PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of South Shore Energy, LLC and Dairyland Power Cooperative for a Certificate of Public Convenience and Necessity for the Nemadji Trail Energy Center Combined-Cycle Project, to be Located in the City of Superior, Douglas County, Wisconsin	9698-CE-100

FINAL DECISION

On January 22, 2019, pursuant to Wis. Stat. § 196.491 and Wis. Admin. Code chs. PSC 4 and 111, South Shore Energy, LLC (South Shore) and Dairyland Power Cooperative (DPC) (together, applicants) filed with the Commission an application for a Certificate of Public Convenience and Necessity (CPCN) to construct a new natural gas-fired combined-cycle (NGCC) electric generation facility.[1] The applicants' proposed generation facility would be a wholesale merchant plant as defined by Wis. Stat. § 196.491(1)(w), and would have a generating capacity of approximately 625 megawatts (MW). The proposed project would be located in city of Superior, Douglas County, Wisconsin. The proposed NGCC generation facility, named the Nemadji Trail Energy Center (NTEC), will consist of one H-class gas turbine generator, one heat recovery steam generator with duct firing, and one steam turbine generator.

The CPCN application is APPROVED, subject to conditions and as modified by this Final Decision.

[1] In addition to the combined-cycle generation facility, the applicants are also proposing to construct a new 345 kilovolt (kV) generator tie line that would connect the proposed new generation facility to the existing electric transmission system. The Commission is reviewing the tie line in docket 9698-CE-101. In addition to construction proposed by the applicants, construction of a new 16-inch lateral natural gas line (see docket 5820-CG-105) and relocation of a 10-inch natural gas line (see docket 5820-CG-106) is proposed by Superior Water, Light and Power Company (SWL&P) to interconnect the generation facility with an existing Great Lakes Transmission Limited interstate pipeline for natural gas service to the facility. In addition to these construction dockets, SWL&P is seeking approval of two affiliated interest agreements between it and the applicants that the Commission is considering in docket 5820-AG-101 and 5820-AG-102.

Introduction

Pre-Hearing Procedures

The Commission determined the application in this docket was complete on February 15, 2019. (PSC REF#: 359629.) A Notice of Proceeding was issued on April 11, 2019. (PSC REF#: 363873.) Wisconsin Stat. § 196.491(3)(g) requires that the Commission take final action within 180 days after it finds a CPCN application complete unless an extension of no more than 180 days is granted by the Commission Chairperson. On April 5, 2019, the Commission Chairperson granted a 180-day extension. (PSC REF#: 363624.) The Commission must take final action on or before February 10, 2020 or the application is approved by operation of law. See Wis. Stat. § 196.491(3)(g).

A Prehearing Conference was held on May 29, 2019. (PSC REF#: 366238.) Requests to intervene were granted to American Transmission Company LLC, Citizens Utility Board of Wisconsin, Clean Wisconsin, Sierra Club, Wisconsin Legislative Black Caucus, and Wisconsin Senator Janet Bewley. (PSC REF#: 366168, PSC REF#: 369610.) The parties, for the purposes of review under Wis. Stat. §§ 227.47 and 227.53, are listed in Appendix A.

The Commission's action in this proceeding is considered a Type I action under Wis. Admin. Code § PSC 4.10(1). It consequently requires the preparation of an environmental impact statement (EIS) under Wis. Stat. § 1.11.[2]

Commission staff worked jointly with the Wisconsin Department of Natural Resources (DNR), and on July 24, 2019, issued a draft EIS. (PSC REF#: 372729.) The Commission took

[2] As part of the Commission's review of the proposed project, it performed a consolidated EIS for both the generation facility (9698-CE-100) and the tie line (9698-CE-101) proceedings. The tie line is a Type II action under Wis. Admin. Code § PSC 4.10(2).

comments on the draft EIS and on October, 3, 2019, issued a final EIS regarding the proposed project, which is entered as an exhibit into the record, pursuant to Wis. Stat. § 1.11 and Wis. Admin Code chs. NR 150 and PSC 4. (PSC REF#: 376795.)

The Commission issued a Notice of Hearing on September 9, 2019. (PSC REF#: 375473.) The Commission held technical hearing sessions in Superior, Wisconsin, on October 29, 2019. At the technical sessions, expert witnesses offered testimony and exhibits on behalf of the applicants, Clean Wisconsin, Sierra Club, and Commission and DNR staff.[3] Public comment hearing sessions were held in Superior, Wisconsin on October 28 and 29, 2019. At the public comment hearings, the Commission accepted both oral and written testimony from members of the public.[4] The Commission also accepted comments from members of the public through its website.[5] The Commission conducted its hearings as Class 1 contested case proceedings, pursuant to Wis. Stat. §§ 196.491(3)(b), 227.01(3)(a), and 227.44.

The issue for hearing, as determined at the May 29, 2019, Prehearing Conference, was:

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

Initial briefs were filed by the applicants, Clean Wisconsin, and Sierra Club on November 13, 2019. (PSC REF#: 379360, PSC REF#: 379361, PSC REF#: 379363.) Reply briefs were filed by the applicants, Clean Wisconsin, and Sierra Club on November 20, 2019. (PSC REF#: 379794, PSC REF#: 379797, PSC REF#: 379799.)

[3] Tr. 136-522 Party Hearing Session - PSC REF#: 379636
[4] Tr. 28-135 Public Hearing Session - PSC REF#: 378852
Tr. 533-585 Public Hearing Session - PSC REF#: 378853
[5] Ex.-PSC-Public Comment - PSC REF#: 378872

Post-Hearing Procedures and Evidentiary Issues

Post-hearing evidentiary issues arose in this docket relating to the sufficiency of the groundwater supply. DNR testimony questioned whether there is sufficient groundwater supply for the plant's 30-year lifespan. The applicants, responding in rebuttal testimony, indicated that they were nearing completion of a new 14-day aquifer pumping test. (PSC REF#: 377496.) The pump test was started three weeks before the October 29, 2019, technical hearing. At the hearing itself, the applicants tried to introduce as an exhibit a graph showing the preliminary results of the incomplete pump test, as well as testimony interpreting the preliminary results. (Tr. at 142:6-144:12). In response to objections, Administrative Law Judge (ALJ) Michael Newmark did not allow the exhibit or the testimony, noting that the exhibit lacked underlying data. (*Id.* at 142:6-144:12; 257:11-259:10, 443:7-15). The parties, however, developed a plan for the applicants to submit the full pump test report and related testimony post-hearing, in the interest of having a complete record. (Tr. at 428:1-438:6).

On November 11, 2019, Commission staff submitted a motion to approve a stipulation in which the parties agreed to modify the schedule and the facilitating matters ordered for the proceeding. (PSC REF#: 379198.) The ALJ then issued a Prehearing Conference Memorandum-Amended Second (Amended Schedule), in accordance with the parties' stipulation. (PSC REF#: 379603.) Pursuant to the stipulation and the Amended Schedule, on November 14, 2019 the applicants filed an Extended Aquifer Test Report and underlying data (2019 Aquifer Report). (PSC REF#: 379395, PSC REF#: 379396.) The filings showed the preliminary results of tests that were still ongoing. The report contained some information about

the pump test itself, but lacked a complete analysis of the pump test recovery period, which was still ongoing. (Ex.-Applicants-DeAngelis-13, § 4.5.)

According to the Amended Schedule the parties filed additional testimony and exhibits limited to the 2019 Aquifer Report on November 26, 2019, and December 4, 2019. (PSC REF#: 380086, PSC REF#: 380067, PSC REF#: 380292, PSC REF#: 380293, PSC REF#: 380294, PSC REF#: 380295, PSC REF#: 380296.). Briefs on the 2019 Aquifer Report were filed on December 13, 2019 by the applicants, Clean Wisconsin, and Sierra Club. (PSC REF#: 380699, PSC REF#: 380700, PSC REF#: 380701.)

On December 20, 2019, the ALJ issued an Order to Show Cause, directing the applicants to show cause as to why certain portions of their briefs, testimony, and exhibits that were supposed to be limited to the 2019 Aquifer Report, should not be stricken. (PSC REF#: 381426.) Noting that the post-hearing testimony and briefing had been permitted as a special process to balance the interests of producing a complete and accurate record (recognizing the time constraints under which Wis. Stat. § 196.491 proceedings must operate) with ensuring due process to all parties, the ALJ raised concerns that certain materials could have have been produced with the 2019 Aquifer Report itself, rather than in the applicants' special process rebuttal. The ALJ suggested that because Wis. Stat. § 227.44(3) provides that "[o]pportunity shall be afforded all parties to present evidence and to rebut or offer countervailing evidence," because the applicants failed to properly identify, fully reference, and timely introduce the documents at issue into the record, the citations to the documents should be stricken.

The applicants urged the ALJ not to strike the identified evidence because it was not clear that the information was relevant until the applicants reviewed the testimony of Sierra Club

witness Dr. Douglas Cherkauer. (PSC REF#: 381549.) The applicants also argued that they only submitted the questioned supporting documentation due to Commission staff and ALJ requests that underlying data, rather than just the 2019 Aquifer Report, be submitted.

Clean Wisconsin argued that the evidence questioned in the Order to Show Cause should be stricken because the applicants should have had sufficient support for their application, including environmental impacts of groundwater pumping, much earlier in the process, when their application and initial testimony was first submitted. (PSC REF#: 381719.) Clean Wisconsin argued that the information presented by the applicants is immaterial and incomplete, and that rather than submitting the evidence to respond to Dr. Cherkauer's testimony, the applicants should have filed a motion to strike objectionable testimony pursuant to the procedures provided in the Amended Schedule.

Meanwhile, on December 19, 2019 the applicants filed additional information in an Extended Aquifer Pumping Test Technical Memorandum for the Nemadji Trail Energy Center (Final Aquifer Report), as a response to an earlier Commission data request. (PSC REF#: 381364.) The Final Aquifer Report included information about the additional test results and analysis that were not complete at the time that the 2019 Aquifer Report was filed.

On January 2, 2020, Commission staff filed a Request for Leave to Supplement the Record (PSC REF#: 381693) to include the Final Aquifer Report. The applicants supported the request, agreeing with Commission staff's assessment that the Final Aquifer Report is material to the docket, and that there is good reason that it was not introduced into the record earlier because the test was not completed until December 12, 2019, after the rounds of supplemental testimony added through the Amended Schedule had concluded. (PSC REF#: 381915.) The applicants

contended that they "did not have reason to perform the extended aquifer test until Mr. Anderson made the full extent of and the bases for his concerns regarding the water supply known in early fall of 2019." Clean Wisconsin (PSC REF#: 381905) and Sierra Club (PSC REF#: 381919) objected to the receipt of the Final Aquifer Report into the record, arguing that the applicants started the pump test discussed in the evidence too late to be used as evidence to meet their burden for a CPCN for this project. Clean Wisconsin also addressed the content of the exhibit, arguing that it does not help the applicants meet their burden for a CPCN. (PSC REF#: 381905). Sierra Club argued that if the Final Aquifer Test Report were to be admitted, additional expert testimony from Sierra Club's witness should also be admitted as countervailing evidence. (PSC REF#: 381917, PSC REF#: 381918.) The applicants objected to Sierra Club's request to submit additional expert testimony, contending that it responded to information that had been in the record much earlier, and was not responsive to new information in the Final Aquifer Report. (PSC REF#: 381995.)

On January 13, 2020, the ALJ issued an Order to Certify Evidentiary Ruling to the Commission, certifying to the Commission the decision whether to receive the evidence related to the 2019 Aquifer Report, which was the subject of the Order to Show Cause, and evidence related to the Final Aquifer Report, which was the subject of the Request for Leave to Supplement the Record. (PSC REF#: 382109.)

The Commission discussed this evidentiary dispute and the record at its open meeting of January 16, 2020.

Findings of Fact

1. The applicants propose to construct a NGCC electric generation facility as a wholesale merchant plant as defined by Wis. Stat. § 196.491(1)(w), with a generating capacity of approximately 625 MW.

2. Energy conservation, renewable resources, or other energy priorities listed in Wis. Stat. §§ 1.12 and 196.025, or their combination, are not cost-effective, technically feasible, or environmentally sound alternatives to the proposed project.

3. The proposed project design and location approved by this Final Decision are in the public interest considering alternative locations, individual hardships, safety, reliability, and environmental factors. Wis. Stat. § 196.491(3)(d)3.

4. The proposed project as approved by this Final Decision will not have undue adverse impacts on environmental values including ecological balance, public health and welfare, historic sites, geological formations, aesthetics of land and water, and recreational use. Wis. Stat. § 196.491(3)(d)4.

5. The proposed project as approved by this Final Decision will not unreasonably interfere with the orderly land use and development plans for the area. Wis. Stat. § 196.491(3)(d)6.

6. The proposed project as approved by this Final Decision will not have a material adverse impact on competition in the relevant wholesale electric service market. Wis. Stat. § 196.491(3)(d)7.

7. A brownfield site as defined in Wis. Stat. § 238.13(1)(a) is not practicable for the applicants' proposed project.

8. The proposed project approved by this Final Decision will affect waterways and wetlands, and will require permits from DNR for construction in waterways and wetlands, construction site erosion control, and stormwater handling.

