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**STATE OF WISCONSIN**
**SUPREME COURT**

Appeal Nos. 2022AP1106
2023AP120

CLEAN WISCONSIN, INC. AND SIERRA CLUB

Petitioners-Appellants-Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent-Respondent,

SOUTH SHORE ENERGY LLC AND DAIRYLAND POWER COOPERATIVE,

Interested Parties-Respondents,

v.

MICHAEL HUEBSCH,

Other Party.

# PETITION FOR REVIEW

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# TABLE OF CONTENTS

**TABLE OF AUTHORITIES**……………………………………………..….4

**INTRODUCTION**……………………………………………………….6

**STATEMENT OF THE ISSUES**………………………………………....7

**STATEMENT OF CRITERIA SUPPORTING REVIEW**……………..…8

**STATEMENT OF THE CASE**…………………………………………...9

**ARGUMENT**…………………………………………………….………..20

**I. The Court Should Accept Review to Clarify the Safeguards in the Plant Siting Law Consistent with the Constitutional Nondelegation Doctrine**…………………..…………..………………………….……..…21

**II. The Court Should Accept Review to Correct the Appellate Court's Misconstruction of a Key Provision of the Plant Siting Law that Supports Application of a Standard of Proof for Approval of CPCNs**…………………………..…..….25

**CONCLUSION**……………………………………………………..….26

## TABLE OF AUTHORITES

### Wisconsin Supreme Court Cases

*Clean Wis., Inc., v. Public Service Commission of Wisconsin*,
2005 WI 93, 282 Wis. 2d 250, 700 N.W.2d 768……………..*passim*

*Gilbert v. State*,
119 Wis. 2d 168, 349 N.W.2d 68 (1984)……………………………..21

*Panzer v. Doyle*,
2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666……………..….21, 23

*Reinke v. Personnel Bd.*,
53 Wis. 2d 123, 191 N.W.2d 833 (1971)……………………………24

### Wisconsin Appellate Cases

*Bracegirdle v. Board of Nursing,*
159 Wis. 2d 402, 464 N.W.2d 111 (Ct. App. 1990)……………….23

*Kohler Co. v. Wis. Dep't of Nat. Res.,*
2024 WI App 2, 410 Wis. 2d 433, 3 N.W.3d 172…………………..24

### Statutes

Wis. Stat. § 1.11………………………………………………..7, 10, 13, 17, 19

Wis. Stat. § 1.12…………………………………………………….7, 10, 13

Wis. Stat. § 30.025………………………………………………………..10

Wis. Stat. § 30.025(4)(b)…………………………………………………10

Wis. Stat. § 196.491(1)(g)……………………………………………..9, n2

Wis. Stat. § 196.491(3)………………………………………..…………..6, 7, 9

Wis. Stat. § 196.491(3)(b)....................24

Wis. Stat. §196.491(3)(d)3....................*passim*

Wis. Stat. §196.491(3)(d)4....................*passim*

Wis. Stat. § 196.491(3)(e)....................8, 25, 26

Wis. Stat. § 227.01(3)(a)....................13

Wis. Stat. § 227.44....................23

Wis. Stat. § 227.44(2)(c)....................24

Wis. Stat. § 227.57(4)....................23, 24

Wis. Stat. § 809.62(1r)(a)....................8

Wis. Stat. § 809.62(1r)(d)....................9

**Regulations**

Wis. Admin. Code ch. DNR 150....................10

Wis. Admin. Code ch. PSC 4....................7, 10, 13

Wis. Admin. Code ch. PSC 111....................7, 10

Wis. Admin. Code ch. PSC 111.53(1)(f)....................10

## INTRODUCTION

Clean Wisconsin, Inc. and Sierra Club ("Environmental Petitioners") seek review of the court of appeals' decision in *Clean Wisconsin, Inc. v. Public Service Commission of Wisconsin,* consolidated appeals Nos. 2022AP1106 and 2023AP120 (Wis. Ct. App. Oct. 8, 2024) (citable, unpublished),[1] affirming issuance of a Certificate of Public Convenience and Necessity ("CPCN") by the Public Service Commission of Wisconsin ("Commission") to South Shore Energy, LLC, and Dairyland Power Cooperative for the construction and operation of a 550-625 megawatt ("MW") natural-gas-fired electric-generating facility in Superior, Wisconsin.

