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TRANSLink Applies To Become State's Second Independent Transmission Company

The TRANSLink Transmission Company LLC and TRANSLink Management Corporation (together TRANSLink) have filed an application with the Public Service Commission ("PSC") for certification to operate in Wisconsin as an independent transmission company ("ITC"). If approved, TRANSLink would become the state's second ITC. TRANSLink has already received conditional approval to function as an ITC from the Federal Regulatory Energy Commission.

Under state law, ITCs are permitted to operate transmission facilities as profit-making public utilities as long as they are operated independently from generation-owning entities. The state's first ITC, American Transmission Company LLC ("ATCLLC"), became operational

on January 1, 2001 and operates throughout most of Wisconsin in the areas served by most of the state's major public utilities. TRANSLink would operate predominately in the Northwest portion of the state in the area currently served by Northern States Power Company ("NSP").

The TRANSLink application includes a request by NSP for approval to transfer some transmission-related assets and functional control of all transmission facilities to TRANSLink. Unlike the transmission-owning entities that formed ATCLLC, NSP would initially retain ownership of most of its transmission facilities, with an option to transfer ownership of these transmission facilities later. It is as yet unclear whether any reliability or rate issues will be raised by the application.

—Richard A. Heinemann

Commission Approves First Phase of PTF-2

The Public Service Commission ("PSC") issued a unanimous decision on December 20, 2002, approving the first (natural gas) phase of Wisconsin Energy Corporation's ("WEC") Power the Future generation plan ("PTF-2"). PTF-2 is Wisconsin Energy Corporation's comprehensive plan to construct thousands of megawatts of new base

load generation capacity over the next 10 years.

The application approved by the PSC specifically calls for construction of 1,090 MW of combined-cycle gas-based generating capacity at a power plant site currently located and operated in Port Washington.

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Commission Approves First Phase of PTF-2

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Because this phase involved replacement of an aging coal facility with capacity that is generally regarded as more efficient and environmentally friendly, the Port Washington application was expected to be the least controversial phase of the PTF-2 plan. Although the application was supported by members of the Customers First! Coalition and other customer groups, the proposal encountered opposition from local and environmental groups, as well as from out of state independent power producers who claimed that the capacity could be built more cheaply.

The Commission's approval also represents the first time that a public utility in Wisconsin has successfully applied to construct large scale generating facilities under Wisconsin's new "leased generation" law, Wis. Stat. §196.52(9)(a)(3). The law, which was passed in 1999, permits public utilities to acquire generating resources through an affiliated entity. In this case, the Port Washington facilities will be constructed by a non-utility affiliate and then leased to the affiliate electric utility, Wisconsin Electric Power Company. In addition to granting construction authority in its order, the Commission specifically approved the affiliated interest lease arrangements proposed by the Wisconsin Energy companies.

Construction of the new facility is expected to begin later this year, with a projected on-line date of 2005.

With the Port Washington proceeding completed, the Commission's focus will now turn to the second phase of the PTF-2 proposal. This phase involves construction of approximately 1,830 MW of advanced coal-based generating capacity at and around proposed sites in Oak Creek and the Town of Caledonia. As coal-based facilities, the proposed plants in the second phase of PTF-2s are expected to generate considerable opposition. Already, environmental groups have filed papers in circuit court opposing the Commission's determination that the company's application is complete.

The Commission has scheduled a public scoping meeting in Oak Creek for the end of January to solicit public input on environmental impact of the proposed coal facilities. Public hearings at the Commission have not yet been set, but are expected to take place in the latter part of 2003.

—Richard A. Heinemann

Lake District Budgets Must Comply with Municipal Standards

Section 65.90 of the Wisconsin Statutes sets out a laundry list of requirements that apply to budgets adopted by counties, cities, villages, towns, school districts, technical college districts, and "all other public bodies that have the power to levy or certify a general property tax or budget." Among these "other public bodies" are public inland lake protection and rehabilitation districts, according to *Chmill v. Lauderdale Lakes Lake Management District*, Appeal No. 02-0475, decided October 23, 2002. Sections 33.30(4)(a) and 33.31(3) of the Wisconsin statutes authorize a lake district to levy a property tax. The *Chmill* ruling clarifies that in levying such a tax, lake districts must comply with the requirements of both Wis. Stat. §§ 33.30 and 65.90.

At issue in *Chmill* was the process by which the Lauderdale Lakes Lake Management District (the "Lake District") adopted its annual budget. The Lake District sent written notice of its annual meeting to electors and property owners in the District as required by Wis. Stat. § 33.30(3). The notice included a summary of the District budget, which totaled \$182,547. It also included a discussion of a proposal to take over water safety patrol duties from the local police department. The cost of the water safety patrol was not included in the budget.

In addition to the mailed notice, the Lake District published notice of the annual meeting in the local newspaper. The notice presented a budget of \$182,547. It did not mention the water safety patrol issue. The notice appeared 10 days before the annual meeting.