9. Construction of wells to provide cooling tower raw water will require a high-capacity well approval from DNR. Expected water withdrawal and resultant water loss require DNR water loss approval under Wis. Stat. § 281.35 and Wis. Admin. Code ch. NR 142.

10. The proposed project approved by this Final Decision may affect endangered and threatened species, and the applicants will need to consult with the DNR Bureau of Natural Heritage Conservation (NHC) to ensure compliance with the state's endangered species law.

11. The proposed project approved by this Final Decision will require the applicants to obtain permits from, provide notifications to and coordinate with various federal agencies, e.g., U.S. Army Corps of Engineers and U.S. Fish and Wildlife Service.

12. Critical proposed facilities that could be damaged by flooding are not located in the 100-year flood plain. Consequently, there is no flood risk to the project per 1985 Executive Order 73 (Order 73).

13. Approval of the proposed project is in the public interest.

Conclusions of Law

1. The Commission has jurisdiction under Wis. Stat. §§ 1.11, 1.12, 44.40, 196.02, 196.025, 196.395, and 196.491, and Wis. Admin. Code chs. PSC 4 and 111, to issue a CPCN authorizing applicant to construct and place in operation the proposed electric generation facilities described in this Final Decision and to impose the conditions specified in this Final Decision.

2. The applicants' NGCC electric generation facility is a wholesale merchant plant, as defined in Wis. Stat. § 196.491(1)(w).

3. The proposed NGCC electric generation facility complies with the Energy Priorities Law as required under Wis. Stat. §§ 1.12 and 196.025(1).

4. In issuing a CPCN, the Commission has the authority under Wis. Stat. § 196.491(3)(e) to include such conditions as are necessary to comply with the requirements of Wis. Stat. § 196.491(3)(d).

5. This is a Type I action under Wis. Admin. Code § PSC 4.10(3), and requires an EIS under Wis. Stat. § 1.11.

6. The Commission prepared an EIS in compliance with Wis. Stat. § 1.11 and Wis. Admin. Code ch. PSC 4.

7. The proposed project, as conditioned by this Final Decision, will not have an undue adverse impact as defined in Wis. Stat. § 196.491(3)(d)4, and the proposed project satisfies the requirements of Wis. Stat. § 196.491(3).

Opinion

Project Description and Purpose

The applicants propose to construct a new 625 MW NGCC electric generation facility, to be located in the city of Superior, Wisconsin. (PSC REF#: 356922.) The proposed project includes construction of a new NGCC generating facility, or power plant, in a "one-on-one" (1x1) configuration. Under this 1x1 configuration, a natural gas-fired combustion turbine (CT) generator set produces electricity using a simple-cycle generation process. Hot gases from the

CT exhausts are directed into a heat recovery steam generator (HRSG), with the resulting steam from the HRSG sent through a steam turbine generator to produce additional electricity.

The proposed project also includes the construction of a high-capacity well and the construction of a 345 kilovolt (kV) tie line to connect NTEC to the existing transmission grid.[6]

For purposes of the Commission's review, the applicants proposed two site alternatives for the facility. One is the Nemadji River Site (Preferred Site), which is owned by Minnesota Power/ALLETE and the other is the Hill Avenue Site (Alternative Site), which the applicants have the option to purchase.

- The Nemadji River Site would be east of the existing Enbridge Energy Superior Terminal Facility on the banks of the Nemadji River. The site is accessible from U.S. Highway 2/U.S. Highway 53 via 31st Avenue East from the northeast. The site is approximately 26.3 acres in size with an additional approximately 24.8 acres of staging and laydown area across the street on 31st Avenue East. It is currently mostly wooded with a parking lot and small stormwater retention pond in the southwest corner. Several existing transmission lines extend through the parcel.
- The Hill Avenue Site would be approximately 1.2 miles northwest of the Nemadji River Site. The site is accessible from the west via Hill Avenue. U.S. Highway 2/U.S. Highway 53 is accessible via Hill Avenue to North 28th Street East, then 18th Avenue east to the highway. No other access to the site currently exists. The site is approximately 75.5 acres in size and is undeveloped. An existing transmission line extends along the northeast border of the site.

[6] The Commission is reviewing the proposed tie line in docket 9698-CE-101.

Natural gas service to NTEC will be supplied by the existing Great Lakes Gas Transmission Limited interstate pipeline via a new 16-inch lateral natural gas line.[7] The proposed project will also tap an existing 10-inch SWL&P natural gas line at the Nemadji River Site. This line will need to be relocated.[8]

The applicants' stated purpose[9] for the proposed project is to:

1. provide energy when intermittent renewables are not;
2. provide reliability benefits; and
3. provide market opportunities.

Interconnection of the Facility to the Existing Electric Transmission System

The transmission interconnection facilities requirements for the proposed project are being determined through the Midcontinent Independent System Operation, Inc. (MISO) Generator Interconnection Queue study process. The applicants have filed an Interconnection Request with MISO. A generator interconnection agreement (GIA) is forthcoming.

The status of the study process and GIA does not, however, preclude Commission action in this docket. *See, e.g.*, Wis. Stat. § 196.491(3)(a)2m. The record in this proceeding provides all of the necessary evidence upon which the Commission can assess whether the statutory criteria for the issuance of a CPCN is in the public interest.

[7] The Commission is reviewing the proposed 16-inch lateral line in docket 5820-CG-105.
[8] The Commission is reviewing the 10-inch natural gas line relocation in docket 5820-CG-106.
[9] (PSC REF#: 375752.)

Evidentiary Issues

In deciding whether to admit evidence outside of the deadlines required by the case schedule, the Commission must balance the need for a complete record against the requirement that parties provide information in a timely manner to facilitate the process and ensure that all parties have a chance to respond. *See* Wis. Stat. § 227.44(3) (providing that "[o]pportunity shall be afforded all parties to present evidence and to rebut or offer countervailing evidence.")

The applicants argued that filing the 2019 Aquifer Report and the Final Aquifer Report and the related evidence was necessary because DNR's and intervenors' issues with the groundwater impacts were not apparent until the testimony of Sierra Club witness Dr. Cherkauer and DNR witness Ian Anderson were submitted in the fall of 2019. Intervenors objected, contending that the information should have been submitted sooner.

The Commission concludes that though full information about the potential for aquifer depletion ideally should have been provided earlier, it does not appear that information was strategically withheld to disadvantage other parties. The Commission recognizes that though time was short, the other parties did have an opportunity to respond to the post-hearing information. Sierra Club provided rebuttal testimony from witness Dr. Cherkauer.[10] Clean Wisconsin also made arguments regarding the substance of the evidence, contending that it does not meet the applicants' burden for a CPCN. Accordingly, the Commission concludes that no party has been disadvantaged by the timing and all parties have been afforded an opportunity to rebut or offer countervailing evidence. Under these circumstances, the interest in having

[10] The applicants' objection to the admission of that evidence is hereby denied. Sierra Club could have requested more time to respond, but did not. And Clean Wisconsin made no attempt to ask for time to respond nor to submit additional information.

material and helpful information in a complete record outweighs the risk of encouraging parties to flout the schedule. The following evidence, identified in the Order to Certify Evidentiary Ruling to Commission, is received:

A. Evidence related to the 2019 Aquifer Report, which was the subject of the Order to Show Cause:

- PSC REF#: 380748 Aquifer Report Rebuttal-Applicants-DeAngelis
- PSC REF#: 380753 Aquifer Report Rebuttal-Applicants-Soutter
- PSC REF#: 380751 Ex.-Applicants-DeAngelis-15

B Evidence related to the Final Aquifer Report, which was the subject of the Request for Leave to Supplement the Record:

- PSC REF#: 381692 Ex.-PSC-Kitsembel-1
- PSC REF#: 381917 Final Aquifer Report Testimony-SC-Cherkauer
- PSC REF#: 381918 Ex.-Sierra Club-Cherkauer-1

The Sur-Surrebuttal Testimony of Douglas Cherkauer is also admitted. (PSC REF#: 381917.)

Burden of Proof and Standard of Proof

With regard to evidentiary determinations, the applicable burden of proof functions in tandem with the applicable standard of proof. The CPCN law, Wis. Stat. § 196.491(3), unlike other provisions of ch. 196, does not assign a burden of proof to any party with regard to any determination that the Commission must make.[11] Nor does the CPCN law itself specify a

[11] *See*, *e.g.*, Wis. Stat. §§ 196.499(5)(am), 196.504(8), 196.54(2).

standard of proof (i.e., quantum of evidence) that must be found in order for the Commission to make one determination rather than another. This is contrasted with other sections of Wis. Stat. ch. 196, which require that certain determinations be made only upon "clear and convincing evidence" or "a preponderance of the evidence."[12]

The CPCN law provides that the Commission "shall approve an application…for a certificate of public convenience and necessity only if the [c]ommission determines…" that a proposed project will be free of specified adverse impacts and in the public interest. These determinations are fact-intensive, and the Commission's action in approving or denying an application ultimately depends on the facts found by the Commission. As such, the standard of proof that the Commission must apply can be logically inferred from the standard of review set forth in Wis. Stat. § 227.57(6), which requires a court to remand a CPCN decision back to the Commission if its decision "depends on any finding of fact that is not supported by substantial evidence in the record."

As the courts have explained, "the substantial evidence test is not weighing the evidence to determine whether a burden of proof is met. Such tests are not applicable to administrative decisions." *Wisconsin Ass'n of Mfrs. & Commerce, Inc. v. Pub. Serv. Comm'n*, 94 Wis. 2d 314, 321, 287 N.W.2d 844, 847 (Ct. App. 1979). The substantial evidence test simply requires that there be enough evidence for a finding to be reasonable. *Kitten v. DWD*, 2002 WI 54, 252 Wis. 2d 561, 644 N.W.2d 649; and *Gateway City Transfer Co. v. Pub. Serv. Comm'n*, 253 Wis. 397, 405, 34 N.W.2d 238, 242, 1948 WL 60150 (1948). In other words, a court must determine

[12] See, e.g. Wis. Stat. §§ 196.499(5) (d), 196.64(2), 196.795(7)(c).

whether the Commission used its technical competence and specialized knowledge to determine the persuasiveness of the evidence and reach a well-reasoned decision.

In light of this standard of proof, for each finding that the CPCN law requires the Commission to make, the Commission focuses on weighing the evidence to identify the finding that is supported by substantial evidence. The standard of proof applicable to CPCN determinations renders the applicable burden of proof a subordinate consideration. A burden of proof consists of a burden of going forward and a burden of persuasion.[13] The import of a burden of proof is generally effectuated through the burden of persuasion, rather than the burden of going forward. Therefore, although in administrative hearings such as this one the common-law rule that the moving party has the burden of proof is generally observed[14], observing this rule is fulfilled by weighing the evidence to determine whether a finding is supported by substantial evidence.

Regarding several of the findings that the CPCN law requires the Commission to make, the opposing intervenors argued that the applicants have not met their burden of proof. To the extent that the opposing intervenors mean this argument to say that there is not substantial evidence to make the findings for which the applicants have advocated, the Commission addresses those concerns in the applicable sections that follow. To the extent that the opposing intervenors mean this argument to say that the CPCN law calls for the Commission to decline to make a finding where substantial evidence supports that finding, the Commission rejects the argument.

[13] *Hocgurtel v. San Felippo*, 78 Wis. 2d 70, 86, 253 N.W.2d 526 (1977).
[14] *Sterlingworth Condominium Ass'n Inc. v. Wis. Dept. of Natural Res.*, 205 Wis. 2d 710, 726, 556 N.W.2d 791 (Ct. App. 1995).

Energy Priorities Law

When reviewing a CPCN application, the Commission considers Wis. Stat. §§ 1.12 and 196.025(1), known as the Energy Priorities Law (EPL), which establishes the preferred means of meeting Wisconsin's energy demands. The Energy Priorities Law creates the following priorities:

> **1.12 State energy policy.** (4) PRIORITIES. 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 using a reactor design or amended reactor design approved after December 31, 2010, by the U.S. Nuclear Regulatory Commission.
>
> (d) Nonrenewable combustible energy resources, in the order listed:
>
> 1. Natural gas.
>
> 2. Oil or coal with a sulphur content of less than 1%.
>
> 3. All other carbon based fuels.

In addition, Wis. Stat. § 196.025(1) declares that the Commission shall implement these priorities in making all energy-related decisions to the extent they are cost-effective, technically feasible and environmentally sound.

The applicants dispute that the Energy Priorities Law applies in this case because the application is for a merchant plant project. Sierra Club also improperly conflates the Commission's review and compliance with the EPL with a needs analysis, and invites the Commission to determine whether the proposed project is needed. Neither approach is appropriate.

As this is a merchant plant, the Commission does not consider whether the plant will satisfy the reasonable needs of the public for an adequate supply of electric energy. Wis. Stat. § 196.491(3)(d)2. The Commission is also precluded from considering alternative sources of

supply, engineering or economic factors in a merchant plant proceeding like this one. Wis. Stat. § 196.491(3)(d)3. Accordingly, there are no alternative sources of supply and need for the Commission to consider. However, that is not the same as saying that the EPL does not apply.