The court of appeals relied on *Clean Wisconsin, Inc., v. Public Service Commission of Wisconsin*, 2005 WI 93, 282 Wis. 2d 250, 700 N.W.2d 768 [hereinafter *Clean Wisconsin*] in finding there is no burden of proof or standard of proof applicable in contested case proceedings on CPCN applications. The court of appeals thus determined that Commission decisions need only be supported by "substantial evidence" upon judicial review. Based on this determination, the court of appeals rejected Environmental Petitioners' other claims regarding deficiency in the Commission's CPCN decision. (Pet-App-001)

This Court should grant review to clarify that *Clean Wisconsin* does not remove applicants' burden to show the statutory standards under Wis. Stat. § 196.491(3), also known as the "Plant Siting Law," are

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[1] On October 28, 2024, Environmental Petitioners filed a motion for reconsideration (Pet.-App-140) which was denied by the appellate court on November 5, 2024. (Pet.-App-139.)

met by a preponderance of evidence. By concluding that the Commission can decide to grant a CPCN on the basis of "substantial evidence," regardless as to where the weight of the evidence falls, the court of appeals would replace the specific criteria set forth in statute with the general judgment of the Commission in all plant siting decisions. Such a rule implicates the constitutional nondelegation doctrine applicable to agency decision-making by removing the strictures under which the Legislature had placed on the Commission's broad discretion in utility regulation. This Court should reaffirm that the strictures on delegation set forth in the Plant Siting Law are binding and clarify that, in Commission decisions made under the Plant Siting Law, applicants have the burden of proof to show the statutory standards are met by a preponderance of the evidence.

## STATEMENT OF THE ISSUES

The Commission is tasked with the critical responsibility of deciding whether to approve applications to construct new electric generation facilities. The criteria the Commission must consider in making these decisions is assigned by the Legislature in Wis. Stat. § 196.491(3). Proposed projects must also comply with Wis. Stat. §§ 1.11, 1.12, and 196.025, and Wis. Admin. Code chs. PSC 4 and PSC 111. Acknowledging the various factors the Commission must weigh, and the technical knowledge and expertise the Commission must deploy, in deciding whether to grant a Certificate of Public Convenience and Necessity, this Court has long characterized the Commission's CPCN decisions as "legislative-type policy determinations." *See Clean Wis.*, 282

Wis. 2d 250, ¶¶35, 138.

Here, ostensibly applying *Clean Wisconsin*, the court of appeals went further than this Court, eliminating the safeguards included by the Legislature in the Plant Siting Law that ensure the Commission's authority does not violate the constitutional nondelegation doctrine.

This petition asks the Court to address the following question:

1. Must applicants seeking a Certificate of Public Convenience and Necessity show they are entitled to the CPCN by any recognized standard and burden of proof, when the CPCN is decided in a Class 1 contested case proceeding, for consistency with the constitutional nondelegation doctrine?
2. Does Wis. Stat. § 196.491(3)(e) allow the Commission to approve an application for a Certificate of Public Convenience and Necessity regardless of whether the statutory requirements of the Plant Siting Law are met?

## STATEMENT OF CRITERIA SUPPORTING REVIEW

The issue presented concerns "[a] real and significant question of . . . state constitutional law." Wis. Stat. § 809.62(1r)(a). Review is necessary to provide clarity regarding the limits imposed on the Commission's authority to make "legislative-type policy determinations" by the constitutional nondelegation doctrine. *See Clean Wis.*, 282 Wis. 2d 250, ¶¶35, 138. By adopting the Commission's position that there is no burden of proof applicable in a contested case proceeding for a CPCN, the appellate court sanctioned an overreach by the Commission, well

past the safeguards included by the Legislature in the Plant Siting Law that protect the Legislature's exclusive lawmaking authority.

