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MGE Rate Proposal Garners State-Wide Attention

A sweeping change in its electric and gas rate design proposed by Madison Gas & Electric (MGE) is wending its way through the Public Service Commission of Wisconsin (PSCW) hearing process and generating wide-spread attention from customer groups, renewable energy advocates, neighboring municipalities and public utilities throughout the state.

In an application filed in June in PSCW Docket 3270-UR-120, MGE sought to increase its fixed customer charge over the next two years from $10 to as high as $69 for standard residential customers, while also decreasing its variable energy charge. The company has since modified its proposal to include a fixed charge of $19/month and an energy charge of 13 cents per KWh in 2015 (down from 14.4 cents currently), while pulling back its proposal for 2016 in order to allow time to explore alternative approaches with customer groups.

According to the company's pre-filed testimony, the proposal is intended as the first step in a comprehensive re-design of the company's electric and natural gas rates largely intended to send more accurate price signals to customers contemplating investments in energy efficiency or renewable energy.

Currently, MGE recovers a substantial percentage of its fixed costs in its variable energy use charge, reflecting long-standing regulatory policy intended to hold down costs for low-use and low income customers. The company's proposal contemplates a three-part rate design similar to what is currently used for its large industrial customers. It includes a larger fixed customer charge to recover administrative and customer-service related costs; demand-based-charges, which will include both a fixed and a variable component; and variable energy-based charges. If the PSCW approves the proposal, the company anticipates future investments in automated and demand-based metering to further enhance the link between cost and actual customer energy use.

In its testimony, the company contends that the proposed electricity rate design will lead to increased transparency and more stable energy rates since reductions in energy use will not result in subsequent rate increases as the company seeks to maintain recovery of its fixed costs for generation and distribution

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Municipal and Coop Pole Attachment Rates Under Attack

In what may well be a bellwether for Wisconsin's municipal electric utilities and electric cooperatives, North Caroline's Business Court ruled in favor of Time Warner Cable in *Rutherford EMC v. Time Warner Entertainment/Advance-Newhouse Partnership* on May 22, 2014. At issue was the standard to be used to determine the reasonableness of pole attachment rates an electric cooperative may charge a cable company to attach to the coop's utility poles.

When Congress passed the federal Pole Attachment Act in 1978, it specifically exempted cooperatives and municipal utilities from pole attachment rate regulation by the Federal Communications Commission ("FCC"). Some states have adopted statutes regulating to some extent the pole rates that consumer-owned utilities may charge. In 2009, the North Carolina legislature adopted N.C. Gen. Stat. § 62-350, which requires North Carolina cooperatives to allow communication service providers to attach to their poles at "fair and reasonable rate[s]." The North Carolina statute also directs North Carolina's Business Courts to resolve disputes where the parties are unable to agree on a pole attachment rate. Wisconsin has a similar statute with respect to the rates that public utilities (which includes municipal utilities, but not electric cooperatives) may charge cable companies and other users for the use of their poles. See Wis. Stat. § 196.04(2). Prior to 2011, the Wisconsin statute did not apply to cable operators or other video service providers.

The Rutherford EMC case was the first rate dispute to be decided under the North Carolina statute. In deciding in favor of Time Warner, the Business Court ruled that the FCC's so-called Cable Rate Formula, which produces rates in the $3.00 to $4.00 range, "offered the most credible basis for measuring the reasonableness of [Rutherford's] pole rates." For the period in dispute (2010 to 2013), the FCC rates were determined to be in the range of $2.54 to $3.63 per pole. Rutherford's rates were well above that mark and in the range of $15.50 to $19.65. The average rate for the same period that was charged by North Carolina's FCC-regulated investor owned utilities ranged from $5.91 to $6.06. The court gave the parties 90 days within which to "negotiate and adopt new rates for the years 2010 through 2013 that are consistent with the reasoning of this Order."

According to the attorneys who led the charge for Time Warner, the North Carolina decision "should serve as helpful precedent in other states that have yet to rationalize escalating cooperative and municipal pole rates." See http://www.natlawreview.com/article/north-carolina-court-issues-first-decision-controlling-coop-pole-attachment-rates. One can only assume that, given its success in North Carolina, Time Warner and other cable companies will continue the attack on pole rates charged by consumer-owned utilities.

