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## RockGen Opponents Take Case to Supreme Court

Since its inception, the proposed RockGen Energy Center in Christiana Township, Dane County, has generated considerable controversy. The 450 megawatt merchant plant is being built under contract with Alliant Energy by SkyGen (formerly Polsky energy Corporation), an independent Illinois energy marketer. Under 1997 Wisconsin Act 204, a merchant plant is defined as a power plant that sells power to utilities but does not provide service to any retail customers and is not owned by a public utility. Although construction already has begun on the facility, town residents and a citizen group known as Responsible Use of our rural & Agricultural Land ("RURAL") have taken their case against the plant to the Wisconsin Supreme Court.

At issue in the legal battle is whether the Public Service Commission of Wisconsin ("PSCW") was authorized to expedite its approval of the RockGen facility under a provision of Wis. Act 204. The provision at issue was enacted in the wake of rolling blackouts in the summer of 1997. It was intended to boost Wisconsin's energy supply by providing for rapid approvals of new generation facilities.

Alliant ostensibly contracted to have the RockGen facility built in order to comply with a 1997 PSC order that requires Alliant to procure

170 MW of new generation capacity. However, lawyers for the RockGen opposition have contended that Act 204 was not intended to expedite approval for a facility with almost three times the capacity required by the PSC. Lawyers for the Commission have argued that the statute contains no specifics about the size of plants subject to the expedited approval procedures.

In addition, opposition lawyers have contended that the PSC approval of the plant was granted before all necessary environmental permits had been issued. Moreover, RURAL has claimed that most of the electricity produced by the plant will wind up being exported out of state. Testimony from one company official, for example, indicated that Alliant would use only about 8 percent of the plant's capacity. Alliant lawyers have countered that the plant is intended as a peaking plant, to be used only during power crunches.

Oral arguments from both sides of the controversy were heard by the Supreme Court on September 6th. The justices could send the case back to the PSC for a more thorough review, one which might even include consideration of alternative sites. A decision is expected by early next year. Pending the outcome, construction on the RockGen plant is expected to be complete in June, 2001.

— Richard A. Heinemann

## Court of Appeals Holds That Chief Deputies Are Subject to MERA

The Wisconsin Court of Appeals, District III, recently held that chief deputies are subject to the Municipal Employee Relations Act. *Oneida County v. WERC* (No. 00-0466 8/29/00).

The issue of whether appointed deputies are within the scope of MERA and, thus, subject to inclusion in municipal bargaining units has been the topic of several appellate cases over the years. The issue was raised again in *Oneida County*. Here the county sought to exclude the chief deputy county clerk, chief deputy clerk of court, chief deputy county treasurer and chief deputy register of deeds from the bargaining unit on the basis of past case law and the statutory ability of the respective clerks to appoint their deputies. Various state statutes empower clerks to appoint and discharge their deputies. The issue before the Court of Appeals has been how to reconcile their appointment and discharge powers with the limitations and restrictions on management's rights in areas of hiring and firing typically found in collective bargaining agreements under MERA.

The Court of Appeals has taken the approach of trying to reconcile the conflicts whenever possible. Therefore, in a case dealing with deputy clerks, the Court of Appeals held that "deputized employees, apart from the chief deputy are exempt from MERA coverage only to the extent that they in fact function as managerial or supervisory employees." Oneida County read the clause excepting chief deputies to mean that chief deputies are exempt as a matter of law from MERA.

The Court of Appeals disagreed. It interpreted case law and the applicable statutes to require that chief deputies are properly subject to the provisions of a collective bargaining agreement bargained under MERA. The only exception is that the chief deputies are not subject to provisions in a collective bargaining agreement that deal with hiring and firing. Because the Wisconsin legislature has given those powers to the respective clerks, such powers cannot be subject to the terms of a collective bargaining agreement. Rather, the clerk retains the power to appoint and discharge. The chief deputy, however, is subject to all other terms and conditions of a collective bargaining agreement.

While we disagree with the result, the Court of Appeals decision does create a clear rule in what has been an unclear area of law and does give management the exclusive right to hire and fire chief deputies. From a practical standpoint, it is likely that management would be consistent with wages and other benefits of the chief deputy in relation to other employees whether or not the chief deputies are in the bargaining unit.

— Steve Zach

## Governor's Commission on State-Local Partnerships For The 21st Century Meets

Governor Thompson created the Blue Ribbon Commission on State-Local Partnerships for the 21st Century on April 5 to study the roles of state and local governments and how they can best provide the most efficient and cost-effective service to Wisconsin residents in the 21st century. The Commission is composed of 32 members from a variety of backgrounds including state, local, and education officials, state lawmakers, and Wisconsin residents. Don Kettl (pronounced like kettle) of the LaFollette Institute at the University of Wisconsin-Madison was appointed to chair the Commission, which is now commonly called the "Kettl Commission."

