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 Montfort,
Petitioners,

For official use

Case No. 19-CV-3418

Chris Klopp,
Gloria and LeRoy Belken,
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.

PETITIONERS DRIFTLESS AREA LAND CONSERVANCY AND WISCONSIN WILDLIFE FEDERATION'S OPENING BRIEF

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INTRODUCTION

This case involves the highly controversial and costly proposed Cardinal-Hickory Creek (CHC) high-voltage 345-kV transmission line and 17-story high towers, which would cut a wide swath through southwest Wisconsin's scenic Driftless Area's vital natural resources, family farms, protected conservation lands and communities. The CHC transmission line is strongly opposed by the Dane County Board, the Iowa County Board, all of the State Senators and State Representatives in affected districts, many conservation organizations including Petitioners Driftless Area Land Conservancy (DALC) and Wisconsin Wildlife Federation (WWF), the Wisconsin Citizens Utility Board, local business groups, and many citizens who live, work, and play in the Driftless Area.

State law requires the PSC to carefully and independently review the need for, impacts of, and alternatives to proposed transmission projects before granting a certificate of public convenience and necessity (CPCN) under Chapter 196 of Wisconsin's statutes. That CPCN allows for-profit utility companies—including American Transmission Company, LLC (ATC), ITC Midwest, LLC (ITC), and Dairyland Power[1] (collectively, "Applicants")—to: (1) charge ratepayers for the costs of the expensive transmission line, plus an annual rate of return (*i.e.*, profit) of 10% - 11.2% each year; and (2) exercise eminent domain to take private property to construct their 100-mile transmission line through the Upper Mississippi River National Wildlife and Fish Refuge, across the Mississippi River, and through Southwest Wisconsin's farmland, small towns and conservation lands. Over this line's expected life, ATC and ITC will collect at least $2.2 billion from utility ratepayers, reflecting the initial capital costs and an annual locked-in profit rate of 10.3% to 11.2% for each of 40 years.

[1] Dairyland Power, a non-profit electric cooperative, owns a minority stake in the CHC line.

The PSC's review did not conform to the requirements of state law. Instead, the PSC ignored its own Staff's expert testimony questioning the benefits of the line and excused the Applicants' failure to examine less expensive and less environmentally-harmful alternatives. In short, the PSC: (1) did not follow the law, (2) predetermined its outcome without fully and fairly considering alternatives, (3) ignored compelling and persuasive record evidence, (4) ignored public officials' and the public's overwhelming opposition, and (5) overlooked two Commissioners' entanglements with parties to the case that created at least an appearance of bias, which should have required recusal. Accordingly, this Court should vacate and remand the PSC's Final Decision under the judicial review provisions of Wis. Stat. Chapter 227.

Context here matters. First, the proposed CHC transmission line is not being proposed as necessary for reliability—to "keep the lights on" in Wisconsin. With electricity demand flat or declining, no one even tried to make that case. Second, the PSC overruled its own expert Staff's testimony that the proposed CHC transmission line is *not* cost-beneficial for consumers in most of the Staff's economic "model runs." Third, the PSC excused Applicants from their burden of proving that the CHC line is *necessary*, despite: (1) testimony from DALC/WWF's four highly-qualified energy economic and policy experts (led by former Federal Energy Regulatory Commission (FERC) Chair Jon Wellinghoff) describing less-damaging alternative transmission solutions that are less expensive and more beneficial for Wisconsin; and (2) testimony from DALC/WWF's four natural resources and conservation scientists (led by former Wisconsin Department of Natural Resources (DNR) Secretary George Meyer) describing the proposed CHC transmission line's devastating and undue adverse environmental impacts throughout Wisconsin's Driftless Area and the need for better alternatives.

Public confidence in the state agencies responsible for protecting the public interest in Wisconsin is already low. If decisions like this are allowed to stand, that confidence will further erode. This reviewing court's responsibility is vitally important in our system of checks and balances. The Wisconsin Supreme Court and Legislature have recently made clear that the courts are no longer obligated to "defer" to the legal conclusions of agencies like the PSC. Wis. Stat. § 227.57(11). Wisconsin courts are duty-bound to independently ensure that agencies comply with legislative directives as expressed in the plain language of the law. For the reasons set forth below, Petitioners respectfully request that this Court vacate the PSC's Final Order granting a CPCN for the CHC project, and remand the case to the PSC to follow the law as required.

ISSUES PRESENTED

1. May the Public Service Commission of Wisconsin (PSC) lawfully grant a certificate of public convenience and necessity (CPCN) for a high-voltage transmission line project without determining whether the project meets the eleven specific and separate requirements set forth in Section 196.491(3)(d) of the Wisconsin statutes?

2. Was the PSC's conclusion that applicants need not prove their cases by a preponderance of evidence, but need only to produce "substantial evidence," consistent with applicable Wisconsin law?

3. Are an administrative agency's legal conclusions subject to greater deference if the agency styles and mischaracterizes them as findings of fact?

4. Under Wisconsin law, in a CPCN proceeding, may the PSC lawfully shift the burden of proof on the availability of reasonable alternatives onto intervenors?

5. Is the Environmental Impact Statement (EIS) for a proposed high-voltage transmission line project adequate under the Wisconsin Environmental Policy Act (WEPA) when it:
   a. Does not assess either indirect or cumulative impacts;
   b. Does not estimate the potential direct impacts of the project on birds and other wildlife;
   c. Fails to fully consider potential less-damaging non-wires alternatives, including alternative transmission solutions (ATS);
   d. Fails to fully consider routes that would avoid conservation areas like the Upper Mississippi National Wildlife and Fish Refuge, and others in the Driftless Area; and
   e. Relies almost entirely on information and analysis provided by the applicants?

6. Do PSC Commissioners have an obligation to recuse themselves based on at least an appearance of bias and/or conflict of interest when:

a. They have immediately prior or ongoing relationships with parties advocating that a CPCN be approved;
b. They have had *ex parte* communications with parties advocating before the PSC that a CPCN be approved;
c. They legally represented, for many years, the utility that controls ATC, which owns 60% of the CHC project for which the CPCN was adjudicated by the Commission?

FACTUAL AND PROCEDURAL BACKGROUND

This case involves the PSC's decision to override its own Staff's expert testimony in granting a CPCN for Applicants' proposed CHC high-voltage transmission line and seventeen-story high towers, which will travel through southwest Wisconsin's iconic Driftless Area, harming many of its valuable natural resources, conservation lands, historic preservation areas, and the region's family farms and tourism-based industries in the rural towns and communities.

The CHC transmission line was first proposed over a decade ago. Since then, the electricity industry has changed—a lot. Electricity demand is much lower, solar and energy storage technologies have improved dramatically, and new "smart wires" and other advanced transmission technologies have emerged as cost-effective options. Just as smartphones and wireless services have largely replaced landline phones with wires and poles in the telecommunications sector, energy storage and other alternative transmission solutions (ATS) are increasingly helping transmission planners defer the need to construct large new "wires" projects. This Statement of Facts therefore begins with a brief description of that history, then reviews the record evidence on the purported "need" for the CHC line, and then explains the harmful environmental impacts and economic consequences of this costly project.

I. THE CHC TRANSMISSION PROJECT

A. CHC's Origins as a MISO High-Voltage "MVP" Transmission Line

The CHC transmission line was first conceived more than a decade ago as one of 11 regional transmission lines in the Midcontinent Independent System Operator's (MISO) Multi-Value Project ("MVP") portfolio. MISO is a "regional transmission organization" covering parts

of 15 states and Manitoba. MISO is *neither* a government agency, *nor* an independent regulator. MISO is an association of investor-owned public utilities, including ATC, ITC, and Dairyland Power, who own and operate transmission lines in the region. MISO facilitates transmission planning, operates the existing transmission system, and advocates for the construction of new transmission lines.

Building large transmission projects is lucrative for MISO's members. In 2006, FERC issued Order 679, entitled "Promoting Transmission Investment through Pricing Reform."[2] Order 679 guaranteed high rates of return on transmission investments (through "return-on-equity adders"), allowed accelerated depreciation, and created new financial incentives to build transmission capacity. Order No. 679, Promoting Transmission Investment through Pricing Reform, 116 FERC ¶ 61,057 (2006). In 2011, FERC's Order 1000 allowed transmission companies to spread the cost of new transmission projects across multi-state regions, if they could get approval from "regional transmission organizations" like MISO. Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC ¶ 61,051 (2011). The result was an explosion of transmission project proposals from the time Order 679 was adopted in 2006 to about 2014.

MISO's 2011 MVP portfolio was part of this transmission upsurge, and the CHC line is the last and most expensive of these MVP lines. Since 2011, however, many core assumptions supporting large transmission projects have changed. Demand flattened (and now has steeply declined during the COVID-19 crisis), and new "distributed energy resources" (DER)—solar energy combined with battery/storage, demand management, energy efficiency—improved dramatically and are now highly cost-competitive. Doc. 1049.[3] Transmission planners and utility

[2] https://www.ferc.gov/whats-new/comm-meet/072006/E-3.pdf.
[3] Citations to the administrative record are listed as "Doc. ##" and contain live hyperlinks.

regulators are increasingly relying on DERs in combination with other advanced transmission technologies to defer or cancel long-planned "large wires" transmission projects. Doc. 1097.

MISO approved the MVP portfolio as a package, and it has never evaluated the "need" for the CHC line—or any other MVP line—on an individual basis. MISO acknowledges that it has no authority to determine whether an individual MVP project makes economic sense at the time it is proposed. MISO also has no authority to approve the construction, siting, or cost-recovery for any MVP line. That is the purview of state regulatory commissions. Nevertheless, MISO has actively represented the interests of its transmission companies and corporate utility members who will profit from construction of the CHC transmission line. Indeed, MISO entered a "common interest" litigation agreement with the CHC project's developers before they filed their application to the PSC. Doc. 266, Ex. B. MISO therefore has not individually assessed whether the CHC project is needed, but has advocated for its members and this project from the beginning.

B. Purported "Need" for the CHC Transmission Project

1. Undisputed Facts: Not a "wind only" project, not needed to "keep the lights on," and guaranteed profit for the transmission companies regardless of "need."

The Applicants claim that the CHC transmission line is primarily needed to relieve "transmission congestion" that is limiting the flow of "low-cost wind energy" from Iowa. Doc. 357 at 31. They assert that connecting the 345-kV transmission system in Iowa and Wisconsin will result in lower energy prices, economic benefits, and more renewable energy for Wisconsin customers. *Id.* at 30-31. This point is disputed, of course, but several material facts are not in genuine dispute.

First, the CHC transmission line will be an "open-access" line, which means that the owners cannot pick and choose which generators of coal, natural gas, nuclear, and wind power will connect to it. It is not a "wind-only" line. Doc. 1103, Doc. 1049 at 42-43. Second, no party

even tried to argue that the CHC line is needed to ensure the reliability of the electric system by "keeping the lights on" in Wisconsin. If the CHC transmission line does not go forward, the transmission companies would build or upgrade other (presumably smaller and less expensive) transmission lines, if that were necessary, to ensure reliability in Wisconsin. Doc. 1060 at 5–6. Third, no one disputes the financial reality that the bigger and more expensive the project, the more the Applicants will collect in revenues with their guaranteed 10.3% to 11.2% annual profit rate for 40 years, whether the project ultimately is needed or not.

2. PSC Staff's testimony on Applicants' economic models concludes that the CHC transmission line will have negative economic benefits in most modeled future scenarios.

The Applicants' prediction that the CHC transmission line project will save Wisconsin ratepayers money is based on a modeling exercise. As with all modeling, the outputs depend on the chosen inputs: what goes in determines what comes out. Expert testimony from PSC Staff, the Citizens Utility Board, and DALC/WWF shows that the Applicants' modeling relied on unfounded economic and market assumptions.

First, the Applicants' models assumed that there would be few, if any, local DERs—solar energy projects, battery storage, demand management, energy efficiency—available at competitive prices to reduce the demands on the transmission system. Their models assume one small (30 MW) solar array, Doc. 1060 at 21, but, at the time of the hearing, at least 700 MW of solar were already approved by the PSC or in the late stages, with an additional 4,500 MW of solar in the active study stage. *Id.* at 21-22. The PSC Staff re-ran ATC's economic model including only the first set of Wisconsin-based solar and wind projects *that have already been approved by the PSC*, and found that the projected economic benefits of the CHC transmission line were reduced by 66%-75%. Doc. 1048 at 35-37; Doc. 89 at 20. Following the PSC's approval of the CPCN, in

November 2019, Alliant Energy announced plans to construct an additional 1,000 MW of solar energy generation by 2023 in its southwestern Wisconsin service territory alone.[4]

Second, PSC Staff expert witnesses Vedvik and Grant testified that the Applicants' modeling results are highly dependent on the "discount rate" and cost-savings "metric" that ATC selected for their model, as well as the amount of Wisconsin-based solar generation included in the model. Doc. 1048 at 7, 33-35; Doc. 1046 at 29-30. The Staff's testimony also disputed ATC's claimed "asset renewal" benefits, explaining that ATC's model failed to recognize the need to replace several old transmission lines by 2030, regardless of whether the new CHC line becomes operational. Doc. 1048 at 13-19.

When the PSC Staff's expert economists re-ran ATC's cost-benefit models with different and more likely inputs, they found that the costs of the CHC transmission line project exceed its likely benefits in most of the modeled scenarios. Doc. 1048 at 37-38; Doc. 711. ATC's model uses a variety of possible "futures" to estimate the potential energy savings under a variety of different scenarios. Staff's lead project engineer, Alexander Vedvik, determined that the Project "could have negative net benefits to the MISO footprint" of between $266.68 and $576.53 million in 6 of the 8 modeled futures. Doc. 1048 at 30-31.

