

2003 Assembly Bill 843

Date of enactment: **March 15, 2004**
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2003 WISCONSIN ACT 152

AN ACT *to renumber and amend* 201.01 (3); *to amend* 76.28 (1) (d); and *to create* 196.027 and 201.01 (3) (e) of the statutes; **relating to:** the issuance of debt by natural gas and electric public utilities to finance certain environmental activities.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1m. 76.28 (1) (d) of the statutes is amended to read:

76.28 (1) (d) “Gross revenues” for a light, heat and power company other than a qualified wholesale electric company or a transmission company means total environmental control charges paid to the company under a financing order issued under s. 196.027 (2) and total operating revenues as reported to the public service commission except revenues for interdepartmental sales and for interdepartmental rents as reported to the public service commission and deductions from the sales and use tax under s. 77.61 (4), except that the company may subtract from revenues either the actual cost of power purchased for resale, as reported to the public service commission, by a light, heat and power company, except a municipal light, heat and power company, that purchases under federal or state approved wholesale rates more than 50% of its electric power from a person other than an affiliated interest, as defined in s. 196.52 (1), if the revenue from that purchased electric power is included in the seller’s gross revenues or the following percentages of the actual cost of power purchased for resale, as reported to the public service commission, by a light, heat and power company, except a municipal light, heat and power

company that purchases more than 90% of its power and that has less than \$50,000,000 of gross revenues: 10% for the fee assessed on May 1, 1988, 30% for the fee assessed on May 1, 1989, and 50% for the fee assessed on May 1, 1990, and thereafter. For a qualified wholesale electric company, “gross revenues” means total business revenues from those businesses included under par. (e) 1. to 4. For a transmission company, “gross revenues” means total operating revenues as reported to the public service commission, except revenues for transmission service that is provided to a public utility that is subject to the license fee under sub. (2) (d), to a public utility, as defined in s. 196.01 (5), or to a cooperative association organized under ch. 185 for the purpose of providing electricity to its members only. For an electric utility, as defined in s. 16.957 (1) (g), “gross revenues” does not include public benefits fees collected by the electric utility under s. 16.957 (4) (a) or (5) (a). For a generator public utility, “gross revenues” does not include any grants awarded to the generator public utility under s. 16.958 (2) (b). For a wholesale supplier, as defined in s. 16.957 (1) (w), “gross revenues” does not include any public benefits fees that are received from a municipal utility or retail electric cooperative or under a joint program established under s. 16.957 (5) (f). For a municipal utility, “gross revenues” does not include public benefits fees received by

* Section 991.11, WISCONSIN STATUTES 2001–02 : Effective date of acts. “Every act and every portion of an act enacted by the legislature over the governor’s partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated” by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

the municipal utility from a municipal utility or retail electric cooperative under a joint program established under s. 16.957 (5) (f).

SECTION 2. 196.027 of the statutes is created to read:

196.027 Environmental trust financing. (1) DEFINITIONS. In this section:

(a) "Ancillary agreement" means any bond insurance policy or other financial arrangement entered into in connection with the issuance of environmental trust bonds.

(b) "Assignee" means any person to which an interest in environmental control property is sold, assigned, transferred, or conveyed and any successor to such a person.

(c) "Energy utility" means a public utility engaged in the transmission, delivery, or furnishing of natural gas by means of pipes or mains or of heat, light, or power.

(d) "Environmental control activity" means any of the following:

1. The construction, installation, or otherwise putting into place environmental control equipment in connection with an energy utility plant that, before the effective date of this subdivision [revisor inserts date], has been used to provide service to customers.

2. The retiring of any existing plant, facility, or other property to reduce, control, or eliminate environmental pollution in accordance with federal or state law.

(e) "Environmental control charge" means a charge paid by customers of an energy utility or its successors for the energy utility to recover environmental control costs and financing costs.

(f) "Environmental control cost" means capital cost, including capitalized cost relating to regulatory assets, incurred or expected to be incurred by an energy utility in undertaking an environmental control activity and, with respect to an environmental control activity described in par. (d) 2., includes the unrecovered value of property that is retired, including any demolition or similar cost that exceeds the salvage value of the property. "Environmental control cost" does not include any monetary penalty, fine, or forfeiture assessed against an energy utility by a government agency or court under a federal or state environmental statute, rule, or regulation.

