

Right-of-Ways and Easements for Electric Facility Construction in Wisconsin



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Introduction

The Public Service Commission of Wisconsin (PSC or Commission) offers this overview to landowners who must negotiate easement contracts with transmission owners for new electric transmission lines or sales of land for substations. It explains the easement process so that landowners may have informed negotiations with transmission owners. Transmission owners are a type of utility company that move electricity from generation sites to distribution lines. Their easement agreements and management of rights-of-way (ROW) are likely to differ from local electric or gas utilities.

The Commission understands that there are concerns among landowners about the eminent domain process (condemnation). The procedures of eminent domain are addressed in this overview, but a more complete discussion is contained in a publication from the Wisconsin State Energy Office entitled, “The Rights of Landowners under Wisconsin’s Eminent Domain Law.”¹ Because easement agreements are private contracts, the PSC does not participate in the negotiations between transmission owners and landowners. The processes for negotiation and condemnation are covered by the laws in Chapter 32 of the Wisconsin Statutes.

This overview explains what a transmission ROW is and how a transmission owner normally obtains the ROW it needs to build and protect its facilities. It also explains the relationship between initial contract negotiations and the eminent domain process. Finally, it discusses some concerns about landowner rights and easement contracts.² If easement negotiations for an easement between a transmission owner and a landowner fail and the condemnation process begins, the landowner should review the “Rights of Landowners” state publication.



Figure 1 Typical Vertical Monopole Structure

Electric Transmission Line ROW

Transmission owners are the entities that own and maintain electricity transmission facilities. An electric transmission line ROW is a strip of land that an electric transmission owner uses to construct, maintain, or repair a large power line. Its use is governed by a private business contract, called an easement, between the transmission owner and the landowner. If the transmission owner needs access roads to get to the power line ROW, it also obtains easements for those access roads.

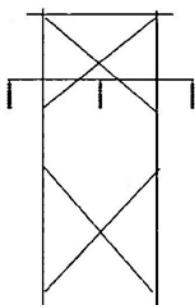


Figure 2 Typical H-Frame Structure

A transmission line ROW is wider than a ROW for a smaller distribution line that serves homes and businesses directly. Transmission lines may operate at several hundred thousand volts and can serve several hundred thousand customers. Distribution lines operate at several thousand volts and can serve a few thousand customers. A service connection to a home operates at a few hundred volts.

A transmission line is usually centered in the ROW. The structures (usually poles and cross arms) keep the wires away from the ground, other objects, and each other. Structure height, type, span length (distance between structures), and ROW width are interrelated. If landowners wish to have fewer transmission structures installed on their land, they might ask if a longer span length is possible. To increase the span length, the transmission owner

¹ “[The Rights of Landowners under Wisconsin’s Eminent Domain Law](http://www.stateenergyoffice.wi.gov/docview.asp?docid=22817&locid=160).” Wisconsin State Energy Office (<http://www.stateenergyoffice.wi.gov/docview.asp?docid=22817&locid=160>)

² Wisconsin utilities have appeared to change their approaches to easement contracts and ROW vegetation management since the creation of the National Electric Reliability Corporation (NERC) in 2007.

might need to increase the structure height. If the span length and height are greatly increased, a wider ROW is sometimes needed.

Sometimes it is necessary to attach distribution lines (distribution underbuild) to transmission line structures. This would limit the transmission span length to maintain safe clearances below the distribution line. Distribution lines along transmission routes are often buried with the transmission lines remaining above ground.

How a Transmission Owner Obtains a ROW

A transmission owner obtains a ROW for an electric transmission line or substation through the purchase of an easement (purchasing rights to the land) or fee title ownership (purchasing the land).

Easements

The most common arrangement for a transmission owner to obtain land rights is an easement. When a transmission owner seeks an easement, a real estate agent contacts a landowner to negotiate the purchase of usage rights for a specific parcel or strip of land that is to be used for the power line.

An easement between a transmission owner and a landowner is a legal contract that allows the transmission owner to build, maintain, and protect the power line. The landowner retains general ownership of the land and pays the taxes on the parcel. The landowner sells the usage rights to the transmission owner for a negotiated amount of money, generally paid in one lump sum. The contract specifies restrictions on both the transmission owner's and the landowner's use of the land and specifies the rights of the transmission owner. It is binding upon the transmission owner, the landowner, and any future owners of the land until the contract is dissolved. Future owners of the land should find the easement contract attached to the deed.

