

**FILED
03-10-2022
CIRCUIT COURT
DANE COUNTY, WI
2022CV000525
Honorable Juan B Colas
Branch 10**

For Official Use:

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

SIERRA CLUB
John Muir Chapter
754 Williamson Street
Madison, WI 53703,

Petitioner,

vs.

Case No.: 22-cv-_____
Case Code: 30607
Administrative Agency Review

PUBLIC SERVICE COMMISSION
OF WISCONSIN
4822 Madison Yards Way
PO Box 7854
Madison, WI 53707

Respondent.

PETITION FOR JUDICIAL REVIEW

Petitioner Sierra Club petitions for review, pursuant to Wis. Stat. §§ 227.52 *et seq.*, of a decision by the Respondent, Public Service Commission of Wisconsin (“PSC” or “Commission”) approving a Certificate of Authority for two proposed liquefied natural gas (“LNG”) storage facilities in the Town of La Grange, Walworth County (Bluff Creek) and in the Town of Ixonia,

Jefferson County (Ixonia) (collectively, “LNG facilities”), and the PSC’s refusal to grant Sierra Club’s petition for rehearing and reconsideration (collectively the “Decision”). A copy of the Decision is designated as document PSC REF#: 427782 in the PSC’s electronic records filing system and available at <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=427782>.

PARTIES

1. Petitioner Sierra Club is a national membership organization with its national headquarters at 2101 Webster St., Ste. 1300, Oakland, CA 94612, and its Wisconsin headquarters at 754 Williamson St., Madison, WI 53703. Sierra Club represents almost 20,000 members in the state of Wisconsin, and advocates on their behalf to minimize the environmental impacts of power production in the state, and promote decision-making across the state that prioritizes a responsible and sustainable energy future.

2. Respondent Public Service Commission is an independent agency of the State of Wisconsin, created under Wis. Stat. § 15.79, whose principal office is located at 4822 Madison Yards Way, Madison, Dane County, Wisconsin. It has authority to issue certificates of authority for new plants and equipment pursuant to Wis. Stat. § 196.49.

JURISDICTION, VENUE, AND STANDING

3. The Decision of the Commission is an administrative decision reviewable under Wis. Stat. § 227.52, *et seq.*

4. Because Petitioner Sierra Club is located or resides in Dane County, venue is proper under Wis. Stat. § 227.53(1)(a)3.

5. Sierra Club was a party to the underlying action before the Commission and have standing and the right to seek and participate in proceedings for review under Wis. Stat. § 227.53(1)(d). Additionally, Sierra Club and its members have an interest in reducing greenhouse gas emissions, are affected by global climate change, and will be further adversely affected if additional sources, such as the LNG facilities in this case, result in additional CO₂-equivalent pollution emitted to the atmosphere. Sierra Club members also live, work, and recreate in Jefferson and Walworth Counties and will be affected by the environmental impacts of the Decision authorizing the proposed LNG facilities, including but not limited to impacts on groundwater supplies, air quality, aesthetics, and loss of habitat. Sierra Club members who are Wisconsin Electric Power Company–Gas Operations and Wisconsin Gas LLC (collectively, “Applicants”) ratepayers will be further affected by the Decision because their rates will increase to cover the increased cost of the proposed facilities. The Decision therefore adversely affects the interests of Sierra Club and its members.

REGULATORY BACKGROUND

6. Before constructing new large LNG facilities, the Applicants must obtain a Certificate of Authority from the PSC. Wis. Stat. § 196.49.

7. To approve a Certificate of Authority, the PSC must finding that, among other factors, the project will not “[p]rovide facilities unreasonably in excess of the probable future requirements” (i.e., does not exceed the utility’s

projected “need”) or “add to the cost of service without proportionately increasing the value or available quantity of service” (i.e., is “cost effective”).

Wis. Stat. § 196.49(3); Wis. Admin. Code ch. PSC 133.

6. Additionally, the PSC must determine that the higher-ranked alternatives identified in the Energy Priorities Law in Wis. Stat. § 1.12, including energy efficiency and renewable sources of energy, are not technically feasible, not cost-effective, or not environmentally sound. Wis. Stat. § 196.025(1)(ar).