(g) "Environmental control equipment" means any device, equipment, structure, process, facility, or technology, owned or controlled by an energy utility, that is designed for the primary purpose of preventing, reducing, or remediating environmental pollution.

(h) "Environmental control property" means all of the following:

1. The right specified in a financing order to impose, collect, or receive environmental control charges, or to obtain adjustments to such charges as provided in this section, and any interest in such right.

2. All revenues and proceeds arising from the right and interests specified in subd. 1.

(i) "Environmental pollution" means the contamination or rendering unclean or impure of the air, land, or waters of the state, or the making of the same injurious to public health, harmful for commercial or recreational use, or deleterious to animal or plant life.

(j) "Environmental trust bonds" means bonds, debentures, notes, certificates of participation, certificates of beneficial interest, certificates of ownership, or other evidences of indebtedness that are issued by an energy utility or an assignee, the proceeds of which are used directly or indirectly to recover, finance, or refinance environmental control costs and financing costs, and that are secured by or payable from environmental control property.

(k) "Financing cost" means any of the following:

1. Interest and redemption premiums, that are payable on environmental trust bonds.

2. A payment required under an ancillary agreement, including any amount required to fund a reserve account.

3. The cost of retiring or refunding an energy utility's existing debt and equity securities in connection with the issuance of environmental trust bonds, but only to the extent the securities were issued for the purpose of financing environmental control costs.

4. Any other reasonable cost related to issuing and servicing environmental trust bonds, including servicing fees, trustee fees, legal fees, administrative fees, placement fees, capitalized interest, and rating agency fees.

5. Any taxes and license fees imposed on the revenues generated from the collection of environmental control charges.

(L) "Financing order" means an order under sub. (2) that allows for the issuance of environmental trust bonds, the collection of environmental control charges, and the creation of environmental control property.

(2) FINANCING ORDERS. (a) *Applications.* An energy utility may apply to the commission for a financing order. In addition to any other information required by the commission, an energy utility shall do all of the following in an application:

1. Describe the environmental control activities that the energy utility proposes to undertake, indicate whether the energy utility's electric, natural gas, or steam service is associated with the activities, and describe the reasons for undertaking the activities.

2. Estimate the environmental control costs of the activities described under subd. 1.

3. Indicate whether the energy utility proposes to finance all or a portion of the costs estimated under subd. 2. with environmental trust bonds. If the energy utility proposes to finance a portion of the costs, the energy utility shall identify that portion in the application.

4. Estimate the financing costs of the environmental trust bonds proposed under subd. 3.

5. Estimate the environmental control charges necessary to recover the environmental control costs and financing costs estimated in the application and indicate whether the environmental control charges are proposed for the energy utility's electric, natural gas, or steam service.

6. Estimate any cost savings to customers resulting from financing environmental control costs with environmental trust bonds as opposed to alternative financing methods.

(b) *Commission powers and duties.* 1. No later than 120 days after receiving an application under par. (a), the commission shall, after a hearing, issue a financing order or an order rejecting the application. The commission may issue a financing order if the commission finds all of the following:

a. That the order will result in lower overall costs to customers than would alternative methods of financing environmental control activities.

b. That the proposed structuring and expected pricing of the environmental trust bonds will result in the lowest environmental control charges that are consistent with market conditions and the terms of the financing order.

c. That the financing order is otherwise consistent with the public interest, and is prudent, reasonable, and appropriate.

2. In a financing order issued to an energy utility, the commission shall do all of the following:

a. Except as provided in subds. 2. c. and 4., specify the amount of environmental control costs and financing costs that may be recovered through environmental control charges and the period over which such costs may be recovered.

b. For the period specified in subd. 2. a. require that, as long as any customer obtains distribution service from the energy utility or its successors, the customer shall pay environmental control charges to the energy utility or its assignees regardless of whether the customer obtains other service from a different energy utility or other energy supplier.

c. Include a formula-based mechanism for making any adjustments in the environmental control charges that customers are required to pay under the order and making any adjustments that are necessary to correct for any overcollection or undercollection of the charges or to otherwise ensure the energy utility's or assignee's timely recovery of environmental control costs and financing costs.

d. Specify the environmental control property that is created and that may be used to pay or secure environmental trust bonds.

e. If considered appropriate by the commission, include a provision allowing for the retirement of environmental trust bonds before their termination dates.

f. Include any other conditions that the commission considers appropriate and that are not otherwise inconsistent with this section.

