

IN THIS ISSUE

- *PSC Offers Provisional Support for "Power the Future" Genco Proposal*
- *Municipal Adult Establishment Licensing Ordinance Found Unconstitutional*
- *Annexations Across River Approved*
- *Court of Appeals Rejects Record Punitive Damages Award in WEPCO Pollution Case*
- *PSC Holds Public Hearing on ROW Rules*
- *Divided Wisconsin Court of Appeals Nixes "Dockominiums"*

PSC Offers Provisional Support for "Power the Future" Genco Proposal

At its open meeting on September 6, 2001, the Public Service Commission ("Commission") had an extensive discussion on a "Request for Declaratory Ruling Approving a Proposed Plan to Increase Generation in Wisconsin" submitted by Wisconsin Electric Power Company ("WEPCO"). WEPCO had sought the declaratory ruling on a number of issues relating to its proposed "Power the Future-2" energy plan ("PTF-2"), including whether it is "prudent" for WEPCO to proceed in developing the PTF-2 proposal; to agree to reimburse the affiliated non-utility generation company (or "Genco") contemplated under the proposal for pre-certification expenses incurred in constructing new generation facilities under the plan; and to include such expenses in lease payments to the Genco. Although the Commission declined to determine these issues explicitly at this time, all three commissioners offered at least preliminary support for WEPCO's plan.

Under WEPCO's plan, 2800 MW of new coal and gas-fired generation facilities would be built and owned by a non-regulated WEPCO affiliate (or "Genco") over the next ten years. The plants ultimately would be operated either by WEPCO or the Genco and leased back to WEPCO. Up to 20% of the new affiliate could be owned by other utilities, including municipal electric utilities. The plan has received the strong endorsement of the Customers First! Coalition, which includes the Municipal Electric Utilities of Wisconsin.

While endorsing the concept behind PTF-2 as an innovative and pragmatic means of addressing the state's reliability problems, two of the three commissioners (Commissioner Bie and Commissioner Mettner) were reluctant to issue a prudence

ruling that could have the effect of ensuring that WEPCO recover its precertification expenses from ratepayers in the event that the project is not completed. Such expenses could range anywhere from \$16 million to \$57 million. Commissioner Garvin stated that it was still too early in the proceeding to fully evaluate the plan but that, because the proposal was sufficiently viable to warrant a prudence determination, he would have granted WEPCO's request.

A prudence ruling was opposed by a group representing independent power producers ("IPPs") on the grounds that PTF-2 does not ensure a competitive bidding process. However, Commissioners Bie and Garvin rejected the notion that the Commission's rules require WEPCO to institute a competitive bidding process for PTF-2. Commissioner Mettner stated that the record in the proceeding is not sufficiently developed at this point to permit a determination that WEPCO's method of evaluating alternatives is adequate.

Commissioner Mettner was also concerned that allowing cost recovery through lease payments to WEPCO's affiliate would amount to a subsidy prohibited under section 196.795(5)(f) of the Holding Company Act. Commission legal counsel Ed Marion underscored that the statutory meaning of the word "subsidy" is, as yet, unclear, but that the issue could prove to be significant down the road and that it would be carefully examined in the context of the Commission's order on WEPCO's declaratory ruling request.

On the whole, the Commission's remarks suggest that there is considerable support for PTF-2, but that the proposal will continue to come under close scrutiny by the Commission as it develops.

— Richard A. Heinemann

Municipal Adult Establishment Licensing Ordinance Found Unconstitutional

An ordinance requiring "adult-oriented establishments" to obtain a license was found unconstitutional by the United States District Court for the Eastern District of Wisconsin. *WIL-KAR, Inc. v. Village of Germantown*, 2000 WL 935718, (Case No. 01-C-0266, 8/13/01).

The facts of the WIL-KAR case suggests that municipalities must take great care in the manner in which they adopt and enforce ordinances aimed at adult-oriented establishments. (See Boardman Municipal Law Newsletter, May, 2001 for additional recent cases). The plaintiff in WIL-KAR operated a video store, renting and selling videos for general distribution. About two percent of the plaintiff's videos are adult videos, and they were kept in a separate section from which minors were excluded. The plaintiff had been in business since 1991, and the ordinance had been in effect since 1992.

In January 2001, Germantown ordered the establishment closed because it had failed to obtain a license from the City. The plaintiff then obtained the license and sued to have the ordinance set aside as unconstitutional.

Acting on a request for a preliminary injunction, Judge Adelman found that the ordinance was unconstitutional both on its face, and as applied.

The court found that strict scrutiny would be applied to the ordinance. Although municipalities have greater leeway in enacting ordinances regulating adult businesses so long as the ordinance is aimed at the "secondary effects" of adult establishments, the village had no evidence that its ordinance was aimed at such matters. Indeed, it appears that Germantown simply picked up an ordinance from another municipality.

The court also found that the ordinance was unconstitutionally overbroad. The court noted that many ordinances require an adult entertainment business to have a "substantial" or "over fifty percent" of its business related to adult entertainment, before being subject to regulation. The Germantown ordinance had no such restrictions. The court noted that the ordinance, if enforced according to its terms, would likely require the closing of all video stores in the village, including such national outlets as Hollywood Video and Blockbuster.

