

2003 ASSEMBLY BILL 843

February 16, 2004 – Introduced by Representatives JENSEN, GOTTLIEB, FRISKE, NISCHKE, HONADEL, RHOADES, STONE, SERATTI, MUSSER, VRAKAS, M. LEHMAN, GROTHMAN, TAYLOR, MCCORMICK, HAHN, JESKEWITZ, JOHNSRUD, SUDER, HUEBSCH, OLSEN, KAUFERT and GUNDERSON, cosponsored by Senators COWLES, PLALE, MOORE, M. MEYER, KANAVAS, WIRCH and ROESSLER. Referred to Committee on Energy and Utilities.

1 **AN ACT** *to renumber and amend* 201.01 (3); and *to create* 73.13, 196.027 and
2 201.01 (3) (e) of the statutes; **relating to:** the issuance of debt by natural gas
3 and electric public utilities to finance certain environmental activities.

Analysis by the Legislative Reference Bureau

This bill allows certain public utilities, with the approval of the Public Service Commission (PSC), to finance the cost of certain environmental control activities with the proceeds of “environmental trust bonds,” which the bill defines as bonds that are secured by charges paid by a public utility’s customers. The bill applies to natural gas and electric utilities, which the bill defines as “energy utilities.” The bonds may be issued by an energy utility, or an assignee of the energy utility, including an affiliate.

An energy utility that applies to the PSC for an order approving the issuance of the bonds must describe the environmental control activities that the energy utility proposes to undertake and the reasons for undertaking the activities. An “environmental control activity” is defined as construction, installation, or otherwise putting in place equipment for controlling environmental pollution in connection with an energy utility plant that has previously been used to provide service to customers. In addition, the energy utility must estimate the costs of proposed activities and indicate whether the energy utility proposes to finance all or only a specified portion of such costs with the bonds. Also, the energy utility must estimate the financing costs of issuing the proposed bonds.

No later than 90 days after the PSC receives an application, the PSC must issue an order that rejects or approves the application. The PSC must approve the

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application if the order will result in lower costs to customers than would alternative methods of financing environmental control activities, the order is otherwise consistent with the public interest, and the order is prudent, reasonable, and appropriate. The bill refers to an order that approves an application as a “financing order.” If the PSC issues a financing order, the order must specify the amount of environmental control and financing costs that the energy utility may recover through charges that customers in the energy utility’s service territory must pay over a period specified in the order. The bill refers to such charges as “environmental control charges.” The PSC may exclude a portion of environmental control costs from recovery as environmental control charges only if the energy utility indicates in the application that it does not propose to finance that portion with bonds. In addition, the order must specify the “environmental control property” that is created and that may be used to secure the bonds. “Environmental control property” is defined as the right, specified in the order, to impose, collect, or receive the environmental control charges. “Environmental control property” is also defined to include all revenues and proceeds arising from such right.

The bill also requires the PSC, without holding a hearing, to adjust the environmental control charges that are approved in a financing order. The order itself must include a formula that the PSC must apply for making adjustments to environmental control charges at least annually within 45 days of the anniversary date of the issuance of the bonds. The purpose of the formula is to make any adjustments to the charges that are necessary based on any overcollection or undercollection of the charges or are necessary to ensure the energy utility’s or an assignee’s timely recover of the environmental control and financing costs. The bill also allows the PSC to issue a subsequent financing order for retiring or refunding the bonds issued pursuant to the original financing order. The PSC may issue a subsequent order if the financing costs of bonds issued pursuant to the subsequent order are lower than the financing costs of the bonds issued pursuant to the original order. The PSC may also issue a subsequent order if retiring or refinancing the bonds issued pursuant to the original order is otherwise in the public interest.