7. The Applicants bear the burden of proof on each of those factors—requiring that they produce a preponderance of credible evidence before the PSC sufficient to support a finding on each factor. *Sterlingworth Condominium Assoc. v. DNR*, 205 Wis.2d 710, 726, 556 N.W.2d 791 (Ct. App. 1996) (applicant in administrative process carries the burden of proof that it meets the requirements for approval); *Investigation of the Contract for Centrex IV/Digital Bus. Systems*, Docket 6720-TI-103, Finding of Fact, Conclusion of Law and Final Order, 1990 WL 10697776 (Wis. Pub. Serv. Comm’n Feb. 6, 1990) (recognizing general rule that “the party which initiates the proceeding should have the burden of proof”).

8. Additionally, before issuing a Certificate of Authority, the PSC must meet its obligations under Wisconsin’s Environmental Policy Act (“WEPA”), Wis. Stat. § 1.11.

9. To meet its WEPA obligations for a Certificate of Authority

authorizing a LNG facility, the PSC must either prepare an Environmental Impact Statement (“EIS”) or prepare an Environmental Assessment (“EA”) demonstrating that the LNG facility decision (along with cumulative impacts from other actions) has no significant affect on the quality of the human environment. The EA or EIS must contain an analysis that includes a specified set of criteria set forth in administrative rules.

10. Because WEPA imposes obligations directly on the PSC before taking action on a Certificate of Authority, the PSC has the burden of proof and must develop a sufficient administrative record to satisfy its obligations under WEPA before issuing a Certificate of Authority.

FACTS

11. On November 1, 2019, Applicants filed an application for a Certificate of Authority to construct the LNG facilities. The Applicants submitted a revised application on June 1, 2020.

12. The Bluff Creek LNG facility will cost \$205 million and the Ixonia facility will cost \$204 million. The Decision also anticipates cost overruns up to 10% (\$41 million) before the Applicants are even required to notify the PSC.

13. The application claimed that the LNG facilities were needed to provide sufficient gas capacity to meet a projected “peak” demand. The Applicants also claimed that the alternative construction projects to provide more peak gas capacity would cost more than the LNG facilities, making the

LNG facilities “cost effective.”

14. Sierra Club intervened in the proceeding before the PSC.

Parties pre-filed testimony and exhibits and a hearing was held on August 9, 2021.

15. The PSC issued an EA on April 4, 2020, purporting to find that any environmental impacts would be insignificant. The EA is designated as document PSC REF#: 410478 in the PSC’s electronic records filing system and is available at

<https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=410478>.

16. The PSC issued its Decision on December 22, 2021.

17. Sierra Club petitioned for reopening, rehearing, and reconsideration on January 11, 2022, pursuant to Wis. Stat. §§ 196.39 and 227.49.

18. The PSC did not acknowledge or respond to the petition for reopening, rehearing, or reconsideration. The petition is therefore deemed denied by operation of law 30 days later, on February 10, 2022, pursuant to Wis. Stat. § 227.49(6).

19. This petition for judicial review is timely filed within 30 days of the “final disposition by operation of law” of the petition for rehearing, pursuant to Wis. Stat. § 227.53(1)(a)(2).

20. The Decision should be reversed or modified pursuant to Wis. Stat. § 227.57 because the PSC committed several material errors of

procedure, erroneously interpreted a provision of law, relies on facts either not actually found or, if found, unsupported by substantial evidence in the record, and involves an exercise of discretion that is outside the range delegated to the PSC by law, inconsistent with the PSC's rules, and is otherwise in violation of statute.

Errors In the PSC's Finding of "Need"

21. To determine whether new equipment is "needed" to supply gas on the "peak-day," utilities calculate the base trend of gas used (called "demand") during prior peak-days, then added expected growth in gas demand due to new customers being added, and then further inflated the projected demand to reflect a "reserve margin." The utility then compares that projected peak-day demand value to the level of peak-day gas its current equipment can supply ("capacity"). If there is insufficient capacity, the size of the deficit indicates the amount of any additional capacity "need."