"Defendant acknowledges that the ordinance's definition encompasses materials sold by mainstream video outlets Additionally, defendant concedes that it is unaware of any studies or other evidence finding secondary effects from establishments whose primary business is renting or selling mainstream videos to general audiences, but which also carry in stock a small percentage of adult material." 2001 W.L. 935718, at p. 10.

The court went on to hold that the broad discretion to set conditions on a license amounted to prior restraint, and enjoined the village from enforcing the ordinance.

— Michael P. May

Annexations Across River Approved

In *Town of Campbell v. City of La Crosse*, Case No. 00-1913 to 00-1916 (Court of Appeals, District IV, August 30, 2001), the City of La Crosse's annexation of certain property was challenged by the Town of Campbell on the basis that the annexed property was not contiguous to the City. The annexed properties were separated from the City by the Black River. Although a bridge spans the Black River, and although property across the Black River was already in the city limits, at no point did the dry lands of the City and the annexed properties meet.

The City contended that the City and the annexed properties were contiguous because those properties were touching at the center of the riverbed of the Black River. The City argued that the contiguity requirement does not mean that dry land must meet dry land. The Town contended that under *Town of Delavan v. City of Delavan*, 176 Wis.2d 516, 500 N.W.2d 268 (1993) water destroys contiguity so that property on the other side of a water body cannot be contiguous.

The Court of Appeals held that the word "contiguous" plainly includes properties that are in physical contact and that the annexing and annexed properties in this case were in physical contact along the riverbed. The Court said that nothing in the law requires a finding that a river running over the point of contact renders properties non-contiguous.

In reaching this result, the *La Crosse* court distinguished *Town of Delavan* on two grounds. First, *Delavan* involved a lake and not a river. Lake beds are owned by the State and owners of land abutting natural lakes own only up to the ordinary high-water mark. Riverbeds, on the other hand, are owned by the riparian property owner who holds title to the thread, or the geographical center, of the river. Second, the Court noted that in *Delavan* no one argued that the properties met under the lake.

— Lawrie J. Kobza

Court of Appeals Rejects Record Punitive Damages Award in WEPCO Pollution Case

The Wisconsin Court of Appeals has overturned a \$100 million punitive damage award against Wisconsin Electric Company ("WEPCO"). The damage award had been ordered in 1999 by a trial jury as a sanction for the company's alleged dumping of cyanide-contaminated wood chips on property owned by the City of West Allis. On the company's appeal, the 1st District Court of Appeals panel in Milwaukee determined that the damage award failed to meet Wisconsin's five-sixths law, which requires that ten of twelve jurors in a civil trial agree on all questions essential to a verdict. Had the award withstood scrutiny, it would have been the largest damages amount upheld in a Wisconsin lawsuit.

The Court of Appeals also rejected the trial court judge's sanction against the company for allegedly lying about its lack of insurance coverage to pay for the punitive damages. The trial judge's order would have prevented the company from using any of its policies to pay for the punitive damages award and would have required the company to pay the full amount of the verdicts as a sanction for lying, even if the verdicts were overturned. The Court of Appeals found that the trial judge had no authority to issue such an order.

During the high-profile trial, WEPCO denied it had dumped the toxic materials, but, in its appeal, did not contest the jury's award of \$4.5 million in compensatory damages. The company has also claimed that environmental remediation was completed at the site some time ago.

Despite ruling on behalf of the company, the Court of Appeals emphasized that WEPCO's actions in dumping the toxic material were "deceitful, flagrant and totally contrary to the rights" of West Allis. According to the company spokespersons, settlement discussions are underway. A retrial has been set on the punitive damages issue only. A decision on whether or not to appeal the damages decision to the Wisconsin Supreme Court has not yet been made.

— Richard A. Heinemann

PSC Holds Public Hearing on ROW Rules

On July 27, 2001, the Public Service Commission of Wisconsin ("PSC" or "Commission") held a public hearing on its draft rules pertaining to the municipal regulation of public rights-of-way ("ROW"). The rulemaking is in response to a June 22, 1998 letter submitted to the Commission on behalf of several privately owned gas, electric, and telephone utilities.

The goal of the utilities was for the Commission to draft a uniform ROW ordinance to be adopted by all villages, cities, and towns in Wisconsin. Recognizing that it did not have such authority, the Commission commenced a rulemaking proceeding to adopt rules to be used as guidelines by the Commission in complaint proceedings challenging a municipal ordinance. The rulemaking process began with the formation of an Advisory Committee, made up of industry and municipal participants, including the League of Wisconsin Municipalities (the "League"). The League is the major opponent of the draft rules.

At the July 27 public hearing, the public was invited to comment on the PSC's draft rules. Written comments were accepted prior to the hearing. While the League did not present oral testimony at the public hearing, it submitted detailed written comments attacking the rules.

