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Municipal Interventions in PSCW CPCN Proceedings for Utility Infrastructure

Over the next 10 years, the demand for electricity to power AI data centers is expected to surge to unprecedented levels -- by some estimates, from around 4 gigawatts in 2024 to more than 120 gigawatts by 2035. These new data centers will require massive investments in transmission lines and substations, as well as new generation sources and natural gas pipelines. The impact of these investments is already being felt in Wisconsin, with dozens of Public Service Commission of Wisconsin (PSCW) applications for new plants and transmission facilities over the past two years alone, and many more to come.

All of these facilities require permitting from a variety of federal, state and local authorities. Local governments are of course familiar with their jurisdiction over water use, conditional use, right of way, floodplain, shoreland, driveway and other local permitting activities. This article will focus on the role municipalities can play in the PSCW proceedings in which developers and utilities seek the authority (known as a certificate of public convenience and necessity, or "CPCN") to construct larger scale utility facilities. These proceedings provide local governments with the opportunity to minimize the potential impact of these utility facilities on their communities.

Wisconsin Statute § 196.491 sets the standards for how the PSCW makes CPCN determinations, which apply to applications to build electric generating facilities with a capacity of 100 megawatts or more, as well as high-voltage transmission lines.

Smaller projects (e.g., generation facilities under 100 MW or certain transmission upgrades), also require PSCW approval (known as a Certificate of Authority, or "CA") when public utility applicants propose projects over a certain cost threshold. Under Wis. Stat. § 196.49, utilities seeking such approvals must demonstrate to the PSCW that the project will not substantially impair the efficiency of the utility's service; will not provide facilities unreasonably in excess of probable future requirements; and will not add to the cost of service without proportionate benefit.

CA proceedings do not provide local governments much of an opportunity to participate meaningfully since these standards are driven by an analysis of utility service needs and require more limited environmental review. In contrast to CPCN proceedings, however, siting and permitting issues for these projects are handled at the local level by boards and zoning authorities,

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Update on the Scope of Arrest Record Protections

The law on arrest and conviction record discrimination under the Wisconsin Fair Employment Act (WFEA) can be tricky for employers to navigate. The restrictions on how employers can use an individual's past arrest/conviction history apply regardless of whether the arrest/conviction was for a felony, misdemeanor, or other offense. This is primarily because employers have different restrictions depending on the employee's current stage in the court proceedings. A recent decision from the Labor and Industry Review Commission (LIRC) helps clarify this important area of the law.

Brief Primer on Arrest and Conviction Record Rules

The WFEA addresses three categories of activity, and each has its own set of rules.

- **Convictions.** For a *conviction,* an employer can terminate, suspend, or refuse to hire an individual *only if* the conviction is *substantially related to the job in question*. Often, this requires employers to consider the nature of the crime, the job description, and how recent the conviction(s) was (among other relevant factors).[1]
- **Arrests.** For an *arrest,* employers cannot take any employment action against an employee or applicant *unless* the employer conducts its own investigation and is legitimately satisfied based on that investigation that the individual has engaged in misconduct. An independent investigation requires the employer to do more than just review the police report or consult with law enforcement. At a minimum, an interview of the individual is usually required.
- **Pending Charges.** A *pending charge* is a specific type of arrest record. If charges are filed following an arrest and those charges are still pending (e.g., have not yet resulted in a conviction), an employer can *only suspend* an existing employee or *refuse to hire* an applicant if the pending charge is *substantially related to the job in question.* An employer *cannot terminate* an existing employee based on a pending charge, even if there is a substantial relationship between the pending charge and the job.

These rules are nuanced and may require consultation with experienced legal counsel where an individual's exact status is unclear. With that primer in mind, we can review the recent LIRC decision, which helps clarify what qualifies as part of an "arrest record."

Facts of the Case

In *Schultz v. Safelite Fulfillment, Inc.,* Jacob Schultz was hired in December 2018 by Safelite as an auto glass technician. When Schultz was hired, Safelite followed its standard procedure and ran a criminal background check on him. Schultz's check came back clean. In addition to running background checks at the time of hire, Safelite also periodically ran background checks on existing employees to stay updated on their criminal records.

