Appeal No. 2010AP2762 **Cir. Ct. No. 2009CV4313**

WISCONSIN COURT OF APPEALS
DISTRICT IV

WISCONSIN INDUSTRIAL ENERGY GROUP, INC. AND CITIZENS UTILITY BOARD,

PETITIONERS-APPELLANTS,

V.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

RESPONDENT-RESPONDENT,

WISCONSIN ELECTRIC POWER COMPANY AND WISCONSIN POWER AND LIGHT COMPANY,

INTERVENORS-RESPONDENTS,

WISCONSIN PUBLIC SERVICE CORPORATION,

INTERVENOR.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

We certify to the Wisconsin Supreme Court the question whether a statute governing the Public Service Commission's review and approval of a proposed large electric generating facility applies when a Wisconsin public utility proposes to build an out-of-state facility.

This case involves a Wisconsin public utility's proposal to build a wind farm in Minnesota to supply electricity to the utility's Wisconsin consumers.

We are told by the parties that the costs associated with building the facility would be borne by Wisconsin ratepayers. The Public Service Commission of Wisconsin approved the wind farm by applying WIS. STAT. § 196.49.[1] Groups representing energy consumers sought review in the circuit court, arguing that the PSC should have applied a more demanding large-facility approval statute, WIS. STAT. § 196.491. Three Wisconsin public utilities intervened, including the company that seeks to build the wind farm in Minnesota, Wisconsin Power and Light Company. The circuit court affirmed the PSC, and the consumers appealed.

For purposes of this certification, we adopt the shorthand used by the parties. They refer to the statute the PSC did apply, WIS. STAT. § 196.49, the Certificate of Authority statute, as the "CA statute." The parties refer to WIS. STAT. § 196.491, the more demanding Certificate of Public Convenience and Necessity statute, as the "CPCN statute."

It is undisputed that, if the large-scale wind farm at issue here were to be built in Wisconsin, the CPCN statute would apply. The question is whether the CPCN statute applies even though the facility is to be built in Minnesota.

It is the position of the PSC and the utilities that the CA statute, not the CPCN statute, applies to such out-of-state facilities.

Both the CA statute and the CPCN statute provide criteria to be applied by the PSC when deciding whether to approve a new facility. The statutes are similar in that both contain criteria that seemingly are designed to protect

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Wisconsin ratepayers from having to pay for unnecessary or inefficient new facilities. For example, under both statutes, the criteria include whether a proposed project would, "[w]hen placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service." *See* WIS. STAT. § 196.49(3)(b)3.; WIS. STAT. § 196.491(3)(d)5. (by cross-reference); *see also* ***GTE N. Inc. v. PSC***, 176 Wis. 2d 559, 568, 500 N.W.2d 284 (1993) ("The primary purpose of the [chapter 196] public utility laws in this state is the protection of the consuming public.").

The dispute here stems from a number of differences between the two statutes.

First, the CPCN statute applies only to large facilities, namely, a "large electric generating facility," defined as having an operating capacity of 100 megawatts or more. *See* WIS. STAT. § 196.491(1)(e) and (g). There is no dispute that the wind farm here would be a "large" facility under this definition. The CA statute does not indicate whether a facility's size matters to its application.

Second, although both statutes allow consideration of the effects on ratepayers, the CPCN statute appears to contain more meaningful ratepayer protection. For example, the CPCN statute *requires* the PSC to apply ratepayer protection criteria. *See* WIS. STAT. § 196.491(3)(d)2. (allowing approval "only if," for example, "[t]he proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy"); *cf.* WIS. STAT. § 196.49(3) (in the CA statute, providing that the PSC "may refuse to certify a project" if criteria are not met). The CPCN statute also requires a public hearing, § 196.491(3)(b), whereas the CA statute does not.

Third, and as we explain in more detail below, the CPCN statute incorporates the CA statute's criteria,[2] and then adds significant additional criteria. There are other differences, but we do not attempt to list them all here.

With this general background in mind, we describe the dispute in this case.

In support of applying the CPCN statute, the energy consumers begin with the correct observation that the CPCN statute is not expressly limited to in-state facilities. The CPCN statute contains no express language suggesting a geographical limit. Instead, so far as the CPCN statute explains, the key feature that makes the statute applicable is the size of the proposed facility. *See* WIS. STAT. § 196.491(3)(a); § 196.491(1)(e) and (g). Further, some of the requirements in the CPCN statute appear to apply regardless of location. *See*, *e.g.*, § 196.491(3)(d)2. (limiting approvals to where "[t]he proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy").

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[2] The CA statute provides that "[t]he commission may refuse to certify a project if it appears that the completion of the project will do any of the following":

> 1. Substantially impair the efficiency of the service of the public utility.
>
> 2. Provide facilities unreasonably in excess of the probable future requirements.
>
> 3. When placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service unless the public utility waives consideration by the commission, in the fixation of rates, of such consequent increase of cost of service.

