

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Joint Application of Dairyland Power Cooperative,
Northern States Power Company - Wisconsin, and
Wisconsin Public Power, Inc., for Authority to Construct
Construct and Place in Service 345 kV Electric
Transmission Lines and Electric Substation Facilities
for the CapX Twin Cities - Rochester - La Crosse Project,
Located in Buffalo, Trempealeau, and La Crosse Counties, Wisconsin

05-CE-136

**BRIEF OF PARTY AND INTERVENOR
STATE OF WISCONSIN DEPARTMENT OF TRANSPORTION (WisDOT)**

INTRODUCTION

Applicants in this proceeding propose to place a 345kV transmission line in west-central Wisconsin along the Mississippi River corridor. Applicant has proposed nine alternative routes. (FEIS XXVI). WisDOT has testified that it can permit, or accommodate, four of those nine routes (Q1-Galesville with STH 88 Option A, Q1-Galesville with STH 88 Option B, Arcadia and Arcadia-Ettrick). (PSC 159447 Fasick Direct p.8-10 and PSC 160008 Rineer rebuttal at p. 2, and p.4). WisDOT has also testified that it can permit or accommodate other routes if the planned facilities were placed underground. (PSC 159447 Fasick Direct p.8-10). Notwithstanding inquiry regarding the cost of underground routes, WisDOT has not been able to determine with certainty whether the underground option on the remaining five routes is reasonable (as to cost) because applicant has refused to provide cost information.

As such, WisDOT has met its obligations to analyze the routes, determine where they meet statute and policy for permitting or accommodation, and provide to applicant and the Commission information regarding the same.

Applicant is not *entitled* to a particular for its transmissions line. And whether applicant ends up with its desired route is not the basis on which a CPCN is granted. Rather, the application is reviewed and analyzed as to all inputs and factors from a multitude of agencies and other parties. Upon that information the Commission makes its determination.

With respect to this application and after having reviewed all information and analyzing the same with respect to its authority and discretion to permit or accommodate this transmission line, WisDOT has determined that it can permit and/or accommodate four of the proposed nine routes. WisDOT cannot permit or accommodate the remaining five routes, absent an underground solution. Those remaining five routes are in opposition with the values, purpose, and public investment in the Great River Road National Scenic Byway and National Parkway. To permit and/or accommodate the five remaining routes would constitute an abrogation of WisDOT's duties and responsibilities under law and public policy.

ARGUMENT

I. WisDOT Can Permit or Accommodate the Q1-Galesville with STH 88 Option A, Q1-Galesville with STH 88 Option B, Arcadia, and Arcadia-Ettrick Routes as in the Public Interest.

A. WisDOT has determined that it can permit or accommodate the above-identified routes because they do not cause WisDOT to abrogate its statutory obligations regarding the Great River Road.

As testified to by Robert Fasick, WisDOT can permit and/or accommodate applicant's routes for Q1-Galesville with STH 88 Option A, Q1-Galesville with STH 88 Option B, Arcadia, and Arcadia-Ettrick. (PSC 159447 Fasick Direct). This determination is based on a review of the highway right-of-way and scenic easements in these areas.

Q1-Galesville with STH 88 Option A: WisDOT would issue a permit aboveground installation since segment 2I is short. For segment 18H, WisDOT would permit the line as an aboveground facility and would release (sell) any scenic easements necessary since that area of Holman is experiencing development and the City has previously asked WisDOT, and WisDOT has approved, releasing scenic easements in that area.

Q1-Galesville with STH88 Option B: WisDOT's position is the same as the Q1-Galesville with STH 88 Option a route alternative

Arcadia: WisDOT would issue a permit for aboveground installation since segments 2A1 and 2A2 are short. For segment 18H, WisDOT would permit the line as an aboveground facility and would release (sell) any scenic easements necessary since that area of Holman is experiencing development and the City has previously asked WisDOT, and WisDOT has approved, releasing scenic easements in that area.

Arcadia-Ettrick: WisDOT's position is the same as the Arcadia route alternative. *Id.*

These routes present viable options for applicants to place the transmission line without destroying the purpose and basis for the Great River Road Scenic Byway and National Parkway. WisDOT can allow applicant to obtain the affected scenic easements based on their limited area and other significant factors such as current development around the scenic easement area. Because of the unique circumstances in these areas releasing the scenic easements in these very limited areas would not undermine the millions of dollars invested in the Great River Road.

II. WisDOT Cannot Permit or Accommodate the Five Identified Q-1 Route Alternatives Under Its Current Statutory Authority Because the Same are in Opposition to The Values, Purpose and Public Investment in the Great River Road National Scenic Byway and National Parkway.

A. WisDOT and other agencies cannot permit five of the proposed routes due to various agency responsibilities regarding their management of and authority over lands subsumed in those routes.

WisDOT cannot permit or accommodate the original Q1, Q1-Highway 35, Q1- Highway 35 with STH 88 Option A, Q1-Highway 35 with STH 88 Option B, and Q1-Galesville routes. Likewise, as specified in the FEIS the US Fish and Wildlife Service cannot permit the Original Q1 route nor can the Wisconsin Department of Natural Resources permit the first four routes listed herein. (PSC 159095 FEIS XXVI) This combination of non-permittability creates a basis for applicant and the Public Service Commission (the Commission) to look at other routes which can be permitted. No route is without impact to all parties and those who commented in this docket. However, these routes present particular issues with respect to permitting.