Those who attended the annual meeting were told that the cost of taking over water safety patrols would average \$32,400 per year. A vote was held by written ballot, and the proposal to implement the patrols at a cost of \$32,400 passed. The District treasurer subsequently certified an annual budget in the amount of \$214,974, which was levied against all properties in the Lake District. *Chmill* challenged the levy for failing to comply with Wis. Stat. § 65.90.

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Scope of BOA Review Determined by Ordinance, Not Statute

The threshold issue in *Chmill* was the relationship between Wis. Stat. §§ 33.30 and 65.90. Section 33.30 provides that a Lake District budget “shall separately identify the capital costs and the costs of operation of the district, shall conform with the applicable requirements under s. 65.90 and shall specify any item that has a cost to the district in excess of \$10,000.” Wis. Stat. § 33.30(3)(b). The Lake District argued that the “applicable requirements under s. 65.90” referred only to the requirements of § 65.90(2), which relate to the statements of revenues and costs that must be included in the budget.

The Court of Appeals disagreed, holding that the requirements of both §§ 33.30 and 65.90 must be followed. It explained that § 33.30 refers to the “applicable requirements” of § 65.90 in order to exclude provisions that apply to municipalities generally, but would not apply to a lake protection and rehabilitation district. As an example, it cited the requirement that a municipality detail costs relating to health and human services, which is clearly beyond the scope of activity in which a lake district would engage.

The remainder of the ruling flowed from the court’s determination that both §§ 33.30 and 65.90 apply. Although the Lake District had complied with the ten-day mailed notice requirement in § 33.30, it had failed to comply with the 15-day published notice requirement in § 65.90. Additionally, the court held that the notice required by § 65.90, is notice of a budget in the form provided by § 33.30. Accordingly, the failure to include the \$32,400 cost of the water safety patrol in the Lake District’s published budget amounted to a violation of § 65.90, because § 33.30 requires costs in excess of \$10,000 to be detailed in the budget.

While it is not surprising that public inland lake protection and rehabilitation districts must comply with the requirements of §§ 33.30 and 65.90, it is ironic. These districts generally deal with substantially smaller budgets than most municipalities, and yet the effect of the *Chmill* ruling is to impose more requirements on them. Nevertheless, with careful attention to detail, lake districts likely will have little difficulty complying with the statutory requirements.

—Dick Lehmann and Matt Weber

Counties may determine by ordinance the scope of review that Boards of Adjustment give to decisions to issue or deny conditional use permits (“CUPs”), the Court of Appeals ruled in *Town of Dayton v. Waupaca County Zoning Board of Adjustment*, Appeal No. 01-3025, decided November 7, 2002.

The case arose from a decision by the Waupaca County Zoning Committee to deny a CUP to an applicant who sought to extend an existing gravel extraction operation to adjoining parcels. The Zoning Committee found the proposed land use inconsistent with the residential character of the area.

The applicant appealed to the County Board of Adjustment (“BOA”). The BOA reversed the Zoning Committee on the ground that the Committee had reviewed the CUP application under zoning ordinance standards generally applicable to conditional uses, rather than under the ordinance standards specifically applicable to mineral extraction operations. The BOA ordered that a CUP be issued. Additional legal proceedings followed, and the matter eventually reached the Wisconsin Court of Appeals on the question of whether the BOA had exceeded its authority. The Court of Appeals concluded that it had.

The court began its analysis by considering the statutory role of the BOA with regard to CUPs. It concluded that under §§ 59.69 and 59.694, the BOA’s role is undefined. That is, while counties may vest boards of adjustment with primary or sole authority to grant CUPs, they could also place that authority elsewhere, such as with a county zoning and planning committee. Where a county chooses the latter course, “a county ordinance may provide for administrative review of the committee’s conditional use decisions.”

The court then turned to the Waupaca County Zoning Ordinance to determine the BOA’s role. It determined that the ordinance limited the BOA’s

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role to correcting erroneous “interpretations of the terms of the Waupaca County Zoning ordinance.” The court concluded that the BOA had exceeded this narrow grant of authority. Rather than identifying an “interpretation error” by the zoning committee, and Board had, instead, substituted its judgment for that of the committee with regard to whether the CUP should be granted.

The Applicant and the BOA nevertheless contended that regardless of the language of the ordinance, the BOA by statute had authority to consider permit applications de novo. They cited § 59.694(8), which provides that when a BOA considers administrative appeals, the Board “may make the order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.”

However, the Court of Appeals rejected this argument. It cited *Town of Hudson v. Hudson Town Board of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990), for the proposition that “where an enabling statute permits a municipal body to grant specific decision-making authority to either the board of adjustment or some other entity, we must look to the zoning ordinance to determine what role, if any, the board may have in acting on the issue in question.” In light of this precedent, the court concluded that it was the language of the Waupaca County Ordinance, and not the statute, that determined the scope of the BOA’s review.

