

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Application of Madison Gas and Electric Company for a Certificate of Public Convenience and Necessity for Construction of a Large Electric Generating Facility and Associated High Voltage Transmission and Natural Gas Interconnection Facilities Located in Dane County

05-CE-121

OFFICIAL FILING

INITIAL BRIEF OF FRIENDS OF RESPONSIBLE ENERGY (FORE)

Friends Of Responsible Energy (“FORE”), by its attorneys, Garvey & Stoddard, S.C., submits this initial brief in the above-captioned case. For the reasons set forth below, the PSC is requested to: 1) deny Madison Gas and Electric Company’s (“MGE’s”) application or a Certificate of Public Convenience and Necessity (“CPCN”) for the proposed West Campus Cogeneration Facility (“WCCF”) project in this matter; 2) decide that the Final Environmental Impact Statement (“FEIS”) and Draft Environmental Impact Statement (“DEIS”) for the WCCF project are inadequate and must be revised, because the Public Service Commission of Wisconsin (“PSC”) and the Wisconsin Department of Administration (“DOA”) have failed to properly fulfill their respective duties under the Wisconsin Environmental Policy Act, Wis. Stat. § 1.11 (“WEPA”); and 3) refer this matter to the DOA for further review under WEPA and Wis. Admin. Code ch. ADM 60.

BACKGROUND

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 (hereinafter collectively referred to as “MGE”), applied to the PSC (a/ka “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). 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. (Trans. at 385-387; Ex. 35 at xv.) 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.

According to the FEIS for the WCCF prepared by PSC staff and staff of the Wisconsin Department of Natural Resources (“DNR”):

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.)

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.*)

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 has proposed to comply with PSC ch. 111 “by providing two alternative plant configurations on the same site rather than two alternative locations.” (*Id.*)

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.)

If approved, the proposed WCCF would 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.)

ARGUMENT

I. THE WCCF PROJECT DOES NOT QUALIFY FOR A CPCN UNDER WIS STAT. § 196.491(3)(d)3. & 4.

The PSC cannot approve a CPCN for the proposed WCCF electric generating facility unless it finds that “[t]he 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....” Wis. Stat. § 196.491(3)(d)3.

Additionally, in order to approve the WCCF project the PSC must find that:

4. The proposed facility will not have an 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.

Wis. Stat. § 196.491(3)(d)4.

1. The WCCF Project Cannot Qualify for A CPCN Because Alternative Locations for the Plant have Not Been Presented by MGE; Therefore, the PSC Cannot Find that the Location of the Proposed Plant is in the Public Interest Based on Any Consideration of Alternative Locations.

The FEIS states that “MGE has proposed that its compliance with PSC 111 be met by providing two alternative plant configurations on the same site rather than two alternative locations.” (Trans. at 385-387, Ex. 35 at xvi.) As a result, the WCCF project has been proposed for only a single site on the UW campus.

However, Wis. Admin. Code § PSC 111.53(2)(b)1. provides that:

(b) 1. An application for a cogeneration facility may meet the requirements of sub. (1) (e) by filing information **on 2 sites that are both located at the steam host's existing industrial plant**, if the cogeneration facility will be a qualifying facility under 18 CFR 292.205 and none of the needed infrastructure improvements would constitute a major action significantly affecting the quality of the human environment under s. 1.11(2)(c), Stats.

Wis. Admin. Code § PSC 111.53(2)(b)1. (emphasis added). Thus, an applicant for a CPCN for such a facility must file information with the PSC “on 2 sites that are both located at the steam host’s existing industrial plant” not just one, in order to meet the requirements of Wis. Admin. Code § PSC 111.53(2)(b)1. So, MGE’s application does not qualify under this exemption from Wis. Admin. Code § PSC 111.53(1) because it has been proposed for only one site on the UW campus.

Likewise, under Wis. Admin. Code § PSC 111.53(1)(e), MGE is required to provide the PSC with information in its CPCN application on “[a]t least two proposed sites for the proposed facility, including a description of the siting process and a list of the factors considered in choosing alternatives.” Wis. Admin. Code § PSC 111.53(1)(e) (emphasis added). The record in this case shows that MGE has not met this requirement either. Therefore, MGE’s application for a CPCN must be denied by the PSC because it does not comply with any subsection of Wis. Admin. Code § PSC 111.53.

2. The WCCF Should Not be Granted a CPCN Because it Will Cause Undue Adverse Environmental Impacts to Nearby Residential Areas from Substantially Increased Noise Emissions.