For WisDOT, the five routes it has determined are not permissible present significant impacts to the Great River Road. Impact which cannot be overcome and which, if permitted, would require WisDOT to abrogate its statutory duty and fail to adhere to established policy.

B. WisDOT is required to protect the Great River Road as a National Parkway under Wis. Stat. 84.105 enacted as Ch. 138, Wisconsin Laws of 1939, to enable WisDOT to participate in the development of National Parkways.

This legislation gave rise to WisDOT's scenic easement activities and designation of National Parkways. The statute was amended by Ch. 268, Laws of 1955 so that the term "national parkway" expressly included the Great River Road

and appurtenances as provided in Section 14 of P.L. 350, 83rd Congress in accordance with the national parkway plans set forth and submitted to Congress in 1951 pursuant to a 1949 Act of Congress. Under this section, WisDOT is required to investigate, study, and cooperate in the acts necessary to “secure all advantages and further that those advantages may accrue to the municipalities along and through such parkway. Wis. Stat. §84.105(1).

Part of securing those advantages is ensuring the continuing view of the Great River Road. While it is true that there exists today a 161kV electric line, that facility pales in comparison to the planned installation. This is evident via the applicant’s visual assessment in their application. (PSC 150062. Appendix O part 2 of 2 to the application). The photographs in this appendix clearly illustrate the impact that the Great River Road view would suffer if the facilities were placed there.

WisDOT has made sure that it complied with Wis. Stat. §84.195 by acquiring and protecting its Great River Road scenic easements. And, in order to continue to comply with this statutory mandate, WisDOT must ensure that any disruption to the Great River Road right-of-way or the scenic easements adjacent thereto is managed under very limited and controlled circumstances.¹ A failure to do so would put WisDOT firmly at odds with its statutory obligation.

C. The Mississippi River Parkway Commission of Wisconsin opposes the Q-1 and Q-1 Highway 35 Great River Road Routes; WisDOT is required to help this Commission preserve and enhance the Great River Road in Wisconsin and its scenic easements, roadside parks and scenic overlooks.

¹ For example, WisDOT has stated that there are a small number of easements which are located in an increasingly suburban area. For these limited locations, WisDOT has stated it will sell those easements because doing so would not be in opposition to the current development of those areas.

The National Mississippi Parkway Commission² was established in 1938 and currently has its national headquarters in Madison, WI. Wisconsin's Mississippi River Parkway Commission³ was created by Ch. 482, Wisconsin Laws of 1961. (PSC REF#:161013). Wisconsin's Mississippi River Parkway Commission⁴ was created by Ch. 482, Wisconsin Laws of 1961 and is now codified as amended at Wis. Stat. §14.85. The Mississippi River Parkway Commission of Wisconsin (MRPC) is comprised of public members, legislators, and the secretaries of tourism, natural resources, transportation, and the director of the historical society. Their charge as MRPC members includes *inter alia*, coordinating the development and preservation of the Great River Road and assisting other agencies in all efforts to create a unified development of the same. Wis. Stat. §14.85(5)(a) & (b). Further, *all* departments and agencies of the State of Wisconsin are mandated, to the best of their abilities, to cooperate with the MRPC in the execution of their agency functions. Wis. Stat. §14.85(7). The MRPC, as testified to by its chairman, strongly opposes the CapX2020 345kV high tower transmission lines that follow the Great River Road National Scenic Byway and National. (Al Lorenz Trans. 863 line 2). It is joined in its opposition by the Wisconsin Mississippi River Parkway Commission and the 10-State National Mississippi River Parkway Commission.

By statute, WisDOT funds 75% of the actual and necessary expenses incurred by the members of the commission and the entirety of the chairman's

² See <http://www.mrpcmembers.com/index.php>

³ See <http://www.wigreatriverroad.org/> and <http://www.experiencemississippiriver.com/wisconsin-along.cfm>

⁴ See <http://www.wigreatriverroad.org/> and <http://www.experiencemississippiriver.com/wisconsin-along.cfm>

expenses. Wis. Stat. 14.85(8)(b) & (c). The MRPC's opposition is not based merely on opinion as to the current beauty and unique nature of the Great River Road rather on specific statutory instructions to develop and preserve this precious resource. As a member of the MRPC, WisDOT (through its designate the secretary) is also charged with these responsibilities. WisDOT would be abrogating its specific responsibility under this statutory mandate if it were to permit applicants 345 kV transmission line or wholesale vacate its scenic easements along the Great River Road.