Staff's Wisconsin-specific analysis of the Policy Regulations future, which ATC concedes is "most likely," "shows near zero 40-year net benefits … using the applicants' formula and methodology." Doc. 1048 at 37 (emphasis added).[5] The Staff analysis further concluded that the Applicants' Low-Voltage Alternative—which *does not* include construction of the new CHC

[4] *Alliant Energy to add 1 GW of solar in Wisconsin by end of 2023*; Utility Dive (Nov. 1, 2019) (available at https://www.utilitydive.com/news/alliant-energy-to-add-1-gw-of-solar-in-wisconsin-by-end-of-2023/566447/).
[5] Staff's analysis found that the "Accelerated Alternative Technologies future" was the only future in which the CHC project had positive economic net benefits to the MISO footprint. (Positive $1.36 billion for the AAT future and positive $1.28 billion for the updated AAT future.) Doc. 1048 at 31.

transmission line— "has net benefits to the MISO market in more futures than the proposed Cardinal-Hickory Creek project." *Id.* at 31-32 (emphasis added). The Wisconsin Citizens Utility Board's expert, Mary Neal, also concluded that ATC overstated the CHC transmission line's benefits and did not evaluate reasonable alternatives. Doc. 1103, 1104, 1143, 1184.[6]

Finally, in addition to predicting "near-zero" and negative net benefits in the majority of likely future scenarios, the PSC Staff's analysis shows that a two-year delay in the in-service date of the CHC transmission line—until at least 2025—would likely produce *positive* economic benefits for Wisconsin ratepayers. Doc. 944 at 6. Jon Wellinghoff, former FERC Chair and among the nation's leading energy experts, explained in his testimony that remanding this case to the PSC for more analysis is a "no regrets" opportunity that could result in more long-term benefits to Wisconsin consumers with fewer adverse environmental impacts. Doc. 1053 at 25.

3. DALC/WWF's testimony concludes that Applicants' planners did not seriously evaluate advanced transmission technologies, including battery storage, that could offset or defer the need for the CHC transmission line.

DALC/WWF retained a team of four highly-qualified energy industry experts, including former FERC Chair Jon Wellinghoff, energy storage expert Kerinia Cusick, transmission systems expert and former senior MISO engineer Rao Konidena, and energy systems modeling expert Mihir Desu. Docs. 1053, 1060, 1097, 1049, 1180, 1183. This experienced energy team described the rapid technological progress and falling costs that have provided transmission planners with new tools to cost-effectively meet today's grid needs. They explained in detail how transmission planners are considering "non-wires" technologies such as solar energy combined with battery storage, in combination with technologies such as enhanced power line monitoring and power electronics, to augment, defer, or entirely replace traditional transmission projects at much lower

[6] Ms. Neal also concludes that the Applicants "ignore[d] the increased fossil-fired generation outside of Wisconsin enabled by the Project." Doc. 1103 at 9.

costs than traditional "wires-based" transmission solutions. Doc. 1097 at 12-14; Doc. 1053 at 18-19. These "alternative transmission solutions" (ATS) can be deployed in combinations that are often much cheaper and more effective than a traditional transmission line. This is no longer "new" or "experimental," but is happening at scale today. Doc. 1097 at 12-14 (examples).

In addition to reduced costs, projects that incorporate alternative transmission solutions frequently have much smaller footprints than transmission lines and therefore produce far less adverse environmental and land-use impacts, which is especially important in the context of the significant harm the CHC line and its 17-story high towers will cause to the Driftless Area's people, communities, and natural resources. DALC/WWF witness Kerinia Cusick, who worked for years developing battery storage projects, explained that a large battery storage system that could provide transmission services would have a footprint "akin to the size of a large shopping complex parking lot." Doc. 1180 at 5. These small, flexible systems can be "deployed incrementally" and quickly, "in some cases as little as 100 days from approval to commercial operation." *Id.* at 6. These alternatives can be built as needed "instead of running the risk of overbuilding a transmission line to service a need that may, or may not, materialize." *Id.* at 6.

ATC's lead planning engineer, Tom Dagenais, admitted that the Applicants never analyzed whether batteries or other advanced technologies could be used in combination with planned upgrades to existing transmission lines to avoid the need for a brand-new, high-voltage line. Doc. 1003 at 72:16-19.[7] Instead, Mr. Dagenais (who conceded that he had no professional experience with energy storage technologies or energy storage project development, Doc. 31 at 446) categorically ruled out a storage-based alternative based solely on his non-expert opinion that it would be too expensive, even while admitting that ATC never attempted to calculate the amount

[7] **Q:** Did you consider any scenarios that included using smaller batteries in addition to a lower voltage transmission alternative? **A:** No. I don't believe we considered that.

of energy storage that would be needed to provide a similar level of transmission services as the CHC project. Doc. 1003 at 65-73; Doc. 32 at 491.[8]

ATC provided no documents or work papers supporting its decision to rule out energy storage, admitting the decision was made through "verbal discussions" between two ATC transmission engineers who have no experience with energy storage and do not consider themselves to be "experts" in non-wires transmission technologies. Doc. 1003 at 68-69[9]; Doc. 31 at 446-47. ATC further admitted that it never considered any scenarios that included using smaller batteries in addition to enhancing the existing lower-voltage transmission system, which is a solution recommended by DALC/WWF's energy storage expert witness Cusick. Doc. 1003 at 72.

Only in response to Intervenors' testimony exposing flaws in its approach did ATC hire a consulting firm to conduct a preliminary analysis of energy storage and solar generation. Quanta's "supplemental NTA"[10]—prepared over the two-week period leading up to Applicants' rebuttal testimony in May 2019—contradicted the Applicants' prior unsupported assertions that a storage-based solution would cost "well into the billions of dollars." Instead, Quanta's "supplemental NTA" provides roughly the same level of "transfer capability" (*i.e.* the ability to reduce transmission congestion) at a cost of $282 million to $416 million *less* than the CHC line transmission line, all while meeting the same required transmission reliability criteria. Doc. 1128

[8] **Q:** Can you point to anywhere in the record where anyone has calculated the amount of storage necessary to mimic the project? **A:** No.

[9] **Q:** Are there any documents or work papers available to support the conclusion that these three large batteries would be required? **A:** Not to my knowledge.

[10] ATC uses the term "non-transmission alternative" (NTA) to refer to a similar concept as the "alternative transmission solutions" (ATS) recommended by DALC/WWF expert witnesses.

at 4;[11] Doc. 1180 at 6-7.[12] According to DALC/WWF witness and energy storage expert Kerinia Cusick, the results of Quanta's preliminary analysis are "striking" and "demonstrate[] the importance of reevaluating the Project and performing a complete and thorough analysis of alternatives to determine if a better solution can be found." Doc. 1180 at 8.

In testimony filed at 11:05 pm on the night before the evidentiary hearing, ATC witness Dr. Henry Chao (who sponsored Quanta's report in earlier testimony) tried to minimize the relevance of Quanta's work, stating that "Quanta did not design the supplemental NTA . . . to provide the same benefits [as the] Project" and that he does not know "whether such an alternative is even technically feasible." Doc. 1189 at 3. Besides directly contradicting his earlier testimony that "[t]he supplemental NTA options *were* designed to mimic the Project as best as possible" Doc. 1128 at 16 (emphasis added), this last-minute flip-flop proves Ms. Cusick's point: despite rapid technological improvements and deployment of energy storage as a transmission solution around the world, and the promising results in Quanta's preliminary study, *ATC never seriously evaluated whether a portfolio of batteries and other advanced transmission technologies could provide similar transmission services as the proposed CHC transmission line*. Doc. 1180 at 14-15.

As argued in Section II.C below, the PSC's Final Decision excused ATC's failure to seriously examine a battery storage-based alternative, adopted ATC's flawed analysis lock, stock, and barrel, and shifted the legal burden from the Applicants *to the Intervenors* to conclusively prove the viability of alternatives to ATC's preferred huge transmission line. *See* Doc. 19 at 35.

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[11] Dr. Henry Chao, who supervised Quanta's work, explains that "Quanta designed the supplemental NTA to achieve approximately 1,383 megawatts (MW) of incremental transfer capability between Iowa and Wisconsin, which is roughly the transfer capability that the Applicants indicated the Project would achieve during the 2027 summer peak, and to meet transmission reliability criteria." Doc. 1128 at 4.

[12] The direct capital cost of Quanta's Supplemental NTA is $177M to $288M, as compared to approximately $500M for the CHC line. Doc. 1180 at 7. Including the utilities' revenue requirement increases the total cost of the CHC project to $628M, as compared to $212M to $346M for the Supplemental NTA. In other words, the NTA's **total cost is $282 million to $416 million lower than the CHC transmission line project.** Doc. 1180 at 7-8.

C. The CHC Transmission Project's Harmful and Undue Adverse Impacts on the Driftless Area's Environmental, Economic, Aesthetic, and Cultural Values.

1. Wisconsin's Driftless Area

The proposed CHC transmission line would cut a wide swath through the Driftless Area in Southwest Wisconsin, which is one of the Midwest's most unique eco-regions and is recognized internationally as a region of vital conservation opportunity and concern. The special and beautiful topography contains rolling hills with deep river valleys nestled in woodland, prairie and riparian habitats. This rural area is home to small towns and mid-sized cities, family farms, protected conservation lands, and an economy centered around agriculture, outdoor recreation, and tourism.

The proposed CHC transmission line would run through and damage many important environmental resources in the Driftless Area, including the Upper Mississippi National Refuge (which "contains one of the largest blocks of riverine habitat in the contiguous United States," Doc. 1193, FEIS at 56),[13] multiple state and private conservation areas and parklands, the Military Ridge Prairie Heritage Area (identified by Wisconsin DNR as the "highest priority for landscape-scale grassland protection and management in Wisconsin" and "one of the best opportunities in the Midwest to protect prairie remnants and area sensitive species, such as grassland birds," Doc. 1270 at 14), and the Black Earth Creek Watershed Area, among others. Doc. 1193, FEIS at 55.

Significant state and federal resources have been expended to protect and conserve the Driftless Area's important ecological and recreational values. Doc. 1107 at 17. In turn, the region's natural resources yield economic benefits through tourism and related spending. As former Wisconsin DNR Secretary George Meyer explained in his expert testimony: "The Driftless Area's robust tourism economy is largely based on the region's valuable natural resources and is based on visitors' enjoyment of the natural scenic beauty, fishing, hunting, camping, hiking, biking, car

[13] The refuge is also designated as a Wetland of International Importance (Ramsar) and a Globally Important Bird Area. Doc. 1193, FEIS at 56.

touring, cultural sites, canoeing and kayaking, geo-caching and bird watching." *Id.* at 20. A 2017 Wisconsin Department of Tourism study found the economic impact of tourism in the Driftless Area (excluding Dane County) was almost $1.5 billion in direct visitor spending. *Id.* at 19-20.

Dr. Curt Meine, a conservation biologist and expert on the Driftless Area, described the "conservation culture" that defines the region, explaining that the Driftless Area "has played a disproportionately important role in the evolution of community-based conservation, watershed rehabilitation, ecological restoration, organic and conservation agriculture, and other creative approaches to individual and collaborative land stewardship." Doc. 1105 at 9.

2. Undue Adverse Impacts on Environmental Values

There is robust and extensive evidence in the record that the proposed CHC high-voltage transmission line and 17-story high towers would have significant and undue adverse impacts on the ecological, cultural, aesthetic, and socioeconomic values of Southwest Wisconsin. DALC/WWF presented expert testimony from four natural resource experts (Terry Ingram, Dr. Curt Meine, George Meyer and Dr. Don Waller) who provided detailed explanations and an inventory of the significant adverse impacts of the projects. Docs. 1042, 1069, 1080, 1099, 1105, 1106, 1107, 1108, 1136, 1137, 1138, 1158, 1165, 1171, 1174. The adverse impacts of the CHC transmission line and high towers are significant, and irreparable.

- ***Aesthetics and Tourism.*** The CHC towers would be 120 to 175 feet tall, and nearly 200 feet high at the Mississippi River crossing. Doc. 1193, FEIS at XXVIII. The visual blight of this proposed transmission line would impair the natural beauty of the area and harm the Driftless Area's outdoor recreation-based tourism industry. Doc. 1107 at 16-18, 22; Doc. 1105 at 13.

- ***Birds.*** The proposed transmission line would cut (1) directly across the Mississippi Flyway, the "most important bird migration corridor in central North America," Doc. 1108 at 26; (2) through the National Wildlife Refuge, which provides critical migratory bird habitat; and (3)

through or near five dedicated Important Bird Areas—which "provide essential habitat to one or more species of breeding or non-breeding birds, particularly species of conservation concern." Doc. 1193, FEIS at 56-57. Dr. Waller estimated the transmission line would kill nearly 20,000 birds every year from collisions, Doc. 40 at 1813, and further harm birds by destroying or damaging habitat and foraging areas. Doc. 1042 at 9-10, Doc. 1108 at 25-26. Southwest Wisconsin has significant conservation value for grassland birds, which are rapidly declining across most of the Midwest. Doc. 1193, FEIS at 54; Doc. 1108 at 25.

