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 REPLY BRIEF

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I. INTRODUCTION

When the rhetorical smoke from the Public Service Commission's (PSC) and Intervenor-Respondents' briefs has cleared, the following factual and legal realities still remain evident. First, the huge Cardinal-Hickory Creek (CHC) transmission line will fundamentally alter and irreparably damage the scenic Driftless Area's vital natural resources, family farms, rural landscapes, local economies, and communities. Second, the transmission company Applicants and the PSC failed to meet their statutory responsibilities to fully and fairly evaluate better, less expensive, and environmentally-preferable alternatives, and impermissibly shifted the transmission company Applicants' burden of proof onto the Driftless Area Land Conservancy (DALC) and Wisconsin Wildlife Federation (WWF), Dane County, Iowa County, the Citizens Utility Board and the many other public intervenors participating in the contested case before the Commission. Third, no party is arguing—because there are no facts to so justify—that the CHC transmission line is needed to avoid brownouts or blackouts in the foreseeable future. Fourth, the PSC's own Staff's expert testimony explained that the proposed costly transmission line is not economically justified (i.e., the total costs exceed the modeled economic benefits) in most of the economic "model runs" performed by the PSC Staff. Fifth, all of the elected State Senators and State Representatives for the districts through which the transmission line would run have publicly and explicitly to the PSC expressed their concerns and opposition, and Dane County, Iowa County and other municipalities are opposing the PSC's approval of this huge proposed transmission line. Sixth, the legal framework for appellate review has now fundamentally changed because of the Wisconsin Supreme Court's *Tetra Tech* decision and the State Legislature's amendment of Wisconsin's judicial review statute to eliminate judicial deference to agency conclusions of law. 2017 Wisconsin Act 369 (amending Wis. Stat. § 227.57(11) and adding Wis. Stat. § 227.10(2g)).

The PSC and Intervenor-Respondents attempt to distract from these realities by mischaracterizing opponents of the CHC project as disgruntled citizens who have been somehow misled and have "very vocally misrepresented" the nature and impact of the CHC high-voltage transmission line based on "emotional" arguments, not facts. (Applicants Br. (Dkt. 202) at 3; CEO Br. (Dkt. 200) at 13) This patronizing narrative is false as a factual matter. It is also insulting to the governing officials of Dane County and Iowa County, the many municipal governments that have adopted resolutions opposing this project (Doc. 1193, FEIS at 23–24, tbl. 1-10), all of the elected State Senators and State Representatives of both political parties who represent the entire southwest Wisconsin region and have written multiple times to the Commission raising serious concerns and opposition (Doc. 1193, FEIS at 24, tbl. 1-11), and the thousands of concerned citizens that have testified at public hearings and filed written comments responsibly opposing this misguided project. The Co-Petitioners in this case represent the *people* of Wisconsin, not the corporate transmission companies and out-of-state generating companies that will profit by running the CHC high-voltage transmission line through Wisconsin's scenic Driftless Area landscapes and communities. This Court should disregard Respondents' attempts to minimize and misrepresent the public's grave concerns and their overwhelming opposition to the huge CHC transmission line and its harmful impacts on Wisconsin's unique landscapes, family farms, people, communities, local economy, and natural environment.

The PSC argues, with no support at all in the record, that "the construction of the project in [the Driftless Area] is not inconsistent with the current aesthetics or environmental impacts already existing in the area." (PSC Br. (Dkt. 201) at 50) The idea that a huge new 345-kV high voltage transmission line and 170-foot high towers are "not inconsistent with the current aesthetics" of Wisconsin's Driftless Area reflects a peculiar bureaucratic viewpoint that is out of

touch with elected officials' and the public's serious concerns. The photographs in the record with simulated "before and after" images of the CHC line running through Dodgeville (Doc. 559) and along the historic Thomas Stone Barn near Barneveld (Doc. 557) highlight the massive nature of this project and its outsized destructive impacts on the landscape and surrounding environment. As Wisconsin Wildlife Federation (WWF) Executive Director and former Wisconsin DNR Secretary George Meyer explained in his testimony: "the natural scenic beauty and exceptional vistas of the Driftless Area … are a major reason for the creation of many of the federal, state and local recreational facilities and are a major foundation for the highly important tourism economy of the Driftless Area. The proposed Cardinal-Hickory Creek transmission line and high towers will have a very substantial adverse effect on the scenic beauty value in the project area." (Doc. 1107 at 15–16)

The real reason that people in Wisconsin are feeling "emotional" about this case is because they *are* informed. They have attended informational sessions, reviewed technical documents, testified at public hearings, and written letters to their representatives. More than 1,000 people attended the PSC's evidentiary hearings and public hearings. More than 1,000 people submitted written public comments filed in the PSC's docket. They have observed that the PSC's process was fundamentally flawed and biased and that the Final Order will allow Applicants to permanently scar the landscape in exchange for speculative "economic benefits" while potential less-costly and less-damaging alternatives remain largely unexplored.

The record supports the public's concerns. It shows that the PSC failed to consider the potential for alternative transmission solutions—like local solar energy development projects, and battery storage coupled with lower-voltage transmission upgrades—based on Applicants' self-serving and flawed application that preordained the Applicants' desired transmission line solution.

The public is frustrated that the PSC approved this transmission line without even requiring the Applicants to update their economic models to reflect the 1,000+ megawatts (MW) of new solar projects in Wisconsin, as the PSC's own Staff recommended. The circumstances suggest that this transmission line project, first proposed more than a decade ago when electricity demand forecasts pointed up instead of the past decade of zero or declining demand, combined with solar energy and battery storage technological improvements and large price drops, is no longer in Wisconsin's best interest but is being carried forward by the sheer momentum of the Midcontinent Independent System Operator's (MISO) outdated planning process. The fact that one of the PSC commissioners who voted to approve the CHC project continued to meet and discuss transmission issues with MISO and other project proponents through MISO's Advisory Committee while the same parties were appearing in the PSC's contested docket creates at least an appearance of bias and lack of impartiality that has further eroded the public's confidence in the independence and fundamental fairness of the PSC's regulatory process.

Petitioners are not asking this Court to "substitute its judgment" for the PSC on technical issues. Petitioners are asking, however, for this Court to reverse and remand the Final Decision because the PSC violated Wisconsin's governing statutory requirements when it granted a Certificate of Public Convenience and Necessity (CPCN) for the CHC transmission project. Specifically, the PSC: (1) failed to apply the required statutory factors for granting a CPCN under Wis. Stat. § 196.491(3)(d); (2) lowered and shifted the Applicants' burden of persuasion by applying the wrong evidentiary standard; and (3) violated the Wisconsin Environmental Policy Act (WEPA) and Wisconsin's Energy Priorities Law by failing to independently "[s]tudy, develop, and describe appropriate alternatives" to the costly and environmentally harmful CHC

transmission line. Wis. Stat. § 1.11(2)(e); Wis. Stat. § 1.12. The serious appearances of bias further taint the PSC's regulatory process and the integrity of the Final Decision.

Fortunately, there is no emergency requiring this Court to allow this project to be rushed forward in the face of the PSC's serious errors of law. The PSC Staff did not identify an immediate reliability need for the project and, in fact, concluded that delaying this project until at least 2025 could save Wisconsin ratepayers millions of dollars. (DALC/WWF Opening Br. at 9, citing Doc. 944 at 5–6) Accordingly, this Court should reverse and remand the Final Decision granting a CPCN so that the PSC can fully and fairly determine the need for the CHC high-voltage transmission line by: (1) complying with the required CPCN statutory elements listed at Wis. Stat. § 196.491(3)(d); (2) applying the correct burden of proof to Applicants' evidence; and (3) conducting the full and fair evaluation of appropriate alternatives required by WEPA, Wis. Stat. § 1.11; and (4) doing so in a manner that is not imbued by the appearance and serious risk of bias and lack of impartiality. This is the "no regrets" approach that will serve the people of Wisconsin very well today and for generations to come.

II. ARGUMENT

Respondents' briefs devote many pages to background material and technical issues that are not germane to the discrete allegations of legal and procedural error identified in DALC's and WWF's Petitions for Review. Respondents characterize DALC/WWF as primarily challenging the sufficiency of the evidence on the PSC's fact-finding, but, in fact, most of DALC/WWF's arguments challenge the agency's misapplication of law to fact. Most of the background and technical material in Respondents' brief are not relevant, and the Court need not engage with these tangents in reaching a legally proper decision in this case. The Court should instead focus on the following **key legal questions** which underpin the PSC's Final Decision:

- When granting an application for a Certificate of Public Convenience and Necessity (CPCN), is the PSC required to apply each of the eleven separately enumerated statutory elements in Wisconsin's CPCN law (Wis. Stat. §§ 196.49(3)(b); 196.491(3)(d)(3)), or is the PSC free to pick and choose which statutory elements to apply and collapse the rest into a general "public interest" review based on the PSC's alleged "broad discretion" to apply "intertwined legal, factual, value and public policy determinations"? (*See* PSC Br. at 27) As explained in DALC/WWF's Opening Brief at pages 31–34 and Section II(A) below, the PSC must do the former to comply with the statute as enacted.

- Does Wisconsin law require applicants to prove their eligibility for a CPCN by a "preponderance of the evidence," or do they only need to produce enough evidence to meet a lower "substantial evidence" standard? As explained in DALC/WWF's Opening Brief at pages 36–37 and Section II(B) below, the PSC must do the former to comply with Wisconsin law.

- Does Wisconsin's environmental review law (WEPA) require the PSC to independently identify, develop, and analyze diverse project alternatives that are capable of meeting the general purpose of an applicants' project, or does WEPA allow the PSC to: (a) adopt a narrow "purpose and need" statement that effectively limits consideration only to the applicant's preferred project; and (b) accept as fact an applicant's self-serving alternatives analysis without reasonable independent analysis or review? As explained in DALC/WWF's Opening Brief at pages 45–49 and Section II(C) below, the PSC must do the former to comply with WEPA.

These legal issues turn on basic principles of administrative law, the separation of governmental powers, and the respective roles of the legislative branch, executive branch agencies, and the judiciary. They are quintessential legal questions and have nothing to do with the PSC's day-to-day experience with the electricity system, transmission lines, or utility regulation. As

specifically directed by the governing judicial review statute and the most recent and applicable Wisconsin Supreme Court precedent, this Court should carefully examine each one of the PSC's errors of law identified below and render an independent judgment using a *de novo* review standard without deference to the agency. Wis. Stat. § 227.57(11); *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W. 2d 21.

A. The PSC Committed Legal Error by Failing to Conform the Analysis in its Final Decision to the Plain Language of Wisconsin's CPCN Statute, Wis. Stat. § 196.491(3)(d).

The PSC's governing statute in this case—Wis. Stat. § 196.491(3)(d)—provides eleven separate statutory elements that a project applicant must satisfy and the PSC must affirmatively "determine" before granting a CPCN. (Wis. Stat. §§ 196.49(3)(b); 196.491(3)(d)). The PSC's Final Decision fails to comply with the CPCN statute because it fails to address several of the law's independent decision criteria, and then conflates others into more generalized points based on the PSC's own "intertwined legal, factual, value, and public policy determinations." (Doc. 19 at 11) In short, the PSC's approach is *ultra vires*. By importing and conflating non-statutory considerations, the PSC effectively changed the meaning of § 196.491(3)(d) and excused the transmission line CPCN applicants from meeting their burden of proof on each of the statutory standards, as required by the legislature. The PSC's impermissible legal shortcuts are contrary to law and entitled to no deference under the Wisconsin Supreme Court's *Tetra Tech* decision and Wis. Stat. § 227.57(11). The Court should reverse and remand the PSC's Final Decision as an erroneous interpretation of law. Wis. Stat. § 227.57(5).

