

MUNICIPAL LAW NEWSLETTER

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PSC Transmission Line Order Challenged

Opponents of the Arrowhead-Weston transmission line project have filed petitions seeking to overturn a Public Service Commission of Wisconsin order approving construction of the 345kV high-voltage transmission line. Filing petitions on November 29th with the Marathon County Circuit Court were the Citizens' Utility Board ("CUB"), Save Our Unique Lands ("SOUL") and Wisconsin's Environmental Decade ("WED"). In October, the PSC issued its final decision approving construction of the 215-mile transmission line linking the Arrowhead substation near Duluth, Minnesota to the Weston substation near Wausau, Wisconsin. The order was issued on an application filed in the fall of 1999 by Wisconsin Public Service Corporation and Minnesota Power. Subsequently, American Transmission Company LLC and ATC Management Inc. became an applicant and co-sponsor of the project.

The Petitioners each filed separate lawsuits. CUB charged that the PSC failed to consider less environmentally destructive and less expensive alternatives to the approved transmission line.

According to CUB, during the PSC proceeding, PSC staff had identified alternative projects that would have caused far less environmental damage, resulted in fewer landowner conflicts and would have been less expensive to construct than the project approved by the PSC.

SOUL charged that the PSC's decision was tainted by bias. An attorney for SOUL was quoted as saying, "No impartial decision-maker would have approved the Arrowhead-Weston line without considering less costly and less environmentally destructive alternatives to serve Wisconsin's reliability needs."

WED, in its petition, complained that the PSC's decision-making process was flawed. WED favored a plan that it advanced at hearing before the PSC that it claimed would satisfy even greater electric demand than the Arrowhead-Weston project through a combination of energy conservation, renewable energy sources, existing transmission upgrades and relatively clean power plants located near the demand.

Responses to the Petitions are due mid-December. — Anita T. Gallucci

The Shocking Collapse of Enron

The electric utility and financial communities have been shocked by the stunning collapse of the \$50 billion Enron corporation, which filed for bankruptcy on December 2, 2001.

Enron was a huge player in the newly deregulating electric markets, and was a strong advocate for such deregulation. Enron was considered one of the most important players nationally, in terms of influence within the Bush administration,

and in the debates before the Federal Energy Regulatory Commission (FERC) and the U.S. Congress over the future course of the electric utility industry.

Enron's position began to look negative during 2000, as its stock fell from its high of above \$80 per share. Although the fall over the next year was significant, many simply considered it to be a market correction.

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The Shocking Collapse of Enron

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However, during 2001, questions were raised about certain investments Enron had made, and whether those investments were properly noted on Enron's financial disclosures. As additional revelations about Enron's accounting practices became known, the stock went into a free fall, resulting in a downgrade to junk status as the value eventually fell below \$1 per share.

During the course of Enron's spiral, it reached an agreement to merge with a smaller Texas energy firm, Dynegy. But that merger came unraveled in the final days prior to Enron's bankruptcy filing.

Whether Enron will or will not be able to emerge from bankruptcy court as an operating entity is an open question.

— Michael P. May

Stray Voltage Lawsuits Filed in Wisconsin

A group of more than 25 dairy farmers have filed complaints with the circuit courts in four Wisconsin counties against several investor-owned power companies, including Wisconsin Electric Power Company, Wisconsin Public Service Corporation and Xcel Energy. The suits allege that facilities owned by these companies have caused damage to farms and dairy herds due to the presence of stray voltage.

Stray voltage is commonly defined as a relatively small voltage differential between two points. The differential generally results from the manner in which utility companies distribute electric power, whereby a primary neutral conductor is grounded along a company's distribution line and at each distribution transformer, so that the earth is used to actually conduct a portion of the electrical energy back to the utility's substation. This electrical energy may then be detected in dairy barns and affect the health of livestock, potentially causing a loss in milk production.

Attorneys for the group of farmers have alleged that stray voltage has been and continues to be a serious and widespread problem for Wisconsin dairy farmers. Although the Public Service Commission of Wisconsin has set standards to address the stray voltage phenomenon, the standards are alleged by the complainants to be inadequate. While individual cases have been successfully litigated over the years, never before has such a large and coordinated group been organized to press the issue in court. Among other things, the complaints allege that the power companies were negligent in constructing and maintaining their distribution systems and seek remediation of the problem, along with damages for lost production and damage to herd.

— Richard A. Heinemann

Federal Commission Modifies Stance on Market Power

In what some public power observers have hailed as a startling turn-about, the Federal Energy Regulatory Commission ("FERC") has announced a new market power test and used it to revoke the market-based rate authority of three investor-owned utilities. The new market power screen, known as the "Supply Margin Assessment," takes into account transmission constraints in specific control area markets. If a supplier's generation is found to be needed in order to meet the market's peak demand, then it is deemed to exercise market control and subject to market mitigation measures.

The more stringent market power test will be applied automatically by FERC to all companies that currently have authority to charge market-based rates — unless such companies participate in a FERC-approved regional transmission organization. Public power advocates are hoping that the Commission's new "get-tough" attitude will translate into meaningful oversight at a time when innovative market-based rate proposals and for-profit transmission company applications are pushing the envelope of permissible competitive models.

