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CIRCUIT COURT
DANE COUNTY, WI
2019CV003418

BY THE COURT:

DATE SIGNED: May 7, 2023

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

County of Dane, et al,

Petitioners,

v. Case No. 19CV3418

Public Service Commission of Wisconsin, et al,

Respondent.

DECISION AND ORDER ON CPCN APPROVAL

This case comes to the Court for review of the Public Service Commission of Wisconsin's decision to grant a Certificate of Public Convenience and Necessity ("CPCN") to American Transmission Company, LLC, ITC Midwest and Dairyland Power Cooperative (the "Applicants"). The CPCN allows the Applicants to build the Cardinal-Hickory Creek Line ("CHC Line"), a high voltage 345 kV transmission line from the Wisconsin-Iowa border near Dubuque that will stretch through Wisconsin to Middleton, Wisconsin. Petitioners are a number of the municipalities affected by this transmission line as well as certain interested groups. Many interested parties also intervened to participate in this review.[1] Respondent is the PSC. I refer to the many opponents of the CPCN being granted as "Opponents."

[1] Petitioners are County of Dane, Iowa County, Town of Wyoming, Village of Montfort, and Driftless Area Land Conservancy. Intervenors include Midcontinent Independent System Operator, Inc., ATC, Clean Energy Organizations, Dairyland Power Cooperative, ITC Midwest LLC, WEC Energy Group, Inc., Wisconsin Wildlife Federation, Chris Klopp, Gloria and LeRoy Belken, and S.O.U.L of Wisconsin.

Though this case has a significant procedural history, I address only the motions and arguments made on the merits of the PSC decision to grant the CPCN. All other issues were addressed in prior orders, which I do not recite or summarize here. This case involved excellent briefing and committed participation from many persons. I wish to extend my appreciation for everyone, counsel and unrepresented parties, who participated in each conference and oral argument.

For the reasons below, I affirm the PSC decision.

PSC MOTION TO STRIKE

The PSC filed a Motion to Strike Documents 1220-1226. The PSC accuses Petitioners of using these submissions to introduce facts outside of the PSC record and of trying to add additional pages of argument after merits briefing concluded. Petitioners respond that these filings were not submitted as extra-record evidence to argue the merits, but rather provide the Court with context to understand why I should grant Petitioners' request for expedited oral arguments.

Though I do not fault Petitioners for wanting to explain why they believed oral arguments needed to proceed promptly, I needed no convincing. This 2019 case on a topic important to many communities and people deserved prompt arguments. That the merits arguments were twice delayed and took a surprising journey to the Supreme Court has rendered a decision on the merits long awaited. It was reasonable for Petitioners to express to this Judge their fervent belief and reasonable request that this case proceed to oral arguments as soon as possible. I hope counsel and the parties recognize that this Court took every effort to promptly hold all necessary hearings and arguments.

I explain all this to say I deny the Motion to Strike. Aside from being factually deficient, the PSC does not show a legal basis for this Court to strike these filings. The PSC never cites statute or precedent supporting their request, rendering the Motion undeveloped. Moreover, these documents do not fall within the ambit of Wis. Stat. §802.06(6), as that section allows a motion to strike pleadings. These objected to filings are not pleadings under §802.01(1). For all these reasons, I deny the Motion to Strike.

However, I agree that I must limit my review of the merits to the PSC record. I assure the PSC and parties that for the merits, I cast from my mind any submissions that relied on or discussed facts outside of that record. This includes Dkts. 1222-25.

STANDARD OF REVIEW

This proceeding arises under Wis. Stat. Ch. 227. Wisconsin statute 227.57 sets out the standards I apply on this review, in relevant parts, as follows:

> (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.
>
> (2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.
>
> (3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.
>
> …
>
> (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.
>
> (6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.
>
> …
>
> (8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

> (9) The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.
>
> (10) Subject to sub. (11), upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.
>
> (11) Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law.
> …

Wis. Stat. §227.57.

I afford the PSC no deference as to interpretation of statutes. I review the PSC's conclusions of law de novo, but may afford "due weight" to the agency's experience or specialized or technical knowledge. *Tetra-Tech EC, Inc. v. Dep't of Revenue*, 2018 WI 75, ¶¶3, 84, 382 Wis. 2d 496, 914 N.W.2d 21. This means "giving respectful, appropriate consideration to the agency's views," which "is a matter of persuasion, not deference." *Id.* at ¶78; *see also* Wis. Stat. §227.57(10) and (11).

I must affirm the PSC's determinations as to the weight it gave the evidence and its resolutions of disputed fact, so long as its decision rests on substantial evidence in the record. The PSC's factual findings "must be upheld on review if there is any credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings." *Currie v. State Dep't of Indus., Labor & Human Relations, Equal Rights Div.*, 210 Wis. 2d 380, 386-87, 565 N.W.2d 253 (Ct. App. 1997). More specifically:

> We review an agency's findings of fact by applying a "substantial evidence" standard, affording significant deference to the agency's findings. Substantial evidence does not mean a preponderance of evidence. It means whether, after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact. "[T]he weight and credibility of the evidence are for the agency, not the reviewing court, to determine." An agency's findings of fact may be set aside only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence.

Milwaukee Symphony Orchestra, Inc. v. Wisconsin Dep't of Revenue, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674 (Footnotes omitted).

This Court does not decide whether to grant a CPCN or whether a CPCN is in the public interest. That determination is the exclusive province of the PSC. As our Supreme Court explained:

> It is not the function of this court to determine this state's energy policy. Nor is it this court's place to decide whether the construction of the power plant at issue in this case is in the public interest. These are legislative determinations that the legislature has assigned to the PSC. Whether a given decision is in the public interest "is a matter of public policy and statecraft and not in any sense a judicial question." This court "cannot substitute its judgment for that of an administrative agency determining a legislative matter within its province."

Clean Wisconsin v. Pub. Serv. Comm'n, 2005 WI 93, ¶35, 282 Wis. 2d 250, 700 N.W.2d 768.

DECISION ON MERITS OF CPCN APPLICATION

For the following reasons, I affirm the PSC's decision to grant the CPCN to the Applicants.

I. THE PSC APPLIED THE APPROPRIATE BURDEN OF PROOF.

Petitioners Iowa County, Village of Montfort and Town of Wyoming, argue the PSC's Decision erred as to the burden of proof the Applicants needed to meet to obtain the CPCN. Petitioners' argument begins with the simple premise that Applicants, as the parties seeking some relief from the PSC, carried the burden of proof and persuasion.