The PSC argument that it has broad discretion to depart from the required statutory elements and, instead, make this CPCN approval based on non-statutory policy factors is drawn from old cases, such as *Clean Wisconsin v. Public Service Commission*, 2005 WI 93, 282 Wis. 2d

250, 700 N.W.2d 768, and *Town of Holland v. Public Service Commission,* 2018 WI App 38, 382 Wis. 2d 799, 913 N.W.2d 914. These cases were based on an extremely deferential view of judicial review that no longer applies in Wisconsin. The Wisconsin Supreme Court's decision in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W. 2d 21, and the State Legislature's concurrent revisions to Chapter 227 changed the legal ground rules and standard of review. The Respondents' tortured attempts to distinguish *Tetra Tech* and other more recent Wisconsin Supreme Court cases are ultimately unconvincing and fail to reckon with the separate statutory changes that eliminated judicial deference to agency conclusions of law. 2017 Wisconsin Act 369 (amending Wis. Stat. § 227.57(11) and adding Wis. Stat. § 227.10(2g)). For the reasons discussed below, the Court should reverse the PSC's failure to comply with the applicable statutory standards as an error of law and remand to the PSC to follow the CPCN statute as written. Wis. Stat. §§ 227.57(5), (11).

1. The PSC's Final Decision unlawfully conflates and fails to apply the eleven separate required elements in the CPCN Law.

Wisconsin's CPCN law includes eleven specific, separate statutory elements that must all be satisfied for the PSC to issue a CPCN. Wis. Stat. § 196.491(3)(d).[1] That is how the Wisconsin

[1] **Wis. Stat. § 196.491(3)(d)** states that the Commission may approve an application for a CPCN "only if the commission determines all of the following" (emphasis added):

> **2.** The proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy … .
>
> **3.** 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 … .
>
> **3m.** For a high-voltage transmission line, as defined in s. 30.40 (3r), that is to be located in the lower Wisconsin state riverway, as defined in s. 30.40 (15), the high-voltage transmission line will not impair, to the extent practicable, the scenic beauty or the natural value of the riverway…
>
> **3r.** For a high-voltage transmission line that is proposed to increase the transmission import capability into this state, existing rights-of-way are used to the extent practicable and the routing and design of the high-voltage transmission line minimizes environmental impacts in a manner that is consistent with achieving reasonable electric rates.

State Legislature wrote the statute: "the commission shall approve an application filed under par. (a) 1. for a certificate of public convenience and necessity only if the commission determines all of the following:…" (emphasis added). What then "follow[s]" are the eleven specific, independent elements, which must be met before the PSC can approve a CPCN that would allow the privately-owned transmission companies, here, to charge utility customers more than $2 billion on their electricity bills, and exercise eminent domain to condemn land on privately-owned land, family farms and homesteads. If, as here, a CPCN applicant fails to meet their burden of proof on "all of the following" elements, 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, at the transmission company Applicants' behest, "interpreted away" the governing statutory standards.

3t. For a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more, the high-voltage transmission line provides usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state and the benefits of the high-voltage transmission line are reasonable in relation to the cost of the high-voltage transmission line.

4. The proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use … .

5. The proposed facility complies with the criteria under s. 196.49 (3) (b) [i.e. does not provide facilities "unreasonably in excess of the probable future requirements"] … .

6. The proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved.

7. The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market.

8. For a large electric generating facility, brownfields, as defined in s. 238.13 (1) (a), are used to the extent practicable.

Wis. Stat. § 196.49(3)(b) further states that the PSC may refuse to certify a project if it will:

1. Substantially impair the efficiency of the service of the public utility.

2. Provide facilities unreasonably in excess of the probable future requirements.

3. When placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service … .

CPCN element 5 explicitly incorporates these "Section 196.49(3)(b)" conditions. *See* Wis. Stat. § 196.491(3)(d)(5).

DALC/WWF's Opening Brief explains (at 26–34) that the Final Decision makes no attempt to conform to the eleven CPCN elements in § 196.491(3)(d). Instead, the Final Decision jumps from issue to issue, in many instances only stating its conclusion on one of the required statutory elements in a cursory sentence and in other places conflating statutory requirements with "intertwined" policy determinations. (*Id.* at 28) The PSC's brief acknowledges that it relied on non-statutory factors when granting the CPCN, admitting that "[t]he Commission's granting of the CPCN in this case involved the interpretation and application of Wis. Stat. § 196.491 ... and other statutes, and intertwined numerous factual, value, and policy determinations." (PSC Br. at 4) (emphasis added)

The PSC's "Decision Matrix" reveals the great extent to which it departed from the CPCN law. (Doc. 66) The Decision Matrix identified each purported contested "issue" in the case and included spaces for the parties to fill in their "position" and supporting record citations for each issue. (*Id.*) Each "issue" concludes with the PSC Staff's formulation of discrete "Commission Alternatives" for the Commissioners to vote upon. During their first open meeting in this contested case, the Commissioners started with "Issue 1" in the matrix and proceeded through the document, discussing and voting on each identified "Commission Alternative."

The PSC's decision matrix in this case contains 33 "issues," most of which relate to specific environmental mitigation measures, construction conditions, routing options, and vegetation management requirements. (Doc. 66) There are only four "issues" that specifically address the energy-related elements in the CPCN statute and those four "issues" include only some, but not all, of the eleven required CPCN statutory elements:

- **Issue 1: Will the proposed project, if constructed, satisfy the reasonable needs of the public for an adequate supply of electric energy as required for Commission approval under Wis. Stat. §§ 196.491(3)(d)2. and 196.491(3)(d)5.?**

- **<u>Issue 2:</u> Will the proposed project, if constructed, provide usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state, and are the benefits of the project reasonable in relation to the cost of the proposed project as provided in Wis. Stat. § 196.49(3)(d)3t?**

- **<u>Issue 4:</u> Would the proposed project have a material adverse impact on competition in the relevant wholesale electric service market under Wis. Stat. § 196.491(3)(d)7?**

- **<u>Issue 29:</u> If approved, would the proposed project comply with Wis. Stat. § 196.491(3)(d)6. and not unreasonably interfere with the orderly land use and development plans for the area involved?**

(Doc. 66 at 1, 10, 22, 88)

The CPCN statutory elements at §§ 196.491(3)(d)3t, (3)(d)6, and (3)(d)7 are the only ones that receive their own "Issue" in the matrix. The PSC's decision matrix collapses many of the remaining statutory elements into a single issue—"Issue 1"—which combines five independent CPCN elements—Wis. Stat. §§ 196.491(3)(d)2, (3)(d)5; Wis. Stat. §§ 196.49(3)(b)1, (3)(b)2, (3)(b)3—into a single generalized question of "need." The decision matrix entirely omits the required CPCN elements at §§ 196.491(3)(d)3 and (3)(d)3r. It also omits the required state energy policy factor at Wis. Stat. § 1.12(3)(c) and lumps all the determinations required under WEPA into Issue 30 together with CPCN element § 196.491(3)(d)4. (Doc. 66 at 92); *compare generally* Doc. 66 (Decision Matrix) *with* Wis. Stat. § 196.491(3)(d) (CPCN statute).

DALC and WWF had an opportunity to review the Staff's draft decision matrix before it was shared with the Commissioners and were alarmed by its failure to track the CPCN statute. DALC and WWF therefore filed a detailed legal memorandum with the PSC Staff and Commission urging them to make corrections "in order to support an accurate and defensible Commission order in this case." (Doc. 1445 at 1) The memo explained:

> Because Wisconsin law requires the Commission to make an independent finding regarding <u>each one</u> of these "applicable laws and legal standards," it is important that each one of these "applicable laws and legal standards" appear as a separate decision point in the Decision Matrix used in this case. Without specifically

> including many of the required legal standards in the decision matrix, it is not possible for the Commission to determine whether or not the Applicants have met their burden of proof as to each one of the statutory requirements.

(Doc. 1445 at 3) Regarding "Issue 1" (which combines five separate CPCN elements) DALC/WWF's legal memorandum explained that:

> For Issue 1, the Matrix collapses almost all of the energy-related requirements in the statute into a vague cost benefit analysis, which effectively erases most of what the statute says. The legislature listed several independent determinations that the Commission needs to make in order to approve a project, and presumably intended those words to be effective.
>
> For example, Wis. Stat. § 196.49(3)(b) states that "[t]he commission may refuse to certify a project if it appears that the completion of the project will do <u>any</u> of the following." The statute then lists several factors, including that the proposed project will "[p]rovide facilities unreasonably in excess of the probable future requirements," § 196.49(3)(b)(2) or "add to the cost of service without proportionately increasing the value or available quantity of service," § 196.49(3)(b)(3). These are each independent grounds for denying a CPCN, and these factors were discussed at length in briefs and testimony in this docket.

(Doc. 1445 at 5–6) DALC/ WWF requested that the Decision Matrix be revised to: (1) include the missing CPCN elements so that the basis for the PSC's decision is clear; and (2) separately list each of the specific CPCN elements as an independent decision point so that they each appropriately carry independent weight, as required by the plain language of the law. (Doc. 1445) In closing, DALC/WWF specifically urged "address[ing] these problems before a final decision matrix is provided to Commission." (*Id.* at 6)

None of DALC/WWF's requested changes were made, and the PSC's final decision matrix contained all the structural problems identified in DALC/WWF's legal memorandum. (Doc. 66) On August 20, 2019, the PSC met for the first time in open session to discuss the merits of this contested case. Commissioner Huebsch led the Commission's deliberations using the Decision Matrix as a roadmap for resolving each "issue" presented in the matrix to grant the CPCN. (Doc. 354)

Following the hearing, the PSC attempted to exclude the DALC/WWF memorandum from the official record of this case, which would have prevented DALC/WWF from bringing these concerns to the Court's attention. On April 17, 2020, this Court granted DALC/WWF's Motion to Supplement the Record and directed the PSC to include the memorandum over the continued objections of the PSC. Dkt. 173; *see also* Dkt. 90 (Amended Order).

The structure of the PSC's Final Decision and Decision Matrix confirm that the PSC did not follow the plain language of the CPCN statute. By ignoring some of the required elements and collapsing others together with the Commissioners' own non-statutory public policy preferences, the PSC effectively rewrote the statute and failed to comply with the law. This violated the plain meaning of § 196.491(3)(d) and core principles of the separation of governmental powers, due process, and administrative law. Accordingly, this Court should reverse and remand the PSC's Final Decision. Wis. Stat. § 227.57(11).