Furthermore, "[t]he court of appeals' decision is in conflict with controlling opinions of . . . the supreme court…." Wis. Stat. § 809.62(1r)(d). The court of appeals relies on *Clean Wisconsin* to assert that the Commission "need not address every statutory factor" (Pet-App-014 at ¶27) in granting a CPCN, in direct conflict with the this Court's finding that the Commission "must comply with *all* of the requirements expressed in [the Plant Siting Law]…." *Clean Wis.*, 2005 WI 93, ¶16 (emphasis added). Review is necessary to correct the appellate court's mistaken application of *Clean Wisconsin* to the question of whether applicants seeking a CPCN have a burden of proof to show they are entitled to the permit by a preponderance of the evidence.

## STATEMENT OF THE CASE

No large electric generating facilities may be constructed in Wisconsin without a CPCN issued by the Commission.[2] Application requirements and standards for approval are set forth, *inter alia*, in Wis. Stat. §196.491(3). *See Clean Wis. v. PSC*, 2005 WI 93, ¶33.

Among the standards for approval are Wis. Stat. § 196.491(3)(d)3. and 4., which provide in relevant part:

> 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…

[2] A "large electric generating facility" is defined as one with an operating capacity of 100 or more megawatts. Wis. Stat. § 196.491(1)(g).

> 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…

(emphasis added); *see also* Wis. Admin. Code ch. PSC 111. Additionally, the application must satisfy the requirements of Wis. Stat. § 1.12, known as the Energy Priorities Law, which gives preference to energy conservation, energy efficiency, and renewable sources of energy over natural gas and other non-renewable resources.

Because the issuance of CPCNs is a major action that significantly affects the quality of the human environment, the Commission, in conjunction with the Wisconsin Department of Natural Resources ("DNR"), must also prepare an Environmental Impact Statement ("EIS") under the Wisconsin Environmental Policy Act ("WEPA"), Wis. Stat. § 1.11, as implemented through Wis. Admin. Code chs. PSC 4 and DNR 150. Pursuant to Wis. Stat. § 30.025, applicants who need DNR approvals for waterway, wetland, and stormwater permits for a large electric generating facility file a unified application for these approvals with the CPCN application. DNR staff participate in the Commission proceedings and provide relevant information about environmental impacts and other issues to the administrative record. Applicable DNR approvals must be issued within 30 days of the Commission's CPCN decision. Wis. Stat. § 30.025(4)(b).

***The NTEC Project***

On January 8, 2019, South Shore Energy, LLC, and Dairyland Power Cooperative (collectively, "Applicants") filed an application with the Commission for a CPCN to construct a new, natural gas-powered

generating facility in Superior, Wisconsin. (R.67, Ex.-Applicants-Application.)[3] The facility, called the Nemadji Trail Energy Center ("NTEC"), would be a 550-625 MW merchant natural gas plant. (R.164 at 182:5-22 (McCourtney).) It would emit up to 2.7 million tons per year of carbon dioxide equivalent and over 200 tons per year of pollutants such as nitrogen oxide and volatile organic compounds. (R.138, Ex.-PSC-FEIS-§3.2.1.2.)

Because applications for CPCNs must include site-related information for two proposed locations, Wis. Admin. Code § PSC 111.53(1)(f), the NTEC application identified a "Preferred" and "Alternate" site. The sites are undeveloped greenfields in an industrial and residential area of the city, within two miles of Lake Superior. (R.67, Ex.-Applicants-Application-Vol. 1:1-6, 1-8, 1-35.) Both sites have unique environmental challenges, but the Preferred Site, which is owned by a parent company of South Shore Energy, LLC, was the site ultimately authorized by the Commission. (*Id.* §§1.0, 6.2; R.22 at 60.)

The Preferred Site is largely wooded, containing wetland and upland habitats, a small existing retention pond, riparian and floodplain habitats associated with the Nemadji River, and a steep, 46-foot slope as a transition between the upland and Nemadji River terrace. (R.48, Direct-CW-Mosca-3 to -4; R.67, Ex-Applicants-Application-Vol. 1:1-7 to 1-8.) Slopes at the Preferred Site are characterized by highly erodible

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[3] "Pet-App-__" refers to documents included in the Appendix to this Petition. "R.__" refers to the record number item as listed by the Commission in their list of items in the agency record (Pet-App-148; Doc.28), followed by the name of the document and, where hearing testimony is cited, the name of the witness. Documents in the circuit court record index are referred to as "Doc.__."

clay soils, creating a risk of slope failure. (R.48, Direct-CW-Mosca-3; R.128, Ex.-CW-Mosca-3 at 45.) The Superior area has experienced large, intense rainfalls in recent years, some of which have caused significant damage to infrastructure, and these rainfalls are expected to continue in the future under current climate predictions. (R.48, Direct-CW-Mosca-8 to -9.) The NTEC plant will have a stormwater pond at the top of the slope. (R.164 at 199:25-201:18.)

