PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation on the Commission's Own Motion to Review Potential Excess Capacity in Electric Generating Units Owned by Wisconsin Electric Utilities

Docket No. 5-EI-150

RESPONSE OF THE JOINT UTILITIES TO REQUEST FOR COMMENTS QUESTIONS 1, 2, 4A, AND 4B

1. **The Commission's authority to order that a public utility mothball or retire an electric generating unit, based on the utility's existing capacity and its capacity needs.**

2. **The Commission's authority to order that a public utility mothball or retire an electric generating unit, based on the existing capacity and capacity needs of a multi-utility area or of the entire state of Wisconsin.**

These questions are addressed together. The Commission's authority is limited to that expressly granted by the legislature or that which is necessarily implied. There is no express authority in the statutes for the Commission to order utilities to mothball or retire generating units based on the utility's existing capacity or its capacity needs, or the capacity or needs of a multi-utility area or the state of Wisconsin. Further, principles of statutory interpretation and precedent reveal that such authority cannot reasonably be implied from the powers given the Commission by the legislature.

I. There is no express statutory authority for the Commission to order mothballing or retirement.

The Commission's authority to regulate utilities is limited to the power bestowed on it by the legislature. Indeed, Wisconsin courts have held that "[a]s a creature of the legislature, the commission has only such powers as the legislature expressly confers upon it or those that are 'necessarily implied'" by chapter 196. *PSC v. Wis. Bell*, 211 Wis.2d 751, 754, 566 N.W.2d 496

(Wis. App. 1997)(*quoting Wis. Power & Light Co. v. PSC*, 181 Wis.2d 385, 392, 511 N.W.2d 291 (Wis. 1994)). When the question is "whether a power not specifically granted to an agency may nonetheless be implied, [the] inquiry is guided by the rule . . . that '[a]ny reasonable doubt as to the existence of an implied power in an agency should be resolved against the exercise of such authority.'" *Wis. Bell*, 211 Wis.2d at 756 (*quoting Kimberly-Clark Corp. v. PSC*, 110 Wis.2d 455, 462, 392 N.W.2d 143 (Wis. 1983)). Finally, since the Commission's authority is conferred only by statute, it has no inherent or common law powers.

Nowhere in the statutes is the Commission expressly given the authority to order the retirement or mothballing of electric generating units due to capacity concerns or for any other reason. Indeed, the concept of retirement comes up surprisingly infrequently in Chapter 196 and the Commission's administrative rules. The Certificate of Authority statute requires utilities to obtain a CA before beginning construction, installation or operation of a new plant, but it does not state that such a certificate is needed to continue operating that plant. Wis. Stats. § 196.49. Likewise, the Certificate of Public Convenience and Necessity statute requires a CPCN to "commence the construction of a facility," but it does not apply to continued operation of the facility. Wis. Stats. § 196.491(3). Thus, neither statute gives the Commission authority to directly order retirement or mothballing of units or even to indirectly accomplish the same thing by revoking a CA or CPCN.

With respect to electric generating units, the Commission's express powers are otherwise limited to: (1) requiring utilities to invest in them if needed to ensure reliable electric service, Wis. Stats. § 196.487; (2) authorizing their sale, acquisition, or lease, *e.g.*, Wis. Stats. §§ 196.80, 196.91, 196.92; (3) regulating certain aspects of their operation through the electric code and electric service standards, *e.g.*, Wis. Stats. §§ 196.491(5), 196.495; and (4) making rates, *e.g.*,

Wis. Stats. §§ 196.03(1), 196.37(2). Noticeably absent from this list is the power to order generating units to be shut down or retired.

II. The Commission does not have implicit authority to order mothballing and retirement of generating units.

Because there is no express grant of authority to order retirement or mothballing, whatever authority the Commission has to do so must be "necessarily implied" by chapter 196. The Wisconsin supreme court has held that "the legislature has specifically charged the PSC with interpretation of chapter 196." *Clean Wis. v. PSC*, 2005 WI 93, ¶ 136. However, the Commission has never examined whether chapter 196 can be read to give it the authority to retire or mothball electric generating units and therefore has never interpreted chapter 196 with regard to the issue. Moreover, any such interpretation would carry less weight than other Commission findings, since courts owe no deference to the Commission's decisions regarding the scope of its own authority. *Wis. Bell v. PSC*, 2004 WI App. 8 ¶ 38, 269 Wis.2d 409, 675 N.W.2d 242.

