

PUBLIC SERVICE COMMISSION OF WISCONSIN

Request for Approval of the 2012-2014 Contract for Services Between
the Statewide Energy Efficiency and Renewables Administration and
Shaw Environmental and Infrastructure, Inc.

9501-FE-116

ORDER

This is the Order in the Request for Approval of the 2012-2014 Contract for Services (Contract) between the Statewide Energy Efficiency and Renewables Administration (SEERA) and Chicago Bridge and Iron (CB&I).¹ 2005 Wisconsin Act 141 (Act 141) provides for Commission oversight of the statewide energy efficiency and renewable resource programs and requires their periodic review. Wisconsin Stat. § 196.374(2)(a)1. requires the Commission to approve the contract between the utilities' non-profit entity, SEERA, and the Program Administrator. The Commission's oversight role includes budget approval and monitoring of program budgets. The Contract between SEERA and CB&I was originally approved by the Commission in this docket on May 6, 2011.

Discussion

The Commission is now presented with two proposed amendments to the Contract. The first proposes to amend the 2014 budget to add certain funding that has, to date, been unallocated. The second proposed amendment is to allow CB&I to use an exchange rate to trade therms for kilowatt-hour (kWh) savings for the purposes of evaluating whether CB&I has met its contractual goals to save a prescribed amount of therms. The Commission finds that

¹ Shaw Environmental and Infrastructure, Inc., was purchased by and succeeded in this Agreement by CB&I.

the funds currently unallocated should remain so until the upcoming Quadrennial Planning Process in 2014 and not be added to the 2014 program budget. The Commission also finds that CB&I and SEERA may adopt a terms to kWh exchange rate for the purposes of evaluating whether CB&I has met its contractual goals.

I. Proposed 2014 Budget Amendments

The Commission is charged with ensuring that the Focus on Energy (Focus) program is cost effective, provides tangible benefits to participants and the rate paying public, and is generally in the public interest. The Legislature has enumerated a number of requirements that the Commission must ensure the Focus program meets. Wisconsin Stat. § 196.374(2)(a)2. sets forth many of the goals that Focus must achieve. The program must help achieve environmentally sound and adequate energy supplies at a reasonable price. *Id.* The program must address the energy needs of residential, commercial agricultural, institutional, and industrial energy users and local units of government. (Wis. Stat. § 196.374(2)(a)2.a.) Components of the program must reduce the energy costs incurred by local units of government and agricultural producers. (Wis. Stat. § 196.374(2)(a)2.b.) The program must include initiatives and market strategies that address the needs of ratepayers who face the “most significant barriers” to creation of or participation in markets for energy efficient products. (Wis. Stat. § 196.374(2)(a)2.c.) It must include components to implement energy efficiency in manufacturing and initiatives for research and development. (Wis. Stat. § 196.374(2)(a)2.a. and b.) In other words, Focus is a substantial program with many significant and important goals. The Commission is charged by the Legislature with ensuring those goals are met. *See, e.g.,* Wis. Stat. § 196.374(3), enumerating specific Commission

powers and responsibilities relative to Focus. The Commission is required to review and approve contracts, and any amendments thereto, between the utilities and program administrators. Wis. Stat. § 196.374(3)(c)1.

In carrying out that task, the Commission conducts a number of important activities, ranging from day-to-day interaction with SEERA, the Program Administrator, and other participants in the program. The Commission continually evaluates and oversees the Focus program. This day-to-day work ensuring the program is working and in the public interest is vital to ensuring the success of the program. The Commission, however, also must periodically review Focus from a broader perspective. That process, the Quadrennial Planning Process, began anew in docket 5-FE-100 in July 2013. The Commission will determine the scope of this second Quadrennial Planning Process before the end of 2013, with final decisions expected by July 2014. In conducting the Quadrennial Planning Process, state law requires the Commission:

At least every 4 years, after notice and opportunity to be heard, the commission shall, by order, evaluate the energy efficiency and renewable resource programs under sub. (2) (a) 1., (b) 1. and 2., and (c) and ordered programs and set or revise goals, priorities, and measurable targets for the programs. The commission shall give priority to programs that moderate the growth in electric and natural gas demand and usage, facilitate markets and assist market providers to achieve higher levels of energy efficiency, promote energy reliability and adequacy, avoid adverse environmental impacts from the use of energy, and promote rural economic development.

