



ENVIRONMENTAL LAW & POLICY CENTER

Protecting the Midwest's Environment and Natural Heritage

July 26, 2019

Steffany Powell Coker
Public Service Commission
P.O. Box 7854
Madison, WI 53707-7854

Re: Draft Decision Matrix for PSCW Case No. 5-CE-146

Dear Ms. Coker:

The Driftless Area Land Conservancy and Wisconsin Wildlife Federation (DALC/WWF) appreciate the opportunity to provide comments on the PSC Staff's Draft Decision Matrix that was circulated to the parties for comment on July 17, 2019 ("Decision Matrix") ([PSC REF#: 372467](#)).

DALC/WWF are concerned that the Draft Decision Matrix is flawed in several respects and must be corrected in order to support an accurate and defensible Commission order in this case. This memo describes these concerns and is intended to accompany DALC/WWF's separate additions to the Draft Decision Matrix submitted today pursuant to Staff's instructions in its July 17, 2019 cover letter. DALC/WWF did their best in that document to fit arguments into the flawed structure of the Draft Decision Matrix, but felt that it was necessary to additionally articulate these concerns which the Matrix's structure would not accommodate.

DALC/WWF has the following broad concerns about the July 17 Draft Decision Matrix:

- **First**, and most importantly, the Draft Decision Matrix omits several of the required legal criteria that the Applicants must prove and the Commission must determine in order to issue a certificate of public convenience and necessity (CPCN). Staff should revise the Decision Matrix to include these missing criteria so that the basis for the Commission's decision is clear and does not omit required factors.
- **Second**, some of the issue statements in the Draft Decision Matrix conflate several related, but independent, legal standards that must be separately considered and decided by the Commission. Issue 1 ("reasonable needs of the public") is an example where several separate legal criteria are blended into one decision point. Issue 30 (WEPA compliance and "undue adverse impact on other environmental values") is another. Staff should revise the Decision Matrix to list each of the specific criteria in the applicable statutes as an independent issue with an independent decision point.

35 East Wacker Drive, Suite 1600 • Chicago, Illinois 60601
(312) 673-6500 • www.ELPC.org

Harry Drucker, Chairperson • Howard A. Learner, Executive Director
Chicago, IL • Columbus, OH • Des Moines, IA • Duluth, MN • Grand Rapids, MI • Indianapolis, IN
Jamestown, SD • Madison, WI • Minneapolis/St. Paul, MN • Sioux Falls, SD • Washington, D.C.

- **Third**, the Commission’s decision points (“Commission Alternatives”) do not accurately reflect the fact that the Applicants bear the burden of proof for each factor. Instead, the decision points are drafted in a neutral way. Staff should revise the Commission Alternatives for each Issue to make it clear that the Commission may only grant the CPCN if the Applicants have proven each and every factor by a preponderance of evidence in the record. For example, the Commission Alternatives for Issue 1 should be redrafted as follows:

COMMISSION ALTERNATIVES
Alternative One: Yes, the Applicants have proven by the preponderance of evidence in the record that the proposed project “satisfies the reasonable needs of the public for an adequate supply of electric energy” as required by Wis. Stat. § 196.491(3)(d)2.
Alternative Two: No, the Applicants have failed to prove by a preponderance of the evidence in the record that the proposed project “satisfies the reasonable needs of the public for an adequate supply of electric energy” as required by Wis. Stat. § 196.491(3)(d)2.

- **Fourth**, there are several issues that are drafted in a way that requires the Commissioners to make inappropriate assumptions. Issues 18 through 27 ask which of specific listed conditions the Commission should impose. These questions seem to presume that some combination of the listed conditions would be sufficient to eliminate undue adverse environmental impacts. It is DALC/WWF’s position that each of these issues should also ask whether Applicants have shown whether implementation of all suggested conditions would be sufficient to eliminate undue adverse environmental impacts, Wis. Stat. § 196.491(3)(d)(4), and minimize environmental impacts, § 196.491(3)(d)(3r). If the conditions would be sufficient, it should also be asked whether there is adequate monitoring, reporting, and enforcement in place to assure compliance. Issue 5 limits the scope of route alternatives to the two adjacent river crossings at Cassville. This issue should also address whether the EIS considered an appropriate range of alternatives and whether the Applicants have proven that there are no reasonable alternative routes that do not cross the Refuge or the Driftless Area.