I agree. Applicants wished to receive a CPCN and needed to provide sufficient evidence to convince the PSC that awarding the CPCN was proper and appropriate. The statutory process to request a CPCN tries to guide applicants to think through the issues they must prove and marshal evidence to do so, as the requirements for a complete application include that an applicant gather some evidence and present an outline of that evidence to the PSC at the application stage. If an applicant hopes to secure the CPCN, it must present substantial proof during the contested proceeding for the PSC to make each finding the statutes

require as mandatory to grant a CPCN. In other words, if an applicant does not present adequate evidence on all issues set out by statute, the PSC would need to deny the application even if no other participant presents contrary evidence.

The PSC recognized as much when it explained its determinations on various facts. The PSC repeatedly explained the competing evidence presented on various issues and detailed why it found certain evidence more persuasive. The PSC specifically stated no less than 8 times that Applicants provided substantial evidence as to different determinations. *See, e.g.* PSC Decision at 20, 24, 31, 33, 35, 46, 50, and 71.

With that said, no party disagrees with Petitioners that the Applicants bore that burden of production and persuasion I describe above. These Intervenors assert that there is a more specific burden of proof applicable here and the PSC ignored it. Specifically, these Petitioners argue that Applicants were required to establish grounds for a CPCN by a preponderance of the evidence. However, they do not meaningfully develop this argument with controlling precedent or statute support.. Dkt. 184 at 18.

The Court is aware that some legal materials provide a general statement regarding the burden of proof in administrative proceedings. Namely, 2 Am. Jur. 2d Administrative Law §344 distills a general rule for administrative proceedings. Though such a general rule may be helpful in many administrative proceedings, it will not apply to others. For example, many administrative proceedings involve determinations on rights and facts capable of a yes/no type answer – a deportation hearing determines does a specific person have the right to be in this country, a worker's compensation hearing determines does the applicant have the right to compensation, a housing discrimination claim determines whether a right to fair housing was violated, an unemployment insurance hearing might determine whether an employee was fired for misconduct and thus not entitled to compensation, as just some examples. Where an administrative law tribunal determines whether such a right exists under statute or whether a violation of a right occurred, the party seeking relief generally can and must prove her case to a specific standard of proof such as by the preponderance of the evidence.

The issue here is not one of a right, but of legislative determinations. Applicants did not have a right to a CPCN. Nobody has such a right in Wisconsin. Thus, Applicants cannot prove they are entitled to a CPCN by a preponderance of the evidence. Rather, as the Supreme Court recognized in *Clean Wisconsin*, most of what the PSC must decide when considering a request for a CPCN requires the PSC to weigh and balance competing interests to decide what is in the public interest. The very language of Wis. Stat. §196.491(3)(d) confirms this is a policy decision, not something that can be established by a preponderance of the evidence. As examples, the PSC can only approve a CPCN application if it determines:

> 2. The proposed facility satisfies the *reasonable needs of the public* for an adequate supply of electric energy….
>
> 3. The design and location or route is *in the public interest*….
>
> 3m. For a high-voltage transmission line, as defined in s. 30.40 (3r), that is to be located in the lower Wisconsin state riverway, as defined in s. 30.40 (15), the high-voltage transmission line *will not impair, to the extent practicable, the scenic beauty or the natural value of the riverway*….
>
> 3r. For a high-voltage transmission line that is proposed to increase the transmission import capability into this state, existing rights-of-way are used to the extent practicable and the routing and design of the high-voltage transmission line *minimizes environmental impacts in a manner that is consistent with achieving reasonable electric rates*.
>
> 3t. For a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more, the high-voltage transmission line provides usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state and the benefits of the high-voltage transmission line *are reasonable in relation to the cost* of the high-voltage transmission line.
>
> 4. The proposed facility *will not have undue adverse impact* on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use….
>
> ….
>
> 6. The proposed facility *will not unreasonably interfere* with the orderly land use and development plans for the area involved.
>
> ….

Wis. Stat. §196.491(3)(d) (Emphasis added). Terms like "reasonable", "unreasonable", "undue" and "minimizes" in the context of the decisions the PSC must make under this statute are fluid and subjective. They are not capable of definitive proof. They involve weighing different factors and considerations and applying public policy considerations to make a highly subjective determination.

These are the very considerations the Supreme Court referred to in *Clean Wisconsin*:

> It is not the function of this court to determine this state's energy policy. Nor is it this court's place to decide whether the construction of the power plants at issue in this case is in the public interest. These are legislative determinations that the legislature has assigned to the PSC. *See* Wis. Stat. §196.491(3)(d)3. Whether a given decision is in the public interest "is a matter of public policy and statecraft and not in any sense a judicial question." This court "cannot substitute its judgment for that of an administrative agency determining a legislative matter within its province."

Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin, 2005 WI 93, ¶35, 282 Wis. 2d 250, 700 N.W.2d 768 (cleaned up); *see also Voight v. Washington Island Ferry Line, Inc.*, 79 Wis. 2d 333, 341, 255 N.W.2d 545 (1977)('Moreover, "what constitutes 'public interest' for various purposes and circumstances and without guidelines has uniformly been held to be a legislative function.')

Though Petitioners' argument that the ordinary burden of proof applies could be true as to certain findings of fact, such as whether the proposed facility will affect a wetland, most of the findings the PSC must make simply are not subject to evidentiary standards applicable to findings of fact at trial. Further, balancing the impact of the facts the PSC finds with the public policy considerations it must apply to determine whether a proposed facility is "reasonable" or causes an "undue adverse impact" cannot be done "by a preponderance of the evidence." That is why the substantial evidence test applies and controls. The PSC must make all decisions based on substantial evidence, but need not require a further specific burden of proof as to many of its determinations.

II. THE PSC DID NOT MAKE ANY ERRORS IN GRANTING THE CPCN.

Petitioners' challenges to the PSC Decision largely boil down to disagreements with the PSC's conclusions and decisions regarding the disputes of fact. Though they couch the arguments as the PSC Decision lacked substantial evidence, when examined more closely Petitioners are actually saying the PSC should not have believed the evidence Applicants submitted and should have given greater weight to the evidence Petitioners or PSC staff provided. However, the Court cannot second-guess the PSC as to weight and credibility of evidence. Because the PSC's Decision relied on substantial evidence, I must affirm.