2. Respondents are incorrect that the PSC has "discretion" to depart from the CPCN statutory requirements.

The PSC attempts to justify its departure from the eleven separate statutory elements by arguing that its decision to grant a CPCN is, effectively, a "legislative determination" that allows the PSC to engage in "statecraft" based on a variety of non-statutory "policy determinations." (Doc. 19 at 11, 17, 18, 78; *see* PSC Br. at 4, 18; Applicants Br. at 3) That purported "broad discretion" for "legislative determinations" is simply an impermissible excuse for the PSC's failure to follow the CPCN statute as enacted by the State Legislature. For this alleged "legislative" authority, the PSC relies almost exclusively on a series of old cases—most notably the Supreme Court's 2005 decision in *Clean Wisconsin*, 2005 WI 93—decided under the former "great weight" deference regime by which a reviewing court could "uphold an agency's interpretation of a statute

so long as it is reasonable." *Id.* at ¶ 41. In response to the petitioners' argument that the PSC erroneously approved a CPCN for a new coal plant, the Court in *Clean Wisconsin* stated:

> It is not the function of this court to determine this state's energy policy. Nor is it this court's place to decide whether the construction of the [project] is in the public interest. These are legislative determinations that the legislature has assigned to the PSC.

2005 WI 93, ¶ 35.

That sweeping statement about agency discretion for "legislative determinations" may have been consistent with a regime of extreme judicial deference, but it's certainly not consistent with the law as it stands today. The PSC's view, based on *Clean Wisconsin*, that granting a CPCN is "not in any sense a judicial question" (PSC Br. at 4, 18) is fundamentally at odds with more recent Supreme Court decisions like *Tetra Tech v. Wisconsin Dep't of Revenue*, *Myers v. Wisconsin Dep't of Natural Resources,* and *Wisconsin Bell v. LIRC.* Each one of these recent cases presents different facts, but the underlying principle of each case is the same: it is fundamentally and exclusively a "judicial question" to ensure that executive branch agencies follow their governing statutes. *Tetra Tech*, 2018 WI 75, ¶84 (stating that the "core judicial power" to interpret statutes was "return[ed] to its constitutionally-assigned residence" by ending the doctrine of deference to administrative agency interpretations of law); *Myers v. Wisconsin Dep't of Natural Resources*, 2019 WI 5, ¶ 17, 385 Wis. 2d 176, 922 N.W.2d 47; *Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n,* 2018 WI 76, ¶ 29, 382 Wis. 2d 624, 914 N.W.2d 1. (*See* DALC/WWF Opening Br. at 24, 31–32)

Wisconsin's statute on judicial review of agency decisions, Wis. Stat. § 227.57, does not contain a category for "legislative-type policy determinations." *Clean Wisconsin*, 2005 WI 93, ¶ 139. Every agency decision must be reviewed as a finding of fact, a conclusion of law, or an exercise of discretion. Wis. Stat. § 227.57(3). *Tetra Tech* and Wis. Stat. § 227.57(11) sweep away

the unrestrained concept of "legislative discretion" that can be found in older cases like *Clean Wisconsin* that were decided under the former version of Wisconsin's judicial review statute and its "arbitrary and capricious" standard. *Voight v. Washington Island Ferry Line, Inc.*, 79 Wis. 2d 333, 340–41, 255 N.W.2d 545, 549 (1977); *Robertson Transp. Co. v. Pub. Serv. Comm'n*, 39 Wis. 2d 653, 659, 159 N.W.2d 636 (1968); *Gateway City Transfer Co. v. Pub. Serv. Comm'n*, 253 Wis. 397, 405, 34 N.W.2d 238 (1948). Those older cases that characterized the PSC as having legislative decisionmaking power involved PSC decisions under former versions of different statutes, Wis. Stat. §§ 194.23 (*Robertson* and *Gateway*) and 195.45 (*Voight,* 79 Wis.2d at 334 n.1), that, unlike the CPCN law at issue in this case, contain few specific statutory elements to cabin the PSC's discretion. This different statutory context explains why those older cases stated that "a finding of what constitutes 'public interest' for various purposes and circumstances *and without guidelines* has uniformly been held to be a legislative function." *Robertson*, 39 Wis. 2d at 659 (*citing Gateway*, 253 Wis. at 405); *Voight*, 79 Wis. 2d at 340–41 (*citing Gateway*, 253 Wis. at 405) (emphasis added). *Compare* Wis. Stat. § 196.491(3)(d) (providing eleven specific statutory elements for CPCN decisions).

The Applicants cite three other old cases for the alleged principle that the PSC has "broad discretion to make legislative-type determinations." *See* Applicants Br. at 3–5 (citing *Wis. Power & Light Co. v. Pub. Serv. Comm'n of Wis.*, 148 Wis. 2d 881, 888, 437, N.W.2d 888, 891 (1989); *Wis. Tel. Co. v. Pub. Serv. Comm'n of Wis.* 206 Wis. 589, 240 N.W. 411, 414 (Wis. 1932); *F.C. Hixon v. Pub. Serv. Comm'n*, 32 Wis. 2d 608, 629–30, 146 N.W.2d 577, 587–88 (1966)). Like the cases discussed above, these old cases—predating *Tetra Tech* and the current version of Wis. Stat. § 227.57(11)—involve different statutes applied in quite different contexts. For example, *Wisconsin Telephone Company* involved a "tersely stated" statute that required public utilities to

pay the expense of investigations into their affairs unless in the PSC's judgment the "public interest" required that they be exempt. *Wis. Tel. Co.*, 240 N.W. at 413. Because this terse "public interest" standard in the 54-year old case is "somewhat intangible in character," the Court provided leeway for the Commission to come to a reasonable conclusion subject to a "judicial test of reasonableness." *Id.* at 414. Similarly, the statute at issue in *Hixon* required only two findings: (1) that a waterway was "navigable" and (2) that issuing a permit "is not detrimental to the public interest." *Hixon*, 32 Wis. 2d at 618. This is entirely different than the detailed CPCN statute with its eleven specific statutory elements that the PSC must follow in this case. Wis. Stat. § 196.491(3)(d). The older, pre-*Tetra Tech* cases cited by the PSC and the Applicants—involving different statutes, different decision criteria, and decided under a different and much broader judicial deference regime—simply do not apply here.

3. Respondents mischaracterize the *de novo* standard of review that this Court must apply to the PSC's conclusions of law.

The Respondents' argument that *Clean Wisconsin* survives largely intact and controls the outcome in this case is not convincing. *Clean Wisconsin's* core reasoning derives entirely from the Court's decision to apply "great weight" deference in that case. That deference regime has been swept away—both by the Supreme Court in *Tetra Tech* and subsequent cases, but also by the Wisconsin legislature: "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). The same Act that amended § 227.57(11) also added a provision to the section of Wisconsin Statutes governing "Administrative Rules and Guidance Documents," that states that "[n]o agency may seek deference in any proceeding based on the agency's interpretation of any law." Wis. Stat. § 227.10(2g).

The PSC and Respondent-Intervenors argue as though the *de novo* standard of review that this court must apply to agency interpretations of law comes from the lead opinion in the fractured *Tetra Tech* decision, but they ignore that the state legislature also eliminated deference to agency conclusions of law when it amended Chapter 227. To the extent there is any question of whether *Clean Wisconsin* survives as good law, the Court must answer this question by interpreting § 227.57(11), as well as interpreting the *Tetra Tech* opinion. It simply is not possible to preserve the core reasoning of *Clean Wisconsin* without also resurrecting "great weight" deference, which is something that the PSC plainly cannot do anymore. Wis. Stat. § 227.10(2g) (prohibiting agencies from seeking deference for interpretations of law).

Respondents' briefs go back to the legal regime that existed before *Tetra Tech* and before the legislature amended Wisconsin's judicial review statute at Chapter 227. For example, the PSC argues that its decision is subject to only "rational basis" review rather than *de novo* review. (PSC Br. at 18) This conflicts with the plain language of Wis. Stat. § 227.11, which requires *de novo* review. It also glosses over the fact that the "rational basis" test used in *Clean Wisconsin* and other old cases derives entirely from the former "great weight" deference regime applied in those cases. *See*, *e.g.*, *Clean Wisconsin,* 2005 WI 93, ¶ 140 ("Because we conclude great weight deference is appropriate, our analysis of the parties' claims regarding the Plant Siting Law will focus on whether the PSC's determination had a rational basis... .") (emphasis added); *see also Wis. Power and Light Co. v. Pub. Serv. Comm'n of Wis.*, 148 Wis. 2d 881, 888 ("rational basis" test derives from "great weight" deference). The PSC's request for "rational basis" review here is simply a request for "great weight deference" under a different name, which conflicts with the statute prohibiting agencies from "seek[ing] deference in any proceeding based on the agency's interpretation of any law." Wis. Stat. § 227.10(2g).

Contrary to the PSC's unlawful request for deference and judicial "restraint" (PSC Br. at 4), this Court must review the PSC's interpretation of the CPCN law using a *de novo* standard of review without deference to the agency. Wis. Stat. § 227.57(11); *Tetra Tech*, 2018 WI 75, ¶¶ 82–84 (*quoting Vogel v. Grant-Lafayette Elec. Co-op.*, 201 Wis. 2d 416, 422, 548 N.W.2d 829 (1996)); *Myers v. WDNR,* 2019 WI 5; *Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n,* 2018 WI 76. *De novo* review applies to both the PSC's interpretation of the CPCN statute's eleven specific elements and the PSC's application of these elements to the facts in the record. *Brown v. Labor & Indus. Review Comm'n*, 2003 WI 142, ¶ 11, 267 Wis. 2d 31, 41–42, 671 N.W.2d 279, 284 (agency application of law to fact is reviewed as a conclusion of law); *Nottelson v. Wisconsin Dep't of Indus., Labor, & Human Relations*, 94 Wis. 2d 106, 115–16, 287 N.W.2d 763 (1980) (same). The *de novo* standard applies even though the PSC's Final Decision improperly seeks to frame some of its CPCN determinations as "findings of fact" because they are actually "conclusions of law." *Citizens' Util. Bd. v. PSCW*, 211 Wis. 2d 537, 550, 565 N.W.2d 554 (Ct. App. 1997) (citing *Connecticut Gen. Life Ins. Co. v. DILHR,* 86 Wis.2d 393, 405, 273 N.W.2d 206, 211 (1979).[2]

The Applicants' overly stretchy argument that *Tetra Tech* somehow applies "only to legal issues of first impression" is immaterial as explained in the statutory discussion above, and also unpersuasive on its own merits. (Applicants Br. at 19) This argument is based on an over-reading of a passage in the lead opinion in *Tetra Tech* which notes that the "precedential and controlling

[2] The Applicants seem to argue that "mixed questions of law and fact" are really exercises of discretion and should be reviewed under the lenient standard in Wis. Stat. § 227.57(8). (Applicants Br. at 20–21) The Applicants are not clear on which PSC determinations they think are "mixed questions," but to the extent they mean issues involving application of law to fact, the law is clear in Wisconsin that application of law to fact is a conclusion of law. And both *Tetra Tech* and Wis. Stat. § 227.57(11) are clear that conclusions of law are reviewed *de novo*. *Tetra Tech*, 2018 WI 75, ¶ 84.

effect" of any prior court opinion interpreting a statute with deference to an agency "will be the same as if the court had based the decision on its own interpretation." *Tetra Tech*, 2018 WI 75, ¶ 93. First, the label of an issue as one of "first impression" (or not) has no bearing on case-specific determinations in PSC adjudications. *Tetra Tech* clearly does not (and could not) reverse the PSC's rationale that it used to grant a CPCN to the applicants in the *Clean Wisconsin* case. But the extremely deferential rationale that the *Clean Wisconsin* Court used to uphold the PSC's decision in that case does not forever bind this court or future courts to employ extreme deference when reviewing the PSC conclusions of law in *future* CPCN cases. *Tetra Tech* and the Wisconsin legislature have swept that deference away. Applicants fail to acknowledge the general principle that "[q]uasi-judicial agencies such as the Public Service Commission are not subject to the rule of *stare decisis*" and, therefore, "should not be bound by prior decisions made in other situations and in other contexts." *Wis. Power & Light*, 148 Wis. 2d at 889. In other words, the Commission must take the law as it exists when it renders its decision in any given case. The Respondents' argument that *Clean Wisconsin* forever locks-in a great-weight deference approach that allows the PSC to engage in "statecraft" divorced from the CPCN statute is contrary to law and must be rejected. The PSC cannot indefinitely rely on a sweeping deference regime that has since been overturned by subsequent Wisconsin Supreme Court decisions and Wisconsin statutes.