As noted above, in order to approve a CPCN for the WCCF the PSC must find that “[t]he design and location...is in the public interest considering alternative sources of supply, alternative locations...and **environmental factors**....” Wis. Stat. §

196.491(3)(d)3. (emphasis added). Additionally, such a project may “not have an 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.” Wis. Stat. § 196.491(3)(d)4. (emphasis added). It is undisputed that a major environmental and public health factor in this case is the potential undue adverse impact of noise emissions from the WCCF on nearby residents, if the WCCF is constructed and put into operation as planned by MGE.

A substantial amount of evidence was presented in the technical hearings in this case on the issue of likely noise impacts from the WCCF. This issue is discussed at pages 171 to 184 of the FEIS. (Ex. 35 at 171-184.) During the technical hearings, MGE presented a “noise panel,” consisting of George Hessler, Stephen R. Pitts, and Stephanie Rath Schwartz. (Trans. at 430-481.) Additionally, FORE had its own noise expert, George Kamperman, who testified during the technical hearings on the noise impacts that can be expected from the WCCF, if approved by the PSC. (Trans. at 481-533; see also 533-547 & 813-849.)

Not surprisingly, all the noise witnesses seemed to agree that the WCCF would cause noticeably increased noise levels in the surrounding residential area. The witnesses disagreed, however, over how significant the increased noise levels would be at various locations, times, and under various weather conditions. The noise discussion in the FEIS, which is based largely on modeling data using ideal weather conditions provided to the PSC staff by MGE and its consultants, states that “it is not expected that the WCCF would cause a noticeable increase in low-frequency noise or vibration at any of the sample receptor locations (MPs).” (Ex. 35 at 183.)

Likewise, George Hessler, one of MGE's noise witnesses, generally testified in support of the WCCF project by downplaying the increased noise emissions that would be caused by its construction and operation. When asked in his pre-filed rebuttal testimony about what he thought residents near the facility would experience if the WCCF is constructed, Mr. Hessler testified predictably that, in his opinion:

For the vast majority o[n] a typical day, the facility noise would not be perceptible to residents in the area. During very late night and early morning hours when traffic subsides in the area, low-level noise may become audible outdoors in the residential community. Though audible, the level would be low and subjectively judged at "faint or quiet" from most observers. The sound emissions would not be perceptible inside of the single-family residences with open or closed windows including those facing north. Noise from the facility at full load could be detectable during late night or early morning hours at the apartments along University Avenue with open windows facing north and when air conditioning or heating airflow is not occurring. Sound from normal window/wall air conditioning or fans would mask any noise from the facility....

(Trans. at 456; Hessler Rebuttal at 6.) Mr. Hessler also, of course, testified that he "believe[s] the facility is designed properly with regard to noise emissions and will be environmentally compatible with the community." (Trans. at 458; Hessler Rebuttal at 8.)

However, another of MGE's noise witnesses, Stephanie Rath Schwarz, admitted under cross-examination that the noise modeling performed by her company for MGE for the WCCF project was based on modeling under essentially still, rather than windy, weather conditions. (Trans. at 465.) Ms. Rath Schwarz had to further admit that wind conditions could have a dramatic effect on the noise that would be heard from the proposed WCCF. (Trans. at 466.) Likewise, Mr. Hessler admitted under cross-examination that weather conditions would "play a role" in the perceptible noise from the

WCCF. (Trans. at 476.) He indicated that, “[a]t small distances, the magnitude of [400 feet] to 700 feet, the closest receptors [used in MGE’s modeling], the increase due to adverse sound propagation conditions would be relatively small. As you go further away, the affects become more—become variable.” (Trans. at 476-477.)

FORE’s noise expert, George Kamperman, took issue with much of the testimony of MGE’s witnesses and particularly with their attempts to downplay the increased noise emissions that would be caused by the WCCF. First, Mr. Kamperman pointed out that MGE’s noise witnesses erroneously claimed that the nearest areas of residential land use to the proposed WCCF were 700 feet away, when “according to the DEIS at page 147, the nearest apartment buildings are 400 feet south of the WCCF.” (Trans. at 514; Kamperman Surrebuttal at 7.)

