

# MUNICIPAL LAW NEWSLETTER

**BOARDMAN** LLP  
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## Virginia Ban on Municipal Telcos Struck Down

In a major victory for municipalities and municipal electric utilities, a U.S. District Court judge has struck down a 1999 Virginia statute that prohibited local governments in Virginia from competing in the public marketplace with commercial providers of telecommunications services and equipment. *City of Bristol, Virginia v. Earley*, Case No. 1:00CV00173 (W.D. Va. May 16, 2001). The City of Bristol, Virginia, which initiated the court action, contended the Virginia statute violated the Telecommunications Act of 1996. Section 253(a) of the Act provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of **any entity** to provide any interstate or intrastate telecommunications service.” 47 U.S.C.A. § 253(a) (emphasis added).

As the court put it, the issue presented by the case

... boils down to whether a city is an “entity” within the meaning of [Section 253(a) of the Telecommunications Act]. If a city is not an entity, then Virginia’s ban on localities providing telecommunications service does not violate the Telecommunications Act’s mandate that a state cannot prohibit the ability of “any entity” to provide telecommunications service. *Id.* However, if a city is an entity, then Virginia’s law is in direct conflict with the federal legislation, and cannot stand under the [federal constitution].

Despite rulings to the contrary by the Federal Communications Commission (“FCC”) and the D.C. Circuit Court of Appeals, the District Court ruled that “the

broad and unambiguous language of § 253(a) makes it clear that Congress did intend for cities to be ‘entities’ within the meaning of the Telecommunications Act.”

In a 1997 order, the FCC interpreted the term “any entity” to exclude municipalities, concluding that the term was ambiguous and therefore could not apply to municipalities without impermissibly invading an area traditionally controlled by states. *Public Utility Commission of Texas*, 13 F.C.C.R. 3460 (1997). On appeal, the D.C. Circuit Court of Appeals upheld the FCC’s ruling, agreeing with the FCC that the term “any entity” was ambiguous, and that therefore the federal statute cannot preempt a traditional area of state control over its political subdivisions. *City of Abilene v. FCC*, 164 F.3d 49, 52-53 (D.C. Cir. 1999).

The Virginia District Court, however, had little trouble in rejecting the FCC’s interpretation. The District Court criticized the FCC and other courts, stating “[b]oth the FCC and other courts have followed the *Abilene* decision without reexamination of the plain language of the Telecommunications Act.” According to the District Court, “it strains logic to interpret the term ‘any entity’ in § 253(a) to mean ‘any entity except for municipalities and other political subdivisions of states.’”

The Virginia Telecommunications Industry Association, which lobbied for the ban on municipal telecommunications providers, intervened in the case and sought to have the case dismissed. The Association is expected to appeal the decision. For now, the City of Bristol intends to proceed with its plans to offer high-speed Internet and cable television services.

— Anita T. Gallucci

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## City's Decision to Waive Formalities in Competitive Bidding Process Upheld as Neither Arbitrary Nor Unreasonable

In 1999, the City of Oshkosh solicited bids for the demolition of several downtown buildings. The bids were opened on June 15, 1999, and SCS of Wisconsin, Inc. ("SCS") was announced as the low bidder. One of the other bidders was DeConstruction, Inc. Its bid envelope contained an alternative bid that was not discovered or read when the bids were publicly announced. After noticing the alternative bid, the City contacted DeConstruction. The City learned that DeConstruction had not received the amended bid form the City had provided to other bidders. A copy of the amended form was then faxed to DeConstruction and, on June 16, 1999, DeConstruction submitted what turned out to be the low bid for the project. The demolition contract was thereafter awarded to DeConstruction.

Aggrieved at losing the contract, SCS sued for an injunction. During hearings on the request for injunctive relief, the City argued that such relief was inappropriate because SCS could seek monetary damages and thereby avail itself of an adequate legal remedy. The litigation relating to the request for injunctive relief lasted seven months. After the request was finally denied, SCS filed an amended complaint seeking monetary damages. In its answer to the amended complaint, the City argued that the action should be dismissed because SCS had failed to comply with the notice of claim statute, §893.80(1), Wis. Stats. The trial court agreed and dismissed the claim, noting that the itemized statement of damages required by §893.80(1)(b) had never been provided. SCS appealed.

In a decision issued on May 9, 2001, the Court of Appeals affirmed, but on grounds different than the ones relied upon below. According to the appellate court, the City could not rely on the notice of claim statute to bar the action because the City had not raised this defense for the first seven months of the litigation and had affirmatively argued that SCS had a damage remedy available to it. Thus, the City was judicially estopped from arguing, contrary to its earlier position, that the action of SCS was barred by failure to comply with §893.80(1).

The appellate court nonetheless upheld dismissal of the claim because it found, under §62.15(5), Wis. Stats., that the City was vested with discretion to act in its best interest. In this instance, the City chose to waive certain formalities of the bidding process in considering the alternative bid of DeConstruction. The City had the discretion to do so because it advanced the public interest in obtaining the most reasonable contract price available. Because plaintiff had no proof that the City's exercise of discretion was either arbitrary or unreasonable, its discretion was upheld.

A factor that may have entered into the Court's decision-making process is highlighted by the last footnote of the decision. There, the Court admonished SCS for submitting a brief that "largely ignores the historical facts to the point of hoodwinking this court as to the factual circumstances." The decision is not recommended for publication.

— Catherine M. Rottier

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## Wisconsin Attorney General Rejects Constitutional Challenge to Transmission Company

Wisconsin Attorney General James Doyle has declined a request to file a complaint against the American Transmission Company (ATCo) on the grounds that the company was created unconstitutionally by the Wisconsin legislature.