As the Wisconsin Supreme Court admonished the PSC almost 50 years ago, "[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 this case, the PSC's decision to issue a CPCN strayed well beyond the specific elements contained in Wis. Stat. § 196.491(3)(d) and substituted a decision-making framework of the PSC's own making. The Court must reverse the PSC's erroneous interpretation of law, without deference to the agency,

and remand to the agency to proceed consistent with law. Wis. Stat. § 227.57(11). CPCN decisions must be based on the law, not the policy preferences of the commissioners that happen to be serving at the time when an applicant seeks a CPCN.

4. The PSC's decision is not entitled to "due weight."

The Respondents' fallback argument is that even if this Court applies *de novo* review, it should uphold the PSC's decision by granting "due weight" to the Commission's "experience, technical competence, and specialized knowledge" under Wis. Stat. § 227.57(10). (PSC Br. at 22; Applicants Br. at 18–20) But the PSC's errors of law alleged here do not turn on the Commission's "experience, technical competence, and specialized knowledge." DALC/WWF allege that: (1) the PSC applied the wrong burden of proof; (2) the PSC applied the wrong standard of review; and (3) the PSC violated WEPA by unlawfully constraining its alternatives analysis. These are quintessential issues of law that are within the exclusive specialized expertise of the judicial branch. This Court should not lean on the *PSC's* understanding, for example, of *this Court's* standard of review under Wis. Stat. § 227.57.

Regardless of the weight "due" the PSC's "specialized knowledge" in other cases, the Court may not affirm an agency order that fails to comply with statutory requirements. *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 LIRC order because its method conflicted with the statute, even after applying "due weight" to the agency's "experience, technical competence, and specialized knowledge"). Even under the old "great weight" deference regime, courts would "not uphold an agency's interpretation of a statute if it is contrary to the clear meaning of a statute." *Clean Wisconsin*, 2005 WI 93, ¶ 43 (quoting *Bosco v. LIRC*, 2004 WI 77, ¶ 19, 272 Wis.2d 586, 681 N.W.2d 157).

At the end of the day, the PSC's legal errors here are fundamental judicial questions that do not require the PSC's specialized knowledge to resolve. Due weight does not "oust the court as the ultimate authority or final arbiter of the law." *Tetra Tech*, 2018 WI 75, ¶ 78. The Court should carefully and independently review the PSC's errors of law using a *de novo* standard of review without deference to the agency's unlawful interpretation. Wis. Stat. § 227.57(11).

B. The PSC Erred by Applying the Wrong Standard of Proof, Which Effectively Shifted the Burden of Persuasion to Intervenors.

DALC/WWF's Opening Brief explains (at 36–37) that the PSC unlawfully lowered the Applicants' burden of persuasion from the "preponderance of the evidence" standard typically used in civil cases to a lower "substantial evidence" standard used by appellate courts to review agency decisions. Respondents' briefs confuse the evidentiary standard used by the PSC to "find facts" in a contested case ("preponderance of the evidence") with the judicial review standard used by courts to review agency findings of fact on appeal ("substantial evidence"). PSC Brief at 30–34; Applicants Br. at 27–29; CEO Br. at 37. The PSC's belief that it is entitled to find facts using a "substantial evidence" standard is directly contrary to Wisconsin Supreme Court precedent, inconsistent with the practice of other state and federal agencies, and structurally unsound. By allowing the PSC to "find" as "facts" evidence that may be "less likely than not" to be true, the substantial evidence standard harms the integrity of the regulatory process, violates the constitutional due process rights of the public and consumers, and results in an arbitrary decision making process in which the PSC can put its "thumb on the scale" to support its desired outcome. For the following reasons, the Court should conclude that the PSC's decision to reduce the transmission line CPCN Applicants' burden of proof to a "substantial evidence" standard is a material error of law and procedure warranting reversal and remand under Wis. Stat. § 227.57(4).

1. The "substantial evidence" test is a deferential standard employed by courts tasked with reviewing agency "findings of fact" for reasonableness.

"Substantial evidence" is the standard that appellate courts use to review an adjudicator's "findings of fact" in a civil or administrative proceeding—not the standard for the agency to use in the first instance when weighing the evidence in that proceeding. *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."); *see* Wis. Stat. § 227.57(6).

2. The "preponderance of the evidence" test is the evidentiary standard properly used by adjudicators to evaluate the evidence in a contested civil or administrative proceeding.

"Preponderance of the evidence" is the standard of proof generally used by trial courts and agencies in civil cases to determine whether a party has met its burden of persuasion. Daniel Blinka, Introduction; burdens of proof, 7 Wis. Prac., Wis. Evidence § 301.1 (4th ed. 2019) (articulating "preponderance of the evidence" as the lowest standard of evidentiary proof required for trials or hearings); Charles H. Koch, Administrative Law and Practice, § 5:64. Factfinding (3d ed. 2010) ("As with most civil trials, the standard of proof in an administrative adjudication is usually preponderance of the evidence."); Wis. Admin. Code HA § 1.17(2) ("Burden of proof. Unless the law provides for a different standard, the quantum of evidence for a hearing decision shall be by the preponderance of the evidence.") Where there is no statute to the contrary, Wisconsin agencies must apply "the clear preponderance of the evidence" as the required burden of proof in administrative proceedings. *Reinke*, 53 Wis. 2d at 137; *id.* at 134 (finding that the State Personnel Board "misinterpreted its function" by using the "substantial evidence" test to determine facts in a contested agency proceeding).

3. None of the Respondents' arguments in defense of the PSC's erroneous use of "substantial evidence" as an evidentiary standard are persuasive.

The Respondents concede that the CPCN statute does not articulate an alternative burden of persuasion for applicants in CPCN cases. (PSC Br. at 31; Applicants Br. at 27) Yet, the Respondents still attempt to defend the PSC's replacement of the traditional "preponderance of the evidence" standard with a lower "substantial evidence" standard for determining whether the transmission line applicants here are entitled to a CPCN. None of the Respondents' arguments have merit.

First, and most importantly, the PSC's claim that Wisconsin Supreme Court precedent "supports the Commission's decision to apply the substantial evidence standard to the record before it" is simply wrong. (Applicants Br. at 28, *citing Sanitary Transfer & Landfill, Inc. v. Dep't of Nat. Res.*, 85 Wis. 2d 1, 14–15, 270 N.W.2d 144, 149–50 (1978)). Indeed, Wisconsin Supreme Court precedent states exactly the opposite. The Supreme Court's opinion in *Reinke v. Personnel Board* is directly on point and controlling here. 53 Wis. 2d 123. In *Reinke*, the Court held that the State Personnel Board erred by using the improper "substantial evidence" standard of proof to support the Board's decision in an agency adjudication—precisely the error the PSC made here. The Court said that in finding that an employer discharged an employee for just cause, "the Board looked upon its role as merely to find substantial evidence to support the action of the employer." *Id.* at 133–34. The court explained why this was an error:

> The substantial-evidence test is applicable only on judicial review; and, therefore, the Board misinterpreted its function, when it found that there was substantial evidence to support the action of the appointing authority.

Id. at 134.

> As we view the statutes and case law of this state, the substantial evidence rule is limited to judicial review of administrative determinations unless expressly otherwise provided by statute.

Id. at 136. After determining that there was no contrary standard set forth in either the statutes or case law of the state, the *Reinke* Court concluded that "the required burden of proof is that of other civil cases, that the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence." *Id.* at 137.[3]

Respondents dispute the persuasive value of the provision of Wisconsin Administrative Code § HA 1.17(2), which articulates a "preponderance of the evidence" standard as the default standard for all contested case hearings conducted by the Division of Hearings and Appeals (DHA) on behalf of other state agencies. (Applicants Br. at 28; PSC Br. at 30–31; CEO Br. at 37) Wisconsin's Administrative Procedure and Review Act (Ch. 227) lists a number of specific state agencies whose hearings must be conducted by the DHA, including the Department of Natural Resources, Department of Transportation, Department of Health Services, Department of Children and Families, any case referred by the State Superintendent, and any review of a worker's compensation claim. Wis. Stat. § 227.43. Further, the DHA is authorized to contract with any state agency to provide contested case hearing services, so long as that agency is not explicitly prohibited from doing so by an agency administrative code provision or administrative decision. Wis. Stat. § 227.43(1m). Although the DHA does not conduct hearings on behalf of the PSC, its status as the default state agency charged with conducting contested case hearings arising from administrative decisions surely imbues its procedures with significant persuasive authority for

[3] The PSC's argument that *Sanitary Transfer* supports its use of "substantial evidence" as the evidentiary standard ignores *Reinke* and misreads *Sanitary Transfer*. In *Sanitary Transfer*, the Court discusses "substantial evidence" as used for judicial review of the agency's action, not the evidentiary standard to be used by the agency itself. 85 Wis. at 13. *Gateway City Transfer Co. v. Public Service Comm*'n, 253 Wis. 397, 34 N.W.2d 238 (Wis. 1948) explains that the appropriate standard of judicial review for agency action is "substantial evidence" and not "preponderance of the evidence," because it assumes that the agency has itself already made its determination based upon the "preponderance of the evidence" standard. 253 Wis. at 407.

determining the standard of proof that the PSC should follow in the absence of an explicitly enumerated standard of proof in the CPCN statute. Federal administrative law also provides further persuasive authority that agencies must use the "preponderance" standard when weighing the evidence in a contested case. *See Steadman v. S.E.C.*, 450 U.S. 91, 99–100 (1981) (interpreting the federal Administrative Procedure Act (APA) to require the traditional "preponderance" test for adjudicatory fact-finding).

The Wisconsin State Legislature was careful to specifically enumerate when it intended an agency to rely upon a standard other than "preponderance of the evidence," which it did not do here. Other provisions of Wis. Stat. ch. 196 require an agency to rely upon a "clear and convincing evidence" standard when levying treble damages against an agent of a public utility, and when ordering a holding company to terminate its interest in a public utility. Wis. Stat. §§ 196.64(2), 196.795(7)(c). These exceptions—articulating a higher burden of proof for agency orders which effectively amount to takings of property—serve to prove the default rule provided in Wis. Admin. Code § HA 1.17(2) that state agencies conducting contested case hearings shall rely on a "preponderance of the evidence" standard. Indeed, Respondents fail to point to a single example, in Wisconsin or anywhere, where a state or federal government agency is authorized to rely on a "substantial evidence" standard to find facts in a contested case adjudicatory proceeding.