Second, Mr. Kamperman took issue with the failure of MGE’s witnesses to fully address the fact that wind and weather conditions would dramatically increase the noise levels that could be heard by nearby residents from the WCCF’s three large cooling towers, which are to be built by Marley Engineering for MGE. On this issue, Mr. Kamperman testified as follows:

To be conservative, I have assumed 450 feet [from the nearest apartment building] to the south wall of the WCCF. The cooling towers above the roof of the WCCF represent the most significant source of noise associated with the entire WCCF facility. The three Marley cooling towers are to be elevated 38 to 60 feet above grade plus an additional 20 plus feet for tower and fan discharge noise barrier. The noise from the three large cooling towers is projected to be about one-half (43.4 dBA of the 47 dBA at Location 3) of the total noise energy emission from the WCCF facility at 900 feet. The situation is the same at Location 1 at 1899 feet south of the WCCF where the WGI projected NO WIND noise level is 43 dBA of which 40 dBA is due to the three cooling towers. All assumptions on the part of

Marley and the WGI design are based on a homogenous atmosphere and NO WIND. In my discussions with the Marley technical engineer, Mr. Roger Roemer, on the particular cooling towers for the WCCF (see Exhibit 45) it became apparent to expect a typical noise increase of 5 dBA to 10 dBA downwind of the WCCF. The worst case is expected to be 10 dBA to 15 dBA noise increase downwind. **It is my professional opinion that these cooling towers present a very serious noise problem.** The cooling tower designs already incorporate all the noise control features practical for this type of cooling tower. There is no simple answer to this most serious noise problem.

(Trans. at 514-515; Kamperman Surrebuttal at 7-8.) (emphasis added).¹

Given the above, Mr. Kamperman pointed out that the projected noise levels from the three Marley cooling towers would increase “very significantly” during normal operating conditions downwind of the WCCF or “if there is a temperature inversion above the WCCF (a common condition during nighttime).” He further testified that, “[i]f we assume a 10 dB noise level increase in the cooling tower noise emission only, both City of Milwaukee and State of Illinois noise limits would be violated at Location 2 at 720 feet and Location 3 at 900 feet. The State of Illinois limits would be violated at Location 1 at a distance of 1800 feet from the WCCF.” (Trans. at 516; Kamperman Surrebuttal at 9.)

Third, Mr. Kamperman differed with MGE’s primary noise witness, Mr. Hessler, on the potential for adverse health impacts from low frequency noise emissions emitted by the WCCF. Mr. Kamperman testified that:

¹ It must be noted that MGE’s attorneys made a feeble attempt to impeach Mr. Kamperman’s credibility by challenging his testimony concerning the information he obtained directly from Mr. Roemer, of Marley Engineering, on the effect of wind on the projected noise levels from the three Marley cooling towers. Any objective reviewer of this impeachment effort, however, would have to conclude that it backfired badly on MGE and that Mr. Kamperman’s testimony was shown to be highly credible and reliable. Moreover, MGE’s impeachment effort all but proved that the three Marley cooling towers will be very noisy for anyone living downwind of them. (See Trans. at 533-547 & 813-849; see also Ex. 73.)

Low frequency noise is a special problem with power plants and combustion turbine facilities in particular. Low frequency noise is usually considered the frequency range between about 10 Hz and 200 Hz. A small percent of the population exposed to low frequency noise become highly annoyed even if the noise level is so low that it is near the threshold of hearing or barely audible in a quiet room. If the low frequency noise level is high enough to become clearly audible in a quiet room, a greater number of people become highly annoyed. Persons highly annoyed by low frequency noise develop numerous undesirable health effects. Five European countries have similar low frequency noise limit standards that limit low frequency noise below the normal threshold of hearing inside a dwelling. **It is my professional opinion that a low frequency limit of 60 dBC outside the nearest residential structure is required to minimize the number of persons [who would be] highly annoyed by low frequency noise from the WCCF operation.**²

(Trans. at 517-518; Kamperman Surrebuttal at 10-11.) (emphasis added).

Finally, Mr. Kamperman took issue with Mr. Hessler's opinion that the WCCF would be able to meet the noise standards of all other states having such standards, including the State of Illinois standards. On this issue, Mr. Kamperman, who was one of the author's of the noise standards adopted by the State of Illinois, testified in his surrebuttal testimony that:

This is a misinterpretation by Mr. Hessler and demonstrates he does not understand the Illinois standard. A-weighted (dBA) or C-weighted (dBC) noise level limits are not a part of the Illinois standard applicable to facilities including the WCCF. The Illinois limits are only specified in octave frequency bands shown in Exhibit 42 (GFH-6). The projected noise levels for the WCCF cannot meet the "Illinois Nighttime Limit, C To A Zoning" shown in this

² Earlier in his surrebuttal testimony Mr. Kamperman testified that: "Based on the WGI noise model I project the WCCF noise level outside the nearest dwelling to be greater than 53 dBA and 72 dBC." (*See* Trans. at 512; Kamperman Surrebuttal at 5.) Thus, based on the WGI noise model the projected WCCF noise level outside the nearest residential structure would exceed the 60 dBC maximum recommended by Mr. Kamperman by more than 12 dBC. This low frequency noise emitted by the WCCF is likely to be highly annoying and cause a nuisance to the WCCF's nearest residents.