A. The Decision Matrix Should Include Each of the “Applicable Laws and Legal Standards.”

Hearing Examiner Michael Newmark’s March 13, 2019 Prehearing Conference Memorandum (Second) ([PSC REF#:361296](#)) lists the following as the agreed upon “issues” in this case:

Does the proposed project comply with the applicable standards under Wis. Stat. §§ 1.11, 1.12, 196.025, 196.49, and 196.491, and Wis. Admin. Code chs. PSC 4, and 111?

The Applicants have the burden of proof in this case and must prove, by a preponderance of the evidence, **each one** of the applicable standards in order for the Commission to issue a certificate of public convenience and necessity (CPCN). Wis. Stat. § 196.491(3)(d) (stating that the Commission shall approve an application for a CPCN “only if the commission determines all of the following [list of ten specific factors]”). If Applicants fail to prove even one factor, the PSC must: (1) “reject the application,” or (2) “approve the application with such modifications as are necessary for an affirmative finding under par. (d).” Wis. Stat. § 196.491(3)(e).

This statutory structure means the Decision Matrix must set out each separate statutory requirement in a separate issue. The Draft Decision Matrix does not, however, even include several of the required factors that the Applicants must prove and the Commission must find in order to grant a CPCN under Wisconsin law. For example, the Draft Decision Matrix does not identify the following legal standards, despite being required by law and discussed in DALC/WWF’s legal briefs and the briefs of other parties to this case:

- FACTOR 1: Wis. Stat. § 196.491(3)(d)(3)
- FACTOR 2: Wis. Stat. § 196.491(3)(d)(3r)
- FACTOR 3: Wis. Stat. § 1.12(3)(c)

Staff’s July 17, 2019 Decision Matrix cover letter indicates that the Commission uses the Decision Matrix “to facilitate its discussion and review of issues that require a Commission determination under the applicable laws and legal standards.” Because Wisconsin law requires the Commission to make an independent finding regarding each one 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.

B. Missing Issues in the Decision Matrix that Staff Should Include in an Updated Draft

The following are the statutory requirements missing from the issues identified in the Draft Decision Matrix. DALC/WWF respectfully asks that the Staff revise the Decision Matrix to include an issue for each of these missing factors. DALC/WWF have also included their position and transcript references for each of the missing factors.

MISSING FACTOR #1: Wis. Stat. § 196.491(3)(d)(3)

This factor requires that “The design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors”

DALC/WWF Position: DALC/WWF’s position is that the Applicants have not satisfied this factor because they have not carried their burden of proving that alternative sources of supply, locations, or routes are not feasible; that the line will result in economic benefits for the public; that the line is needed to address reliability concerns; and that the “need” for the line justifies the environmental harm it will cause.

Transcript References:

1. in general

- Initial brief at 5 (citing this provision and arguing Applicants must prove each factor)
- Initial brief at 20, fn. 2 (citing provision)

2. *alternative sources of supply*

- Initial brief at 2 (Direct-DALC/WWF-Cusick-r; Direct-DALC/WWF-Wellinghoff-r)

3. *alternative locations or routes*

- Initial brief at 23–24 (discussing routes that don't cross Refuge)
- Reply brief at 3 (routes that don't cross Refuge)
- Reply brief at 12

4. *economic*

- Initial brief at 2 (Direct-PSC-Vedvik; Direct-CUB-Neal-r2; Direct-DALC/WWF-Desu-c)
- Initial brief at 4 (Direct-PSC-Vedvik-38; Ex.-PSC- Vedvik-7p at 6)
- Initial brief at 9–12 (economics on the energy side)
- Initial brief at 24–25 (tourism and recreation economics) (Direct-DALC/WWF-Meyer-r2-6-21; Direct-DALC/WWF-Meine-r2-24-26; Direct-DALC/WWF-Meyer-r2-19-20)
- Reply brief at 6–8 (negative economic impact on energy side)
- Reply brief at 10–11 (discussing Applicants' attempt to discredit Staff's critique of Applicants' economic analysis)