In January 2019, approximately one month after he started working for Safelite, Schultz had a domestic dispute with his girlfriend. As a result, the police arrested him, and he spent the night in jail. From jail, Schultz called a coworker to inform him that he would not be at work the following day. After being released, Schultz informed his supervisor that he had been arrested and that he had hired an attorney. Importantly, Schultz never admitted wrongdoing to anyone at Safelite.

Prosecutors eventually charged Schultz with five crimes: one felony count of strangulation; two counts of misdemeanor disorderly conduct; and two counts of misdemeanor battery. In November 2019, Schultz and the prosecutor reached an agreement on how his charges would proceed. They entered a "Deferred Acceptance of a Guilty Plea Agreement" (DGAP Agreement), which meant that Schultz would plead guilty to some of the crimes in exchange for the court holding off on convicting him for those crimes if he met certain conditions. Those conditions required Schultz to complete community service, complete a domestic abuse program, pay a fine, and not commit any additional crimes. If Schultz violated these conditions, the court would enter a judgment of conviction, and Schultz would be formally convicted of the crimes. Because Schultz was never convicted of any crime under the terms of his agreement, these charges all remained part of his "arrest record."

In March 2020, a risk management employee ran a background check on Schultz, which revealed his DGAP Agreement and guilty pleas. Based on this report, Safelite assumed that Schultz had been convicted of violent crimes and based on Safelite's criteria, he would not have been eligible for hire based on these convictions. Therefore, Safelite decided Schultz could not remain employed, and he was terminated. Safelite's assumption was wrong because Schultz had not actually been convicted of anything; the court had explicitly held

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PSC Investigating Construction Cost Overruns on Electric, Gas, and Water Projects

The Public Service Commission of Wisconsin (Commission) has opened a docket (PSC Docket 5-UI-124) to investigate the issue of construction cost overruns for electric, gas and water projects. The docket seeks to gather information with the goal of developing a framework and methodology to consider construction cost overruns. According to the Commission, "[a] more cohesive and consistent approach across our regulated entities will have wide-ranging benefits." The docket does not distinguish between municipal and investor-owned utilities, nor electric and water utilities.

This docket is the result of the Commission's direction to staff in PSC Docket 6630-CE-3170 to open a generic investigation to examine and develop a consistent approach to analyzing construction cost overruns. That prior docket involved WEPCO's application to construct a $1.2 billion natural gas facility to help power Microsoft's new data center in southeast Wisconsin. Intervenors opposed to the project raised issues about cost overruns and who should bear the risk of cost overruns (customers or shareholders).

In its notice opening Docket 5-UI-124 (Notice), the Commission states that:

> *The frequency and magnitude of cost overruns in energy (electric and natural gas) and water infrastructure construction projects before the Commission has increased in recent years. Due to the ongoing energy transition, projected additions of large load customers, increased electrification, economic uncertainty, and an increase in Commission-regulated infrastructure construction projects statewide, the Commission anticipates cost overruns will continue to occur and be a critical issue in future proceedings.*
>
> *While the Commission has a long history of analyzing evidence and issuing decisions on a case-by-case basis, that narrow, piecemeal approach does not facilitate the comprehensive, creative, and collaborative approach necessary to sufficiently and consistently address cost overruns. As such, the Commission agreed that greater study and analysis of the cost overruns issue is needed.*
>
> *Therefore, this investigation will facilitate a deliberative and comprehensive analysis of cost overruns, with the goal of developing a viable framework for utilities, merchant developers, parties, and Commission staff to employ when cost overruns occur.*

Comments on the docket must be submitted to the Commission by 1:30 p.m. on Monday, October 27, 2025. The Notice opening the docket describes the methods by which comments may be filed with the Commission. All Wisconsin electric, gas, steam, and water public utilities are parties to this docket and are encouraged to file comments.