Exhibit. The word “ZONING” is wrong. The correct term is: “Land Use.” The “ENFORCEABLE ‘LIMITS’” on the right side of Exhibit 42 (GFH-6) are the fabrication of Mr. Hessler and have nothing to do with the Illinois Noise Standard. The noise from any industrial land use that exceeds any of the nine octave frequency band levels at a residential land use property line is in violation of the Illinois Standard. For example, a narrow band of high frequency noise may exceed the Illinois nighttime limit and read less than 40 dBA on a simple sound level meter. And a low frequency rumble may also exceed the nighttime limits and register less than 65 dBC on the simple sound level meter. Specifying noise limits in octave frequency bands can provide far more protection for the nearby residents than can be achieved with a combined dBA and dBC limit specification.

(Trans. at 513; Kamperman Surrebuttal at 6.) Later in his surrebuttal testimony, Mr. Kamperman testified further about the Illinois noise standards and rendered the following opinions concerning the WCCF:

If Mr. Hessler feels so confident about the controlled noise emissions from the WCCF I strongly recommend [that] the Commission and the City of Madison adopt the State of Illinois Noise Standard and use its Site Specific Rules for the WCCF for enforcing WCCF noise emission limits in this case over the entire residential land use area within one-half mile of the facility. The Illinois standard is up to date with references to all the current American National Institute of Standards needed to address all issues for proper measurement of the noise emission[s] from the WCCF. Hessler Exhibit 42 (GFH-6) shows the Illinois daytime and nighttime octave frequency band limits that apply where residential land use is next to heavy industrial land use. It is the responsibility of each industrial entity (Property Line Noise Source) not to exceed any of the nine octave band limits at the nearest residence (Residential Receiving Property Line). If the WCCF were to be built in Illinois the facility would be automatically required to meet the Illinois daytime and nighttime octave band limits at all times irrespective of weather conditions. **It is my professional opinion that [MGE] should be required (and be willing) to provide the same degree of noise control that would be required of a similar facility in**

Illinois, to afford the Madison residents the same degree of protection from excessive noise. It is also my professional opinion [that] the WCCF violates the Illinois noise standards and the present design concept cannot be improved sufficiently to meet the Illinois noise limits with residents downwind of the facility. Therefore, I recommend that [the] Commission not approve construction of the WCCF at the proposed location.

(Trans. at 519-520; Kamperman Surrebutal at 12-13.) (emphasis added).

For all of the reasons set forth by Mr. Kamperman, the PSC should find that the proposed WCCF would cause undue adverse environmental and public health impacts to surrounding residential areas due to the increased noise emissions that would come from the plant and its three Marley cooling towers. Consequently, the PSC should deny MGE's request for a CPCN for the WCCF under Wis. Stat. § 196.491(3) (d) 3. & 4.

3. The WCCF Cannot Qualify for a CPCN Because it will Create an Increased Safety Risk in a Residential Area which is Not in the Public Interest.

The PSC cannot approve a CPCN for the proposed WCCF electric generating facility unless it finds that “[t]he design and location...is **in the public interest considering** alternative sources of supply, **alternative locations** or routes..., **safety**,...and environmental factors....” Wis. Stat. § 196.491(3)(d)3. (emphasis added). As such, the location of the plant relative to public safety is an important consideration for the PSC in the decision on whether to allow the WCCF to be developed as proposed by MGE and the UW.

During the technical hearings there was virtually no testimony concerning the public safety risks associated with the location of the WCCF on the UW campus, which is surrounded by residential areas. However, this issue is something that must not be

overlooked or swept under the carpet by the PSC, given the serious public safety risks from possible accidents at the WCCF and the domestic security concerns relative to the possibility of terrorism targeted at electrical generating facilities in the United States. Fortunately, these public safety issues were addressed in the public hearings in this case by Ms. Andrea Frank, a doctoral candidate at the UW Madison who holds a Bachelor's Degree in community health from the UW LaCrosse and Master's Degree in health promotion from Purdue University. (*See Trans. at 1275-1276.*)

Ms. Frank's testimony regarding the public health and safety risks associated with accidents and the possibility of terrorism directed at power plants, particularly when located in urban areas, was well researched and highly informative. She made a strong case for why the PSC should find that the proposed WCCF could well become a public safety nightmare waiting to happen, and thus why it should be rejected by the PSC. (*See Trans. at 1278-1287.*) Without quoting or repeating the testimony here, FORE strongly encourages the PSC to read and carefully consider Ms. Frank's testimony on this issue and to find that the proposed WCCF would create an undue adverse public safety risk to the UW campus and surrounding residents of the City of Madison. Additionally, FORE requests that the PSC deny MGE its requested CPCN, in part, for the safety and security reasons set forth in Ms. Frank's testimony.