A. The PSC adequately addressed the competing evidence and reached conclusions supported by substantial evidence.

The Petitioners challenge the PSC's conclusions that the CHC line is needed or that it is the preferred way to address the needs of the energy system. The Legislature set out in statute what the PSC must conclude before approving a CPCN as follows:

> (d) Except as provided under par. (e), the commission shall approve an application filed under par. (a) 1. for a certificate of public convenience and necessity only if the commission determines all of the following:
>
> > 2. The proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy. This subdivision does not apply to a wholesale merchant plant.
> >
> > 3. The design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors, except that the commission may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant. In its consideration of environmental factors, the commission may not determine that the design and location or route is not in the public interest because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285.
> >
> > 3m. For a high-voltage transmission line, as defined in s. 30.40 (3r), that is to be located in the lower Wisconsin state riverway, as defined in s. 30.40 (15), the high-voltage transmission line will not impair, to the extent practicable, the scenic beauty or the natural value of the

> riverway. The commission may not require that a high-voltage transmission line, as defined in s. 30.40 (3r), be placed underground in order for it to approve an application.
>
> 3r. For a high-voltage transmission line that is proposed to increase the transmission import capability into this state, existing rights-of-way are used to the extent practicable and the routing and design of the high-voltage transmission line minimizes environmental impacts in a manner that is consistent with achieving reasonable electric rates.
>
> 3t. For a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more, the high-voltage transmission line provides usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state and the benefits of the high-voltage transmission line are reasonable in relation to the cost of the high-voltage transmission line.
>
> 4. The proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use. In its consideration of the impact on other environmental values, the commission may not determine that the proposed facility will have an undue adverse impact on these values because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285.
>
> 5. The proposed facility complies with the criteria under s. 196.49 (3) (b) if the application is by a public utility as defined in s. 196.01.
>
> 6. The proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved.
>
> 7. The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market.
>
> 8. For a large electric generating facility, brownfields, as defined in s. 238.13 (1) (a), are used to the extent practicable.

Wis. Stat. §196.491(3).

The PSC made specific findings of fact and applied those facts to the statutes to reach conclusions on each of these issues. For example:

5. The high-voltage transmission line facilities as approved by this Final Decision will adequately address the present needs of the applicants' electric system and are necessary to satisfy the reasonable needs of the public for an adequate supply of electrical energy. Wis. Stat. § 196.491(3)(d)2.

6. The design, location, and route of the high-voltage transmission line facilities as approved by this Final Decision are in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability, and environmental factors. Wis. Stat. § 196.491(3)(d)3.

7. The high-voltage transmission line facilities as approved by this Final Decision are not located in the Lower Wisconsin State Riverway. Wis. Stat. § 196.491(3)(d)3m.

8. The high-voltage transmission line facilities as approved by this Final Decision provide increased transmission import capability into the state, and use existing rights-of-way (ROW) to the extent practicable. In addition, the routing and design of the project minimizes environmental impacts in a manner consistent with achieving reasonable electric rates. Wis. Stat. § 196.491(3)(d)3r.

9. The high-voltage transmission line facilities as approved by this Final Decision provide usage, service, or increased regional benefits to wholesale and retail customers or members in this state, and the benefits of the facilities are reasonable in relation to their cost. Wis. Stat. § 196.491(3)(d)3t.

10. The high-voltage transmission line facilities 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.

11. The general public interest and public convenience and necessity require completion of the project. Completion of the project at the estimated cost will not substantially impair the efficiency of the applicants' service, will not provide facilities unreasonably in excess of probable future requirements, and when placed in operation, will not add to the cost of service without proportionately increasing the value or available quantity thereof. Wis. Stat. §§ 196.491(3)(d)5 and 196.49(3)(b).

12. The high-voltage transmission line facilities 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.

> 13. The high-voltage transmission line facilities 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.

PSC Decision at 6-8.

These findings are not required to include explanation in the recitation of the findings of fact. However, the PSC provided a detailed and lengthy written decision explaining its weighing of the evidence and why it found the facts it did. Decision at pages 10 to 78 goes into significant detail explaining why the PSC reached its decisions and how it assessed the competing evidence presented. Though the PSC could have provided even more explanation, these 68 pages are in depth and address the PSC's thinking and assessments of the evidence presented. This is all the law requires.

Turning to specific evidence presented to the PSC, there is no legitimate argument that Applicants provided no evidence to support their application. Instead, the Opponents argue that the PSC should not have believed or given weight to the evidence from Applicants because the opposing evidence was better. Again, I cannot overrule the PSC as to the weight it provided to the different witnesses and evidence. The PSC adequately explained why it found certain evidence more persuasive and addressed its concerns with other evidence, including why it rejected some testimony from the PSC staff. These conclusions rested on evidence presented to the PSC. Accepting the facts the PSC found after weighing the competing evidence, I find that the PSC properly applied those facts to the statutory requirements to approve the project.

As the PSC explained, this line is a MISO Multi-Value-Project (MVP) project. MISO is a not-for-profit regional transmission organization. Some explanation of what MISO is aids in the review of the Decision. As MISO summarized in its brief:

> MISO is a regional transmission organization ("RTO"), under the supervision of the Federal Energy Regulatory Commission ("FERC") and other federal authorities, that (among other matters) is responsible for ensuring that the regional transmission system is reliably planned to provide for existing and expected use of that system. MISO is a not-for-profit entity that provides reliability and market services over a region that stretches

> from the Ohio-Indiana border to Eastern Montana and south to New Orleans.
>
> MISO does not own transmission assets serving its region, but supervises those facilities and maintains the tariff that governs the service provided by those facilities. "MISO is responsible for approving transmission service, new generation interconnections, and new transmission interconnections within the MISO's regional area of operations, and for ensuring that the system is planned to reliably and efficiently provide for existing and forecasted usage of the transmission system." MISO performs planning functions collaboratively with stakeholder input and provides planning assessments that are independent from the transmission system owners regarding the needs of the system.

Dkt. 199 at 6-7.