WIS. STAT. § 196.49(3)(b). By cross-reference, WIS. STAT. § 196.491(3)(d)5. incorporates this criteria into the CPCN statute's mandatory requirements applicable to public utilities.

The PSC and the utilities take the position that the consumers' interpretation of the statute is unreasonable because some parts of the CPCN statute are incompatible with out-of-state applications. The PSC points to the following examples:

- The CPCN statute requires a determination that "[t]he proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved," *see* WIS. STAT. § 196.491(3)(d)6., but the orderly use of out-of-state land is a concern of the people of the other state, not the people of Wisconsin.

- The CPCN statute provides: "If installation or utilization of a facility for which a [CPCN] has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility may nevertheless proceed," *see* § 196.491(3)(i), but Wisconsin authorities have no power to override such out-of-state local ordinances.

- The CPCN statute provides: "The commission shall hold a public hearing on an application … in the area affected," *see* § 196.491(3)(b), but it is obvious that our legislature did not contemplate holding public hearings in other states.

The CPCN statute contains other apparent misfits, but a further listing is unnecessary for purposes of this certification.

The CA statute, on the other hand, does not contain these same apparent misfits. One seemingly minor exception is that the CA statute requires a determination that "brownfields … are used to the extent practicable." *See* WIS. STAT. § 196.49(4). By cross-reference to the definition in WIS. STAT. § 560.13(1)(a), we know that brownfields are "abandoned, idle or underused industrial or commercial facilities or sites." Seemingly, the legislature would not have intended that the PSC make this determination for out-of-state sitings.

It is the PSC's view that looking at the statutes in terms of fits and misfits appears to lead to the conclusion that the CA statute is a better fit and, therefore, what the legislature intended. But this view has its own problem.

The consumers point out that, under the PSC's view, an otherwise identical facility, presumably with identical potential impacts on Wisconsin ratepayers, is treated differently based on its location. That is, assuming that the PSC and the utilities are correct that the CA statute applies, rather than the CPCN statute, this means that fewer criteria apply to an otherwise identical out-of-state facility. More importantly, although both statutes have ratepayer-protection criteria, application of the ratepayer-protection criteria is mandatory only in the CPCN statute. It is the consumers' position that ratepayer-protection criteria is mandatory in large facility approval situations because large facilities inherently have a greater potential to significantly affect ratepayers. Thus, the question arises whether the legislature intended to give the PSC the discretion to approve a large facility without considering ratepayer-protection criteria. It is apparent that the energy consumers are concerned about this scenario. They argue that there is no apparent reason why ratepayers should lose this mandatory safeguard when a large facility is built out of state, rather than in state.

Thus, to summarize, we are left with two problematic interpretations. One view would apply the CPCN statute to the wind farm because the wind farm is sufficiently large, but that would bring into play some specific CPCN requirements that cannot be literally applied to an out-of-state facility. This view would treat similar facilities the same way for purposes of ratepayer protection, regardless of a facility's location. The contrary view would avoid misfits in the CPCN statute's subsections, but would deprive ratepayers of

mandatory protections and would produce a seemingly illogical distinction based on the location of a facility.

We note that, in this particular case, it appears that the PSC did more than necessary under the CA statute, but less than required under the CPCN statute. The PSC argues that, if it was error to not apply the CPCN statute, that error was harmless because the PSC did everything it would have done had it applied the CPCN statute, considering the out-of-state location of the facility. Our review of this issue suggests that the PSC's argument falls short. For example, the consumers point out that the PSC did not comply with the CPCN statute requirement that the PSC deem the application complete under WIS. STAT. § 196.491(3)(a)2. A supreme court opinion strongly suggests that this is a significant step in the procedure under the CPCN statute. *See* ***Clean Wisconsin, Inc. v. PSC***, 2005 WI 93, ¶¶57-96, 282 Wis. 2d 250, 700 N.W.2d 768 (explaining that "the filing of the CPCN application and the PSC's determination that the application is complete are the first two steps in the process leading up to the ultimate issuance of the CPCN," ***id.***, ¶57; holding that a completeness determination is "subject to judicial review," ***id.***, ¶58; and proceeding to determine whether a completeness determination was proper). Thus, it appears to us that the legal issue presented cannot be avoided by a harmless error analysis. And, regardless whether this case could be resolved on the basis of harmless error, it appears to us that the supreme court should resolve the legal issue to avoid delays and legal battles over the next large out-of-state project.

Finally, we note that the representation of interests in this case favors granting the certification. Two Wisconsin public utilities have submitted briefs in support of the PSC's position. On the other side, both large industrial consumers and residential and other smaller-scale consumers are represented.

Because it appears that all of the major interests are represented in this case, and because the parties are in agreement that the issue is likely to recur, this is an appropriate case for supreme court review.