The Commission has an obligation, to consider Energy Priority Law priorities in all energy related decisions including construction of new electric generation facilities.[15] In the Commission's Final Decision in the Glacier Hills docket[16] the Commission concluded that it "must implement state energy policy when reviewing any application." It made a similar conclusion in the Badger Hollow docket.[17]

It is a canon of construction that statutes or general laws that are *in pari materia* (enacted at different times but pertain to the same subject matter) must be interpreted in light of each other since they have a common purpose. *See Responsible Use of Rural & Agr. Land (RURAL) v. Pub. Serv. Comm'n of Wis.*, 2000 WI 129, ¶ 59, 239 Wis. 2d 660, 699, 619 N.W.2d 888, 909 (quoting *Mid–Plains Tel. v. Public Serv. Comm'n*, 56 Wis.2d 780, 787, 202 N.W.2d 907 (1973), quoting *Wisconsin Tel. Co. v. Public Serv. Comm'n*, 232 Wis. 274, 287 N.W. 122 (1939)). *See also* In Pari Materia, Black's Law Dictionary (11th ed. 2019). The Commission's interpretation and application of the Energy Priorities Law must thus be read in context with the Commission's other statutory obligations, including those imposed by Wis. Stat. § 196.491.

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[15] Wis. Stat. § 196.025(1)(ar) provides:
To the extent cost-effective, technically feasible and environmentally sound, the commission shall implement the priorities under s. 1.12(4) in making all energy-related decisions and orders, including advance plan, rate setting and rule-making orders.

[16] *Application of Wisconsin Electric Power Company for a Certificate of Public Convenience and Necessity to Construct a Wind Electric Generation Facility and Associated Electric Facilities, to be located in the Towns of Randolph and Scott, Columbia County, Wisconsin*, Docket 6630-CE-302 (January 22, 2010), (PSC REF#: 126124.)

[17] *Application for a Certificate of Public Convenience and Necessity of Badger Hollow Solar Farm, LLC to Construct a Solar Electric Generation Facility, to be Located in Iowa County, Wisconsin*, Docket No. 9697-CE-100 (April 18, 2019) (PSC REF#: 364425.)

Looking at the statutory scheme as a whole, it becomes clear that while it is true that the limited inquiry into cost and alternatives mandated by the CPCN law for wholesale merchant plant applications does not allow the Commission to make a finding regarding the proposed merchant plant relative to other energy priority alternatives, the Commission is still tasked with determining whether the proposed project is in the public interest. Inherent in that public interest inquiry is an assessment of how the proposed project fits in with the state's energy policy—the statement of the public priorities for meeting the state's electric generation needs. Because the Energy Priorities Law instructs the Commission to implement the energy priorities to the extent they are environmentally sound, and the Commission must assess the environmental impacts of a wholesale merchant plant under Wis. Stat. § 196.491(3)(d)3., the Commission still must assess whether a proposed wholesale merchant plant project is environmentally sound. It is accordingly appropriate for the Commission to assess how the proposed project fits within the state's preferred means of meeting Wisconsin's energy needs, which is laid out in the Energy Priorities Law.

The proposed project will be a natural gas-fired electric generation facility. Energy conservation and efficiency, noncombustible renewable energy resources, and combustible renewable energy resources are higher priorities. In enacting the Energy Priorities Law, however, the Legislature made a point of recognizing that the bill did not create any standards for determining the extent to which the priority list is actually used in making such determinations, nor did the lawmakers establish that an item that is not on the top of the list cannot be built. Instead, the legislators made clear that agencies should look to how a project could fit into the entire energy mix. "[C]ompliance with the directive that agencies follow the priority list will be reflected in the overall pattern of decisions made by each agency . . . the success of implementing the priority list

will be reflected in the overall pattern of energy generation and use, across the state and through time." Prefatory Note to 1993 Assembly Bill 701.

The applicants state that the main purpose of the proposed plant is to facilitate the deployment of renewable resources and overall system reliability by providing energy when intermittent renewable resources cannot. More particularly, the applicants introduced expert testimony that the plant will provide up to 625 MW of dispatchable generation to support the integration of renewable energy sources. (Surrebuttal-Applicants-Coughlin-2, PSC REF#: 378053.) The applicants asserted that the plant will enhance system reliability because it will be able to ramp up and down very quickly, and that no higher priority options that could provide reliable and dispatchable generation were cost-effective and technically feasible. (PSC REF#: 375752, PSC REF#: 378053, PSC REF#: 378054; Tr. at 329:2-9; Tr. at 329:13-330:1; Tr. at 349:12-22.) The applicants' expert further testified that combined-cycle resources like the proposed plant have significant advantages over batteries, which require recharge, have limited duration, and have shorter life cycles. (PSC REF#: 378054; Tr. 292:22 to 293:1.) They also argued that combined-cycle resources are more cost-effective when compared to batteries and batteries plus renewables. (PSC REF#: 378054.)

Intervenor Sierra Club argued that there are other ways to support intermittent renewables, such as battery storage. (PSC REF#: 377454.) Its expert witness contended that battery storage systems installed in conjunction with renewable resources offers better support than a gas plant for short-range flexibility needs. (Tr. 339:15-25.) He testified that large-scale battery storage technologies are proliferating and are "poised to grow as the economics of

batteries continue to improve." (PSC REF#: 377454; see also Tr. 313:14-314:3.) He admitted, however, that the technology is not currently available. (Tr. 331:14 to 332:4, Tr. 335: 4-8.)

Commission staff testified that wind and solar generating resources experience variations depending on factors like outdoor temperature, wind conditions, cloud cover, and resources out of service for maintenance. (PSC REF#: 376794, PSC REF#: 376795.) Solar resources commonly ramp up to, and down from, full production very quickly. *Id.* Because natural gas combined-cycle facilities are capable of ramping up and down quickly, Commission staff testified that they are appropriate resources to accommodate greater proliferation of intermittent resources. *Id.* Commission staff also provided testimony that battery storage is not a viable method for effectively integrating wind and solar resources at all times of day, that it is unclear when and to what extent storage will proliferate, and that the proposed plant would be "an appropriate resource[e] to accommodate greater proliferation of intermittent resources." (PSC REF#: 376794.) While intervenors asserted that the Energy Priorities Law has not been satisfied because the applicants have not demonstrated that non-combustible renewable energy resources such as wind and solar are not available, the Commission finds that there was ample testimony in the record to support a conclusion that the proposed project will facilitate deployment of such resources, and that such resources alone could not provide the reliability benefits that are the target of this plant.

Similarly, no substantive evidence was presented to demonstrate how the energy and capacity from the proposed project could be replaced by energy conservation and efficiency. Finally, the Commission does not find the intervenor argument, that the possibility of battery use demonstrates that the Energy Priorities Law has not been met, to be compelling. Batteries,

which do not generate electricity, are not higher priority resources under the Energy Priorities Law. *See* Wis. Stat. §§ 1.12 and 196.378(1)(h), (j) (defining renewable energy resources and resources). Sierra Club's claim that battery storage could meet the needs was rebutted by testimony from its own witness admitting that there are no utility scale battery resources available. (Tr. 331:14 to 332:4, Tr. 335:4-8.) Current battery technology is not yet capable of replacing a plant of this size.

The Commission thus concludes that the applicants' proposed project complies with the Energy Priorities Law and furthers the public policy of the state in encouraging the development of renewable resources.[18]

Material Adverse Impact on the Wholesale Electric Market

Under Wis. Stat. § 196.491(3)(d)7., the Commission may only issue a CPCN for a project that "will not have a material adverse impact on competition in the relevant wholesale electric service market." The proposed project would inject additional energy into the wholesale market and is anticipated to have a positive impact on the market. (PSC REF#: 376794 at 7; PSC REF#: 375754 at 12-14.) As a wholesale merchant plant, concerns regarding horizontal market power are not at issue. No parties testified that the proposed project would have a material adverse impact on the wholesale electric market. As such, the Commission finds that the proposed project meets the requirements of Wis. Stat. § 196.491(3)(d)7.

[18] *See* Wis. Stat. §§ 1.12(3)(b) and 196.377.

Siting Process

Wisconsin Stat. § 196.491(3)(d)3., requires the Commission to consider alternative locations when determining whether a proposed generating plant is in the public interest. Wisconsin Admin. Code § PSC 111.53(1)(e) and (f) require a CPCN application to describe the siting process, to identify the factors considered in choosing the alternative sites, and to include specific site-related information for each site.

The application explained that a group of potential plant owners operating in the upper Midwest, particularly in the states of Wisconsin, Minnesota, and North Dakota, conducted a site selection study to identify and evaluate potential sites for future development of a new gas-fired generation facility. The siting study included consideration of potential sites across the upper Midwest that could potentially be used for joint development of such a facility by multiple regional utilities. The study identified several suitable sites throughout the upper Midwest that appeared to be reasonable sites for new natural gas-fired generation. The applicants were among the companies with service areas included in the siting study and within which some sites were identified for potential future development. The study was a desktop screening to identify a minimum of three potential plant sites and provide the information necessary for the study participants to focus and support subsequent site acquisition and permitting efforts. The objectives of the study were substantially the same as the requirements for what would become the proposed NTEC project. (PSC REF#: 375754 at 5.)

The applicants reviewed this study in relation to the proposed NTEC project and determined that the study methodology remained generally valid. This study was used as a

significant initial basis for the identification of potential locations for the proposed NTEC plant. (*Id*. at 6.)

The original siting study identified six developable sites in the MISO footprint. Once the final NTEC project participants, South Shore and DPC, were known, additional factors were considered. The applicants preferred a site in MISO zone 1 since both DPC and South Shore's affiliate, Minnesota Power are located in MISO zone 1. Douglas County was also strongly preferred as it is located close to a boundary between DPC's and Minnesota Power's respective service areas. DPC's and Minnesota Power's service areas border each other near the Minnesota/Wisconsin state line, approximately 75 miles to the south. The applicants identified this border between the two study areas as the most reasonable location for a joint project. A study area extending 75 miles from the Duluth/Superior area was identified for consideration and identification of potential alternative sites for the proposed project. The Superior, Wisconsin area site scored highest in the site selection study. (*Id*. at 7 and 8.)

The applicants then studied additional potential sites in Douglas County considering the following factors:

1) Sufficient land space must be available for the NTEC natural gas-fired generating unit and supporting infrastructure;
2) Corridors to connect electricity transmission and natural gas pipelines must be available to access the site;
3) Proximity to appropriate electricity grid and natural gas pipeline tap locations to minimize impacts and costs associated with the development of this infrastructure; and

4) Avoiding major approval or permitting concerns such that the site would have a reasonable probability of being approved and permitted if selected for the proposed project.

Using these criteria, the applicants identified the Nemadji River Site and the Hill Avenue Site as the two potential sites for the NTEC project. (*Id*. at 8.)

Clean Wisconsin found fault with the site selection process, contending "that the applicants have not satisfactorily explained why alternatives, without so many wetland impacts, are not practicable." (Clean Wisconsin Initial Br. at 9.) Clean Wisconsin testified that the applicants: (1) conducted their search for sites in a manner that prohibited the applicants from effectively identifying viable alternatives with lesser environmental impacts; (2) gave inadequate consideration to the presence of wetlands at a site; and (3) inaccurately assessed the likelihood of adverse impacts to wetlands at the Nemadji River Site. (PSC REF#: 378618 at 16-18.)

The Commission's analysis of alternative locations is guided by Wis. Admin. Code § PSC 111.53(1)(e) and (f), which require the applicants to provide the Commission with a description of the alternatives considered, a description of the siting process, a list of the factors considered in choosing and ranking the alternatives, and detailed site-specific information on two proposed sites. The purpose of requiring this information is to equip the Commission to: (1) understand the overall context of site alternatives; (2) understand and potentially judge an applicant's decision to move forward with a site, given the other alternatives considered; (3) understand in great detail the characteristics of the two sites proposed to the Commission; and (4) determine whether one, both, or neither of the two sites is in the public interest, taking

into consideration the Commission's judgment of the factors the applicant used in ranking the alternatives and the rank it assigned.

The Commission finds that the applicants appropriately considered environmental factors and individual hardships in ranking and choosing among site alternatives. The sites considered by the applicants were reviewed for their impacts to wetlands, as well as other environmental impacts. The sites were ranked based, in part, on their anticipated environmental impacts as well as considerations that were reasonable predictors of the extent to which the sites would impose individual hardships. Under this methodology, the Nemadji River Site compared favorably to all of the other sites considered. It was reasonable for the applicants to move forward with a proposal to develop NTEC at the Nemadji River Site. (PSC REF#: 356922.)

Once the Nemadji River Site was selected, the applicants appropriately identified the Hill Avenue Site as the alternative site. In reviewing site alternatives, the Commission considers whether the sites are sufficiently distinct to offer different packages of benefits that present the Commission with a choice. The Wisconsin Supreme Court affirmed this standard in *Clean Wisconsin et. al. v. Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources*, 2005 WI 93, ¶¶66-70. By proposing the Hill Avenue Site, the applicants presented the Commission with two different packages of benefits and impacts, particularly with regard to wetlands and potential slope erosion. (PSC REF#: 357004.)

Chairperson Valcq dissents and writes separately.