The CHC Line was part of plans approved by MISO and by a more focused regional group as an important development for regional energy needs and reliability. As the PSC describes:

> In late 2008, the governors of Wisconsin, Minnesota, Iowa, North Dakota, and South Dakota formed the Upper Midwest Transmission Development Initiative (UMTDI). The overall goal of the UMTDI was to identify and begin to resolve some of the regional transmission design issues and cost allocation issues associated with the delivery of large amounts of new renewable energy from areas with better wind resources into the MISO energy market. The UMTDI executive committee's final report, issued September 2010, indicated five transmission projects in the area which would likely be first-movers.6 Included in this list and located in Wisconsin were the North La Crosse-North Madison,7 and Dubuque (Iowa)-Spring Green-Cardinal (West Middleton) 345 kV transmission line projects.8 The project is one of the projects listed in the UMTDI as likely to work in the MISO real-time energy market.

Decision at 12.

This and other studies the PSC described identified this project as useful for bringing renewable energy being generated West of Wisconsin into Wisconsin and states and cities East of us where more energy is consumed. The PSC described this process and conclusions reached in more detail as follows:

> As a result of these studies, a list of projects was developed for bringing renewable energy into the real-time energy market. These projects comprise the MVP portfolio, and were approved by the MISO board of directors as part of MISO's Transmission Expansion Plan from 2011 (MTEP11) process in December 2011. On January 10, 2012, the final MVP

> portfolio report was issued, stating that the projects would provide reliability, public policy, and economic benefits. The MVP criteria are described in MISO Attachment FF88 to its tariff. The three main criteria include:
>
> • Criterion 1 – The projects to be developed deliver energy in a reliable and economic manner to support the law enacted or adopted through state or federal legislation or other regulatory requirements.
>
> • Criterion 2 – The MVP must provide multiple types of economic value across multiple transmission pricing zones with MVP benefit to cost ratios of 1.0 or higher.
>
> • Criterion 3 – An MVP must address at least one transmission issue associated with a projected violation of NERC or Regional Entity standards and at least one economic-based transmission issue across multiple transmission pricing zones.
>
> (Id. at 60-104.)
>
> The project is included in the final MVP portfolio report which recognizes that integrating non-dispatchable wind generating facilities into the real-time LMP market requires a balance of locating wind generators in areas with better wind resources, while minimizing transmission investment by balancing the transmission system with existing and future conventional synchronous generation under various scenarios. This concept was initiated in the UMTDI and RGOS, and is discussed in greater detail in the final MVP portfolio report. The MVP portfolio report concluded that the MVP portfolio projects would result in benefit to cost ratios greater than one for all seven MISO north and central Local Resource Zones when considering a range of future scenarios. (Id. at 60-104.)

Decision at 14-15. Projects in the MISO MVP portfolio are subject to cost-sharing across the MISO region. In other words, even if much of the cost for the project is built in Wisconsin, other states in MISO will be required to contribute to that cost based on the benefit provided to the greater MISO region.

The PSC considered the CHC Line, three alternatives provided by the Applicants, as well as alternatives proposed by PSC staff. Except for the PSC staff proposal, these various alternatives were evaluated using PROMOD modeling software and a variety of potential future scenarios to assess the costs and benefits of each alternative in a variety of circumstances. The PSC then considered what these different analyses show as the net cost or benefit of the project and each alternative. As the PSC explained:

> Practically speaking, the total net benefits being evaluated for this project take the form of reduced energy costs derived from a reduction in congestion on the transmission lines between Iowa and Wisconsin that would otherwise compel the dispatch of higher cost-fuel resources east of the congestion, or the reliability benefits generated by the project, whichever is greater. When these reduced costs or reliability benefits exceed the cost of the project or alternative being analyzed, it is anticipated that the project or alternative will produce net benefits over the cost of the project or alternative. As discussed below, the Commission finds that the applicants demonstrated substantial evidence that the project is likely to provide total net economic benefits greater than its costs.

Decision at 19-20.

The PSC described these various considerations in detail. It then addressed the evidence presented and explained its conclusions regarding the need and benefits of the CHC Line versus the alternatives. It also explained why it deemed certain proposed alternatives insufficiently developed or unpersuasive as true alternatives. As but some of the PSC's explanation of its determinations:

> The applicants' modeling demonstrated net benefits to Wisconsin customers in all cases, and the net economic benefits of the project exceed the net economic benefits of all other studied alternatives in every scenario modeled.

Decision at 21.

The PSC also addressed why it rejected the Opponents' criticisms of the Applicants' evidence. The Opponents claimed that Applicants' evidence relied on outdated information and was therefore inaccurate in light of today's needs and resources, including new renewable energy projects already in existence or planned. The PSC pointed out that these criticisms were factually incorrect, as the Applicants' modeling relied on information updated as of 2017, and that PSC staff modeling included recently approved or proposed renewable energy projects in Wisconsin and the modeling still showed net benefits from the CHC Line. Decision at 21-22.

Without reciting it in detail, the PSC also explained why it rejected other criticisms the Opponents raised to the CHC Line. The argument that the PSC Decision is not supported by substantial evidence in reality ask the Court to weigh the evidence presented to the PSC and declare that the PSC gave too much weight

to the evidence Petitioners disagree with and not enough weight to the evidence the Petitioners presented. That goes beyond the scope of my review. The PSC alone gets to weigh the evidence and assess credibility of witnesses. As long as the PSC explains its decisions as to declaring certain evidence more persuasive or certain witnesses more or less credible, my review ends. As the Supreme Court explained:

> Substantial evidence does not mean a preponderance of evidence. It means whether, after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact. "[T]he weight and credibility of the evidence are for the agency, not the reviewing court, to determine." An agency's findings of fact may be set aside only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence.

Milwaukee Symphony Orchestra, Inc., 2010 WI 33, ¶31 (Footnotes omitted).

The Applicants and those intervenors who favor the CHC Line detail at length the substantial evidence they offered the PSC to prove the different findings needed to grant the CPCN. This included the testimony of experts who explained the benefits of this project. As but some examples of the many pages detailing the various witnesses and experts who provided testimony, MISO's brief at pages 9-12 highlights the evidence that this Line is needed and improves the reliability of the electric network in Wisconsin and beyond, reduces carbon emissions by brining renewable energy to Wisconsin from the West, and that this Line is in fact a necessary piece of the framework required for other planned renewable energy projects in Wisconsin to proceed and provide their benefits to Wisconsinites. The following briefs also further expand on the facts presented to the PSC to support its findings needed to approve the CPCN: Clean Energy Organizations brief, Dkt. 200, at pages 9-12, and pages 12-13 details why the CHC Line is superior to other alternatives; PSC brief, Dkt. 201, at 14, 22-28, 38-44; ATC brief, Dkt. 202, at 33—58.