D. WisDOT is obligated to protect the Great River Road Scenic/Conservation Easements.

In 1961, the legislature enacted Chapter 427, Laws 1961, creating Wis. Stat. §15.60, *et al. inter alia*, to protect scenic resources along highways' and appropriating funds for the 'acquisition of scenic easements. This statutory section allocated \$2,000,000 (in 1961 dollars) to protect scenic resources along Wisconsin highways and also established as first priority obtaining scenic easements along the Great River Road. Wis. Stat. §15.60(1)(b) and §(6)(i) Wisconsin Statutes 1961. The purpose of the scenic easements along the Great River Road is to preserve the natural beauty of roadsides and prevent any future developments that would detract from that natural beauty. (*id.*, PSC 159456 Vetsch Direct p1, line 16 and p. 2 line 19). Therefore, WisDOT's purchase and maintenance of those easements is obligated to it under state law setting forth the priority to obtain the scenic easements along the Great River Road.

E. WisDOT scenic easements are not susceptible to interference by applicants desire to place a new utility facilities in their existing easements which

may overlap WisDOT scenic easements or where applicants currently do not have facilities and desire to place them on WisDOT scenic easements.

In the precedential court case approving the authority of WisDOT to acquire these scenic easements by eminent domain, the Wisconsin Court recognized the Congressional and State purposes of the scenic easements.

“...scenic easements or reservations would be sought, averaging 300 feet wide, along both sides of the construction right-of-way. There would be purchased from the owner only his right to convert a certain part of his farm land to residential or commercial uses. While he could not add new houses or erect billboards, paralleling pole lines, or other structures, he would continue to exercise all other privileges of ownership and in no way would be restricted in his agricultural pursuits. *Neither would the public have any right to enter upon these lands for any purpose.* This method of scenic conservation should result in large savings over outright purchase, retire less farm land from the tax rolls, *and attach the pastoral views permanently to the parkway* without cost to the public for maintenance.’ *Kamrowski v. State*, 31 Wis.2d 256, 262 (1966).

Kamrowski goes on to state that scenic easements form the basis for the premise that the public travelling within the areas covered by scenic easements gain enjoyment and recreation because they can observe “a relatively unspoiled natural landscape” *id* at 263. This is, indeed, the purpose of WisDOT’s scenic easements. Further, the scenic easements provide a means to preserve existing agricultural uses and “*uses which have not yet commenced but involve more jarring human interference with a state of nature.*” *Id.* (*emphasis added*).

The scenic easements acquired by WisDOT are also “conservation easements” as defined under Wis. Stat. §700.40(1)(a). This conservation easement statute was created April 27, 1982; part of the law, Chapter 261, Laws of 1981, Section 3. This law provides for retroactive application of the statute to

any interest created prior to that date. Hence, the statute applies to all of WisDOT's scenic easements.

Conservation easements enjoy unique and powerful protection under Wisconsin law. Conservation easements are of unlimited duration. Wis. Stat. §700.40(2)(c) Conservation easements do not require repeated recording. Wis. Stat. §893.33(5) and (6m). Conservation easements can be enforced by the property owner subject to the easement as well as the holder of the easement or by a third party having an enforcement right.⁵ Wis. Stat. §700.40(3)(a).

There are many reasons this argument would be most vigorously applied against the scope of the Dairyland 161 kV easements and would not be applied with regard to any of these public scenic conservation easements.

First and foremost, the standard typical introduction to all the scenic easements declares with specificity and clarity the intent of the easement - to preserve, insofar as reasonably is possible, the natural beauty of the roadsides, and to prevent any unsightly developments that will tend to mar or detract from such natural beauty or to degrade the character of the project as constructed. While not all of the terms of each scenic easement are identical in the context the express language and intent of the scenic conservation easements it was never contemplated to allow the construction of large new 345 kV transmission lines and high tower structures within the easement area.

Further evidence of the intent is shown by language that limits any expansion or alteration of existing commercial or industrial uses within the scenic

⁵ Third-party enforcement right" means a right provided in a conservation easement empowering a governmental body, charitable corporation, charitable association or charitable trust, which, although eligible to be a holder, is not a holder, to enforce any term of the easement. Wis. State. 700.40(1)(c).

easement areas. The typical scenic easements that include the electric lines “use exception” also states that:

“Existing commercial and industrial uses of lands and buildings may be continued, maintained, and repaired, but may not be expanded nor shall any structural alteration be made.” (*emphasis added*).

Surely, replacing a 161vK pole line with a substantially larger and more intrusive 345kV pole line would be considered an expanded use and/or a structural alteration. WisDOT believes this is the case. (see PSC 150062 Appendix O part 2 of 2 to application for visual representation of this change).

Further, many of the easements do not contain the applicants’ asserted “exceptions” for 345 kV high tower transmission lines and the structures to carry the lines. This is true even where the applicants highlight language for electric lines does appear in the easement documents,

Utilities themselves distinguish between electric lines (service drops, local distribution lines, and existing lines) and lands for “present or future overhead or underground transmission lines and appurtenant facilities and supporting structures....” In this case, the utilities themselves distinguish between “electric” lines and “transmission” lines and between those different types of “lines” and the “structures” supporting the lines. This distinction goes to what can reasonably be interpreted as to allowable facilities under the easements at issue.

Where “transmission” lines are not a specific permitted use and in light of the specifically stated purpose of the scenic easements, clearly a new 345 kV line with taller and significantly more intrusive structures and a much wider footprint and blow out/clear zone area is not a legitimate or legal use.