Sometimes, a new line needs to be installed in place of an older line that is in poor condition. If the existing ROW is not appropriate for the new line, a new ROW must be obtained through a new easement. Under Wis. Admin. Code § PSC 113.0509(2), new transmission easements must specify the: (1) type, height limits, and number of new structures; (2) line voltage; and (3) ROW width.

If the existing ROW and structures are still appropriate but the original easement can be improved in other ways, the transmission owner may offer to renegotiate the easement contract. For example, some older easements have wording that is difficult to interpret or a legal description that refers to an entire 40-acre parcel for the ROW when only a 60-foot-wide strip is needed. The transmission owner may ask to renegotiate a contract when rebuilding an old line on existing ROW in order to clarify its relationship with the affected landowner.

Fee Simple Purchases

Another arrangement for obtaining new power line ROWs is for the transmission owner to actually purchase the land. In this arrangement, the landowner sells the strip of land to the transmission owner outright, and the utility owns the ROW in fee simple. In this situation, the landowner gives up ownership of the land along with all the rights and responsibilities that ownership entails. This is a common arrangement for new substations, but is rarely used when siting transmission lines.

Substation Lands

Transmission substations vary in size because of the different numbers of lines and different size lines and transformers in each one. A simple distribution substation may require less than one acre, while a large

substation may require six acres or more. Some land outside the substation fence may be needed for access roads. If landscaping or earthen berms are used to screen the substation, more land may be necessary. If more land is purchased than is needed for the substation, the utility may sell the excess land, rent it out for farming or other local uses, or retain it for potential substation expansions.

How a Transmission Owner Obtains Easements

A transmission owner acquires easements by negotiating with landowners on whose lands the power line will be constructed. Easement negotiations begin at different times, depending on the type of project and the type of approval the transmission owner must receive from the Commission. A transmission owner must receive a Certificate of Public Convenience and Necessity (CPCN) from the Commission for a transmission project that is either: (1) 345 kilovolts (kV) or greater; or (2) less than 345 kV but greater than 100 kV, over one mile in length, and needing new ROW.

A transmission owner must receive a Certificate of Authority (CA) for any transmission line it proposes of any voltage if the proposed cost exceeds a cost threshold related to the transmission owner's size.

According to Wisconsin's eminent domain law (Wis. Stat. § 32.03(5)), a transmission owner generally may not acquire an easement for transmission projects requiring a CPCN until it receives the CPCN from the Commission. The Commission determines the transmission line route and structure designs that should be used after reviewing the record of the public hearing for the CPCN. However, Wis. Stat. § 32.03(5)(c) does allow a transmission owner to negotiate an easement with a landowner before a CPCN is issued if the transmission owner advises the landowner that it doesn't have authority to acquire the property by condemnation until the CPCN actually is issued.

For lower voltage lines where a CA is required, there may be only one proposed route and structure type. For these types of proposed construction cases, the transmission owner may begin easement negotiations before the CA has been granted by the Commission.

Although the negotiation for an easement is a private transaction between the transmission owner and the landowner, a formal process protects a landowner's rights during the negotiation. In a typical negotiation, a transmission owner's agent presents a landowner with a draft easement and an estimate of the value of the ROW it wants to purchase. The landowner has the right to have his or her own appraisal made by a qualified appraiser. The reasonable cost of this appraisal must be reimbursed by the transmission owner if: (1) it is submitted to the utility within 60 days after receipt of the utility's appraisal; and (2) it meets the standards of the law in Wis. Stat. § 32.09.

The easement between a transmission owner and an individual is specific to the land in question and each easement differs depending on many factors. The landowner should not sign an easement without first reading it, asking questions, and negotiating. Under Wis. Admin. Code § PSC 113.0509, the landowner shall have a minimum period of five days to review the proposed easement, unless this period is voluntarily waived by the landowner. Also, there is nothing barring one landowner along a proposed transmission route from discussing easement concerns with other landowners before signing. As stated earlier, in the case of high-voltage transmission lines, Wis. Admin. Code § PSC 113.0509(2) states that the easement contract must have certain descriptive details about the line:

- Length and width of the ROW.
- Number, type, and maximum height of all structures to be erected on that ROW.
- Minimum height of the transmission lines above the landscape.
- Number and maximum voltage of the lines to be installed on that ROW.

