

IN THIS ISSUE

- *PSCW Approves MGE Middleton Solar Project*
- *New Legislation Expands Issuance of Search Warrants to Noncriminal First Offense OWIs*
- *Current Status of EPA's Clean Power Plan*
- *Nonprofit Rescue Squad Entitled to Notice of Wrongful Death Claim*

PSCW Approves MGE Middleton Solar Project

After reviewing supplemental information provided by Madison Gas & Electric Company (MGE) following its initial review in January, the Public Service Commission of Wisconsin gave the company a green light to move forward on its 500 kW community solar project at the Commission's March 11th open meeting.

In response to the Commission's concerns about potentially discriminatory restrictions on project participation, MGE agreed to make solar subscriptions available to all its Middleton residential retail customers, including those who are already receiving solar energy through rooftop installations. Addressing the Commission's skepticism about ratepayer benefits associated with the leasing of Middleton's Police Station rooftop for a 100 kW solar installation related to the project, MGE agreed to seek Commission approval in future rate cases before including the police station portion of the project in its electric rate base.

MGE also provided additional information to the Commission on the system-wide benefits purportedly associated with the project's use of so-called smart inverters, the costs of which the company is at least in part proposing to include in the rates of non-solar users. The inverters are designed to smooth out intermittent power flow, gather usage data, and protect the reliability of MGE's electric distribution system. The Commission agreed with MGE that potential cross subsidies caused by under-enrollment in the project could be controlled by the Commission through sales forecasts, as long as MGE provides projected sales information in future rate cases so that adjustments could be considered.

The Commission's approval of the project is thought by many industry stakeholders to be a potential boon to community solar development because MGE's project model differs from existing solar pilot projects previously approved by the Commission. The community solar tariffs approved for Northern States Power-Wisconsin (NSPW) and WPPI Energy (WPPI), for example, employ customer bill credits as a financing mechanism. MGE's Middleton project instead requires interested customers to pay an initial nonrefundable subscription fee equivalent to about 10% of the project's overall cost (approximately \$189 per kW) and a levelized annual solar rate of \$.12 per kWh over the 25-year life of the project for the customer's share of the solar energy produced from the project.

In contrast to NSPW and WPPI, MGE is also proposing to own and operate the project rather than rely on a third-party developer, meaning that MGE will be providing a dedicated renewable resource for a specific group of customers willing to pay slightly higher rates for green energy. However, MGE projects

New Legislation Expands Issuance of Search Warrants to Noncriminal First Offense OWIs

On February 29, 2016, Governor Walker signed 2015 Wisconsin Act 183, which expands the use of search warrants in noncriminal drunk driving cases. Act 183 allows a court, upon a finding of probable cause, to authorize a search warrant that allows law enforcement officers to search and seize anything that is the fruit of, or has been used in, the commission of a crime or of a civil violation for operating a motor vehicle with a prohibited alcohol concentration or while under the influence of an intoxicant, controlled substance, controlled substance analog, or any combination thereof.

Act 183 adds the following italicized language to Wis. Stats. §§ 968.13(1)(b) and 968.13(1)(c):

968.13 Search warrant; property subject to seizure.

(1) A search warrant may authorize the seizure of the following:

(b) Anything which is the fruit of or has been used in the commission of any crime *or of a violation of s. 346.63 or a local ordinance in conformity therewith.*

(c) Anything other than documents which may constitute evidence of any crime *or of a violation of s. 346.63 or a local ordinance in conformity therewith.*

Before the changes, search warrants could be authorized only for evidence related to crimes. Now, search warrants may be authorized for evidence related to crimes and non-criminal OWIs.

The changes were likely in response to the United States Supreme Court's April 17, 2013 decision in *Missouri v. McNeely*, 113 S. Ct. 1552 (2013). The issue in *McNeely* was whether police could perform a warrantless blood draw in all OWI cases, including noncriminal cases, where there is a refusal. The Court held that police need a search warrant for the blood unless they can show the existence of exigent circumstances beyond the rate of alcohol absorption. The Court's decision had important implications in Wisconsin, where the *Bohling* rule had been in place for approximately 20 years. *Bohling* allowed for warrantless forced blood draws in all OWI cases where a defendant refused to take a test. The Court's ruling makes *Bohling* inapplicable and mandates that police obtain search warrants in cases involving blood draws.