— Richard A. Heinemann

LEGISLATIVE UPDATE

BILL	TOPIC/STATUS
AB 113	Municipal Residency Requirements Introduced 2/13/01. Referred to Committee on Urban and Local Affairs. Public Hearing held 4/3/01. Recommended for passage, as amended, 4/11/01 (3-2 vote). Referred to Committee on Rules 4/18/01. Assembly Amendment 2 offered by Representative Stone, which inserts the following language: "(d) This section does not affect any local ordinance or resolution that requires a village manager to reside within the village for which he or she is the village manager."
AB 233	Sale of a Municipal Utility Introduced 3/20/01. Referred to Committee on State and Local Finance. Public Hearings held 3/29/01, 4/12/01, 4/20/01 and 4/26/01. AB 518 Municipal Telcos Ban Introduced 9/28/01. Referred to Committee on Information Policy and Technology.
AB 584	Utility Share Revenue Payments Introduced 10/18/01. Referred to Committee Energy and Utilities. Assembly Amendment 1 offered and public hearing held 10/25/01. Recommended for passage (9-0 vote) and referred to Committee on Rules 10/29/01. Assembly Substitute Amendment 1 offered, amendment 3 to Assembly Substitute amendment offered and adopted 11/1/01. Amended Assembly Substitute Amendment 1 passed (96-2 vote) 11/6/01. Received in the Senate 11/14/01. Referred to Committee on Health, Utilities, Veterans and Military Affairs. Public hearing held 12/5/01.
SB 23	Municipal Cable TV Introduced 1/23/01. Referred to Committee on Health, Utilities, Veterans and Military Affairs. Public Hearing held 4/11/01. Recommended for passage (9-0 vote) 5/7/01. SB 248 Municipal Telcos Ban Introduced 9/20/01. Referred to Committee on Health, Utilities, Veterans and Military Affairs.

These bills were discussed in previous Municipal Law Newsletter articles. You may check the current status of a bill on the Internet at <http://www.legis.state.wi.us/billform.html>.

Midwest ISO Files To Increase Rate of Return; Prepares To Begin Operations

The Midwest Independent System Operator (“Midwest ISO”) and the Midwest ISO transmission owners have applied to the Federal Energy Regulatory Commission (“FERC”) for authority to increase the Midwest ISO’s approved rate of return from 10.5% to 13%. The filing includes a request for FERC authorization of incentives for new facility construction and accelerated depreciation initiatives.

The 13% rate of return would apply to all Midwest ISO pricing zones except the American Transmission Company LLC (“ATCLLC”) zone, in deference to the settlement reached by ATCLLC with its customer intervenor groups this past fall. Fearing the implications of such a precedent for future transmission costs, municipal wholesale customer groups in Wisconsin are currently determining whether or not to protest the proposed modifications.

The Midwest ISO filing comes in the midst of a flurry of Midwest-ISO related activities. Ending a two-year challenge, the FERC issued an Order on October 11, 2001, formally resolving the remaining issues in the Midwest ISO’s formation. Among other things, the Order required that bundled retail load and grandfathered load actually be made immediately subject to the Midwest ISO tariff, prompting a number of protests from transmission-owning members concerned about the possibility of not being able to recover the increased cost of including such load. The Commission has not yet acted on these protests.

Meanwhile, plans have gone ahead to make the Midwest ISO fully operational. On December 15, 2001, the next phase of its commercial operations plan took effect when the Midwest ISO took over key regional transmission administrative functions, including security coordination. On that date, the Midwest ISO also initiated procedures for operations planning, generation interconnection, maintenance coordination, and other services.

The Midwest ISO will serve as a transmission agent for 25 transmission-owning members throughout the upper Midwest region, controlling 73,000 miles of transmission across fifteen states and parts of Canada. Full implementation of the Midwest ISO tariff is expected in February, 2002. At that point, the Midwest ISO will be responsible for evaluating and coordinating access to the regional transmission grid on a non-discriminatory basis.

— Richard A. Heinemann

IPPs Challenge WEPCO’s Power the Future Plan

Midwest Independent Power Suppliers Coordination Group (“MWIPS”) has filed a petition for review in Dane County Circuit Court seeking to overturn the Public Service Commission of Wisconsin’s declaratory ruling on Wisconsin Electric Power Company’s (“WEPCO’s”) Power the Future-2 energy plan (“PTF-2”). 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 leased back to WEPCO. WEPCO had sought the declaratory ruling on a number of issues relating to its proposed PTF-2 plan, including whether it is prudent for WEPCO to proceed in developing the PTF-2 proposal, to agree to reimburse the Genco for pre-certification expenses incurred in constructing the new generation facilities, and to include such expenses in lease payments to the Genco.

In its declaratory ruling, the PSC found that PTF-2 complies with the Leased Generation Law, that pre-certification expenditures are reasonable, and that it is prudent for WEPCO to incur an obligation to reimburse the Genco for such expenditures. The Commission also found that PTF-2 was not subject to competitive bidding requirements.

In its Petition challenging the declaratory ruling, MWIPS complains that the PSC’s decision authorized WEPCO to file a construction application without considering alternative proposals in violation of competitive bidding requirements. MWIPS’s central contention is that the PSC’s decision will enable WEPCO to unfairly compete with MWIPS’s members, who are in the process of developing additional electric generation facilities to compete with WEPCO. According to the Petition, “[t]he decision creates a significant barrier to such competition by allowing WEPCO to subsidize its development of PTF-2 facilities with ratepayer dollars and to recover such development costs from ratepayers even if the proposed facilities are never constructed.

Responses to MWIPS’s Petition are due mid-December.

— Anita T. Gallucci

SPEAKERS FORUM

January 25, 2002

Ownership, and Rights of Owners of Private Real Estate with Respect to Waters Adjoining, On, and Under their Property - Wisconsin Society of Land Surveyors

Stevens Point, WI

Richard A. Lehmann and Lawrie J. Kobza

MUNICIPAL LAW NEWSLETTER

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If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the Boardman attorneys listed below who are contributing to this newsletter.

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