3. A financing order issued to an energy utility may provide that the energy utility's acquisition of environmental control property specified in subd. 2. d. is conditioned upon, and shall be simultaneous with, the sale of the environmental control property to an assignee and the pledge of the environmental control property to secure environmental trust bonds.

4. a. If the commission issues a financing order, the commission shall apply, at least annually, the formula-based mechanism specified in subd. 2. c. and, based on estimates of demand and other mathematical factors, make the adjustments described in subd. 2. c. The commission shall make the adjustments within 45 days of the anniversary date on which environmental trust bonds are issued and after expiration of the comment period described in subd. 4. b.

b. The commission may not hold a hearing for the purpose of making an adjustment under subd. 4. a., but shall allow interested parties 30 days to make comments limited to any error in the application of the formula-based mechanism relating to the appropriate amount of any overcollection or undercollection of environmental control charges and the appropriate amount of an adjustment.

5. A financing order is irrevocable and, except as provided in subds. 2. c. and 4., the commission may not reduce, impair, or otherwise adjust environmental control charges approved in the order.

(c) *Subsequent orders.* The commission may commence a proceeding and issue a subsequent financing order that provides for retiring or refunding environmental trust bonds issued pursuant to the original financing order if the commission included a provision described in par. (b) 2. e. in the original financing order and if the commission finds that the subsequent financing order satisfies all of the criteria specified in par. (b) 1. a., b., and c.

(d) *Judicial review.* A financing order or an order rejecting an application under par. (b) 1. is reviewable by the circuit court for Dane County under ch. 227, except that the court shall proceed to hear and determine the action as expeditiously as practicable and give the action precedence over other matters not accorded similar precedence by law.

(e) *Effect of orders.* 1. A financing order shall remain in effect until the environmental trust bonds issued pursuant to the order have been paid in full and the financing costs of the bonds have been recovered in full.

2. A financing order issued to an energy utility shall remain in effect and unabated notwithstanding the bankruptcy of the energy utility.

3. An application by an energy utility for a financing order and commission approval of a financing order are in addition to and do not replace or supercede any other review or approval by the commission under this chapter that may be required or allowed for environmental control activities.

(3) EXCEPTIONS TO COMMISSION JURISDICTION. (a) If the commission issues a financing order to an energy utility, the commission may not, in exercising its powers and carrying out its duties regarding rate making, consider the environmental trust bonds issued pursuant to the order to be the debt of the energy utility, the environmental control charges paid under the order to be the revenue of the energy utility, or the environmental control costs or financing costs specified in the order to be the costs of the energy utility, nor may the commission determine that any action taken by an energy utility that is consistent with the order is unjust or unreasonable. Nothing in this paragraph affects the authority of the commission to adjust or reduce an energy utility's revenue requirements under sub. (4) (a).

(b) The commission may not order or otherwise directly or indirectly require an energy utility to use environmental trust bonds to finance any project, addition, plant, facility, extension, capital improvement, environmental control equipment, or any other expenditure, unless, except as provided in sub. (2) (c), the energy utility has made an application under sub. (2) (a) to finance such expenditure using environmental trust bonds. The commission may not refuse to allow an energy utility to recover costs for environmental control activities in an otherwise permissible fashion solely because of the potential availability of environmental trust financing.

(4) ENERGY UTILITY DUTIES. (a) An energy utility shall place the proceeds of any environmental trust bonds issued pursuant to a financing order in a separate account. An energy utility may use the proceeds only for paying environmental control costs and financing costs that are prudent, reasonable, and appropriate, and only if the energy utility has applied for and obtained all approvals from the commission under this chapter that are required for the environmental control activities for which the environmental control costs are incurred or expected to be incurred. If the commission finds that the proceeds have been used for environmental control costs or financing costs that are not prudent, reasonable, or appropriate, the commission may adjust or reduce the energy utility's revenue requirements in connection with charges other than environmental control charges for the purpose of ensuring that the energy utility's customers do not pay for such costs.