4. The WCCF Will Cause a Net Increase in Local Air Pollution Unless the PSC Orders MGE to Reduce Air Emissions at its Blount Street Plant as Part of the So-Called "Mitigation Plan."

The FEIS for the WCCF project states that:

The project will meet all air quality standards applicable in the state. However, it would consume much of the margin for clean air for some pollutants. Modeling shows that the facility would meet potential standards for PM_{2.5}, which

are expected to go into effect in the near future. An air quality mitigation plan developed by MGE, the UW, and other concerned parties should address any concerns related to air quality impacts of this proposal. Other health risks due to air pollution emissions have been modeled, and are expected to be very small.

(Ex. 35 at xxi.) However, the FEIS also states that, “[m]odeling conducted by the DNR concludes that the proposed project would result in **a net increase in fine particulate and other pollutant concentrations in the vicinity of the plant**, as measured at University Avenue and Franklin Street.” (Ex. 35 at 93.) (emphasis added).

Although MGE and the UW have negotiated various agreements or memoranda of understanding (“MOUs”) with the City of Madison, the Regent Neighborhood Association, and others, and although these MOUs have as one of their goals the mitigation of the additional air pollution that would be created by the proposed WCCF plant, the mitigation of this additional pollution would depend entirely on reductions in other off-site sources of air pollution, according to Jeffrey Jaeckels, MGE’s primary air quality and emissions consultant. (Trans. at 359-374.) Additionally, mitigation of the increased air pollutants from the WCCF through other off-site reductions is goal-based, rather than based on any enforceable regulatory provisions. However, the goals set in the MOUs simply cannot be enforced by the signatory parties because they simply rely on voluntary actions by MGE and others. (*Id.*) Moreover, it is unclear from the FEIS and the MOUs what the baseline for these mitigation efforts would be.

Thus, the much-touted air mitigation plan of MGE and the other parties to the MOUs is arguably wishful thinking on the part of the other parties, and window dressing on the part of MGE. Unfortunately, the MOUs have been used by MGE to support approval of the proposed WCCF by the media, the public, the DOA, the PSC, the DNR,

the governor, and most recently the State Building Commission. These MOUs obviously made for good press releases and editorials in the local newspapers. But unfortunately they are unlikely to accomplish any real mitigation of the increased air pollution that will be caused by the WCCF, if approved.

In reality, the only way for the PSC to ensure real air quality mitigation would be for it require MGE, itself, to mitigate the WCCF's increased air pollution by reducing, on a one-for-one basis, the levels of all air pollutants that would be emitted from MGE's Blount Street plant as a condition of approval of the WCCF. This would make sense, of course, only if the PSC approves the WCCF with meaningful conditions to meet the letter and spirit of the law to protect the public interest and the environment. With respect to this type of ordered mitigation by MGE, it is important to note that Mr. Jaeckels testified under cross-examination that "internally MG&E could potentially reduce the emissions at the Blount Street plant to be part of that mitigation plan." (*See* Trans. at 373.)³ FORE, therefore, urges the PSC to order MGE to implement its own mitigation of all of the increased air pollution that would be caused by the proposed WCCF as a condition to any CPCN over which it retains jurisdiction, if approved. As a part of this, however, FORE urges the PSC to also require that a baseline for implementing such mitigation be established by MGE in cooperation with the DNR.

II. THE DEIS AND FEIS FOR THE PROPOSED WCCF PROJECT ARE INADEQUATE AND FAIL TO COMPLY WITH WEPA.

³ Unfortunately, it took cross-examination at the technical hearings by FORE to bring this out. This begs the question of why MGE didn't offer to implement such mitigation as part of its CPCN application or, at least, as part of its MOUs. Perhaps the answer is that none of the other parties to the MOUs effectively pursued this issue in their negotiations with MGE. Or perhaps they were fooled by MGE, the UW and all the other advocates of this arguably over-sized and unnecessary project. Hopefully the PSC will not be fooled in this manner.

1. The PSC Erroneously Determined that MGE's Project Qualifies as an Existing Cogeneration Facility Entitling it to a More Circumscribed PSC and WEPA Review of Alternatives.