The Preferred Site is undersized and requires a large sheet pile wall, i.e. a giant retaining wall, to reclaim enough of the site to build the facility. (R.48, Direct-CW-Mosca-5 to -6; R.164 at 173:9-16 (Coughlin).) The wall would take an entire construction season to build and would require significant excavation and fill activities. (*Id.*; R.45, Direct-Applicants-Coughlin-2.)

There are wetlands on the Preferred Site containing diverse native plants. (R.48, Direct-CW-Mosca-13; R.55, Direct-WDNR-Rowe-5 to -6.) Wetlands in this area also perform floodwater storage services, a significant benefit in this area of highly erodible soils and frequent heavy rains. (R.56, Direct-WDNR-Tekler-6; R.67 at 402:23-403:6, 409:9-16 (Tekler); R.48, Direct-CW-Mosca-16; R.136, Ex.-CW-Mosca-11.) The Preferred Site will have at least 4.36 acres of permanent wetland fill and 14.8 acres of temporary fill in an adjacent laydown/staging area that may last up to 3.5 years. (R.48, Direct-CW-Mosca-11 to -12, -16.) These are large wetland impacts for a single project. (*Id.* at 12.) The project would also cause secondary impacts to unfilled wetlands, or impacts caused by changes in hydrologic sources to wetlands or streams, an influx of invasive species, water quality impacts due to stormwater

inputs, and other perturbations. (*Id.* at 14.)

***Procedural History at the Commission***

Following submission of the application for a CPCN, the Commission issued a notice of a Class 1 contested case proceeding pursuant to Wis. Stat. § 227.01(3)(a). (R.1, Notice.) The issue before the Commission in the contested case proceeding 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?" (Pet-App-065.) Environmental Petitioners and other parties moved to intervene. (R.11, Order on Requests to Intervene.) The Commission scheduled a contested case hearing on the merits of the application for October 29, 2019, to be presided over by an administrative law judge. The hearing was preceded by four rounds of written, pre-filed testimony and exhibits. (R.13, Prehearing Conference Memorandum-Amended.)

Applicants proceeded first, but their testimony did not address many of the standards in Wis. Stat. §196.491(3)(d)3. and 4., and often relied on future DNR permit processes and generic and unspecified best management practices to address environmental concerns. (*E.g.*, R.24 at 8, Applicants' Reply Brief; R.47, Direct-Applicants-McCourtney; R.45, Direct-Applicants-Coughlin.) No witness, including any of Applicants' witnesses, could identify another plant over 500 MW located on a bluff with highly erodible soils overlooking a water body, featuring a stormwater pond at the top of the bluff. (R.164 at 176:17-25 (Coughlin); 185:8-17 (McCourtney); 388:7-18 (Greene).)

Meanwhile, testimony submitted by Clean Wisconsin witness Vince Mosca, who has 30 years of experience as an environmental

consultant, demonstrated that the plant presented significant risks to the environment, especially relating to erosion, stormwater, and wetlands. (*E.g.*, R.48, Direct-CW-Mosca-r; R.64, Surrebuttal-CW-Mosca.) As he testified, building the sheet wall and otherwise preparing the site involves a significant amount of engineering, grading, and construction that would be expensive, risky, and easily avoided if a different site was selected. (R.48, Direct-CW-Mosca.) Despite these risks, the Applicants' stormwater management plans were incomplete or, to the extent presented, insufficient to address the site's unique challenges. (*Id.*) Mr. Mosca also testified about the project's significant wetland impacts and the lack of complete information about wetland quality and secondary impacts to wetlands. (*Id.*)

DNR and Sierra Club witnesses testified that the plant lacked sufficient groundwater supply for its expected 30-plus year lifespan or, at least, that the record lacked evidence of sufficient recharge to the aquifer to supply the plant. (*E.g.,* R.51, Direct-WDNR-Anderson; R.65, Surrebuttal-WDNR-Anderson.) Additionally, Sierra Club witness Michael Goggin testified that the proposed plant was being offered to serve a need that could readily have been met by higher priority alternatives under Wisconsin's Energy Priorities Law. (R.61, Rebuttal-SC-Goggin.)

