

IN THIS ISSUE

- *Seventh Circuit Upholds Local Zoning Control Over Cell Towers*
- *Speaker's Forum*
- *Huge Electrical Blackout Hits Northeast U.S.*
- *New Open Records Law Limits Impact of Woznicki Case*

SPEAKERS FORUM

October 22, 2003

Bankruptcy: A Primer for Handling Delinquent Consumer Accounts

MEUW Accounting & Customer Service Workshop, Wisconsin Dells, WI
Richard A. Heinemann

October 22, 2003

An Update on the Recently Revised Open Records Law

MEUW Accounting & Customer Service Workshop, Wisconsin Dells, WI
Anita T. Gallucci

October 25, 2003

Legal Liabilities and Responsibilities of Policymakers

APPA Policymakers Workshop, Seattle, WA
Michael P. May

Seventh Circuit Upholds Local Zoning Control Over Cell Towers

St. Croix County recently scored a major victory in defense of local government authority to control the siting of wireless communication towers in *VoiceStream Minneapolis, Inc. v. St. Croix County*, Appeal No. 02-2889 (Sept. 8, 2003). Affirming a district court decision for the county, the Seventh Circuit's opinion helps define limits to the scope of the federal Telecommunications Act of 1996 (TCA).

The St. Croix River was one of the first waterways protected under the federal Wild and Scenic Rivers Act (WRSA) in 1972. The goal of the act is to preserve designated rivers in as wild and pristine condition as possible. Since its designation, the National Park Service (NPS) has spent over \$100 million acquiring scenic easements and outright ownership of property in the quarter mile bordering each side of the river. The county developed zoning rules limiting development along the river to implement the goals of the WRSA. Following the adoption of the TCA, the county also enacted an ordinance setting conditions for the siting of cell towers in various zoning districts. The express goals of the ordinance included minimizing the adverse visual impact of cell towers on the scenic riverway.

VoiceStream applied to the county for a conditional use permit to construct a single 185-foot communications tower just outside of the boundaries of the riverway to close a gap in its coverage along highways 35 in Wisconsin and 95 in Minnesota. The tower would be much higher than any other structures or trees in the area and could not be camouflaged or disguised. The tower proposal engendered vigorous opposition

from the NPS, local communities, associations, and residents concerned about the impact on the natural scenery and the historic character of the town of Marine-on-St. Croix located just across the river. St. Croix County hired an independent cell tower consultant to assist its planning department in analyzing the proposal. VoiceStream's materials submitted to the county mentioned consideration of a four-tower proposal with shorter towers to be located along the highways, but provided no details about this alternative.

After an extensive hearing, the St. Croix County Board of Adjustment tabled the proposal on the grounds that it could not determine whether it represented the least intrusive alternative for closing the coverage gap. Under a provision in the county ordinance, the board ordered VoiceStream to investigate the alternative of using more, but shorter towers to meet its needs while minimizing the overall visual obtrusiveness of the towers. The board's order expressly directed VoiceStream to document its investigation and to prepare maps and mock-ups of multiple tower alternatives. The NPS repeatedly told VoiceStream that it would be willing to entertain proposals for locating antennas on public land within the riverway if it would reduce the overall visual impact on the riverway.

Nine months later, VoiceStream responded to the board stating in conclusory fashion that it had investigated alternatives and none were feasible or less intrusive than its single-tower proposal. It provided few details on its investigation and no maps or mock-

Continued on page 2

ups of any alternatives. At a second hearing, VoiceStream's lawyer testified that it had excluded any consideration of placing antennas within the riverway because of its conclusions that the county ordinance would not permit it and that the NPS, despite all testimony to the contrary, would not or could not permit antennas on public land. Opponents again testified about the significant adverse impact that the tower would have on the scenic and historic qualities of the area.

The board denied VoiceStream's application. The board's decision did not rule out the possibility that the proposal could be approved in the future, but pointed out that VoiceStream had not complied with its order and, therefore, had not met its burden of proof that its proposal was the least intrusive means of providing coverage in the area.