The PSC should have treated the WCCF project as one subject to review under Wis. Admin. Code § PSC 111.53(1) rather than Wis. Admin. Code § PSC 111.53(2)(b)1. Had the PSC done so, it would have had to prepare a DEIS and FEIS addressing the full range of alternatives to the proposed project, including smaller scale facilities, different locations, different plant designs, incremental build-outs, and information on locating the proposed project (or alternatives to it) on at least two different possible sites on the UW campus and elsewhere. Nonetheless, because the WCCF project was proposed for only a single site on the UW campus it does not qualify for the limited scope of review by the PSC under Wis. Admin. Code § PSC 111.53(2)(b)1. Consequently, the WCCF project does not qualify for the limited WEPA review it has received by the PSC and the DNR in this case. This is tacitly acknowledged in the FEIS for the project, which states that, “MGE has proposed that its compliance with PSC 111 be met by providing two alternative plant configurations on the same site rather than two alternative locations.” (Trans. at 385-387, Ex. 35 at xvi.) Of course, MGE is not proposing to replace or improve the existing industrial facility at Walnut Street, but is rather proposing to continue to operate that facility and build an entirely new plant at a different location.

Although PSC staff member, Ken Rineer, testified that if the WCCF's proposed “infrastructure improvements” were hypothetically proposed to be built at the same site on the UW campus without being a part of the “cogeneration plant itself,” he did not think an EIS would be required for those facilities by the PSC (Trans. at 391-392.), there can be no dispute that the information filed by MGE in support of the proposed WCCF

relates to only one and not two sites on the UW campus.⁴ However, Mr. Rineer was not asked his opinion about whether an EIS for such hypothetical facilities might have to be prepared by another agency of state government, such as the DOA. But regardless of what his response might have been to this question, the proposed WCCF simply does not qualify for the limited scope of PSC review set forth under Wis. Admin. Code § PSC 111.53(2)(b)1. because it is being proposed at a single site.

Furthermore, MGE's application does not even qualify at this time as being complete and ready for review under Wis. Admin. Code § PSC 111.53(1) because MGE has proposed only one site for the WCCF plant. *See* Wis. Admin. Code § PSC 111.53(1)(e). This issue was also addressed by Ms. Andrea Frank at the public hearings held on July 21, 2003. Ms. Frank put it well when she testified as follows:

I specifically draw your attention to PSC 111.53(1)(e) which requires that a complete CPCN for a large electric generating facility must contain, quote, "at least two proposed sites for the facility," unquote. Please note that MGE has failed to provide any alternative location for this facility. One and only one location near the WARF building has been proposed. MG&E should not be allowed to circumvent the statutory requirement by merely proposing two alternative plant layout configurations on a single site and suggesting that this miraculously fulfills the statutory need for them to propose two alternative locations. The Commission should reject their application on this basis alone.

(Trans. at 1277.) Given that MGE has failed to meet the requirements of Wis. Admin. Code § 111.53 by providing alternative sites for the plant, the PSC staff could not possibly evaluate the range of alternatives and potential environmental impacts of the

⁴ The UW campus is apparently considered by the PSC staff to be the "steam host's existing industrial plant" for purposes of Wis. Admin. Code § PSC 111.53(2)(b)1. (*See* June 19, 2003 Memorandum to the PSC from Robert Norcross Re: FORE's Request for Reconsideration of Completeness Determination in Docket 05-CE-121 at 12.)

proposed project if it had been proposed at other sites. Yet this is exactly what should have been done in order for the PSC staff to comply with WEPA and Wis. Admin. Code § PSC 4.60.

2. The DEIS and FEIS Did Not Adequately Consider at Several Alternatives to the Proposed WCCF that Should Have Been Explored in Much Greater Depth by MGE, the UW, and the PSC Staff.

The FEIS itself acknowledges that several alternative options to the proposed WCCF (two of which were analyzed by a consultant, Sebesta Blomberg & Associates, hired by the DOA) were not “filed with the Commission or analyzed by PSC staff.” (*See* Trans. at 385-387, Ex. 35 at 80.) On this the FEIS states that:

A report from Sebesta Blomberg & Associates, a consultant hired by the DOA, compared the costs for the UW to build and operate its own smaller, 45-MW plant with the cost for developing a 150-MW plant with MGE. Both plants would generate electricity from natural gas and provide steam to heat new campus buildings. The Sebesta Blomberg report also compared a third option of steam boilers and no electric generation. In addition, comments at a public hearing held by UW on March 13, 2003, to discuss the three options, included proposal of another electric generation alternative, two LM 6000 turbines for a total of 90 MW.

None of these four options were filed with the Commission or analyzed by PSC staff.

(Id.)

This is, in effect, an admission by the PSC staff that its hands were tied by MGE, the UW, and the PSC itself, because of the early determination that this project qualified for the limited scope of review set forth in Wis. Admin. Code § PSC 111.53(2)(b)1. As described above, however, that determination was in error from the outset. Had it not been made, MGE and the UW would have had to provide much more information to the PSC staff regarding alternatives to the proposed WCCF. If that had happened, the PSC

staff would have had a duty under WEPA to fully evaluate at least the four alternative options mentioned briefly but given short shrift in the FEIS.