The bill prohibits the PSC from revoking a financing order, except for changes made by a subsequent financing order described above. In addition, the bill provides that a financing order remains in effect until 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. Also, the bill provides that a financing order issued to an energy utility remains in effect notwithstanding the bankruptcy of the energy utility. The bill also creates the following limits on the PSC’s jurisdiction over an energy utility that is issued a financing order: 1) the PSC may not consider environmental trust bonds to be the debt of the energy utility; 2) the PSC may not consider the environmental control charges paid under the order to be the revenue of the energy utility; and 3) the PSC may not consider the environmental control or financing costs specified in the order to be the costs of the energy utility. In addition, the bill prohibits the PSC from determining that any action taken by an energy utility that is consistent with the order is unjust or unreasonable.

In addition, the bill does all of the following:

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1. The bill establishes legal characteristics of environmental control property that is created in a financing order and of any sale, assignment, or transfer of such property.

2. The bill provides that, with certain specified exceptions, the state's version of article 9 of the Uniform Commercial Code governs the granting and enforcing of security interests in environmental control property created in a financing order.

3. The bill provides that the state is not liable on environmental control bonds and that the bonds are not public debt.

4. The bill requires an energy utility to place the proceeds of any environmental trust bonds into a separate account and use the proceeds only for paying environmental control and financing costs.

5. The bill requires an energy utility that is issued a financing order to provide annual explanations of environmental control charges to its customers.

6. The bill provides that requirements under current law that apply to the issuance of securities by energy utilities do not apply to the issuance of environmental trust bonds under the bill.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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

1 **SECTION 1.** 73.13 of the statutes is created to read:

2 **73.13 Environmental trust bonds.** The department of revenue shall not
3 consider the acquisition, ownership, or disposition of any direct interest in an
4 environmental trust bond, as defined in s. 196.027 (1) (j), for the purpose of
5 determining whether a person is subject to any tax imposed by this state or by a local
6 governmental unit, as defined in s. 16.97 (7).

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

8 **196.027 Environmental trust financing. (1) DEFINITIONS.** In this section:

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

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

4 (c) “Energy utility” means a public utility engaged in the transmission,
5 delivery, or furnishing of natural gas by means of pipes or mains, heat, light, or power
6 or any successor to such a public utility.

7 (d) “Environmental control activity” means the construction, installation, or
8 otherwise putting into place environmental control equipment in connection with an
9 energy utility plant that has been used to provide service to customers before
10 beginning the construction, installation, or otherwise putting into place
11 environmental control equipment.

12 (e) “Environmental control charge” means a charge paid by customers of an
13 energy utility for the energy utility to recover environmental control costs and
14 financing costs.

15 (f) “Environmental control cost” means capital cost, including capitalized cost
16 relating to regulatory assets, incurred or expected to be incurred by an energy utility
17 in undertaking an environmental control activity. “Environmental control cost” does
18 not include any monetary penalty, fine, or forfeiture assessed against an energy
19 utility by a government agency or court under a federal or state environmental
20 statute, rule, or regulation.

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

25 (h) “Environmental control property” means all of the following:

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

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

6 (i) “Environmental pollution” means the contamination or rendering unclean
7 or impure of the air, land, or waters of the state, or the making of the same injurious
8 to public health, harmful for commercial or recreational use, or deleterious to fish,
9 bird, animal, or plant life.

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

16 (k) “Financing cost” means any of the following:

17 1. Debt service, including interest, that is payable on environmental trust
18 bonds.

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

21 3. Any other cost related to issuing and servicing environmental trust bonds,
22 including servicing fees, trustee fees, legal fees, administrative fees, placement fees,
23 capitalized interest, and rating agency fees.

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

ASSEMBLY BILL 843**SECTION 2**

1 (k) “Financing order” means an order issued by the commission under sub. (2)
2 that allows for the issuance of environmental trust bonds, the collection of
3 environmental control charges, and the creation of environmental control property.

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

8 1. Describe the environmental control activities that the energy utility
9 proposes to undertake and the reasons for undertaking the activities.

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

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

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

18 5. Estimate the environmental control charges necessary to recover the
19 environmental control costs and financing costs estimated in the application.