Wisconsin case law recognizes that if the intent of a restrictive covenant can be clearly ascertained from the covenant itself, the restrictions will be enforced. Intent is not the subjective intent of the drafter, but the scope and purpose of the covenant as manifest by the language, to protect the natural beauty of the area.

Wisconsin law regarding interpretation of restrictive covenants states that the same is enforceable against *any activity that contravenes the purpose* of the restrictive covenant where that purpose is clearly discerned. *Zinda v. Krause* 191 Wis.2d 154, 167, 528 N.W.2d 55. A restrictive covenant need not expressly prohibit the specific activity in question in order to be enforceable. *Id* at 170.

Interpretation of WisDOT's scenic easements will be made as to their stated purpose, which in the case of its scenic easements is not ambiguous even where certain specific terms may differ between easements. This is true because WisDOT's scenic easements are clear in their statement of purpose. Accordingly, that purpose is *not* ambiguous and therefore not susceptible to more than one interpretation.

As explained in *Zinda*,

“...a restrictive covenant need not expressly prohibit the specific activity in question in order to be enforceable. *Id.* at 166, 528 N.W.2d 55. If the intent of the restrictive covenant can be clearly ascertained from the covenant itself, the restrictions will be enforced. *Id.* at 166-67, 528 N.W.2d 55. The language in a restrictive covenant is ambiguous when it is capable of more than one reasonable interpretation. *Id.* at 165-66, 528 N.W.2d 55.”

“The appellants do not dispute that *Zinda* has standing to enforce the terms of the restrictive covenant. However, the appellants argue that Wisconsin's public policy favors their free and unrestricted use of the common area. *Crowley v. Knapp*, 94 Wis.2d 421, 434, 288

N.W.2d 815, 822 (1980). The appellants note that “restrictions contained in deeds and in zoning ordinances must be strictly construed to favor unencumbered and free use of property.” *Id.* Further, when the meaning of the language in a restrictive covenant is doubtful, “all doubt, under the general rule, should be resolved in favor of the free use thereof for all lawful purposes by the owner of the fee.” *Id.* at 438 n. 3, 288 N.W.2d at 823 n. 3. Here, the appellants claim that the restrictive covenant giving rise to this case is ambiguous because the term “natural beauty” is susceptible to more than one meaning. Accordingly, the appellants argue that the covenant must be construed in favor of their free and unrestricted use of the common area.” *Id.*

“However, if the intent of a restrictive covenant can be clearly ascertained from the covenant itself, the restrictions will be enforced. *Voyager Village Property Owners Ass’n v. Johnson*, 97 Wis.2d 747, 749 (1980). By intent, we do not mean the subjective intent of the drafter, but the scope and purpose of the covenant as manifest by the language used. *See Hall v. Church of the Open Bible*, 4 Wis.2d 246, 248 (1958).

“Thus, although we agree that beauty may be a subjective impression that varies from person to person, when read in context it is clear that the purpose of the covenant is to restrict those activities that threaten the common area's natural condition. Therefore, because the purpose of the covenant may be clearly ascertained, the trial court properly determined that the covenant was valid and enforceable.” *Zinda* at 167.

Clearly, and notwithstanding application of the majority rule in Wisconsin, restrictive covenants are enforceable when the purpose of the covenant is clear and unambiguous and even where the easement or covenant does not *expressly* prohibit desired activity.

F. There is no existing electric transmission line or structure whatsoever on the proposed Q-1 Highway 35 Great River Road National Scenic Byway and National Parkway or on any WisDOT acquired scenic easements in the Black River Bottoms/Van Loon Wildlife Area.

There are today *no* transmission line easements in existence in the Black River Bottoms/Van Loon Wildlife Area (see segments 8A, 8B, and 8C). Further, the

applicants currently have no easements in the Great River Road right-of-way. As such, any placement of facilities by applicants in the Black River Bottom/Van Loon Wildlife area would require a new easement. WisDOT would not grant high voltage transmission easements to applicants in its highway right-of-way on the Great River Road.

Likewise, there are other areas where the Q1, Q1-Galesville, and Q1-Highway 35 Routes directly impact WisDOT scenic easements and where there are no existing transmission line easements of any voltage or structure for carrying the lines. In these areas, with the limited exceptions stated in Mr. Fasick's testimony, WisDOT would not grant easements within its scenic easements. (PSC 158447 Fasick Direct pg. 9, line 14 through p. 10, line 2.)

Pursuant to current law, no high voltage transmission line, whether in easement or otherwise, "may obstruct or incommode the public use of any highway... or body of water." Wis. Stat. §182.017(2). While it is reasonable to presume that a utility line along the Great River Road would not necessarily "obstruct"⁶ the highway or river, it is not reasonable to presume that the utility line would not incommode the Great River Road and the Mississippi River. To incommode means to cause to be inconvenienced or to disturb. (Amer. Heritage Dictionary, second college edition 1976). It cannot be stated with any degree of seriousness that the placement of substantially taller and larger transmission towers will not disturb the public use of the Great River Road as to its view shed and natural beauty.

⁶ Obstruct meaning to block or fill with obstacles. (Amer. Heritage Dictionary, second college edition 1976).