- ***Forests, Grasslands, Waterways.*** Construction of the CHC line would clear all vegetation from the full width of the right-of-way, Doc. 356, Application at 96, which would generally be 150 feet (*id.* at 3) and 260 feet through the Refuge. Clearing or expanding rights-of-way destroys and fragments habitat, creates edge impacts, and encourages the spread of invasive species. Doc. 1108 at 12-15, 17-20. The CHC transmission line would also have significant negative impacts on wetlands, streams, and hydrology. Doc. 1194, Public Comment by Dr. Joy B. Zedler (wetland ecologist); Public Comment by Dr. Barbara L Peckarsky (stream ecologist).

- ***Land Use Plans.*** This huge transmission line would run through and adjacent to numerous small rural communities and sensitive resource areas, causing significant conflicts with the communities' land use plans and their own visions for development. Doc. 1158 at 13-15; Doc. 1168 at 2-6. Significant concerns have been raised about impacts to recreation and conservation areas, many of which also have land use or management plans, including the Ice Age National Scenic Trail. Doc. 1105 at 14; Doc. 1194, Public Comment by Ice Age Trail Alliance, Inc.

- ***Takings of Private Property and Impacts on Private Land Use.*** The CHC transmission line would also require hundreds of acres for new and expanded rights-of-way through individual farmers' and landowners' private property. The Applicants' preferred route would impact 355

property owners and 58% of the 1,577 acres of right-of-way would be new. Doc. 829 at 106-07. This does not include additional acres needed for access roads, the sixteen laydown yards of 10+ acres each, helicopter landing zones, or work platforms. Doc. 829 at 18-19.

D. Summary of Public Response and Opposition

The CHC transmission line project is opposed by many people, organizations, local governments, and public officials that value the Driftless Area:

- ***Numerous local governments*** intervened in the PSC proceeding to oppose the transmission line, including Dane and Iowa Counties, the Towns of Arena, Lima, Vermont, Wingville, and Wyoming, and the Village of Montfort. Doc. 12. Many additional local municipalities and school districts filed resolutions and comments opposing the transmission line and/or requesting that the Commission consider alternatives. Doc. 1193, FEIS at 23-24.

- ***All of the State Senators and Representatives representing the area***—both Republicans and Democrats—wrote letters to the PSC, expressing concerns about impacts and urging the Commissioners to thoroughly explore alternatives to the CHC transmission line and towers. Doc. 1193, FEIS at 24; Docs. 1414, 1415, 1417, 1418.

- ***Numerous organizations and businesses*** also have raised concerns, including the Citizens Utility Board, Black Earth Watershed Conservation Association, Friends of Governor Dodge State Park, Prairie Enthusiasts, Madison Audubon and others; Wisconsin Farmers Union and Amish farmers; and local businesses such as Uplands Cheese, White Oak Savanna, Dreamy 280, and more. Doc. 1194; Doc. 29 at 2407, 2549; Doc. 25 at 2060; Doc. 1444.

- ***Individual citizens:*** More than 1,000 comments were filed by those opposing the proposed CHC transmission line. For three days on June 25, 26 and 27, about 1,300 Wisconsin residents attended and 100 testified at the Lancaster, Madison, and Dodgeville public hearings. Virtually all spoke out strongly against the CHC transmission line and asked the PSC to decline the proposed

CPCN and consider alternatives. Docs. 25, 26, 27, 28, 29, 30.

II. THE PSC'S PROCEEDINGS BELOW (PSC DOCKET 5-CE-146)

A. The Contested Case and Parties Before the PSC

The Applicants filed their Application for a CPCN on April 30, 2018 (Doc. 356, Application), which the PSC docketed as a contested case under Wis. Stat. Chapter 227. PSC Docket 5-CE-146. On January 3, 2019, the Administrative Law Judge granted DALC's and WWF's requests to intervene. Doc. 12. DALC is a not-for-profit conservation organization with many members who work to protect ecologically sensitive lands, historic properties, and natural resources in southwest Wisconsin's Driftless Area. WWF is a membership organization dedicated to protecting wildlife habitat and natural resources throughout the State of Wisconsin. About 50 individuals, groups of individuals, local governments, and organizations were granted intervention into this contested case. Doc. 12.

B. The PSC's Environmental Review

PSC Staff worked together with the Wisconsin DNR on a joint environmental review pursuant to each agency's obligations under WEPA, Wis. Stat. § 1.11. Doc. 1193, FEIS. The PSC issued the Final Environmental Impact Statement ("FEIS") in May 2019 and accepted written public comments through June 28, 2019. Doc. 1193, FEIS.

C. Amicus Briefs of Illinois and Michigan

The Attorneys General of Illinois and Michigan submitted an *amicus* brief asking that the PSC deny the CPCN. Doc. 111. They stated that approximately 10% of the line's cost is expected to be borne by Illinois electricity ratepayers, and 21% by Michigan electricity ratepayers with little corresponding benefit. Doc. 111 at 1. The Attorneys General contended that circumstances had changed drastically enough since MISO evaluated the MVP in 2011 that a more rigorous analysis of alternatives should be required before determining that the line was needed. Doc. 111 at 3–4.

D. PSC Decision Matrix

Following the evidentiary hearings, the PSC Staff produced a "Decision Matrix" to guide the Commissioners' deliberations regarding whether to issue a CPCN. Doc. 66. DALC/WWF separately filed a memorandum explaining serious concerns that the structure of the decision matrix omitted many of Wisconsin's statutory requirements for issuing a CPCN and collapsed many others into a generalized "public interest review" instead of requiring a specific determination on each statutory factor as required by law. Doc. 1445.

E. DALC/WWF's Motion for Recusal

On August 20, 2019, the PSC Commissioners met in an open session to discuss the merits of this contested case. Chair Valcq began the meeting by stating that Commissioner Huebsch would lead the discussion because "Commissioner Huebsch is our delegated Commissioner for MISO and OMS." Led by Commission Huebsch, the Commissioners then used the Decision Matrix as a roadmap for their deliberations and voted unanimously to grant the CPCN. Doc. 354.

On September 20, 2019, Petitioners DALC and WWF filed a Motion with the PSC to recuse and disqualify Commissioner Huebsch and Chair Valcq, alleging a variety of entanglements with parties centrally involved in this the case that created at least a "risk of bias" and lack of impartiality that in the totality of the circumstances requires disqualification under Wisconsin law. Doc. 266 (citing *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 64, 382 Wis. 2d 495, 553, 914 N.W.2d 21; *Guthrie v. Wisconsin Employment Relations Comm'n*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983)).[14] The Motion stressed that the avoidance of even the appearance of bias is central and important in Wisconsin's administrative law and judicial systems.

[14] Petitioners DALC and WWF are separately challenging the Commissioners' decision not to recuse themselves as a violation of federal due process. United States District Court for the Western District of Wisconsin, Case No. 19-CV-1007. The PSC's motion to dismiss that case based on, *inter alia*, federal abstention doctrine, is fully briefed and pending. If the federal court dismisses that lawsuit without prejudice because it holds that DALC/WWF should have

The Motion stated the following pertinent facts: Upon graduating from law school in 1999, Chair Valcq began working as regulatory counsel for We Energies and her legal practice encompassed all aspects of administrative and regulatory law and policy, including "trying cases in front of the PSC." Chair Valcq served as regulatory counsel for We Energies for 14 years and 11 months, until 2014. We Energies provides electricity to customers in Wisconsin, and its parent company WEC Energy Group Inc. owns more than 60% of ATC, the lead Applicant for the CPCN in the PSC's contested case. In 2017, Chair Valcq joined Quarles & Brady, which is We Energies' principal outside law firm and legal counsel, where she continued to represent We Energies in regulatory matters, including many cases at the PSC. Chair Valcq left Quarles & Brady on Friday, January 4, 2019, and began working as Chair of the PSC the following Monday, January 7, 2019.

In January 2019, Chair Valcq filed a "Recusal Policy" statement acknowledging her obligation to comply with Wisconsin's statutory and rule-based ethical obligations. Doc. 266, Ex. C. The Recusal Policy and its addendum lists 30 open matters before the PSC in which Valcq "personally and substantially participated" while working at We Energies or Quarles & Brady. Valcq agreed to recuse herself from those 30 matters and any new matter filed with the PSC within 12 months of Valcq's appointment in which she "was personally and substantially involved." *Id.* The 30 matters from which Valcq agreed to recuse herself include three cases involving We Energies and ATC—both owned by WEC Energy Group—as parties. *Id.*

In January 2019, Commissioner Michael Huebsch was appointed as a member of the formal Advisory Committee of the Midcontinent Independent System Operator (MISO). As explained above, MISO is not a governmental agency. MISO is a private entity owned by electric

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brought those federal claims in this state court suit, DALC/WWF will seek to amend their Petitions for Review in this case to add those federal claims and will respectfully request at that time that parties be allowed to submit supplemental briefs on federal constitutional issues to this court.

utilities and transmission companies that operate in the MISO region, including ATC, Dairyland Power, ITC and We Energies.[15] The MISO Advisory Committee's Charter states, "The Advisory Committee reports to the MISO Board of Directors" and "The MISO President and at least two other members of the MISO Board of Directors shall meet with the Advisory Committee at least quarterly."[16] The MISO Advisory Committee meets several times a year to discuss policy matters and "hot topics" that are often contested issues in PSC proceedings.[17]

As a MISO Advisory Committee member, Commissioner Huebsch engaged in regular meetings and conversations with MISO Board members during the time of the PSC contested case proceedings. Commissioner Huebsch attended at least three MISO Advisory Council meetings during the pendency of or in proximity to this contested case in March 2018 (in New Orleans), March 2019 (again in New Orleans), and June 2019 (in Traverse City, Michigan). Doc. 266. Documents on MISO's website demonstrate that these meetings included presentations and discussions on relevant, material contested facts and issues that the Applicants, MISO and other parties were contemporaneously litigating in this contested case. *Id.* The MISO Advisory Committee discussions included representatives of WEC Energy Group (which owns more than 60% of ATC) and ITC Midwest, LLC, while the contested case was pending. *Id.* Commissioner Huebsch also served as the Secretary of the Organization of MISO States (OMS). MISO provides funding to OMS, including a grant of $1,348,959 in 2018. *Id.*

At the time that Commissioner Huebsch was meeting with MISO and other parties in his capacity as the Secretary of OMS and member of MISO's Advisory Committee, MISO was also actively supporting ATC and the other Applicants as a party in the CHC case at the PSC. MISO

[15] https://cdn.misoenergy.org/Current%20Members%20by%20Sector95902.pdf.
[16] https://cdn.misoenergy.org/2019%20AC%20Charter328080.pdf.
[17] https://www.misoenergy.org/stakeholder-engagement/committees/advisory-committee/.

and ATC entered a "Common Interest Agreement" to jointly strategize and litigate this contested case, Doc. 266, Ex. B, and MISO filed legal briefs, presented expert testimony, and cross-examined expert witnesses to support Applicants in their efforts to secure a CPCN for the CHC line. Commissioner Huebsch voted in favor of the CPCN and subsequently resigned from his position on the PSC as of February 2020.

F. The PSC's Final Decision

On September 26, 2019, the PSC issued its Final Decision approving the Applicants' CPCN application, thereby allowing them to (a) exercise eminent domain powers to condemn and take private property for the new transmission line; and (b) charge utility ratepayers more than $2.2 billion over 40 years. Doc. 19. The PSC's Final Decision denied the Plaintiffs' Motion for Recusal and Disqualification. *Id.*

G. Petitions for Review

On December 13, 2019, DALC and WWF each filed a petition for review of the PSC's Final Decision. Pursuant to Wis. Stat. § 227.52, the petitions were filed in their respective principal places of business, Iowa County and Columbia County. On January 24, 2020, this Court consolidated those petitions for review into Dane County Circuit Court with other petitions filed by Dane County, Iowa County, Town of Wyoming, and Village of Montfort. Dkt. 95.

STANDARDS OF LAW

The Court's review of the Final Order is pursuant to Wisconsin's Administrative Review Law, Wis. Stat. Chapter 227: "Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law." Wis. Stat. § 227.57(11).

I. CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY (CPCN) (WIS. STAT. §§ 196.49, 196.491 AND WIS. ADM. CODE CH. PSC 111)

Developers must obtain a CPCN pursuant to Wis. Stat. § 196.491 and the PSC's rules at Chapter 111 of Wisconsin's Administrative Code to build a high-voltage transmission line, charge utility ratepayers for the transmission line and the developers' profit, and exercise eminent domain to take private property on the right of way. Wis. Stat. § 32.03(5)(a).

Wisconsin law sets out multiple specific requirements that must each and all be met before the PSC may grant a CPCN. The PSC must make an independent affirmative determination on eleven separate statutory criteria including that the proposed facility "satisfies the reasonable needs of the public for an adequate supply of electric energy," Wis. Stat. § 196.491(3)(d)(2), that 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), and that the 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)

If a CPCN applicant does not meet its burden of proving all eleven statutory factors, the PSC "shall reject the application or approve the application with such modifications as are necessary for an affirmative finding under par. (d)." Wis. Stat. § 196.491(3)(e).

II. THE WISCONSIN ENVIRONMENTAL POLICY ACT (WEPA) (WIS. STAT. § 1.11 AND WIS. ADM. CODE CH. PSC 4)

A CPCN application requires preparation of an Environmental Impact Statement (EIS) under WEPA and corresponding agency regulations. WEPA requires the state agencies to "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Wis. Stat.

§ 1.11(2)(e). The EIS must thoroughly analyze all direct, indirect, and cumulative environmental impacts of the project in combination with other past, present, and reasonably foreseeable actions that could have a significant impact on the environment. Wis. Stat. § 1.11; Wis. Admin. Code §§ PSC 4.30, NR 150.30.