Act 183's changes apply to offenses occurring on or after March 2, 2016.

— Kate A. Harrell

Current Status of EPA's Clean Power Plan

President Obama's signature climate initiative, the Clean Power Plan, has been headline news lately. Broadly, the Clean Power Plan is an effort to accelerate the transition away from coal and toward more "clean" sources of energy. Under the plan, the Environmental Protection Agency (EPA) established national targets for the reduction of greenhouse emissions, gave each state a target, and instructed the states to come up with plans to achieve those reductions. Those plans are mostly expected to involve improving efficiency and using more natural gas and renewables rather than fossil fuels.

The legality of the Clean Power Plan had been challenged by a coalition of state opponents, led by West Virginia. The lawsuit is currently pending in front of the D.C. Circuit Court of Appeals. The opponents asked the D.C. Circuit to issue a stay, halting implementation of the Clean Power Plan until a final ruling in the case. When the D.C. Circuit refused, the opponents filed a motion with Supreme Court Chief Justice John Roberts asking the Supreme Court to issue the stay instead. In an unprecedented move, the Supreme Court voted 5 to 4 to issue the stay, prohibiting the EPA from taking actions to implement or enforce the Clean Power Plan pending the resolution of the court case. Although the Supreme

Continued on page 3

PSCW Approves MGE Middleton Solar Project

Continued from front page

that its Middleton solar project participants will see economic benefits in about 17 years since the fixed solar rate will act as a hedge against rising retail rates, which MGE projects will increase by about 3% per year. Participants will also receive a 50% reduction in the transmission service charge for PV production, representing the avoidance of transmission costs associated with interconnecting a large scale solar installation directly into MGE's distribution system.

MGE is making participation available to customers in 250 watt increments and expects about 250 customers to enroll. The city of Middleton still needs to review and approve the project. More information about the project will be available after May 1. The city of Middleton has a goal of 25% renewable energy by 2025.

— Richard A. Heinemann

Nonprofit Rescue Squad Entitled to Notice of Wrongful Death Claim

An estate making a wrongful death claim against Hazel Green Rescue Squad, Inc. must provide the Rescue Squad with notice of claim under Wisconsin's municipal notice of claim statute, the Court of Appeals recently held in *Estate of Clarence Collins v. Hazel Green Rescue Squad, Inc. et al*, Appeal No. 2015AP1018, decided March 3, 2016.

Hazel Green Rescue Squad is a nonprofit organization that uses volunteer drivers to provide ambulance services for a group of neighboring municipalities. Each participating municipality pays a portion of the organization's equipment and operating costs in exchange for receiving ambulance service.

In October of 2012, a resident of one of the municipalities served by the Rescue Squad was killed after the ambulance that was transporting him to the hospital rolled over and threw him into a ditch. His estate filed a wrongful death action against the Rescue Squad in May of 2014. The Rescue Squad moved for summary judgment, arguing that the estate had failed to provide notice of the wrongful death claim within the period required by Wisconsin's municipal notice of claim statute, Wis. Stat. § 893.80. The court agreed, and ruled in favor of the Rescue Squad.

Wisconsin law provides that claims against a municipality based on the negligent operation of a municipal motor vehicle are subject to the municipal notice of claim requirements found in Wis. Stat. § 893.80. Under the notice of claim statute, claimants must provide written notice of the circumstances of the claim within 120 days of the event giving rise to it. If such notice is not provided, the claim is generally barred.

The estate argued that Hazel Green Rescue Squad is not a political corporation or governmental subdivision entitled to notice under the statute because nothing in its articles of incorporation indicates that it has a political or public purpose or requires its directors to be elected officials or represent member municipalities. The Rescue Squad disagreed, arguing that it is not a private entity for purposes of the notice of claims statute, but rather a political corporation or governmental subdivision of the municipalities it serves.