(Wis. Stat. § 196.374(3)(b)1.)

At the conclusion of this process, the decisions made will be in effect for the next quadrennial period (January 2015 through December 2018). It is in this context that the Commission reviews the request to allocate \$15 million to the 2014 budget.

Focus has accrued a budget reserve and unallocated funds of approximately \$66 million. Unallocated and reserve funds have accrued over time due to significant changes in the program that created uncertainty at the time of how much money would be available for the program. One of the important jobs the Commission, SEERA, and CB&I share is to ensure program continuity and the solvency of the program fund.

In late 2010, the Legislature's Joint Finance Committee approved an increase in Focus funding of approximately \$20 million for 2011.² Shortly thereafter, the Committee indicated it was considering reversing that increase. At the time the 2011 Focus budget was created, it was unknown whether the 2011 increase would be reversed by the Committee. As a result, the 2011 budget did not include the additional \$20 million. The Committee, however, ultimately did not reverse the funding increase for 2011.

At approximately the same time, SEERA was in the process of selecting a new program administrator. The outgoing program administrator informed SEERA and the Commission that it had already obligated the program to spend \$36 million in future program years. When the new program administrator, CB&I, took over, the exact amount of those liabilities was unknown and expected to be significant. As a result, the new budget for CB&I was reduced to ensure that funding was available for those liabilities. The liabilities that the former program administrator identified, however, were much less than expected.

As a result of the Committee's maintenance of the 2011 increase in funding, and the lesser liabilities from the previous program administrator, the program now has \$36 million unallocated. CB&I now requests the Commission approve CB&I spending \$15 million of

² The Committee also approved greater increases for 2012 and 2013, but those changes were later reversed.

those dollars in 2014, less any carryover from 2013. CB&I and SEERA, pursuant to an amendment to the Contract in December 2012, indicated at that time, that any unallocated reserves “be used to meet anticipated increased program demand in 2013 and 2014 as new programs become established.” ([PSC REF#: 177616](#).)

In general, the Commission favors matching the annual budget for Focus to the available funds for that year, but only when this is in the best interest of ratepayers and does not jeopardize the solvency or stability of the fund. While Wis. Stat. § 196.374 (3)(b)2. requires that the Commission ensure each energy utility spend 1.2 percent of its annual operating revenue to fund the Focus program, that does not mean that the Commission is required to spend all of those funds collected in the same year that they are paid. The language of Wis. Stat. § 196.374(3)(b)2 is silent as to when the funds collected from the utilities on an annual basis need to be spent. Similarly, Wis. Stat. § 196.374(5m)(a) requires only that, on an annual basis, customers have “the opportunity to receive grants and benefits” (emphasis added)—there is no statutory guarantee or mandate that they will receive those benefits in the same year they are paid.

Past Commission practice is consistent with this statutory interpretation. Since at least 2009, the Commission has not spent the entire amount collected in a given year in that year. Without objection, the Commission has previously approved not including funds collected when the amount of approved funding was uncertain and when the exact amount of liabilities were unknown. ([PSC REF#: 147956](#)). The Commission’s thoughtful spending and maintenance of unallocated and reserve funds has not negatively impacted ratepayers or the Focus program. To the contrary, the program is currently achieving the highest level of electric energy savings and

second highest level of natural gas savings in the program's history at an impressive benefit-cost ratio of 2.89.

This practice is prudent to ensure fund solvency and to maximum ratepayer benefit for each dollar spent. Authorization to allocate an additional \$15 million in funds for 2014 without a thoughtful cost benefit analysis is not the best use of ratepayer dollars. The Commission must balance the benefit of matching spending to the year it is collected against all of the other responsibilities the Commission has relative to Focus.