III. WISCONSIN ENERGY PRIORITIES LAW (WIS. STAT. § 1.12)

Wisconsin's Energy Priorities Law establishes ranked priorities for meeting electricity demand and for siting transmission lines, which the PSC must consider when making decisions. The law provides that it is the "policy of the state, to the extent cost-effective and technically feasible," to consider less-polluting energy alternatives, § 1.12(4), and also requires that "the siting of new electric transmission facilities…to the greatest extent feasible … should follow the following order of priority": "[e]xisting utility corridors"; "[h]ighway and railroad corridors"; "[r]ecreational trails, to the extent that the facilities may be constructed below ground and that the facilities do not significantly impact environmentally sensitive areas"; then "[n]ew corridors." § 1.12(6). The PSC must implement the Energy Priorities Law "in making all energy-related decisions and orders." Wis. Stat. § 196.025(1)(ar).

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

In 2018, the Wisconsin Supreme Court ended its practice of deferring to administrative agencies' conclusions of law. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, represents a "significant break" from the Court's prior "hands off" approach in CPCN cases. In decisions like *Clean Wisconsin* and *Town of Holland*, the courts gave the PSC wide latitude to grant or deny a CPCN based on various public policy considerations that may be somewhat related to, but certainly are not the same as, the specific statutory CPCN criteria in Chapter 196. *See Clean Wisconsin, Inc. v. PSCW,* 2005 WI 93, ¶ 35, 282 Wis.2d 250, 700 N.W.2d 768; *Town of Holland v. PSCW*, 2018 WI App 38, ¶¶ 31-32, 382 Wis.2d 799, 913 N.W.2d 914.

Clean Wisconsin is no longer good law. The Supreme Court has dismantled the "great weight" deference scheme at the heart of *Clean Wisconsin*, and reaffirmed the following fundamental principles: (1) an administrative agency's power extends no further than the statute that delegates its legislative authority; and (2) it is solely the court's job (not the agency's) to interpret the statutory limits on the agency's power. *See Tetra Tech*, 2018 WI 75. Subsequent Supreme Court cases have followed *Tetra Tech* and emphasized that administrative agencies may not stray beyond the limits of their delegated statutory authority. *See, e.g., Myers v. WDNR,* 2019 WI 5, 385 Wis. 2d 176, 922 N.W.2d 47; *Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n,* 2018 WI 76, 382 Wis. 2d 624, 382 Wis. 2d 624. Shortly after *Tetra Tech*, the legislature amended Wisconsin's judicial review statute to both preclude courts from deferring to an agency's conclusions of law, Wis. Stat. § 227.57(11), and preclude agencies from claiming deference for their legal conclusions. Wis. Stat. § 227.10(2g).

Decades of "great weight" deference has allowed the PSC to become sloppy in reviewing CPCN applications, and that practice carried over to the present case. Instead of applying each CPCN factor as required by the statute, the Final Decision combines and conflates many of the eleven statutory factors into a generalized, nebulous, and essentially unreviewable question of "need." Doc. 1445. Relying on the outdated *Clean Wisconsin* and *Town of Holland* cases, the PSC's Final Decision: (1) mischaracterizes the standard of review, (2) makes conclusions of law based on non-statutory public policy criteria, (3) omits many required statutory findings altogether, (4) fails to sufficiently explain its reasoning for others, and (5) mislabels legal conclusions as "findings of fact."

The PSC's Final Decision reads as though *Tetra Tech* was never decided, reflecting an erroneous belief among the Commissioners that they can make policy, engage in "statecraft," and

issue a CPCN for non-statutory reasons. That flawed view offends basic principles of separation of powers and constitutional due process, and it undermines the public interest.

As a "creature of the legislature," the PSC must respect the legislature's careful balancing of statutory criteria to protect the public interest. It is the judicial branch's duty to independently interpret and enforce the limits of the PSC's delegated statutory authority without deference to the agency. If the courts continue to allow the PSC to operate beyond its statutory authority, the public will be deprived of legal protections and lose confidence in the regulatory process. That risk is elevated here, where two of the three Commissioners had extensive professional relationships and *ex parte* communication with party advocates for the CHC line that created, at the very least, the objective appearance and risk of bias.

As further explained below, this Court should: (1) review the PSC's legal conclusions, its interpretation of statutes and rules, and its application of legal principles to the facts without deference; and (2) reverse and remand the PSC's Final Decision with instructions for the agency to conform its review to the statutes, as written, that define the PSC's delegated authority.

ARGUMENT

I. THE PSC FAILED TO COMPLY WITH THE PLAIN LANGUAGE OF WISCONSIN'S CPCN STATUTE (WIS. STAT. § 196.491).

"[A]dministrative agencies are creatures of the legislature" and have "only those powers expressly conferred or necessarily implied by the statutory provisions under which [they] operate[]." *Myers*, 2019 WI 5, ¶ 21; *Wisconsin Power & Light Co. v. PSCW* 181 Wis.2d 385, 392, 511 N.W.2d 291, 293 (1994). Thus, "[e]very administrative agency must conform precisely to the statutes from which it derives power." *Mid-Plains Tel., Inc. v. PSCW*, 56 Wis. 2d 780, 786, 202 N.W.2d 907, 910 (1973). In short, agencies must follow and comply with the statutes as they are enacted by the Legislature.

In this case, the PSC erred because it did not follow the text of Wisconsin's CPCN statute but instead: (1) ignored several required statutory factors, and (2) collapsed the remainder into a generalized "public interest" review that included a wide range of non-statutory factors and public policy considerations. The PSC's failure to comply with the statutory requirements is a reversible error. *See Myers*, 2019 WI 5, ¶ 21 (reversing DNR order where the agency lacked specific statutory authority for its action); *Wisconsin Bell*, 2018 WI 76 (reversing agency's test for "discriminatory intent" under Wisconsin's Fair Employment Act because it strayed from the statutory language).

A. The PSC's Final Decision Does Not Comply with the Plain Language of Wisconsin's CPCN Statute (Wis. Stat. § 196.491).

Agencies, such as the PSC, must follow statutes according to their plain meaning—namely, the text of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.,* 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Under Wisconsin's CPCN statute, the PSC can approve an application for a CPCN "*only if* the commission determines *all of*" a list of eleven specific statutory criteria. Wis. Stat. § 196.491(3)(d). If an applicant fails to prove even one factor, the PSC must: (1) "reject the application," or (2) "approve the application with such modifications as are necessary for an affirmative finding under par. (d)." Wis. Stat. § 196.491(3)(e).

The PSC was required to make an affirmative finding for each applicable legal standard, and the Final Decision should have addressed each one as a separate decision point. *See Enbridge Energy Co., Inc. v. Dane County*, 2019 WI 78, ¶ 28, 387 Wis. 2d 687, 929 N.W.2d 572 (when interpreting a statute, "every word and every provision is to be given effect … None should be ignored"). But that is not what happened here. The PSC, in its Final Decision, ignored several of the statutory standards and blended the rest together with various non-statutory factors and public policy goals. *See* Doc. 19; Doc. 1445. That approach essentially rewrites and fails to comply with

the statute as written, and it enables the proposed transmission line developer to avoid meeting its burden of proof in satisfying the statutory requirements.

The PSC's analysis of "Project Need" beginning at page 17 of the Final Decision reflects how the PSC systematically expanded its own decision-making authority and failed to follow the plain language of the governing statute. The PSC begins by correctly stating the legal requirement (Wis. Stat. § 196.491(3)(d)(2)) that "[t]he Commission's assessment of need requires that the Commission find that the project, if constructed, *will satisfy the reasonable needs of the public for an adequate supply of electric energy*." Doc. 19 at 17 (emphasis added). This statutory language is relatively straightforward. "Need" means "the lack of something important" or a "requirement." Black's Law Dictionary, 11th ed. (2019). "Supply" means "the amount of goods available at a given price." (*Id.*) These definitions, in the context of § 196.491(3)(d), make clear that the legislature intended the PSC to determine the "supply" (*i.e.*, amount) of electric energy that the public "reasonably needs." The PSC in its Final Decision, however, never evaluates whether the proposed CHC transmission line is needed to ensure an "adequate supply" of electricity. Instead, the Final Decision states—without statutory support—that the PSC's assessment of "need" is "*not limited* to determining whether there is an adequate supply of electric power in the area," [*i.e.*, the statutory language] but instead can include a broad range of "*additional* [*i.e.*, non-statutory] relevant factors 'such as increased reliability, economic benefits, and public policy considerations.'" Doc. 19 at 17.

The PSC's erroneous belief that it is "not limited" to the statutory language directly contradicts one of the most basic rules of statutory construction. When interpreting a statute, "nothing is to be added to what the text states or reasonably implies." *Enbridge Energy*, 2019 WI

78, ¶ 23 ("[C]ourts should not add words to a statute to give it a certain meaning.") (citing *Fond du Lac Cty. v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989)).

The PSC carries this fundamentally flawed belief that it is "not limited" to the statutory language through the entire Final Decision. *See, e.g.,* Doc. 19 at 11 (describing the decision as involving "intertwined legal, factual, value, and public policy determinations"). For example, the Final Decision rejects Staff's "Base with Asset Renewal Alternative" based on a variety of "economic, reliability, and public policy benefits" that do not appear in the statute. *See* Doc. 19 at 33. Similarly, the PSC's Final Decision rejects solar energy and battery storage solutions based on the Applicants' unfounded (non-statutory) argument that such alternatives would not be "as effective at interconnecting new low-cost renewable generation" in states to the west of Wisconsin. Doc. 19 at 35. The Final Decision includes entire sections devoted to public policy factors, *e.g.*, Doc. 19 at 30-32 ("Access to Renewable Energy Sources"); *id.* at 78 ("Public Health and Welfare"); *id.* at 78 ("Public Health and Welfare").[18]

In sum, the PSC's Final Decision does not "conform precisely" to the CPCN statute; it *rewrites* the statute and does not comply with the law. The PSC's extra-statutory approach violates basic rules of statutory construction, offends principles of due process and fair play, and frustrates effective judicial review. The Court should reverse and vacate the PSC's "erroneous interpretation of law" and instruct the PSC to more closely conform its future review of CPCN applications and final decisions to the text of the CPCN statute. Wis. Stat. § 227.57(5); *see Myers*, 2019 WI 5; *Wisconsin Bell*, 2018 WI 76.

[18] The record contains significant debate regarding the extent to which the CHC transmission line "is needed" to deliver wind energy from Iowa. While the CPCN statute does not mention this factor, Wisconsin's Energy Priorities Law does direct state agencies to "rely to the greatest extent feasible on energy efficiency improvements and renewable energy resources" in meeting the state's energy demands. Wis. Stat. § 1.12(5). Thus, to the extent that the Governor's announced renewable energy goal is relevant to this docket, the PSC should have considered it under the Energy Priorities Law, and not as some sort of free-floating policy consideration that trumps or displaces the statutory CPCN analysis required by Wis. Stat. § 196.491.

B. The Final Decision Ignores and Fails to Explain Several Required CPCN Determinations.

Administrative agencies cannot ignore relevant statutory requirements and they must sufficiently explain the reasons for their decisions to enable effective judicial review. *Transp. Oil Inc. v. Cummings*, 54 Wis. 2d 256, 264–65, 195 N.W.2d 649 (1972). "If possible, every word and every provision is to be given effect. … None should be ignored." *Enbridge Energy Co.*, 2019 WI 78, ¶ 28. "It is only when the agency adequately states its reasons for taking an action that meaningful judicial review is possible." *Transp. Oil Inc.*, 54 Wis. 2d at 264.

In this case, the PSC ignored several required CPCN standards and failed to independently analyze and explain its legal conclusions regarding several others. For example:

- Wis. Stat. § 196.491(3)(d)(6) requires the PSC to find that the proposed transmission line "will not unreasonably interfere with the orderly land use and development plans for the area involved." All of Southwestern Wisconsin's state legislators and many of the rural communities in the area expressed concerns about the project's impact on the region's land use and development plans, and both Dane County and Iowa County filed testimony and legal briefs on this issue. Yet the Final Decision does not provide any explanation for the PSC's conclusion that the project "will not unreasonably interfere with the orderly land use and development plans of the project area." The PSC states its conclusion in one *pro forma* three-line sentence. Doc. 19 at 78.

- Despite extensive testimony from intervenors and the Commission's own Staff questioning the need for the CHC transmission line, the Final Decision contains no explanation (or even discussion) of the intertwined multiple legal conclusions located in the erroneously labeled "Finding of Fact" No. 11:

> 11. The general public interest and public convenience and necessity require completion of the project. Completion of the project at the estimated cost will not *substantially impair the efficiency of the applicants' service*, will not *provide facilities unreasonably in excess of probable future requirements*, and when placed

> in operation, will not *add to the cost of service without proportionately increasing the value or available quantity thereof*. Wis. Stat. §§ 196.491(3)(d)5 and 196.49(3)(b).

Doc. 19 at 7 (emphasis added). The PSC's legal conclusions regarding *three separate* CPCN standards are packed into this one "Finding of Fact" paragraph. *See* Wis. Stat. §§ 196.49(3)(b)(1), (2), and (3). These six lines of text are the only place these three independent legal standards are mentioned in the entire document. The Final Decision does not attempt to apply the statutory requirements as written, identify what evidence it found particularly relevant, or explain how it weighed that evidence against contrary evidence to reach its legal conclusion. The PSC simply and unlawfully collapses its review into an abrupt and generalized conclusion that "the general public interest and public convenience and necessity require completion of the project." Doc. 19 at 7. It is not clear how this court can even begin to review the PSC's conclusions of law on these three independent standards. There is simply no discussion.