(b) An energy utility shall annually provide to its customers a concise explanation of the environmental control charges approved in a financing order issued to the energy utility. The explanation may be made by bill

inserts, Web site information, or other appropriate means.

(c) The failure of an energy utility to comply with this subsection shall not invalidate, impair, or affect any financing order, environmental control property, environmental control charge, or environmental control bonds.

(5) ENVIRONMENTAL CONTROL PROPERTY. (a) *In general.* 1. Environmental control property that is specified in a financing order shall constitute a present property right notwithstanding that the imposition and collection of environmental control charges depend on the energy utility to which the order is issued performing its servicing functions relating to the collection of environmental control charges and on future energy consumption. Such property is considered to exist whether or not the revenues or proceeds arising from the property have accrued and whether or not the value of the property is dependent on the receipt of service by customers of an energy utility.

2. Environmental control property specified in a financing order shall continue to exist until the environmental trust bonds issued pursuant to the order are paid in full and all financing costs of the bonds have been recovered in full.

3. Environmental control property specified in a financing order issued to an energy utility may be transferred, sold, conveyed, or assigned to any person, including an affiliate of the energy utility created for the limited purpose of facilitating or administering environmental control property or environmental control trust bonds under the financing order and not including any other affiliate of the energy utility. Environmental control property may be pledged to secure environmental trust bonds issued pursuant to the order. Each such transfer, sale, conveyance, assignment, or pledge by an energy utility or affiliate of an energy utility is considered to be a transaction in the ordinary course of business.

4. If an energy utility defaults on any required payment of revenues arising from environmental control property specified in a financing order, a court, upon application by an interested party, and without limiting any other remedies available to the applying party, shall order the sequestration and payment of the revenues. Any such order shall remain in full force and effect notwithstanding any bankruptcy, reorganization, or other insolvency proceedings with respect to the energy utility.

5. The interest of an assignee or pledgee in environmental control property specified in a financing order issued to an energy utility, and in the revenue and collections arising from that property, are not subject to setoff, counterclaim, surcharge, or defense by the energy utility or any other person or in connection with the bankruptcy of the energy utility or any other entity.

6. Any successor to an energy utility, whether pursuant to any bankruptcy, reorganization, or other insol-

veny proceeding, or pursuant to any merger or acquisition, sale, or transfer by operation of law, as a result of energy utility restructuring or otherwise, shall perform and satisfy all obligations of, and have the same rights under a financing order as, the energy utility under the financing order in the same manner and to the same extent as the energy utility including collecting and paying to the person entitled to receive them revenues with respect to the environmental control property.

(b) *Security interests.* Except as otherwise provided in this paragraph, the creation, perfection, and enforcement of security interests in environmental control property to secure environmental trust bonds are governed by ch. 409. Notwithstanding ch. 409, with regard to creating, perfecting, and enforcing a valid security interest in environmental control property to secure environmental trust bonds, all of the following apply:

1. The description of environmental control property in a security agreement is sufficient if the description refers to this section and the financing order creating the environmental control property.

2. A security interest is created, valid, binding, and perfected at the time a security agreement is made and attaches without any physical delivery of collateral or other act, and the lien of such security interest shall be valid, binding, and perfected against all parties having claims of any kind in tort, contract, or otherwise against the person granting the security interest, regardless of whether such parties have notice of the lien. The filing or recording of a financial statement or instrument in which such a security interest is created is not required.

3. A security interest in environmental control property is a continuously perfected security interest and has priority over any other lien created by operation of law or otherwise, which subsequently attaches to the environmental control property.

4. The priority of a security interest created under this paragraph is not affected by the commingling of proceeds arising from environmental control property with other amounts.

5. Any changes that the commission makes to a financing order that creates the environmental control property does not affect the validity, perfection, or priority of a security interest in the environmental control property.

(c) *Sales.* The sale, assignment, and transfer of environmental control property are governed by this paragraph. All of the following apply to a sale, assignment, or transfer under this paragraph:

1. The sale, assignment, or transfer is an absolute transfer of, and not a pledge of or secured transaction relating to, the seller's right, title, and interest in, to, and under the environmental control property, if the documents governing the transaction expressly state that the transaction is a sale or other absolute transfer. After such a transaction, the environmental control property is not

subject to any claims of the seller or the seller's creditors, other than creditors holding a prior security interest in the environmental control property perfected under par. (b).

