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Circuit Court Rejects Diocese's Challenge to La Crosse's Stormwater Charge

The Diocese of La Crosse brought a lawsuit against the City of La Crosse challenging the City's imposition of stormwater utility charges against the Diocese, six Parishes associated with the Diocese, and Aquinas Catholic Schools. The Diocese argued that they were exempt from the City's stormwater charge. The City, represented by Boardman & Clark LLP, moved for summary judgment dismissing the lawsuit. In an August 1, 2014 decision, the La Crosse County Circuit Court granted the City's motion and dismissed the Diocese's challenge.

La Crosse's stormwater utility was established as of January 1, 2012. Like other stormwater utilities across the state, it imposed stormwater charges on all developed property with impervious area in the City. The charges imposed were based on ERUs (or Equivalent Residential Units). One ERU is equal to the statistical average impervious area of a residential housing unit within the City. Residential property owners are charged for one ERU, and non-residential property owners are charged for the actual number of ERUs of impervious surface area on their property. La Crosse allows property owners to earn credits against their stormwater charges by implementing their own stormwater management practices on their property.

The Diocese argued that, as a tax exempt entity, it is exempt from the City's stormwater charge. The Diocese argued that the City's stormwater charge was actually a "tax," and it cited to a host of federal case law in support of its argument that the stormwater charge is really a tax, relying particularly on *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992) and *Oneida Tribe of Indians of Wisconsin v. Village of Hobart,* 891 F. Supp. 2d 1058 (E.D. Wis. 2012). The City argued, and the Court agreed, that these federal law cases were inapplicable to whether a charge was a tax under state law.

Further, these federal cases did not address how the City's stormwater charge is a general property tax. As the Court noted, the Diocese is exempt from paying general property taxes, not from paying any and all taxes. The Court easily concluded that the City's stormwater charge is not a general property tax levied under Chapter 70 of the Wisconsin Statutes. Unlike general property taxes, the stormwater service charge is not levied on all property, and the amount of the service charge is in no way tied to a property's value.

The Court also concluded that the City's stormwater charge imposed under Chapter 66 of the Wisconsin Statutes is not a different type of tax, but rather is a service charge allowed by the legislature under Wis. Stat. § 66.0821. According to the Court, under § 66.0821, municipalities have a choice of how to fund their stormwater management systems, and La Crosse has elected to fund its stormwater system by stormwater service charges instead of by taxation.

The Court also commented with approval on certain characteristics of La Crosse's stormwater program. One, all money collected via the City's stormwater utility charges are used solely to fund stormwater utility projects and are not shared with any other part of the City's budget. Two, other than residential properties, the City's stormwater charge is tailored to each property based on the amount of impervious area on the property calculated using the most accurate methods possible. Three, property

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Milwaukee Seeks Rehearing of PSC Streetcar Decision on Utility Relocation Costs

On September 17th, the City of Milwaukee petitioned the Public Service Commission of Wisconsin (the Commission) to rehear the Commission's final decision issued on August 29th in the Milwaukee Streetcar case. At issue in this declaratory ruling proceeding was whether a Milwaukee ordinance and resolution were unreasonable on the basis that that they each required We Energies, AT&T and others to relocate or modify their facilities in the right-of-way at the companies' expense to accommodate Milwaukee's proposed streetcar project.

The Commission determined that both the ordinance and the resolution as well as any other "current or future municipal regulations . . . that require the [companies] to pay any amount of modification or relocation costs to accommodate the Streetcar Project . . . are unreasonable and void, as applied" to the project.

In its rehearing request, Milwaukee asked, among other things, for the Commission to clarify just what effect its decision would have. The ordinance, which requires utilities to relocate their facilities at their expense when necessary to allow a public works project to proceed in city streets, is a relic from the days when Wisconsin courts made a distinction between governmental projects (for which the utilities paid their relocation expenses) versus proprietary projects (for which the city had to pay the utilities' relocation expenses). Since that distinction was rejected by the Wisconsin Supreme Court 52 years ago, Milwaukee has not relied on or applied that ordinance. Thus, Milwaukee asked the Commission to explain what effect voiding "as applied" an ordinance that has not, nor ever would have been, applied to the streetcar project could possibly have.