- The PSC was required to determine that there would not be any "undue adverse impacts on [] environmental values," including, specifically "the aesthetics of land and water and recreational use" in order to grant a CPCN. Wis. Stat. § 196.491(3)(d)(4). Yet the PSC failed to discuss aesthetics or tourism impacts anywhere in the Final Decision even though multiple parties filed expert testimony and legal briefs on this issue. *E.g.*, Doc. 1158 at 13-15; Doc. 1168 at 2-6.

The PSC's failure to adequately explain how it arrived at its legal conclusions is consequential and should be fatal on judicial review. First, "courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *Transp. Oil*, 54 Wis. 2d at 264. The Wisconsin Supreme Court's opinion in *Transport Oil* painstakingly explains the requirement for agencies to adequately explain their decisions, and the Court quotes at length from the U.S. Supreme Court's seminal decision in *Securities and Exchange Comm'n v.*

Chenery Corp., 318 U.S. 80 (1943), Justice White's opinion in *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), and Professor Kenneth Culp Davis's treatise on administrative law. Quoting from *Burlington Truck Lines*:

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. … Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can became a monster which rules with no practical limits on its discretion.'

Transp. Oil Inc., 54 Wis. 2d at 266 (quoting *Burlington Truck Lines*, 371 U.S. at 167) (internal citations omitted). Agencies must "build a bridge from the evidence to the conclusion" or else the decision is "analytically inadequate—in a word, unreasoned." *Groves v. Apfel*, 148 F.3d 809, 811 (7th Cir. 1998); *see also Zblewski v. Schweiker*, 732 F.2d 75, 79 (7th Cir. 1984) (holding that the requirement for agencies to articulate the reasons for their legal conclusions is "absolutely essential for meaningful appellate review"); *Cotter v. Harris*, 642 F.2d 700, 705 (3d Cir. 1981) (same). When an agency fails to mention rejected evidence, "the reviewing court cannot tell if significant probative evidence was not credited or simply ignored." *Id.*

C. The Final Decision Reflects the PSC's Erroneous Belief That Granting a CPCN is "Statecraft" That Is "Not Limited" by Adherence to the Statutory Text.

The Final Decision cites *Clean Wisconsin* and *Town of Holland* for the PSC's belief that its authority to grant a CPCN is "not limited" to the statutory text and, instead, is a "*legislative determination involving public policy and statecraft*." Doc. 19 at 17-18, 78 (emphasis added); *see also id.* at 11 (the decision whether to grant a CPCN involves "intertwined legal, factual, value, and public policy determinations"). In *Clean Wisconsin*, the Court applied "great weight deference" to the PSC's interpretation of law and abandoned its constitutional role to review the legality of the PSC's issuance of a CPCN. 2005 WI 93, ¶ 35 (It is not "this court's place to decide whether the construction of the power plants at issue in this case is in the public interest."). The

Clean Wisconsin court went so far as to say that it would uphold the PSC's interpretation of Wisconsin's CPCN law "even if a more reasonable interpretation exists." *Id.* at ¶ 41. That proposition was questionable at the time, and clearly is incorrect following the Court's rejection of "great weight deference" in decisions like *Tetra Tech*, *Myers*, and *Wisconsin Bell*.[19]

The Wisconsin Supreme Court has "dismantled" the deference doctrine at the heart of *Clean Wisconsin*, and that decision is no longer good law. *Tetra Tech*, 2018 WI 75, ¶ 80. Clearly, issuing a CPCN is not "statecraft." *Cf.* Doc. 19 at 78. "Statecraft" is for elected legislators, not the appointed regulators who are responsible for following the law by implementing specific delegated legislative policies. The Final Decision loses sight of the fact that the PSC's authority *derives from* but cannot *go beyond* the agency's specific legislative mandate:

> The very existence of the administrative agency or director is dependent upon the will of the legislature; its or his [*sic*] powers, duties and scope of authority are fixed and circumscribed by the legislature and subject to legislative change.

Schmidt v. Dep't of Res. Dev., 39 Wis. 2d 46, 56, 158 N.W.2d 306 (1968); *see also Koschkee v. Taylor*, 2019 WI 76, ¶ 14, 387 Wis. 2d 552, 929 N.W.2d 600 (agencies possess "only those powers [that] are expressly conferred or [that] are necessarily implied by the statutes under which [they] operate"). That is what the Wisconsin Supreme Court meant when it observed that agencies are "creatures of the legislature," *Myers*, 2019 WI 5, ¶ 21, and why "every administrative agency must conform precisely to the statutes from which it derives power." *Mid-Plains Tel.*, 56 Wis. 2d at 780, 786.

[19] *Clean Wisconsin* cited *Westring v. James*, 71 Wis. 2d 462, 473 (1976), for the premise that issuing a CPCN "is a matter of public policy and statecraft and not in any sense a judicial question." *See* 2005 WI 93, ¶ 35. This quote is inapplicable and out of context. The agency decision at issue in *Westring* was not even a contested case, and the statute at issue (regarding the incorporation of municipalities) lacked the type of explicit statutory criteria that cabin the PSC's discretion in Wis. Stat. § 196.491. *See Westring*, 71 Wis. 2d at 475.

D. The PSC's Failure to Conform Its Decision to the Text of the CPCN Statute Undermines Judicial Review, Due Process, and the Rule of Law.

The PSC's erroneous belief that its authority is "not limited" to the text of the CPCN statute is an error of law with several harmful consequences. First, it materially changes the scope of the PSC's review, increasing the risk of arbitrary decision making. Second, it offends basic notions of due process and fair play. How can parties that oppose a proposed transmission line effectively litigate when the PSC can base its decision on a "moving target" of amorphous and unreviewable policy considerations? *See, e.g.,* Doc. 1445. Third, it undermines effective judicial review. What standard is a reviewing court to apply when the agency declares it is "not limited" to the statutory language and its Final Decision does not follow the applicable statutory provisions? *See Transp. Oil Inc.*, 54 Wis. 2d at 264–65 (agencies must conform decisions to statutory standards to "preserve the meaningful quality of judicial review") (quoting Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Admin. Orders*, 1969 Duke L. J. 199, 223, 224)).

Finally, the PSC's belief that it is "not limited" to the plain meaning of its statutory standards undermines the agency's accountability to the public and creates risks of regulatory capture. Without statutory safeguards, the temptations for a regulator to be inappropriately swayed by powerful interests are heightened. *See Schmidt*, 39 Wis. 2d at 57 (stating that requiring agencies to "conform precisely to the statute which grants the power" acts as a "check[] upon the abuse of power by administrative agencies" (quoting *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 507–08, 220 N.W. 929 (1928))). That last consideration is especially apt here, where two of the three Commissioners who voted to grant a CPCN had entanglements with parties that were appearing before them and advocating for the project. *See* Doc. 266; Section IV, *infra.*

The twin legal requirements for agencies to (1) explicitly make the statutory findings required by law, and (2) thoroughly explain their reasoning in reaching those conclusions promote

accountability, due process, and the rule of law. In *Transport Oil*, the Court held that "reversal is inevitable" when "the agency has not made the findings required by the statute nor given its reasons for the result." 54 Wis. 2d at 264–65. This is "both to preserve the meaningful quality of judicial review and to force the agencies to do their homework." *Id.* After many years of "great weight" deference, the PSC's decision-making has drifted away from the required statutory foundations. The Court should reverse and remand the Final Decision so the PSC can "rethink the problem" and tee up its conclusions of law for meaningful judicial review. *Transp. Oil Inc.*, 54 Wis. 2d at 264–65; *Myers*, 2019 WI 5, ¶ 21; *Wisconsin Bell*, 2018 WI 76.

II. THE FINAL DECISION UNLAWFULLY SHIFTS THE BURDEN OF PROOF, MISLABELS "CONCLUSIONS OF LAW" AS "FINDINGS OF FACT," AND EXCUSES THE APPLICANTS' FAILURE TO PROVE THEIR CASE BY A PREPONDERANCE OF THE EVIDENCE.

In contested cases, agencies must reach legal conclusions based on the preponderance of evidence and must adequately explain the reasons for their decisions. *Sterlingworth Condo. Ass'n, Inc. v. State, Dep't of Nat. Res.*, 205 Wis. 2d 710, 726, 556 N.W.2d 791 (Ct. App. 1996); *Transp. Oil*, 54 Wis. 2d at 264–65. Agencies cannot shift the burden of proof to intervenors. In this case, the PSC made several related legal errors in reaching its legal conclusions. First, the PSC mislabeled numerous conclusions of law as findings of fact. Second, the PSC based its legal conclusions on the "substantial evidence" standard that courts use to review agency decisions, rather than the more stringent "preponderance of the evidence" standard that applies to agency decision-making. Third, the PSC inappropriately shifted the burden of proof from the Applicants seeking a CPCN to the intervenors opposing it. Each of these constitutes legal error. Combined, they completely undermine the validity of the PSC's Final Decision. The PSC's structural errors are "danger signals" suggesting that "the agency has not really taken a 'hard look' at the salient

problems, and has not genuinely engaged in reasoned decision-making." *See Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970).

The Court should not let the structural flaws in the PSC's analysis distract from reviewing the agency's legal conclusions, without deference, to determine whether the PSC has appropriately interpreted and applied the law. "Due weight" under Wis. Stat. § 227.57(10) is "not a talisman" and depends on the strength of the agency's analysis and its power to persuade. *Tetra Tech*, 2018 WI 75, ¶ 79. Under these circumstances, little, if any, weight is "due" to the PSC's fundamentally flawed analysis. *Id.*; *Wisconsin Bell*, 2018 WI 76, ¶¶ 41–42.

A. The Final Decision Mislabels Many Legal Conclusions as "Findings of Fact."

Wisconsin's judicial review statute requires courts to "separately treat disputed issues of agency procedure, interpretations of law, and determinations of fact or policy within the agency's exercise of delegated discretion." Wis. Stat. § 227.57(3). Different standards of review apply to an agency's findings of fact § 227.57(6);[20] exercises of discretion § 227.57(8);[21] and conclusions of law § 227.57(11) ("Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law."). The PSC's determinations on each of the CPCN factors in Wis. Stat. § 196.491(3)(d), the adequacy of the EIS in Wis. Stat. § 1.11, and the application of the Energy Priorities Law in Wis. Stat. § 1.12 are conclusions of law. *See Town of Holland*, 2018 WI App 39, ¶ 23; *Citizens' Util. Bd. v. PSCW*, 211 Wis. 2d 537, 552–53 (Ct. App.

[20] "If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record."

[21] "The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion."

1997). Thus, under Wis. Stat. § 227.57(11) and *Tetra Tech*, the court must review the PSC's determinations *de novo* with no deference to the agency. *Tetra Tech*, 2018 WI 75, ¶ 84.

The PSC's Final Order mislabels its determinations on many of the CPCN statutory factors as "findings of fact" rather than "conclusions of law." *See* Doc. 19 at 6–8 ("Findings of Fact" numbers five through thirteen). This was improper and misleading. *Tetra Tech* and a long line of Wisconsin cases make clear that when an agency applies a statutory standard to a set of facts in the record, that is reviewed as a *conclusion of law,* not a finding of fact. "Whether the facts of a particular case fulfill a legal standard is a question of law we review de novo." *Tetra Tech*, 2018 WI 75, ¶ 84 (quoting *Vogel v. Grant-Lafayette Elec. Co-op*., 201 Wis. 2d 416, 422, 548 N.W.2d 829 (1996)). The court is "not bound by an agency's characterization of whether it is finding a fact or making a conclusion of law." *Citizens Util. Bd.*, 211 Wis. 2d at 550 (citing *Connecticut Gen. Life Ins. Co. v. DILHR*, 86 Wis. 2d 393, 405, 273 N.W.2d 206 (1979)).

Therefore, the Court should review the PSC's determinations regarding the CPCN standards as "conclusions of law," without deference to the agency, regardless of how the PSC mislabels and mischaracterizes them in the Final Decision.[22] *Tetra Tech*, 2018 WI 75, ¶ 84.

B. The Final Decision Inappropriately Bases Its Legal Conclusions on the "Substantial Evidence" Standard That Courts Use to Review Agency Decisions, Rather Than the More Stringent "Preponderance of the Evidence" Standard That is Applicable to Agency Decision Making.

The PSC erred by applying the wrong evidentiary standard in reaching its decision. In a contested case hearing, "[u]nless the law provides for a different standard, the quantum of evidence for a hearing decision shall be by the preponderance of the evidence." Wis. Admin. Code § HA

[22] The Final Decision does correctly label the PSC's ultimate conclusions that "[t]he project meets the requirements of Wis. Stat. § 196.491(3)(d)" and that the project "will not have an undue adverse impact on other environmental values as defined in Wis. Stat. § 196.491(3)(d)4" as conclusions of law. Doc. 19 at 9. The agency fails to explain how its determinations that *each* individual requirement of § 196.491(3)(d) is met can be factual findings when its determination that *all* requirements of § 196.491(3)(d) are met is a legal conclusion.

1.17(2). The Administrative Code defines "[p]reponderance of the evidence" to mean "the greater weight of the credible evidence." Wis. Admin. Code § HA 1.02(9). Even though no statute or regulation prescribes a burden of proof other than the "preponderance of the evidence" in CPCN hearings, the PSC held the Applicants to the weaker "substantial evidence" standard, lessening their burden of proof. *See* Doc. 19 at 20, 23–24, 31, 33, 35, 45–46, 50, 71. That wrongly applied standard constitutes reversible legal error. Wis. Stat. § 227.57(11).

