

STEVEN D. EBERT
CIRCUIT COURT BR 4

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

FRIENDS OF RESPONSIBLE ENERGY
202 N. Spooner Street
Madison, WI 53726,

Petitioner,

v.

Case No: 03CV3389
Case Code: 30607
Administrative Agency Review

Nov 6 4 09 PM '03

CIRCUIT COURT
DANE COUNTY, WI

PUBLIC SERVICE COMMISSION OF WISCONSIN,
610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854,

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
101 South Webster Street
P.O. Box 7921
Madison, WI 53707-7921,

UNIVERSITY OF WISCONSIN BOARD OF REGENTS,
1852 Van Hise Hall
1220 Linden Drive
Madison, WI 53706,

WISCONSIN DEPARTMENT OF ADMINISTRATION,
101 East Wilson Street
Madison, WI 53703,

Respondents.

PETITION FOR JUDICIAL REVIEW

Petitioner, Friends of Responsible Energy ("FORE"), by its attorneys, Garvey & Stoddard, S.C., petitions the court pursuant to Wis. Stats. §§ 1.11, 196.491(3)(j), and 227.52 to 227.58, for judicial review of the final decisions (and non-decisions) of Respondents relative to their review and approval of the proposed MGE-UW West

Campus Cogeneration Facility ("WCCF"), as set forth in the decisions of Respondent, Public Service Commission of Wisconsin ("PSC"), dated October 9, 2003 and corrected on October 27, 2003 (attached hereto as Exhibits A & B), and of Respondent Wisconsin Department of Natural Resources ("DNR"), dated July 29, 2003 (attached hereto as Exhibit C). Petitioners allege and show the Court as follows:

PETITIONER

1. Petitioner FORE is an unincorporated, grass-roots, citizen association consisting of Wisconsin residents and University of Wisconsin-Madison students, many of whom pay Wisconsin taxes, tuition to the University of Wisconsin, and utility rates charged by Madison Gas & Electric ("MGE"). Many FORE members reside near the WCCF site. FORE is concerned about the environment and the quality of life enjoyed by its members. FORE promotes cost-effective energy solutions consistent with a healthy environment. FORE is governed by a five-member executive committee and a broader steering group comprised of Madison residents, University of Wisconsin-Madison students, faculty and staff, and financial and technical professionals. FORE actively participated in the review of the WCCF project by the PSC and consistently took the position that the Wisconsin Department of Administration ("DOA") and the University of Wisconsin Board of Regents ("UW") had failed to comply with Wis. Stat. § 1.11 relative to this matter. Additionally, FORE was provided Intervenor Compensation funding by the PSC and was a full intervening party in the underlying contested case proceedings on the WCCF conducted by the PSC. The quality of life and property of FORE's members will be adversely affected by the WCCF and FORE is, therefore, aggrieved by the final decisions (and non-decisions) of Respondents relative to the proposed WCCF, as set forth

in the decisions of the PSC, dated October 9, 2003 and corrected on October 27, 2003 (attached hereto as Exhibits A & B), and of the DNR, dated July 29, 2003 (attached hereto as Exhibit C).

RESPONDENTS

2. Respondent PSC is an agency of the State of Wisconsin, created under Wis. Stat. § 15.79, whose principal office is located at 610 North Whitney Way, 610 North Whitney Way, Madison, WI 53707-7854. The PSC has responsibility for the regulation of electric utilities, pursuant to Wis. Stat. ch. 196. The PSC and the other Respondents have a responsibility to evaluate the full range of environmental impacts and reasonable alternatives to the WCCF under Wisconsin's Environmental Policy Act, Wis. Stat. § 1.11 ("WEPA"). Pursuant to Wis. Stat. § 196.41 and relevant case law, any PSC order or determination may be reviewed under Wis. Stat. ch. 227. The final decisions of the PSC in this matter are subject to review under Wis. Stat. ch. 227.

3. Respondent DNR is an agency of the State of Wisconsin, created under Wis. Stat. § 15.34, whose principal office is located at 101 South Webster Street P.O. Box 7921, Madison, WI 53707-7921. The DNR has responsibility for air pollution controls necessary for the WCCF under Wis. Stats. §§ 285.60, 285.61 and 285.62, and chs. NR 406 and 407, Wis. Admin. Code. The DNR has responsibility for wastewater permits and approvals for the WCCF, including construction storm water management approval under ch. NR 216, Wis. Admin. Code. The DNR also has responsibility for water loss registration and approvals for the WCCF under NR 142, Wis. Admin. Code, and for permits issued to WCCF under Wis. Stat. ch. 30 for installation of pipelines and related facilities. Additionally, the DNR and the other Respondents have a responsibility

to evaluate the full range of environmental impacts and reasonable alternatives to the WCCF under WEPA. The final decisions of the DNR in this matter are subject to review under Wis. Stat. ch. 227.