While a prior amendment to the Contract may have indicated how unallocated funds were to have been used, the Commission is not bound by that prior contractual agreement between SEERA and CB&I. The Commission has the authority to approve or modify such contracts where the public interest is served by such an amendment. Because the next Quadrennial Planning Process has recently begun, the Commission denies the requested increase in the 2014 budget and declares the contractual provision in the December 2012 contract amendment addressing how unallocated reserves were to be spent null and void. The Quadrennial Planning Process will provide the Commission with substantial information regarding the effectiveness of all of the Focus programs. Allocating the unspent funds here would deprive the Commission, and therefore the ratepaying public, the benefits of that planning process. While ratepayers will not see this benefit of the funds in 2014, holding these funds in reserve until the conclusion of the Quadrennial Planning Process will ensure that the funds are spent in the most appropriate manner. A premature decision to spend \$15 million in unallocated funds now, without thoughtful consideration, could negatively impact the program's overall cost-effectiveness and could result in missed opportunities.

A decision to withhold funding is not to suggest the program is not functioning well. However, there is always room for improvement and the Commission has an obligation to ensure that we maximize the benefit of the dollars spent. The decision simply gives the Commission the opportunity to more carefully study how those funds should be spent.

Commissioner Callisto dissents.

II. Therm to kWh Savings Exchange

The Commission last considered the issue of goals for electric and natural gas savings and annual targets for the Focus program at its open meeting on December 22, 2011. ([PSC REF#: 158228](#).) Based on the Commission's determination, gross life cycle³ targets and goals were developed and included in the contract between SEERA and CB&I as shown in Table 1.

Table 1

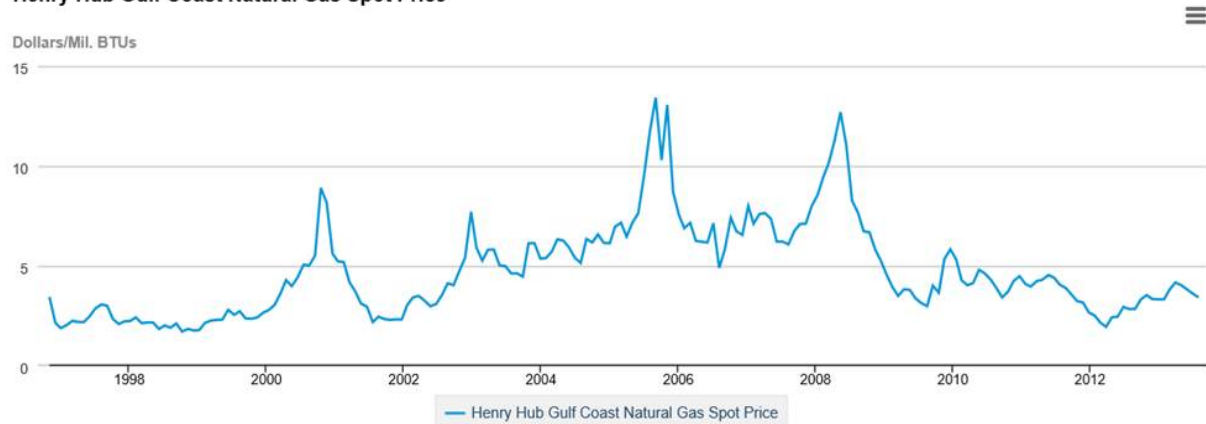
Year	MWh	Therm (thousands)	MW
2011	6,000,000	288,000	83.77
2012	6,000,000	288,000	83.77
2013	6,000,000	288,000	83.77
2014	6,000,000	288,000	83.77
TOTAL	24,000,000	1,152,000	335.08

The Commission determined that the four-year goals for electric and natural gas savings should reflect an annual achievement that is 10 percent higher than the Focus 2009 achievement. Although the highest annual savings achievement to date occurred in 2009, the Commission believed that the new program offerings beginning in 2012, along with administrative efficiencies, would allow for a higher level of savings. As Figure 1 below

³ Life cycle savings represent the savings that will be achieved by the measures installed in a given year over their useful lifetimes. The Commission determined in the first Quadrennial Planning Process to report life cycle savings since it represents future savings, which is more useful for planning purposes.

illustrates, one variable, the price of natural gas, has changed significantly between 2009 and 2013. In 2008 (when natural gas projects were planned for completion in 2009), the average spot price for natural gas was \$8.86 per dekatherm. The 2012 average spot price was \$2.75 per dekatherm. This dramatically lower price has greatly affected the willingness of customers to pursue natural gas saving projects. The Focus program has two ways to respond to this. Focus can either pay a premium in an attempt to achieve the established therm goals or achieve fewer therm savings.