Additionally, a more thoughtful consideration of other alternatives to the WCCF by its proponents and the PSC should have initially defined the “needs” which the WCCF is purportedly intended to meet. These include: 1) the UW’s need for additional chilled water and steam capacity; 2) the UW’s alleged need for greater electric reliability; and 3) MGE’s alleged need for additional generating capacity. Had the PSC’s WEPA analysis addressed these different “needs” in a more coherent manner other, better alternatives would almost certainly have been defined and analyzed. For example, one alternative would have been for the DOA and the UW to address the UW’s alleged need for more chilled water and steam capacity, coupled with its alleged need for greater electric reliability on campus, without any involvement by MGE. This could have yielded the alternative of a smaller 90-100 MW cogeneration plant to serve the needs of the UW campus. Had the DOA and the UW seriously advanced such a proposal and considered alternatives to it under WEPA through an EIS prepared by the DOA, they may not have had to seek PSC approval at all.

With respect to MGE’s alleged need for additional generating capacity, it could have proposed a very different project than the WCCF to meet that “need.” For example, MGE could have proposed a smaller power plant outside the City of Madison or the development of new renewable sources of energy to provide additional capacity and reliability for its customers. It was apparent from the technical hearing testimony that MGE’s customers would like to purchase more wind energy from MGE but the utility currently lacks enough capacity to meet customer demand. As such, one alternative

MGE should have proposed would have been development of a new wind energy farm that would look like the pretty pictures MGE uses on its billboards and billing statements. Such a project would almost certainly have fewer adverse environmental impacts than the proposed WCCF and would help align MGE's electric generation activities with its advertising and public relations activities.

In summary, the DEIS and FEIS did not adequately consider several alternatives to the proposed WCCF that should have been explored in much greater depth by MGE, the UW, and the PSC staff.

3. The PSC Failed to Fulfill its Duty Under Wis. Admin. Code § PSC 4.60 to Properly Consult and Enter an Agreement with DOA to Develop a Joint EIS that Would Satisfy the WEPA Obligations of Both Agencies.

The PSC has, in effect, taken the position that it has a limited scope of WEPA review relative to the DOA due to the fact that the project is proposed as a cogeneration facility. *See* Wis. Admin. Code § PSC 111.53(2)(b)1. The FEIS states that the DOA “deferred WEPA compliance to MGE’s CPCN application review” by the PSC in this case. (Ex. 35 at xvi.) However, in deferring administrative oversight to the PSC, whose charge is to review MGE’s application, DOA could not legally just defer its own obligation to review the environmental impacts of the State’s contribution to this project.

Although the PSC “may enter into agreements with other federal or state agencies to develop a joint EIS that satisfies the requirements of the participating agencies” under Wis. Admin. Code § PSC 4.60(3), FORE is aware of no provision in the law that relieves DOA of its independent duty under WEPA and Wis. Admin. Code ch. ADM 60 to prepare a complete EIS on the State’s behalf for this project. That duty cannot legally be deferred to the PSC as was done in this case without a formal agreement between the two

agencies. (See DEIS at Executive Summary, p. xiv.) In theory the DOA, the PSC, and the DNR could have all cooperated in doing a joint, three-way DEIS and FEIS for the project that would have satisfied WEPA. But neither the PSC nor the DOA apparently chose to do this, presumably because a broader review of the project would have been required had the the DOA been involved in preparing the DEIS and FEIS. The PSC's failure to insist that DOA be involved in the WEPA review of this project through a formal agreement, particularly in light of the PSC's awareness of the Sebesta Blomberg report as mentioned in the FEIS (Ex. 35 at 80), constitutes a failure on the part of the PSC to properly fulfill its own obligations under WEPA and Wis. Admin. Code § PSC 4.60.

4. The Commission's Erroneous Completeness Determination Interfered with FORE's Right to Full and Meaningful Participation under WEPA and Wis. Stat. ch. 227.