For a newly proposed project, the landowner may also examine the project application that the transmission owner submitted to the PSC for review. For projects that require a CPCN, the PSC ensures that copies of the application are provided to the clerk of each municipality and town in the project area and also to the main public library in each county in the project area. Interested persons can also request copies of the application directly from the transmission owner or review it on the PSC's Electronic Regulatory Filing (ERF) system web site (<http://psc.wi.gov>). All documents for proposed construction cases can be accessed on the PSC's website by using a project application's unique PSC docket number. More information about using the PSC's ERF system can be found on the web site or by contacting the PSC Division of Energy Regulation at (608) 266-5481.

Landowners' Rights, and Waiving Those Rights

Wisconsin law lists some rights of landowners whose properties will be affected by a transmission line that is 100 kV or larger and over one mile in length. Table 1 lists these rights. The landowner may be asked to waive, or give up, one or more of these rights, but does not have to do so. In the easement, marked or crossed-out items in the list are "waived" or no longer applicable if the landowner signs the easement. The easement should not be signed unless the landowner absolutely agrees to waive the items as indicated.

Easements are legally binding and should be written in precise language. The landowner's rights listed in Table 1 are generally included as part of the easement by being attached as an "Exhibit." A term of the easement might state that those rights that are listed, marked, or crossed out in the exhibit would be "waived," *i.e.*, not included in the easement. Table 2 gives an example of easement language that one might see for waiving landowner rights. (The "Grantor" is the landowner and the "Grantee" is the utility, in this case a transmission owner).

Waiving any of these rights, as well as any other part of the contract not required by law, is negotiable and not an obligation.

Table 1 Landowners' Rights

Landowners who sign an easement with the utility have the specific rights provided under the Wisconsin Statutes. These rights are applicable for high voltage power lines that are 100 kV or larger, longer than one mile, and built after 1976. If landowners have questions or problems related to these rights, they should contact the PSC at (608) 266-5481 or (888) 816-3831.

Under Wisconsin law (Wis. Stat. § 182.017(7)(c) to (h)), the rights are expressed as utility requirements:

- (c) In constructing and maintaining high-voltage transmission lines on the property covered by the easement the utility shall:
 1. If excavation is necessary, ensure that the top soil is stripped, piled and replaced upon completion of the operation.
 2. Restore to its original condition any slope, terrace, or waterway which is disturbed by the construction or maintenance.
 3. Insofar as is practicable and when the landowner requests, schedule any construction work in an area used for agricultural production at times when the ground is frozen in order to prevent or reduce soil compaction.
 4. Clear all debris and remove all stones and rocks resulting from construction activity upon completion of construction.
 5. Satisfactorily repair to its original condition any fence damaged as a result of construction or maintenance operations. If cutting a fence is necessary, a temporary gate shall be installed. Any such gate shall be left in place at the landowner's request.
 6. Repair any drainage tile line within the easement damaged by such construction or maintenance.
 7. Pay for any crop damage caused by such construction or maintenance.
 8. Supply and install any necessary grounding of a landowner's fences, machinery or buildings.
- (d) The utility shall control weeds and brush around the transmission line facilities. No herbicidal chemicals may be used for weed and brush control without the express written consent of the landowner. If weed and brush control is undertaken by the landowner under an agreement with the utility, the landowner shall receive from the utility a reasonable amount for such services.
- (e) The landowner shall be afforded a reasonable time prior to commencement of construction to harvest any trees located within the easement boundaries, and if the landowner fails to do so, the landowner shall nevertheless retain title to all trees cut by the utility.
- (f) The landowner shall not be responsible for any injury to persons or property caused by the design, construction or upkeep of the high-voltage transmission lines or towers.
- (g) The utility shall employ all reasonable measures to ensure that the landowner's television and radio reception is not adversely affected by the high-voltage transmission lines.
- (h) The utility may not use any lands beyond the boundaries of the easement for any purpose, including ingress to and egress from the right-of-way, without the written consent of the landowner.

Table 2 Examples of Easement Contract Language that Waive Certain Landowner Rights

In the Contract: “The parties hereto do hereby agree to the terms and conditions set forth in Exhibit(s) _____, attached hereto and incorporated therein.”
At the top of the Exhibit: “As part of the foregoing High Voltage Electric Line Easement, Grantor(s) do hereby specifically waive certain of the following rights as designated at the bottom hereof . . .”
At the Bottom of the Exhibit: “The Grantor(s) do hereby waive the rights provided in the following paragraphs of this Exhibit A . . .” [with spaces following for listed rights to be waived]

PSC Involvement in Easement Negotiations

An easement is a private agreement between the landowner and the transmission owner. The PSC, therefore, cannot become involved in easement negotiations.