Figure 1 **Natural Gas Prices**
Henry Hub Gulf Coast Natural Gas Spot Price



In order to address this issue, the concept of an exchange rate was proposed. Under this concept, minimum thresholds for kWh and therm savings are established. However, for the remainder of the Commission-established goals, the Program Administrator has the flexibility to trade therms for kWh. Commission staff determined an appropriate ratio for trading therms and kWh in two steps.

First, Commission staff determined the generation potential of each fuel. Commission staff used data from an in-state power plant to calculate that burning 1 therm of natural gas

would generate approximately 13.5 kWh of electricity. Accordingly, saving 1 therm of natural gas would save the same amount of energy as saving 13.5 kWh of electricity.

Second, Commission staff adjusted the savings ratio to account for the fact that gas-saving and electricity-saving measures offered by Focus have different average lifetimes. Commission staff calculated the average lifetime for all gas-saving and electricity-saving measures provided by Focus from January through June 2013, weighted by the amount of savings achieved by each measure during that six-month period. Separate averages were calculated for the Mass Markets and Targeted Markets portfolios because of the different mix of measures offered by each. Applying the differences in average lifetime, Commission staff calculated final exchange rates of 6 kWh per therm for the Mass Markets portfolio, and 18 kWh per therm for the Targeted Markets portfolio.

The Commission determines that it is reasonable and in the public interest to allow CB&I to use an exchange rate for therms to kWh savings. The exchange will help to ensure that Focus dollars continue to be spent in the most efficient manner possible.

IT IS ORDERED:

1. The request to allocate \$15 million to the 2014 budget is denied.
2. CB&I may use the exchange rate for converting kWh savings into therm savings.
3. Jurisdiction is retained.

DISSENT

Commissioner Callisto dissents, in part, and writes separately (see attached).

CONCURRENCE

Commissioner Nowak concurs and writes separately (see attached).

Dated at Madison, Wisconsin, this 5th day of February, 2014.

By the Commission:

A handwritten signature in cursive script, appearing to read "Sandra J. Paske".

Sandra J. Paske
Secretary to the Commission

SJP:CAS;jlt:DL: 00886355

See attached Notice of Rights

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

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE
TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE
PARTY TO BE NAMED AS RESPONDENT**

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of the date of service of this decision, as provided in Wis. Stat. § 227.49. The date of service is shown on the first page. If there is no date on the first page, the date of service is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of the date of service of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of the date of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission serves its original decision.⁴ The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: March 27, 2013

⁴ See *State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

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9501-FE-116

DISSENT OF COMMISSIONER ERIC CALLISTO

I dissent from that portion of the Commission's Order disallowing \$15 million in unallocated Focus on Energy (Focus) dollars for use in the Focus program budget for 2014. The Commission is opting to keep these previously collected ratepayer dollars out of 2014 energy efficiency programming. The Commission prefers that these unallocated funds instead be spent at some yet unspecified time and in some yet unspecified way. The Commission has concluded that doing so "will ensure that the funds are spent in the most appropriate manner."¹ The Commission's conclusion is without support. Its decision to withhold \$15 million in unallocated funds ignores important facts and is inconsistent with statutory directives.

As a result of the Commission's decision, the Focus budget for 2014 will be \$17 million less than it was in 2013, a 16.5 percent cut. The program will achieve about 32 percent less in energy savings. Wisconsin will forego important carbon emission reductions just as new federal carbon regulations are released. Funding for the extremely popular and award-winning Small Business Program will fall by 70 percent.² The Focus program's trade allies will need to lay off employees. And Wisconsin utilities will be asked to roll back their marketing and promotion

¹ See Order in this docket at 6 (February 5, 2014).

