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## 26 Municipalities Intervene in City of Milwaukee's Suit Against AT&T

A group of Wisconsin villages and cities have intervened in the name of the Regional Telecommunications Commission ("RTC") in the federal district court lawsuit brought by the City of Milwaukee against AT&T. Milwaukee seeks a determination of whether AT&T's new U-Verse video service is a cable service within the meaning of the federal Cable Act. Under federal law, a cable television operator may not provide cable television service in a municipality without first obtaining a cable television franchise from the local government. AT&T maintains that its new U-Verse video service is not a cable television product and therefore, that the company need not comply with the federal Cable Act or local ordinances that require cable franchises before video service can be offered to the public.

Milwaukee filed its lawsuit in U.S. District Court for the Eastern District of Wisconsin on December 20, 2006. AT&T subsequently filed a motion to dismiss the complaint. Milwaukee has responded to the motion, and the parties are now awaiting a ruling on the motion. The RTC filed its own complaint against AT&T and a motion to intervene in the law suit on February 2, 2007. AT&T has yet to file its response. Participating in the lawsuit as members of the RTC are the following cities and villages: Appleton, Brookfield, Brown Deer, Cudahy, Elm Grove, Fox Point, Franklin, Glendale, Greendale,

Hales Corners, Hartland, Janesville, Menomonee Falls, Muskego, Neenah, New Berlin, Oak Creek, Oconomowoc, Pewaukee, Racine, Saukville, Shorewood, South Milwaukee, Sussex, Thiensville, and Wauwatosa. Other communities are expected to join the intervention group.

AT&T recently launched a multi-billion dollar upgrade of its telecommunications network in the thirteen states in which the company provides local telephone service, including Wisconsin. AT&T plans to upgrade its network by replacing existing copper wiring with fiber that will extend to large "fiber conversion cabinets" in existing neighborhoods or to the premises in new developments. In existing neighborhoods, this fiber will then be connected to existing copper wiring to cover the "last mile" between the cabinets and individual customer homes. Known as "Project Lightspeed," these system improvements, when completed, will purportedly enable AT&T to offer voice, high-speed Internet access, and video services over Internet Protocol.

While AT&T has been deploying its large cabinets in Milwaukee and the surrounding communities, it has yet to begin offering service. Neither Milwaukee nor any of the RTC members has sought to prevent AT&T from offering its video services in Wisconsin, and it is expected that AT&T will start offering its U-Verse video service as soon as it is able.

— Anita T. Gallucci

## Billboards: Actual or Assessed Value Applicable to 50% Raze or Repair Rule

Municipalities' ability to eliminate dilapidated billboards is narrower than might have been anticipated. In May 2005, the City of Wausau issued an order to raze a billboard pursuant to section 66.0413, Stats. The billboard owner sought judicial review and a stay of the order. The circuit court dismissed the raze order on two grounds. First, it concluded that a billboard is not a "building" within the meaning of section 66.0413(1)(b), because the statute addresses building "unfit for human habitation." Second, the court determined that the cost of repairs did not exceed 50 percent of the value of the billboard.

In an unpublished decision, the court of appeals affirmed the circuit court decision, but only on the second ground. *Lamar Central Outdoor, LLC, v. City of Wausau*, 2006AP387 (December 19, 2006, not recommended for publication). The court of appeals declined to address whether billboards constitute buildings under section 66.0413, because it was unnecessary in reaching its decision. The city had argued that the circuit court's interpretation on this issue would lead to an absurd result that a city could not raze a dilapidated garage or tool shed because such structures are not intended for human habitation.

With respect to the reasonableness of the cost of repairing the billboard, the city relied exclusively on the presumption in section 66.0413(1)(c), Stats., that repairs are unreasonable if they exceed 50 percent of the assessed value of the building. The city placed the "net assessed value" of the billboard at \$1,565.21, thereby considering repair costs in excess of \$782.61 to be unreasonable. The city conceded that the presumption could be overcome by sufficient proof by the owner, but argued that the owner had not done so. The owner offered evidence that the billboard produced roughly \$6,000 per year in income. Testimony by the owner and an employee of a competitor established that the fair market value of the billboard would be approximately five times the yearly income it generated, or \$30,000. While the lawsuit was pending, the owner had repaired the billboard. The undisputed evidence established the cost of repair to be just over \$1,000. Citing *State ex rel. Covenant Harbor Bible Camp v. Steinke*, 7 Wis. 2d 275, 96 N.W.2d 356 (1959), the court of appeals noted that the actual fair market value, rather than the assessed value, must be used in determining the reasonableness of repairs.

While the city may have lost the battle, it probably won the war by establishing a fair market value for the billboard 20 times greater than the previous assessed value. For a more detailed description of appropriate methods of assessing the fair market value of billboards for tax purposes, see *Adams Outdoor Advertising Ltd. v. City of Madison*, 2006 WI 104.

— Mark J. Steichen

## First Town Challenge To Direct Annexation Defeated

In 2004, the annexation statute, section 66.0217, Stats., was amended to provide that towns could no longer challenge petitions for direct annexation by unanimous approval. A unanimous direct annexation is one in which all of the property owners and electors in the annexed territory sign the annexation petition. Under then-existing law, residents of a town living outside the annexed territory could not challenge an annexation of town territory on the grounds that the town represented their interests.