The request came to Doyle from an attorney representing a landowner who desires to halt construction of the proposed Duluth-to-Weston transmission line. In a letter to Doyle, the attorney asked Doyle to find that the law which approved ATCo was a special or private law, or that it was improperly included in the omnibus Budget Bill.

Doyle rejected both counts. The test for whether something constitutes a private law in Wisconsin, Doyle opined, is whether there is a public purpose for the action by the legislature. Doyle found that there clearly was a public purpose in the creation of a single transmission company to own and operate high voltage facilities within the state, separate from generating companies. Doyle also rejected other claimed infirmities in the legislation.

The parties who wish to challenge the formation of ATCo still have the right to file an action in state court.

— Michael P. May

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## Oconto Falls and Reedsburg Are WPPI's Newest Members

As of April 26, WPPI has two new members. The WPPI board of Directors approved the applications for full membership of Oconto Falls Water & Light Commission and the Reedsburg Utility Commission. WPPI will now be the wholesale power suppliers for the two municipal utilities.

Oconto Falls provides electric service to 1,527 customers in southeastern Oconto County, while Reedsburg serves 4,150 electric customers in northern Sauk County.

Formed in 1978, WPPI is a statewide non-profit power company owned by 32 municipalities that operate electric utilities. These municipal utilities purchase all of their electric requirements from WPPI and supply power to more than 110,000 homes and businesses throughout Wisconsin.

Oconto Falls and Reedsburg are the first new members to join WPPI since 1989. The communities will begin taking power from WPPI in the next few months.

— Anita T. Gallucci

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## Laura Sutherland Leaving the Practice of Law

Laura M. Sutherland, a partner at the Boardman Law Firm, will be leaving the firm and the practice of law in June, 2001. Laura will be attending Wartburg Seminary in Dubuque, Iowa and will be studying to become a Lutheran minister.

Laura previously served as an Assistant Attorney General in the Wisconsin Department of Justice before joining the Boardman firm in May, 1998. We wish her the best of luck in her future career.

## Wisconsin Leads the Way in Passing Wetlands Legislation

In January, 2000, the United States Supreme Court issued a decision restricting federal authority to regulate wetlands not adjacent to navigable waters (*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, No. 99-1178, U.S. Jan. 9, 2001; see *Municipal Law Newsletter*, February 2001). Because state regulation of wetland water quality certification programs in Wisconsin and elsewhere relies heavily on the broad understanding of federal jurisdiction rejected in that case, observers have been looking to see how state legislatures would respond.

This month, Wisconsin became the first state in the nation to pass a protective wetlands law in response to the Supreme Court's decision. The new law was passed unanimously by the Wisconsin Senate and Assembly, and was signed by Governor Scott McCallum on May 7, 2001. It became effective on May 8, 2001.

Under the new law, the state retains authority to protect the at least one million acres of isolated wetlands in Wisconsin that are no longer subject to federal jurisdiction. The law provides that no one may discharge dredged or fill material into a non-federal wetland unless the project meets water quality standards.

The bill also prohibits the Department of Natural Resources from requiring applicants for water quality certifications for nonfederal wetlands to submit additional information concerning practicable alternatives if the wetlands are less than one acre in size, do not exist in areas of "special natural resources interest," and the application includes a copy of a determination that the discharge is necessary for public safety. The law requires local government units and state transportation agencies to make a determination of public safety if requested to do so by an applicant.

According to the Department of Natural Resources, application of the state's existing wetlands standards has cut wetland acreage lost to permitted filling or dredging from an average of 1,440 acres in 1991 to about 350 today. The new law insures that such regulation will be maintained and has been hailed by conservation and environmental group leaders.

— *Richard A. Heinemann*

## Dane County Court Allows Madison to Include Lead Replacement in Water Rates

On May 9, 2001, a Dane County Circuit Court held that the City of Madison's request to include the cost of private lead pipe replacements in water utility rates should be allowed. The decision reversed a prior ruling by the Public Service Commission of Wisconsin ("PSC") denying the City of Madison Water Utility's request for a 5.5 cents surcharge per hundred feet of water consumption (*Municipal Law Newsletter*, January 2001). The surcharge had been sought to reimburse customers with lead pipe laterals for one half the cost of lead pipe replacement, up to \$1000.

In reversing the PSC's decision, the Dane County court found that the water utility had a legal obligation to comply with the Safe Drinking Water Act regulations; that the water utility had negotiated a more cost effective way of complying with these regulations than chemical treatment; and that this savings was of benefit to all customers. The court held that the cost of complying with this regulatory responsibility had to be borne by the water utility and could not be passed on to private property owners.

The court noted further that "[t]he PSC's denial of the proposed surcharge, despite the negotiation and public comment that went into its formulation, discourages efficient management. It encourages the utility to acquiesce to standard mandatory chemical treatment, a more costly and less desirable solution."

The decision confirms the right of a municipal water utility to address compliance issues in the most cost-effective way.

— *Richard A. Heinemann*

### SPEAKERS FORUM

June 12, 2001

#### **Improving Planning**

Wisconsin Chapter American Planning Association  
Great Communities Workshop  
Waukesha, WI  
Richard A. Lehmann

June 15, 2001

#### **Religious Land Use and Institutionalized Persons Act: What Does it Mean for Your Municipality?**

2001 Municipal Attorney Institute  
Delavan, WI  
Richard A. Lehmann

June 15, 2001

#### **Municipal Concerns Relating to Regulation of Railroads and Railroad Property**

2001 Municipal Attorney Institute  
Delavan, WI  
Mark J. Steichen

### LEGISLATIVE UPDATE

#### BILL      TOPIC

#### **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.

#### **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) 5/2/01.

*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>.*

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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.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at [cbeals@boardmanlawfirm.com](mailto:cbeals@boardmanlawfirm.com).

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