5. *reliability*

- Initial brief at 2 (Direct-DALC/WWF-Konidena-c; Direct-PSC-Vedvik)
- Initial brief at 7–8

6. *environmental factors*

- Initial brief at 2 (Direct-DALC/WWF-Meyer-r2; Direct-DALC/WWF-Meine-r2; Direct-DALC/WWF-Waller-r2; Direct-DALC/WWF-Ingram)
- Initial brief at 28-29 (discussing inadequacy of determining mitigation measures after CPCN approval)
- Reply brief at 13 (discussing lack of clear mitigation measures; noting that Applicants bear burden on each statutory point)
- Reply brief at 14–15 (noting that Applicants cannot rely on DNR permitting conditions to eliminate and minimize environmental impacts)

MISSING FACTOR #2: Wis. Stat. § 196.491(3)(d)(3r)

This factor requires that “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.”

DALC/WWF Position: DALC/WWF's position is that the Applicants have not satisfied this factor because the routing and design of the project, including the as-yet-unplanned mitigation measures and BMPs do not minimize environmental impacts.

Transcript References:

- Initial brief at 20, fn. 2 (citing provision)
- Initial brief at 28-29 (discussing inadequacy of determining mitigation measures after CPCN approval)
- Reply brief at 12 (discussing routing through Refuge) and 12, fn. 3 (discussing overlap with existing ROW)
- Reply brief at 13 (discussing lack of clear mitigation measures; noting that Applicants bear burden on each statutory point)
- Reply brief at 14–15 (noting that Applicants cannot rely on DNR permitting conditions to eliminate and minimize environmental impacts)
- Direct-DALC/WWF-Meine-r2-5, 15–16, 30–31
- Direct-DALC/WWF-Meine-r2-15-16
- Direct-DALC/WWF-Waller-r2-9-10, 15–16, 20, 22–24

MISSING FACTOR #3: Wis. Stat. § 1.12(3)(c)

This factor requires that the project be consistent with “the goal of the state to ensure a future supply of wood fuel and reduce atmospheric carbon dioxide by increasing the forested areas of the state.”

DALC/WWF Position: DALC/WWF’s position is that the Applicants have not satisfied this factor because the project would reduce forested areas of the state.

Transcript References:

- Initial brief at 20, fn. 2 (citing provision), and 26 (arguing line is not consistent with stated goal)
- Direct-DALC/WWF-Waller-r2-16-17

C. The Decision Matrix Should Not Conflate Related Statutory Factors.

In other instances, the Draft Decision Matrix might reference the statutory standards, but it improperly collapses several significant and multi-part questions into single items.

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 any 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.

Similarly, for Issue 30, the Draft Decision Matrix lumps all of WEPA and the basic requirement of avoiding undue adverse environmental impacts into one question. The decision matrix should spell out the specific requirements of WEPA and PSC and DNR's implementing regulations, as well as the specific requirements in the Council on Environmental Quality NEPA guidance incorporated by explicit reference in WEPA, including the requirements to develop and analyze alternatives; to independently verify information; to fully consider and discuss direct, indirect, and cumulative impacts; and to encourage and incorporate public input. Similarly, the specific environmental values listed in Wis. Stat. § 196.491(3)(d)4 should be enumerated and discussed in the "Issue Scope." Additionally, the EIS, being co-written by DNR, must also comply with Wis. Admin. Code ch. NR 150, and those requirements should be broken out as well.

Unfortunately, by either burying or even completely avoiding the specific requirements of several statutes, by neglecting the allocation of the burden of proof, and by assuming that environmental risks will in all cases be fully addressed by permit conditions the Applicants agree to, the Draft Decision Matrix makes it less likely that the PSC's ultimate decision will be defensible. We urge Staff to address these problems before a final decision matrix is provided to the Commission members.