Brownfield Sites

Wisconsin Stat. § 196.491(3)(d)8. provides that a CPCN generating project must be sited in a brownfield area "to the extent practicable."[19] Clean Wisconsin also questioned applicants' compliance with this statutory requirement as part and parcel of its complaints regarding applicants' siting process. The Commission is not persuaded by this critique. In the analysis of potential sites, brownfields were considered in conjunction with industrial sites. However, existing power plants were not considered for expansion. Several existing brownfield sites are located near the proposed project sites and were evaluated for potential use. These sites were either located in close proximity to residential areas, did not have sufficient land available for the proposed project, and/or were located in high-density developed areas of Duluth, and were therefore not considered as practicable. (PSC REF#: 356922 at 1-29.) The Commission therefore finds that both proposed site alternatives comply with Wis. Stat. § 196.491(3)(d)8.

Authorized Site

For a wholesale merchant plant, Wis. Stat. § 196.491(3)(d)3. requires that the design and location of the project be in the public interest considering alternative locations, individual hardships, safety, reliability and environmental factors. As the Wisconsin Supreme Court has declared, issuing a CPCN is a legislative determination involving public policy and statecraft. *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 2005 WI 93, ¶ 35, 282 Wis. 2d 250, 700 N.W.2d 768. The Commission' expertise in administering Wis. Stat. § 196.491 has long

[19] "Brownfield" is defined as an "abandoned, idle or underused industrial or commercial facilities or sites, the expansion or redevelopment of which is adversely affected by actual or perceived environmental contamination."

been recognized by Wisconsin courts. *Id.; see also Wisconsin Power & Light Co. v. Pub. Ser'v Comm'n of Wisconsin*, 148 Wis. 2d 881, 888, 437 N.W.2d 888, 891 (Ct. App. 1989).

Determining whether a proposed project is in the public interest often requires a high degree of discretion, judgment, and technical analysis. Such decisions involve intertwined legal, factual, value and public policy determinations. The Commission, as the finder of fact, is charged with sifting through all of the information and applying the statutory criteria to reach a well-reasoned decision. In doing so, the Commission uses its experience, technical competence and specialized knowledge to determine the credibility of each witness and the persuasiveness of the highly technical evidence presented on each issue.

Clean Wisconsin argued that neither the Nemadji River Site nor the Hill Avenue Site is in the public interest, when consideration is given to alternative locations. As discussed in detail in the section of this Final Decision pertaining to environmental impacts, Clean Wisconsin testified that constructing NTEC at either location would adversely impact wetlands.

The Commission authorizes the Nemadji River Site for the NTEC. While both the Nemadji River Site and the Hill Avenue Site satisfy the requirements of Wis. Stat. § 196.491(3)(d)3, the Commission finds that the Nemadji River Site is preferable as it is closest to the needed and related infrastructure, has the least amount of impacts to landowners and residents, and, as will be discussed in greater detail later in this opinion, has the lowest wetland and associated natural resource impacts. For these reasons and those discussed in detail in the following sections, the Commission finds, considering alternative locations, individual hardships, safety, reliability, and environmental factors that both the Nemadji River Site and the Hill Avenue site are in the public interest and authorizes the Nemadji River Site.

Chairperson Valcq dissents and writes separately.

Reliability

In determining whether an application for a CPCN for a wholesale merchant plant is in the public interest, the statutes instruct the Commission to consider reliability. Wholesale merchant plants were authorized by the 1997 Electric Reliability Act, the purpose of which was to increase the reliability of the state's electric supply by increasing the supply of electric generation.

The evidence in this proceeding indicates that the NTEC will increase the supply of electric generation in the state through the operation of the 625 MW generation facility. Therefore, the Commission finds that its consideration of reliability weighs in favor of determining that the project is in the public interest.

Chairperson Valcq dissents and writes separately.

Safety and Individual Hardships

In determining whether the proposed project meets the statutory standard for a CPCN, the Commission also considered safety and individual hardships. Intervenors claimed that individual hardships would be caused because of the generation plant's location near residential neighborhoods. More particularly, Clean Wisconsin was concerned about a great deal of traffic from construction trucks being routed near residential streets. In the longer term, Clean Wisconsin argued that the proposed cooling tower could result in ground fog and rime icing, which could affect neighbors. Finally, Clean Wisconsin cited noise pollution as another individual hardship.

With regard to safety, Clean Wisconsin again pointed to traffic concerns, and highlighting their familiarity with "a major fire and explosions at the nearby Husky oil refinery," noted that one public comment worried "about the possibility of a catastrophic industrial accident." Most of the cited individual hardships and safety concerns are temporary, as traffic and noise will be substantially lessened if not entirely eliminated after construction has been completed. While the Commission recognizes and appreciates the distress the Husky oil refinery accident caused, concerns about the mere possibility of another industrial accident, without any evidence suggesting that such an accident would be likely to arise from the proposed project, are far too remote and hypothetical, and thus grossly insufficient to justify denial of the CPCN. Moreover, as discussed below, the Commission is imposing significant mitigation measures through this Final Decision, which will lessen impacts of the individual hardships and safety concerns identified in the record. The Commission accordingly finds that the safety and individual hardship concerns identified in the record do not require denial of the CPCN.

Land Use and Development Plans

Wisconsin Stat. § 196.491(3)(d)6. requires that a proposed generating facility not "unreasonably interfere with the orderly land use and development plans for the area involved."

The Nemadji River Site is owned by Minnesota Power and much of the surrounding area has been appropriated for industrial use. Clean Wisconsin argued, however, that aspects of the proposed project conflict with the City of Superior and Douglas County comprehensive plans, which call for reducing or eliminating light, noise, and air pollution. (PSC REF#: 379797.) Clean Wisconsin also complained that 16.6 acres of land that is currently zoned apartment residential will be rezoned to heavy manufacturing. *Id.*

The applicants acknowledged that some rezoning will be required, but stated that they intend to seek rezoning and any local permits that may be required. The record also reflects many public comments supporting the proposed project. Numerous state officials, members of trade unions and associations, the City of Superior, and officials from Douglas County testified in favor of the project. (PSC REF#: 378852, PSC REF#: 378853, PSC REF#: 378872.) Even the City Council member representing the neighborhood closest to the Nemadji River Site also voted in support of the proposed project. (Tr. 162:9-18.)

The Commission recognizes that the proposed project, as would any major construction project, will create impacts on the land use and development plans of affected areas. It nonetheless finds that the proposed project will not unreasonably interfere with the orderly land use and development plans of the project area.

Wisconsin Environmental Policy Act Compliance and Environmental Review

The Wisconsin Environmental Policy Act (WEPA) requires all state agencies to consider the environmental impacts of "major actions" that could significantly affect the quality of the human environment. Wis. Stat. § 1.11. The Commission must determine whether it has complied with this requirement. Before granting a CPCN for NTEC, the Commission must also determine that the project is in the public interest considering environmental factors, and that the project will not have an undue adverse impact on environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water, and recreational use. Wis. Stat. § 196.491(3)(d)3. and 4.

Compliance with WEPA

The Commission and DNR issued a joint final EIS regarding the project, pursuant to Wis. Stat. § 1.11 and Wis. Admin Code chs. NR 150 and PSC 4. (PSC REF#: 376466.) The final EIS considered a broad range of ecological and socioeconomic impacts that could occur as a result of the construction and operation of the project, such as impacts to local natural resource areas, landowner rights, aesthetics, airports and airstrips, archaeological and historic resources, cultural resources, electric and magnetic fields, property values, radio and television reception, recreation and tourism, safety, communication facilities, endangered resources, forested lands, grasslands, invasive species, waterways, wetlands, and wildlife.

Opposing intervenors argued that the Commission and DNR failed to comply with WEPA, asserting that the final EIS was deficient. Clean Wisconsin argued that the applicants did not submit sufficient information for the Commission's and DNR's review, and that the staff of the agencies did not conduct an adequately informed independent analysis of impacts to wetlands, waterways, rare plants, cumulative impacts, indirect impacts, and cultural resources. (PSC REF#: 378618.) Sierra Club argued that the Commission and DNR failed to comply with WEPA, asserting that the Commission staff failed to respond to Sierra Club's comments on the draft EIS, which relate to, among other topics, Sierra Club's contention that renewable generators in conjunction with storage could meet the need that NTEC was offered to address and that the draft EIS did not consider the climate impacts of upstream natural gas extraction. Furthermore, Sierra Club argued that the Commission failed to comply with the requirement to evaluate reasonable alternatives to the proposed project pursuant to Wis. Admin. Code § PSC 4.30(3)(c). (PSC REF#: 375504.)

The Commission finds that it has fulfilled the requirements under WEPA through the preparation and issuance of the final EIS and the creation of the record of the technical and public hearings held in the project area. Its review of the project is adequate in both of these respects. In preparing the EIS, Commission staff reviewed the information from the applicants' CPCN application, responses to Commission staff data requests, comments received during scoping for development of the draft EIS, comments received during the draft EIS comment period, maps, Geographic Information System (GIS) data, aerial imagery, and reports from consultants. Commission staff assessed information from other sources including comments from individuals, state and federal agency information, local officials, and scientific literature. Commission staff also coordinated review with DNR to assess wetland, waterway, water use, water withdrawal, air emission, and endangered resource impacts.

The final EIS for this project contained over 170 pages documenting potential environmental and socioeconomic impacts, including information on environmental effects associated with upstream gas extraction. The Commission staff reviewed all comments submitted on the draft EIS, and made associated changes to the final EIS as appropriate, including those made by Sierra Club.

Contrary to Sierra Club's assertions, the Final EIS described the need that the project was proposed to address, as required by Wis. Admin. Code § PSC 4.30(3)(am). It also evaluated alternatives to the proposed project by extensively discussing intermittent resources, both those currently in operation as well as those in the interconnection queue, and discussing how the project would contribute to the reliability of the supply of electric generation. The Commission simply declined Sierra Club's urging to expand this analysis in order to contravene the CPCN

law's instruction that the Commission not consider the need for the project or alternative sources of supply in its determination of whether to grant a CPCN to a merchant plant. Moreover, the final EIS incorporated public input, party recommendations, and the expertise of Commission and DNR staff to provide a list of potential conditions for the Commission's consideration to prevent or mitigate potential impacts of the project, many of which, as will be discussed, are incorporated into this Final Decision.

Consideration of Environmental Factors and Impacts and Other Considerations

The primary environmental concerns identified in the final EIS relate to impacts associated with construction on highly erodible soil, loss and fragmentation of wetland and upland habitat, and the ability of the local aquifer to sustain continued operation of the proposed high-capacity wells. (PSC REF#: 376466.) Opposing intervenors submitted testimony on each of these concerns and argued that neither the Nemadji River Site nor the Hill Avenue Site is in the public interest considering environmental factors, and that the proposed project would have undue adverse impacts on environmental values at either site.

Clean Wisconsin argued that, because the applicants' plan for the Nemadji River Site calls for constructing a large retaining wall on a slope over the Nemadji River, the site presents a significant risk of adverse environmental impacts. Clean Wisconsin testified that the soil at the site is highly erodible and therefore presents the risk that the retaining wall will fail and cause catastrophic harm to the quality of the Nemadji River. Clean Wisconsin testified that this risk is exacerbated by the fact that the applicants' planned stormwater controls are inadequate for preventing stormwater from contributing to slope failure. (PSC REF#: 378618 at 5-11.)

The applicants responded to the concerns raised by Clean Wisconsin by arguing that siting NTEC at either site would be in the public interest because both sites are in sparsely populated industrialized areas and that the applicants will follow best management practices and implement all mitigation measures required by DNR to mitigate impacts to wetlands. (PSC REF#: 375754 at 8; PSC REF#: 375752 at 3.) The applicants testified that Clean Wisconsin's criticisms of the adequacy of the stormwater controls at the Nemadji River Site are unfairly premature because final plans for erosion control and stormwater management will not be made unless and until the Commission authorizes a particular site, at which point the plans will be submitted for DNR review. (PSC REF#: 377488 at 2.)

The groundwater impact from the project would be the same at either site. As discussed in the final EIS, the proposed project for both sites includes construction of five non-potable high-capacity wells, each with a projected capacity of 750 gallons per minute, for a total capacity of 5.4 million gallons per day (MGD) from groundwater within the Lake Superior Basin. The anticipated instantaneous water demand for NTEC would range from 3.4 MGD to 4.1 MGD, and the estimated average annual use would be 2.9 MGD. The water from the high-capacity wells would be used solely for plant processes, including steam cycle water, cooling tower water, nitrogen oxides, injection water, evaporative cooling water, and service water. The proposed project would consume water through evaporation and draft from the cooling tower, losses from the steam cycle, and inlet air evaporative cooling. (PSC REF#: 376466 at 58.)

In order to construct and operate the high-capacity wells, the applicants will need to obtain from DNR: (1) a high-capacity well permit under Wis. Stat. § 281.34; (2) a water use individual permit under Wis. Stat. § 281.346(5); and (3) a water loss approval under Wis. Stat.