² Not long after the Commission's decision to scale back the Small Business Program, the Midwest Energy Efficiency Alliance (MEEA) awarded that same program with MEEA's "Innovation Award" for the program's ability in 2013 to assist over 7,000 Wisconsin small businesses save more than \$12 million in energy costs. See MEEA press release, dated January 17, 2014, <http://mwalliance.org/press-releases/innovative-projects-help-promote-energy-literacy-among-students-slash-energy-costs-sm>.

efforts for the Focus program since available funding will be well outpaced by expected program demand. These are not positive developments by any measure. While I recognize that tough choices are necessary in budgeting, Focus has more than enough available—and already collected—funding to allow for 2014 programming that is commensurate with 2013.

Unallocated Focus funds currently total about \$66 million.³ That means the equivalent of roughly 76 percent of the entire program budget for 2014 will continue to sit in the bank, with no plans for use on energy efficiency or renewable resource programming in the near future. These are funds that utilities collected in accordance with Wis. Stat. § 196.374, and which are statutorily required to be spent on energy efficiency and renewable resource programs. The Commission is keeping these funds sidelined, while at the same time cutting popular, cost-effective, job-creating energy efficiency programs. Why?

It is hard to discern from the Commission's Order. The Order spends several pages listing the Commission's various statutory obligations under Wis. Stat. § 196.374, outlining some of the history of why there is now \$66 million in unspent, unallocated Focus funds, and pointing out that the Commission's Quadrennial Planning Process for the period covering 2015-2018 is now underway. The Order also includes some discussion of program solvency and stability.⁴ Nowhere is there any discussion of what the impact will be to ratepayers, utilities, or other Focus stakeholders as a result of holding back unallocated funds for 2014. Nowhere is there any discussion of the pros and cons of applying the \$15 million in unallocated funding for

³ See Order in this docket at 4 (February 5, 2014). I note that the Order makes a distinction between a "budget reserve" and "unallocated funds." While I understand that Commission staff and the Statewide Energy Efficiency and Renewables Administration (SEERA) have been working to develop a budget reserve policy, it is not yet final, nor has it been forwarded to the Commission for approval. Unallocated funds thus total \$66 million, not \$36 million. *Cf. id.* at 4.

⁴ The Order does not explain how spending \$15 million in unallocated Focus funding in 2014 threatens program solvency or stability.

2014. Nowhere is there a reasoned evaluation of the Small Business Program, which will endure the biggest hit from the Commission's decision.⁵ Nowhere is there a discussion of how the Commission's decision will impact the program's estimated energy savings in 2014 or subsequent years, its overall cost-effectiveness, or any of the other program metrics enumerated in both statute and administrative rule.⁶

The Commission's central conclusion is that there will be another Quadrennial Planning Process to govern the four-year period from 2015-2018, and because of that, none of the \$66 million in unallocated Focus funding can be used in 2014. The Commission further warns that it would be a "premature decision to spend \$15 million in unallocated funds now, without thoughtful consideration" and that doing so "could negatively impact the program's overall cost-effectiveness and could result in missed opportunities."⁷ There is no factual basis for the claim that applying \$15 million in unallocated funding collected during *this* quadrennial period (2011-2014) for use on cost-effective Focus programming in 2014 is "premature" or would be done "without thoughtful consideration." A year ago, this Commission specifically approved applying the remaining, unallocated Focus funds from previous years for use in 2014 "to meet anticipated increased program demand."⁸ There is no suggestion that the Commission acted

⁵ Commissioner Nowak, in her concurrence, newly reveals her disagreement with the Commission's cut to the Small Business Program, suggesting that the program administrator should have proposed other programs to cut. *See* Concurrence of Commissioner Nowak, in this docket at 3 (February 5, 2014). It has been known to Commission staff and to those receiving updates from Commission staff throughout much of 2013 that the Small Business Program was going to be substantially scaled back without the influx of unallocated funds. It was also clearly set forth for the Commission's consideration in an October 2013 staff memorandum. *See* Memorandum for Commission Agenda, in this docket, prepared by Division Administrator Robert Norcross (October 7, 2013). If the Small Business Program was a priority for the Commission, there were numerous opportunities, well in advance of this decision and Order, for those with the responsibility of leading the program's oversight to ensure appropriate funding in 2014.

⁶ *See generally* Wis. Stat. §§ 196.374(2), (3) and (5m); Wis. Admin. Code ch. PSC § 137.05.

⁷ *See* Order in this docket at 6 (February 5, 2014) (emphasis added).