DNR and Commission staff testified about their review of the project and preparation of the project's Environmental Impact Statement. DNR waterway and wetland specialist Lindsay Tekler agreed with Mr. Mosca that the Applicants had homogenized the wetlands by lumping as many as 17 wetlands together on one data

sheet, even those that were ecologically distinct or located in different landscape positions. (R.48, Direct-CW-Mosca; R.56, Direct-DNR-Tekler; R.164 at 401:21-402:5 (Tekler).) Ms. Tekler testified that she would likely require resubmission of individualized wetland data sheets, in addition to conducting her own site visit in the spring to assess wetland quality. (R.164 at 401:3-5-402:22 (Tekler).)

Regarding waterway impacts, at the time of hearing, the DNR lacked even an engineering plan that would allow it to evaluate whether a Chapter 30 permit is required for direct impacts (i.e., fill). (R.56, Direct-WDNR-Tekler; R.164 at 394:22-396:12.) Stormwater plans were not reviewed by DNR staff, despite that agency's ultimate authority to approve an erosion control plan, and no DNR staff testified about stormwater issues. (R.164 at 391:10-23 (Tekler).)

The Commission accepted public comments and held two public hearings on the application. The proposal was controversial, generating hundreds of written and oral comments. (R.140, Ex.-PSC-Public Comment; R.165, Tr. 28-135 Public Hearing Session; R.166, Tr. 533-585 Public Hearing Session.) Opponents raised issues about climate impacts, fracking, water quality, groundwater, industrial accidents, traffic, noise, and impacts to tribal interests. (*Id.*)

***The Commission's Decision***

After post-hearing briefing, the Commission announced its decision on January 16, 2020, which it later memorialized in a written final decision dated January 30, 2020 ("Decision"). (Pet-App-063.)

By a 2-1 vote, the Commission granted the CPCN. While the Commissioners acknowledged concerns about environmental impacts,

the majority concluded that both the Preferred and Alternative sites satisfied the standards in Wis. Stat. §196.491(3)(d)3. and 4.—clearing the way for Applicants to proceed with their Preferred site. (Pet-App-088, 089.) The Commission's findings regarding stormwater, waterway, and wetland impacts largely relied on other future permits to determine the standards were satisfied. (*See* Pet-App-102-104, 109-110.) It required that "all permits be in place before the commencement of construction," a condition it described as "essential to its determination that the project meets the standards for a CPCN." (Pet-App-106.) The Commission also included in its order several previously used or "commonly-used order conditions" that it said would mitigate environmental impacts. (Pet-App-104, 110-116.) The Commission declined to include project-specific conditions suggested by Clean Wisconsin. (Pet-App-119-120.) With respect to groundwater, the majority accepted the Applicants' evidence that sufficient groundwater was available to supply the plant. (Pet-App-100.) It did not address the issue of recharge and made the CPCN approval conditional on Applicants obtaining future DNR permits related to groundwater. (Pet-App-102.)

The dissenting commissioner determined that the record did not support the Commission's findings that Wis. Stat. §196.491(3)(d)3. and 4. were satisfied. The dissent found that reliance on decisions by other agencies, under different and/or narrower standards, did not satisfy the Commission's broader duty to make findings under Wis. Stat. §196.491(3)(d)3. and 4. (Pet-App-131-132.) The dissenting commissioner disagreed with the majority's conclusion that groundwater supply for the plant was sufficient and that there were no issues with soil stability.

(Pet-App-133.)

With respect to the Energy Priorities Law, the Commission found that the NTEC plant complied with the law and rejected the possibility of renewables with battery storage as a basis to find non-compliance. (Pet-App-083-083.) The Commission also found, by unanimous vote, that it had complied with WEPA in reviewing the CPCN application through the preparation of the EIS and related processes. (Pet-App-095.)

***Procedural History in the Circuit Court***

Environmental Petitioners filed a petition for judicial review challenging the Decision on February 28, 2021. (Doc.2.) The Commission and Applicants filed notices of appearance. (Docs.6-8.)