Agricultural Land as a Special Case

Agricultural land presents a special case. A negotiation tool that may be available to farm operators or farmland owners is the Agricultural Impact Statement (AIS) prepared for certain power line projects by the Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP). Any power line or substation that involves taking an interest in over five acres from any single farm operation requires preparation of an AIS before easement or purchase contract negotiations can begin. A “farm operation” is defined by law as an activity conducted primarily for the production of commodities for sale or home use in such quantity that the commodities contribute materially to the support of the farm operator.

Even if the taking is less than five acres, DATCP may decide to prepare an AIS if it believes the acquisition will have a significant effect on farm operations. The completed AIS is sent to affected farmland owners and farm operators. By law, DATCP must also distribute copies to certain local municipal offices and libraries in the potentially affected area. The transmission owner is not allowed to negotiate with the property owner or begin condemnation for at least 30 days after publication of the AIS. (For more on condemnation, see discussion below.)

According to Wisconsin law (Wis. Stat. § 32.09(6r)), if the transmission line is at least 100 kV and more than one mile long, the transmission owner’s offer for land “zoned or used for agricultural purposes” must be in two forms: a lump sum payment and an annual payment “which represents just compensation under sub. (6) for taking of the easement for one year.” The agricultural landowner chooses which type of payment to accept. If annual payments are chosen, payments will be received only as long as the land remains in agricultural use.

When Negotiations Break Down – the Transmission Owner’s Right of Eminent Domain (Condemnation)

Despite earnest negotiations, it is possible that a landowner and a transmission owner will not reach agreement on the terms and conditions of an easement. Under these circumstances, the transmission owner has the right to take the easement or property through court action. It may “condemn” the land, if needed, using its statutory right of eminent domain.

Transmission owners as utilities have been granted the right of eminent domain because it is in the public interest to provide safe and reliable electric service at a fair price. For major transmission lines, however, a transmission owner may not condemn property before the utility receives a CPCN from the PSC. A public hearing in the project area is required for these types of projects.

In a condemnation action, the local condemnation commission determines the fair price to be paid, based on testimony provided to it by the transmission owner and the landowner’s witnesses. Landowners have rights in this process under the Wisconsin Eminent Domain Law (Wis. Stat. ch. 32). These rights are described in a state-produced brochure, “[The Rights of Landowners under Wisconsin Eminent Domain Law](#).³”³ The transmission owner must provide this brochure to affected landowners. If the transmission owner begins the condemnation process, it is important for the landowner to review the information outlined in this publication.

The Importance of Negotiation

A landowner does not have to sign the standard easement form as the transmission owner agent initially presents it. Landowners have the right to negotiate for terms in the easement contract that will avoid or reduce the line’s impact on their land. The transmission owner, in turn, has an obligation to negotiate. The transmission owner will make an initial offer of money to be paid for the easement, but this amount is also negotiable. To complete a satisfactory easement negotiation, however, both the landowner and the transmission owner must have reasonable expectations and be reasonable in negotiations.

If the landowner feels threatened about condemnation during the easement negotiations with the transmission owner, the best action is to continue to negotiate. Some landowners find that hiring a lawyer is helpful if negotiations are not progressing. Transmission owners generally do not prefer condemnation. Condemnation procedures are expensive and time consuming, not only for the landowner but also for the transmission owner.

The Condemnation Process

The transmission owner generally only begins the condemnation process after negotiation with a landowner has failed to result in an agreement. The condemnation process begins with the transmission owner offering the landowner an official “jurisdictional offer,” by personal delivery service or certified mail. The jurisdictional offer is an official written notice by the transmission owner to the landowner that: (1) describes the proposed public use of the land; (2) describes what property is to be taken and the date when it will be taken; and (3) states the amount of compensation the landowner is to be paid. The landowner, by law, has 20 days from the receipt of this offer to accept it or reject it.