The Notice includes numerous questions the Commission would like comments on. Topics include the development of cost estimates and project budgets, the use of change orders, force majeure clauses, and reasons for cost overruns. Communities should consider submitting comments on the many ways municipal utilities differ from investor-owned utilities and how the public bidding process applies to municipal projects.

— Lawrie Kobza

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off on entering judgment and sentencing him. Therefore, Safelite should have followed the rules regarding "pending charges" rather than "conviction record."

The Decision & Key Takeaways

Schultz sued Safelite for arrest record discrimination, and he won. LIRC decided that Safelite's assumption that Schultz had been convicted was incorrect. Instead, Safelite should have followed the procedures applicable to an individual's pending charges since Schultz had never actually been convicted of any crime. LIRC made it clear that employers may only rely upon the substantial relationship test to terminate when a current employee has either actually been convicted of a crime or when there is a pending charge against the individual.

This case is an important reminder for employers to consult early on with legal counsel when there is a concern with an individual's criminal history. Background checks and online court records can be

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whose decisions cannot be superseded by the PSCW, which is not the case under the CPCN statute. So local governments can mitigate the potential impacts of these smaller utility infrastructure projects directly through their permitting authority (see, e.g., PSCW Docket No. 4740-CE-106, in which City of Plymouth obtained a CA to construct a substation in the Town of Mitchell).

To obtain a CPCN, utilities or developers generally must demonstrate that the proposed facility (i) satisfies the reasonable needs of the public; (ii) will not have adverse environmental impacts; (iii) will not unreasonably interfere with land use and development; and (iv) is in the public interest, taking into account alternative sources of supply; economic development; public health and safety; environmental protection; and energy supply diversification.

Depending on the scope of the project and the nature of its potential impact on the local community, there are many ways a local government can weigh in to address these issues as part of a CPCN proceeding.

The first thing to do is file a motion to intervene. In a CPCN proceeding, the applicant includes the names and addresses of local officials in the communities directly impacted by the project, so these officials should be notified when a CPCN application is filed. They should also receive a formal Notice of Proceeding, which describes the date and procedures for intervening.

Local officials of course can opt to file public comments as part of a CPCN proceeding, and many often do, even before a formal application is filed, since utility applicants usually reach out to local communities well in advance of a formal application filing in order to obtain feedback from local residents and officials. Such public comments can be useful and are included in the formal record reviewed by the PSCW when it deliberates over its decision to grant, deny or modify a CPCN application.

However formal intervention is a more effective way for a local government to become involved because intervenors are granted full party status in the proceeding and therefore have the ability to file testimony, engage expert witnesses, undertake discovery and participate in the technical hearings to cross-examine witnesses, among other things.

In some instances, they can also negotiate an agreement with the applicant to address specific areas of concern. In the Paris Solar proceeding (PSC Docket No. 9801-CE-100), in which the PSCW granted a CPCN in 2020 for a 200 MW solar facility in the Town of Paris, the Town was able to negotiate a Memorandum of Understanding that addressed a number of local concerns, including coordinated planning during the construction phase of the project; mitigation of drainage issues; road use; vegetation management; stormwater management and erosion control; replacement of lost property tax revenue; decommissioning, and many other important issues.

The Town of Paris subsequently succeeded in another CPCN proceeding (Docket 6630-CE-316, 2025) to persuade the PSCW to require the utility to build a proposed 128 MW natural gas-fired generation plant on an alternative site located closer to existing utility infrastructure and further away from residential property and wetlands. The Town was able to submit evidence that its preferred alternative site location was more consistent with the Town's land use plan and less impactful on the environment -- and the Commission agreed, notwithstanding that the alternate site would delay the project due to additional air permitting requirements.

In an ongoing high-voltage transmission line proceeding (Docket 5-CE-157) , the Village of Merrillan is currently seeking similar relief, citing concerns in its Motion to Intervene about the transmission company's preferred route for a proposed 345 kV transmission line that bisects the Village and potentially threatens to disrupt local infrastructure and utility operations, property values and community character.