On the merits, Environmental Petitioners argued, *inter alia*, that the Commission erred in applying no standard or burden of proof to the Applicants' request for a CPCN and that the standard of proof should be at least a preponderance of the evidence, that the Commission had erroneously interpreted its broad authority under Wis. Stat. §196.491(3)(d)3. and 4. and lacked substantial evidence when it granted the CPCN, erroneously determined the NTEC facility would comply with the Energy Priorities Law, and incorrectly determined the EIS prepared for the project satisfied WEPA, Wis. Stat. §1.11. (Docs.199, 228.) The Commission and the Applicants opposed these arguments. (Docs.224, 225.)

The circuit court affirmed the Commission's decision. First, the court agreed that the Applicants had, what it called, "the burden of proof" to show they should get a CPCN, but it found that "there is no specific standard of proof the applicant must satisfy." (Pet-App-048-050.)

Rather, the circuit court accepted the Commission's argument that the caliber of facts offered by the Applicants only needed to satisfy the substantial evidence test applicable when agency decisions are challenged in circuit court. (*Id.*) It based this conclusion on a deferential view of the Commission's authority and its belief that the standards the Commission must apply—such as "unreasonable" and "undue"—"are all squishy" and did not lend themselves to "evidentiary standards meant for findings of fact." (Pet-App-050.) The "burden" was thus the burden of introducing "substantial evidence" in support of the application.

The circuit court also concluded that the Commission properly interpreted its broad authority under Wis. Stat. §196.491(3)(d)3. and 4. to find that the NTEC plant was in the public interest and would not cause undue environmental harm, though the circuit court failed to address the dissenting Commissioner's arguments about the scope of the Commission's duty and the reliance on future environmental permitting by other agencies. (Pet-App-051-054.) It also found the Commission had substantial evidence to support its determination. (Pet-App-054-055.)

Finally, the circuit court found that the Commission's decision complied with the Energy Priorities Law, rejecting Environmental Petitioners' argument that the Commission had improperly shifted the burden to them to show a higher priority renewable resource under the law was available. (Pet-App-056.) It also found that the EIS sufficiently examined the project's environmental and other impacts. (P-App-056-061.)

***<u>Procedural History in the Appellate Court</u>***

Environmental Petitioners appealed the circuit court's decision.

Because courts of appeal review Commission decisions directly, not the circuit court decisions upholding them, Environmental Petitioners again explained that the Commission erred by failing to require Applicants to demonstrate the proposed project met the statutory standards set forth in the Plant Siting Law by a preponderance of the evidence, that this failure was due to the Commission's erroneous interpretation of its own authority under Wis. Stat. § 196.491(3)(d)3. and 4., and that the Commission lacked substantial evidence to support its "findings" that the NTEC project met these standards when it granted the CPCN. Environmental Petitioners also argued that the Commission erroneously determined the NTEC facility would comply with the Energy Priorities Law and incorrectly determined the EIS prepared for the project satisfied Wis. Stat. § 1.11. Again, the Commission and the Applicants opposed these arguments.

In a decision filed on October 8, 2024, the appellate court rejected Environmental Petitioners' argument, affirming the Commission's granting of the CPCN. First, while recognizing that an applicant "must obviously provide the Commission with evidence that enables the Commission to make the necessary determinations" (Pet-App-013 at ¶26), the appellate court went further than the circuit court, finding no burden of proof required of an applicant. The appellate court agreed with the circuit court that the Commission's determinations need only satisfy the substantial evidence test applicable upon judicial review. (Pet-App-003 at ¶3.)

The appellate court then rejected each of Environmental Petitioners' subsequent arguments, finding that the Commission

correctly interpreted Wis. Stat. § 196.491(3)(d)4. and the Energy Priorities Law, complied with WEPA, and that its determinations were supported by substantial evidence. (Pet-App-16-39).