Finally, the notion that the Commission could rely upon a "substantial evidence" standard to make its CPCN determination is conceptually flawed because it would authorize the Commission to find "facts" that could support "two conflicting views" so long as a "reasonable person" could accept it. *See Robertson Transp. Co. v. Pub. Serv. Comm'n.*, 39 Wis.2d 653, 658, 159 N.W.2d 636, 638 (Wis. 1968) ("Substantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may each be sustained

by substantial evidence."). If a trial judge in a civil case gave a "substantial evidence" instruction to a jury, instead of a "preponderance" instruction, they would surely be reversed.

4. The PSC's use of the wrong evidentiary standard is not harmless error.

The Applicants, but not the PSC, argue that even if this Court concludes that the PSC erred by reducing the Applicants' burden of proof, it should nonetheless affirm the PSC's decision as "harmless error" so long as this Court finds substantial evidence in the record to support the PSC's conclusions. (Applicants Br. at 28–29) This error was not harmless. The PSC used the "substantial evidence" standard of proof throughout the Final Decision to endorse the Applicants' positions and reject testimony offered by its own PSC Staff and by DALC/WWF and other Intervenors. *See, e.g.,* Doc. 19 (Final Decision) at 20, 23–24, 31, 33, 35, 45–46, 50. This relieved Applicants from their legal burden to demonstrate that they are entitled to a CPCN by a "preponderance of the evidence" and effectively shifted the burden of persuasion to Staff and Intervenors to prove that they are not.

One concrete example helps illustrate the point. DALC/WWF's Opening Brief described the significant testimony in this case—from all sides—about the impact of additional solar generation on the continued economic viability of the CHC line. (DALC/WWF Br. at 7–9) The Applicants' case for the CHC line assumed only one small (30 MW) solar array in Wisconsin, Doc. 1060 at 21, which the PSC Staff, DALC/WWF and other Intervenors testified was unrealistic because, at the time of the hearing, at least 700 MW of solar were already approved by the PSC or in the late stages of approval, with an additional 4,500 MW of Wisconsin-based solar in MISO's active study stage. *Id.* at 21–22. To test the impact of this new Wisconsin solar generation on the presumed "benefits" of the CHC line, the PSC Staff re-ran Applicants' model with the first 550 MW of solar projects that had already been approved by the PSC. When that solar energy

generation was added, the projected economic benefits of the CHC project plunged by hundreds of millions of dollars.[4] (Doc. 1048 at 35–37)

Applying the flawed and lenient "substantial evidence" standard, the Final Decision dismissed Staff's concerns, stating that Staff "did not provide a conclusive basis to find that the project should be delayed." (Doc. 19 at 20, 23) But the Commission should not have required the PSC Staff to provide a "conclusive basis" for rejection when it is the CPCN Applicants who bear the unshifting burden of persuasion in this case. *See Village of Menomonee Falls v. Wisconsin Dep't of Nat. Res.*, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Ct. App. 1987) ("the Village, not the DNR, was the applicant, or moving party, in these proceedings and bore the burden of proof").

The disparity between the solar assumptions in Applicants' cost/benefit model and the current pace of solar energy development in Wisconsin is becoming even greater and more evident. On May 29, 2020, for example, Alliant Energy filed an Application with the PSC for approval to construct or acquire six additional Wisconsin-based solar energy generating plants totaling 675 MW of new solar capacity.[5] When added to the 700 MW of solar previously identified by the PSC Staff, this means that there are now more than 1,300 MW of solar projects under active development in Wisconsin that are *not reflected in Applicants' cost/benefit model for the CHC*

[4] The Applicants do not deny the existence of these new Wisconsin-based solar projects or dispute the accuracy of the PSC Staff's calculations. Instead, the Applicants argue that Staff should *also* have included additional wind projects in areas to the west of Wisconsin "that are just as far (or farther along) in the process of getting interconnected to the grid." (Applicants Br. at 41) Sidestepping the question of whether it was *PSC Staff's* job to fix Applicants' model, this exchange confirms that Applicants' modeling of the CHC project is significantly out-of-date and no longer reflects the actual conditions on the ground—either in Wisconsin or to the west.

[5] *See* PSCW Docket 6680-CE-182, *Application of Wisconsin Power and Light Company for a Certificate of Authority for Acquisition, Construction, Installation, and Operation of Six Solar Electric Generation Facilities in Wisconsin*. The Court can take judicial notice of this proposal as an official record of the PSC. Wis. Stat. § 902.01; *Town of Holland v. PSCW*, 2018 WI App 38, ¶ 30 n.9, 382 Wis.2d 799, 913 N.W.2d 914.

project. (Doc. 1048 at 35–37; Doc. 89 at 20)[6] The foregoing example—only one of many instances in which the PSC used the "substantial evidence" standard to lower the bar for the CPCN Applicants' evidence—highlights how the PSC's failure to apply the appropriate evidentiary standard is a grave procedural error for which the solution is reversal and remand. Wis. Stat. §§ 227.57(4), 227.57(11); *see* Daniel Blinka, Introduction; burdens of proof, 7 Wis. Prac., Wis. Evidence § 301.1 (4th ed. 2019) ("[a]ssignment of the burdens of proof to a party on a substantive issue is a critical decision"). The Court should reverse and remand this "material error in procedure" pursuant to Wis. Stat. § 227.57(4).

C. The PSC Violated WEPA by Defining an Impermissibly Narrow "Purpose and Need" for the CHC High-Voltage Transmission Line that Foreclosed Consideration of Reasonable Less Environmentally Harmful and More Economical Alternative Transmission Solutions.

The Wisconsin Environmental Policy Act (WEPA) is designed to encourage state agencies to make better, smarter, and more environmentally protective decisions by requiring them to "[s]tudy, develop, and describe appropriate alternatives" before granting a permit or license for a major project that would harm the environment. Wis. Stat. § 1.11; *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 161, 175, 255 N.W.2d 917, 925 (1977), *holding modified by State ex rel. Town of Delavan v. Circuit Court for Walworth Cty*., 167 Wis. 2d 719, 482 N.W.2d 899 (1992). The Respondents' stretch the facts by arguing that the PSC conducted a "robust" WEPA analysis that "adequately evaluated" alternatives to the CHC transmission line. (PSC Br. at 50; Applicants Br. at 62) But that is not what really happened. Instead of independently studying

[6] This is just the tip of the iceberg for Wisconsin-based solar development. At the time of the contested case hearing on the CHC line, there were 4,500 MW of Wisconsin-based solar projects under review in MISO's interconnection queue. (Doc. 1060 at 21–22) This ongoing "solar boom" highlights the urgency of the problems caused by the Commission's decision to relieve Applicants from the need to prove their case by a "preponderance of the evidence."

a range of "appropriate alternatives," the PSC simply adopted, as its own, the Applicants' flawed analysis that effectively predetermined the result of choosing their own highly-profitable high-voltage transmission line. The PSC failed to consider whether an appropriately designed portfolio of alternative transmission solutions (ATS)—including battery storage, solar energy generation, energy efficiency, and upgrading existing transmission lines—could help avoid the need for the proposed more costly new high-voltage transmission line cutting a wide swath through Wisconsin's Driftless Area scenic landscape and communities. This constricted and flawed approach violated the PSC's duty to independently "study, develop, and describe appropriate alternatives" as required by law. Wis. Stat. §§ 1.11(2)(e). The Court should reverse the PSC's erroneous interpretation and misapplication of WEPA's requirements and remand the Final Environmental Impact Statement (FEIS) because it was fatally flawed as a matter of law. Wis. Stat. § 227.57(4), (5).

1. The PSC abdicated its statutory responsibilities by parroting the Applicants' narrow and self-interested "purpose and need" for the CHC project that foreclosed full and fair consideration of solar generation, energy storage, and other non-wires alternatives.

As explained in DALC/WWF's Opening Brief (at 46–47), an agency's determination of the "purpose and need" for a proposed project is a vital first step in the WEPA analysis because it defines the scope of alternatives that must be considered. The agency must ensure that the "purpose and need" is defined broadly enough so that reasonable alternatives are not foreclosed at the outset. *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997).

The transmission company Applicants argue that the "purpose and need" that they defined for the CHC project was "broad enough to allow consideration of several alternatives" including various combinations of energy efficiency, demand response, solar generation, and lower-voltage transmission lines. (Applicants Br. at 63) Not so. In reality, the Applicants defined the purpose of

the CHC project so narrowly that it eliminated from serious consideration any alternatives that did not "directly link" Iowa and Wisconsin—in other words, anything that was not a high-voltage transmission line:

> By definition, non-transmission alternatives such as energy efficiency, demand response, and renewable or conventional generation would not directly link the high-voltage transmission systems in Iowa and Wisconsin. As a result, these options would have little impact on power transfer capability or transmission congestion, and would do little (if anything) to facilitate the import of low-cost energy into Wisconsin.

Doc. 356, Application at 61 (emphasis added). In short, the Applicants and the PSC impermissibly "defined away" meaningful alternatives.

DALC/WWF's highly-qualified team of energy experts[7] testified that the Applicants' unreasonably narrow focus on the purported need for a "direct link" between Iowa and Wisconsin foreclosed reasonable consideration of battery storage, solar energy generation, energy efficiency and other alternative transmission solutions (ATS) that can reduce congestion and increase transfer capacity on the transmission system without creating a new "direct link" between two endpoints. (Doc. 1097 at 10–11) DALC/WWF expert witness Kerinia Cusick testified how ATS technologies can be deployed in combination to provide congestion relief by helping to "flatten out" the peaks that cause bottlenecks on the existing transmission network:

> Speaking in broad terms, the transmission system is sized to accommodate a peak, similar to the rest of the electric system. … Using technologies such as solar, that generate electricity on peak, placed strategically on existing lower voltage transmission lines to reduce congestion where it is occurring, will flatten out the peak. A lower voltage transmission line outfitted with technologies designed to strategically reduce the peak may be able to "keep up" with higher voltage

[7] DALC/WWF presented expert testimony from a team of four highly-qualified energy industry experts, including Jon Wellinghoff, the longest-serving Chair of the Federal Energy Regulatory Commission (FERC) (Doc. 591); Rao Konidena, a former Principal Advisor at MISO and expert in the areas of energy storage and transmission planning (Doc. 730); Kerinia Cusick, an energy storage business and technology leader and Co-Founder of the Center for Renewables Integration (Doc. 733); and Mihir Desu, an energy systems modeler (Doc. 737).

> transmission lines that it is connected to. By using technologies in combination to reduce the load locally, the lower voltage transmission line may no longer be a bottleneck. Without bottlenecks, the cheapest generation assets can be dispatched.

Doc. 1097 at 10. By analogy, instead of building an entirely new highway (or transmission line), transportation planners (or grid operators) can also relieve congestion by encouraging cars (or electrons) to travel at times that avoid rush hour traffic.[8] DALC/WWF's expert testimony included many other examples of real-world "virtual transmission line" projects that use strategically-placed energy storage facilities to augment existing transmission by relieving congestion and enhancing reliability. (Doc. 1097 at 12–17) These projects are not theoretical. They are happening today, all around the U.S. and the world's electricity systems. In this case, however, they never received the evaluation and consideration that WEPA and the Wisconsin Energy Priorities Law require.