In its written comments, the League expressed its opposition to the draft rules based on three principal reasons:

- The proposed rules are a backdoor attempt by the Commission to directly dictate and regulate municipal ROW management practices, which the Commission lacks the authority to do.
- Rulemaking action is unwarranted because of the dearth of complaints challenging particular ROW management practices and because, without a specific factual setting to review, there is insufficient information and factual foundation for assessing the propriety of particular ROW management provisions.
- The proposed rules should not be adopted because, they either: (a) do nothing more than restate existing law and there is no need for the Commission to enact redundant rules; (b) are too vague and indefinite to guide the Commission in a complaint proceeding or otherwise provide functional guidance to municipalities and ROW users; or (c) are inconsistent with existing law.

At the public hearing, six people testified, both in favor of and in opposition to the draft rules. Among those testifying in opposition to the draft rules was Robert Chernow, Chair of the Regional Telecommunications Commission. Mr. Chernow stated that the rules were not needed because municipalities and utilities are able to work together to address any ROW issues. Mr. Chenow also endorsed the League's written comments.

Also testifying in opposition to the rules was Attorney Lawrie Kobza. Ms. Kobza testified on behalf of MEG-Water, an association of 35 municipal water utilities. She stated that the rules had been drafted without any input from the water utilities and, therefore, the rules neglected to take into account several issues of importance to water utilities. The water utilities' primary concern is access to their facilities. They want municipalities to be able to, among other things, establish corridors of use in the ROW and to recover from private utilities the additional costs the water utilities incurs in having to work around those utilities' facilities.

Testifying in favor of the rules was Attorney Ron Kuehn. Mr. Kuehn testified on behalf of AT&T, which generally supported the written comments submitted by the Wisconsin Utilities Association. Mr. Kuehn stated that the draft rules should be adopted because the rules will serve as clear guidelines for municipalities in drafting ordinances; they will reduce the number of complaints brought at the PSC

(there has been only one such complaint in the last three years), and will provide an economic benefit to municipalities.

Also testifying in favor of the draft rules was Everett Perry, Associate Manager of Rights-of-Way for TDS. Mr. Perry stated that the rules would be useful to the PSC (by reducing the number of complaints), to municipalities (by providing guidance in drafting ordinances), and to private utilities (by providing a "hammer" to use to keep municipalities in line). He also made the point that if a municipality was a telecommunications provider, then that municipality should be required to process ROW applications without discriminating against other providers and without obtaining information from a competitor that would aid the municipality's telecommunications utility.

Commission staff is currently revising the rules based on the written and oral comments that were submitted by interested parties. It is uncertain when the redrafted rules will be available and whether the Commission will adopt them. The draft rules are available on line at http://www.psc.state.wi.us/pdf/ord_notc/3477.pdf.

— Anita T. Gallucci

Divided Wisconsin Court of Appeals Nixes "Dockominiums"

In a case of first impression in the state, a divided Second District Court of Appeals held that the creation of "dockominiums" on Lake Geneva violated the public trust doctrine of the Wisconsin Constitution. *ABKA Ltd. Partnership v. Dept. of Natural Resources*, (Case No. 99-2306, 8/22/01). Publication is recommended.

The case involves the Abbey Harbor Slip Marina on Lake Geneva, Wisconsin. ABKA owned a 407-slip marina on the lake. It filed a condominium declaration to convert and sell the entire marina, including the boat slips, to owners as dockominium units. The "unit" owned by each was a small lockbox in the marina building. Each owner also owned a "limited commons" interest in a boat slip within the marina reserved for the exclusive use of that owner, together with a shared ownership and shared usage of about 20 acres of common facilities on the lakeshore.

In a 2-to-1 decision, the Second District Court of Appeals found that this arrangement violated the public trust doctrine embodied in the Wisconsin Constitution. The court found that the attempt to create a dockominium was an attempt to sell the water and the lake bed under the boat slip and to create expectations that the owners have exclusive control over those waters and lake beds, to the exclusion of public rights in the same waters and lake beds. The court found this to be an attempt to vest rights in private persons that, as a matter of state constitutional law, are held in trust for the public.

In reaching its decision, the court found that ABKA had waived its objection to the jurisdiction of the Department of Natural Resources (DNR) when it applied for a new permit under Chapter 30 of the Wisconsin Statutes. Although the owners reserved their right to challenge the DNR jurisdiction, through an agreement with the DNR, the court held that this was ineffective. If the owners wish to challenge the DNR jurisdiction, they were required to risk an enforcement action or bring a declaratory judgment action.

In its determination, which had been upheld by the Circuit Court, the DNR found that a condominium method could be used to create dockominiums, but that the owners had to set aside a certain number of slips for use by the general public.

In his dissenting opinion, Judge Brown indicated he would have upheld the decision of the ALJ and the DNR. He criticized the majority opinion as being based on fear that the dockominium was a scheme or manipulation, whereas he believed the evidence showed it was very up-front in its operation, and was not in any way antithetical to the public trust doctrine.

— Michael P. May & Richard A. Lehmann

MUNICIPAL LAW NEWSLETTER

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