The substantial evidence standard is used by courts to review an agency's factual determinations. That is *not* the standard for an agency to use in evaluating evidence during a contested case hearing. *Reinke v. Personnel Board*, 53 Wis. 2d 123, 136, 191 N.W.2d 833 (1971) ("[T]he substantial evidence rule is limited to judicial review of administrative determinations unless expressly otherwise provided by statute."). The substantial evidence standard sets a lower bar than the preponderance of the evidence standard. *Wisconsin Bell*, 2018 WI 76, ¶ 30 ("Substantial evidence does not mean a preponderance of the evidence.") (quoting *Milwaukee Symphony Orchestra, Inc. v. DOR*, 2010 WI 33, ¶ 31, 324 Wis. 2d 68, 781 N.W.2d 674). The PSC's use of an incorrect weaker standard for its decision-making is both contrary to law, Wis. Stat. § 227.57(5), and a material error in procedure that impaired the fairness of the proceedings or the correctness of the action, § 227.57(4). Therefore, this Court should reverse and remand the PSC's Final Decision for further proceedings applying the preponderance of the evidence standard.

C. The PSC Unlawfully Shifted the Statutory Burden of Proof by Requiring Its Own Staff and Intervenors to Conclusively Prove the Viability of Alternatives to the Proposed CHC High-Voltage Transmission Line.

The applicants for a CPCN bear the statutory burden of production and persuasion regarding every relevant statutory factor. *Sterlingworth Condo. Ass'n,*, 205 Wis. 2d 710, at 726 (holding that *the applicant* in an administrative proceeding assumes the burden of establishing compliance with all statutory requirements) (citing *State v. McFarren*, 62 Wis. 2d 492, 499–500,

215 N.W.2d 459 (1974) ("The customary common law rule that the moving party has the burden of proof—including not only the burden of going forward but also the burden of persuasion—is generally observed in administrative hearings.")).

In this case, the PSC frequently rejected evidence of alternatives offered by its own Staff and intervening parties, including DALC and WWF, based on the theory that the intervenors did not provide "conclusive evidence" or "independent modeling" to prove the feasibility of those alternatives "with certainty." However, Intervenors cannot be legally required to conclusively "prove" the existence of preferable alternatives to the CHC transmission line. The Applicants bear the burden of proof throughout the case, and that cannot be shifted unto others. *See Wisconsin Bell,* 2018 WI 76, ¶ 3 (overturning agency's method for determining "employment discrimination" because it "excuses the employee from [the] burden of proving discriminatory intent"). The PSC's requirement that intervenors conclusively prove the feasibility of alternatives is reversible error under Wis. Stat. § 227.57(5).

The Illinois Supreme Court addressed a similar situation in which the Illinois Commerce Commission—the state's public utilities regulatory commission—impermissibly shifted the burden of proof *from* the utility to prove the reasonableness of nuclear plant construction costs *onto* the intervenors to prove the costs to be *un*reasonable. *People Ex Rel. Hartigan v. Illinois. Commerce Comm'n*, 117 Ill. 2d 120 (1987). The Court explained that the "Commission is an investigator and regulator *of the utilities*," and therefore "may not rely on intervening parties … to challenge the evidence offered by the utility":

> Nothing in the Public Utilities Act requires any party other than the Commission and the utility seeking a rate increase to participate in a ratemaking proceeding. Thus, any participation by persons or groups opposing an increase is voluntary and purely fortuitous. It is possible that no person or entity will seek to intervene when a rate increase is sought; in other cases, those who intervene may lack the financial resources or the incentive to launch a vigorous challenge to all aspects of the

> increase. (*See Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Com.* (D.C. Cir. 1971), 449 F.2d 1109, 1118.) **Requiring intervenors to establish unreasonableness is therefore no substitute for requiring proof of reasonableness. The difference is significant.**

People Ex Rel. Hartigan, 117 Ill. 2d at 135–136 (emphasis added).

Assume, for example, that no civic or conservation organizations had voluntarily chosen or were financially able to present expert testimony and hire attorneys in order to effectively intervene in a CPCN proceeding. Under Wisconsin's statutes, the PSC, as a public agency, still has an affirmative responsibility to protect the public's interest by ensuring that the applicant for a CPCN meets its burden of proof in satisfying each and all of the statutory requirements to support its request to charge millions of dollars—in fact, billions in this case!—to utility ratepayers and to exercise eminent domain to take private property.

Wisconsin's CPCN statute (Wis. Stat. § 196.491), WEPA (Wis. Stat. § 1.11), and the Energy Priorities Law (Wis. Stat. § 1.12) all put an affirmative burden on CPCN applicants and the PSC to evaluate and consider potential less-damaging alternatives. For example:

- **The CPCN law, Wis. Stat. § 196.491(3)(d)(3)** requires the PSC to determine that 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" before issuing a CPCN. The word "alternative" means "[b]eing one of a number of possible choices or courses of action." *Alternative*, American Heritage Dictionary (5th ed. 2020). In addition, "source" is defined as "A…thing from which something comes into being or is derived or obtained: *alternative sources of* energy…." *Source*, American Heritage Dictionary (5th ed. 2020). Put together, "alternative sources" in the context of § 196.491(3)(d)(3) means that the PSC must evaluate other potential methods or "courses of action" that could achieve the goals of the project to determine whether the CHC transmission line is in the public interest. That is

completely different than only looking at alternatives that adjust portions of the route as the PSC did in this case.

- **The CPCN law, Wis. Stat. § 196.491(3)(d)(4)** prohibits the PSC from issuing a CPCN if the proposed project will have an "*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) (emphasis added). Black's Law Dictionary defines "undue" as "[e]xcessive or unwarranted," which implies that if less-damaging alternatives are feasible, then *any* incremental negative impacts of the project are "undue." *Undue*, Black's Law Dictionary (11th ed. 2019).

- **WEPA and the Energy Priorities Law** also require the PSC to consider alternatives "in making all energy-related decisions and orders." The core principle of WEPA is that agencies must develop and consider real alternatives, as more fully explained below. Wis. Stat. § 1.11(2)(c)(3), (2)(e). The Energy Priorities Law requires transmission facilities to follow the prioritized siting locations for transmission lines "to the greatest extent feasible that is consistent with…protection of the environment…." Wis. Stat. § 1.12(6).

Instead of reviewing the record to determine whether the Applicants met their burden of proof to persuasively rule out the viability of less-damaging alternatives, the PSC's Final Decision concluded *that the Intervenors* failed to sufficiently demonstrate the "feasibility" of less-damaging transmission alternatives, and "failed to demonstrate" that these alternatives would be "as effective" at meeting various non-statutory public policy objectives such as enabling wind power development in states west of Wisconsin. Doc. 19 at 35. Similarly, the PSC rejected Staff's "Base With Asset Renewal Alternative" because Staff did not prove, with "certainty" that it was "truly feasible or implementable." Doc. 19 at 33.

The fundamental problem with the Final Decision's treatment of alternatives was that *it was not DALC or WWF's legal responsibility*, as voluntary intervenors, to conclusively prove the feasibility and effectiveness of alternative transmission solutions. DALC and WWF did make their case by presenting extensive, detailed highly-credible testimony by a team of leading energy experts demonstrating that ATC's analysis of battery storage and alternative transmission solutions was grossly inadequate and deficient. *See* Section I(F)(5), *supra*; Docs. 1097, 1180, 1053, 1183. The PSC should have applied this evidence to each of the relevant CPCN statutory standards and requirements to determine whether Applicants met their burden of proving that the CHC transmission line was necessary and in the public interest. The PSC did not do so. Instead, the PSC's cursory rejection of DALC/WWF's testimony—based on the theory that *the intervenors* did not conclusively prove the feasibility of battery storage alternatives—flipped the burden of proof and excused the Applicants' deficient analysis. *E.g.*, Doc. 19 at 35.

Similarly, it was not the PSC *Staff's* job to fully develop the "Base With Asset Renewal Alternative" to prove, with certainty, that it was "truly feasible or implementable." Doc. 19 at 33. Considering Staff's strong and credible testimony that the alternative *could* reasonably be a better, less costly, less environmentally damaging and more feasible solution, the PSC should have determined whether *Applicants* provided sufficient evidence to rule it out. Instead, the PSC rejected Staff's testimony as not sufficiently developed "other than as a modeling comparison to the project." *Id.* at 33. In other words, the Final Decision put the burden on Staff and Intervenors to prove the viability of alternatives and excused the Applicants from their statutory burden of proving, by a preponderance of the evidence, that the CHC transmission project was the most appropriate and reasonable alternative under the applicable statutory criteria.

The consideration of alternatives was not the only place where the PSC's Final Decision inappropriately shifted the burden of proof from Applicants to Intervenors. For example:

- The parties disagreed on the proper "discount rate" for long-term economic impact modeling. Despite acknowledging that the discount rate "significantly impacts the results" and that "no one can be certain which rate more accurately will predict the future," Doc. 19 at 24, the PSC simply accepted the Applicants' rate because its own Staff and Intervenors had not adequately proven the superiority of their discount rates. *Id.*

- Staff also challenged the cost savings metric the Applicants used to calculate the purported economic benefits of the proposed transmission line. Like the discount rate, the PSC's Final Decision acknowledges that the chosen cost metric "significantly impacts the results." Doc. 19 at 24. But the Final Decision ignored Staff's testimony because Staff did not provide "independent modeling"[23] proving that the Applicants' projected benefits were "so unreliable as to be dismissed by the Commission." Doc. 19 at 26. In other words, the PSC did not require ATC and its fellow applicants to prove the validity of its proposed economic analysis by a preponderance of evidence in the record, but unlawfully shifted the burden of proof to the Staff and Intervenors to prove that the Applicants' method is "so unreliable as to be dismissed by the Commission." Doc. 19 at 26.

In summary, the Applicants bear the legal burden and statutory responsibility to prove the case for a CPCN with a preponderance of evidence in the record. The participation of intervenors in regulatory proceedings is "voluntary and purely fortuitous." *People ex rel. Hartigan*, 117 Ill. 2d at 135–36. The PSC Final Decision erroneously shifted the burden of proving the reasonableness

[23] In several places, the Final Decision criticizes intervenors for not running their own "PROMOD or other modeling of their own" to test the assumptions of the applicants. *See, e.g.,* Doc. 19 at 22, 26. PROMOD is a proprietary software that costs many thousands of dollars to license and run. The Applicants bear the statutory burden to establish each of the necessary findings by a preponderance of the evidence and the PSC should not have required Intervenors to conduct independent PROMOD runs as a threshold for the PSC to consider their testimony.

and viability of transmission alternatives from the Applicants to Staff and Intervenors. This Court should reverse and remand the PSC's errors of law pursuant to Wis. Stat. § 227.57(5). *See Wisconsin Bell*, 2018 WI 76, ¶¶ 1–3.

D. The PSC's Flawed Legal Analysis and Conclusions Are Not Entitled to "Due Weight" Under *Tetra Tech* and Applicable Laws.

A reviewing court's decision regarding the weight that is "due" to an agency's decision has fundamentally changed. It is not the same as "due weight deference" under Wisconsin's old common law three-tier deference system. *Tetra Tech*, 2018 WI 75, ¶ 78. Instead, the "due weight" required by Wis. Stat. § 227.57(10) is a "matter of persuasion, not deference." *Id.*

To be "persuasive," agencies must provide a reasoned explanation for their legal conclusions, which the PSC's Final Decision frequently did not do. *Transp. Oil*, 54 Wis. 2d at 264–65. The need for reasoned explanation is *especially* important for the numerous issues where PSC's Final Decision overrules or discounts evidence offered by its own expert Staff, as well as Intervenors including DALC-WWF. Courts can remain the "ultimate authority or final arbiter of the law" while still respecting the agency's "experience, technical competence, and specialized knowledge." *Tetra Tech,* 2018 WI 75, ¶ 78. But, in this case, the court should recognize that the PSC's "experience, technical competence, and specialized knowledge" are housed primarily within the PSC's professional Staff, whose testimony the Commissioners rejected. The fact that the Final Decision frequently ignores or overrules the Staff's expert witness testimony, without reasoned explanation for finding the Applicants' evidence more convincing, further reduces the Final Decision's persuasiveness. The procedural irregularities involving significant contact and entanglements between PSC Commissioners and active litigating parties in this case, together with the other structural defects in the Final Decision, represent a "combination of danger signals" that

should inspire a close and searching review by this Court. *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970).

In the final analysis, "due weight" cannot save an agency decision that is structurally flawed or that exceeds the agency's statutory authority. *See Wisconsin Bell*, 2018 WI 76, ¶ 42–43. In this case, the many structural flaws in the PSC's analysis, including the PSC's failure to conform its analysis to the plain statutory language, compel reversal irrespective of the "weight" that may be due to the PSC's specialized knowledge—mostly to its Staff—under Wis. Stat. § 227.57(10).

III. THE PSC VIOLATED THE WISCONSIN ENVIRONMENTAL POLICY ACT (WEPA) AND ITS REQUIRED PROCEDURES.

WEPA's purpose is to encourage state agencies to make better, smarter, and more environmentally-protective decisions by ensuring that agencies have all of the relevant information and that they rigorously explore and objectively evaluate all reasonable alternatives in order to avoid undue, adverse environmental impacts and harms. Wis. Stat. § 1.11. Agencies must analyze direct, indirect, and cumulative environmental impacts of proposed projects. Agencies must solicit and consider public input. If an agency does not have this information, or does not fully and fairly consider the information, it has not satisfied WEPA.