§ 281.35. DNR staff responsible for these permits provided information for the final EIS and submitted testimony in this proceeding pursuant to Wis. Stat. § 30.025(2g)(b). DNR staff testified that DNR had not reached any final determinations with regard to the respective permits, but that DNR staff's analysis of the information available at the time testimony was submitted indicated that the aquifer would not adequately supply the withdrawal needs of the project and such withdrawals would have an adverse impact on the quantity of groundwater in the area. (PSC REF#: 376827 at 3-7, PSC REF#: 376824 at 3-5, PSC REF#: 381933 at 4.) DNR staff's assessment of the availability of groundwater and the impacts of the project were based on DNR staff's opinion that the sand and gravel found beneath the project site is an isolated lens, that the aquifer is confined rather than regionally extensive, and that the groundwater in the aquifer is therefore subject to depletion. (PSC REF#: 376827, PSC REF#: 379032.)

The applicants disputed DNR staff's description of the aquifer and submitted substantial evidence analyzing the characteristics of the aquifer and projecting the amount of groundwater obtainable from the aquifer over time. (PSC REF#: 381692.) Based the results of soil borings, a 20-day pumping test, and a recovery test, the applicants testified that the aquifer is not an isolated lens, is regionally extensive, and receives recharge water from outside the aquifer. To predict whether the aquifer would be capable of supporting the anticipated withdrawals, and to forecast the impact on the aquifer after one year of operation, the applicants used the calculation methods (the Hantush-Jacob leaky aquifer equation) that the applicants argued were appropriate for the type of aquifer at issue. Based on these calculations, the applicants testified that the aquifer would be capable of supporting the anticipated withdrawals, and that the withdrawals would not deplete the aquifer. (PSC REF#: 381692, PSC REF#: 380292, PSC REF#: 380293.)

Sierra Club argued that the proposed project would have undue adverse environmental impacts at either site, because withdrawing the quantity of groundwater needed to operate the facility would unduly harm the quality and quantity of the water in the aquifer. Specifically, Sierra Club dismissed the applicants' projections and testified that withdrawing water from the aquifer in the manner described by the applicants would draw down the water level of the aquifer, thereby introducing air into the aquifer and harming the quality of the water. (PSC REF#: 381917 at 4-6.) Sierra Club testified that the applicants' bases for selecting the calculation methods they relied upon were insufficient, and that another calculation method would be more appropriate until the applicants identified the source of the water leaking into the aquifer and demonstrated that water will leak into the aquifer and replace the water withdrawn from the aquifer at a rate and in an amount needed to supply the facility throughout the life of the project. (PSC REF#: 381917 at 2-4.)

The Commission finds that the project will not have an undue adverse impact on environmental factors at either site. The Commission finds that Clean Wisconsin's concern that "a major slope failure on the escarpment along the Nemadji River could result in a catastrophic water quality impact to the river…" is too conjectural to be given credence. The applicants have submitted substantial evidence that the proposed retaining wall at the Nemadji River Site will be designed and constructed in accordance with professional standards, and Clean Wisconsin failed to convincingly demonstrate that the design entails deficiencies that would present an actual risk of slope failure. Furthermore, the Commission is sensitive to the wetland impacts associated with developing the sites. However, the Commission finds that the conditions recommended by DNR staff and incorporated into this decision as discussed later will mitigate the impacts

associated with construction and thereby prevent the project from having an undue adverse environmental impact.

With regard to groundwater, DNR's authority over the issuance of the relevant permits in no way relieves the Commission of its duty under the CPCN law to judge whether the project will have an undue adverse environmental impact. This is a function that the Commission must perform for itself, and in doing so, must weigh the evidence and not substitute the judgment of any other entity for its own. For this reason, the Commission must take care not to let its regard for the expertise of DNR staff obscure the provisional nature of DNR staff's testimony. DNR staff, cognizant of the parameters of their own work, have refrained from making any final permitting decisions based on the knowledge of the aquifer that they have acquired thus far. It is in that context that the Commission must view DNR staff's testimony when weighing the evidence.

The Commission finds that the applicants have provided substantial and credible evidence that the aquifer is capable of satisfying the anticipated withdrawal demands of the project, and that the withdrawals will not deplete the aquifer in a manner that adversely affects the groundwater in the area. To the extent that the applicants' description of the aquifer as having a source of leakage differs from DNR staff's description of the aquifer as fully confined, the Commission finds the applicants' description to be more credible, due not only to the provisional nature of DNR staff's testimony but also to the fact that Sierra Club's testimony on this point affirms the applicants rather than DNR staff.

Having found the applicants' description of the aquifer to be credible, the Commission finds that DNR staff's reasons for disapproving of the applicants' use of the Hantush-Jacob formula do not apply. Moreover, the Commission finds that the applicants' use of this

calculation method is persuasively supported by the testimony submitted on this topic. Finally, the Commission accordingly finds the applicants' projections of the groundwater supply and drawdown to be credible. While the Commission appreciates Sierra Club's concerns that, lacking absolute certainty about all characteristics of the aquifer, the applicants' projections entail the risk of inaccuracy, the Commission finds that the prospect of achieving greater certainty fails to cast doubt on the projections.

Chairperson Valcq dissents and writes separately.

Having weighed the evidence, the Commission finds that the record supports a conditional approval rather than a denial of the CPCN.[20] Because the Commission has found that the weight of the evidence indicates that the project is in the public interest and will not have an undue adverse environmental impact, a denial would be an inappropriate application of the CPCN law. The Legislature has authorized the Commission to issue conditional orders and approve CPCN applications with such modifications as are necessary to find that a project is in the public interest and will not have undue adverse environmental impacts. Having been granted this authority, the Commission must exercise its authority in a manner that best serves the purpose of the CPCN law.

Opposing intervernors' argument that the Commission should resolve any uncertainty regarding the availability of groundwater by denying the CPCN and having the applicants refile the application is a policy recommendation rather than an argument grounded in the evidence of this proceeding. Such a policy would not serve the purpose of the CPCN law in this instance. Having made factual findings for itself regarding the availability of groundwater, the only uncertainty

[20] While Chairperson Valcq dissents from approval and granting a CPCN for the project, she concurs with the imposition of conditions to the extent the project is authorized.

remaining before the Commission is whether DNR's final analysis will lead to the issuance or denial of the relevant permits. Under the CPCN law, this uncertainty is appropriately addressed by imposing the condition that the applicants obtain the permits, not by denying the CPCN.

The Commission finds that, due to the central role that the water issue has played in the Commission's overall environmental and public interest determinations, prudence requires addressing any risks of adverse impacts to groundwater by conditioning the approval of the CPCN on the applicants obtaining from DNR the high-capacity well permit under Wis. Stat. § 281.34, the water use individual permit under Wis. Stat. § 281.346(5), the water loss approval under Wis. Stat. § 281.35, and any other required local, state, or federal permit or approval as required for this project and the NTEC project.

Required Local, State, and Federal Permits

Prior to the initiation of construction, the applicants must obtain all required local, state, and federal permits and regulatory approvals. The following tables provide a list of the various anticipated permits and approvals that would be required for construction and operation of the NTEC project. The status of permits as of the final EIS has been included when available.

Table 1-2 Anticipated local permits and approvals

Agency	Planned Activity	Type of Approval
Douglas County	Delivery of large/heavy components over county-controlled roads	Heavy Haul/Oversized Load permits, as authorized by Wis. Stat. §§ 348.25-348.28; Douglas County Highway Department 2018 Weight Limits
City of Superior	Construction of facilities	Building, electrical, and plumbing permits, Superior Code of Ordinances Chapter 34 (Construction Code)
	Delivery of large/heavy components over City-controlled roads	Heavy Haul/Oversized Load permits, as authorized by Wis. Stat. §§ 348.25-348.28, Superior Code Chapter 112 Section 112-33 (Heavy traffic [truck] route)
	Pretreatment permit for discharge of wastewater to a municipal treatment facility	WPDES1 permit, Wis. Admin. Code chs. NR 108, 211, and 220-297

Table 1-3 Anticipated state permits and approvals

Agency	Planned Activity	Type of Approval	Status
PSC	Building and operating generating units and 345 kV transmission line	Certificate of Public Convenience and Necessity (Wis. Stat. § 196.491(3))	Submitted January 8, 2019
	Relocation of the existing 10-inch gas pipeline currently located on Preferred Site	Certificate of Authority (Wis. Stat. § 196.49)	Submitted January 9, 2019
	Construction of 16-inch pipeline to serve project	Certificate of Authority (Wis. Stat. § 196.49)	Submitted January 9, 2019
	Relocation of existing transmission assets currently located on Preferred Site	Affiliated Interest Agreement approval of agreement between SWL&P and its affiliate SSE (Wis. Stat. § 196.52)	Filing date TBD
	Relocation of existing 10-inch gas pipeline currently located on Preferred Site	Affiliated Interest Agreement approval of agreement between SWL&P and its affiliate SSE (Wis. Stat. § 196.52)	Filing date TBD
	Construction of 16-inch pipeline to serve project	Affiliated Interest Agreement approval of Development Agreement between SWL&P and its affiliate SSE (Wis. Stat. § 196.52)	Approved in Docket 5820-AG-100 on May 7, 2018
	Construction of 16-inch pipeline to serve project	Affiliated Interest Agreement approval of Construction and Service Agreement between SWL&P and its affiliate SSE (Wis. Stat. § 196.52)	Filing date TBD
DNR	Construction and operation of new source of air emissions	Construction and operating permits: (Wis. Admin. Code ch. NR5 405 through 407, 40, CFR Part 52.21), and acid rain permit (40 CFR Part 75 and NR 409)	TBD
	High capacity well system for non- potable use	Approval of high-capacity wells (Wis. Admin Code ch. NR 812.09	Submitted December 18, 2018
	Erosion control and stormwater management for land disturbance during construction	Construction site stormwater discharge permit (Wis. Admin. Code ch. NR 216)	Submitted December 18, 2018
	Hydrostatic test water for water supply system water	Wis. Stat. § 283	Submitted December 18, 2018
	Non-transient Non-community Public Water System	Public Water Supply (Wis. Admin. Code chs. NR 809 and 810)	TBD
	Operational stormwater pollution prevention plan	Industrial stormwater discharge permit (Wis. Admin. Code ch. NR 216)	Submitted December 18, 2018
	Various land disturbance construction activities	Potential impact to federal and state threatened and endangered species	Guidelines to be followed
	Consumptive water use	Water Withdrawal Individual Permit	Submitted December 18, 2018
	Water use	Water Use Permit	TBD
	Placement of structure within a waterway; placing [temporary] bridges over navigable waterway	Wis. Stat. Chapter 30 (Navigable Waters, Harbors and Navigation) Permit: Wis. Stat. §§ 30.12 and 30.123 and Wis. Admin. Code ch. NR 320	USACE reviewing wetland delineation report in preparation for PSCW decision
	Required for issuance of USACE Section 404/10 permits unless waived by DNR	Section 401 Water Quality Certification (Application for Wetland Water Quality Certification, Form 3500-53N)	USACE reviewing wetland delineation report in preparation for PSCW decision
	Invasive Species management for land disturbance during construction	Chapter NR 40 Invasive Species Identification, Classification and Control (Wis. Admin. Code ch. NR 40)	Guidelines to be followed
	Construction of all buildings and structures	Approval of plans and specifications (Wis. Stat. § 101.02)	To be filed

Agency	Planned Activity	Type of Approval	Status
Wisconsin Department of Safety and Professional Services	Installation of fuel or lubricating oil storage tanks	Approval of plans and specifications (Wis. Stat. § 101.09)	To be filed
Professional Services	Installation of dust filtering and HVAC equipment	Approval of plans and specifications (Wis. Stat. § 101.12)	To be filed
	Installation and registration of boilers, pressure vessels, and power piping	Machines and boilers, safety requirements (Wis. Stat. 101.17)	To be filed
WisDOT	Delivery of equipment to the construction site	Oversized Equipment Delivery Permit	To be filed
Wisconsin Historical Society	Site preparation and grading	Approval of archaeological surveys (Wis. Stat. § 44.40) and Section 106 Cultural Resources Clearance	Filed with CPCN Application

Table 1-4 Anticipated federal permits and approvals

Agency	Planned Activity	Type of Approval	Status
FAA	Construction or alteration of structures more than 200 feet above ground level	7460 Notice of Proposed Construction or Alteration (14 Code of Federal Regulations (CFR) S77.13)	8-25-17
USFWS	Various land disturbance construction activities	Endangered Species Act and National Bald Eagle Management Guidelines	Guidelines to be followed
USACE	Discharge of dredged or fill material into waters of the U.S.	Clean Water Act - Section 404 Permit	Reviewing wetland delineation report in preparation for PSC decision
USEPA	Storage of petroleum products	Spill Prevention, Control and Countermeasures Plan and Facility Response Plan (40 CFR 112)	To be implemented and kept on site

Conditions of Approval

General Conditions

Typically, the Commission's Final Decision in electric power plant generation construction projects includes a number of general conditions that would be applicable to most if not all electric generation projects. Commission staff reviewed the proposed project and prior Commission orders and developed suggested order conditions related to proposed project construction, noting that a range of commonly used order conditions can mitigate impacts associated with construction activities and the operation of the proposed plant. Conditions like these have been included in recent electric generation orders, such as that in *Application for a Certificate of Public Convenience and Necessity of Badger Hollow Solar Farm, LLC to*

Cosntruct a Solar Electric Generation Facility, to be Located in Iowa County, Wisconsin, Docket No. 9697-CE-100 (PSC April 18, 2019). For the reasons discussed below, the Commission finds it reasonable to include, as conditions of approval, the following order conditions:

a. If the applicants enter into any arrangement with another party regarding ownership of the project, the applicants shall provide prior notice to the Commission.
b. The applicants are authorized to construct the facilities as approved by this Final Decision using the Nemadji River Site.[21]
c. All necessary federal, state, and local permits shall be secured by the applications prior to commencement of construction.
d. The applicants shall inform the Commission of the final expected nameplate capacity for the project.
e. The applicants shall commence construction of the project no later than one year after the applicants have received all necessary federal, state, and local permits and approvals.
f. If the applicants do not begin on site physical construction of the authorized project within one year of the time period specified by this Final Decision, the CPCN authorizing the approved project for which construction has not commenced shall become void unless the applicants:
    i. file a written request for an extension of time with the Commission before the effective date on which the CPCN becomes void, and
    ii. are granted an extension by the Commission.
g. This Final Decision takes effect one day after the date of service.
h. Jurisdiction is retained.