If the issues facing your community are substantial – such as the siting of a transmission line through the center of town or a substation near a residential area or an environmentally sensitive area – engaging an attorney with experience in PSCW proceedings to assist in the intervention (beginning with filing the Motion to Intervene) may be well worth the effort.

— Richard A. Heinemann

One-Time Beer Sale Didn't Preserve Bar and Restaurant's Nonconforming Use Status

In a recent case, *Doubleday v. C. Goeman Properties V LLC*, 2024AP742 (August 13, 2025), the Wisconsin Court of Appeals held that the sale of a "beer or two" to a banker in a former bar and restaurant that was otherwise closed to the public and unfit for occupancy did not preserve the property's nonconforming use protections under the local zoning code.

The case concerned a piece of property that had historically been operated as a bar and restaurant. The property was rezoned to residential in 1999, but the bar and restaurant was allowed to continue operating as a nonconforming use under the local zoning code. However, the zoning code provided that nonconforming use protection would be lost "where any such nonconforming use is discontinued for a period of twelve (12) consecutive months" and in that case, "any future use of the building, structure, or land shall conform to the regulations of the district in which it is located."

The owner continued to operate the bar and restaurant until September 10, 2017, at which point he shut it down for economic reasons. When he stopped paying his mortgage on the property, his lender foreclosed and ultimately sold the property to C. Goeman Properties V LLC (Goeman), the defendant in this case. Goeman reopened the bar and restaurant for business on April 16, 2019 and the neighbors objected, arguing that the property had lost its protected status as a nonconforming use under the local zoning code because the bar and restaurant had been closed for more than 12 months. The neighbors brought a private zoning enforcement action and asked the court to find that the property's nonconforming use had lapsed and to issue an injunction preventing any further use of the property as a bar and restaurant.

Goeman disagreed with the neighbors and claimed that the former owner and the lender had taken steps to ensure that the property's nonconforming use protections would not lapse. An employee of the lender testified that he had been concerned that the property would lose its nonconforming use status if it remained closed for too long, so he arranged to meet the property owner on site on May 5, 2018 and have the owner sell him "a beer or two" to "deal with the nonconforming issue." Apparently the employee had used this same strategy at other properties at least a dozen times, and described one instance where he had the owner of a closed business meet him at the property and sell him "Kwik Trip donuts and a Busch Light" to avoid lapse of the property's nonconforming use status. In Goeman's view, this one-off sale of a "beer or two" to the lender's employee within twelve months of when the business first closed was sufficient to continue the nonconforming use of the property as a bar and restaurant, even though the bar and restaurant did not reopen to the public until months later.

The Court of Appeals disagreed. The evidence showed that, at the time the beer sale took place, there was no electricity to the building, there had been a water break due to a freezing issue, the refrigerator and freezers were left open and empty of food, there was no staff on the payroll, and the building was "cold, dark, dirty, and stinky and had a musty odor." The Court of Appeals found that a "one-time beer sale" to a lender's employee in a building that "was never held open to anyone of the public, during which the premises was otherwise entirely unfit for food or beverage service, [and] unfit for occupancy does not establish that the property was being used as a bar and restaurant during the relevant twelve-month time period" (internal quotation marks omitted). Therefore, the Court found that the property's nonconforming use protection under the local zoning code had lapsed—it could no longer operate as a bar and restaurant and instead must comply with all of the requirements of the residential zoning district in which it was located.

The outcome of this case should come as no surprise, but it is a good example of the strategies property owners and lenders sometimes employ to claim continuation of a nonconforming use, and a reminder to municipalities to interrogate those claims rather than simply accepting them at face value.

— Julia K. Potter

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misleading, and technicalities, which are not always evident in these resources, can make a huge difference in how to proceed with a particular individual. The use of a vendor to conduct a background check also implicates the authorization and notice requirements of the federal Fair Credit Reporting Act.

— Storm B. Larson, Douglas E. Witte, & Brian Goodman

[1] School districts can refuse to hire anyone who was convicted of a felony, without needing to apply the substantial relationship test. Other exceptions might also apply for specific employers or for specific job positions.

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