G. WisDOT is required to protect the values for which the Great River Road was designated.

The route of the Great River Road is expressly designated by statute, not by WisDOT. It runs along the Mississippi River bank of the ten states bordering the river. Further endorsement of the concept and designation was enacted by Congress in 1973 to provide the public with access to the river's scenic views and recreational activities. SECTION 129, PL 93-87. Wisconsin's specific portion of the Great River Road route was statutorily established by 1993 Wisconsin Act 357, Wis. Stat. 84.107, and runs precisely as legislatively designated along the Mississippi River on Wisconsin's west border. It is used by bicycles as well as motor vehicles. In the La Crosse, Trempealeau and Buffalo Counties, the Great River Road route proceeds from the

“junction with USH 14/61 in La Crosse County; then proceeding northerly on USH 14/61 to its junction with USH 53; then proceeding northerly on USH 53 to its junction with STH 35; then proceeding northerly on STH 35 to its junction with Business 35/CTH "HD" near Holmen; then proceeding northerly on Business 35/CTH "HD" to its junction with STH 35; then proceeding northerly on STH 35” continuing on STH 35 through Trempealeau and Buffalo Counties.”
Wis. Stat. §84.107(1)

For the purposes of any highway improvement project funded by WisDOT, the entire Great River Road is considered a portion of the state trunk highway system under the jurisdiction of WisDOT. Wis. Stat. §84.107(2)

H. WisDOT needs to orderly enforce its land use and development plans regarding control of outdoor advertising.

Wis. Stat. §84.30 was enacted as a condition of receipt of federal highway funds pursuant to 23 USC 131 and in particular 23 USC 131(s) relating to scenic

byways. This is a statewide zoning law administered by WisDOT and illustrates the seriousness with which WisDOT and the State of Wisconsin intend to protect the Great River Road and other scenic byways. Wisconsin law prohibits the erection of outdoor advertising signs along any scenic byway.

“Scenic byway prohibition.--If a State has a scenic byway program, the State may not allow the erection along any highway on the Interstate System or Federal-aid primary system which before, on, or after the effective date of this subsection, is designated as a scenic byway under such program of any sign, display, or device which is not in conformance with subsection (c) of this section.” Wis. Stat. §84.30(s).

Wis. Stat. 84.30(2)(em) expressly provides this regulatory prohibition to the Great River Road:

"Great River Road" means any highway officially designated as part of the Great River Road system by the department and approved by the appropriate authority of the federal government and any highway designated as part of the Great River Road under s. 84.107. Signs along the Great River Road shall be regulated as are signs along primary highways."

Certainly if a bill board is an excluded use, a new 345kV transmission line would mar the intent and purpose of the Great River Road. In addition to conflicting with other efforts to preserve and enhance the natural beauty of the Great River Road, the proposed 345kV facility will unreasonably interfere with the orderly land use and development plans for the area involved.

I. WisDOT must protect the substantial public investment in the Great River Road National Scenic Byway and National Parkway to preserve and enhance its natural beauty.

WisDOT has acquired at least 557 scenic easements over the years from at least the 1950s through as recently as 1998 to protect the values for which the National Parkway, Great River Road Route, Scenic Byway was designated.

(Trans. 837). Millions of dollars have been invested in the Great River Road by the federal government, the State of Wisconsin, and the public in general.

(PSC159450 Carrola Direct). There is a substantial public interest in maintaining the investment in and integrity of the entire continuous route, not just the scenic easements directly impacted by the proposed Q1, Q1 Galesville, and Q1 Highway 35 Routes. The easements are not identical. From a qualitative viewpoint there is consensus that the most significant aesthetic, scenic, and environmental impacts are where the Q1/Q1 Highway 35 Routes and the Great River Road conflict.

In 2003, recreational users along the Great River Road Scenic Byway generated an estimated \$337.5 million in expenditures. This represents an average expenditure per day of \$76.73 for non-residents and \$46.97 for residents. These expenditures supported an estimated 10,219 full-time equivalent jobs along the byway. In turn, these full-time jobs generated an estimated \$145 million in wages and proprietary income along the Great River Road. State government collected \$39 million in revenues as a result of recreational users' expenditures along the Great River Road and local governments collected \$16 million.

Economic Impact Study & Marketing Analysis of Wisconsin's National Scenic Byway: the Great River Road, 2004. (PSC 161076 Carrola Ex. 2). According to the 1990 FHWA publication, *Case Study on the Great River Road*, from 1973 to 1978, Congress authorized a total of \$314 million in categorical Great River Road funds for the development of this route. Categorical grants can be defined as funds issued by Congress which may be spent only for narrowly-defined purposes. Using the Bureau of Labor Statistics CPI inflation calculator, **this**

investment in 2011 dollars is \$1,601,270,000. Wisconsin's allocation of those Federal categorical grants is listed as \$21,165,109. Using the Bureau of Labor Statistics CPI inflation calculator, this investment in 2011 dollars is \$107,930,000. There have also been a great deal of other federal and state funds invested in the Wisconsin portion the Great River Road at issue here since the 1973 to 1975 expenditures. (PSC 159450 Carrolla Direct).