The Applicants' planning process was designed so that energy storage, solar generation, and other non-wires solutions would fail. They never had a chance. Instead of attempting to design an alternative that could "mimic the benefits" of the CHC Project, the Applicants' planners explain that they "took a different tack." (Doc. 468 at 29)[9]. Their "tack" was to throw a few miscellaneous technologies into what they deemed a "non-transmission alternative" (NTA)—without any regard to their ability to relieve transmission congestion—until that bucket was "roughly the same ratepayer cost to Wisconsin as the Project." (*Id.*; Doc. 1097 at 9)[10] The Applicants then summarily

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[8] No party disputed Ms. Cusick's testimony that energy storage and other non-wires technologies *can* relieve transmission congestion in this manner. Indeed, MISO and American Transmission Company (ATC), one of the Applicants for the CPCN, are both participating in FERC proceedings regarding the use of energy storage as a transmission asset (FERC Docket ER20-588-000), and ATC is currently developing a different battery storage project to provide transmission services on its Wisconsin transmission network. (Doc. 833 at 6)

[9] Doc. 468 is the Applicants' "Planning Analysis Document," attached as Exhibit D to the Application, which describes how Applicants developed and evaluated project alternatives.

[10] The Applicants' NTA consists of a mix of local energy efficiency, demand response, residential solar facilities, and a 30 MW utility-scale solar plant compared to the 1000+ MW of solar now being developed in Wisconsin. It is described in the FEIS at Section 3.9.2 (Doc. 1193, FEIS at 96)

dismissed this strawman alternative because it "does not involve the construction of any additional transmission facilities." (Doc. 356, Application at 59)

American Transmission Company (ATC) assigned their lead planner, Tom Dagenais, with responsibility to design this strawman "NTA" to include in ATC's Application to the PSC for the CHC project. Mr. Dagenais admitted on cross-examination: (1) that he had no experience with energy storage and did not consider himself to be an expert in non-wires transmission technologies; and (2) that he ruled out the potential role of energy storage from the outset, without any supporting analysis, documentation, or consultation with actual energy storage experts. (Doc. 31 at 446–47; Doc. 1003 at 68–69, 72) When asked on cross-examination whether he could "point to anywhere in the record where anyone has calculated the amount of storage necessary to mimic the project," Mr. Dagenais answered simply: "No." (Doc. 32 at 491, lines 3–6)[11]

The Applicants argue, without support, that the PSC nonetheless "adequately evaluated Project alternatives." (Applicants Br. at 62) Let's be clear: the PSC's Final Environmental Impact Statement (FEIS) simply restates what the *Applicants* did to study (and rule out) alternatives. The FEIS does not independently "[s]tudy, develop, and describe appropriate alternatives" as the law requires. Wis. Stat. § 1.11(2)(e). Indeed, the single "non-transmission system alternative" described in the FEIS is the same "doomed to fail" strawman that Applicants included in their Application. (Doc. 1193, FEIS Ch. 3.9.2) Despite the considerable testimony about the potential for battery storage, solar energy generation, energy efficiency, line upgrades, and other ways to

[11] Applicants subsequently hired Quanta, a consulting firm, to develop additional NTAs, including one that incorporated energy storage. But this "supplemental NTA" was doomed from the start because it could not meet the narrow "purpose and need" of the CHC line project. Instead, the Applicants' witness Dr. Chao admitted in his testimony that "Quanta did not design the supplemental NTA . . . to provide the same benefits [as the] Project." (Doc. 1189 at 3) There simply was never an apples-to-apples comparison. Applicants' flawed NTA process and dismissal of energy storage are described in more detail in DALC/WWF's opening brief at 9–12.

offset or defer high-voltage transmission lines, the FEIS is completely silent on energy storage and considers only the 30 megawatts of solar energy that the Applicants modeled, as opposed to the more than 1,000 megawatts now under development and the 4,500 megawatts of solar energy generation in MISO's transmission queue at the time the PSC prepared the FEIS. It does not even acknowledge the *potential* for batteries to provide transmission services, much less "study, develop, or describe" a storage-based alternative that could potentially avoid the need for the project. The words "battery" or "energy storage" do not appear even once in the 660-page FEIS. (Doc. 1193, FEIS) The FEIS contains no explanation for why energy storage technologies—which are being deployed elsewhere to avoid new transmission lines—are entirely ignored in the PSC's lengthy FEIS for this very expensive and environmentally destructive transmission line.

The PSC repeatedly refers to the length of its FEIS, as if the sheer weight of the document proves the quality of its analysis. (*E.g.* PSC Br. at 6, 47, 50) Size, alone, doesn't matter: the FEIS contains no analysis of the kind of ATS packages that are being deployed elsewhere throughout the country to avoid or defer the need for new transmission infrastructure. The PSC's decision in its FEIS to simply restate the results of the Applicants' self-interested alternatives analysis, rather than conduct any analysis for itself, violates the PSC's obligation to independently "study, develop, and describe appropriate alternatives" and must be reversed. Wis. Stat. § 1.11(2)(e); Wis. Stat. § 227.57(4).

2. The PSC's WEPA review unlawfully deferred to the transmission companies' private objectives instead of the broader statutory goals expressed in Wisconsin's governing CPCN and Energy Priorities law.

The Applicants' claim that the PSC was within its legal rights to adopt Applicants' private "goals and objectives" (at 63) rests on a fundamental misreading of the governing Wisconsin statutes and WEPA case law. The Applicants rely on *BioDiversity Conservation Alliance v. Bureau*

of Land Management, 608 F.3d 709, 715 (10th Cir. 2010) for the principle that the PSC should give "substantial weight" to a private applicant's "goals and objectives" when conducting its WEPA review. (Applicants Br. at 63) But *BioDiversity* is grounded on an entirely different statutory framework than Wisconsin's CPCN law and is not applicable here. In *BioDiversity*, the federal Bureau of Land Management (BLM) was planning for the development of mineral rights that were already owned by non-federal entities. The agency considered, but ultimately rejected, a "phased" development approach—whereby the development of resources would be delayed by decades—because it would be inconsistent with BLM's legal obligations, including its contractual obligations to the mineral lessees. *W. Org. of Res. Councils v. Bureau of Land Mgmt.*, 591 F. Supp. 2d 1206, 1228 n.4 (D. Wyo. 2008), aff'd sub nom. *BioDiversity Conservation All. v. Bureau of Land Mgmt.*, 608 F.3d 709 (10th Cir. 2010). In the current case, the Applicants have no existing rights to develop the proposed transmission line, and the underlying CPCN law requires the PSC to fully consider the project's impact on the *public* interest, including, among other factors, the environmental and aesthetic impact of the project. *See* Wis. Stat. § 196.491(3)(d)4.[12]

Likewise, the Applicants' reliance on *Environmental Law & Policy Center v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676 (7th Cir. 2006) is misplaced. (Applicants Br. at 64) In that case, the federal agency "evaluated a wide range of reasonable alternatives" to the proposed action of siting a new nuclear plant to provide baseload energy, but did not consider energy efficiency as an alternative. *Id.* at 680. Importantly, however, the EIS at issue only dealt with the siting permit for the nuclear plant, and another environmental analysis would be required before construction of the plant. *Id.* at 684. The Court states that there would be a "needs" analysis at that point, which would

[12] This CPCN element requires the PSC to ensure that "[t]he proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use."

include consideration of energy efficiency. *Id.* at 684. In short, the issue was the timing of the robust alternatives analysis that, in any event, must take place before a construction permit—akin to the CPCN here—could be approved.

The facts of *Backcountry Against Dumps v. Chu*, 215 F. Supp. 3d 966 (S.D. Cal. 2015) are much closer to this case than *BioDiversity* or *Environmental Law & Policy Center* and should be given due consideration here. In *Backcountry*, the district court overturned the U.S. Department of Energy's EIS for a high-voltage transmission line intended to provide access to a wind energy project across the Mexican border from California. The court held that the agency adopted an unreasonably narrow "purpose and need" for the project that foreclosed due consideration of distributed generation projects (*e.g.* solar energy) that could potentially avoid or defer the need for the proposed transmission line. *Id.* at 979. That is exactly what happened here.

These cases make clear that the touchstone for determining the range of reasonable alternatives to be evaluated in an EIS is the agency's underlying relevant substantive statutes and their objectives. *See, e.g., Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195–96 (D.C. Cir. 1991) (explaining that the agency's characterization of the "objectives" of proposed action should always consider "the agency's statutory authorization to act"). For example, if the legislature had passed a law requiring that a transmission line be built between Iowa and south-central Wisconsin, that would necessarily constrict the range of alternatives that would need to be considered in an environmental review process. The purpose and need would be constrained by the statutory language, and that would mean consideration of a narrower range of alternatives would be lawful.

But of course, Wisconsin law says no such thing. The Wisconsin laws that govern this case define the state's energy goals much more broadly—to ensure that proposed energy facilities

"satisf[y] the reasonable needs of the public for an adequate supply of electric energy" and avoid "undue adverse impact on other environmental values" including the "aesthetics of land and water and recreational use," among other factors. Wis. Stat. § 196.491(3)(d). By adopting the Applicants' unduly constricted, pre-determination of the alternatives analysis, the PSC *precluded* the consideration of an appropriately designed ATS package: an alternative that could have potentially avoided the environmental and aesthetic impacts of a high-voltage transmission line. This undermines the public interest goals of the CPCN law and directly conflicts with WEPA's requirement for the agency to independently "[s]tudy, develop, and describe appropriate alternatives" to an applicant's desired course of action. Wis. Stat. § 1.11(2)(e).

The PSC's legal error is compounded by its failure to follow Wisconsin's Energy Priorities Law, which specifically requires the PSC to consider alternatives like conservation and energy efficiency. Wis. Stat. § 1.12. That statute "prioritizes" those kinds of measures over big, high-capital-cost investments like the CHC high-voltage transmission line. The PSC's deference to the Applicants' narrow "direct link" requirement, to the exclusion of potential higher priority alternatives under the Priorities Law, makes the error of a too-narrow purpose and need statement and too-narrow range of alternatives even more glaring.

The general rule in National Environmental Policy Act (NEPA)[13] cases is that agencies must define the "purpose and need" of an agency action by reference to the "general goal" of the project "rather than only those alternatives by which a particular applicant can reach its own specific goals." *Envtl. Law & Policy Ctr.*, 470 F.3d at 683 (quoting *Simmons*, 120 F.3d at 669); *see also Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). The PSC violated that rule here. The "general goal" of the CHC project is to "ease congestion" and increase the "transfer

[13] WEPA was patterned after NEPA, so federal case law on NEPA is persuasive to Wisconsin state courts interpreting NEPA. *Wisconsin's Envtl. Decade, Inc.*, 79 Wis. 2d at 174–75.

capability" of the electric system. (Doc. 1193, FEIS at XXIX) ("Need for the Proposed Project") The record contains numerous examples of ATS packages consisting of energy storage, solar energy generation, energy efficiency, existing line upgrades, and other non-wires technologies that can accomplish both of those goals. (Doc. 1097 at 12–17) The Applicants ignored this evidence, substituted their own narrow "direct link" requirement, and then used that purported "need" to eliminate competing alternatives to their preferred high-voltage transmission line. (*See* Doc. 356, Application at 61) The PSC did not question Applicants' self-serving analysis, but just accepted it lock, stock, and barrel. (Doc. 1193, FEIS Ch. 3.9.2)

NEPA requires 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; *Envtl. Law & Policy Ctr.*, 470 F.3d at 682–83. Indeed, the U.S. Court of Appeals for the Seventh Circuit has repeatedly warned agencies that "blindly adopting the applicant's goals is 'a losing proposition.'" *Envtl. Law & Policy Ctr.*, 470 F.3d at 683 (quoting *Simmons*). In *Simmons*, the Court reversed the agency's approval of a permit for a dam precisely because "We conclude that the U.S. Army Corps of Engineers defined an impermissibly narrow purpose for the contemplated project. The Corps therefore failed to examine the full range of reasonable alternatives and vitiated the EIS." 120 F.3d at 667. As the Court explained:

> 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). We are confronted here with an example of this defining-away of alternatives.