22. The PSC accepted the Applicants projected "need" based on flawed and insufficient evidence. Applicants' projections combined a historic peak-day demand trend projection with projected demand from new customer additions. However, the historic peak-day trend projection already included year-over-year increases due to new customers being added. When Applicants then added new demand based on projected new customer additions to the trend line, without accounting for the rate of new customer additions already included in that trend line, it double-counted at least some

projected demand attributable to new customer additions.

23. Additionally, the Applicants added a significant amount of new projected demand calculated based explicitly on the number of assumed jobs to be created by Foxconn.

24. Foxconn is a company which originally proposed to invest \$10 billion into a manufacturing plant in Mount Pleasant, Wisconsin, through an agreement with the State of Wisconsin. As part of that agreement, Foxconn was supposed to employ up to 13,000 employees at the plant in order to qualify for \$3 billion in state subsidies. *See* Wikipedia, *Foxconn in Wisconsin*, https://en.wikipedia.org/wiki/Foxconn_in_Wisconsin (last visited Mar. 10, 2022).

25. Foxconn has since abandoned its original plans (as well as subsequent plans to manufacture respirators and electric cars) and renegotiated its agreement with the State. Currently Foxconn has only committed to create up to 1,454 jobs. Even if it does so, which is uncertain at best, that reflects a small fraction of what it originally proposed.

26. The “need” for the Bluff Creek LNG facility included a very specific amount of peak-day demand attributed directly to Foxconn and to new residential customers resulting from direct and indirect jobs at Foxconn. There is no evidence to support the Foxconn job numbers that Applicants used to calculate the Foxconn-related peak-day gas demand growth, which alone represents 29 percent of the purported “need” for the Bluff Creek

facility.

27. The Applicants also failed to include the capacity available for its existing Oak Creek LNG storage facility when calculating the purported “need” for the new LNG facilities. Instead, the Applicants’ “need” for new LNG facilities assumes that the Oak Creek facility will be permanently retired. There is no evidence in the record to support the assumption that the Oak Creek storage equipment will be unavailable.

28. The “need” for the LNG facilities also assumes a 5% “reserve margin” beyond the projected actual peak-day demand. There is no evidence in the record to support a need for an additional 5% “reserve margin,” other than testimony that this is a requirement imposed by the PSC.

29. The Decision states that a 5% reserve margin is only “a planning target, not an enforceable standard or threshold.” But elsewhere the Decision refers to a 5% reserve margin as a “long-established ... requirement.” Other PSC orders also refer to a range of 2 to 5% as a PSC-imposed requirement. *Superior Water, Light & Power Co. Gas Supply Plan for the Period Beginning Nov. 1, 2018*, No. 5820-GP-2018, 2018 WL 4927977, at *2 (Oct. 5, 2018) (describing a “reserve margin ranging between 2 to 5 percent” as a requirement imposed by the PSC on gas utilities).

30. If a 5% reserve margin is a requirement imposed by the PSC on utilities, it must be adopted through formal rulemaking. Wis. Stat. §§ 227.01(13), 227.10(1). The PSC’s failure to adopt that reserve margin

requirement through rulemaking, and applying it in this case without first undertaking rulemaking, constitutes a violation of statute, an erroneous interpretation of law, and an exercise of discretion outside the range provided by law.

31. Even if the 5% reserve margin is not a requirement, policy, or interpretation of statute adopted by the PSC to implement Wis. Stat. § 196.49 and Wis. Admin. Code ch. PSC 133, it must still be based on record evidence. A reserve margin is a proxy for the probability of sufficient capacity to meet customer demands. There was no evidence in the record in this case about the probability of peak-day demand exceeding the Applicants' projections, much less evidence that would support a specific 5% margin.

32. Further still, the PSC erred in attempting to shift the burden to Sierra Club by announcing that a 5% reserve margin reflects the appropriate value based, at most, on the PSC's general practice and experience and shifting the burden to other parties "to support departing" from it.