To ignore this substantial investment and allow a use that is clearly contrary to the purpose of the scenic easements, and the Great River Road's Scenic Byway and National Parkway designations itself is tantamount to pretending the investment was never made in the first place. Such a squandering of public funds is not rational or supportable.

III. The Q1, Q1 Galesville, and Q1 Highway 35 route alternatives are not in the public interest considering the requirements of Wis. Stats. §§ 1.12(6), 196.025(1m) and 196.491(3)(d)3, 3r, 4, and 6.

A. The proposed Q1, Q1 Galesville, and Q1 Highway 35 Route Alternatives Conflict with Wis. Stats. §§1.12(6) and 196.025(1m):

“1.12(6) Siting of Electric Transmission Facilities. In the siting of new electric transmission facilities, including high-voltage transmission lines, as defined in s. 196.491 (1) (f), it is the policy of this state that, to the greatest extent feasible that is consistent with economic and engineering considerations, reliability of the electric system, and protection of the environment, the following corridors should be utilized in the following order of priority:” (*emphasis added*)

Wis. Stat. §1.12 presents a list of options a utility should consider for determining utility routing. The list (presented in order of priority) does not however, represent a *per se* right to locate or to locate in any one of the four

alternatives listed.⁷ In fact, the statute under section (d) offers an option which supports the reality that in some cases, the first three alternatives simply may not be feasible. No doubt, where there is an existing utility corridor or highway corridor available a utility would look to these first as required by this statute. WisDOT has permitted thousands of utility routes in the State under the second option. However, it is very clear that the legislature contemplated that those options would not in certain cases be the appropriate or available choice for the utility to route facilities. That is the case in this docket.

Because of the presence of the Great River Roadway and its special designation as a Scenic Byway and National Parkway, the existing utility corridor and highway corridor is simply not a viable option for the five routes identified by WisDOT and other agencies. This reality was fully accounted for within the explicit language of the statute which offers additional options when a higher priority option, for whatever reason, is simply not appropriate or permissible for the route.

Certainly, the funds expended on the Great River Road and the funds available in the future for further preservation illustrate that to simply abrogate the foundation of the preservation of the Great River Road, *the scenic easements*, would constitute a failure to properly account for economic considerations and protection of the environment as required in the siting statute. It is implausible to

⁷ (a) Existing utility corridors. (b) Highway and railroad corridors. (c) Recreational trails, to the extent that the facilities may be constructed below ground and that the facilities do not significantly impact environmentally sensitive areas. (d) New corridors.

believe that putting aside decades of legislation, community action, and agency decision and work would represent compliance with this statutory section.

“196.025(1m) TRANSMISSION CORRIDORS. The commission shall implement the policy specified in s. 1.12 (6) in making all decisions, orders, and rules affecting the siting of new electric transmission facilities.”

The proposed Q1, Q1-Galesville, and Q1-Highway 35 routes are not consistent with the protection of the aesthetic environment and the values, purpose, and public investment in the Great River Road National Scenic Byway and National Parkway. (PSC 159456 Vetsch Direct p.2-3). As originally proposed and as continuously modified by applicants, the Q1, Q1-Galesville, and Q1-Highway 35 routes deviate from the existing 161kV corridor and conflict with WisDOT acquired scenic conservation easements. The existing 161 kV Dairyland transmission line along the Great River Road has an 80 foot wide footprint including blow out area. The 345 kV transmission lines have a 150 foot to over 200 foot wide footprint and clear zone/blow out area requirement. The 345 kV towers will be much taller, and visible from much greater distances from the roadway even if placed within the same Dairyland corridor.

The proposed lines and structures are not allowed on or along the Great River Road. Citing the applicants new line along the Great River Road or in WisDOT's scenic easements would not be consistent with the Commission's responsibility to adhere to the requirements of Wis. Stat. §196.025(1m). Doing so would ignore the economic and environmental consideration requirements of Wis. Stat. §1.12(6).

To avoid direct conflict with WisDOT scenic easements where there are no existing electric transmission lines and structures, the applicants propose to deviate from Q1- Highway 35 Great River Road National Scenic Byway and National Parkway right of way in the Black River Bottoms/Van Loon Wildlife Area. (See Segments 8A, 8B and 8C). There are no transmission line easements in existence in those locations. Placement of a utility facility in those locations would defy specifically stated permit restrictions identified by the United States Fish and Wildlife Service and the Wisconsin Department of Natural Resources. (PSC 159095 FEIS XXVI, **see** Segments 5A, 5B and 5C). Further, environmental mitigation is not an alternative that may be considered by the WisDNR on the Q1, Q1-Galesville, or Q1-Highway 35 routes in areas of special natural resource interest in the Van Loon Wildlife Area and Upper Mississippi River National Wildlife and Fish Refuge. Wis. Admin. Code DNR 10304(8)(4)(b) (Trans. 511-512 Laatsch cross examination).

IV. THE PROPOSED Q1, Q1-Galesville, and Q1- HIGHWAY 35 ROUTE ALTERNATIVES CONFLICT WITH WIS. STAT. 196.491(3)(d)3, 3r, 4, and 6.

“196.491(3)(d) ... the commission shall approve an application filed under par. (a) 1. for a certificate of public convenience and necessity **only if the commission determines all of the following:**”

“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...”