³ <http://www.stateenergyoffice.wi.gov/docview.asp?docid=22817&locid=160>

If the landowner accepts the offer, the offered payment is made by the transmission owner and the condemnation process terminates. If the landowner rejects the offer or does not respond within 20 days, the transmission owner may petition the court to have the county condemnation commission determine the appropriate level of compensation for the ROW. The condemnation process continues until the easement or property is obtained and the landowner is compensated. The process is outlined in the “Rights of Landowners under Wisconsin Eminent Domain Law” state publication previously mentioned.

ROW Restrictions

Transmission Owner Use

After acquiring an easement from the landowner, the transmission owner owns the right to do only what is provided for in the easement. If the transmission owner buys the ROW in fee simple, it is limited only by the regulations, such as local zoning restrictions, that would apply to any landowner.

An important part of what the easement allows is the ability of the transmission owner to control the types of vegetation that may grow in the ROW. This special ability is described in the following major section of this overview entitled, “ROW Maintenance (Vegetation Management)”.

Property Owner Use

Modern easements specify how a landowner is allowed to use the ROW. In general, property uses that do not interfere with the transmission line are acceptable. These uses can include dairy farming, crop farming, grazing, some gardening, hunting, biking, hiking, snowmobiling, and parking, among other things.

Modern easements may specify the type and location of buildings or woody plants allowed within the ROW. The State Electrical Code sets the minimum distance between transmission lines and buildings (such as storage sheds). It prohibits new transmission lines from being built over residential dwellings and prohibits new houses from being built under transmission lines. The easement can specify the types of woody species that are permitted and any conditions required by the transmission owner for location, maintenance, or maximum heights allowed. Some transmission owners may prefer to discuss any exceptions they may allow with landowners. Only the terms of the easement are legally enforceable, and if exceptions are not provided for in the easement, they may be withdrawn in future maintenance cycles.

If the power line is installed underground, the ROW may be narrower than for an overhead line of the same voltage. However, buildings, shrubs, and trees are prohibited throughout the ROW.

Public Use

Landowners retain the right to limit public access on their lands. Fences are allowed across the ROW. Fences constructed in ROWs of transmission lines that are 100 kV or larger, longer than one mile, and built after 1976 are specifically protected in Wis. Stat. § 182.017(7)(c) which states that the transmission owner must satisfactorily repair to its original condition any fence that is damaged as a result of construction or maintenance operations. If the fence has no gate and the transmission owner needs access to a ROW, they will cut the fence and a temporary gate will be installed. Any such gate may be left in place at the landowner’s request. Transmission owners that damage fences located in ROWs not mentioned in Wis. Stat. § 182.017(7) (see Table 1) are required to meet the conditions specified in the easement.

ROW Maintenance (Vegetation Management)

[Note, August 27, 2015: Commission staff is in the process of obtaining clarification from the transmission owners about their vegetation management plans and requirements for landowners.

Vegetation management is not within the Commission's jurisdiction unless specifically included as a condition for approval of a CA or CPCN. This overview may be amended as new information is available.]

After a transmission line is installed, the transmission owner maintains the ROW according to its specified practices for the type, size, and voltage of the line. Transmission owners often use contractors for the actual on-the-ground management of the ROW. Contractors may be responsible for work planning, operations, and/or inspections as well as communications with landowners.

Generally, the area directly under the transmission line's conductors is usually kept in low-growing forbs and grasses to make it easier for line maintenance and repair. All woody vegetation in this zone is usually removed. Some compatible, low growing species of shrubs or dwarf trees may be allowed in gardens or yards on the edges of a ROW. Each transmission owner's staff should be available to discuss how it manages the species growing in the ROW and what types of plantings may be acceptable. The transmission owner may allow some of these short-growing woody species, but it is important to note that anything located in an easement can be at risk for removal if not specified in the easement or if there is a change to the operation or maintenance requirement of the electrical facilities.

There may be other exceptions for vegetation management depending on ROW conditions. For an overhead line where engineering allows, trees and shrubs that remain short as they mature might be allowed to grow in the ROW but not under the line. Where a line crosses a valley and has the wires high off the ground, trees and shrubs may be allowed to grow in the lower part of the valley. There might be buffer zones necessary where low-growing woody plants are allowed to remain at streams and river crossings.