The first test of the new statute came in *Ostrander, et al. v. Village of Genoa City*, Appeal No. 2006 AP 314 (December 20, 2006, unpublished). In that case, several residents of the town living outside the annexed territory and the Town of Randall challenged the annexation of a parcel of land to the Village of Genoa City. The individuals asserted standing on the grounds that the annexation would affect their town taxes and that it would adversely affect their children, who were enrolled in the Randall school district. The existing town and village land use plans, as well as the proposed use of the annexed territory within the village called for a greater density of residential development within the village compared to the town. Based on published statements of the superintendent of the Randall School District, the complaint alleged that the increase in residential development would overburden an already overcrowded school district. The individuals and the town also challenged the constitutionality of the statute as having been politically motivated and having no rational basis. Prime Genoa, a developer with a contingent interest in the annexed property, intervened and moved to dismiss the complaint on the grounds that none of the plaintiffs had standing to challenge the annexation.

The circuit court granted the motion to dismiss on standing grounds, and the Court of Appeals affirmed. Citing *Village of Slinger v. City of Hartford*, 2002 WI App. 187, para. 9, 256 Wis. 2d 859, 650 N.W.2d 81, the Court of Appeals stated that a resident's concern about the future development of annexed neighboring property does not give rise to challenge the annexation. The Court was not persuaded by the plaintiffs' distinctions between the *Slinger* case and the instant case, including the fact that the increased residential development potential within the village was based on existing land use plans. The Court further held that, if the legislature had

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# FERC Forges Ahead With Mandatory Reliability Standards

In response to the 2003 blackout, the Energy Policy Act of 2005 mandated federal reliability standards to regulate the bulk power system. Industry stakeholders widely agreed that such standards were necessary in light of the inability of the existing system of voluntary compliance to protect the grid. However, implementation of the law has proven to be somewhat unwieldy and has left numerous as yet unanswered questions, particularly for smaller, municipally-owned utilities.

The law requires all users, owners and operators on the nation's transmission system to comply with standards to be developed and enforced by an electric

reliability organization (ERO) and approved by the Federal Energy Regulatory Commission (FERC). FERC has certified the North American Electric Reliability Council (NERC), which has been managing voluntary reliability standards since 1968, as the ERO. Last fall, NERC requested approval from FERC of 107 specific reliability standards, of which 83 have been approved so far and submitted for public comment. The others remain under review. The standards will take effect on June 1, 2007.

The new standards are complex and designed to be broadly applicable, in part because the industry now is comprised of many new players, including independent generating companies and independent transmission operators whose interests are not always aligned. The law is clear that all entities that have a material impact on the grid are obligated to comply, and are therefore potentially liable for monetary penalties that can be as high as \$1 million a day per violation. What is not clear is exactly what constitutes "material impact." That issue, along with the identification of which entities should be responsible for various reliability functions and therefore the responsibility for adhering to the attendant reliability standards, remains to be clarified through the FERC rulemaking process.

In the past, municipal utilities generally have not needed to deal directly with NERC or regional reliability councils, to which NERC will likely delegate reliability standard enforcement at the regional level. Now however, local communities owning 69 kV lines, small generators that supply power to the grid, or undervoltage load-shedding equipment will need to assess their electrical operations and, at a minimum, document their potential impact on the system.

In Wisconsin, Municipal Electric Utilities of Wisconsin along with Wisconsin Public Power, Inc. and other joint action agencies have taken the lead in informing their members of potential obligations and compliance measures, beginning with the possible need to register with either of the two regional reliability councils with footprints in Wisconsin, namely the Midwest Reliability Organization and Reliability First. Additional information can be obtained from the NERC website [ftp://www.nerc.com/pub/sys/all\\_updl/ero/Statement\\_of\\_Compliance\\_Registry\\_Criteria\\_Rev1\\_20061204.pdf](ftp://www.nerc.com/pub/sys/all_updl/ero/Statement_of_Compliance_Registry_Criteria_Rev1_20061204.pdf)

— Richard A. Heinemann

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## First Town Challenge To Direct Annexation Defeated

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intended to allow individuals living outside the annexed territory to challenge an annexation, it would have said so when amending the statute. It did not address the fact that prior case law, not the annexation statutes, barred challenges by individuals on the basis that towns could represent their interests.

Finally, the plaintiffs had argued that, if neither the town nor individual residents of the town outside the annexed territory could challenge a unanimous direct annexation, then no one (perhaps other than residents of the annexing municipality) would be able to enforce the procedural and substantive rules governing unanimous direct annexations. If no one has the ability to enforce those laws, they would effectively become a nullity. In response, the Court of Appeals adopted Prime Genoa's argument that the Randall School District might have standing. However, this argument is internally contradictory. The Court had held that the individual residents did not have standing based on the impact of the annexation on their school children. The effects of overcrowding do not affect the district itself, but rather the children who attend it. If the individuals did not have standing, it is difficult to see how the school district itself could have standing.

Despite recommendations from both sides that the decision be published, the Court of Appeals chose not to recommend the decision for publication. There is at least one other challenge to the annexation statute pending in the Court of Appeals and additional challenges are being filed. The *Ostrander* case is only the first shot across the bow. The plaintiffs in *Ostrander* were represented by Boardman Law Firm.

— Mark J. Steichen

# MUNICIPAL LAW NEWSLETTER

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