

## IN THIS ISSUE

- *Federal DOT Proposes Drive Time Limits*
- *Supreme Court: No Requirement to Join Equal Protection and Certiorari Claims*
- *Electric Dereg Disaster in California*
- *Speakers Forum*
- *PSC Draft Strategic Energy Assessment Finds Energy Supply To Be Adequate*
- *Portland Open Access Decision Overturned*

## Federal DOT Proposes Drive Time Limits

As part of an ongoing safety action plan, the Federal Motor Carrier Safety Administration ("FMCSA") has proposed revisions to its hours-of-service regulations. Current hours-of-service rules for commercial drivers stem from a 1937 Interstate Commerce Commission regulation that has not been revised since 1962. The current rule requires that drivers take eight hours of rest after driving a maximum of hours or 15 hours on duty. FMCSA anticipates the proposed rule would prevent 2,600 crashes, 115 fatalities and almost 3,000 serious injuries annually.

The proposed rules would impose hours-of-service limits on, among others, emergency repair crews of investor-owned utilities ("IOUs") and rural cooperatives. Units of state and local government, including municipal utilities, are exempt. However, municipal utilities may be affected by the proposed rules because they sometimes

rely on assistance from IOUs and coops during emergencies.

Recognizing that the proposed rules may hamper the ability of municipal utilities to respond to emergencies, the American Public Power Association has publicly proposed that the new FMCSA rules be revised so that utility crews are placed in the same category as fire fighters and ambulance drivers. They have been joined by the rural cooperatives and IOUs in proposing such a change.

Final hearings on the proposed rules were held in July in Washington, D.C. Written comments on the proposal are due no later than October 30, 2000 and should be sent to the USDOT Docket Facility, Attn: Docket FMCSA-97-2350, 400 Seventh St., S.W., Washington, D.C. 20590. The full text of the rules can be downloaded from the Department of Transportation website at: <http://www.fmcsa.dot.gov/hos/hos.htm>.

— Richard A. Heinemann

## Supreme Court: No Requirement to Join Equal Protection and Certiorari Claims

The Wisconsin Supreme Court ruled, in a case decided this summer, that a property owner seeking judicial review of a municipal decision in a ch. 68 certiorari proceeding is not required to join the request with a lawsuit for money damages under an equal protection claim. The two claims may survive as two separate actions.

The decision comes from a continuing, decade-old southern Wisconsin case. *Hanlon v. Town of Milton*, 2000 WI 61, 2000 Wisc. LEXIS 402, June 21, 2000. In 1990, James Hanlon, a Town of Milton property owner, sought zoning approval from the Town of Milton Plan-

ning and Zoning Committee to operate a gravel quarry on his farm. The Committee held a meeting in which it considered Hanlon's request as well as two other similar requests to operate quarries. The two other applicants were members of the Planning and Zoning Committee. Even though the two applicants/members did not vote on any of the three requests, their two requests were approved while Hanlon's was denied.

In 1990, Hanlon sought judicial review of the denial, known as certiorari review, under the Municipal Administrative Procedures Act (ch. 68, Wis. Stats).

*Continued on page 2*

## Supreme Court: No Requirement to Join Equal Protection and Certiorari Claims

(Continued from front page)

His request for a new hearing was granted by the court; however, he was again denied the permit from the Town. In 1997, Hanlon brought a separate constitutional equal protection lawsuit in Federal Court against the Town seeking money damages under 42 U.S.C. sec. 1983 because the Town approved the operation of two other quarries and denied the operation of his quarry.

The Town argued that Hanlon's equal protection claim was barred under the doctrine of claim preclusion. The Town claimed Hanlon was required to bring the equal protection lawsuit with his request for certiorari review. The Supreme Court disagreed.

In support of its opinion, the court noted that certiorari review under Ch. 68 is generally limited to the existing record while an equal protection claim requires additional evidence. Also, judicial relief under certiorari review is limited. Courts can affirm, reverse or remand for further proceedings. However, under equal protection claims, money damages and reasonable attorney fees are available. Furthermore, the court stated a plaintiff in an equal protection lawsuit has a right to demand a jury trial while no such right exists for certiorari review. Additionally, a party has 30 days after receiving a final determination to seek certiorari review while equal protection claims have a six-year statute of limitations. Therefore, the court concluded litigants may join equal protection claims with requests for certiorari review, but such a joining is not required.

