts," and indicates this holding adopts conclusions reached by PSC and DNR staff. Setting aside that such a holding would be a legal conclusion, the conclusions the Commission purports to adopt do not appear in those experts' environmental testimony. The PSC does not link the testimony claimed-to have arrived at this conclusion. And, such testimony does not exist.

The natural resource and environmental testimony of PSC staff and the WDNR include no ultimate conclusions as to whether impacts are "undue." The word "undue" constitutes a legal judgment; the appears once in the EIS, in a recitation of the requirements of Wis. Stat. § 196.491(3)(d)4. (R. 1193. PSC REF#: 366195 [FEIS, p. 5, p. 51 of the PDF]) Nowhere else. That testimony also lacks evaluation that could be construed as concluding that the witnesses deemed the impacts "undue." That testimony instead identifies many serious and damaging impacts to natural resources, indicates actions that can reduce impacts, indicates adjustments that will have to be made on protected lands to accommodate the project to reduce, but not eliminate, adverse impacts, and indicates that the harms, mitigations and adjustments do not preclude construction of the project, i.e., that the project is "permittable."

Whether adverse environmental impacts are "undue" is a legal question entirely separate from the issue of whether the project can get permits, and also

separate from what measures may reduce impacts. "Permittable" only means a project will not be blocked by a legal limit outside the PSC's jurisdiction. Functionally equating "no undue adverse environmental impact" with "permittable," as the Commission does, is a legal error, and represents abandonment of the Commission's responsibilities.

4. Failing to develop alternatives or evaluate them comparatively against the project in light of the statutory criteria.

The PSC cannot approve a CPCN if a facility will "have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use," or if it will "unreasonably interfere with the orderly land use and development plans" Wis. Stat. §§ 196.491(3)(d)4. & 6. To determine whether the impacts are "undue" there must be a comparative analysis of the project with alternatives. The Decision does not indicate, and no factual findings show, that the PSC evaluated alternatives by reviewing their comparative impacts on the "environmental values" or "land use plans" before making a go/no go decision on the project. The Decision instead indicates the go/no go determination was based on the UMTDI process. The EIS and environmental testimony reveal that environmental values, land use plans and the rest of the statutory issues were addressed almost exclusively under the presumption the project was the only option under consideration, and would be approved.

That the project qualifies under the UMTDI process does not negate, sideline, or satisfy the requirements of state statutes. And, to the degree comparative impacts

were not squarely before the PSC, e.g., when the PSC wrote that "pursuing projects like the base with asset renewal alternative would entail unknown costs" (Decision, p. 33), the PSC was indicating that either "hand waving" objections to any alternative were adequate to have it ignored R.1193, or that the PSC had failed to do its job.

It is not just subparts of Wis. Stat. § 196.491(3)(d) that require the development of alternatives. EIS law establishes an entwined obligation and assigns it to the Commission. (*See*: Wis. Admin. Code § PSC 4.30(1)(a)) adopting by reference 40 C.F.R. pts. 1500-1508, the Council on Environmental Quality (CEQ) guidelines; Wis. Stat. § 1.11(1); Chapter 274, laws of 1971, section 1: Wisconsin Environmental Policy Act (WEPA) to be interpreted to advance substantive environmental goals; ***Wis.'s Envtl. Decade, Inc. v. Wis. Dep't of Nat. Res.***, 115 Wis. 2d 381, 403, 340 N.W.2d 722 (1983): CEQ Guidelines are requirements "to be followed"; 40 CFR § 1502.1: "primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions"; ***Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Soc. Services***, 130 Wis. 2d 56, 73, 387 N.W.2d 245, 252: (1986) : "description of alternatives [is] the heart of the environmental impact statement."; 40 CFR, §15.02(14): [The EIS] should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice; 40 C.F.R. § 1505.2(b) and (c): a "record of decision" must identify "all alternatives considered by the agency in reaching its decision," and indicate the "environmentally preferable," alternative(s); 40 CFR §1502.14(a): Alternatives must be "*rigorously explore(d)* and *objectively*

evaluate(d)." [Emphasis provided]; Alternatives must be *explored in enough detail* "so that reviewers may evaluate their comparative merits." [Emphasis provided]; ***Wisconsin's Environmental Decade, Inc. v. Public Service Commission***, 79 Wis.2d 161, 175 - 176, 255 N.W.2d 917, 926 (1977) (WED II): "[The EIS] should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.").

The question of alternatives is not an abstract or academic concern. Statutes specifically authorize the PSC to order construction of an alternative transmission project if there is a need for a transmission upgrade and the alternative is superior to the Applicants' project. Wis. Stat. § 196.494(3).

Courts have, for too long, both ignored the requirements of EIS law, and deferred to the PSC under the "great deference" standard with respect to whether impacts are "undue." The sufficiency of the EIS (addressed in detail by an aligned party), and whether impacts are "undue" because of economics or because the PSC staff's "base with asset renewal alternative" (addressed in detail by aligned parties) are questions of law reviewed under Chapter 227.57. The PSC no longer gets deference. The court must make an independent decision.

III. CONCLUSION

For reasons set forth in this brief and in the briefs of other Appellants and interveners, the Decision should be reversed. While some of the shortcomings might

be curable with additional PSC attention, such attention, fairly applied, would lead to a different outcome. Other shortcomings are incurable.

Dated and respectfully submitted this 1st day of May, 2020.

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