“3r. For a high-voltage transmission line that is proposed to increase the transmission import capability into this state, existing rights-of-way are used to the extent practicable and the routing and design of the high-voltage transmission line minimizes environmental impacts in a manner that is consistent with achieving reasonable electric rates.”

“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.”

For all of the reasons stated herein, the proposed Q1, Q1-Galesville, and Q1-Highway 35 route alternatives are not in the public interest due to their adverse impact on the values, purpose, and public investment in the Great River Road National Scenic Byway and National Parkway.

In their application, the applicants themselves identified an alternative viable routes. The Arcadia route is both a feasible and prudent alternative. All routes other than the Q1, Q1-Galesville, and Q1-Highway 35 routes minimize environmental impacts. The Q1, Q1-Galesville, and Q1-Highway 35 routes have a direct and undue adverse impact on historic sites, geological formations, the aesthetics of land and water, and recreational use on and along the Great River Road National Scenic Byway and National Parkway and unreasonably interfere with the long-standing and orderly land use and development plans for this National Scenic Byway and National Parkway.

The STH 88 options and Arcadia routes proposed by the applicant utilities themselves follows existing transmission line routes and should be the routes considered if the CPCN is granted. The Q1, Q1 Galesville, and Q1-Highway 35 routes are not viable, feasible, nor permissible for overhead transmission line facility placement under this application.

V. Under Federal and Wisconsin law and policy, WisDOT cannot and will not approve the proposed 345 kV facility on the Q-1 and Q-1 Highway 35 route

alternatives along or across the Great River Road National Scenic Byway and National Parkway.

A. Wis. Stat. 86.16 –WisDOT will not grant written consent as required for utility lines on or across highways under its jurisdiction for the Q-1, Q1-Galesville, or Q1-Highway 35 route proposals.

Wis. Stat. §86.16 permits utilities to locate, construct, and operate transmission lines along, across or within the limits of a highway “with the written consent of the department with respect to state trunk highways.” As stated above, the Great River Road at this location is a State Trunk Highway (STH 35 and USH 53 for some connector segments). (PSC 160891 Fasick redirect p 4270428). WisDOT may deny a permit under this section. WisDOT has determined that the Q1, Q1-Galesville, and Q1 Highway 35 345 kV utility installation proposals are not in the public interest and pose an unreasonable obstruction to use and purposes of the public highway, the Great River Road National Scenic Byway and National Parkway.

B. WisDOT will not grant and the utilities cannot acquire from WisDOT any new (On or After September 30, 1975) utility easements required by Wis. Stat. §182.017(7)(a).

Wis. Stat. §182.017(7)(a) requires that high voltage transmission line easements obtained by a utility on or after September 30, 1975 must specify “the number, type and maximum height of all structures to be erected ... and the number and maximum voltage of the lines....” This statute applies to any new easements that the utility group may need to acquire in order to locate along the proposed Great River Road National Scenic Byway and National Parkway.

WisDOT recognizes that the statute does not require the utility group to obtain a new more specific easement, if easements the utilities acquired prior to September 30, 1975 provide the necessary rights for a new structure and higher voltage lines within the existing utility easement boundaries. *Wisconsin Public Service Corp. v. Andrews*, 316 Wis.2d 734, 744 (Wis. App. 2009). *Fields v. American Transmission Co., LLC* 2010 WL 916771 (Wis.App.2010). However, there are no existing utility easements along the Great River Road National Scenic Byway at the southern end of the Q1, and Q1-Highway 35 routes. There are no existing utility easements within the Great River Road National Scenic Byway and National Parkway right of way. There are no existing utility easements where any new 345 kV easement would extend beyond the existing Dairyland easements but encroach on the pre-existing and perpetual WisDOT acquired scenic conservation easements. Furthermore, the utilities cannot condemn WisDOT property. WisDOT will not sell or release any scenic easements or grant any easements or permits along or across the Great River Road National Scenic Byway and National Parkway to accommodate the Q1, Q1-Galesville or Q1 Highway 35 route alternatives because doing so would constitute an abrogation of WisDOT's statutory responsibilities.

C. WisDOT has determined that the proposed Q1, Q1-Galesville, and Q1 Highway 35 high voltage transmission lines and structures will impermissibly "Incommode" the public use of the Great River Road National Scenic Byway and National Parkway s prohibited by Wis. Stat. §182.017(2).

Wis. Stat. §182.017(2) provides that no high voltage transmission line may at any time obstruct or incommode the public use of a highway. The word "obstruct"

would generally apply to a physical obstruction to public use of the highway by the traveling public. The word “incommode” refers to causing inconvenience or distress to the public user of the Great River Road National Scenic Byway and National Parkway. It is clear that the proposed Q1, Q1-Galesville, and Q1 Highway 35 routes incommode the use of this public highway and such, WisDOT cannot permit or accommodate those routes because doing so would be wholly contrary to the requirements of Wis. Stat. §182.017(2).

D. Federal and Wisconsin law and policy prohibit issuance of utility/highway crossing permits for the Q1, Q1-Galesville, and Q1-Highway 35 Routes.