2. The characterization of the sale, assignment, or transfer as an absolute transfer under subd. 1. and the corresponding characterization of the purchaser's property interest is not affected by any of the following factors:

a. Commingling of amounts arising with respect to the environmental control property with other amounts.

b. The retention by the seller of a partial or residual interest, including an equity interest, in the environmental control property, whether direct or indirect, or whether subordinate or otherwise.

c. Any recourse that the purchaser may have against the seller.

d. Any indemnifications, obligations, or repurchase rights made or provided by the seller.

e. The responsibility of the seller to collect environmental control charges.

f. The treatment of the sale, assignment, or transfer for tax, financial reporting, or other purposes.

(6) ENVIRONMENTAL TRUST BONDS NOT PUBLIC DEBT. The state is not liable on environmental trust bonds and the bonds are not a debt of the state. An issue of environmental trust bonds does not, directly or indirectly or contingently, obligate the state or a political subdivision of the state to levy any tax or make any appropriation for payment of the bonds.

(7) ENVIRONMENTAL TRUST BONDS AS LEGAL INVESTMENTS. Any of the following may legally invest any sinking funds, moneys, or other funds belonging to them or under their control in environmental trust bonds:

(a) The state, the investment board, municipal corporations, political subdivisions, public bodies, and public officers except for members of the public service commission.

(b) Banks and bankers, savings and loan associations, credit unions, trust companies, savings banks and institutions, investment companies, insurance companies, insurance associations, and other persons carrying on a banking or insurance business.

(c) Personal representatives, guardians, trustees, and other fiduciaries.

(8) STATE PLEDGE. (a) In this subsection, "bondholder" means a person who holds an environmental trust bond.

(b) The state pledges to and agrees with bondholders that the state will not do any of the following:

1. Take or permit any action that impairs the value of environmental control property.

2. Except as allowed under this section, reduce, alter, or impair environmental control charges that are imposed, collected, and remitted for the benefit of the bondholders until any principal, interest, premium, or other charge incurred, or contract to be performed, in

connection with environmental trust bonds held by the bondholders are paid or performed in full.

(c) Any person who issues environmental trust bonds is allowed to include the pledge specified in par. (b) in the bonds and relating documentation.

(9) CONFLICTS. In the event of conflict between this section and any other law regarding the attachment, assignment, or perfection, or the effect of perfection, or priority of any security interest in environmental control property, this section to the extent of the conflict shall govern.

(10) EFFECT OF INVALIDITY ON ACTIONS. Effective on the date that environmental trust bonds are first issued under this section, if any provision of this section is held to be invalid or is invalidated, superseded, replaced, repealed, or expires for any reason, that occurrence shall not affect any action allowed under this section that is taken by an energy utility, an assignee, a collection agent, or a party to a transaction and any such action shall remain in full force and effect.

SECTION 3. 201.01 (3) of the statutes is renumbered 201.01 (3) (intro.) and amended to read:

201.01 (3) (intro.) "Securities" means capital stock and evidences of indebtedness of a public service corporation, ~~not including, however, (a) any~~ but do not include

any of the following:

(a) Any obligation of a public service corporation which is not a public utility as defined in the federal ~~power act~~ Power Act, falling due one year or less after its date and bearing date not later than the day of sale; ~~or (b) any.~~

(b) Any evidence of indebtedness of a public service corporation which is a public utility as defined in the federal ~~power act~~ Power Act, the issuance, renewal or assumption of which is exempt from ~~sec. section~~ section 204 (a) of the federal ~~power act~~ Power Act by the provisions of ~~sec. section~~ section 204 (e) thereof; ~~or (c) any.~~

(c) Any obligation issued to the United States of America in connection with loans for rural telecommunications facilities made pursuant to the ~~rural electrification act~~ Rural Electrification Act of 1936, as amended; ~~or (d) any.~~

(d) Any securities issued by a corporation organized under ch. 185 for the purpose of furnishing telecommunications service in rural areas.

SECTION 4. 201.01 (3) (e) of the statutes is created to read:

201.01 (3) (e) Any environmental trust bonds issued pursuant to a financing order of the commission under s. 196.027 (2).