On October 28, 2024, Environmental Petitioners filed a motion for reconsideration with the appellate court, requesting reconsideration of the appellate court's decision because that decision implicates the constitutional nondelegation doctrine by sanctioning an overreach by the Commission. (Pet-App-140-147.) In the motion, Environmental Petitioners explained how the appellate court's interpretation of the Commission's "legislative-type" authority in making CPCN determinations nullifies the ascertainable standards in the Plant Siting Law and eliminates the procedural safeguards required for lawful delegation of Legislative powers to executive branch agencies. (*Id.*) On November 5, 2024, the court of appeals denied the Motion for Reconsideration without substantively responding to Environmental Petitioners' claims. (Pet-App-139.)

## ARGUMENT

The Court should grant review of the court of appeals decision for two reasons. First, the court of appeals overlooked the constitutional implications of its decision authorizing the Commission to approve applications for a CPCN without ascribing a burden of proof or a standard of proof in a contested case proceeding. Second, the court of appeals misconstrued a key provision in the Plant Siting Law to support its conclusion that there is no standard

of proof applicable to the Commission's determination on an application for a CPCN.

## I. The Court Should Accept Review to Clarify the Safeguards in the Plant Siting Law Consistent with the Constitutional Nondelegation Doctrine.

The nondelegation doctrine places limits on the Legislature's ability to delegate its power to executive branch agencies. "[O]ne branch of government may delegate power to another branch, but it may not delegate too much, thereby fusing an overabundance of power in the recipient branch." *Panzer v. Doyle*, 2004 WI 52, ¶ 52, 271 Wis. 2d 295, 680 N.W.2d 666. A legislative delegation of authority to an agency will be upheld only if "the purpose of the delegating statute is ascertainable and there are procedural safeguards to ensure that the board or agency acts within that legislative purpose." *Id.* at ¶ 55 (citing *Gilbert v. State*, 119 Wis. 2d 168, 349 N.W.2d 68 (1984).

First, by holding that there is no burden of proof applicable in a contested case proceeding for a CPCN, the court of appeals ran afoul of the nondelegation doctrine by construing the Plant Siting Law to give the Commission total discretion as to siting decisions without regard to any substantive direction as to *how* they should make such decisions. In Wis. Stat. § 196.491(3)(d), the Legislature delegated "legislative-type policy determinations" to the Commission, but did so in a manner that plainly prescribes ascertainable standards by which those determinations are to be made. *See Clean Wis.*, v. PSC, 2005 WI 93, ¶ 138.

For example, the ascertainable standards in Wis. Stat. § 196.491(3)(d) include, in part, that the Commission must determine:

> 3. The design and location… is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors…
>
> 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 [and…]
>
> 7. The proposed facility will not have a material adverse impact on competition in the relevant wholesale electric service market.

The appellate court's dismissal of any burden upon CPCN applicants to *show* that these ascertainable standards are met eliminates the safeguards of legislative power included by the Legislature in its delegation of this authority.

According to the court of appeals, the Commission "need not address every statutory factor or fully explain why it believes the proposed project meets the standards under the law." (Pet-App-014 at ¶27.) That is: According to the decision on which Environmental Petitioners seek review, the Commission may disregard one or more of the criteria for approving a project set forth by the Legislature entirely. To be sure, courts need only find "enough evidence in the record and analysis by the Commission such that courts can discern the basis for its decision and the reasonableness of it." (Pet-App-014 at ¶27, citing *Clean Wis.*, 282 Wis. 2d 250, ¶145.) But the courts must also satisfy themselves that *the Commission* required the applicant to

meet the statutorily-defined criteria in reaching that decision.

*Clean Wisconsin* is not to the contrary. *Clean Wisconsin* is clear that "the [Commission] must comply with *all* of the requirements expressed in …the Plant Siting Law, and must make certain express findings regarding a project." *Clean Wis*., 282 Wis. 2d 250, ¶16 (emphasis added). The court of appeals decision in this case directly contradicted this Court's holding in *Clean Wisconsin* when it held that the Commission "need not address every statutory factor." (Pet-App-014 at ¶27.) But even if the court of appeals' decision were not at odds with *Clean Wisconsin*, it would raise serious constitutional concerns. In holding that that Commission need not determine that all of the requirements in the Plant Siting Law are met by *any* standard of proof, the court of appeals rendered the "purpose" of the delegation afforded the Commission under the Plant Siting Law—i.e. the criteria dictating *how* the Commission is to make its decision—a nullity. *Cf. Panzer*, 2004 WI 52, ¶ 55.