The Commission has, in the past, pointed to two statutory provisions in support of expanding its authority: Wis. Stats. §§ 196.02(1) and 196.37(2). *Wis. Bell v. PSC*, 2003 WI App. 193 at ¶ 10, 267 Wis.2d 193, 670 N.W.2d 97. Wis. Stats. § 196.02(1) says, "The commission has jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient to its jurisdiction." Wis. Stats. § 196.37(2) states:

> If the commission finds that any measurement, regulation, practice, act or service is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise unreasonable or unlawful, or that any service is inadequate, or that any service which reasonably can be demanded cannot be obtained, the commission shall determine and make any just and reasonable order relating to a measurement, regulation, practice, act or service to be furnished, imposed, observed and followed in the future.[1]

[1] It bears noting that Wis. Stats. § 196.37 appears in one of the statutes discussing the Commission's ratemaking authority. The Commission has historically handled questions of excess electric generating capacity through its

These powers, however, are not self-executing. Rather, "[t]he [C]ommission does not exercise the entire regulatory power of the state. It may exercise only such powers as the legislation has seen fit to confer upon it and those powers must be exercised in the manner prescribed." *Friends of the Earth v. PSC*, 78 Wis. 2d 388, 400, 254 N.W.2d 299 (Wis. 1977) (*quoting Wis. Tel. Co. v. PSC*, 232 Wis. 274, 326, 287 N.W.2d 122 (Wis. 1939)). Thus, Wis. Stats. §§ 196.02(1) and 196.37(2) do not expand the scope of the Commission's jurisdiction, which is defined by the range of specific responsibilities and authorizations the legislature delegated to the Commission throughout chapter 196. But as discussed above, the legislature has not seen fit to assign to the Commission the goal of ensuring against an excess amount of generation capacity in the state, so there is no basis for an implied power to order retirement or mothballing of generating units.

III. Principles of statutory construction and precedent weigh against an implicit power to order retirement or mothballing.

At least three considerations indicate that the legislature did not intend to give the Commission the power to order retirement and mothballing. First, the legislature expressly granted the Commission authority over certain aspects of generating facilities - building, modifying and acquiring. The legislature did not, however, give the Commission authority to shut down a power plant. The legislature obviously carefully considered what authority the Commission should have over generating units and what power a private owner of such private property should retain.

---

ratemaking authority under Wis. Stats. §§ 196.03(1), 196.20 and 196.37(2). Under this authority, the Commission may "shift some of the cost of excess generating capacity to utility shareholders where (1) the excess generating capacity was imprudently acquired, or (2) the excess capacity was not used or useful in serving the public." *Madison Gas & Elec. Co. v. PSC*, 109 Wis.2d 127, 135, 325 N.W.2d 339 (1982) (*citing Milwaukee S. & T. Corp. v. PSC*, 13 Wis.2d 384, 393, 108 N.W.2d 729 (1961)); *Wisconsin Telephone v. PSC*, 232 Wis. 274, 348, 287 N.W. 122 (1939). The fact that the Commission has been given the power to deal with excess capacity through ratemaking, and has historically done so, tends to undermine any claim that it has direct authority to order retirement or mothballing of plants. This issue--addressing excess capacity through ratemaking--will be more fully explored in the utilities' response to Question 7.

Had the legislature intended to grant such authority, it could have expressly done so. Where the legislature grants authority in other contexts, but declines to do so in the situation at hand, courts will hold that the legislature intended to deny the authority. *Meghrig v. KFC Western, Inc*., 516 U.S. 479, 485 (1996) ("Congress . . . demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy"); *FCC v. NextWave Pers. Communications, Inc*., 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly"); *Albrechtsen v. Dept. of Workforce Devel*., 2005 WI App. 241 ¶ 12, 288 Wis.2d 144, 708 N.W.2d 1.