4. Respondent UW is a body corporate created by the State of Wisconsin under Wis. Stat. ch. 36. The UW owns the real property at the WCCF site and was a party and co-applicant with MGE in the underlying PSC proceedings. The UW and the DOA were responsible for making decisions that led to entering into negotiations and agreements with MGE for the development and siting of the WCCF on real property held by the UW even before the WCCF project application was submitted to the PSC by MGE. This property is under the control of the DOA and the Wisconsin Building Commission. Because of the substantial state investment required, and the significant social and environmental impacts associated with the WCCF project, the UW and the DOA had a duty under WEPA to evaluate the full range of reasonable alternatives that would meet the energy and steam reliability needs of the UW Madison campus in the future, including alternatives to the WCCF that did not involve MGE; however, the UW and the DOA failed to do so and thus violated WEPA. The final decisions (and non-decisions) of the DOA and the UW in this matter are subject to review under Wis. Stat. ch. 227.

5. Respondent DOA is an agency of the State of Wisconsin, created under Wis. Stat. § 15.10, whose principal office is located at 101 East Wilson Street, Madison, WI 53703. The DOA and the UW were responsible for making decisions that led to entering into negotiations and agreements with MGE for the development and siting of the WCCF on real property held by the UW and the DOA even before the WCCF project

application was submitted to the PSC by MGE. This property is under the control of the DOA and the Wisconsin Building Commission. Because of the substantial state investment required, and the significant social and environmental impacts associated with the WCCF project, the DOA and the UW had a duty under WEPA to evaluate the full range of reasonable alternatives that would meet the energy and steam reliability needs of the UW Madison campus in the future, including alternatives to the WCCF that did not involve MGE; however, the DOA and the UW failed to do so and thus violated WEPA. The final decisions (and non-decisions) of the DOA and the UW in this matter are subject to review under Wis. Stat. ch. 227.

BACKGROUND

6. The WCCF was formally proposed in June 2002, when MGE, MGE Power LLC (“MGE Power”), a non-utility affiliate, and MGE Energy, Inc. (“MGE Energy”), a holding company (collectively, “MGE”), applied to the PSC (a/k/a “Commission”) for a CPCN under Wis. Stat. § 196.491(3) and Wis. Admin. Code ch. PSC 111, and for any additional approvals required from the PSC to construct and operate a large electric power generating facility under Wisconsin’s leased generation statute, Wis. Stat. § 196.52 (9).

7. MGE’s application was supplemented at various times in August through October 2002, and the PSC determined that the application was complete on October 21, 2002. (PSC Contested Case Hearing Trans. (“Trans”) at 385-387; Ex. 35 at xv.)

8. In April 2003, and again in June 2003 in response to a letter of May 29, 2003 from Administrative Law Judge David C. Whitcomb, FORE requested the PSC to

reconsider its completeness determination of October 21, 2002. These requests were denied by the Commission in an order mailed to the parties by the PSC on June 30, 2003.

9. According to the Final Environmental Impact Statement (“FEIS”) for the WCCF prepared by PSC and DNR staff:

The facility is expected to be a cogeneration facility located on the campus of the University of Wisconsin-Madison (UW). It would be capable of providing a nominal 150 megawatts (MW) of electric power, plus 500,000 pounds per hour of steam and 20,000 tons of chilled water capacity. It would be fueled primarily by natural gas with ultra-low sulfur distillate fuel (0.003 percent sulfur) serving as a backup fuel. Chilled water would be provided from electric motor-driven chillers. The UW uses steam and chilled water primarily for heating and air conditioning on the Madison campus. The entire facility is referred to as the West Campus Cogeneration Facility (WCCF).

(Trans. at 385-387; Ex. 35 at xv.)

10. The proposed location of the WCCF is “adjacent to and north of the existing UW West Campus Heating Plant located on the 500 block of Walnut Street in Madison, Wisconsin, on the UW campus. The site occupies approximately 4.5 acres and is currently used for agricultural crop research.” (*Id.*)

11. According to the FEIS, the WCCF would qualify as a cogeneration plant under federal law, 18 CFR § 292.205, as referenced in Wis. Admin. Code § PSC 111.53(2)(b). (Ex. 35 at xv-xvi.) MGE proposed to comply with PSC ch. 111 “by providing two alternative plant configurations on the same site rather than two alternative locations.” (*Id.*)

12. The FEIS states that:

The location of the proposed site is based on decisions made by the Wisconsin Department of Administration (DOA) Division of Facilities Development (DFD). All real

property held by the UW System's Board of Regents is under control of the DFD and the Wisconsin Building Commission. It appears that the proposed site was identified by MGE because it was previously identified as the location for expansion of utility facilities on the UW campus and reserved for utility use in the UW's current Madison Campus Master Plan.