[21] Chairperson Valcq dissents as she would have not authorized construction, but to the extent authorized, concurs that it shall be constructed as approved by this Final Decision.

i. The applicants shall construct the project in conformance with the design specified in its application, and the subject to the conditions specified in this Final Decision. Should the scope, design or location of the project change significantly, the applicants shall notify the Commission within 30 days of becoming aware of possible changes.

j. Until the project is fully operational, the applicants shall submit quarterly progress reports to the Commission that summarize the status of construction, the status of environmental control activities, and the overall percent of physical completion. The applicants shall include a summary of its consultations with DNR and other agencies concerning the issuance of necessary permits. The date when construction commences shall be duly included in the report for that quarter. The first report is due for the quarter ending June 30, 2020, and each report shall be filed within 30 days after the end of the quarter.

k. The applicants shall comply with the National Electric Code (NEC) or the National Electric Safety Code (NESC) and Wis. Admin. Code ch. PSC 114, as appropriate. In the case of conflict or overlap between code requirements, the applicants shall comply with the more stringent code requirement.

The applicants did not take issue with the above conditions, except to request a modification of condition (c), to clearly allow the applicants to construct portions of the project that are unrelated to any pending permit. As discussed above, however, DNR and intervenors raised concerns related to the effects of construction on erodible soils, loss and fragmentation of wetlands, and the potential depletion of the aquifer. The Commission finds the conditions requiring that all permits be in place before the commencement of construction to be essential to its determination that the project meets the standards for issuance of a CPCN. If the necessary permits are not granted, the project should not be built. The Commission thus concludes that the language as proposed above is necessary, and declines to edit the proposed condition as requested by the applicants.

The Commission also notes that condition (k) in the above list, requiring the applicants to construct the project to comply with NEC or NESC and Wis. Admin. Code ch. PSC 114, was inadvertently omitted from the draft decision matrix that was issued for comment, and thus that condition was not specifically addressed by the applicants in this docket. In the related 9698-CE-101 docket, however, the applicants requested that a similar condition requiring NEC, NESC, and Wis. Admin. Code ch. PSC 114 compliance "recognize that Wis. Admin. Code ch. PSC 114 does not apply to DPC." (PSC REF#: 381404.)

In general, NEC applies to non-supply facilities owned by non-utility entities, and NESC applies to supply facilities owned by utilities. The Commission finds it reasonable to require the applicants to construct, maintain, and operate all applicable project facilities to comply with NEC or NESC and Wis. Admin. Code ch. PSC 114, as appropriate. In case of conflict or overlap between code requirements, the applicants should construct, maintain, and operate all applicable project facilities to comply with the more stringent requirement. This will ensure public safety. Absent such a condition, as a wholesale merchant facility the applicable codes and enforcement necessary to ensure public safety would be unclear. Further, this condition will ensure that if Wisconsin public utilities purchase the facilities at some time in the future, the facilities will not require additional code upgrades that could be an unnecessary cost. The Commission does not find that additional language like that suggested by the applicants in the related 9698-CE-101 docket for this condition is necessary or appropriate.

The Commission finds that the imposition of the above order conditions is reasonable and in the public interest. These conditions mitigate potential impacts and ensure the Commission and the public are informed as construction proceeds.

Endangered Resources Conditions

Endangered resources include rare or declining species, high quality or rare natural communities, and unique or significant natural features. Endangered resources within and adjacent to a project site could be affected by construction operation and/or maintenance activities associated with the project throughout the life of the constructed facilities. The applicants submitted a project specific Endangered Resources Review in which DNR identified "recommended" and "required" actions that applicants should implement if the project is approved in order to minimize or avoid take of listed endangered resources. The main difference between these two types of actions is that DNR can require the applicants to perform "required" actions, but does not have authority to require the applicants to perform "recommended" actions. The Commission has commonly included DNR "recommended" actions as order conditions as a practical and informed mitigation method to minimize or avoid impacts to endangered resources.

Intervenors raised concerns that endangered resources would not be adequately protected during construction and operation of the project. As discussed below, the Commission will require that an independent environmental monitor (IEM) be engaged for the project which will help ensure that the applicants comply with applicable laws and implement best practices to mitigate and avoid impacts to endangered resources. DNR staff recommended that the applicants be required to work with DNR's Natural Heritage Conservation program to conduct additional surveys where rare species information is lacking. Because construction could take a long time, and the Commission anticipates that circumstances and thus the endangered resources that could be impacted could change, the Commission finds it reasonable to require that the information about endangered resources be updated periodically. Inclusion of these practices

and requirements will help ensure that endangered resources are effectively located, protected, and that impacts are mitigated. The Commission finds it reasonable to include the following additional conditions to mitigate impacts to endangered resources within the project area:

- The applicants shall work with DNR to follow all required actions within the Endangered Resources (ER) Review, and survey for rare plant species listed in the ER Review, notifying DNR of what was found. If rare plant species are identified, the applicants shall work with DNR to implement an appropriate relocation plan prior to the start of construction.
- The applicants shall provide an updated ER Review to DNR and the Commission if the commencement of construction occurs greater than one year after the initial ER Review and at any point the ER Review is greater than one year old while construction is still taking place.

Final Erosion and Stormwater Control Plan

As discussed above, the potential impacts of slope erosion and stormwater control have been of primary concern in this case. The applicants developed a planning document that addresses both erosion and stormwater control. The Erosion Control and Storm Water Management Plan describes the methods that would be employed to reduce and mitigate impacts during and after construction of the proposed project. Site-specific plans would be developed during the final design phase of the project and provided to DNR and the City of Superior for review and approval prior to commencement of construction. Best management practice (BMP) erosion control techniques would be used to mitigate soil impacts.

Intervenors remained concerned about potential erosion and stormwater impacts.

The Commission shares the concerns about potential erosion and stormwater impacts, but is persuaded by the applicants and by the mitigation recommendations suggested by DNR

witnesses that sufficient mitigation measures can be implemented to minimize and mitigate these impacts.

Accordingly, the Commission finds it reasonable and necessary to include the following condition, which the applicants did not oppose, to further ensure that the potential for environmental impacts caused by erosion and stormwater are continually monitored.

> The applicants shall submit the Final Erosion and Stormwater Control Plan to the Commission prior to the commencement of construction, after the plan has been reviewed and permitted by the DNR as part of DNR's Construction Site Stormwater Permit process. The plan shall be followed during construction.

Best Management Practices Conditions

There are a range of pre- and post-construction activities and BMPs that are commonly seen in electric generation projects. BMPs are generally considered effective and practical ways of preventing or reducing impacts from project construction or activities.

A number of such BMPs were identified in the final EIS and in testimony from DNR staff, and were thus considered by the Commission. Many of the BMPs selected by the Commission have previously been ordered by the Commission to address potential impacts of a project. Moreover, such conditions directly address concerns raised regarding the effects construction could have on erodible soils and the loss and fragmentation of wetlands.

The Commission finds it reasonable to include the following order conditions to assist in mitigating some of the ecological and environmental impacts that may occur as a result of the actions implemented by the applicants within the approved site, during the construction, maintenance, and restoration phases of the proposed project.

Wetland Impact Mitigation Conditions

The applicants shall implement all practicable mitigation methods when working in and adjacent to wetlands, including when working on slopes leading to wetlands, to minimize the impacts of the project to wetlands, including the following:

a. The applicants shall avoid equipment access in wetlands, wherever possible;
b. The applicants shall site off-ROW access roads, laydown yards, and staging areas outside of wetlands;
c. The applicants shall mark the boundary of wetlands prior to construction;
d. The applicants shall limit construction in wetlands to winter months when soils and water are frozen and vegetation is dormant;
e. The applicants shall use construction matting and wide-track vehicles to spread the distribution of equipment weight when crossing wetlands during the growing season or when wetlands are not stable or not frozen;
f. The applicants shall use adjacent roads and existing off-ROW access roads for vehicle access when possible;
g. The applicants shall site structures and access roads on the edges of wetlands rather than in the middle of wetland to avoid fragmenting wetland complexes;
h. The applicants shall reduce the construction workspace in wetlands;
i. The applicants shall install effective, site-specific sediment and erosion control measures and devices prior to construction activities and must maintain the devices during construction and restoration phases. These devices must be inspected daily to ensure they are in working order. If they are not in working order, they must be fixed and/or replaced immediately wetlands;
j. The applicants shall implement a construction sequencing plan that minimizes the amount of land disturbed or exposed (susceptible to erosion) at one given time across the project;

k. The applicants shall isolate all soil piles with perimeter sediment control devices, and place all soils piles in wetlands on top of construction mats to prevent soil mixing;

l. The applicants shall use alternative construction methods and equipment such as helicopters, marsh buggies, and vibratory caisson foundations;

m. The applicants shall prepare and implement an invasive species management plan that identifies known areas of invasive species populations and addresses site restoration activities and includes equipment decontamination protocols to minimize the spread of invasive species;

n. The applicants shall minimize the amount of vegetation clearing in wetland and conversion of wetland types;

o. The applicants shall remove all brush piles, wood chips, and woody debris from wetlands following clearing activities;

p. The applicants shall conduct surface and sub-surface assessments prior to construction, including hydrology and soil evaluations; modify the engineering plans as needed to avoid and minimize long-term impacts to surface and subsurface resources and to re-establish conditions post-construction;

q. The applicants shall prepare and implement dewatering practices that prevent sedimentation into wetlands;

r. The applicants shall schedule construction to avoid disrupting sensitive species;

s. The applicants shall limit the amount of time necessary to complete construction;

t. The applicants shall construct ponds and sediment basins as soon as possible, and ensure all permanent post-construction stormwater management practices are designed to accommodate the additional runoff from new impervious surfaces and the loss of flood storage caused by permanently filling wetlands;

u. The applicants shall revegetate disturbed areas of exposed soil as soon as possible, and seed with a cover crop and/or native seed mix to help prevent the establishment of invasive species;

v. The applicants shall prepare and implement an invasive species management plan that identifies known areas of invasive species populations and addresses site

restoration activities and includes equipment decontamination protocols to minimize the spread of invasive species.