VoiceStream brought suit under the TCA asserting two claims. First, it claimed that the board's decision was not supported by substantial evidence in the record because the county had the burden of establishing that there were less intrusive alternatives. Second, VoiceStream argued that the denial of its proposal, the first application for a tower in this area by any carrier, constituted an effective prohibition of wireless service. VoiceStream also asserted that these alleged violations of the TCA entitled it to collect its attorney's fees and damages of hundreds of thousands of dollars in lost revenue from the county under 42 U.S.C. § 1983.

The district court affirmed the county's decision, concluding that the burden of proof was on VoiceStream and finding that VoiceStream had not documented sufficiently that it was impossible to obtain approval for a multi-tower approach. However, the court found it to be a "close case." Because it affirmed the board's decision, the district court did not reach the question of the applicability of section 42 U.S.C § 1983.

On appeal, the Seventh Circuit showed no such hesitation in affirming the board's decision. The court noted that Congress had rejected a House version of the TCA that would have placed control over siting of cell towers with the FCC and instead expressly opted to preserve the power of state and local governments. The decision reinforces that the "substantial evidence" test under the TCA is a "highly deferential" standard to the local board. The court agreed that the evidence of aesthetic impact was well grounded in the specifics of the case.

This case is the Seventh Circuit's first direct foray into the meaning of the "prohibition of service" clause of the TCA. The court agreed with the First Circuit that the denial of a single application for a tower (as opposed to a blanket ban on towers or a pattern of denials) may violate the TCA, but that the carrier has a "heavy burden" to show that "further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." The court stated that "so long as the service provider has not investigated thoroughly the possibility of other viable alternatives" it cannot meet this heavy burden. The Second and Third Circuits have held that local governments may not deny an application if it is the least intrusive means of closing a coverage gap. The Fourth Circuit has criticized this "interpretative rule" on grounds that it unduly restricts the control of local governments, which might under some circumstances choose a more intrusive proposal that has other offsetting benefits such as better service. The Seventh Circuit sided with the Fourth in holding that local governments retain the right to make this balancing decision.

St. Croix County and its Board of Adjustment were represented at the district and appeals courts by the Boardman Law Firm.

— Mark J. Steichen

Huge Electrical Blackout Hits Northeast U.S.

On August 14, 2003, the largest electrical blackout in American history hit the northeastern United States. Large metropolitan areas such as New York City, Cleveland, Detroit and Toronto were without power for as long as several days. Up to 20 million persons were without electricity.

The blackout comes at a time of increasing change in the electric utility industry and will influence not only policies to be adopted by the Federal Energy Regulatory Commission (FERC), but is likely to impact the politics of a pending energy bill in the U.S. Congress.

A joint Canadian-American task force is examining the events that led to the blackout and should be issuing a report soon. On September 12, 2003, the National Electric Reliability Council (NERC) issued its report which simply detailed the time that certain events took place on the eastern grid. The NERC report can be found at their website: www.nerc.com.

Initial reports show that outages on several generating units and transmission lines in northern Ohio were the first matters that began to have impacts on the system. Some of these outages caused huge shifts in power flows, as the system reacted to areas that were lacking in generation, or where transmission lines had separated from the system due to low voltages. In a matter of minutes beginning at about 4:08 p.m. on Thursday, August 14, the outages cascaded across the northeastern United States. It was at approximately 4:09 that the first large areas, in Akron, Ohio, began to go black. Within a 5-minute period, the outages spread to and affected areas from Michigan to Ontario to New York.

In Congress, the blackout has had an impact on the stalled energy legislation. Some members of Congress are calling for consideration of a stand-alone bill on electric reliability, which would make mandatory current voluntary reliability standards and increase the authority of both NERC and FERC to require certain reliability standards. Others argue that such provisions should only be included in a comprehensive energy bill. The energy bill is now in a conference committee and there are significant differences among members of Congress as to such controversial items as drilling in the Alaska National Wildlife Refuge and repeal of the Public Utility Holding Company Act.