The late release of the PSC's FEIS in June 2003 was nearly simultaneous with the scheduled deadline for the filing of pre-filed direct testimony under the scheduling order set by Administrative Law Judge David C. Whitcomb in his letter of April 29, 2003, and in the Notice of Hearing issued by the PSC, dated June 3, 2003. This violated FORE's procedural rights under WEPA for a properly structured environmental review that fully informed the approval process of this MGE/UW/DOA-sponsored project. The PSC has a limited period of time in which to complete its work, 180 days with the possibility of a one-time extension of another 180 days. Wis. Stat. § 196.491(3)(g). By determining that the application was complete when it clearly was not, the PSC started the clock running on the length of time it could take to conduct its review. The constricted schedule significantly compromised the right of FORE and the public to full participation under

WEPA, Wis. Stat. ch. 227, and the PSC's administrative rules governing contested case hearings.⁵

III. THE DOA FAILED TO FULFILL ITS INDEPENDENT DUTY UNDER WEPA IN THIS MATTER.

This project is proposed to be built on State of Wisconsin property and to involve \$90 million in State expenditures. Regardless whether Wis. Admin. Code § PSC 111.53(2)(b) applies to the Commission's review of the MGE application, DOA has an independent duty under WEPA and Wis. Admin. Code ch. ADM 60, to prepare a complete EIS on the State's behalf. This EIS must consider a broad range of alternatives to the project, including smaller scale facilities, different locations, different plant designs, incremental build-outs, and the impact on UW and State ratepayers. As discussed above, one alternative would have been for the DOA and the UW to have proposed development of a smaller 90-100 MW cogeneration plant to serve the needs of the UW campus without any involvement by MGE. However, such alternatives and impacts were not considered by the PSC and DNR in the joint DEIS and FEIS documents issued in March, 2003 and June 2003, respectively.

⁵ The PSC was required by Wis. Stat. § 196.491(3)(a)2. and Wis. Admin. Code § PSC 111.53 to determine whether MGE's application in this docket was complete. This "completeness" determination triggered a 180 day period within which the Commission had to take final action on MGE's application, under Wis. Stat. § 196.491(3)(g), or the Commission would have been considered to have issued a CPCN for the project. An extension of this time frame was granted by the Dane County Circuit Court under the statute. *See* Wis. Stat. § 196.491(3)(g). The time for review by the PSC began running the day the PSC made its completeness determination on October 21, 2002. The PSC also had to meet its obligations under WEPA during this time frame. Thus, it was important for the PSC to require MGE's application to contain sufficient information to allow the PSC staff to complete their legal obligations in reviewing the project, including their WEPA review. FORE, therefore, reiterates its previous comments and position that the PSC's completeness determination of October 21, 2002 was in error and premature. The PSC's completeness determination of that date was substantively in error because it determined MGE's application was complete under Wis. Admin. Code § PSC 111.53(2)(b)1. This was a fundamental error by the PSC which led to inadequate PSC and WEPA review of the proposed WCCF project. For these reasons, MGE's application for a CPCN remains incomplete and must be denied.

As noted above, the PSC and DOA could have entered into a formal agreement under Wis. Admin. Code § PSC 4.60(3), under which the PSC and DOA would have developed a joint EIS for the WCCF project to fulfill DOA's WEPA obligations. But this was not initiated by the PSC, and there was apparently no effort made by the DOA to contract with the PSC or any other party to do an EIS for the DOA under Wis. Admin. Code § ADM 60.06(1). Instead, there is only the statement in the PSC's FEIS that the DOA "deferred" to the PSC. (Ex. 35 at xvi.) This hardly satisfies the legal standard that must be met under WEPA when a state agency decides an EIS is not required for an administrative decision. The legal standard is one of "reasonableness," which has been articulated as a two-part test by the Wisconsin Supreme Court:

First, has the agency developed a reviewable record reflecting a preliminary factual investigation covering the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the action proposed; second, giving due regard to the agency's expertise where it appears actually to have been applied, does the agency's determination that the action is not a major action affecting the quality of the human environment follow from the results of the agency's investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations?

Wisconsin's Environmental Decade, Inc. v. Public Service Commission, 79 Wis. 2d 409, 424-425, 256 N.W.2d 149, 158 (1977).

Here, the record shows that the DOA did not even make an effort to go through the motions, let alone meet the requirements of this test. Instead, in either its arrogance or its ignorance, it appears the DOA simply tried to pass off its WEPA obligations to the PSC. Consequently, the PSC should formally acknowledge this failure and refer this matter to the DOA for further review under WEPA and Wis. Admin. Code ch. ADM 60.

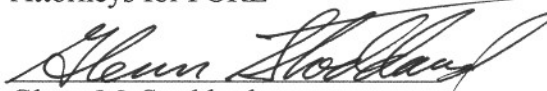
WHEREFORE, the PSC is hereby requested to:

1. Deny MGE's application or a CPCN for the proposed WCCF project in this matter;
2. Decide that the FEIS and DEIS for the WCCF project are inadequate and must be revised, because the PSC and the DOA have failed to properly fulfill their respective duties under WEPA; and
3. Refer this matter to the DOA for further review under WEPA and Wis. Admin. Code ch. ADM 60.

Dated this 6th day of August, 2003.

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