The DFD has indicated that, although it would normally prepare an environmental assessment or an environmental impact statement for siting a project such as the WCCF, it did not in this case. Instead, it deferred WEPA compliance to MGE's CPCN application review. However, because the UW Board of Regents has already approved the project, and the Building Commission, which controls the site, has already authorized construction of the WCCF at this location only (in May 2002), the Commission does not have alternative sites to consider in this docket.

(Trans. at 385-387; Ex. 35 at xvi.)

13. The proposed WCCF is expected to cause numerous environmental impacts, chief among them increased air pollution, water quantity and quality impacts, and increased noise emissions. (See Trans. at 385-387, Ex. 35 at xxi-xxvi & 87-199; Trans. at 430-547 & 813-849; Exs. 43-46.)

14. Notwithstanding the opposition of FORE and many other individual citizens who testified in opposition to the WCCF project, the PSC issued its "Final Decision" approving the WCCF with conditions on October 9, 2003. (Attached as Exhibit A.) the PSC subsequently issued a "Corrected Final Decision" on October 27, 2003. (Attached as Exhibit B.) The DNR issued its final decision on WEPA compliance for the WCCF on July 29, 2003. (Attached as Exhibit C.) Exhibits A, B and C, attached hereto, contain additional information concerning this matter which is incorporated herein by reference.

CLAIMS & GROUNDS FOR REVIEW

I. The DOA And The UW Failed To Fulfill Their Independent Duties Under WEPA.

15. Petitioners incorporate by reference all allegations set forth in the preceding paragraphs.

16. The DOA and the UW failed to fulfill their independent duties under WEPA, Wis. Stat. § 1.11, to evaluate the full range of reasonable alternatives to the WCCF to meet the UW's energy and steam reliability needs in the future and to minimize adverse social, economic and environmental impacts to state taxpayers, UW students, and nearby residents.

17. Key decision-makers within the DOA and the UW deliberately decided (before the WCCF project application was even submitted to the PSC) not to analyze the full range of reasonable alternatives to the WCCF and, instead, decided to fully support the WCCF project in conjunction with MGE even though a smaller, alternative plant owned and operated by the UW and the DOA would have yielded lower public costs, more reliable energy and steam for the UW, and reduced adverse environmental impacts to the community

18. At least one and possibly other key UW and DOA decision-makers had apparent conflicts of interest relative to the UW's and DOA's actions in this matter that were not disclosed during the PSC proceedings. (*See Exhibit D.*)

19. The final decisions (and non-decisions) of the DOA and the UW relative to the WCCF were arbitrary, capricious, erroneous and contrary to law under WEPA, Wis. Stat. § 1.11, and must be set aside or remanded with directions. This is because the substantial state investment required, coupled with the significant social and

environmental impacts associated with the WCCF project, meant that the UW and the DOA had an independent duty under WEPA, which could not simply be “deferred” to the WEPA review of the WCCF project by the PSC and the DNR, to evaluate the full range of reasonable alternatives that would meet the energy and steam needs of the UW Madison campus in the future, including alternatives to the WCCF that did not involve MGE.

II. The Joint PSC & DNR FEIS For The WCCF Was Inadequate And Failed To Comply With WEPA.

20. Petitioners incorporate by reference all allegations set forth in the preceding paragraphs.

21. The PSC erroneously determined that the WCCF qualified as an existing cogeneration facility entitling it to a more circumscribed PSC and WEPA review of alternative sites, alternative ownership and operating arrangements, and alternative plant sizes and configurations.

22. The FEIS did not adequately consider the full range of reasonable alternatives to the WCCF that should have been explored by the PSC and the DNR in cooperation with the UW and the DOA.

23. The FEIS did not adequately consider the adverse environmental impacts or required local approvals that would be needed for excavation and dewatering of the WCCF site.

24. The FEIS did not adequately consider the air pollution control technology alternatives, particularly the use of new “SCONOX” technology, to reduce air emissions from the WCCF.

25. The FEIS did not adequately consider the potential risks to public health and safety that could result from potential acts of terrorism against the WCCF.