Waterway Impact Mitigation Conditions

The applicants shall implement all practicable mitigation methods when working in and adjacent to waterways, including when working on slopes leading to waterways, to minimize the impacts of the project to waterways, including the following:

a. The applicants shall mark the locations of waterways prior to construction;
b. The applicants shall use alternative equipment access, including off-ROW access roads, and installation methods to avoid needing to cross waterways with equipment;
c. The applicants shall install effective, site-specific sediment and erosion control measures and devices prior to any construction activity and must maintain the devices during construction and restoration phases. These devices must be inspected daily to ensure they are in working order. If they are not in working order, they must be fixed and/or replaced immediately;
d. The applicants shall implement a construction sequencing plan that minimizes the amount of land disturbed or exposed (susceptible to erosion) at one given time across the project;
e. The applicants shall isolate all soil piles from adjacent waterways with perimeter erosion control devices;
f. The applicants shall revegetate disturbed areas and areas of exposed soil as soon as possible;
g. The applicants shall leave existing vegetative buffers undisturbed whenever possible, or vegetation clearing should be kept to a minimum in riparian zones. For areas where construction impacts cannot be avoided, low-growing native tree and shrub buffers along these streams should be allowed to regrow and/or should be replanted to maintain the pre-construction water quality in the streams;

h. The applicants must avoid the use of herbicides near waterways, or utilize herbicides approved for use in aquatic environments;

i. The applicants shall conduct surface and sub-surface assessments prior to construction, including hydrology and soil evaluations; modify the engineering plans as needed to avoid and minimize long-term impacts to surface and subsurface resources and to re-establish conditions post-construction;

j. The applicants shall prepare and implement dewatering practices to prevent sedimentation into waterways;

k. The applicants shall avoid the withdrawal of water from surface waters;

l. The applicants shall mark temporary clear span bridges (TCSB) to alert navigators;

m. The applicants shall restore waterway banks and beds to pre-existing conditions;

n. The applicants shall schedule construction to avoid disrupting sensitive species;

o. The applicants shall limit the amount of time necessary to complete construction;

p. The applicants shall check equipment for fluid leaks before crossing TCSBs;

q. The applicants shall anchor TCSBs to prevent them washing away during high flow conditions;

r. The applicants shall monitor TCSBs daily for debris and remove debris as necessary;

s. The applicants shall locate TCSBs to avoid unique or sensitive portions of these waterways, (e.g., riffles, pools, spawning beds, etc.);

t. To avoid sedimentation into waterways, applicants shall install appropriate sediment control BMPs under and on the sides of the TCSB during the installation, use, and removal of TCSBs, and those BMPs must be regularly inspected and maintained throughout the project;

u. The applicants shall construct ponds and sediment basins as soon as possible and ensure all permanent post-construction stormwater management practices are designed to direct runoff to those stormwater management practices and not adjacent waterways;

v. The applicants shall not construct cofferdams from earthen material;

w. The applicants shall avoid dredging work during high-flow conditions;

x. The applicants shall continuously monitor weather forecasts to know when rainfall is expected during dredging activities;

y. The applicants shall monitor water flows throughout dredging activity;

z. The applicants shall operate equipment from the banks or from a TCSB during dredging activities, and not from the waterway bed;

aa. The applicants shall size the stream bypass system used during dredging activities based on expected flow for the time of construction at each waterway to ensure the level of flow expected is appropriately and effectively managed;

bb. The applicants shall use appropriate energy dissipation measures to minimize bed scour of the waterway;

cc. The applicants shall use floating, screened intakes during dredging activities to minimize sediment transport and prevent impacts to aquatic species;

dd. The applicants shall segregate excavated stream bed layers to help facilitate restoration. The soil layers should be returned to their pre-existing location, and bed elevations restored to match pre-construction conditions;

ee. The applicants shall remove work zone isolation systems, such as cofferdams, gradually and use in-water sediment control devices such as a silt curtain to minimize downstream impacts;

ff. The applicants shall monitor and maintain any fences placed across waterways on a regular basis to address debris accumulation.

The applicants did not specifically object to any of the wetland and waterway impact mitigation conditions identified above. They did, however, request a modification to the language in conditions (a) and (b), to change the word “necessary,” which had initially been proposed, to “practicable” in the description of which mitigation methods must be implemented when working in and adjacent to wetlands or waterways. The Commission finds it reasonable to make that modification, which is reflected in the conditions of this Final Decision.

The Commission also recognizes that this Final Decision is attaching a substantial number of conditions, and that some may be duplicative of restrictions and requirements that may ultimately be imposed by DNR and other permits that the applicants will be required to secure for the project. Due to the timing restrictions imposed by the CPCN statute, however, the Commission must impose conditions that can mitigate the environmental impacts adequately to meet the statutory requirements for approval of the project, without yet knowing what other restrictions will be imposed through other processes. Because the Commission anticipates that there may be some clarification needed once all required permits are obtained, it finds that an additional condition, requiring communication and cooperation between DNR, the applicants, and Commission staff is a reasonable and necessary means that could ensure that the applicants know how they must actually proceed if and when construction is imminent. The Commission thus finds it reasonable to impose the following additional condition:

> Following the issuance of all required permits by DNR, the applicants shall work with Commission and DNR staff to identify any duplicative, conflicting or unnecessary environmental conditions imposed by this Final Decision. The applicants may seek a waiver from the Commission for any such conditions. The Commission delegates authority to approve such waiver requests to the Administrators for the Division of Energy Regulation and Analysis and the Division of Digital Access, Consumer and Environmental Affairs.[22]

Chairperson Valcq dissents from the above condition requiring post-permitting meeting and coordination among the applicants, DNR staff, and Commission staff regarding potentially required waivers.

[22] The Commission has the power to delegate this authority to the Division Administrator.

Independent Environmental Monitor

While pre- and post-construction conditions specified in the Commission's Final Decision and the various required permits can avoid, minimize, or mitigate the potential adverse impacts of an approved project, it can be useful to employ an IEM.

An IEM is required in some Commission orders to monitor construction of an approved project. The IEM typically reports directly to Commission and DNR staff rather than the applicants or construction subcontractors. Construction activities subject to monitoring and reporting by the IEM include activities that would affect wetlands, waterways, habitats and occurrences of protected species, archaeological sites, agricultural fields, state and federal properties, and/or private properties with specific issues such as organic farming practices or the disposition of cleared trees. The IEM can be responsible for reporting incidents or stopping work, when appropriate, when construction practices violate any applicable permit, approval, order condition, or agreement with regulatory agencies, or are likely to cause unanticipated impacts to the environment or private properties. In short, IEMs assist the regulatory agencies in ensuring compliance with regulatory requirements, and can, in some cases, have stop work authority. (PSC REF#: 376466 at Sections 3.4.5.3; 4.2.6.1.)

For several recent major construction projects, the Commission has authorized the hiring of an IEM. IEMs are typically required by the Commission after considering the scope of the project, the complexity of environmental issues, and the presence of sensitive natural resources. The IEMs are funded by the applicants, and report directly to the staff of the involved state agencies.

The applicants objected to the hiring of an IEM, claiming the condition was not discussed in testimony and is not necessary because the applicants have already agreed to have an environmental monitor present during construction. The benefit of having an IEM was discussed in the final EIS, however, and is a reasonable means for ensuring that the identified environmental protection requirements are followed. That the applicants have their own IEM does not provide the protection needed in this case, where there is a possibility of a large number of environmental impacts if mitigation measures are not implemented and order conditions are not followed.

The Commission thus finds that because the project location includes a high number of environmental issues and because of the complexity and scope of the potential impacts, it is reasonable to require the applicants to employ an IEM during the construction phase of the proposed project. The Commission requires the applicants to consult with the Commission and DNR staff for the issuance of a Request for Proposals (RFP) to hire the IEM. The applicants shall fund the salary and expenses of the IEM. The IEM shall report to Commission and DNR staff, and assist the regulatory agencies in ensuring compliance with regulatory requirements, including order and permit conditions. The Commission does not find it reasonable or necessary to grant the IEM stop work authority for this project.

Pre- and Post-Construction Noise Studies

There has been long-standing Commission precedent of requiring pre-construction and post-construction noise studies for any new proposed generation facility, for both renewable and conventional electric generation resources. The applicants submitted some preliminary information about the anticipated noise that could result from the construction and operation of

the project and noise impacts and possible mitigation measures were discussed in the final EIS. (PSC REF#: 376466 at 71-74.) Until the project is constructed and placed in operation, however, uncertainty remains as to the level of noise and associated impacts caused by the project.

The Commission finds it reasonable that the applicants be required to perform pre-construction and post-construction noise studies as described in the most current version of the Commission's Noise Measurement Protocol. This will ensure that any noise created by the project will be identified and mitigated in accordance with the Commission's standards. The applicants should work with Commission staff to determine appropriate locations and conditions for the noise measurements. In the event of a substantial change to the proposed facility, the applicants shall confer with Commission staff to determine if a new pre-construction noise study must be completed. The applicants shall file a copy of the post-construction noise study report with the Commission.

Other Proposed Conditions

Intervenors did not object to any of the proposed conditions, though they maintained that the conditions were not sufficient to justify approval of the project. Clean Wisconsin also claimed that additional conditions suggested by Commission staff and intervenors' testimony should be considered. In particular, Clean Wisconsin suggested that the applicants should be required to:

- Screen dewatering discharges for per- and polyfluoroalkyl substances (PFAs) and potentially limit them (Direct-WDNR-Liska-3, PSC REF#: 376823);[23]

[23] DNR has already indicated that it intends to require that any dewatering discharge be screened for PFAs. *See* final EIS at 64, 126. (PSC REF#: 376795.)

- Survey, avoid, and relocate rare plants (Direct-WDNR-Rowe-6, PSC REF#: 376822);
- Implement strong erosion and siltation measures, avoid work during periods that would impact rare herptiles in the Nemadji River (Direct-WDNR-Rowe-6, PSC REF#: 376822);
- Design stormwater controls well in excess of the 25-year, 24-hour storm event (Direct-CW-Mosca-7, PSC REF#: 376914);
- Utilize a secondary stormwater control that will not cause slope failure or erosion (Direct-CW-Mosca-7, PSC REF#: 376914);
- Include stormwater detention for Nemadji River Laydown/Staging are, avoid erosive pressure on stream W-517F and W-518-W1, and ensure groundwater supply is not cut off to wetland W-501f (Direct-CW-Mosca-101-11, PSC REF#: 376914; Tr. at 399:5-400:9).

The proposed additional mitigation measures are for the most part repetitive. The conditions that the Commission is imposing in this order are exhaustive, and coupled with requirements imposed by DNR and other permits that will be required for the project to go forward, provide substantial protections to the concerns raised. The Commission therefore declines to add the additional conditions listed by Clean Wisconsin, not finding them to be reasonably necessary, particularly given the extensive list of conditions already being imposed.

Chairperson Valcq dissents and writes separately.

Flood Hazard Review

The proposed project was reviewed for potential flood hazard exposure per Order 73. As no flood-sensitive facilities are to be located in or near any designated floodplain or flood prone areas, there is no significant flood risk to the proposed project.

Project Construction Schedule

The applicants provided a representative construction schedule as part of its application, which is summarized as follows:

Activity	Estimated Start
Stormwater pond rework	April 2020
10-inch gas line relocation construction	June 2020
Fiber relocation construction	June 2020
Existing transmission line relocation construction	August 2020
Sheet pile wall construction	June 2021
Power train erection	December 2022
Cooling tower erection	April 2023
Gas turbine generator first fire complete	May 2024
NTEC mechanically complete	June 2024
NTEC Commercial operation	December 2024

Assignment of Rights

Pursuant to Wisconsin's CPCN law, the application was reviewed in accordance with those criteria applicable to Commission authorization for the construction of wholesale merchant plant rather than public utility plant. Wis. Stat. § 196.491(3)(d). Because the criteria applicable to review of CPCN applications by public utilities differs from that applicable to wholesale merchant plants, the rights granted under a CPCN issued to a wholesale merchant plant are also distinct from those granted to a public utility. Accordingly, the Commission finds it reasonable, given the possibility of the assignment of ownership and rights by applicant at some point in the future, to include an order condition limiting the rights granted under the CPCN to those

provided to applicant as a wholesale merchant, and requiring any future owner or operator of the NTEC project to honor the commitments made by applicant.

Certificate

The Commission grants the applicants a CPCN for construction of the proposed NTEC natural gas-fired combined-cycle electric generating facility, as described in the application and as modified by this Final Decision.

Order

1. All evidence that was the subject of the Order to Show Cause and the Request for Leave to Supplement the Record is admitted to the record in this docket.

2. The applicants are authorized to construct the facilities as approved by this Final decision using the Nemadji River Site.

3. The applicants shall construct the project in conformance with the design specified in its application, and subject to the conditions specified in this Final Decision. Should the scope, design or location of the project change significantly, the applicants shall notify the Commission within 30 days of becoming aware of possible changes.

4. The applicants shall inform the Commission of the final expected nameplate capacity for the project.

5. If the applicants enter into any arrangement with another party regarding ownership of the project, applicants shall provide prior notice to the Commission.

6. The applicants shall comply with NEC or NESC and Wis. Admin. Code ch. PSC 114, as appropriate. In the case of conflict or overlap between code requirements, the applicants shall comply with the more stringent code requirement.

7. All necessary federal, state and local permits shall be secured by the applicants prior to commencement of construction.

8. The applicants shall implement all practicable mitigation methods when working in and adjacent to wetlands, including when working on slopes leading to wetlands, to minimize the impacts of the project to wetlands, including the following:

a. The applicants shall avoid equipment access in wetlands, wherever possible;
b. The applicants shall site off-ROW access roads, laydown yards, and staging areas outside of wetlands;
c. The applicants shall mark the boundary of wetlands prior to construction;
d. The applicants shall limit construction in wetlands to winter months when soils and water are frozen and vegetation is dormant;
e. The applicants shall use construction matting and wide-track vehicles to spread the distribution of equipment weight when crossing wetlands during the growing season or when wetlands are not stable or not frozen;
f. The applicants shall use adjacent roads and existing off-ROW access roads for vehicle access when possible;
g. The applicants shall site structures and access roads on the edges of wetlands rather than in the middle of wetland to avoid fragmenting wetland complexes;
h. The applicants shall reduce the construction workspace in wetlands;
i. The applicants shall install effective, site-specific sediment and erosion control measures and devices prior to construction activities and must maintain the devices during construction and restoration phases. These devices must be inspected daily to ensure they are in working order. If they are not in working order, they must be fixed and/or replaced immediately wetlands;

j. The applicants shall implement a construction sequencing plan that minimizes the amount of land disturbed or exposed (susceptible to erosion) at one given time across the project;

k. The applicants shall isolate all soil piles with perimeter sediment control devices, and place all soils piles in wetlands on top of construction mats to prevent soil mixing;

l. The applicants shall use alternative construction methods and equipment such as helicopters, marsh buggies, and vibratory caisson foundations;

m. The applicants shall prepare and implement an invasive species management plan that identifies known areas of invasive species populations and addresses site restoration activities and includes equipment decontamination protocols to minimize the spread of invasive species;

n. The applicants shall minimize the amount of vegetation clearing in wetland and conversion of wetland types;

o. The applicants shall remove all brush piles, wood chips, and woody debris from wetlands following clearing activities;

p. The applicants shall conduct surface and sub-surface assessments prior to construction, including hydrology and soil evaluations; modify the engineering plans as needed to avoid and minimize long-term impacts to surface and subsurface resources and to re-establish conditions post-construction;

q. The applicants shall prepare and implement dewatering practices that prevent sedimentation into wetlands;

r. The applicants shall schedule construction to avoid disrupting sensitive species;

s. The applicants shall limit the amount of time necessary to complete construction;

t. The applicants shall construct ponds and sediment basins as soon as possible, and ensure all permanent post-construction stormwater

management practices are designed to accommodate the additional runoff from new impervious surfaces and the loss of flood storage caused by permanently filling wetlands;

u. The applicants shall revegetate disturbed areas of exposed soil as soon as possible, and seed with a cover crop and/or native seed mix to help prevent the establishment of invasive species;

v. The applicants shall prepare and implement an invasive species management plan that identifies known areas of invasive species populations and addresses site restoration activities and includes equipment decontamination protocols to minimize the spread of invasive species.