The Wisconsin Supreme Court was not asked to rule on the merits of the equal protection challenge – just whether the equal protection and certiorari claims were required to be joined. Therefore, with the high court ruling, Hanlon is allowed to return to court for a trial on his equal protection claim.

—Laura Sutherland

## Electric Dereg Disaster in California

California was the first state in the nation to embark on a broad program of deregulating its retail electric utility system. The model used in California has been followed, with some modifications, in most of the 20-some states that have moved toward deregulation. Now several years into deregulation, the California market is in crisis, and appears close to disaster.

For a period of time after deregulation was approved, there were limitations on the prices which could be charged to retail ratepayers. In some areas, particularly San Diego, that price limit began to expire this year. As wholesale price spikes began to be passed on to individual ratepayers in San Diego, some saw their annual cost of electricity doubling or tripling. Among the other developments in California:

- A Democratic state Senator who spearheaded the deregulation effort is now considering reimposing traditional regulatory schemes.
- An economist's report indicates that California ratepayers have paid between \$500-\$800 million in excess costs for electricity, due to market power of generation owners.
- In the San Francisco Bay area, customers were subjected to rolling blackouts. California Governor Gray Davis has asked the state Attorney General to investigate manipulation of the state's utility market.
- Independent companies, who were expected to construct new power plants with the demise of regulation, announced that plans for new plants may be delayed if the state pursues renewed regulation of the market.
- The California ISO reduced the maximum rate for wholesale electric prices to \$250 per megawatt hour. This wholesale figure is about three to five times the retail price paid in Wisconsin.

The lack of a truly competitive generation market is the major culprit in the California deregulation disaster. Some generation owners with a sufficient share of the market are able to withhold sales until the market clearing price reaches a certain level; under the California model all sellers then can obtain this higher price. The state of the generation market will continue to be examined closely in any other electric deregulation efforts.

— Michael P. May

### SPEAKERS FORUM

September 18, 2000

#### Municipal Entry into the Telecommunications Market

APPA Telecommunications Conference  
Scottsdale, AZ  
Anita T. Gallucci

September 18, 19, & 20, 2000

#### Management Responsibility

Milwaukee Fire Department  
Milwaukee, WI  
Robert E. Gregg

September 21, 2000

#### Discipline and Discharge Seminar

CUNA  
Madison, WI  
Robert E. Gregg

September 21, 2000

#### Duty of Care Program

Health Care Finance Management  
Conference  
Madison, WI  
Robert E. Gregg

September 28, 2000

#### Supervisory Communication

Middleton Chamber of Commerce  
Middleton, WI  
Robert E. Gregg

September 29, 2000

#### Employment Issues for Small Businesses

State Bar of Wisconsin

Waukesha, WI

Robert E. Gregg

October 12, 2000

#### Civil Rights Training for County Employees

Outagamie County  
Appleton, WI  
Robert E. Gregg

October 17, 2000

#### 401(k) plans

Employee Benefits Institute of America  
Columbus, OH  
Cynthia A. Van Bogaert

October 18, 2000

#### COBRA

Society for Human Resource  
Management  
Madison, WI  
Cynthia A. Van Bogaert

October 19, 2000

#### Employment Issues

South Madison Business Association  
Madison, WI  
Robert E. Gregg

October 26, 2000

#### New Dimensions of Fair Play: Understanding Due Process

League of Wisconsin Municipalities'  
Annual Conference  
La Crosse, WI  
Richard A. Lehmann

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# PSC Draft Strategic Energy Assessment Finds Energy Supply To Be Adequate

A draft Strategic Energy Assessment ("SEA") Report issued by the Public Service Commission of Wisconsin ("PSC") finds that the regional bulk power market has provided an adequate and reliable source of capacity and energy to meet the public's needs and is likely to continue doing so for the foreseeable future. The draft SEA Report was issued on June 30, 2000, pursuant to Wis. Stat. § 196.491(2) and is the first such assessment since 1997 Wisconsin Act 204 repealed the advance plan process for electric utilities and replaced it with the SEA.