33. The PSC's application of a 5% reserve margin value is a material error in procedure, a failure to follow required rulemaking procedures, a violation of statutes requiring rulemaking, an exercise of discretion outside the range provided by law unlawful, and unsupported by substantial evidence. Additionally, the PSC's attempt to shift the burden to Sierra Club to disprove the 5% reserve margin is a material error in procedure and an exercise of discretion outside the range provided by law.

Errors In the PSC’s “Cost-Effectiveness” Finding and Analysis of Alternatives

34. The PSC failed to analyze potential alternatives when determining whether the LNG facilities comply with the Energy Priorities Law, Wis. Stat. § 196.025(1)(ar), and with the certificate of authority statute, Wis. Stat. § 196.49(3)(b)3.

35. The Decision correctly states that Applicants have the burden to demonstrate that their LNG facilities provide value commensurate with their costs and that no higher-ranked alternatives in the Energy Priorities Law are feasible or cost-effective. The Decision also correctly notes that Applicants, generally, should include energy efficiency and demand response in their analyses to demonstrate that such higher-ranked options are not cost-effective alternatives to fossil fuel infrastructure.

36. The PSC Chairwoman stated during the PSC’s deliberations in this case that the Applicants have the relevant evidence on the feasibility and cost of energy efficiency and demand response. Intervenors like Sierra Club and the PSC do not have access to the same level of information regarding those alternatives. Sierra Club’s expert witness nevertheless provided evidence that energy efficiency is generally available and cost-effective in Wisconsin, including in Applicants’ service territory, and that demand-response programs are available to cost-effectively reduce peak-day gas demand.

37. PSC Commissioner Huebner noted during deliberations in this

case that the Energy Priorities Law requires evidence that the utility did its homework and that the Applicants should demonstrate that higher-ranked alternatives are not feasible or cost-effective.

38. The Applicants did not demonstrate that higher-ranked alternatives such as energy efficiency and demand response are infeasible or not cost-effective. The PSC should have denied a Certificate of Authority in this case based on that lack of evidence sufficient to meet the Applicants' burden of proof.

39. However, the PSC instead erroneously placed the burden on Sierra Club to prove that the higher-ranked alternatives in the Energy Priorities Law are feasible and cost-effective. That is a legally incorrect shift in the burden of proof.

40. PSC's decision based on a record that fails to demonstrate the infeasibility or lack of higher-ranked energy efficiency or demand response and inappropriately shifting the burden of proof to Sierra Club to disprove an assumed infeasibility or lack of cost-effectiveness is an error of agency procedure, an erroneous interpretation of law and violation of statute, and an exercise of discretion outside the range provided by law.

The PSC's Violation of WEPA and the PSC's WEPA Regulations

41. The Decision also fails to fulfill the PSC's obligations under WEPA, Wis. Stat. § 1.11, and implementing regulations in Wis. Admin. Code ch. PSC 4.

42. WEPA requires the PSC to prepare an EIS for any action, including granting a certificate of authority, if the action would significantly affect the quality of the human environment. Wis. Stat. § 1.11(2)(c).

43. To implement that obligation, the PSC adopted regulations identifying construction of a “liquefied natural gas plant,” such as the LNG facilities in this case, as a “Type II Action” that has the potential to significantly affect the quality of the human environment. Wis. Admin. Code § PSC 4.10(2) and Table 2(k).

44. The PSC is required to either produce a full EIS or prepare an EA demonstrating that the impacts from the LNG facilities are insignificant.

45. The PSC elected to produce an EA in this case. That EA, however, lacks several required analyses.

46. EAs produced by the PSC must include specific information, including “[a]n evaluation of the significant positive and negative, short-term and long-term environmental effects that would result if the commission approves the proposed action” which “shall” include “[c]onflicts with federal, state or local plans or policies.” Wis. Admin. Code § PSC 4.20(2)(d). Additionally, the EA must include “[a]n evaluation of the reasonable alternatives to the proposed action and significant environmental consequences of the alternatives, including those alternatives that could avoid some or all of the proposed action’s adverse environmental effects....” Wis. Admin. Code § PSC 4.20(2)(e).