— Anita T. Gallucci

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system infrastructure. The rate design is also intended to eliminate the competitive disadvantage faced by industrial customers and high-tech commercial customers whose variable production costs include fixed cost components that benefit users system-wide.

Customer advocates, in contrast, contend that the increase in fixed customer charges, combined with reduced energy charges, will disproportionately harm low income energy users and discourage residential customers from undertaking energy efficiency measures. Renewable energy advocates have also expressed concern that the proposal will especially harm efforts by the City of Madison and neighboring communities to promote the installation of solar panels (MLN September/October, 2013). The City of Monona recently installed nearly 400 solar panels on municipal buildings in anticipation of energy savings due to reduced usage. Monona and Madison have both filed separate interventions in the case.

The rate case is still in its discovery phase, with additional testimony and opportunity for public comment before a scheduled public hearing on October 1. The Commission is expected to issue a decision before the end of the year.

— Richard A. Heinemann

Federal Court Invalidates Wisconsin's Same-Sex Marriage Ban; Appeal is Placed on Fast Track

On June 6, 2014, U.S. District Judge Barbara B. Crabb issued a decision invalidating Wisconsin's ban on same-sex marriage. She concluded specifically that state statutory restrictions on marriage and the state's constitutional amendment Art. XIII, § 13 defining marriage as between "one man and one woman" violate the fundamental right to marry and the right to equal protection of laws for same-sex couples. The decision also invalidates any law that denies recognition of marriages between same-sex couples performed in other states. Judge Crabb's ruling was the latest in a series of federal trial court decisions in recent months striking down similar laws in other states.

The case was brought by eight same-sex couples who were either married outside Wisconsin or wanted to legally obtain Wisconsin marriage licenses. They argued that Wisconsin's marriage amendment, which was passed in 2006 as a statewide referendum by 59% of voters, violated both the Due Process and Equal Protection clauses of the U.S. Constitution. The state attempted to defend the ban on numerous grounds, all of which were ultimately rejected by Judge Crabb in her 88-page decision.

Judge Crabb explained that the Due Process Clause prohibits states from depriving persons of life, liberty, or property without due process of law. The Due Process Clause is implicated by the state's ban on same-sex marriage because the "liberty" protected by the constitution includes the fundamental right to marry. When a state law significantly interferes with a fundamental right, the state must show that it has a sufficiently important state interest to justify the burden to the fundamental right and that the law is closely tailored to that interest. Judge Crabb wrote that Wisconsin's marriage amendment and the Wisconsin statutes defining marriage as requiring a "husband" and "wife" significantly interfere with same-sex couples' right to marry and thus, the laws must be supported by "sufficiently important state interests" that are "closely tailored to effectuate only those interests," in order to survive constitutional scrutiny.

Judge Crabb rejected the argument made by the state that the fundamental right to marry applied only to heterosexual couples based on the link between marriage and procreation, tradition and the "nature" of marriage. She noted that gay persons have the same ability to procreate as anyone else and that same-sex couples often raise children together. She also stated that "although the Supreme Court has identified procreation as a reason for marriage, it has never described procreation as a requirement." As for tradition, Judge Crabb dismissed the idea that fundamental rights are only those that are "deeply rooted" in the country's legal tradition. She pointed out that contraception and abortion were not deeply rooted traditions when the U.S. Supreme Court recognized those rights as constitutionally protected. Additionally, she cited Supreme Court decisions striking down laws prohibiting interracial marriage and homosexual conduct to support her conclusion that the state could not rely "on a history of exclusion to narrow the scope of a [fundamental] right." Finally, she wrote that the argument made in a non-party ("amici") brief about the "nature" of marriage "simply reveals another similarity between the objections to interracial marriage and amici's objections to same-sex marriage. In the past, many believed that racial mixing was just as unnatural and antithetical to marriage as amici believe homosexuality is today."