The legislature granted the Commission other significant powers over utilities, including the right to set their rates, to approve new facilities and modifications to existing facilities, to regulate certain aspects of their operation, to approve sale and acquisition of facilities and to adjudicate disputes with customers. Further, the legislature has demonstrated that it knows how to grant administrative agencies the authority to shut down power plants and other businesses where appropriate. For example, Wis. Stats. § 285.85 provides that the Secretary of the Department of Natural Resources--an agency specifically tasked with protecting Wisconsin's air and other resources--may order any facility that emits pollutants that are harmful to human health and safety to "reduce or discontinue immediately the emission of air contaminants." Wis. Stats. § 285.85 (1), (2). The practical effect of that power is that in some situations the Secretary of the DNR may order generating units to be shut down immediately. The legislature did not give the Commission similar authority.

Further, the legislature *did* see fit to give the Commission the power to order utilities to invest in their facilities to ensure reliable electric service. Wis. Stats. § 196.487(2). When it

granted that power, the legislature could have easily extended the Commission's authority to allow it to order retirement or mothballing, but it declined to do so. This also indicates that the legislature did not intend the Commission to have that authority.

Second, it is well established in the case law that an agency is not a "super board of directors" for regulated utilities. *In re. Investigation into Demand Side Mgmt. by Elec. Utils.*, 127 PUR4th 516, 521 (Pa. PUC, 1991) (*citing N. Pennsylvania Power Co. v. Pennsylvania PUC*, 5 A.2d 133 (Pa. 1939)); Wis. Tel. Co., 232 Wis. at 328 ("The Commission is invested with no managerial powers."); *Wis. Pub. Serv. Corp. v. PSC*, 156 Wis.2d 611, 618, 457 N.W.2d 502 (Wis. Ct. App. 1990) ("In assessing imprudence, PSC must asses the utility's conduct without usurping the role of management."). Indeed, as the Supreme Court stated in *Missouri ex rel. South Western Bell Teleph. Co. v. PSC*, "[i]t must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership." 262 U.S. 276, 289 (1923). In other words, the Commission has very limited authority to interfere with the discretionary power of the utilities over their legitimately internal affairs. To date, decisions about whether to retire units have been left to the individual utilities as they considered what units were needed to economically provide service to customers. Determinations about retirement and mothballing are just the type of "business decisions" that have historically been left to the utilities, and so have been beyond the regulatory reach of the Commission.

Third, as discussed above, the courts have been very clear that implied authority under Chapter 196 is disfavored. Such authority must be "necessarily" implied and any doubts resolved against the existence of such authority. As the Commission may address issues of

excess capacity through exercise of its ratemaking authority, and has historically done so, there is no basis for a claim that the Commission must have the authority to directly order the shutdown of an electric generating facility or else issues of excess capacity would go unaddressed.

The utilities respectfully request the opportunity to provide additional information in response to these questions as necessitated by the submissions of other parties, or as the proceeding develops.

4. The utility-specific and unit-specific factors that the Commission should consider in making determinations about whether to mothball or retire an electric generating unit. Please provide comment on the appropriateness of a factor for consideration, as well as a substantive response on each factor for each gas and coal unit in your generation fleet.

The joint responses to questions 4a and 4b reflect the policy-level position of the Joint Utilities. Each utility will provide comments and information pertinent to its particular situation and generation fleet.

a. What pollution controls, if any, are already installed at the unit.

It is appropriate to include an inventory of already installed emission controls (both pre- and post-combustion) in the analysis of unit retirement. This inventory should be used in the life cycle economic analysis to ascertain the competitiveness of a unit in the MISO Energy Market and corresponding value the unit provides to the utility and customers, and the remaining "exposure" of a unit to the costs of additional emission controls. This analysis should include any fuel-switching which has occurred on a unit to assist in achieving emission limits.

b. What air pollution controls must still be installed to comply with state or federal requirements.

It is reasonable to assess what emission control options (e.g., repowering, fuel switching, combustion controls, post-combustion controls) are available to comply with current and future likely air pollution regulations in a given planning future. Electric utilities face numerous Clean

Air Act regulatory requirements over the next decade. As these requirements become defined over time, utilities will continue to assess the viability of existing electric generation with respect to the options available for reducing a variety of emissions.