The PSC's determination that the Environmental Impact Statement (EIS) is adequate is "a conclusion of law." *Clean Wisconsin*, 2005 WI 93, ¶ 190. Thus, under *Tetra Tech* and Wis. Stat. § 227.57(11), this court must independently determine whether the agency's environmental review meets WEPA's legal requirements without any deference to the PSC. *Tetra Tech*, 2018 WI 75, ¶108. The PSC's EIS for the CHC transmission line was hurried, ducked key issues, and is legally inadequate in multiple ways. This is fatal to the PSC's decision to issue a CPCN.

A. The PSC Failed to Develop, Consider, and Evaluate Reasonable Alternatives.

WEPA requires state agencies to fully and fairly consider all reasonable alternatives to an environmentally harmful project. Wis. Stat. § 1.11(2)(c)(3), (2)(e). The PSC must "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action." § 1.11(2)(e). An EIS must include "[a]n evaluation of the reasonable alternatives to the proposed action and significant environmental consequences of the alternatives." Wis. Admin. Code § PSC 4.30(3)(c). The Wisconsin Supreme Court has emphasized that this consideration of alternatives requires "[t]horough agency action" to "assure that alternatives are adequately explored in the initial decision-making process, to provide an opportunity for those removed from that process to evaluate the alternatives, and to provide evidence that the mandated decision-making process has taken place." *Wisconsin's Envtl. Decade, Inc. v. PSCW*, 79 Wis. 2d 161, 255 N.W.2d 917 (1977).

WEPA was modeled on the National Environmental Policy Act (NEPA) and agencies must follow the federal Council on Environmental Quality's (CEQ) guidance on NEPA compliance. Wis. Stat. § 1.11(2)(c); *see also* Wis. Admin. Code § PSC 4.30(1)(a). CEQ's regulations explain that the alternatives analysis "is the heart of the environmental impact statement" and "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." 40 C.F.R. § 1502.14. CEQ regulations require agencies to:

> (a) *Rigorously explore and objectively evaluate all reasonable alternatives*, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
>
> (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
>
> (c) Include reasonable alternatives not within the jurisdiction of the lead agency.

40 C.F.R. § 1502.14 (emphasis added).

The first step in determining what alternatives are reasonable is defining the underlying "purpose and need" for the project. It must be defined broadly enough to not exclude reasonable alternatives. The Applicants argue that the CHC transmission line is "needed" to decrease "congestion" so that more power can flow between Iowa and Wisconsin. Doc. 357 at 31. But, the FEIS does not even conclude that there *is* a need for this project, stating that the agencies' evaluation of need and alternatives is "ongoing" and "staff anticipates its review to continue." Doc. 1193, FEIS at 60. The PSC ducked this core issue in the FEIS.

WEPA requires the PSC to consider "all reasonable alternatives" to meet *the underlying goal* of the CHC project (*i.e.*, relieving congestion), not just alternative ways to build a transmission line. Federal court decisions on NEPA, which Wisconsin courts look to for guidance in interpreting WEPA, *Wisconsin's Envtl. Decade, Inc.*, 79 Wis. 2d at 174–75, emphasize that the agency cannot constrict the scope of its alternatives analysis in ways that effectively dictate the developer's preferred outcome. The alternatives analysis "is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals." *Van Abbema v. Fornell,* 807 F.2d 633, 638 (7th Cir. 1986) (emphasis in original). "NEPA mandates a searching inquiry into alternatives," and if the agency "excludes what truly are reasonable alternatives, the EIS cannot fulfill its role." *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997).

Simmons, which deals with a proposed dam, is closely analogous to the present transmission line case, and explains the agency's duty to consider "all reasonable alternatives":

> When a federal agency prepares an Environmental Impact Statement (EIS), it must consider "all reasonable alternatives" in depth. 40 C.F.R. § 1502.14. No decision is more important than delimiting what these "reasonable alternatives" are. That choice, and the ensuing analysis, forms "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. To make that decision, the first thing an agency must define is the project's purpose. *See Citizens Against Burlington, Inc. v. Busey*,

> 938 F.2d 190, 195-96 (D.C. Cir. 1991). The broader the purpose, the wider the range of alternatives; and vice versa. The "purpose" of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. § 4332(2)(E).

Simmons, 120 F.3d at 666 – 667.

In *Simmons*, the Court rejected the U.S. Army Corps of Engineers' EIS because it confined its analysis to the applicants' preferred "single-source idea" (*i.e.*, damming a single lake for a drinking water source) instead of exploring broader alternatives such as purchasing water from another source. *Id.* The Court concluded that the Army Corps "defined an impermissibly narrow purpose for the contemplated project," and reversed the EIS. *Id.*

Like the Army Corps in *Simmons*, the PSC accepts the Applicants' *narrow purpose* of building a transmission line instead of looking more broadly at alternative transmission solutions that could relieve congestion without building a new high-voltage line. NEPA and WEPA require agencies to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." *Simmons,* 120 F.3d at 669, quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991) (Buckley, J., dissenting). An agency may not show "blind reliance on material prepared by the applicant in the face of specific challenges raised by opponents." *Van Abbema*, 807 F.2d 633. In this case, the PSC relied entirely on self-serving and flawed analyses provided by the transmission developers. This was a material error of law that requires reversal under Wis. Stat. § 227.57(5).

1. The PSC failed to independently evaluate alternative transmission solutions to meet the underlying purpose of reducing transmission congestion.

The PSC failed to adequately consider alternative technologies—options other than building a new high-voltage transmission line—that could reduce transmission congestion. As explained above, DALC and WWF expert witnesses provided comprehensive, compelling, and credible evidence of alternative technologies like solar generation, energy storage, energy efficiency, and demand response that can be designed and deployed to have a similar transmission "function" as a new transmission line, and with less environmental damage.[24] There is no evidence whatsoever that the PSC did any independent analysis of these alternatives, as required by 40 C.F.R. § 1506.5 ("[t]he agency shall independently evaluate the information submitted and shall be responsible for its accuracy"). The FEIS relies entirely on self-serving analyses presented by the transmission developers. *See* Doc. 1193, FEIS.[25] Thus, the PSC abdicated its legal duty to "study, develop, and describe" "all reasonable alternatives" to the proposed transmission line.

2. The PSC failed to develop and consider alternative routing options that would have less environmental impact.

The PSC similarly failed to develop and describe alternative routing options that would avoid cutting through the National Wildlife Refuge or the Driftless Area. Again, the EIS relies entirely on the Applicants' selected routing alternatives without any independent analysis. In just two sentences, the FEIS accepts as fact the Applicants' assertion that the transmission line must cross the Mississippi River at Cassville. Doc. 1193, FEIS at 98. The FEIS similarly ignores

[24] Note that DALC and WWF raised the critical importance of considering alternative transmission solutions multiple times, including in scoping comments (submitted January 2019), comments on the Draft EIS (submitted April 2019), and comments on the Final EIS (submitted June 2019). Because of the PSC's deeply flawed public participation process, addressed in greater detail below, *none* of these filings were before the Commissioners for consideration as it determined the adequacy of the FEIS.

[25] The EIS makes clear that the PSC relied on the *Applicants'* evaluation of alternatives rather than conducting an independent review as required by law. For example, Section 3.9 is titled "*Applicants'* Alternatives to the Proposed Project," and 3.9.1 begins, "*[t]he applicants* considered several NTAs to the proposed Cardinal-Hickory Creek project …." Doc. 1193, FEIS at 94. Section 3.9.2 provides "*Applicants' evaluation* of non-transmission system alternatives," and 3.9.4 provides "*Applicants' evaluation* of transmission system alternatives." Doc. 1193, FEIS at 96, 99 (emphasis added).

evidence of other planned projects outside the Driftless Area, including the SOO Green Renewable Rail line and the Grain Belt Express line. Doc. 1270 at 6.

3. The PSC failed to require further development of Staff's Base with Asset Renewal Alternative as a less environmentally-harmful alternative.

As discussed above, the PSC ignored its own Staff's testimony regarding a "Base With Asset Renewal Alternative" that could have potentially served the transmission need identified by Applicants at lower overall cost and with less environmental damage. Doc. 19 at 33. An agency must "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14. The FEIS only considered the Base With Asset Renewal Alternative in discussing the need for the transmission line—it did not evaluate this option as an actual "alternative" under WEPA and did not compare the environmental impacts of this option to the impacts of the proposed project. Accordingly, the PSC failed to "develop, study, and describe" "all reasonable alternatives," as required by law, and the Commission's implied determination that the FEIS meets the requirements of WEPA is legally erroneous and must be reversed. Wis. Stat. § 227.57(5).

B. The PSC Failed to Adequately Consider Direct, Indirect, and Cumulative Impacts, as Required by WEPA.

The FEIS ignores or fails to adequately consider serious direct, indirect, and cumulative impacts of the proposed transmission line. An EIS must include "[t]he environmental impact of the proposed action" and "[a]ny adverse environmental effects which cannot be avoided should the proposal be implemented." Wis. Stat. § 1.11(2)(c). "Each EIS shall evaluate reasonably foreseeable, significant effects to the human environment and significant socioeconomic effects of the proposal and its alternatives." Wis. Admin. Code § PSC 4.301)(b). The impacts analysis must include "direct, indirect and cumulative environmental effects" and both "short-term and long-term effects." § PSC 4.30(3). Cumulative impacts are those that "result[] from the incremental

impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of [who] undertakes such other actions." 40 C.F.R. § 1508.7. In addition, "[t]he information [in environmental documents] must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential." 40 C.F.R. § 1500.1(b).

The PSC cannot limit its WEPA analysis only to "direct" effects. *Wisconsin's Envtl. Decade, Inc. v. PSCW*, 79 Wis. 2d 409, 428, 256 N.W.2d 149 (1977). It must take a "'hard look' at environmental consequences," *Habitat Educ. Center, Inc. v. Bosworth*, 363 F. Supp. 2d 1070, 1075 (E.D. Wisc. 2005) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)), and cannot shift the burden to an intervenor "to prove to the Commission's satisfaction that significant environment effects would be produced." *Wisconsin's Envtl. Decade, Inc.*, 79 Wis. 2d at 430. "[T]he burden of compliance with WEPA was upon the Commission." *Id.* at 430.

1. The EIS failed to adequately consider the direct impacts of bird mortality.

The PSC's EIS failed to acknowledge or consider the scope and magnitude of impacts on birds, which is especially troubling because the proposed transmission line would cut east-west through the Upper Mississippi River National Wildlife and Fish Refuge—a primary purpose of which is to provide a refuge for migratory birds—and across the Mississippi Flyway, a major north-south corridor for migratory birds. The EIS provides *no estimate or range of the anticipated number* of birds expected to be killed from collisions with the proposed line, claiming it would be too difficult to quantify, Doc. 1193, FEIS at 203, although DALC/WWF's expert Dr. Don Waller testified that a fair estimate would be about 20,000 birds per year. Doc. 40 at 1813–14. The PSC's inability to precisely quantify bird mortalities does not excuse the agency's failure to estimate the project's likely impact on birds for the public's and decisionmakers' understanding. *See Wisconsin's Envtl. Decade, Inc.,* 79 Wis. 2d at 434.

2. The EIS fails to adequately consider impacts to whooping cranes, bald eagles, and other special status species.

The EIS also failed to discuss impacts to specific special status species, including whooping cranes, which are federally endangered, even though experts and the public raised significant concerns, Doc. 1108 at 5, 27–28; Doc. 1040 at 13–14; Doc. 1264; Doc. 1287, and offered proof of whooping cranes in the National Wildlife Refuge where the CHC transmission line would run. Doc. 1270 at 30.

While the FEIS acknowledged that other protected and endangered species may exist near the proposed routes, neither the agencies nor the Applicants carried out on-the-ground surveys to determine the species' locations. *See, e.g.*, Doc. 1193, FEIS at 246, 305, 372, 451. While DNR knew there were records of bald eagle nests very close to the proposed route, the CPCN was approved without any on-the-ground surveys to determine the exact locations, Doc. 1193, FEIS at 305, and *with no analysis* of the impacts of a high-voltage line built near a bald eagle nest.

3. The EIS fails to adequately consider the cumulative impacts of the CHC transmission line together with other large transmission projects in western Wisconsin.

The PSC must consider how the CHC transmission line will impact the environment in combination with other projects and activities in the same area such as the CAPX 2020 and Badger-Coulee 345-kV transmission lines in southwest and central Wisconsin. Doc. 1193, FEIS at 107. The EIS acknowledges that the "associated cumulative impacts" of these very large high-voltage transmission projects "encompass large portions of western, southwestern, and southcentral Wisconsin," *id.*, but the agencies *never actually evaluated* the admittedly "important analysis" of cumulative impacts. The EIS does not consider or analyze the *cumulative* impact of the CHC line on the environment, resources, species, and the overall landscape and aesthetics.

4. The EIS fails to adequately evaluate the direct and indirect economic impacts to southwestern Wisconsin's tourism economy.

The EIS also fails to analyze harmful impacts to Driftless Area tourism and economy. The EIS acknowledges that many commenters raised concerns about negative impacts to tourism (*e.g.*, Doc. 1193, FEIS at XXIX, 10, 147, 165, 330, 380, 425, 456), but simply notes that there may be "negative affects [sic]" to tourism and lists specific tourism attractions. *E.g.*, Doc. 1193, FEIS at 166, 255, 382. There is no analysis of how much Driftless Area tourism will likely decline, or what the economic impacts would be on businesses and communities, beyond a brief acknowledgment that decreases in tourism could decrease economic activity. Doc. 1193, FEIS at 166. This does not provide adequate information for decisionmakers as WEPA requires.