⁸ *See* Amendment 2 to the Contract for Services between SEERA and Shaw Environmental and Infrastructure, page 3, approved by the Commission on December 6, 2012 (PSC REF# 177616).

“prematurely” then, and there is no basis for concluding that it would be doing so now.

Moreover, the expected mismatch between program demand and funding available in 2014 has been known for at least several months, Commission staff and the program administrator have been developing options to deal with it, and a very thoughtful analysis was prepared for the Commission in October 2013, setting forth various options and evaluating the implications of each.⁹ The Commission’s Order simply ignores that history and fails to address Commission staff’s detailed and considered analysis.

Furthermore, the fact that there will be another Quadrennial Planning Process for the 2015–2018 time period, by itself, is not a sufficient reason to withhold \$66 million in previously collected Focus funding. On this point, the Order contains a series of conclusory statements. There is no explanation why holding on to the funds indefinitely will ensure “maximum ratepayer benefit.”¹⁰ There is no factual basis for the suggestion that using a portion of the unallocated funding in 2014 will threaten “fund solvency” or “stability.”¹¹ There is not offered even the slightest evidentiary support for the claim that applying \$15 million in 2014 will “negatively impact” program cost-effectiveness or “result in missed opportunities.”¹² Imagining how various things *could* happen, in the absence of and contrary to actual facts, is an insufficient basis for a Commission Order

For the last two years, the Commission has received regular, quarterly updates about the Focus program from Commissioner Nowak.¹³ Nowhere in any of those memoranda is there a

⁹ See Memorandum for Commission Agenda, in this docket, prepared by Division Administrator Robert Norcross (October 7, 2013).

¹⁰ See Order in this docket at 6 (February 5, 2014).

¹¹ See *id.* at 5-6.

¹² See *id.* at 6.

¹³ See generally Memoranda for Commission Information, in this docket, prepared by Commissioner Ellen Nowak, dated July 30, 2012, October 31, 2012, January 31, 2013, April 30, 2013, July 31, 2013, and October 31, 2013.

hint that the program isn't performing well, that the program administrator isn't wisely spending funds, that it's trying to manipulate the Commission into more funding, that there is reason to doubt the program's job creation impact, or that the cost-effectiveness of the program is otherwise insufficient—all reasons that were raised during the Commission's discussion of record (but not included in the Order) for not spending any of the unallocated funds in 2014. Indeed, as recently as July 2013, the Commission received an update that reported on Focus achieving a 2.89 benefit-cost ratio, high degrees of customer participation and satisfaction, and "the highest level of electric energy savings and second highest level of natural gas savings . . . in the program's history."¹⁴ And as recently as December of last year, this Commission submitted a letter to the U.S. Environmental Protection Agency (EPA), signed by all three commissioners, touting "a very effective, utility-funded energy efficiency program called Focus on Energy," highlighting its accomplishments, and ultimately stressing its importance for Wisconsin in complying with future federal regulations on carbon emission reductions.¹⁵

So regardless of whether one looks at the Order itself or the Commission discussion, the Commission's decision to withhold the unallocated \$15 million is without a sufficient factual basis.

It also misunderstands the law. While the Order acknowledges that the Commission has a statutory obligation to "require each energy utility to spend 1.2 percent of its annual operating

¹⁴ See Memorandum for Commission Information, in this docket, at 3, prepared by Commissioner Ellen Nowak (July 31, 2013).

¹⁵ See Letter from Public Service Commission of Wisconsin and Wisconsin Department of Natural Resources to U.S. EPA Administrator Gina McCarthy (December 13, 2013).