With respect to the Equal Protection Clause, she found that there was no controlling precedent that determined the appropriate level of scrutiny that should apply to laws that distinguish between people based on sexual orientation. After analyzing various factors, including the history of discrimination based on sexual orientation and the nature and severity of the deprivation at issue, she ultimately concluded that "heightened scrutiny" should apply. This standard of review is similar to the heightened level of scrutiny that applies to legal classifications based on gender.

After concluding that same-sex couples have a fundamental right to marry and that any purported state interest was subject to heightened scrutiny, Judge Crabb concluded that the state had not identified any important state interest that justified the ban on same-sex marriage. She addressed each purported interest presented by the state and amici, including preserving tradition, protecting the institution of marriage, promoting optimal child-rearing, proceeding with caution and "slippery slope." She found none of these arguments to be persuasive.

Judge Crabb also addressed federalism, which is the concept that states should be "laboratories of democracy"

Appellate Court Concludes that Arrest of Man Driving with Gun in His Hand was Reasonable in Light of Uncertainty Created by Wisconsin's Open-Carry Law

A June 17, 2014 decision from the Court of Appeals for the Seventh Circuit in *Gibbs. v. Lomas* considered whether a City of Madison police officer violated a citizen's constitutional rights by charging him with disorderly conduct after he was seen driving through the city with a gun in his hand. The court ultimately concluded that the officer was entitled to qualified immunity because it was uncertain whether Wisconsin's recently enacted gun legislation protected the man's conduct.

The case arose out of an incident that occurred in the City of Madison in July 2012. Officer Brooke Lomas responded to a complaint that a young man in a red Jeep was driving through Madison holding an unholstered handgun near his head, pointed at the roof of the car. The caller said the driver was not threatening anyone, but that he was "driving badly" and "speeding really fast." The caller told police dispatch that the man with the gun had parked and gone into a bar.

Officer Lomas and three other officers arrived just as a man matching the given description walked out of the bar. The man was Roric Gibbs. Officer Lomas and another officer handcuffed Mr. Gibbs, frisked him for weapons, and placed him in the back of a squad car. Officer Lomas then called the citizen who had reported seeing the man with a gun to confirm the details of what had been seen.

Eventually, Officer Lomas and the officers on the scene learned from Mr. Gibbs that he had been handling an airsoft gun in his car. Airsoft guns are replicas of real firearms and usually have the same color, dimensions and markings as real guns. Mr. Gibbs had been driving home from an airsoft event when he had realized that he was still wearing an airsoft gun, which had led to him handling it while driving. After the discussion with Mr. Gibbs, Officer Lomas searched Mr. Gibbs' jeep and found two airsoft guns. Officer Lomas then discussed the situation with her supervisor, and they jointly decided to release Mr. Gibbs after issuing him a citation for disorderly conduct.

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Mr. Gibbs subsequently sued Officer Lomas, claiming that he had been arrested without probable cause and that his car had been searched without a warrant. Mr. Gibbs argued that his conduct could not qualify as disorderly conduct based on amendments to Wisconsin's disorderly conduct law that were added as part of the Personal Protection Act, 2011 Wisconsin Act 35, more commonly known as the Concealed Carry Law. Among other things, the Concealed Carry Law amended Wisconsin's disorderly conduct statute to add a new subsection (2) related to carrying a firearm. The amended statute provides:

947.01 Disorderly Conduct

(1) Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

(2) Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried.

Subsection (2) is the newly-added portion of the statute. Mr. Gibbs argued that under that section, his action of driving with an airsoft gun in his hand did not qualify as disorderly conduct because it amounted to "loading, carrying, or going armed with a firearm" and because there was no evidence that he had criminal of malicious intent.

Officer Lomas moved for dismissal of the claim in the federal district court, arguing that her conduct was immunized by the doctrine of qualified immunity. That doctrine protects governmental actors from liability for discretionary actions, so long as the action did not violate any "clearly established statutory or constitutional rights" of which a reasonable person would have known. The district court rejected Officer Lomas' arguments, concluding that no reasonable officer would have believed that Mr. Gibbs' conduct qualified as disorderly conduct in light of Wisconsin's new gun rights laws.