Despite the useful discussion in *Town of Dayton* of the authority of a county to determine by ordinance the role of a board of adjustment, this opinion will not be published in the official reports.

—Dick Lehmann and Matt Weber

Municipalities Must Honor “Misabeled” Open Records Requests

The Wisconsin Court of Appeals recently ruled that municipalities must respond in accordance with the Open Records Law to open records requests even if the request is mislabeled. *Eco, Inc. v. City of Elkhorn*, 2002 Wis. App. 302 (November 20, 2002). In this case, the City of Elkhorn received a written open records request that was proper in all respects except for the fact that it was labeled as a request pursuant to the federal Freedom of Information Act (“FOIA”).

On receiving the FOIA request, the City reviewed it and decided not to respond. Before the court of appeals, the City defended its failure to respond by arguing that, because the request was filed pursuant to the FOIA, which does not apply to municipalities, the City did not have a duty to respond. The court rejected the argument, concluding that “because the letter clearly describes open records and the letter had all the earmarkings of an open records request, the . . . letter was in fact an open records request and triggered, at a minimum, a duty to respond to the request.”

The court of appeals explained that the Open Records Law, Wis. Stat. §§ 19.31 to 19.37, does not require that a records request contain any “magic words.” Rather, all that the Open Records Law requires is that the request “reasonably describes the requested record or the information requested.” See Wis. Stat. § 19.35(1)(h). Therefore, according to the court, the mislabeled request triggered the City’s statutory duty to, “as soon as practicable and without delay, either fill the request or notify the requester of the [City’s] determination to deny the request in whole or in part and the reasons therefor.”

Finally, the court determined that the requester was entitled to costs, fees and damages under the Open Records Law. The case has been remanded to the circuit court so that the issue of damages can be addressed.

—Anita T. Gallucci

Village Taxpayers Lack Standing to Challenge Violation of TIF District Restrictions

Property in a tax increment finance district (a “TIF District”) that is suitable for industrial use and zoned for such use, must remain so zoned for the life of the district. Wis. Stats. § 66.1105(4)(gm)5. However, where a village amends the text of its zoning ordinance after establishing a TIF District to allow non-industrial uses in an industrial zone, village property owners and taxpayers lack standing to challenge the amendment as a violation of TIF district restrictions. The Wisconsin Court of Appeals so held in *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, Appeal No. 02-0198, decided November 13, 2002.

The driving issue in *Lake Country* was whether a YMCA would be allowed to construct a recreational facility on a lot within the Village of Hartland’s TIF District. The Village had zoned all property within the District “light industrial” when it created the District. However, when the YMCA showed interest in the property, the Village attempted to rezone it for park and recreational uses. The Lake Country Racquet & Athletic Club (the “Athletic Club”) then filed the first of two suits against the Village.

The Athletic Club challenged the rezoning as a violation of the project plan for the TIF District. The Village defended the action in part on the ground that the Athletic Club lacked standing to sue. However, the court rejected this argument and ruled in favor of the Athletic Club on the merits. The Village did not appeal.

The Village responded to the court’s ruling by amending its zoning ordinance to allow recreational uses as conditional uses within the “light industrial” zoning classification. It subsequently issued a conditional use permit to the YMCA. The Athletic Club again filed suit. It argued, in part, that issuance of the conditional use permit violated the requirement under Wis. Stat. § 66.1105(4)(gm)5 that property zoned industrial remain so zoned until the TIF District

terminated. In response, the Village challenged the Athletic Club’s standing to sue. This time, in front of a different judge and on different facts, the Village prevailed. The Athletic Club appealed.

The Athletic Club rested its claim to standing solely on its status as a property owner and taxpayer in the Village. However, the Court of Appeals held that such status alone generally is not enough to convey standing. Rather, a claimant must show some pecuniary loss or other substantial injury to his interests to have standing to sue. Insofar as the Athletic Club alleged no such loss or injury, the court held that it lacked standing.

In reaching this conclusion, the court distinguished *Weber v. Town of Lincoln*, 159 Wis. 2d 144, 463 N.W.2d 869 (Ct. App. 1990), in which a town board repealed the town’s zoning ordinance. The court of appeals in that case had found that town residents had standing to sue because elimination of the zoning code would affect the interests of all town residents. By contrast, in *Lake Country Racquet*, the issuance of a conditional use permit for a single parcel of land was “a far cry” from such broadly-felt action.

It is important to note that the Court of Appeals did not reach the merits of the Athletic Club’s challenge to the Village’s actions. Accordingly, we do not know whether the Village would have prevailed. Indeed, unless a zoning action negatively affects the property value or other interests of property owners in or near a TIF District, it appears unlikely that a court will ever address the legality of such conduct. To that extent, it may be immune from judicial review.

This decision has been recommended for publication in the official reports.

—Dick Lehmann and Matt Weber

MUNICIPAL LAW NEWSLETTER

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