Simmons, 120 F.2d at 666.

The PSC concluded that it is not required to "essentially spec its own alternative project" (PSC Br. at 51) and that all it was "obligated" to do was "consider the record before it." (PSC Br. at 52) This ignores WEPA's *explicit statutory mandate* that the agency "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action." Wis. Stat. § 1.11(2)(e). This is not a passive obligation to simply review the alternatives proposed by a private applicant. "The obligation imposed is greater than the simple taking into account of alternatives by the agency in its decision-making. … Thorough agency action is required." *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 161, 175, 255 N.W.2d 917, 925 (1977), *holding modified by State ex rel. Town of Delavan v. Circuit Court for Walworth Cty.*, 167 Wis. 2d 719, 482 N.W.2d 899 (1992).[14]

Accordingly, the Court should reverse and remand because: (1) the PSC failed to comply with its legal duty to "study, develop, and describe appropriate alternatives" to the CHC project as required by Wis. Stat. § 1.11(2)(e); (2) the Applicants failed to meet their burden to prove that the CHC Project is "in the public interest considering alternative sources of supply" within the

[14] Federal courts have long recognized the danger in letting interested parties draft Environmental Impact Statements. *See, e.g., Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 87 (2d Cir. 1975) (explaining that authorship of an EIS by an interested party "might prevent the fair and impartial evaluation of a project"). In *Trinity Episcopal Sch. Corp. v. Romney*, 523 F.2d 88, 94 (2d Cir. 1975), the federal agency "simply adopt[ed] the conclusion" of the applicant that there were no viable alternatives to its proposed project." That is exactly what happened here.

meaning of Wis. Stat. § 196.491(3)(d)3;[15] and (3) the PSC failed to comply with Wisconsin's Energy Priorities Law, Wis. Stat. § 1.12, when it selected the transmission line alternative without independently reviewing higher-priority energy options and alternatives. *See* Wis. Stat. § 227.57(4), (5).

3. DALC/WWF did not waive their WEPA procedural claims.

DALC/WWF's opening brief argues (at 52–53) that the PSC violated WEPA's procedural requirements by prohibiting DALC, WWF, and other intervenors from submitting public comments on the Final EIS. Respondents claim that DALC/WWF have somehow "waived" this claim by failing to petition for interlocutory review below. (PSC Br. at 59, Applicants Br. at 70) Not so. Wis. Admin. Code § PSC 2.27 allows for interlocutory review of ALJ orders, but does not require parties to seek interlocutory review. The single case cited by the PSC is inapposite. In *Clean Water Action Council of Northeast Wisconsin v. Wisconsin Department of Natural Resources*, 2014 WI App 61, ¶ 1, 354 Wis. 2d 286, 848 N.W.2d 336, the plaintiffs sought judicial review of an agency action, when they were required to first seek a contested case hearing at the agency. In the current case, DALC/WWF did fully participate in the contested case proceeding at the PSC below. The record on review includes all issues raised in the agency proceeding below. Wis. Stat. § 227.55(1). In this case, DALC/WWF appropriately raised this issue in the PSC proceeding below (Doc. 249) and the ALJ ruled on it. (Doc. 16) Both of these documents are in the PSC's official record on review and the issue is preserved for appeal.

[15] Wis. Stat. § 196.491(3)(d)3 requires the PSCW to determine that "[t]he 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 …."

D. The Applicants' Accusation that DALC/WWF Have Misrepresented Facts Is Inaccurate Hyperbole.

The Applicants argue that DALC/WWF's brief "misrepresent[s] undisputed facts to the Court." (Applicants Br. at 21) That is false. Apart from a minor typographical and non-substantive error, which is acknowledged below, the Applicants' purported table of "misrepresentations" is simply wrong. For example, the Applicants take issue with DALC/WWF's statement that the CPCN will allow Applicants to collect $2.2 billion from electric utility customers, including the companies' locked-in profit annual rate of 10.3% to 11.2% for each of 40 years. The $2.2 billion of charges over 40 years comes directly from the exhibits and cross-examination of one of the Applicants' witnesses, Mike Degenhardt, who sponsored an exhibit and verified the calculation method on the stand. (Doc. 548; Doc. 32 at 621–22) The high cost of this transmission line underscores the importance of independent regulatory and judicial review.

The Applicants' quibble with DALC/WWF's statement that the CHC project's transmission towers will be "17 stories high" is similarly false and, if anything, *understates* the towers' actual height. A "story" is generally recognized to be approximately 10 feet high and, as explained in the FEIS, the towers would generally be "120 to 175 feet tall," and "between 173 and 198 feet tall" at the Mississippi River crossing. (Doc. 1193, FEIS at XXVIII) Thus, it is undisputed that the CHC transmission structures will be approximately 12 to 20 stories in height, and the Applicants' statement that DALC/WWF "misrepresented" the record is false.

Applicants also take issue with DALC/WWF's statement that MISO has never "individually assessed" the need for the CHC project, claiming that "MISO has conducted numerous studies and expended thousands of hours of its own staff's time studying whether the Project is needed." (Applicants Br. at 22) This is misleading. The record is clear that MISO's approval and periodic review of the *portfolio* of 17 MVP transmission lines do not analyze any of

the individual transmission projects like the CHC line. PSC Staff expert witness Alexander Vedvik testified that "[n]either MISO nor the applicants have evaluated any of the projects approved as part of the MVP portfolio individually, including the proposed Cardinal-Hickory Creek project." (Doc. 1048 at 27) MISO emails produced in discovery confirm that it "does not model the costs and benefits of any single MVP outside the context of an MVP portfolio." (Doc. 1060 at 14 (quoting MISO email)) Unlike MISO, the PSC Staff *did* model the regional costs and benefits of the CHC project individually. The PSC Staff's expert analysis concluded that the CHC project will have "negative net 40-year economic benefits" of $266 million to $318 million in the future deemed "most likely" by MISO:

> Finally, based on the applicants' PROMOD modeling, the proposed Cardinal-Hickory Creek project appears to only provide net benefits to the whole MISO market in the AAT future. Various sensitivities of the PR future, the future deemed to be the most likely scenario by MISO stakeholders and the applicants, show ***negative net 40-year economic benefits as compared to the costs of the proposed project of from $266.7 million to $318.5 million.***

Doc. 1193, FEIS at 104 (emphasis added). MISO and the Applicants did not challenge the PSC Staff's conclusion. Thus, the undisputed record evidence demonstrates that the CHC project will likely result in an overall economic loss for ratepayers across the region. This is one of the reasons why the Citizens Utility Board of Wisconsin and the Attorneys General of Michigan and Illinois also opposed the CHC project before the PSC. (Doc. 111 (Amicus Brief of Attorneys General); Doc. 89 (Initial Brief of Citizens Utility Board)) It is similarly a true statement that MISO advocated for the CHC project in lockstep with its transmission company members from the beginning of this case. Indeed, the Petitioners uncovered in discovery the fact that MISO entered a "common interest" litigation agreement with the CHC project's developers before they filed their application to the PSC in order to jointly strategize and best position the CPCN Application for approval before the PSC. (Doc. 266, Ex. B)

Finally, DALC/WWF's assertion that the Commission "only look[ed] at alternatives that adjust portions of the route" is also true. The PSC did not independently analyze alternatives, but rather simply described the limited and self-serving analysis *done by the Applicants themselves*. The FEIS pages cited by the Applicants demonstrate this—for example, on page 94, the FEIS states "The NTAs [Non-Transmission Alternatives] that were evaluated and considered *by the applicants* include . . ." Page 97 explains that "*[t]he applicants* considered several transmission system alternatives to the proposed project … " (Doc. 1193, FEIS) (emphasis added)

DALC/WWF acknowledge that they mistakenly referred to the CHC line, on one occasion, as "one of 11 regional transmission lines" instead of "one of 17 regional transmission lines." (Opening Br. at 4)[16] The fact that Applicants felt compelled to point out this non-substantive typo to the Court and characterize it as a "misrepresentation" has already consumed more space in this brief than it deserves. In summary, the Applicants' hyperbolic accusations that DALC/WWF have "misrepresented" the record is false and the Court should ignore them.

E. The Circumstances of this Case Create an Objective Appearance of Bias and Serious Risk of Unfairness that Taint the Commission's Order.

Former PSC Commissioner Michael Huebsch, who led the Commission's deliberations on the Final Decision approving the CPCN, was an officially appointed member of the formal MISO Advisory Committee throughout this case: (1) when MISO was an active litigating party before the PSC, and (2) while MISO had a formal joint litigation strategy agreement with ATC to advocate together for the CPCN approval. Through his role on MISO's Advisory Committee, Commissioner Huebsch met with MISO senior executives and discussed issues relating to regional

[16] Both DALC's and WWF's Petitions for Judicial Review correctly state that MISO's MVP portfolio contains 17 transmission lines. On the same page, DALC/WWF stated that ATC owns 60% of the CHC project, instead of stating that WEC Energy Group owns 60% of ATC. Three other references in DALC/WWF's opening brief state correctly that WEC Energy Group has a greater than 60% ownership interest in ATC. (Opening Br. at 19, 20, and 54)

transmission, the use of energy storage as a transmission asset, and MISO's MVP portfolio on a regular basis with MISO officials, Applicant transmission company representatives, and other parties that were simultaneously appearing before the PSC in the CHC docket. PSC Chair Rebecca Valcq spent almost the entirety of her legal career working for and on behalf of We Energies and related corporate entities under the parent WEC Energy Group, which owns a controlling share in ATC, an Applicant here. As explained in DALC/WWF's Opening Brief (at 54–57), these entanglements with parties to the CHC case create appearances and serious risks of bias that taint the Commission's Final Decision.

Subsequent to DALC/WWF's opening brief, the Wisconsin Supreme Court issued its decision *In re Paternity of B.J.M.*, which confirms that Wisconsin courts review allegations of bias using an objective standard that does not require litigants to prove actual bias. *In re Paternity of B.J.M.*, 2020 WI 56, ¶ 24, 994 N.W.2d 542. Circumstances that would lead a reasonable observer to conclude that there is a "serious risk of actual bias" require disqualification of the adjudicator and reversal of the decision. *Id.* The facts and circumstances raised in DALC/WWF's Motion for Recusal, Petitions for Judicial Review, and Opening Brief create, at a minimum, a serious appearance and risk of unfairness that requires this Court to reverse the PSC's Final Order. *Guthrie v. Wisconsin Employment Relations Comm'n*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983); *Tetra Tech*, 2018 WI 75, ¶ 64.