revenues to fund [Focus programs],” Wis. Stat. § 196.374(3)(b)2., it only selectively quotes Wis. Stat. § 196.374(5m)(a), a provision that, when read more completely, requires the Commission to “ensure that, on an annual basis, each customer class of an energy utility has the opportunity to receive grants and benefits under energy efficiency programs in an amount equal to the amount that is recovered from the customer class” in rates. These statutes embody a requirement that directly links what ratepayers contribute to the Focus program and what they are entitled to in program expenditures. And Wis. Stat. § 196.374(5m)(a) is explicit that customers must on an annual basis have the opportunity to receive benefits from the program at a level that is equal to what customers have contributed. I recognize that for various legitimate reasons we cannot require a perfect match between ratepayer contributions in one calendar year and Focus expenditures in that same calendar year. Indeed, I am not suggesting that the law requires such a perfect calendar year match or that the Commission has in the past applied the spending requirements in that fashion.¹⁶ But there is too significant a disconnect between program expenditures and ratepayer contributions when \$66 million in unallocated Focus funding—about 76 percent of the total budget for 2014—is allowed to sit in the bank indefinitely. Collecting so substantial a sum of ratepayer money, year after year, yet depriving those same ratepayers of the opportunity to receive the energy efficiency benefits that would result from using those funds on cost-effective Focus programs cannot be consistent with the Commission’s obligations under

¹⁶ Both the Order and the Concurrence of Commissioner Nowak focus their legal analyses around the idea that the statutes do not require that the exact amount of monies collected in one calendar year equal the amount of Focus expenditures in that same calendar year. *See* Order in this docket at 5-6, and Concurrence of Commissioner Nowak in this docket at 1 (February 5, 2014). I agree with that conclusion, and I think it’s consistent with the historical practice of the Focus program. Quite clearly, I am not claiming that a perfect calendar year match is what the law requires or what the practice of this Commission has been.

Wis. Stat. §§ 196.374(3)(b)2. and (5m)(a) if those statutes are to have any meaning.¹⁷ If the Commission is allowed to continue to store away \$66 million in ratepayer dollars, what's to stop it from doing the same with \$100 million? Or more? The Commission's Order neither answers that question nor makes an effort to articulate the limits or parameters of its decision.¹⁸ I doubt that the Commission's decision would survive a court challenge.¹⁹

While I continue to believe that the Focus program is well-run, cost-effective, and of great value to ratepayers, it is Commission decisions like these that trouble me. I understand that a \$15 million decision doesn't make or break the Focus program. What is most bothersome is the Commission's willingness to ignore the relevant facts and so cavalierly adopt reasons that are at odds with what the Commission itself says in every other context about the Focus program. Further, holding on to this much ratepayer money, collected years ago, is fraught with legal problems and introduces a troubling precedent into how the Commission carries out its statutory obligations under Wis. Stat. § 196.374. The better, and more defensible decision, would have been for the Commission to approve the \$15 million for 2014, allow the Small Business Program

¹⁷ Both the Order and the Concurrence of Commissioner Nowak liken withholding \$66 million in ratepayer dollars from Focus programs with past decisions to hold back much smaller quantities of funding. *See* Order in this docket at 5-6, and Concurrence of Commissioner Nowak in this docket at 1 (February 5, 2014). Previous decisions to not allocate Focus funding were driven by the probability of legislative defunding in 2011 and the transition to a new program administrator, as the Order points out. *See id.* at 4-5. Circumstances such as those do not exist today, and those previous withholdings were of amounts that are a fraction of the \$66 million being held back by the Commission's decision today.

¹⁸ The Order does express a preference for matching annual contributions with available funding, "but only when this is in the best interest of ratepayers and does not jeopardize the solvency or stability of the fund." *See* Order in this docket at 5 (February 5, 2014). The Order includes no explanation of how using \$15 million in unallocated funding would jeopardize program solvency or stability, nor does it offer factual support for the implication that applying the \$15 million in 2014 would negatively impact the program.

¹⁹ *See* Wis. Stat. § 227.57(5) (Agency actions shall be set aside or modified if the agency "has erroneously interpreted a provision of law . . ."); *see also* Wis. Stat. § 227.57(8) ("The court shall reverse or remand the case to the agency if the agency's exercise of discretion is . . . in violation of a . . . statutory provision . . .").

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to continue to perform at a high level, and fully support the job-creating potential of Focus programs.

I respectfully dissent.