9. The applicants shall implement all practicable mitigation methods when working in and adjacent to waterways, including when working on slopes leading to waterways, to minimize the impacts of the project to waterways, including the following:

a. The applicants shall mark the locations of waterways prior to construction;

b. The applicants shall use alternative equipment access, including off-ROW access roads, and installation methods to avoid needing to cross waterways with equipment;

c. The applicants shall install effective, site-specific sediment and erosion control measures and devices prior to any construction activity and must maintain the devices during construction and restoration phases. These devices must be inspected daily to ensure they are in working order. If they are not in working order, they must be fixed and/or replaced immediately;

d. The applicants shall implement a construction sequencing plan that minimizes the amount of land disturbed or exposed (susceptible to erosion) at one given time across the project;

e. The applicants shall isolate all soil piles from adjacent waterways with perimeter erosion control devices;

f. The applicants shall revegetate disturbed areas and areas of exposed soil as soon as possible;

g. The applicants shall leave existing vegetative buffers undisturbed whenever possible, or vegetation clearing should be kept to a minimum in riparian zones. For areas where construction impacts cannot be avoided, low-growing native tree and shrub buffers along these streams should be allowed to regrow and/or should be replanted to maintain the pre-construction water quality in the streams;

h. The applicants must avoid the use of herbicides near waterways, or utilize herbicides approved for use in aquatic environments;

i. The applicants shall conduct surface and sub-surface assessments prior to construction, including hydrology and soil evaluations; modify the engineering plans as needed to avoid and minimize long-term impacts to surface and subsurface resources and to re-establish conditions post-construction;

j. The applicants shall prepare and implement dewatering practices to prevent sedimentation into waterways;

k. The applicants shall avoid the withdrawal of water from surface waters;

l. The applicants shall mark TCSBs to alert navigators;

m. The applicants shall restore waterway banks and beds to pre-existing conditions;

n. The applicants shall schedule construction to avoid disrupting sensitive species;

o. The applicants shall limit the amount of time necessary to complete construction;

p. The applicants shall check equipment for fluid leaks before crossing TCSBs;

q. The applicants shall anchor TCSBs to prevent them washing away during high flow conditions;

r. The applicants shall monitor TCSBs daily for debris and remove debris as necessary;

s. The applicants shall locate TCSBs to avoid unique or sensitive portions of these waterways, (e.g., riffles, pools, spawning beds, etc.);

t. To avoid sedimentation into waterways, applicants shall install appropriate sediment control BMPs under and on the sides of the TCSB during the installation, use, and removal of TCSBs, and those BMPs must be regularly inspected and maintained throughout the project;

u. The applicants shall construct ponds and sediment basins as soon as possible and ensure all permanent post-construction stormwater management practices are designed to direct runoff to those stormwater management practices and not adjacent waterways;

v. The applicants shall not construct cofferdams from earthen material;

w. The applicants shall avoid dredging work during high-flow conditions;

x. The applicants shall continuously monitor weather forecasts to know when rainfall is expected during dredging activities;

y. The applicants shall monitor water flows throughout dredging activity;

z. The applicants shall operate equipment from the banks or from a TCSB during dredging activities, and not from the waterway bed;

aa. The applicants shall size the stream bypass system used during dredging activities based on expected flow for the time of construction at each waterway to ensure the level of flow expected is appropriately and effectively managed;

bb. The applicants shall use appropriate energy dissipation measures to minimize bed scour of the waterway;

cc. The applicants shall use floating, screened intakes during dredging activities to minimize sediment transport and prevent impacts to aquatic species;

dd. The applicants shall segregate excavated stream bed layers to help facilitate restoration. The soil layers should be returned to their

pre-existing location, and bed elevations restored to match pre-construction conditions;

ee. The applicants shall remove workzone isolation systems, such as cofferdams, gradually and use in-water sediment control devices such as a silt curtain to minimize downstream impacts;

ff. The applicants shall monitor and maintain any fences placed across waterways on a regular basis to address debris accumulation.

10. The applicants shall submit the Final Erosion and Stormwater Control Plan to the Commission prior to the commencement of construction, after the plan has been reviewed and permitted by the Wisconsin Department of Natural Resources (DNR) as part of DNR's Construction Site Stormwater Permit process. The plan shall be followed during construction.

11. The applicants shall work with DNR to follow all required actions within the ER Review, and survey for rare plant species listed in the ER Review, notifying the DNR of what was found. If rare plant species are identified, the applicants shall work with DNR to implement an appropriate relocation plan prior to the start of construction.

12. The applicants shall hire and employ an IEM to assist the regulatory agencies in ensuring compliance with regulatory requirements, including order and permit conditions. The IEM shall be funded by the applicants, and would report directly to Commission and DNR staff. The applicants shall work with the Commission and DNR to identify responsibilities and reporting requirements for the IEM. A Request for Proposal for the IEM shall be issued in consultation with Commission and DNR staff.

13. The applicants shall perform pre-and post-construction noise studies as described in the most current version of the PSC Noise Measurement Protocol. The applicants shall work with Commission staff to determine appropriate locations and conditions for the noise

measurements. In the event of a substantial change to the proposed facility layout, the applicants shall confer with Commission staff to determine if a new pre-construction noise study must be completed. The applicants shall file a copy of the post-construction noise study report with the Commission.

14. The applicants shall provide an updated ER Review to Commission and DNR staff if the commencement of construction occurs greater than one year after the initial ER Review and at any point the ER Review is greater than 1 year old while construction is still taking place.

15. Following the issuance of all required permits by DNR, the applicants shall work with the staff of DNR and the Commission to identify any duplicative, conflicting or unnecessary environmental conditions imposed by this Final Decision. The applicants may seek a waiver from the Commission for any such conditions. The Commission delegates authority to approve such waiver requests to the Administrators for the Division of Energy Regulation and Analysis and the Division of Digital Access, Consumer and Environmental Affairs.

16. The applicants and their contractors, successors, assigns, and corporate affiliates shall comply with all of the commitments included in their application and subsequent filings in this docket, and the provisions of the Final Decision.

17. Until the project is fully operational, the applicants shall submit quarterly progress reports to the Commission that summarize the status of construction, the status of environmental control activities, and the overall percent of physical completion. The applicants shall include a summary of their consultations with DNR and other agencies concerning the issuance of necessary permits. The date when construction commences shall be duly included in the report

for that quarter. The first report is due for the quarter ending June 30, 2020, and each report shall be filed within 30 days after the end of the quarter.

18. If the applicants do not begin on site physical construction of the authorized project within one year of the time period specified by this Final Decision, the CPCN authorizing the approve project for which construction has not commenced shall become void unless the applicants:

i. file a written request for an extension of time with the Commission before the effective date on which the CPCN becomes void, and

ii. are granted an extension by the Commission.

19. The applicants shall commence construction of the project no later than one year after the applicants have received all necessary federal, state and local permits and approvals.

20. This Final Decision takes effect one day after the date of service.

21. Jurisdiction is retained.

Dissent and Concurrence

Chairperson Valcq dissents and concurs and writes separately.

Dated at Madison, Wisconsin, the 30th day of January, 2020.

By the Commission:

Steffany Powell Coker
Secretary to the Commission

SPC:JAK:jlt:DL:01712463

Attachments

See attached Notice of Rights

PUBLIC SERVICE COMMISSION OF WISCONSIN

Docket 9698-CE-100

Application of South Shore Energy, LLC, and
Dairyland Power Cooperative for a Certificate
Of Public Convenience and Necessity for the Nemadji 9698-CE-100
Trail Energy Center Combined-Cycle Project, to be
Located in the City of Superior, Douglas County, Wisconsin

DISSENT AND CONCURRENCE OF CHAIRPERSON REBECCA CAMERON VALCQ

I write to dissent from the Commission's decision in docket 9698-CE-100, Application of South Shore Energy, LLC, and Dairyland Power Cooperative (collectively, applicants) for a Certificate Of Public Convenience and Necessity (CPCN) for the Nemadji Trail Energy Center Combined-Cycle Project, to be Located in the City of Superior, Douglas County, Wisconsin.

I would not have granted a CPCN for the project on the basis that neither site put forth by the applicants is in the public interest. While I disagree with the Commission's decision to grant a CPCN, I concur with the Commission's determination that any such authorization must be conditional and join my colleagues in many of the conditions imposed as part of the Commission's authorization.

Under Wis. Stat. 196.491(3)(d)3., we are required to make the finding that electric generation siting decisions are in the public interest when considering a list of criteria. It is only when the record supports a public interest finding that we can grant a CPCN. While this analysis differs for facilities owned by regulated utilities and those owned by unregulated companies (referred to as merchants), our responsibility to weigh the public interest is no less important. For a merchant plant, the design and location of a proposed project must be in the public interest

when considering alternative locations or routes, individual hardships, safety, reliability, and environmental factors.

The Wisconsin Supreme Court has clarified the Commission's responsibility in considering these factors by explaining that "[t]he central purpose of the CPCN law is to ensure that the PSC gives due consideration to the environmental impact of large-scale facilities on the locales in which they will be sited." (*Wisconsin Industrial Energy Group v. Pub. Ser'v Comm'n*, 2012 WI 89, ¶49, fn. 15, 342 Wis. 2d 576, 606, 819 N.W.2d 240, 255) The Court has further explained that determining whether the construction of a plant is in the public interest is a "legislative determination that the legislature has assigned to the PSC…" and is "a matter of public policy and statecraft…" (*Clean Wisconsin v. Pub. Ser'v Comm'n*, 2005 WI 93, ¶35, 282 Wis. 2d 250, 306, 700 N.W.2d 768, 795 (internal citations omitted).) While I understand that certain environmental permitting authority rests with the DNR, the larger question of whether a generating facility taken as a whole is in the public interest rests solely with us. The Legislature assigned this duty to the Commission because it wants all of these factors considered together, not in isolation, and the Commission is the only entity with the expertise to do so.

The Commission has a unique responsibility to comprehensively evaluate the potential benefits and potential disadvantages of proposed power plants because we are required by law to determine whether the adverse impacts of a proposal are "undue". (Wis. Stat. § 196.491(4)(d)4.) This is different from DNR's reviews, which are focused on particular impacts of individual parts of a project, not the project as a whole.

I believe that the evidence in the record identifies significant adverse environmental impacts relating to groundwater, slope erosion, stormwater impact, and secondary impacts to

wetlands. I found the applicants' ranking of environmental factors insufficient to demonstrate that either proposed site is in the public interest because the ranking did not sufficiently weigh those factors. I also found the site selection process to be unreasonably narrow.

Given these environmental impacts, in order for the Commission to determine that the location is nonetheless in the public interest, we look to the potential reliability benefits provided by the facility and whether the public interest is best served at this location or at an alternative location. I believe the evidence in the record does not indicate that the design of the plant at either of the proposed locations will increase the reliability of the state's electric supply. I was persuaded by the evidence in the record which, in my mind, raised questions about the sufficiency of the water supply that will be required for this plant to operate. I also believe the evidence raised concerns about soil stability.

My dissents related to specific order conditions are found in the Final Decision. It is important that we at the Commission do not lose sight of our obligation to mitigate the impact of large-scale generating facilities. DNR does not have the authority to address secondary impacts to wetlands nor is that agency able to enforce protections for rare plants species, so it is necessary for the Commission to impose conditions to address the environmental impacts that have been identified through the CPCN process. I would have incorporated proposed conditions 8a through 8k as part of the Final Decision, including the additional conditions that were proposed by Clean Wisconsin.

Docket 9698-CE-100

PUBLIC SERVICE COMMISSION OF WISCONSIN
4822 Madison Yards Way
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NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of the date of service of this decision, as provided in Wis. Stat. § 227.49. The date of service is shown on the first page. If there is no date on the first page, the date of service is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of the date of service of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of the date of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission serves its original decision.[24] The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: March 27, 2013

[24] *See Currier v. Wisconsin Dep't of Revenue*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

APPENDIX A

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Docket 9698-CE-100

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