1. **DALC/WWF have presented sufficient facts that, when viewed objectively, demonstrate a "serious risk" of bias.**

The PSC and Applicants argue that DALC/WWF "have not presented <u>any</u> evidence to support their bias allegations." (Applicants Br. at 71; PSC Br. at 66) That argument is demonstrably false. DALC/WWF's Motion for Recusal and Disqualification (Doc. 266) cited significant

evidence that established, at a minimum, unreasonable appearances of bias. For example, with respect to Commissioner Huebsch, the evidence established, in relevant part, that:

- When opening the meeting on the decision matrix for the PSC's vote to grant the CPCN, Chair Valcq turned to Commissioner Huebsch to lead the deliberations "as our delegated Commissioner for MISO and OMS." (Doc. 266 at 3, 12) This statement created at least the appearance that the PSC intended to lean on the viewpoints and expertise that Commissioner Huebsch had gathered through conversations with MISO and other parties to this case during his interactions with them through MISO's Advisory Committee and OMS (the Organization of MISO States)—in other words, outside of the hearing room and record in this case.
- Commissioner Huebsch attended numerous MISO Advisory Committee and OMS meetings during the same time period that MISO was appearing as an active party in the PSC's CHC docket before Commissioner Huebsch to advocate in support of the Applicants' CPCN in this matter. (Doc. 266 at 15)[17]
- The agendas and minutes for these MISO meetings reveal that (a) multiple party representatives were frequently present (Doc. 266 at 15);[18] and (b) the topics of discussion included

[17] At least the following MISO Advisory Committee meetings were held during the pendency of this contested case: on February 20, 2019, March 20, 2019, May 22, 2019, June 19, 2019, August 21, 2019 and September 18, 2019. (Doc. 266 at 15) (citing https://www.misoenergy.org/stakeholder-engagement/committees/advisory-committee/)

[18] For example, MISO's meeting minutes for its March 20, 2019 Advisory Committee meeting in New Orleans revealed the following participants in addition to Commissioner Huebsch: several MISO Board members and Staff; Cynthia Crane of ITC, an Applicant in the CHC docket; Chris Plante of WEC Energy Group, which owns a controlling share of ATC, an Applicant in the CHC docket; Beth Soholt, the Executive Director of Clean Grid Alliance, which is an intervenor party (one of the "Clean Energy Groups") in the CHC docket; and Megan Wisersky of MG&E, which is a part-owner of ATC, an Applicant in the CHC docket. (Doc. 266 at 16) The meeting minutes for this meeting are available in Doc. 266 at 15, n.15 (citing https://cdn.misoenergy.org/20190522%20AC%20Item%2001c%20Minutes%2020190320331762.pdf).

relevant, material, and contested facts and issues that were contemporaneously being litigated by the same parties in the PSC's docket on the CHC transmission line. (Doc. 266 at 15–16)[19]

These undisputed facts, standing alone, create at a minimum an objective appearance and serious risk of actual bias. PSC commissioners should not be engaging with parties to a contested docket, during the course of that contested docket, regarding material issues being litigated in that contested docket, simply because they do so through an Advisory Committee established by one of the parties to that contested docket. The circumstances of Commissioner Huebsch's continued engagement with MISO while MISO was pressing its case before the PSC severely erodes the public's trust in the fairness and impartiality of the Commission's decision-making process. *Guthrie v. Wisconsin Employment Relations Comm'n,* 107 Wis. 2d 306, 314, 320 N.W.2d 213 (Ct. App. 1982) (holding that a "compelling appearance of impropriety" that requires recusal may result from "a number of acts, not individually as egregious in nature" that "together have a cumulative impact of eroding public trust in an administrative agency"); *In re Paternity of B.J.M.*, 2020 WI 56. The same is true with regard to Chair Valcq's apparent conflicts. *See* DALC/WWF Opening Br. at 54–57.

2. **DALC/WWF did not waive their bias claims.**

Respondents argue that DALC/WWF have somehow waived their bias claims because "[t]he facts underlying DALC and WWF's procedural due process claims were a matter of public

[19] For example, MISO's minutes for the March 2019 meeting indicate that Cynthia Crane, who is employed by ITC (which is one of the Applicants here), provided a detailed update on MISO's work on Storage as Transmission-Only Asset and Non-Transmission Alternatives ("NTAs") in her role as MISO's Chair of the Planning Advisory Committee. Ms. Crane expressed her viewpoints on these topics, including her opinion that "MISO does not have jurisdiction over NTAs and that there is no current cost recovery mechanism under the Tariff to allow for this." (Doc. 266 at 16) Ms. Crane's out-of-court statement involved a contested material issue in the CHC docket. *See*, *e.g.*, Doc. 1183 at 11 (testimony of DALC/WWF expert witness Jon Wellinghoff describing why existing FERC rules allow cost allocation for ATS that provide transmission services). Thus, Ms. Crane's presentation was an *ex parte* communication by a party representative on a relevant, material, contested issue in the CHC docket.

knowledge for months—or even years—before the Commission issued the Final Decision." (Applicants Br. at 74; PSC Br. at 62) That statement is not true and it mischaracterizes the relevant "facts" that support DALC and WWF's bias claim.

First of all, it is Commissioner Huebsch's own responsibility to avoid *ex parte* communications and recuse himself in circumstances such as these. Second, DALC/WWF's bias claim goes beyond Commissioner Huebsch's *general* involvement with MISO. This case turns on the *specific* facts and circumstances, and interactions, participants, and topics identified in DALC/WWF's Motion for Recusal (Doc. 266), Opening Brief (at pages 18–21, 54–57), and above. These specific facts crystallized at and after the PSC's first open meeting on August 20, 2019 in which Chair Valcq delegated responsibility to Commissioner Huebsch to lead the Commission's deliberations. (Doc. 266 at 7) (explaining that the due process violations first became "clear and crystallized" at the Commissioners' open meeting for deliberation on August 20, 2019). Litigants should not be placed between "a rock and hard place" where they must bring a serious due process complaint based on generalized concerns or risk waiving their claim entirely. DALC/WWF understands that bias claims should not be raised lightly. *See, e.g., Stivers v. Pierce,* 71 F.3d 732, 748 (9th Cir. 1995) ("To suggest the existence of a conflict would likely antagonize the Board, and might offer little if any hope for relief"). The standard for recusal in Wisconsin requires a "serious risk of bias." *In re Paternity of B.J.M.*, 2020 WI 56, ¶ 24. That is the case here based on the facts known thus far.

3. **The PSC has unreasonably blocked DALC/WWF's good-faith attempts to gather more evidence to support their allegations of bias.**

Despite the PSC's assurances that "the Commission took DALC/WWF's allegations very seriously," (PSC Br. at 64), the PSC has taken repeated steps to prevent or delay DALC/WWF's reasonable, prompt, and good faith attempts to obtain additional factual information, records, and

other details both through Wisconsin Open Records Requests and through discovery in a federal court case. On January 21, 2020, DALC/WWF submitted an Open Records Request to the PSC seeking records related to communications between Commissioner Huebsch and MISO. Despite repeated requests for status updates, and the statutory requirement that agencies provide requested records "as soon as practicable and without delay," Wis. Stat. § 19.35, the PSC still had not provided the requested records by late May 2020—four months after DALC/WWF's original request. After still further delay, the PSC only began producing documents after DALC/WWF filed a Petition for a Writ of Mandamus in Dane County Circuit Court. (Case No. 20-cv-1091, May 22, 2020)[20]

The PSC has also tried to delay discovery in DALC/WWF's related due process complaint in federal court. (No. 19-cv-1007, W.D. Wis.) The PSC's refusal to respond to DALC/WWF's discovery requests finally led to DALC/WWF filing a motion to compel, which the court granted. No. 19-cv-1007, Dkt. 59, Dkt. 61. The PSC then filed a Motion for Reconsideration, Dkt. 62, which the court denied. Dkt. 64. After these significant delays, the Magistrate Judge ordered the PSC to finally turn over responsive documents to DALC/WWF by July 13, 2020 with a threat of sanctions for further delay and non-compliance.

The PSC's persistent delay tactics to stymie DALC and WWF's access to information undermine their criticism that DALC/WWF have not yet produced more evidence of bias. (PSC Br. at 66) The publicly available documents in the record, alone, contain sufficient facts that, when viewed objectively, demonstrate a "serious risk" of bias. If DALC/WWF finally receive more information in response to their open records request and federal court discovery that further

[20] The Attorney General's office is still in the process of reviewing and providing responsive records to DALC/WWF's Open Records Request, and the records were not all provided before DALC/WWF's reply brief is due on July 10, 2020.

strengthens these claims, DALC/WWF will seek leave to appropriately bring these facts forward for this Court's consideration. *See* Wis. Stat. § 227.57(1) (allowing further testimony upon leave of the court "in cases of alleged irregularities in procedure before the agency").

4. The bias of even one of the Commissioners contaminates the deliberative process and requires reversal of the PSC's Final Decision.

Respondents argue that the disqualification of Commissioner Huebsch or Chairperson Valcq does not matter because the one remaining commissioner's vote "would have been sufficient" to support the decision. (Applicants Br. at 79; PSC Br. at 67) That is incorrect as a matter of law. Wisconsin and U.S. Supreme Court case law is clear that a single biased decisionmaker's participation on a panel disqualifies the decision of the entire panel. "Where a justice who participated in a case was disqualified by law, the court's judgment in that case is void." *State v. Am. TV & Appliance of Madison, Inc*., 151 Wis. 2d 175, 179, 443 N.W.2d 662 (1989); *Jackson v. Benson*, 2002 WI 14, ¶ 14, 249 Wis. 2d 681, 691, 639 N.W.2d 545, 549. The same rule applies "when the disqualified judge has acted simply as one of a bench composed of several judges, even though the vote of the disqualified judge was not necessary to the decision." *Case v. Hoffman*, 100 Wis. 314, 74 N.W. 220, 222 (1898); *accord Williams v. Pennsylvania,* 136 S. Ct. 1899, 1906 (2016) (participation of biased judge is "structural" and "'not amenable' to harmless-error review, regardless of whether the judge's vote was dispositive"); *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995) ("Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings and violates due process.").

This is especially true here, where Commissioner Huebsch was leading the PSC's deliberations, and Chair Valcq is the PSC Chair. Respondents' argument that Commissioner Nowak's vote, alone, would be sufficient to approve the CPCN is wrong as a matter of law and

lacks merit. Accordingly, the Court should reverse the PSC's Final Decision and declare it void as a matter of law for this reason as well.

III. CONCLUSION

Over the past few years, Wisconsin's electricity sector and its legal framework for appellate review have both changed dramatically. Solar energy generation is accelerating, and energy storage is rapidly entering the Wisconsin and Midwest market, while energy demand remains flat or declining. The Wisconsin Supreme Court's *Tetra Tech* decision and the Legislature's revisions to Wisconsin's judicial review statute have similarly shifted business as usual in Wisconsin courts. These changing circumstances make it particularly important for this Court to undertake a searching review of the PSC's Final Decision, without deference to Commission's pre-*Tetra Tech* and pre-Act 369 interpretations of law. The PSC's Final Decision and its Brief before this Court read as though these fundamental energy market and legal changes never occurred. They read as if the Wisconsin Supreme Court's landmark *Tetra Tech* decision and the State Legislature's 2017 Act 369 eliminating judicial deference to agency conclusions of law somehow change nothing. Simply put, that is not and cannot be the case here. *Tetra Tech* stands for the principle that courts must ensure that administrative agencies follow their governing statutes when deciding cases. For the reasons described in Petitioners DALC and WWF's Opening Brief and herein, the Court should reverse the PSC's Final Decision granting a CPCN for the Cardinal-Hickory Creek transmission line and remand the Application to the PSC.

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Respectfully submitted,

/s/ Electronically Signed by Bradley D. Klein

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