Yes, the Opponents absolutely did provide contrary evidence on many issues. Yes, this included expert testimony to contest the experts presented in favor of the CHC Line. Yes, this included that PSC staff also testified in ways contrary to the PSC's ultimate decisions and findings. However, the Opponents

never convincingly show that any conclusion of the PSC on a factual issue or the decisions for which it is entitled to due weight as policy choices lacked a basis in substantial evidence. Having reviewed hundreds of pages of testimony, the Decision indeed rests on substantial evidence.

Many of the Opponents focus heavily on the fact that PSC staff disagreed with a number of the facts and conclusions the PSC made. The Opponents argue that the staff, not the PSC acting through its appointed Commissioners, are the real experts and their testimony should be afforded greater weight and deference. The Opponents provide no law to support this argument. There is none. Though PSC staff surely are experts on many issues and they perform incredible work for the benefit of the PSC Commissioners and the people of Wisconsin, their testimony is not entitled to any special treatment. The PSC must assess their credibility and give what weight it deems appropriate to their testimony the same as it assesses all witness testimony. If the PSC gave special weight to the testimony of PSC staff just because they are employed by the PSC without independently assessing the credibility of their testimony and the veracity of their conclusions, the PSC would be opening itself up to attack. This includes not only to reversible error in that findings based solely on the employment status of PSC staff could be challenged as lacking substantial evidence, but also to arguments that it failed to follow its procedural duty to assess credibility and weight of evidence.

Having reviewed the evidence, I must conclude substantial evidence exists in the record that supports the PSC Decision. That contrary evidence also exists in the record is not a basis for me to overrule the PSC.

B. The PSC did not shift any burden of proof on the Opponents.

Opponents complain that the PSC's comments that they did not present their own modeling inappropriately shifted the burden of proof to the Opponents instead of requiring the Applicants to prove the statutory factors existed supporting the CPCN. This criticism rings hollow. Indeed, this argument asks the Court to impose a burden on Applicants that does not exist in the statutes – that the

Applicants apparently must disprove every theoretical alternative that any opponent proposes.

The PSC required and relied on significant evidence from Applicants showing that the CHC Line provides meaningful benefits to Wisconsin and satisfies the requirements of Wis. Stat. §196.491(3)(d). Having concluded that Applicants met their burden, any opponent then must offer more persuasive evidence that an alternative to the project is better or showing that some aspect of Applicants' submissions was incorrect and should therefore be rejected by the PSC. Though a theoretical criticism of Applicants proof may be persuasive to the PSC, there is no doubt that had Opponents prepared and presented their own comparable modeling confirming a defect in Applicants' evidence or a tested, superior alternative, Opponents' evidence and criticism would have been more persuasive. By their strategic choice not to present modeling, Opponents risked the PSC rejecting their criticisms and alternatives as unproven/unpersuasive. The PSC did just that. The PSC explained why it rejected Opponents' position and the PSC's conclusions rest on substantial evidence.

Indeed, taken to its logical conclusion, Opponents' position could make obtaining a CPCN practically impossible by requiring an applicant to conceive of every theoretically possible alternative to their proposal and proactively discount all of those theoretical possibilities. I do not read the statutes as imposing such an impossible burden.

That said, the law does require Applicants to show that the proposal satisfies the law, which includes showing that realistically feasible alternatives to their proposal are inferior or otherwise not possible. Wis. Stat. §196.491(d)3 - 4. If a proposal from opponents were patently better, certainly an applicant would need to consider running its own modeling to show that the alternative is not reasonable, feasible or superior. However, that will not always be true. Here Applicants addressed what they needed to by running models on a variety of alternatives and showing the superiority of the CHC Project. Because of the technical nature of the issues here, proving an alternative adequately meets the same needs the CHC

Line does in a superior manner requires some level of proof, likely through modeling.

The PSC's acceptance of the Applicants' evidence and rejection of the Opponents suggested alternatives rested on substantial evidence. The PSC went through various challenges to the different models and inputs used to project benefits and costs of the project and explained why it found certain inputs reasonable and why it rejected others. This analysis rests on substantial evidence in the record and explains the PSC's reasoning. The PSC concluded as follows:

> No party or witness provided credible evidence that these or any other metrics used to evaluate the projected benefits of the project are so unreliable as to be dismissed by the Commission. The Commission also finds important that while a number of party witnesses raised questions about assumptions and data used by applicants that they assert may have shown different outcomes, none of these witnesses actually performed independent modeling to bear out these concerns. Many of the expert witnesses emphasized that reliance on any particular modeling run outcome is not advised, as the future is difficult to predict. Rather, it is more important that a project provide benefits over a range of modeling assumptions to account for an uncertain future. And in using both metrics to evaluate the energy cost savings of the project, Commission staff found that in almost all cases the project showed net economic benefits regardless of what metric was used.

Decision at 26.

The Opponents do not convincingly show that the PSC's conclusions do not rely on substantial evidence in the record. The Applicants did present evidence to support their Application, to show that alternatives proposed by opposing witnesses were not persuasive, and to contest criticisms raised by PSC staff and opponents of the project. The PSC explained what evidence it deemed credible and persuasive. Having confirmed that the evidence the PSC relied on exists in the record, I must affirm the PSC's decisions as to credibility and weight of that evidence. The PSC properly explained what evidence it found credible and why that evidence satisfied Wis. Stat. §196.491(3)(d). My review ends there.

C. The PSC must still determine state energy policy, not the courts.

I also reject Opponents argument that I perform a de novo review of whether each item of §196.491(3)(d) is satisfied by the evidence. Though *Tetra Tech* and

the revision of Wis. Stat. §227.57(11) reject deference to the PSC on interpretations of law, I disagree that this means I perform an independent assessment of each item under §196.491(3)(d). As I read Opponents argument, they assert that I (and any further appellate courts) must only accept the specific facts found by the PSC if supported by substantial evidence, but then must decide de novo whether those facts show, as examples, that the proposed CHC Line satisfies the reasonable needs of the public, that the proposed route and design is in the public interest, and that the project will not "have undue adverse impact on other environmental values…" Wis. Stat. §196.491(3)(d)2. – 4.