The outage also has increased the pressure

Continued on next page

New Open Records Law Limits Impact of *Woznicki* Case

on FERC to come up with a workable plan for regional transmission organizations (RTOs). Some initial analysis suggests that a significant cause of the blackout was lack of proper communication between various transmission control areas within the Midwest Independent System Operator (MISO). Indeed, some transcripts of telephone conversations between MISO and transmission controllers in the FirstEnergy system in Ohio were stunning in their depiction of a lack of knowledge of the system. At one point, the FirstEnergy controller stated that, "We have no clue," as to what was happening on the system.

The MISO does not control the transmission systems directly in the Midwest, but must rely upon separate control area operators. A number of these operators, such as FirstEnergy, also own generating units. In Wisconsin, the American Transmission Company operates the transmission system in eastern Wisconsin, but does not own any generation.

In Wisconsin, Governor Jim Doyle responded to the blackout by ordering the state Public Service Commission and Department of Natural Resources to increase cooperation in the review of transmission construction projects. Governor Doyle issued the Executive Order (Executive Order No. 20) on August 18, 2003, and the Public Service Commission and Department of Natural Resources announced a new coordinating plan on September 9, 2003.

The blackout also comes at a time when some transmission operators are attempting to move to a new standard market design which will include financial rights and hedges to use the transmission system. There are also calls that, in order to increase reliability, the FERC should allow utilities to collect "incentive rates," on transmission facilities. Public power utilities generally oppose any such incentive rate mechanisms.

The blackout of 2003 will continue to reverberate throughout the electric utility industry for many years.

— Michael P. May

On August 11, 2003, Governor Doyle signed a new law that makes some important changes to Wisconsin's Open Records Law. The change in the open records law is directed at the so-called *Woznicki* line of cases. *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W. 2d 699 (1996). The *Woznicki* line of cases dictated the procedure a records custodian had to follow, if, after applying the open records balancing test, the custodian concluded that the requested information should be released. If the record contained "personally identifiable information" or information contrary to the privacy and reputational interests of the record subject, then the *Woznicki* line of cases required the records custodian to give notice to the record subject before releasing the information so that the person would have an opportunity to bring a court action to block the release. The change in the law restricts the *Woznicki* line of cases so that only a small class of persons have the right to notice and opportunity for judicial review of a decision to release personal information.

The new law (2003 Wis. Act 47) begins with the presumption that a records custodian is not required to notify a record subject prior to the release of personally identifiable information and that no record subject is entitled to seek judicial review of the decision to release the record.

The new law, however, goes on to define a narrow class of records which a municipality cannot release without first notifying the record subject and giving that person an opportunity to seek judicial review. Those records are: 1) A record containing information relating to a public employee that is the result of an investigation into a disciplinary matter or the employee's possible employment-related violation of a statute, ordinance, rule, regulation, or policy of the municipality, 2) a record obtained through a subpoena or search warrant, and 3) a record prepared by a private employer that contains information relating to an employee of the private employer, unless the employee authorizes the municipality to provide access to that information.

With regard to requests for such records, the new law sets out the time frame for the municipality to give notice to the record subject, for the record subject to initiate a legal challenge and give notice to the municipality of its intent to initiate such action, and for the circuit court to render its decision.

The new law, however, prohibits a municipality from providing access to its records containing any of the following information: 1) information concerning the home address, home email address, home telephone number, or social security number of an employee, unless the employee authorizes access to the information, 2) information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation, 3) information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited, and 4) information relating to one or more specific employees used for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.

Moreover, with regard to employees of contractors on public works projects, a municipality may not grant access to a record containing personally identifiable information relating to the contractor's employee, unless the employee authorizes access to that information. The term "personally identifiable information" does not include information relating to an employee's work classification, hours of work, or wage or benefit payments received for work on such projects.

The new law took effect on August 25.

— Anita T. Gallucci

MUNICIPAL LAW NEWSLETTER

The Municipal Law Newsletter is published monthly by the Municipal Utility and Municipal Special Services Practice Group and the Environmental and Land Use Practice Group of Boardman, Suhr, Curry & Field LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group - Municipal Drinking Water Division.

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