Sincerely,

/s/ Bradley Klein

Bradley Klein

Justin Vickers

Rachel Granneman

Environmental Law & Policy Center

35 E. Wacker Dr., Suite 1600

Chicago, IL 60601

(312) 673-6500

bklein@elpc.org

*Attorneys for the Driftless Area Land
Conservancy and Wisconsin Wildlife
Federation*

Legal Standards:

(1) Wis. Stat. § 1.11 Wisconsin Environmental Policy Act (WEPA)

- **Legislative purpose 1.11(1):** Requires state policies and regulations to be “interpreted and administered” in accordance with the legislative purposes of Wisconsin’s Environmental Policy Act (chp 274, laws of 1971). That law states that “The purposes of this act are to declare a policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; and to enrich the understanding of the important ecological systems and natural resources.”
- **EIS requirement 1.11(2):** Requires all agencies of the state to produce a detailed EIS regarding “major actions significantly the quality of the human environment.”
- **Contents of EIS 1.11(2)(c):** The EIS must include discussion of: **1.** The environmental impact of the proposed action; **2.** Any adverse environmental effects which cannot be avoided should the proposal be implemented; **3.** Alternatives to the proposed action; **4.** The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; **5.** Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; and **6.** Details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages and disadvantages of the proposal.
- **Alternatives analysis 1.11(2)(e):** The law further directs agencies to “[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”

(2) Wis. Stat. § 1.12 State Energy Priorities Law

- **Afforestation. 1.12(3)(c)** It is the goal of the state to ensure a future supply of wood fuel and reduce atmospheric carbon dioxide by increasing the forested areas of the state.
- **Priorities: 1.12(4)** “In meeting energy demands, the policy of the state is that, to the extent cost-effective and technically feasible, options be considered based on the following priorities, in the order listed:
 - (a) Energy conservation and efficiency.
 - (b) Noncombustible renewable energy resources.
 - (c) Combustible renewable energy resources.
 - (cm) Advanced nuclear energy ...
 - (d) Nonrenewable combustible energy resources ...”
- **Meeting Energy Demands. 1.12(5)** “(a) In designing all new and replacement energy projects, a state agency or local governmental unit shall rely to the greatest extent feasible on energy efficiency improvements and renewable energy resources, if the energy efficiency improvements and renewable energy resources are cost-effective and technically feasible and do not have unacceptable environmental impacts. (b) To the greatest extent cost-effective and technically feasible, a state agency or local governmental unit shall design all new and replacement energy projects following the priorities listed in sub. (4).”

- **Siting of electric transmission facilities.** [1.12\(6\)](#) “In the siting of new electric transmission facilities, including high-voltage transmission lines ... it is the policy of this state that, to the greatest extent feasible that is consistent with economic and engineering considerations, reliability of the electric system, and protection of the environment, the following corridors should be utilized in the following order of priority:
 - (a) Existing utility corridors;
 - (b) Highway and railroad corridors;
 - (c) Recreational trails; to the extent that the facilities may be constructed below ground and that the facilities do not significantly impact environmentally sensitive areas;
 - (d) New corridors.”

(3) [Wis. Stat 196.025](#) **Duties of the Commission**

- **Energy Priorities** [196.025\(1\)\(ar\)](#): Explicitly requires the Commission to “implement the priorities under s. [1.12 \(4\)](#) [Energy Priorities Law] in making all energy-related decisions and orders” “to the extent cost-effective, technically feasible and environmentally sound.”
- **Transmission Corridors** [196.025\(1m\)](#): Explicitly requires the Commission to “implement the policy specified in s. [1.12 \(6\)](#) [Transmission Siting] in making all decisions, orders, and rules affecting the siting of new electric transmission facilities.”
- **Environmental Review** [196.025\(2\)](#): Requires the Commission to promulgate rules that provide “adequate opportunities” and “adequate time” for the public to be heard on environmental impact statements as well as deadlines that allow “thorough review” of environmental issues without imposing unnecessary delay.