Though I agree that the Court must decide if the PSC made sufficient findings of fact to show that this project satisfies each of these requirements, I do not go further. If Opponents argue that this Court determines de novo what constitutes "the reasonable need of the public", what is "in the public interest", or what constitutes an "undue adverse impact", I reject the argument. If there were a dispute what these terms mean, a matter of statutory interpretation, the Court would interpret the terms without regard to the PSC's interpretation. However, deciding what the reasonable needs of the public are is a factual determination the PSC makes which I cannot overturn if supported by substantial evidence or is a policy/statecraft determination that relies on the PSC's expertise and historical role in the energy sphere. If the latter, and of course if supported by substantial evidence, these would be the determinations *Tetra Tech* provides are entitled to due deference for their persuasive value.

To read *Tetra Tech* as saying the courts independently determine what this State's power needs are, what electric system transmission choices are in the public interest, or what transmission options cause an undue adverse impact surely goes too far. As explained already, these are not facts capable of determination according to a burden of proof. These are policy choices the Legislature delegated to the PSC, not to the courts. Whether the various pros and cons of the CHC Line provide a better alternative to the other options, such as BWARA, is a policy choice appropriate for the PSC, not a legal interpretation or legal assessment of whether certain facts meet a legal standard.

D. The PSC adequately explained its Decision.

I find unpersuasive Opponents' arguments that the PSC did not adequately explain its Decision. The Clean Energy Organizations' Response Brief accurately recites the law regarding the detail required from the PSC in its Decision. I borrow part of that recitation as follows:

> Instead, the findings of fact and conclusions of law need only be "specific enough to inform the parties and the courts on appeal of the basis of the opinion." *State ex rel. Harris*, 275 N.W.2d 668, 675; *see also Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶ 49, 362 Wis. 2d 290, 312–13, 865 N.W.2d 162, 173.
>
> Accordingly, in an agency's findings of fact, "a detailed or explicit explanation of the [agency's] reasoning is not necessary." *Oneida*, 2015 WI 50, ¶ 49; *Renew Wis. v. Pub. Serv. Comm'n of Wis.*, 2016 WI App 57, ¶¶ 16-17, 370 Wis. 2d 787, 882 N.W.2d 871 (quoting *Oneida*). The agency is not required to detail what evidence it believed and what evidence it rejected. *State ex rel. Harris*, 275 N.W.2d 668, 675. Nor is it required to justify its rejection of testimony or arguments of interested parties. *Wis.'s Envtl. Decade, Inc.*, 298 N.W.2d 205, 213.
>
> *In Wisconsin's Environmental Decade, Inc. v. Public Service Commission of Wisconsin*, this same issue was raised with the appellant challenging a PSC decision for failure to provide adequate reasons for its decisions. *Id.* at 212. The appellant, an environmental advocacy organization, asserted that the PSC had not sufficiently explained why it had not adopted the cost allocation and figures proposed by the organization or the reasons for the PSC's implied rejection of a rate structure also offered by the organization. *Id.* at 212-13. The court held that an agency has no duty to justify its rejection of figures or methods urged by interested parties. *Id.* at 213. As the court explained, "[t]he burden would simply be too onerous if an agency would be required to substantiate its reasons for not adopting all alternatives urged on it." *Id.* The PSC's findings were sufficient, the court concluded, because its order was specific enough to inform the parties and the courts on appeal of the basis of the decision. *Id.*

Dkt. 200 at 36-37.

The PSC summarized the various parties' arguments and much of the relevant evidence both for and against the CHC Line. It explained, often in detail, why it deemed certain witnesses more credible and specific evidence of greater weight, as well as why it gave lesser or no weight to other evidence. The PSC provided sufficient explanation for its decision such that this Court could indeed

review and analyze the Decision. The Opponents demand more of the PSC than the law requires.

III. THE PSC PROPERLY CONCLUDED THAT THE EIS SATISFIED LAW.

The PSC properly concluded that the EIS satisfied the Wisconsin Environmental Policy Act. All parties agree an EIS was required for the CHC Line and agree as to the statutes and administrative code provisions that apply to an EIS. As such, I do not recite those statutes/codes in detail. Rather, I turn to the legal review regarding the sufficiency of the EIS.

A. Law Applicable to an EIS.

The briefs set out the legal principles applicable to my review relating to the EIS. I borrow the following recitation of the law:

> The Court reviews the "determination of EIS adequacy in the PSC order, not to the EIS itself." *Citizens' Util. Bd. v. Pub. Serv. Comm'n of Wisconsin*, 211 Wis. 2d 537, 543, 565 N.W.2d 554, 558 (Ct. App. 1997).
>
> WEPA requires that all state agencies include in every recommendation or report on Type I Actions a detailed statement including the following: (1) the environmental impact of the proposed project; (2) any adverse environmental impacts which cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the human environment and the maintenance and enhancement of longterm productivity; (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; and (6) the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal. See Wis. Stat. § 1.11(2)(c); see also Wis. Admin. Code § PSC 4.30….
>
> The purposes of the EIS is to "inform the commission and the public of significant environmental impacts of a proposed action and its alternatives, and reasonable methods of avoiding or minimizing adverse environmental effects." Wis. Admin. Code § PSC 4.30(1)(a). "WEPA 'requires that agencies consider and evaluate the environmental consequences of alternatives available to them and undertake that consideration in the framework provided by [§ 1.11].'" *Clean Wisconsin*, 2005 WI 93, ¶ 188, *citing State ex rel. Boehm v. Wisconsin Dep't of Nat. Res.*, 174 Wis. 2d 657, 665, 497 N.W.2d 445, 449 (1993). Importantly, "if the adverse environmental consequences of the proposed action are adequately

> evaluated, WEPA does not prevent an agency from determining that other values outweigh the environmental costs." *Id.* at ¶ 188.
>
> "No matter how exhaustive the discussion of environmental impacts in a particular EIS might be, a challenger can always point to a potentiality that was not addressed." *Id.* ¶ 191. As such, the agency's duty to prepare an EIS "does not require it to engage in remote and speculative analysis." *Id.* "[E]very potentiality need not be evaluated." *Id.* Instead, courts review an EIS in light of the "rule of reason," which requires an EIS to "furnish only such information as appears reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible." *Id.* (citation omitted).