47. The Applicants' projected "need" for the LNG facilities assumes exponential growth in natural gas use for at least ten years, followed by plateaued gas use. It does not envision any reduction in gas use, ever. That is inconsistent with policy commitments by President Biden and Governor Evers to reduce climate pollution. To meet federal and state climate policies, gas use will have to decline.

48. Additionally, Governor Ever's Task Force on Climate Change called for a one percent per year decrease in gas use each year and notes that no new fossil fuel infrastructure can be built if Wisconsin is to meet its climate change policies.

49. The PSC's EA in this case contains no acknowledgement nor discussion of the LNG facilities' greenhouse gas impacts, that the projected year-over-year gas use increases assumed to justify the "need" for the LNG facilities conflicts with the Governor's Task Force's recommended 1 percent *decrease* in gas use year-over-year, that building two new fossil fuel storage facilities with 30 year (or longer) lives conflicts with the Governor's policy on climate change, including the Task Force recommendation that no new fossil fuel infrastructure be constructed, or even that building the new fossil fuel infrastructure in conflict with federal and state climate change policy is controversial. The EA therefore lacks the minimum necessary information required by Wis. Admin. Code § PSC 4.20(2)(d)(2), (3).

50. The EA instead states that the PSC did not discover any

conflicts with federal, state, or local plans or policies. It also incorrectly claims that there is no known significant controversy associated with the proposed action.

51. The EA also lacks an adequate discussion of alternatives to the LNG facilities, as required by Wis. Admin. Code § PSC 4.20(2)(e). Rather than providing an “evaluation of the reasonable alternatives to the proposed action and significant environmental consequences of the alternatives, including those alternatives that could avoid some or all of the proposed action’s environmental effects,” Wis. Admin. Code § PSC 4.20(2)(e), the PSC’s EA contains only a half-page recitation of the Applicants’ contentions that not building the LNG facilities “is not feasible” and that utilizing existing resources is infeasible, and that conservation and efficiency do not provide additional capacity and supply.

52. The PSC failed to develop a sufficient record about alternatives or to evaluate alternatives in the EA. Merely reciting the Applicants’ conclusory contentions is insufficient to meet the PSC’s obligations under Wis. Admin. Code § PSC 4.20(2)(e). Sierra Club’s affirmative evidence at hearing raised significant questions about the availability of higher-ranked energy efficiency and demand response alternatives. In fact, as the Commissioners’ comments during their deliberations reveal that, if anything, the Commission had insufficient information about energy efficiency, conservation, and demand-response as alternatives.

53. The PSC's failure to produce a sufficient EA that discusses conflicts between the LNG facilities and federal and state climate policies, that acknowledges the significant controversy associated with the project, and that lacks an analysis of the reasonable alternatives—including energy efficiency, conservation, and demand-response—constitutes a material error in procedure or failure to follow prescribed procedure, an erroneous interpretation of law, a lack of substantial evidence to support the EA's findings, outside the discretion afforded to the PSC, and inconsistency with the PSC's own rules.

GROUNDINGS FOR REVIEW

54. The Commission made errors of law, fact, procedure, and discretion when it determined that the application for a certificate of authority for LNG facilities meets the standards in Wis. Stat. §§ 1.11 1.12, 196.025(1)(ar) and 196.49 and Wis. Admin. Code chs. PSC 4 and 133. Wis. Stat. § 227.57(4), (5), (6), and (8).

PRAYER FOR RELIEF

WHEREFORE, Sierra Club respectfully requests judgment in its favor as follows:

1. Reversing, affirming, modifying or, in the alternative, remanding the final decision of the PSC to grant the Certificate of Authority, Wis. Stat. § 227.57;
2. Staying the Certificate of Authority during the pendency of this action pursuant to Wis. Stat. § 227.54; and

3. Granting such other relief as the Court may deem just and equitable.

Respectfully submitted this 10th day of March, 2022.

EARTHJUSTICE

Electronically signed by David C. Bender

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