(4) [Wis. Stat. § 196.49](#) **Authorization from Commission**

- **Authorization required** [196.49\(2\)](#): Requires utilities to receive Commission authorization before beginning construction of any new “plant, equipment, property, or facility...”
- **Denial of certification** [196.49\(3\)\(b\)](#): Allows the Commission to “refuse to certify a project” if it appears that completion of the project would “(1) Substantially impair the efficiency of service of the public utility, (2) Provide facilities unreasonably in excess of the probable future requirements, ... [or] (3) ... add to the cost of service without proportionately increasing the value or available quantity of service ...”

(5) [Wis. Stat. § 196.491\(3\)](#) **Certificate of Public Convenience and Necessity**

- **CPCN required** [196.491\(3\)\(a\)1](#): Requires the Commission to issue a CPCN before any person may commence construction of a “large electric generating facility” or a “high-voltage transmission line” as defined in the Act.
- **Standards for CPCN approval** [196.491\(3\)\(d\)](#): The Commission shall approve an application for a CPCN only if the commission determines all of the following:
 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. The commission may not require that a high-voltage transmission line, as defined in s. [30.40 \(3r\)](#), be placed underground in order for it to approve an application.

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.

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.

- **Rejection/modification of CPCN [196.491\(3\)\(e\)](#):** If an application filed under par. [\(a\) 1.](#) does not meet the criteria under par. [\(d\)](#), the commission shall reject the application or approve the application with such modifications as are necessary for an affirmative finding under par. [\(d\)](#).
- **360-day deadline [196.491\(3\)\(g\)](#):** The commission shall take final action on an application filed under par. [\(a\) 1.](#) within 180 days after the application is determined or considered to be complete under par. [\(a\) 2.](#) If the commission fails to take final action within the 180-day period, the commission is considered to have issued a certificate of public convenience and necessity with respect to the application, unless the chairperson of the commission extends the time period for no more than an additional 180 days for good cause. If the commission fails to take final action within the extended period, the commission is

considered to have issued a certificate of public convenience and necessity with respect to the application.

- **Judicial review** [196.491\(3\)\(j\)](#): Any person whose substantial rights may be adversely affected or any county, municipality or town having jurisdiction over land affected by a certificate of public convenience and necessity for which an application is filed under par. [\(a\) 1.](#) may petition for judicial review, under ch. [227](#), of any decision of the commission regarding the certificate

(6) [Wis. Admin. Code ch. PSC 4](#) -- **Environmental Analysis**

- **EIS requirement** [PSC 4.30\(1\)\(a\)](#): EIS must “inform the commission and the public of significant environmental impacts of a proposed action and its alternatives, and reasonable methods of avoiding or minimizing adverse environmental effects.”
- **Alternatives analysis** [PSC 4.30\(3\)\(c\)](#): EIS must include an “evaluation of the reasonable alternatives to the proposed action and significant environmental consequences of the alternatives, including those alternatives that could avoid some or all of the proposed action's adverse environmental effects and the alternative of taking no action.

(7) [Wis. Adm. Code ch. PSC 111](#) – **CPCN requirements**

- **Prohibition of construction** [PSC 111.51\(1\)](#): Prohibits commencement of construction until the commission issues a CPCN.
- **CPCN application requirements for transmission lines** [PSC 111.55](#): Contains a list of requirements for CPCN applications.
- **Need** [PSC 111.55\(1\)](#): Among other factors, the application for a CPCN must include information about “[t]he need for the proposed project, including all planning criteria, assumptions, historical outage data, stability, and power-flow studies that address need.”

(8) [Wis. Adm. Code ch. NR 150](#)—**Environmental Analysis and Review Procedures**

- **EIS action analysis** [NR 150.30](#): Lists requirements for Environmental Impact Statements prepared by the Department of Natural Resources.
- **Cooperation with other agencies.** [NR 150.40](#): When the department conducts an environmental review jointly with another state agency, “[t]he joint process shall meet the requirements of this chapter.”