Dkt. 201 at 48-49.

The Commission's determination that an EIS is adequate is a conclusion of law that the Court should review de novo. *Clean Wis.*, 282 Wis. 2d 250, ¶190; *Tetra Tech*, 382 Wis. 2d 496, ¶ 54; *see also* Wis. Stat. § 227.57(11).

B. The EIS Satisfies the WEPA.

With these standards in mind, I turn to my review of the EIS here. Though my review is de novo, I focus only on those specific deficiencies in the EIS that Petitioners raise. First, the Opponents claim that the EIS did not sufficiently address the reasonable alternatives to the CHC Line. Evaluation of alternatives to the proposed action is required in an EIS. The Supreme Court long ago emphasized the importance of this requirement as certain Opponents accurately summarize:

> The Wisconsin Supreme Court has emphasized that this consideration of alternatives requires "[t]horough agency action" to "assure that alternatives are adequately explored in the initial decision-making process, to provide an opportunity for those removed from that process to evaluate the alternatives, and to provide evidence that the mandated decision-making process has taken place." *Wisconsin's Envtl. Decade, Inc. v. PSCW*, 79 Wis. 2d 161, 255 N.W.2d 917 (1977).

Dkt. 185 at 53.

The final EIS thoroughly evaluates the overall project and a variety of alternatives to the CHC Line. As alternatives must be assessed within the context of the proposed Line's benefits and costs, the EIS spends 28 pages detailing the

MISO system, what MVP projects are, that the CHC Line is an MVP project, and details the various benefits of the CHC Line including those benefits specific to being an MVP project. The EIS details not only the Applicants summary of these issues, but also the PSC staff's review of costs, benefits and thoughts on additional information. The EIS then spends 6 pages discussing the various alternatives to the CHC Line, including those proposed by the Applicants and the BWARA alternative PSC staff proposed, which is the alternative the Opponents argue needed further PSC development to satisfy the law for an EIS.

To support their argument that the EIS does not adequately review alternatives, the Opponents unreasonably and incorrectly describe the purpose of the CHC Line. The Opponents claim that the purpose or need of this project is to relieve congestion between Iowa and Wisconsin so more power can flow between these states. In fact, the Applicants described the need this project serves as far broader. The PSC agreed that the CHC Line addresses broader needs than just relieving congestion. The Applicants stated:

> The Project fulfills a well-recognized and longstanding need to tie-in the 345 kV electric transmission systems in southwest and southcentral Wisconsin and Iowa. Currently, Wisconsin and Iowa are electrically connected via a 161 kV line and two 69 kV lines, which MISO and the Applicants, after their independent evaluations, deemed wholly inadequate to serve future needs.
>
> As described in more detail below, the Project if constructed will:
>
> • Provide net economic benefits to Wisconsin customers (even after accounting for the Project's cost to Wisconsin customers) of between $23.5 million and $350.1 million over its 40-year expected life;
> • Avoid the need to spend between $87.2 million and $98.8 million on reliability projects and asset renewal projects over the 40-year life of the Project that would otherwise be needed if the Project were not constructed;
> • Increase the transfer capability of the electric system between Iowa and southwest and southcentral Wisconsin by approximately 1,300 MW, thereby easing congestion, increasing generator competition, and allowing the transfer of additional low-cost wind energy into the state;
> • Allow low-cost wind energy that is trapped in areas to the west of Wisconsin to be released to the system by allowing more than a dozen new low-cost wind facilities to fully interconnect to the electric system and deliver their full output;

> • Support 25 GW of low-cost wind resources that have requested interconnection in Iowa and areas west of Wisconsin, including some wind farms owned by Wisconsin utilities and wind farms with which these utilities have power purchase agreements;
> • Eliminate the need for three MISO system operating guides in southwest and southcentral Wisconsin, which currently require load shedding and/or other operational actions under certain contingencies due to reliability concerns in the area; and
> • Create numerous other reliability and public policy benefits stemming from a more robust and flexible electric transmission system in the state.

PSC Record Document 357 at 30-31. In other words, this project not only reduces congestion between Iowa and Wisconsin, but also connects existing 345 kV lines on both sides of the Mississippi River, improves reliability of the system in Wisconsin, provides Wisconsin access to renewable energy that exists further West and creates a system for more renewable energy resources in Iowa and Wisconsin to connect to the power grid.

The Opponents accurately cite persuasive authority from the Seventh Circuit Court of Appeals addressing similar issues under federal law. That law cautions that an agency cannot allow applicants to define a project's purpose so narrowly as to ensure no reasonable alternatives exist to their proposal. Though I agree that this project would be insufficient and the EIS faulty if the project purposes were too narrowly tailored, this application is not unreasonably limited such that no alternative can succeed.

The purposes recited above are multiple, but all connected. There is no dispute that significant renewable energy is generated West of Wisconsin. There is no dispute that the need for this energy is great in Wisconsin and further East. There is no dispute that the current system has reliability issues and congestion problems, all of which prevents the efficient and cost-effective movement of these significant renewable energy resources from West to the East where they are needed. The purpose of increasing reliability and reducing congestion goes hand-in-hand with the purpose of making existing excess renewable energy available in Wisconsin and eastward.

The statutes and cases interpreting them do not prohibit the PSC from allowing the Applicants to propose a project that checks numerous boxes. Indeed, it would seem that if the PSC is going to approve a project that carries substantial cost to build and will affect the environment, there is wisdom to ensuring that the project addresses many needs rather than only one. Further, the Opponents provide no law or persuasive argument that any of the purposes Applicants propose for this project are somehow prohibited purposes. Despite that, the Opponents' arguments come close to implying such a prohibition.

For example, the Opponents criticize the Applicants and PSC for stating there is really only one option for the Wisconsin entrance of this proposed Line, namely Cassville, WI. However, it is clearly a permissible goal for a project to increase the ability to bring power into Wisconsin from another state, as Wis. Stat. §196.491(3)(d)3r. specifically sets rules applicable only to a "high-voltage transmission line that is proposed to increase the transmission import capability into this state." If increasing that capacity were not a permissible goal, the Legislature would not have set additional requirements specific to lines for that purpose. As most, if not all, states closely regulate the placement of high voltage power lines and presumably attempt to minimize the total number of such lines, there is necessarily going to be a limited set of options where such lines can connect between two states. It would be absurd to argue that the PSC or Applicants needed to consider options for connecting high voltage lines with Iowa at locations nowhere near Iowa's existing lines or power generation facilities. In other words, the patently permissible goal of connecting high voltage transmission lines between Iowa and Wisconsin will by its nature have limited options for the location of that connection. That limitation on the connection site will likewise result in a narrowing of possible routes from the connection site to other facilities in Wisconsin. I do not see any of the purposes as so narrow to exclude from consideration any alternative but the CHC Line.