26. The PSC failed to fulfill its duty under Wis. Admin. Code § PSC 4.60 to properly consult and enter an agreement with the DOA and the UW to develop a joint environmental impact statement that would satisfy the WEPA obligations of all Respondents in this matter.

27. The final decisions (and non-decisions) of the PSC and the DNR relative to the FEIS for the WCCF were arbitrary, capricious, erroneous and contrary to law under Wis. Stat. § 1.11 (WEPA) and must be set aside, or remanded with directions, because the FEIS was inadequate.

III. The PSC's Completeness Determination Was Premature And In Error.

28. Petitioners incorporate by reference all allegations set forth in the preceding paragraphs.

29. The PSC's completeness determination in this matter was premature and in error because it denied FORE's members full and timely notice of MGE's proposal and the full range of other reasonable alternatives. Therefore, the PSC's completeness determination interfered with FORE's right to full and meaningful due process of law and public participation under WEPA, Wis. Stat. § 1.11, Wis. Stat. § 196.491(3), and Wis. Stat. ch. 227.

30. The PSC's completeness determination relative to the WCCF was arbitrary, capricious, erroneous and contrary to law under WEPA, Wis. Stat. § 1.11, Wis. Stat. § 196.491(3), and Wis. Stat. ch. 227, and must be set aside or remanded to the PSC with directions.

IV. The WCCF Project Did Not Qualify For A CPCN Under Wis. Stat. § 196.491(3)(d)3. & 4.

31. Petitioners incorporate by reference all allegations set forth in the preceding paragraphs.

32. The WCCF project did not qualify for a CPCN under Wis. Stat. § 196.491(3)(d)3. & 4. because alternative locations for the WCCF plant were not presented by MGE and thus the PSC did not reasonably find that the site of the proposed plant was in the public interest based on any consideration of alternative locations.

33. As approved by the PSC, the WCCF would cause undue adverse environmental impacts to nearby residential areas from substantially increased noise emissions.

34. As approved by the PSC, the WCCF would create an increased safety risk in a residential area which is not in the public interest.

35. As approved by the PSC, the WCCF would cause a net increase in local air pollution, unless the PSC or the DNR subsequently order MGE to reduce WCCF air emissions by installing "SCONOX" technology and by reducing emissions at MGE's existing Blount Street plant.

36. The PSC's final decision to approve the CPCN for the WCCF under Wis. Stat. § 196.491(3)(d)3. & 4. was arbitrary, capricious, erroneous and contrary to law and must be set aside or remanded to the PSC with directions.

RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request that the Court grant the following relief, pursuant to Wis. Stat. §§ 1.11 and 227.52 to 227.58:

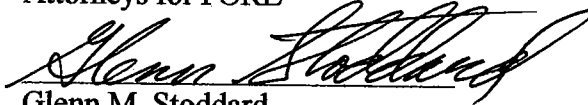
1. That the Court enter an expedited scheduling order for judicial review of this matter because certain excavation activities have already begun at the WCCF site;
2. That the Court declare that the final decisions (and non-decisions) of the DOA and the UW relative to the WCCF were arbitrary, capricious, erroneous and contrary to law under WEPA, Wis. Stat. § 1.11, because the UW and the DOA had an independent duty to evaluate the full range of reasonable alternatives that would meet the energy and steam reliability needs of the UW Madison campus in the future, including alternatives to the WCCF that did not involve MGE;
3. That the Court declare that the final decisions (and non-decisions) of the PSC and the DNR relative to the FEIS for the WCCF project were arbitrary, capricious, erroneous and contrary to law under WEPA, Wis. Stat. § 1.11, because the FEIS was inadequate;
4. That the Court declare that the PSC's completeness determination relative to the WCCF was premature and, therefore, arbitrary, capricious, erroneous and contrary to law under WEPA, Wis. Stat. § 1.11, and Wis. Stat. § 196.491(3), and Wis. Stat. ch. 227;
5. That the Court declare that the WCCF project does not qualify for a CPCN under Wis. Stat. § 196.491(3)(d)3. & 4.;
6. That the Court set aside, or remand with directions to all Respondents, the final decisions (and non-decisions) of Respondents relative to the WCCF, including but not limited to the decisions of the PSC, dated October 9, 2003 and corrected on October 27, 2003 (attached hereto as Exhibits A & B), and of the DNR, dated July 29, 2003 (attached hereto as Exhibit C).; and

7. That the Court order such other relief as it deems appropriate under the circumstances.

Dated this 6th day of November, 2003.

GARVEY & STODDARD, S.C.

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