WisDOT Policy as approved by the Federal Highway Administration prohibits new utility installations on highway right of way in areas where scenic easements have been acquired on and adjacent to the highway right of way. (PSC 161077 WisDOT Utility Accommodation Policy, see Wis. Stats. §86.07(2), 86.16(1), 182.017(1r) 23 USC 111, and 23 CFR 645.209(h)). With regard to any above ground transmission line or structure location on or crossing a WisDOT property interest, Policy 96.26 B. reads in part as follows:

“B. Scenic Areas

Areas which have been acquired or set aside for their scenic quality, such as scenic strips, overlooks, rest areas, recreation areas, public parks, historic sites, etc., and the right-of-way which traverses these areas, are in a special category and new utility installations shall not be permitted except as provided in this section.

2. New overhead installations shall be prohibited at such locations where there is a feasible and prudent alternative to the use of scenic areas by the overhead facility.”

This policy clearly defines for WisDOT how it is expected to make decisions regarding placement of utility facilities. While WisDOT attempts to accommodate and permit utility facilities pursuant to applicant's requests, there are simply circumstances where doing so would require WisDOT to act in disregard to its responsibility. In this case, applicants have a feasible alternative to the Great River Road National Scenic Byway and National Parkway.

WisDOT was conferred with the Federal Highway Administration (FHWA) regarding permitting of the routes proposed by applicants. (PSC 156191). In this communication, WisDOT queried FHWA regarding WisDOT's determination that it could not permit aboveground facility siting along the Great River Road Scenic Byway and National Parkway based on 23 CFR 645.209(h). Further, as WisDOT's Utility Accommodation Policy, which must be approved by FHWA prohibits siting in scenic areas, WisDOT asked for concurrence in its authority and responsibility to deny permitting based on this policy. *Id.*⁸

FHWA responded to this correspondence stating its shared concern with placement of this type of facility on or along the scenic easements of the Great River Road. As stated by FHWA,

“unless the State determines an exception is warranted and the installation meets the conditions specified in 645.209(h), new utility installations are not permitted on highway right-of-way or other lands adjacent to areas of scenic enhancement and natural beauty.” (PSC 159530).

⁸ Note that at the time of this correspondence WisDOT believed that underground placement of the facilities was not feasible. Since that time, WisDOT has tried to illicit information from applicants that confirms or denies this presumption. WisDOT has not been able to obtain the cooperation of the applicants on this point and as such can only surmise the same. (PSC 160791 Cross examination of Mr. Stevenson p. 203-204 and PSC160891 cross examination of Mr. Hillstrom p. 295-296)

Finally, FHWA assured WisDOT that as long as it follows its approved accommodation policy it would not intervene or have cause to participate in the decision. *WisDOT has followed the requirements of 645.209(h) and its Utility Accommodation Policy in denying permitting for the Q1, Q1-Galesville, and Q1-Highway 35 routes.*

CONCLUSION

Installation of the proposed 345 kV high voltage transmission lines and new structures on and along the Great River Road National Scenic Byway and National Parkway as proposed for the Q1, Q1-Galesville, and Q1-Highway 35 routes would:

- 1) Conflict with Wis. Stats. 1.12(6), 196.025(1m), and 196.491(3)(d)3, 3r, 4, and 6.
- 2) Violate the express terms of a number of the WisDOT scenic conservation easements along with the intent and purpose of the other scenic conservation easements.
- 3) Have an adverse impact on the purposes and values for which the Great River Road was created, designated, and marked as a National Parkway and National Scenic Byway and the public investment in the Great River Road that promotes tourism and jobs while preserving farmland.
- 4) Violate WisDOT's statutory obligation to assist the Mississippi River Parkway Commission in protecting and enhancing the natural beauty of the areas and the values for which the Great River Road National Scenic Byway and National Parkway was created.
- 5) Impermissibly "Incommode" the Public Use of the Great River Road National Scenic Byway and National Parkway.
- 6) Unreasonably interfere with WisDOT's orderly land use and development plans for the area.
- 7) Violate WisDOT's utility accommodation policy that conforms to federal regulations and violate the purpose of the Great River Road National Scenic Byway and National Parkway.

WisDOT may also consider the adverse reactions of the Mississippi River Parkway Commission, affected property owners, and the other members of the public who are interested in preserving the scenic values for which the Great River Road was designated. Further, any change in WisDOT policy allowing the wholesale release and

sale or swap of the scenic conservation easements raises the question of whether a separate or revised Environmental Assessment would be required by WisDOT.

WisDOT has determined it will not grant permits or sell or release easements along or across the Great River Road National Scenic Byway and National Parkway for the Q1, Q1-Galesville, and Q1-Highway 35 Great River Road 345 kV routes. Nor will WisDOT will jeopardize the ability of WisDOT and other Wisconsin governmental and public entities to successfully compete for future grants for affected portions of the Great River Road. Under Federal and Wisconsin law and policy, WisDOT cannot and will not approve the proposed 345 kV facility on the Q1, Q1-Galesville, and Q1-Highway 35 route

alternatives along or across the Great River Road National Scenic Byway and National Parkway absent acting in an arbitrary and capricious manner. That, WisDOT cannot and will not do.

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State of Wisconsin
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