The Applicants submitted numerous highly vetted alternatives for the PSC to consider. This included a variety of alternative means to meet the same needs, as well as explaining the review of alternative locations for the CHC Line. PSC staff

requested modifications to some of those and proposed their own BWARA alternative. The PSC considered each of these and explained why it rejected them. Though I agree that the PSC did not ensure that the BWARA option was fully vetted to the same extent as other alternatives, and indeed notes it lacks sufficient development to be fully considered as a true alternative, these criticisms from the PSC came after it already rejected BWARA for a reason that further study would not resolve. Namely, the PSC concluded that BWARA only addressed a very targeted need of resolving limited, specific reliability issues. Decision at 32-33. Because the purpose of the CHC Line is to address far greater needs than providing only limited reliability benefits, the PSC appropriately excluded BWARA as not a true alternative to the CHC Line. This consideration was detailed and reasoned. It satisfies the legal requirements for the EIS. The law specifically does not require the PSC to fully develop an alternative that is not truly feasible or appropriate.

The Opponents challenge that the PSC failed to consider sufficient route alternatives also fails. These arguments are largely underdeveloped. The law requires a relatively limited review of alternative routes. Specifically, Wis. Stat. §196.025(2m)(c) narrows the requirements of §1.11 by stating that "for a project identified in an application for a certificate under s. 196.491 (3), the commission and the department are required to consider only the location, site, or route for the project identified in the application and one alternative location, site, or route."

Though the Applicants could certainly have hurt their chances of securing a CPCN if they proposed only the two routes required by statute and selected two routes that plainly violated the requirements for a CPCN rather than proposing numerous routes, this criticism of the EIS fails as a matter of law. The Applicants proposed more than the two routes mandated by statute. The EIS addressed the numerous proposed routes in detail. That is all that the law required.

I also agree with the PSC that the EIS appropriately addressed the cumulative impacts of the CHC Line, including its effects on avian populations. To begin, I agree that DALC/WWF failed to cite any law to support their allegations of deficiencies in the EIS on these issues. Specifically, they provide no law to support

the claim that the EIS needed to estimate the number of likely bird deaths or needed to include facts obtained through on-the-ground surveys. As the PSC points out, these criticisms were undercut by various witnesses' testimony, including experts DALC/WWF presented who confirmed that the surveys complained about appropriately occur after project approval and are not possible pre-approval, as they take years to complete, while a CPCN application must be decided within no more than 1 year.

As each of Opponents criticisms of the EIS fail, I conclude that the PSC properly approved of the final EIS and it complies with the requirements of the statute and code.

IV. THE OPPONENTS REMAINING ARGUMENTS ARE WAIVED OR BEYOND THE SCOPE OF THIS REVIEW.

Certain Opponents raise additional arguments that are not properly before the Court. One, DALC/WWF asserts that the ALJ improperly deprived it of the opportunity to submit public commentary on the final EIS. As the PSC notes, DALC/WWF did not seek review of the ALJ's decision on this issue with the PSC. Thus, DALC/WWF is barred from raising this issue for failure to exhaust its administrative remedies. *See Clean Water Action Council of Ne. Wisconsin v. Wisconsin Dep't of Nat. Res.*, 2014 WI App 61, ¶4, ¶13, 354 Wis. 2d 286, 848 N.W.2d 336. Further, its not clear that DALC/WWF suffered any harm as a result, considering that the ALJ's decision to exclude a public comment was because DALC/WWF, as a party, had the opportunity to challenge the final EIS as part of the PSC review of the merits. I see no reason to not consider this argument waived.

Two, Iowa County's argument that this project required an Interstate Compact to be properly approved is also barred because it was not raised in the administrative agency proceeding. *Id.*; *see also State v. Outagamie Cty. Bd. of Adjustment*, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376 ("It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency"). I consider this argument underdeveloped as well, because the brief offers no meaningful argument with citation to law regarding principles of statutory interpretation to back up its interpretation of the relevant

statute. The Court will not refrain from enforcing the waiver of this argument when Iowa County did not sufficiently develop its argument.

Three, Iowa County and Ms. Belkens' argument that ITC Midwest is not permitted to own transmission facilities in Wisconsin was likewise waived for failing to raise it before the PSC. *Id.*

Though the Court could potentially address these challenges despite the failure to raise them before the PSC, I decline to do so. None of these challenges raises an issue that is of sufficient importance to decline to apply the waiver rule. Further, the failure to raise these issues below deprived the PSC, the other parties, and thus the Court, of the opportunity for a record to be developed to address these arguments fully. In particular, as to the third issue, ITC Midwest never had a chance to present argument or evidence before the PSC to show it is permitted to own transmission facilities. As my review is especially limited when it comes to factual disputes, the failure to raise the issue where evidence could be developed is especially troublesome here.

I reject Iowa County's argument that waiver does not apply to it because of its right to appear on a Chapter 227 review regardless whether it appeared in the proceedings before the PSC. Iowa County relies on Wis. Stat. §196.491(3)(j) (though they incorrectly cite it). Though that statute does grant Iowa County the right to appear in this case despite not appearing before the PSC, it does not grant the right to raise any and every argument imaginable. Rather, that statute provides:

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

Id. Thus, the right to petition for judicial review is limited to review of decisions the PSC made "regarding the certificate." This challenge to ITC Midwest's ability to own transmission lines is not an issue relating to the CPCN.

Lastly, I agree that whether ITC Midwest is capable of exercising eminent domain authority is not an issue before me on this review of the PSC's granting a CPCN for the CHC Line. As such, I cannot address it.

CONCLUSION

This Court understands and respects the massive impacts a major project of this nature holds for the State and the serious concerns its opponents raise. However, applying the legal standards, the PSC properly conducted itself in granting the CPCN at issue. For all these reasons, I affirm.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.