Under 1997 Wisconsin Act 204, the purpose of the SEA is to examine the cost, reliability, health, safety, and environmental effects of the various alternatives available for meeting the state's future electric energy needs. Specifically, the draft Report covers the historic years 1995-1999 and the forecast years of 2000-2002. It includes information on all plans, from providers and merchant plant developers alike, for construction of generation and transmission facilities and for the reliable transfer of electric power into Eastern Wisconsin and the state as a whole. In addition, the SEA tracks projected demand, as well as activities to discourage the inefficient use of power and encourage the use of renewable energy.

According to the draft Report, the bulk power market succeeded for the period 1995-1999 in meeting the energy and capacity needs of the public. The draft Report bases this conclusion on the fact that electric supply matched electric demand statewide during that period without contract defaults or the need to impose rolling blackouts. Because expected planning reserve margins for the period 2000-2002 exceed 18 percent statewide, the Report also concludes that adequate electric capacity and energy reserves will continue to ensure electric system reliability for the foreseeable future.

The draft Report does acknowledge that the assessment is subject to several caveats, including that individual electric providers' situations may vary from what is projected on a statewide basis. The data included in the Report also reflects expected capacity purchases, including purchases from facilities for which construction has yet to begin. Moreover, this data is based on estimates, whereas actual operation of the system may vary during times of stress. Finally, the assessment does not account for unexpected circumstances and relies on continued extensive use of the constrained Minnesota-Wisconsin and Illinois-Wisconsin transmission interfaces.

Hearings on the draft Report are scheduled to take place at the PSC on Monday, September 18 at 9:00 a.m. Comments are due by Thursday, September 28, 2000 and should be addressed to Lois J. Hubert, SEA Coordinator, Electric Division, Public Service Commission, P.O. Box, WI 53707-7854. Copies of the draft Report are available on the PSC website: <http://www.psc.state.wi.us/cases/sea/index.htm>.

— Richard A. Heinemann

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## Portland Open Access Decision Overturned

The Ninth Circuit Court of Appeals overturned the decision of the Oregon District Court in *AT&T Corp. v. City of Portland*, No. 99-35609 (9th Cir., June 22, 2000). The lower court had ruled that the City of Portland had authority to condition the City's consent to the transfer of the local cable franchise on the requirement that the new cable operator, AT&T, provide "open access" to the operator's @Home Internet service. The open access condition would have required AT&T to allow its @Home customers to access the Internet service provider of their choice without having to pay the full @Home rate.

The Court of Appeals, however, found that the Communications Act prohibits a cable television franchising authority "from regulating cable broadband Internet access, because the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service."

Under the Court's ruling, municipalities can no longer use their cable franchising authority to regulate Internet service provided over a cable system. Among other things, a municipality would be prohibited from mandating that a cable operator pay franchise fees on revenues derived from the provision of Internet service. Some Wisconsin municipalities currently require such payments.

The regulatory implications of the Court of Appeals' holding is unclear. The Federal Communications Commission's ("FCC") long-standing policy has been to refrain from regulating "computer data services" provided over telecommunications facilities. The FCC has extended that policy to the Internet, believing that the Internet should remain unregulated so as not to hinder the competitive development of broadband services. While the Court of Appeals' ruling that cable modem service is a telecommunications service opens the door to the FCC applying its extensive common carrier regulations to such service, few expect this to happen given the FCC's past policy on the Internet.

Shortly after the Court released its decision, the FCC announced that it would initiate a formal proceeding on the open access issue. The FCC intends to establish a national broadband policy. In a press release, FCC Chairman Kennard stated that, while he agreed with the municipalities in the goal of an open cable platform, he believed that the goal should be achieved through market forces rather than through government intervention.

The Fourth Circuit Court of Appeals will have the opportunity to decide the open access issue in a case involving a Henrico County, Virginia ordinance that required AT&T to provide open access if it wanted to acquire the cable franchise held by MediaOne Group Inc. Henrico County has appealed the lower court's ruling that its open access ordinance is illegal.

— Anita T. Gallucci

# MUNICIPAL LAW NEWSLETTER

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