The Kettl Commission's mandate is to develop innovative approaches and propose reforms to the state-local relationship and the operation of local government. As its first step, the Commission divided state-local relations into several areas and recently began looking at which entity can handle the area most efficiently. The Commission expects to pass resolutions on each issue before its last scheduled meeting on December 14, 2000.

Identifying the areas of state-local relations has been the primary focus of the Commission thus far. Now that the areas have been identified by the members and they have received briefings on the current handling of each area, active discussion has begun. The twelve core issues that the Commission members have focused on are: Education, Land Use, Transportation, Public Safety, Criminal Justice, Human Services, Health, Environmental Protection, Parks and Recreation, Basic Needs, Commercial, and Employment Security.

Updates on the Kettle Commission's efforts and resolutions can be obtained from the Commission's website at <http://www.lafollette.wisc.edu/reform/>.

— Lawrie J. Kobza

## Federal Agency to Investigate Electric Power Markets

The Federal Energy Regulatory Commission (FERC) has ordered its staff to undertake a fact-finding investigation into market power conditions in wholesale electric power markets. The staff is to report its findings to the Commission by November 1, 2000.

The Commission is reacting to extreme price volatility in the wholesale markets, particularly within California. The FERC has undertaken a program of bringing more competition to the wholesale electric power markets. The Commission is concerned that the markets do not reflect true competition. The Commission is expected to utilize the results of the staff study to determine whether existing transmission or power exchange tariffs or agreements need to be modified, and whether changes need to be made in requirements established in Order 2000 for regional transmission organizations.

— Michael P. May

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## NLRB Changes Position on Weingarten Application

In a significant decision, the National Labor Relations Board recently extended *Weingarten* principles to non-union employees. *Epilepsy Foundation of Northeast Ohio and Borgs/Hasan*, 331 NLRB 92 (7/10/2000). While the decision does not directly affect Wisconsin municipal employers because they are governed by the Wisconsin Employment Relations Commission ("WERC"), it may be a harbinger of future developments from WERC. Moreover, the decision serves as a reminder of the obligations union employers have in investigating employees for potential discipline.

The United States Supreme Court decision in *Weingarten* entitles unionized employees who are subject to investigatory interviews that could lead to discipline to union representation during such interviews, if requested by the employee. While that decision involved the National Labor Relations Act, the *Weingarten* principle has been applied by WERC to unionized municipal employees.

The right to representation during an investigatory interview in a union shop is based upon the National Labor Relations Act provision which protects an employee's right to "engage in concerted activities for mutual aid and protection." (Section 7). The Municipal Employment Relations Act has the same provision, upon which the WERC bases its adherence to *Weingarten* principles. Virtually all municipal union contracts include a "just case" for discipline provision and a grievance procedure involving union representation. The right to representation at the initial investigatory interview flows logically from these contract provisions and union representation.

The right to representation in an investigatory interview in a non-union setting does not clearly flow from Section 7 rights. First, most non-union employees have an "at-will" status for which just cause need not exist for discipline or termination. Second, discipline and discharge decisions, except for police department non-union personnel, are not subject to a grievance or other review procedure. Third, non-union employees do not have an existing organization to represent them during an investigation.

Nonetheless, the NLRB concluded that because Section 7 of the NLRB protects non-union as well as union employees, the non-union employees should be afforded the "opportunity to act together to address the issue of an employer's practice of imposing unjust punishment on employees." Thus, it extended *Weingarten* rights to non-union employees. Failure to comply with this requirement could give rise to an unfair practice charge and the invalidation of the discipline.

Under the *Epilepsy Foundation* decision, an employer within the NLRB's jurisdiction must now grant a non-union employee's request to have someone present with the employee during an investigatory interview which could lead to discipline of the employee. If the employee does not request to have someone present, the employer is not required to advise the employee of the right. If the employee requests to have someone present during the interview, the employer has the right to forego the interview and proceed with the discipline.

So what does this mean for municipal employers? First, the *Weingarten* rights still apply to municipal union employees, so it remains essential that a municipal employer afford its employees their *Weingarten* rights. Failure to do so could invalidate the proposed disciplinary action. Second, while NLRB law is not

## American Transmission Company on Track For January 1 Start-up

The nation's first independent transmission company, American Transmission Company LLC ("ATC"), took a major step toward formation on August 18 by filing with the Public Service Commission of Wisconsin ("PSCW") for certification as an electric transmission company to begin operations on January 1, 2001. As part of its comprehensive application, ATC also filed jointly with Wisconsin Electric, Wisconsin Public Service, Madison Gas & Electric and Alliant-Wisconsin Power & Light and Wisconsin Public Power, Inc. ("WPPI") to transfer the electric transmission systems from these utilities. ATC's Open Access Transmission Tariff was filed in July with the Federal Energy regulatory Commission ("FERC").