DL: 00896951

PUBLIC SERVICE COMMISSION OF WISCONSIN

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9501-FE-116

CONCURRENCE OF ELLEN NOWAK

I write in concurrence of the Commission's Order disallowing \$15 million in unallocated Focus on Energy (Focus) dollars for use in the Focus program budget for 2014 (docket 9501-FE-116). Specifically, I write to address some of the comments in Commissioner Callisto's dissent regarding the facts and statutory directives that this Commission allegedly ignored.¹

The Order properly describes why the Focus budget has accumulated unallocated reserves over the past several years, and I will not restate the history here.² (*See* Order at p. 4). The undisputed fact that these reserves accumulated over several years contradicts the dissent's contention that ratepayer contributions must closely mirror program expenditures on an annual

¹ Commissioner Callisto's speculation about how the Commission's decision would fare upon judicial review ignores the appropriate standard of review. The Legislature has given the Commission the discretion to oversee and implement Focus. The dissent selectively quotes Wis. Stat. § 227.57(8) and conveniently ignores the last part of that provision which provides "but the court shall not substitute its judgment for that of the agency on any issue of discretion." The Commission has to make tough choices and balance many factors. It did so here, and its decision has a sound rational basis. The fact that Commissioner Callisto disagrees with the rationale does not make the decision arbitrary or capricious.

² Commissioner Callisto's dissent states that the unallocated funds total approximately \$66 million. The dissent also acknowledges that the \$66 million figure is overstated, by about \$30 million. As Commissioner Callisto notes in his dissent, Commission staff, Wipfli and the Statewide Energy Efficiency and Renewables Administration (SEERA) have been working to develop a budget reserve policy. The SEERA board approved a reserve policy on January 31, 2014, which requires that a cash reserve equal to 30 percent of the prior year's actual revenue will be maintained to ensure adequate liquidity to meet on-going obligations. This leaves approximately \$31.5 million in unallocated funds.

basis. In the years 2011-2012, funds accumulated without matching expenditures. That practice was not improper then, and it is not now.

Also, as noted by the Order, there is no such statutory directive that monies collected be spent in the year received. I would venture to guess that never has the amount collected in a particular year matched the expenditures for that year. The program has had years, such as 2013, where program expenditures exceeded revenues. Also, the program has had years where revenues exceeded expenditures.

Commissioner Callisto next argues that the Commission's decision in this matter will result in a 16.5 percent cut in the Focus budget for 2014. This is misleading. Reserve and roll-over dollars were used to increase the 2013 budget in order to cover the ramp-up of newly implemented programs. However, comparing 2013 to 2014 *revenues*, the program has been relatively constant.

A criticism of the Focus program has been inconsistent funding levels, causing programs to start up and stop or be eliminated entirely. Infusion of one-time cash to programs, such as was proposed here, would only exacerbate the problem we are trying to solve. Striving to maintain consistent levels of funding and keeping close tabs on expenditures so that ratepayer dollars are effectively spent is the goal.

A final issue that I'd like to address is the threat that the Focus program's most popular program, the Small Business program, would suffer cutbacks if this spending request was not approved. To clarify, the base budget for the Small Business program was only reduced by \$500,000. In 2013, the base budget was \$5.5 million. The base budget in 2014 is \$5 million. Prior to 2013, small businesses were a relatively untapped market for the Focus Program. As a

result, when it was started up in 2013, there was greater demand in this new market than anticipated. In response, the Program Administrator added an additional \$11 million to the budget over the course of 2013.

While I may disagree with the Program Administrator's decision to reduce spending on such a popular and effective program, the Commission generally gives discretion to the Program Administrator to use funds in the most effective way to meet its goals. The Commission has the authority to order a higher spending level for any particular program, but chose not to do so in this case. As noted at the open meeting, budgets are about priorities, and the Program Administrator had the discretion to propose reallocated funds based on ratepayer demands and cost effectiveness in order to meet its goals. In the future, I would encourage the Program Administrator to look for ways to streamline other less popular or cost-effective programs rather than reducing funding for one of the most popular and effective programs.

To be sure, Focus is functioning well and is currently achieving the highest level of electric energy savings and second highest natural gas savings in the program's history, with a cost benefit ratio of 2.89. However, these statistics do not mean that additional money equals additional electric and gas savings.

At the open meeting when the Commission discussed this request, I voiced my desire that we not spend this money quickly, but wisely. It is important to remember that these are ratepayer dollars and that this Commission is entrusted with administering the funds in a manner that provides the maximum benefit of the dollars spent.