The resolution voided by the Commission's final decision was adopted by the Milwaukee Common Council in July 2011. It approved the streetcar project and directed the Commissioner of Public Works, among others, to carry out the streetcar project. There was no directive requiring utilities to relocate or modify their utilities at their expense to accommodate the project. The rehearing request asked the Commission to clarify what the Commission intended by voiding this resolution and argued that the Commission had no authority to void a public works project, such as the streetcar project.

Finally, the rehearing request questioned the Commission's authority to declare unreasonable and void actions that may or may not take place sometime in the future.

The Commission has 30 days from the date the rehearing request was filed to act on the request. If the Commission does nothing, then the rehearing request is deemed denied as a matter of law. If that happens, the City will still have the opportunity to petition the circuit court for review of the PSC's final decision.

— Anita T. Gallucci

DNR Review of High Capacity Well Application Requires Consideration of Cumulative Impacts

An Administrative Law Judge (ALJ) has determined that the Wisconsin Department of Natural Resources (DNR) is obligated to consider cumulative impacts related to a proposed high capacity well if it is presented with concrete information on those impacts. In reaching this conclusion, the ALJ rejected the DNR's contention that when reviewing a high capacity well application its legal authority is limited to considering only the potential adverse environmental impacts of the proposed high capacity well for which approval is being sought. The DNR took the position that it does not have the legal authority to take into account the cumulative impacts to the environment caused by the drawdown from the proposed well combined with the existing drawdowns of groundwater and surface waters.

The case involved Richland Dairy which proposed to construct a concentrated animal feeding operation (CAFO) in Adams County, part of Wisconsin's Central Sands area. The Dairy filed an application for approval of two high capacity wells for the CAFO operation. The DNR approved the application for the two wells at a pumping rate of 72.5 million gallons per year (mgy). Family Farm Defenders, Friends of Central Sands, Pleasant Lake Management District and the Hanaman Family filed petitions for a contested case hearing regarding the well approval. A contested case was held and the ALJ issued his decision on September 3, 2014.

The ALJ agreed with petitioners and held that the DNR was obligated to consider cumulative impacts from the proposed withdrawal and existing withdrawals in order to prevent "potential harm to waters of the state." According to the ALJ, "[i]t is scientifically unsupported, and impossible as a practical matter, to manage water resources if cumulative impacts are not considered. That is, when assessing impacts to a resource, one must examine how existing and proposed impacts affect the resource as a whole from a pre-pumping or pre-impacted condition."

The ALJ based his decision on a consideration of Wisconsin's specific high capacity well permitting statutory scheme, the Wisconsin Supreme Court's *Lake Beulah* decision, and general common law principles set forth in the modified reasonable use doctrine. Under the modified reasonable use doctrine as set out in the *Michels Pipeline* case, a landowner's rights to the use of groundwater for a beneficial

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owner can receive a credit for taking positive steps to reduce their contribution to the stormwater system. According to the Court, these characteristics serve to demonstrate that the City's stormwater charges are genuine service charges rather than taxes.

The Diocese also briefly raised the argument that the City's stormwater charge violated Article I, Section 18 of the Wisconsin Constitution. However, since the Diocese did not brief this issue, it was deemed waived.

Attorneys Lawrie Kobza, Rich Bolton and Sarah Painter from Boardman & Clark LLP represented the City of La Crosse in the case.

— Lawrie Kobza

Regulatory Watch

"Regulatory Watch" highlights federal and state agency actions of interest to municipalities and their utilities. It is presented as a regular feature of the Municipal Law Newsletter by Anita Gallucci, Rhonda Hazen, Richard Heinemann and Lawrie Kobza.

FERC Issues Presque Isle Decision

The Federal Energy Regulatory Commission (FERC) issued its order in the Presque Isle Power Plant (PIPP) proceedings on July 29, 2014. The original filing was made by the Midcontinent Independent System Operator (MISO) on January 31, 2014 in Docket No. ER14-1242, in order to recover costs necessary to maintain operations of the PIPP to ensure transmission system reliability. The PIPP is located in the Upper Peninsula of Michigan. A protest was filed in April by the Public Service Commission of Wisconsin (PSC) alleging that MISO had unjustly and unreasonably sought to collect costs from Wisconsin customers who do not benefit from continued operations of the plant (March/April *Regulatory Watch*). The July 31st FERC order appeared to support the PSC's contention and required MISO to make a compliance filing to revise the proposed system support rate, based on an updated analysis of customer load impacts. However, MISO's August 11th compliance filings continued to allocate the lion's share of PIPP-related costs to Wisconsin customers, resulting in a new round of protests and requests for rehearing from utilities, wholesale customers and state regulatory agencies. A decision on the rehearing requests is expected within a few weeks.