ATC was formed under provisions of the Reliability 2000 legislation contained in Governor Thompson's 1999-2001 budget bill. It is intended to provide reliable, high voltage transmission service to customers in areas presently serviced by participating utilities. The company will be a transmission-owning member of the Midwest Independent System Operator, as well as regional reliability councils. Among the expected benefits being touted by company representatives are efficient and prudent expansion of Wisconsin's constrained transmission system; elimination of "pancaked" rates for service within the system; and actualization of the FERC's functional unbundling requirements.

Initially, the company will be wholly owned by participating utilities. Transmission-owning utilities can participate by contributing transmission assets. Transmission-dependent utilities and retail electric cooperatives in Wisconsin can participate by purchasing equity interests in the company. As required by the law, ATC's initial board will include outside as well as owner-appointed directors, thus facilitating public input into company decisionmaking.

At a technical conference held by the company for interested parties on September 7, ATC representatives encouraged municipal utilities and others to participate in the company by contributing either assets or cash. Although the company's enabling statute requires utilities to join by January 1, 2001, utilities considering joining the company are urged to do so as soon as possible in order to ensure that there is ample time for regulatory approval.

More information on ATC can be obtained on the company website: <<http://www.atcl.com>>.

— Richard A. Heinemann

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binding on the WERC, the Wisconsin labor statute tracks the NLRB and the WERC considers NLRB case law in formulating its policy. The WERC has not yet extended *Weingarten* rights to non-union employees, but it might.

One of the disconcerting facts of *Epilepsy Foundation* is that the NLRB applied its decision retroactively. Thus, the employer who had been following NLRB policy was nonetheless penalized by the NLRB for doing so. If you have a situation in which a non-union employee asks to have someone present during an investigatory interview, consideration should be given to complying with that request even though, under current WERC law, you are not required to do so. In making that decision, you should balance the pros and cons of having someone present against the small risk that the WERC would change its policy and apply it retroactively.

— Steve Zach

# MUNICIPAL LAW NEWSLETTER

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|                        |          |  |
|------------------------|----------|--|
| Richard L. Bolton      | 283-1789 | <a href="mailto:rbolton@boardmanlawfirm.com">rbolton@boardmanlawfirm.com</a>         |
| Christopher J. Dodge   | 283-1777 | <a href="mailto:cdodge@boardmanlawfirm.com">cdodge@boardmanlawfirm.com</a>           |
| Anita T. Gallucci      | 283-1770 | <a href="mailto:agallucci@boardmanlawfirm.com">agallucci@boardmanlawfirm.com</a>     |
| Robert E. Gregg        | 283-1751 | <a href="mailto:rgregg@boardmanlawfirm.com">rgregg@boardmanlawfirm.com</a>           |
| Rhonda R. Hazen        | 283-1724 | <a href="mailto:rhazen@boardmanlawfirm.com">rhazen@boardmanlawfirm.com</a>           |
| Richard A. Heinemann   | 283-1706 | <a href="mailto:rheinemann@boardmanlawfirm.com">rheinemann@boardmanlawfirm.com</a>   |
| Lawrie J. Kobza        | 283-1788 | <a href="mailto:lkobza@boardmanlawfirm.com">lkobza@boardmanlawfirm.com</a>           |
| Richard A. Lehmann     | 283-1719 | <a href="mailto:rlehmann@boardmanlawfirm.com">rlehmann@boardmanlawfirm.com</a>       |
| Michael P. May         | 283-1737 | <a href="mailto:mmay@boardmanlawfirm.com">mmay@boardmanlawfirm.com</a>               |
| Jennifer S. Mirus      | 283-1799 | <a href="mailto:jmirus@boardmanlawfirm.com">jmirus@boardmanlawfirm.com</a>           |
| Jon C. Nordenberg      | 283-1739 | <a href="mailto:jnordenberg@boardmanlawfirm.com">jnordenberg@boardmanlawfirm.com</a> |
| Catherine M. Rottier   | 283-1749 | <a href="mailto:crottier@boardmanlawfirm.com">crottier@boardmanlawfirm.com</a>       |
| Mark J. Steichen       | 283-1767 | <a href="mailto:msteichen@boardmanlawfirm.com">msteichen@boardmanlawfirm.com</a>     |
| Laura M. Sutherland    | 283-1774 | <a href="mailto:lsutherland@boardmanlawfirm.com">lsutherland@boardmanlawfirm.com</a> |
| Cynthia A. Van Bogaert | 283-7543 | <a href="mailto:cvanbog@boardmanlawfirm.com">cvanbog@boardmanlawfirm.com</a>         |
| Steven C. Zach         | 283-1736 | <a href="mailto:szach@boardmanlawfirm.com">szach@boardmanlawfirm.com</a>             |

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Fourth Floor  
1 South Pinckney Street  
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