Officer Lomas appealed. In a unanimous opinion, the Seventh Circuit Court of Appeals reversed the district court, stating that it was not at all clear whether Mr. Gibbs' conduct was protected by the newly amended disorderly conduct law. Because the enactment of the amended law was so recent, officers had received little guidance from courts about what conduct was punishable as disorderly

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and should be allowed to choose whether to extend certain rights. With respect to federalism in particular, the state argued that Wisconsin should be permitted to determine whether the state wants to recognize same-sex marriage and that, in fact, the citizens had already made that determination by voting in favor of the 2006 referendum banning same-sex marriage. Judge Crabb rejected this argument, writing that states cannot be left to "experiment" with social policies that violate the constitution. Federalism cannot trump due process and equal protection rights.

Judge Crabb noted that the amendment to the state constitution "represents a rare, if not unprecedented, act of using the Wisconsin constitution to restrict constitutional rights rather than expand them and to require discrimination against a particular class." Because laws already on the books in 2006 had limited marriage to opposite-sex couples, "enshrining the ban in the state constitution seems to suggest that the amendment had a moral rather than practical purpose."

Like other judges who have invalidated same-sex marriage bans, Judge Crabb relied in part on the Supreme Court's *U.S. v. Windsor* decision from June 2013 striking down a key part of the federal Defense of Marriage Act. Although acknowledging that the *Windsor* decision did not apply to state law bans on marriage between same-sex couples, Judge Crabb noted that:

> In light of *Windsor* and the many decisions that have invalidated restrictions on same-sex marriage since *Windsor*, it appears that courts are moving toward a consensus that it is time to embrace full legal equality for gay and lesbian citizens. Perhaps it is no coincidence that these decisions are coming at a time when public opinion is moving quickly in the direction of support for same-sex marriage. *Compare* Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?* 95 Mich. L. Rev. 1578, 1585 (1997) ("Public opinion may change . . . but at present it is too firmly against same-sex marriage for the courts to act."), with Richard A. Posner, *"Homosexual Marriage—Posner," The Becker-Posner Blog* (May 13, 2012) ("[T]he only remaining basis for opposition to homosexual marriage . . . is religious. . . . But whatever the [religious objections are], the United States is not a theocracy and should hesitate to enact laws that serve religious rather than pragmatic secular aims.")

In the initial June 6 decision, Judge Crabb did not formally order state officials to stop enforcing the ban on same-sex marriage. Instead, she asked both sides to file a proposed order to put her decision into effect. She also asked them to address the state's request that her decision be stayed. Over the next several days, hundreds of Wisconsin same-sex couples were married in the state. However, in a decision on June 13, Judge Crabb halted further weddings pending appeal of the June 6 decision. Judge Crabb wrote that she believed she was required to stay her decision pending appeal because the Supreme Court had ordered a stay of a similar federal court decision in Utah. The state has since appealed, and the Court of Appeals for the Seventh Circuit has placed the case on a fast-track with a similar case out of Indiana.

— Sarah B. Painter & JoAnn M. Hart

Appellate Court Concludes that Arrest was Reasonable

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and what was protected by the newly added subsection (2). Without such guidance, a reasonable officer could have concluded that Mr. Gibbs' act of raising an unholstered gun in the air while driving was more than simply "carrying or going armed with a firearm" and was not protected by the statute. Additionally, a reasonable officer could have concluded that Mr. Gibbs' actions evidenced a criminal or malicious intent, as Wisconsin law makes it illegal to fire a gun from a vehicle or to enter a bar with a handgun. The court of appeals concluded that "even if Officer Lomas was mistaken in believing that she had probable cause to arrest Mr. Gibbs, such a mistake was reasonable in light of the facts and circumstances of this case and in light of the undeveloped case law regarding subsection 947.01(2)."

Notably, the court of appeals did not decide whether Mr. Gibbs' conduct actually violated the disorderly conduct statute. The court decided only that Officer Lomas did not violate any "clearly established" rights and thus, was entitled to qualified immunity. The scope of the recently enacted amendment to the disorderly conduct statute remains uncertain.

Boardman & Clark represented Officer Brooke Lomas in this litigation. For additional information regarding the implications of Wisconsin's recently amended disorderly conduct statute, see the September/October 2013 Municipal Newsletter located in the newsletter archives on Boardman & Clark's website.

— Sarah B. Painter

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