PSC Begins Hearings on We Energy's Proposed Acquisition of Integrys

Wisconsin Energy Corporation (WEC) announced in June that it intends to acquire the Integrys Energy Group, which includes Wisconsin Public Service Corporation and Peoples Gas among its holdings, in a stock purchase deal worth nearly $6 billion. On August 6, 2014, WEC filed a request for approval with the PSC under Wisconsin's Wisconsin Utility Holding Company Act (PSC Docket No. 9400-YO-100). According to the filing, WEC is proposing several conditions to expedite the requested approval, including proposals to waive recovery of a $2.4 billion acquisition premium and transaction costs; measures to mitigate the impact of the combined company's majority interest in the American Transmission Company LLC, and a two-year commitment to preserve the jobs of union employees. WEC has also filed to seek FERC approval of the proposed acquisition. Numerous customer stakeholder groups, including the Municipal Electric Utilities of Wisconsin, Great Lakes Utilities, WPPI Energy and the Citizens' Utility Board, have intervened in the PSC proceeding. Testimony and briefs will be due over the next several months, with a public hearing and final decision expected in 2015.

MGE and WEPCO Rate Cases Generate Controversy

Madison Gas & Electric (MGE) and Wisconsin Electric Power Company (WEPCO) have both filed applications at the PSC to substantially change the design of their retail rates in order to increase fixed monthly customer charges and reduce variable energy rates (PSC Docket Nos. 3270-UR-120 and 5-UR-107, respectively). The filings reflect efforts by both companies to better absorb the impacts of anticipated increases in the installation of customer generation and energy efficiency facilities and have generated widespread concerns on the part of renewable energy developers and customers with large distributed generation facilities. In response to public criticisms, MGE has already scaled back the scope of its initial filing, reducing the proposed fixed customer charge and limiting the application to rate year 2015 (July/August MLN). WEPCO's filing seeks to replace over a dozen current buyback and customer generation tariffs with four new, consolidated tariff options designed to compensate parallel generation customers at lower avoided cost rates, rather than at current retail rates. The filing also includes a proposal for a mandatory standby tariff designed to ensure that large customers with their own generation pick up a share of system costs associated with grid support and back-up power. The PSC is expected to decide both rate cases by the end of the calendar year.

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use is recognized as being qualified. One cannot cause harm to others by lowering the water table or adversely impacting surface water.

The ALJ found that the petitioners had met its burden of providing concrete evidence showing that pumping over the past several decades have impaired navigation on a nearby lake, deterred riparian owners from using the lake, eliminated boat access to a nearby wetland and harmed near-shore vegetation. According to the ALJ, Richfield Dairy's application would contribute to and likely worsen that condition at a 72.5 mgy pumping rate. Therefore, based upon his consideration of the concrete scientific evidence presented at hearing, the ALJ concluded that the permit should be limited to 52.5 mgy to prevent significant adverse impact to the nearby lake, wetland, creek, and spring.

According to the ALJ, a reduction in the maximum annual withdrawal to 52.5 mgy would allow the dairy operation a "reasonable use" of groundwater necessary to proceed while also ensuring that it does so in a manner that better protects public waters. Although public waters would still remain at some risk at this level of pumping, the ALJ concluded that a preponderance of the credible evidence supported a finding that at this reduced level detrimental environmental impacts would not be significant enough to deny the permit outright.

According to the ALJ, his decision represents an appropriate balance between the rights of private parties to a reasonable use of waters of the State, and the rights of the public to not experience detrimental impacts to those public waters. "Inherent in the balancing which is at the heart of Wisconsin's rich tradition and practice in interpreting the public trust doctrine is the idea that neither private rights not public rights are paramount, and that, accordingly, often no single party gets exactly what it wants. This approach has served the state and its natural resources very well."

— Lawrie Kobza

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