Nor does the fact that a CPCN decision is "legislative-type policy determinations" excuse the Commission from requiring the Applicant to meet the statutory standards by a preponderance of the evidence. *See Clean Wis.*, 282 Wis. 2d 250, ¶¶35, 138. CPCNs may only be granted after the Commission holds a contested case proceeding on the application. Wis. Stat. § 196.491(3)(b). A contested case proceeding, governed by Wis. Stat. § 227.44, involves due process rights, which do not apply to legislative decision-making. *See* Wis. Stat. § 227.57(4); *Bracegirdle v. Board of Nursing,* 159 Wis. 2d 402, ¶ 416, 464 N.W.2d 111 (Ct. App. 1990) ("The requirement of fairness imposed by [Wis.

Stat. §] 227.57(4) merely insures that the procedure before the administrative agency will meet the requirements of due process.”); *Kohler Co. v. Wis. Dep't of Nat. Res.,* 2024 WI App 2, ¶ 80, 410 Wis. 2d 433, 3 N.W.3d 172 (“We have previously held that a failure to provide notice for a contested hearing under [Wis. Stat.] § 227.44(2)(c) of all of the issues involved can constitute a deprivation of a party's due process rights.”).

Nor does the lack of a *statutorily* defined burden or standard of proof mean that none exists or that the Commission is free to grant CPCNs without regard to the relative weight of evidence presented. While the appellate court seems persuaded that the absence of an express assignment of a burden or standard of proof in the Plant Siting Law is dispositive, that absence does not give the Commission license to excuse applicants from complying with the common law burden of proof. In *Reinke v. Personnel Bd.*, there was also no burden of proof “set forth in either the statutes or case law” for the personnel matter in that case. *Reinke v. Personnel Bd.*, 53 Wis. 2d 123, 136, 191 N.W.2d 833 (1971). However, under those circumstances, the court looked to other closely related statutes “to conclude that the standard to be used by the Personnel Board in making its findings should be that used in ordinary civil actions, to a reasonable certainty, by the greater-weight-of-the- credible-evidence-standard.” *Id.* at 137 (footnote omitted).

It is impossible to square the court of appeal's conclusion that there is no burden of proof on an applicant in a contested case proceeding for a CPCN with the Legislature's requirement that a

contested case proceeding be conducted as part of the Commission's determination on the application. If there is no burden of proof on an applicant to show that the standards are met, then the safeguards established by the Legislature, both as to due process and as to the criteria the Commission should use in determining whether a resource should be built, can be freely ignored. This cannot be the case.

## II. The Court Should Accept Review to Correct the Appellate Court's Misconstruction of a Key Provision of the Plant Siting Law that Supports Application of Standard of Proof for Approval of CPCNs.

Second, the court of appeals misconstrues a key provision in the Plant Siting Law to support its conclusion that there is no burden of proof on an applicant for a CPCN. Wis. Stat. § 196.491(3)(e) allows the Commission, if it finds that a CPCN application does not meet the requirements of the Plant Siting Law, to "approve the application with such modifications as are necessary for an affirmative finding." The appellate court erroneously concludes that provision means, "the Commission is expressly allowed to conditionally approve a CPCN application regardless of whether the statutory requirements are met." (Pet-App-012 at ¶ 24.) That is a misconstruction of the statute.

Instead, Wis. Stat. § 196.491(3)(e) allows the Commission to modify the application, through conditions, so that it *does* meet the statutory requirements of the Plant Siting Law. The other option provided by Wis. Stat. § 196.491(3)(e) is to "reject the application" if it does not meet the statutory requirements. The Plant Siting Law is clear, an application can only be approved if it meets the requirements

therein, whether on its own, or through conditions imposed by the Commission. The correct construction of Wis. Stat. § 196.491(3)(e) supports the proposition that the requirements of the Plant Siting Law be met by a preponderance of evidence.

## CONCLUSION

The Court should grant the petition for review and reverse the decision of the court of appeals.

Dated this 5th day of December 2024.

*Electronically Signed by Brett Korte*

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,622 words.

Dated this 5th day of December 2024.

*Electronically Signed by Brett Korte*
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## CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of December 2024.

*Electronically Signed by Brett Korte*
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