Regulatory Framework

Vegetation management in the ROW is one part of transmission system reliability that is overseen by the North American Electric Reliability Corporation (NERC). NERC has been certified by the Federal Energy Regulatory Commission as the reliability organization for the North American electric transmission system. It oversees reliability of the transmission system's lines and has established a national reliability standard for ROW vegetation management (FAC-003-3),⁴ on the transmission system for lines over 200 kV. Each transmission owner must have a line clearance plan available to NERC related to the NERC-required clearances for that type of line. Landowner use of the ROW must conform to these standards as well.

With the current NERC standards, the major transmission owners in Wisconsin ([American Transmission Company LLC](#), [Dairyland Power Cooperative](#), and [Xcel/Northern States Power](#)) have changed their tolerances towards woody vegetation in the ROW. These tolerances have become more restrictive compared to those prior to 2003. Generally, they will not allow taller tree and shrub species to grow in the ROW. Some transmission owners employ a zoned approach to the ROW, allowing different types of vegetation in different sections of the ROW. Some transmission owners may have a list of recognized compatible/incompatible species which are primarily based on height at maturity.

Hazard Trees

Under Wis. Admin. Code § 113.0512, a transmission owner may also conduct additional tree trimming or removal outside of the ROW to trim or remove trees that could pose a threat to the transmission line.

⁴ <http://www.nerc.com/files/FAC-003-3.pdf>.

These “hazard” trees are trees that pose an unacceptable risk of falling and contacting the line before the next ROW maintenance cycle. If identified, these hazard trees must be topped, pruned, or felled so that they no longer pose a hazard. The easement should specify and enable this utility obligation. Wood from these trees is not removed from the site, but stacked as firewood or left to decay naturally. Landowners may be given an opportunity to request part of the trunk of the hazard trees be left standing for wildlife, or options regarding the cut wood. Safety requirements may not allow for this wildlife habitat to be left and would be decided on a case-by-case basis.

All woody vegetation over underground lines is removed. If a line is buried, the ROW is likely to be much narrower than an overhead line, but vegetation would still be removed in the ROW that is associated with the underground line.

Under Wis. Admin. Code § PSC 113.0510, the utility must make a reasonable attempt at contacting landowners a minimum of 24 hours before beginning maintenance activities in the ROW (emergency repairs are exempted from this notification requirement). The ROW is inspected from the air at least once a year and inspected by ground patrol periodically, generally every three to four years. Property owners with concerns or questions about ROW management on their land should contact the relevant transmission owner.

Herbicides

Herbicides may be used to remove trees and other woody vegetation, unless prohibited in the easement. Landowners may require that herbicides not be used on their property. The use of herbicides can be an effective way of controlling incompatible species, and is part of the industry-recognized Integrated Vegetation Management (IVM) of ROWs. The goal of IVM is to effectively use methods, such as targeted herbicide applications, to reduce incompatible species over time to create a sustainable and low-maintenance community within the ROW. This method can lead to an overall reduction in herbicide use over time. A landowner should be informed as to what herbicide the transmission owner or their contractors are using and if there are any restrictions to grazing or accessing the area after application. If no herbicides or chemicals are used, the transmission owner relies on cutting and other mechanical means of control. Without the use of herbicides, vegetation management within the ROW may be much more invasive and impactful in the long-term.

How Long an Easement Lasts

Length of Easement Terms

The transmission owner will retain its ROW rights and obligations in perpetuity unless it removes the line, abandons the ROW, and releases the easement rights. The easement becomes part of the property deed and is thereafter transferred with the property. Except in certain farmland situations, the easement compensation is a one-time payment by the transmission owner to be allowed to maintain the ROW and protect the line in perpetuity. The transmission owner, the landowner that signed the easement agreement, and all future owners of that property must abide by the terms of the easement.

ROW Abandonment

If the transmission owner removes a power line, it might offer a landowner the opportunity to nullify an easement. The transmission owners usually charge landowners a fee to release the easement rights. For example, a transmission owner might charge landowners the administrative costs or the current market value of the easement to clear the easement from the property deed.

The Public Service Commission of Wisconsin is an independent state agency
that oversees more than 1,100 Wisconsin public utilities that provide
natural gas, electricity, heat, steam, water, and telecommunication services.



Public Service Commission of Wisconsin

P.O. Box 7854
Madison, WI 53707-7854

Telephone: 608-266-5481

Toll free: 888-816-3831

Consumer affairs: 608-266-2001 / 800-225-7729

TTY: 608-267-1479 / 800-251-8345

Fax: 608-266-3957

Website: <http://psc.wi.gov>

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