The court relied on the definition of "municipality" in the statute governing municipal liability for motor vehicle accidents, which includes commissions formed by contract under Wisconsin's intergovernmental cooperation statute, Wis. Stat. § 66.0301. Under the intergovernmental cooperation statute, which courts interpret liberally, a municipality may contract with other municipalities "for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law." Because municipalities are authorized to provide ambulance services, and neighboring municipalities organized and maintained Hazel Green Rescue Squad to do just that, the court held that the Rescue Squad was an intergovernmental organization and therefore a "municipality" entitled to notice of the Estate's wrongful death claim.

— Julia K. Potter

Current Status of EPA's Clean Power Plan

Continued from page 2

Court sometimes grants stays of laws and regulations in cases pending before the Court, it had never before imposed a stay on a regulation pending in front of a Court of Appeals.

The case is scheduled for oral arguments in front of the D.C. Circuit on June 2nd. Court commentators expect that the D.C. Circuit will look favorably upon the Clean Power Plan, but the 5-4 vote in the Supreme Court in favor of the stay is at least some indication that the justices of the highest court would vote to invalidate the Clean Power Plan on that same 5-4 margin.

But the death of Supreme Court Justice Antonin Scalia is likely to change the ultimate outcome of the legal battle. Justice Scalia was well-known for a number of opinions critical of EPA regulations and he was widely expected to be one of the five Justices to vote against the Clean Power Plan. With his seat vacant, the Court is much more likely to split evenly when ruling on the Clean Power Plan. When the Supreme Court splits evenly, the decision of the lower court (here, the D.C. Circuit, likely to rule in favor of the Clean Power Plan) remains the law of the land, and it is as if the Supreme Court had never taken the case.

As a practical matter, the stay means that the EPA is prohibited from taking actions to implement or enforce the Clean Power Plan pending the resolution of the case. In a symbolic move, Governor Walker has also issued an executive order prohibiting state agencies from developing a plan to comply with the Clean Power Plan. For utilities, however, the stay is unlikely to have much of an impact. Larger market forces such as steadily decreasing prices of natural gas and renewable energy, coal retirements, and new business models are pushing utilities in the direction of reducing emissions regardless of the specific requirements of the Clean Power Plan.

— Julia K. Potter

boardman & clark llp

LAW FIRM

Boardman & Clark LLP
Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701 -0927

PRST STD
U.S. Postage
PAID
Madison, WI
PERMIT NO. 511

ADDRESS SERVICE REQUESTED

Certified ABA-EPA Law Office
Climate Challenge Partner

MUNICIPAL LAW NEWSLETTER

The Municipal Law Newsletter is published by Boardman & Clark LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group - Water Division.

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 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@boardmanclark.com.

Eileen A. Brownlee	822-3251	ebrownlee@boardmanclark.com
Jeffrey P. Clark	286-7237	jclark@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@boardmanclark.com
Kathryn A. Harrell	283-1744	kharrell@boardmanclark.com
JoAnn M. Hart	286-7162	hart@boardmanclark.com
Richard A. Heinemann	283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	286-7210	pjohnson@boardmanclark.com
Michael J. Julka	286-7238	mjulka@boardmanclark.com
Lawrie J. Kobza	283-1788	lkobza@boardmanclark.com
Julia K. Potter	283-1720	jpotter@boardmanclark.com
Mark J. Steichen	283-1767	msteichen@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com

This newsletter is published and distributed for informational purposes only. It does not offer legal advice with respect to particular situations, and does not purport to be a complete treatment of the legal issues surrounding any topic. Because your situation may differ from those described in this Newsletter, you should not rely solely on this information in making legal decisions.

boardman
& clark llp

LAW FIRM



© Copyright 2016, Boardman & Clark LLP

 Paper contains 100% recycled post-consumer fiber and is manufactured in Wisconsin.