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## **Wisconsin Municipal Electric Utilities Prevail With Court of Appeals' Decision in Territorial Dispute**

The Wisconsin Court of Appeals issued a recent decision that could greatly benefit Wisconsin municipal electric utilities. The decision will not only have a specific and practical application for municipalities that wish to extend service to new customers under Wisconsin's anti-duplication statute, Wis. Stats. § 196.495, but it will also provide guidance as to how the anti-duplication law will be interpreted and applied in the future.

*Wisconsin Power & Light Co., v. Public Service Commission of Wisconsin*<sup>1</sup>, was initiated in 2006 as a territorial dispute between Wisconsin Power and Light Co. ("WPL") and the City of Wisconsin Dells ("Wis. Dells"). The case was first presented to the Public Service Commission of Wisconsin ("PSC") as a dispute over WPL's and Wis. Dells' rights to provide electric service to three condominium complexes located near the Chula Vista Resort. In 2007, the PSC concluded that under the state's anti-duplication law, WPL had the right to serve one of the complexes, the Rio Condominiums, and Wis. Dells had the right to serve the other two complexes, the Fairway Villas Condominiums and Cold Water Canyon Condominiums.<sup>2</sup> WPL appealed the PSC's decision regarding the Fairway Villas and Cold Water Condominiums to the Dane County Circuit Court. In September, 2008, Circuit Court Judge John Albert affirmed the PSC's decision in its entirety.<sup>3</sup> As discussed below, WPL's subsequent appeal of that decision to the Court of Appeals resulted in a significant victory for Wisconsin's municipal electric utilities.

The territorial dispute between WPL and Wis. Dells hinged on the part of the anti-duplication statute known as the "500 foot rule." Under this rule, if two electric utilities are competing to provide service to a new customer, the length of line extensions that each needs to construct to reach the customer becomes important. If only one of the utilities can reach the customer with an extension of less than 500 feet, that utility will have the exclusive right to serve the customer. If both utilities are within 500 feet of the customer, the customer can choose between them.<sup>4</sup> Wisconsin statutes prescribe how extensions are to be measured, and importantly, the PSC's regulations provide more specific direction: "[T]he measurement of an extension's length . . .

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<sup>1</sup> *Wisconsin Power and Light Co. v. Public Service Commission of Wisconsin*, 2008AP823 (Wis. Ct. App., October 29, 2009).

<sup>2</sup> *Wisconsin Power and Light Co. Compl. Against the City of Wisconsin Dells*, Final Decision, Docket No. 6680-DR-110 (PSC, June 6, 2007).

<sup>3</sup> *Wisconsin Power and Light Co. v. Public Service Commission of Wisconsin*, Dane County Circuit Ct., No. 2007CV2380 (September 23, 2008).

<sup>4</sup> Wis. Stats. § 196.495(1m)(b).

shall be from an existing local service distribution line that is, or has been, *actually used in rendering local service to a customer.*"<sup>5</sup>

In this case, WPL asserted that only it had facilities within 500 feet of the two condominium complexes and, therefore, that it had the exclusive right to serve the condominiums. In contrast, Wis. Dells asserted that it did have facilities within this distance, namely two sewer lift stations that had previously been built by the City's sewer and water utility. The main issue in the case became whether these two lift stations could legitimately constitute facilities under PSC sec. 112.08. If the lift stations were within the regulation, then Wis. Dells' distribution lines to those facilities could be used as the beginning points for measuring the lines for 500 foot rule purposes.

In the first round of review, the PSC agreed with Wis. Dells that the lift stations were "customers" within the meaning of sec. 112.08, and that the distribution lines Wis. Dells constructed to serve the lift stations were proper starting points for determining whether the extensions to the condominiums were less than 500 feet. The PSC reached this conclusion after concluding that Wis. Dells located the lift stations based on gravity and not as a way to gain advantage in serving the condominiums, and after also determining that the Wis. Dells electric utility treated the City's sewer and water utility the same as it did any other electric customer (i.e. the sewer and water utility was billed for electric service to the lift stations as any other customer would be billed).

WPL challenged that decision, focusing on the fact that the City obtained the right to serve the lift stations pursuant to a 2005 PSC order and a statutory provision that provides authority for public utilities to extend service to their "own property or facilities."<sup>6</sup> WPL argued that if the lift stations were the City's own property or facilities, they could not also be "customers." Accordingly, the lines to serve these facilities could not be providing electric service to a "customer" as required by PSC 112.08. The PSC, the circuit and the Court of Appeals consistently rejected WPL's position. At each level of review, the agency and the courts all concluded that a public utility could provide service to its own facilities and, at the same time, be providing service to a customer for 500 foot rule purposes. The decisions can be summarized with the following quote from the court of appeals:

We conclude that the PSC's interpretation of "customer" in Wis. Admin. Code § PSC 112.08(1) to encompass a facility that is receiving and paying for electrical service from a municipal electric utility, even if that facility is owned by the municipality, is reasonable and is consistent with the language and purpose of the regulation and the purpose of the anti-duplication statute. We reach the same conclusion with respect to the PSC's application of the regulation to the facts of this case.<sup>7</sup>

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<sup>5</sup> Wis. Admin. Code § PSC 112.08 (emphasis added).

<sup>6</sup> See Wis. Stat. 196.495(3) ("Nothing in this section shall preclude any public utility . . . from extending electric service to its own property or facilities. . . .").

<sup>7</sup> *Wisconsin Power and Light Co., v. Public Service C.*, ¶ 27.

In essence, the court of appeals provided several conclusions that will favor municipal electric utilities in future territorial matters: First, the analysis the court went through to reach its conclusion clarified and undoubtedly strengthened the concept that an agency's interpretation of its own rules, as the PSC provided here, will be controlling, even if the court concludes that there is an alternative interpretation that is as reasonable or more reasonable than that of the agency. Second, the court's decision confirms that a municipality's own property or facilities can be considered customers so that lines extending to serve these facilities can be used at starting points when measuring extensions under the 500 foot rule. Third and perhaps most importantly, the court's discussion focused on the purpose of PSC sec. 112.08, and the measurement provisions within that regulation that are to apply to 500 foot rule matters. Specifically, the court explained that a key purpose of the regulation is to prevent utilities from undermining the 500-foot rule by placing certain facilities in strategic locations to gain unfair territorial advantage. The critical concern the PSC's regulation addresses is whether the line providing service is "used and useful." This concept can well serve a utility assessing whether a particular line will qualify as a legitimate starting point for 500 foot rule purposes. Is the line one that is actually useful, such as in this case where the lines were extended to serve lift stations that were legitimately located according to gravity, or was the line extended to some point on pretext as a means of targeting and acquiring particular customers?

In sum, the court of appeals' decision in the *Wisconsin Power and Light* case is significant in its practical conclusion regarding a public utility's service to its own facilities as well as in its analysis which can guide extension and service decisions in the future.