C. The PSC Violated WEPA's Procedural Requirements by Prohibiting Parties to the Contested Case from Submitting Comments on the Final Environmental Impact Statement.

The PSC violated WEPA's procedural requirements by prohibiting DALC, WWF, and other intervenors from submitting public comments on the Final EIS. Doc. 16. Under WEPA, the public must be given an opportunity to comment on any proposal for which an EIS is required. Wis. Stat. § 1.11(2)(d); Wis. Admin. Code §§ PSC 4.30(5); PSC 4.50(1)(a)(1); NR 150.04(2)(g). The PSC must provide "[a]dequate opportunities" and "adequate time" for the public to be heard on environmental impact statements. Wis. Stat. § 196.025(2). "[P]ublic scrutiny [is] essential" for environmental analyses, 40 C.F.R. § 1500.1(b), and agencies must "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures" and to "[s]olicit appropriate information from the public." 40 C.F.R. § 1506.6.

An agency must "internalize opposing viewpoints into the decision-making process to ensure that an agency is cognizant of all the environmental trade-offs . . . To effectuate this aim, NEPA requires not merely public notice, but public participation in the evaluation of the environmental consequences of a major federal action." *State of Cal. v. Block,* 690 F.2d 753, 771 (9th Cir. 1982). This reasoning also applies to WEPA. *See Larsen v. Munz*, 167 Wis. 2d 583, 599,

482 N.W.2d 332 (1992). WEPA's encouragement of "effective citizen participation" is "consistent with Wisconsin's political traditions favoring citizen participation in government." *Id.*

The PSC's approach was perplexing and legally flawed. The public could provide comments on scoping and the Draft EIS, but those comments were not provided to the Commissioners. Doc. 40 at 2008-09. Only comments on the *Final* EIS were included in the record. Thus, the Commissioners would never see comments noting problems in the Draft EIS unless the commenter filed *another* set of comments on the Final EIS. This counterintuitive process limits the value of public input and strips the Commissioners of valuable insight for decision-making.

In addition, DALC/WWF and other intervenors *were categorically barred from submitting public comments on the Final EIS*. *See* Doc. 16. Essentially, the PSC decided that if an individual or organization exercised its legal right to participate in the CPCN proceeding, they were *stripped of the right given to all members of the public to comment on the Final EIS*. The PSC's decision to bar parties from filing comments undermines the public participation element of WEPA and reduces the value of the public comment process.[26] DALC, WWF, and other intervenors devoted great time and resources to examining the relevant environmental issues and provided comprehensive comments on the FEIS. The ALJ's order rejecting these comments was improper, violated WEPA, and should be reversed. Doc. 16.

Public participation is a core element of WEPA. Public comments often provide important information that is overlooked by the agency, but the public comment process also fosters public trust in the agency's process. The PSC's decision to bar intervenors from submitting public comments is a legal error and requires reversal pursuant to Wis. Stat. § 227.57(4)–(5).

[26] Strangely, the FEIS itself seems to acknowledge that parties were supposed to be able to comment on the FEIS: "At the public hearing sessions, a court reporter will record the oral and written testimony presented by Commission staff, utility staff, staff of other agencies, *representatives of intervening organizations*, and the public." Doc. 1193, FEIS at 9 (emphasis added).

IV. THE PSC'S ENTANGLEMENTS WITH PARTIES TO THIS CASE CREATED A RISK OF UNFAIRNESS, BIAS, AND LACK OF IMPARTIALITY THAT IS IMPERMISSIBLY HIGH.

The Wisconsin Supreme Court's commitment to the principle of a fair trial in a fair tribunal "is such that [it does] not accept even the appearance of bias." *Tetra Tech*, 2018 WI 75, ¶ 64. Decisionmakers are usually presumed to be acting impartially, but "[w]hen the appearance of bias reveals a great risk of actual bias, the presumption of impartiality is rebutted." *Id.* (quoting *State v. Herrmann*, 2015 WI 84, ¶ 46, 364 Wis. 2d 336, 867 N.W.2d 772); *see also State of Wisconsin v. Marcotte*, Appeal No. 2019AP695-CR (April 14, 2020), *slip op.* at 14-16, 19-20. This risk-of-bias standard is applied to administrative agency decision-making to protect integrity and the public's trust in an agency's decisions. *Guthrie v. Wisconsin Employment Relations Comm'n*, 107 Wis. 2d 306, 314, 320 N.W.2d 213 (Wis. App. 1982).

In this case, the facts of Chair Valcq's and Commissioner Huebsch's entanglements with active litigating parties in this case (ATC and MISO) create at least the "appearance of bias" and require their recusal under Wisconsin's common law recusal standard. *Id.*

Facts regarding Chairperson Valcq: We Energies' parent company, WEC Energy Group, Inc., has more than a 60% controlling ownership of ATC, the lead Applicant at the PSC. Chair Valcq worked as a regulatory attorney for We Energies for almost 15 years until 2014. Doc. 266. In 2017, she joined Quarles & Brady, representing We Energies and WEC Energy Group during her time at the firm. *Id.* Chair Valcq left Quarles & Brady on Friday, January 4, 2019, and assumed her role as the new Chair of the PSC on the following Monday, January 7, 2019. *Id.* Chair Valcq joined the PSC *after* ATC had filed its application for a CPCN for the CHC transmission line and *after* the PSC docketed this contested case. Thus, Chair Valcq's work as counsel for We Energies and WEC Energy Group encompassed the same time period during which: (1) MISO conceived of and planned the MVP transmission projects, including the CHC transmission line,

and (2) ATC prepared and filed its Application for a CPCN that Chair Valcq ultimately voted to approve. In other words, Chair Valcq acted as both a lawyer and advisor to WEC Energy Group during the time the CHC line was proposed, and then as an adjudicator in approving that same transmission line. Chair Valcq has a duty to recuse herself when facts and circumstances would lead a reasonable person to question her ability to be unbiased and impartial. WI SCR 60.04(4). She refused to do so.

Facts regarding Commissioner Huebsch: MISO is a private entity owned by public utilities and transmission companies that operate in the MISO region, including ATC, Dairyland Power, ITC Midwest, and We Energies. Doc. 266. MISO intervened before the PSC in this CPCN case and actively litigated in support of the Applicants' desired CPCN for the CHC line. Even before the Applicants filed their CPCN application, MISO entered into a joint litigation and strategy agreement with ATC. Doc. 266, Ex. B.

In January 2019, PSC Commissioner Huebsch became a member of the MISO Advisory Committee, which advises the MISO Board and senior staff. Doc. 266. The record evidence and public documents show that Commissioner Huebsch engaged in regular meetings and *ex parte* communications with MISO Board members and staff outside of the PSC hearing process at the same time that MISO was an active litigating party in the CPCN Docket 5-CE-146. *Id.* Documents posted on MISO's website demonstrate that Commissioner Huebsch attended at least three in-person MISO Advisory Council meetings during the pendency of or in proximity to this contested case in March 2018, March 2019, and June 2019, and likely in September 2019, where he was charged with helping to develop the meeting agenda. *Id.* The MISO Advisory Committee meetings and discussions also included representatives of ATC, ITC Midwest, WEC Energy Group, and other proponents of the CHC transmission line *while, at the same time, the contested case was*

pending before the PSC. *Id.* Documents posted on MISO's website demonstrate that at these MISO Advisory Committee meetings there were presentations and discussions on relevant, material contested facts and related issues that the parties were contemporaneously litigating before the PSC in the contested CPCN case. *Id.*

On August 20, 2019, at the PSC's first open meeting to discuss the evidentiary record in this contested CPCN case, Chair Valcq announced at the outset that Commissioner Huebsch would lead the Commissioners' deliberations because "Commissioner Huebsch is our delegated Commissioner for MISO and OMS" and "the project before us is due to MISO's MVP process." As an adjudicator, Commissioner Huebsch has a duty to recuse himself when the facts and circumstances are such that a reasonable person would question his ability to be impartial and without bias. *See* WI SCR 60.04(4). He failed to do so.

The PSC denied DALC/WWF's recusal motion because it concluded that the circumstances of Commissioner Huebsch and Chair Valcq's participation "complied with all applicable ethical and legal standards." Doc. 19 at 86. But that is not the correct common law legal standard. Even if an administrative proceeding complies with the letter of all statutory and regulatory recusal standards, the *risk* or *appearance* of bias in an administrative proceeding may still be "impermissibly high." *Guthrie*, 111 Wis. 2d at 454. In *Guthrie* and *Tetra Tech*, the Wisconsin Supreme Court ruled that common law and state constitutional due process notions of fair process are violated in situations that present an intolerably high "appearance of bias," even when there is no reason "to question the agency's good faith." *Tetra Tech*, 2018 WI 75, ¶ 69. Wisconsin courts have recognized that *Guthrie* established "a common law duty of disqualification" that applies even to decisionmakers who are not subject to statutory ethics obligations. *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 24 n.5, 498 N.W.2d 842 (1993).

Commissioner Huebsch's continued participation in meetings and extensive discussions with MISO Board members, MISO staff, and other parties to the CHC case outside of the hearing room created at least a "risk of bias" and lack of impartiality. *Tetra Tech*, 2018 WI 75, ¶ 64; *Guthrie*, 111 Wis. 2d at 454. Similarly, Chairperson Valcq's participation in the CPCN decision despite her long and extensive employment history for companies directly affiliated with ATC also creates an intolerably high risk of bias. This Court must vacate the Final Decision if it finds that the appearance or "risk" of bias or unfairness is "intolerably great." *Guthrie*, 111 Wis. 2d at 461.

Even if the Court does not vacate the CPCN on bias grounds, the unusual circumstances of this case, involving Commissioners' entanglements with the Applicants and other intervenors, provide yet another reason for the Court to undertake a "strict and demanding" review of the Final Decision. *See Transp. Oil Inc.*, 54 Wis. 2d at 265–66; *Tetra Tech*, 2018 WI 75, ¶¶ 63–64. The weight, if any, that is "due" the PSC's Final Order under Wis. Stat. § 227.57(10) is very low in light of the totality of these facts and circumstances. *Tetra Tech*, 2018 WI 75, ¶ 79 ("'[D]ue weight' is not a talisman" but depends on "the persuasiveness of the agency's perspective").

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Petitioners Driftless Area Land Conservancy and Wisconsin Wildlife Federation respectfully request that the Court:

1. Declare that the correctness of the action was impaired by material errors in procedure and by failures to follow prescribed procedure. Wis. Stat. § 227.57(4).

2. Declare that the PSC erroneously interpreted provisions of law and that correct interpretations could reasonably compel particular actions different from the approval of the Applicants' requested CPCN and other actions taken by the PSC. Wis. Stat. § 227.57(5).

3. Declare that the PSC impermissibly shifted the burden of proof in meeting multiple statutory standards from the Applicants to intervenors.

4. Declare that the PSC's Final Decision and decision-making process failed to comply with the Wisconsin's Certificate of Public Convenience and Necessity Law, Wis. Stat. § 196.491.

5. Declare that the PSC's Final Decision and decision-making process failed to comply with the Wisconsin Energy Priorities Law, Wis. Stat. §§ 1.12 and 196.025(1).

6. Declare that the PSC's Final Decision and decision-making process failed to comply with the Wisconsin Environmental Policy Act, Wis. Stat. § 1.11.

7. Reverse and vacate the PSC's Final Decision granting the CPCN for the CHC transmission line until such time as:

a. the PSC conforms its analysis precisely to the statutes from which it derives power (*Mid-Plains Tel.,* 56 Wis. 2d at 786);

b. the PSC makes a separate and independent finding for each of the required statutory criteria (Wis. Stat. § 196.491(3)(d));

c. the PSC adequately explains its reasons for each required statutory finding (*Transp. Oil Inc.*, 54 Wis. 2d at 265–66);

d. the PSC holds Applicants to their legal burden of proving that their application meets each statutory factor for a CPCN rather than shifting the burden to other parties to conclusively prove the viability of alternatives (*Sterlingworth Condo. Ass'n, Inc.*, 205 Wis. 2d at 726);

e. the PSC complies with WEPA by producing an EIS that independently develops and describes a reasonable range of appropriate alternatives, including alternative river crossings that protect the Upper Mississippi River National Wildlife and Fish Refuge, and alternative transmission solutions based on higher-priority energy technologies (Wis. Stat. § 1.11(2));

f. the PSC provides all members of the public with an opportunity to file comments on the PSC's EIS as required by WEPA (Wis. Stat. § 1.11(2)(d));

g. the PSC does not unlawfully limit the scope of its analysis under the Energy Priorities Law to one resource (energy conservation and efficiency) and requires Applicants to evaluate higher priority energy options that are cost-effective and technically feasible (Wis. Stat. §§ 1.12 and 196.025);

h. the PSC eliminates the circumstances creating an unreasonable risk of bias, lack of impartiality and conflicts of interest (*Guthrie*, 111 Wis. 2d at 457, 461); and

i. the PSC complies with all other applicable statutes, rules, and the instructions of this Court.

8. Award DALC/WWF's fees and costs pursuant to Wis. Stat. § 814.245.

9. Grant such further legal and equitable relief as the Court determines to be just, appropriate and necessary, and in the public interest.

Date: May 1, 2020

Respectfully submitted,

/s/ Electronically Signed by Bradley D. Klein

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