20 (b) *Commission powers and duties.* 1. No later than 90 days after receiving an
21 application under par. (a), the commission shall issue a financing order or an order
22 rejecting the application. The commission shall issue a financing order if the
23 commission finds that the order will result in lower costs to customers than would
24 alternative methods of financing environmental control activities, is otherwise
25 consistent with the public interest, and is prudent, reasonable, and appropriate.

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

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

6 b. For the period specified in subd. 2. a. require that, as long as any customer
7 resides in the service territory of the energy utility as that territory exists on the date
8 the financing order is issued, the customer shall pay environmental control charges
9 to the energy utility or its assignees regardless of whether the customer obtains
10 service from a different energy utility or other energy supplier, including a
11 municipality.

12 c. Include a formula for making any adjustments in the environmental control
13 charges that customers are required to pay under the order and making any
14 adjustments that are necessary to correct for any overcollection or undercollection
15 of the charges or to otherwise ensure the energy utility's or assignee's timely recovery
16 of environmental control costs and financing costs. The order shall require the
17 commission to apply the formula at least annually within 45 days of the anniversary
18 date that environmental trust bonds are issued pursuant to the order and to approve
19 any adjustments that result from application of the formula. The commission shall
20 apply a formula and make any adjustments under this subd. 2. c. without a hearing.

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

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

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1 control property to an assignee and the pledge of the environmental control property
2 to secure environmental trust bonds.

3 4. Except as provided in subd. 2. c., a financing order is irrevocable and the
4 commission may not reduce, impair, or otherwise adjust environmental control
5 charges approved in the order.

6 (c) *Subsequent orders.* The commission may issue a subsequent financing order
7 that provides for retiring or refunding environmental trust bonds issued pursuant
8 to the original financing order if the commission finds that environmental trust
9 bonds issued pursuant to the subsequent financing order have lower financing costs
10 than the environmental trust bonds issued pursuant to the original financing order
11 or that retiring or refunding the environmental trust bonds issued pursuant to the
12 original financing order is otherwise in the public interest.

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

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

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

23 3. An application by an energy utility for a financing order and commission
24 approval of a financing order are in addition to and do not replace any other

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1 application or approval under this chapter that may be required for environmental
2 control activities.

3 **(3) EXCEPTIONS TO COMMISSION JURISDICTION.** If the commission issues a
4 financing order to an energy utility, the commission may not, in exercising its powers
5 and carrying out its duties under this chapter, including any power or duty regarding
6 rate making, consider the environmental trust bonds issued pursuant to the order
7 to be the debt of the energy utility, the environmental control charges paid under the
8 order to be the revenue of the energy utility, or the environmental control costs or
9 financing costs specified in the order to be the costs of the energy utility, nor may the
10 commission determine that any action taken by an energy utility that is consistent
11 with the order is unjust or unreasonable.

12 **(4) ENERGY UTILITY DUTIES.** (a) An energy utility shall place the proceeds of any
13 environmental trust bonds issued pursuant to a financing order in a separate
14 account and may use the proceeds only for paying environmental control costs and
15 financing costs.

16 (b) An energy utility shall annually provide to its customers a concise
17 explanation of the environmental control charges approved in a financing order
18 issued to the energy utility. The explanation may be made by bill inserts, Web site
19 information, or other appropriate means.

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

23 **(5) ENVIRONMENTAL CONTROL PROPERTY.** (a) *In general.* 1. Environmental
24 control property that is specified in a financing order shall constitute a present
25 property right notwithstanding that the imposition and collection of environmental

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1 control charges depend on the energy utility to which the order is issued performing
2 its servicing functions relating to the collection of environmental control charges and
3 on future energy consumption. Such property is considered to exist whether or not
4 the revenues or proceeds arising from the property have accrued and whether or not
5 the value of the property is dependent on the receipt of service by customers of an
6 energy utility.

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

10 3. Environmental control property specified in a financing order issued to an
11 energy utility may be transferred, sold, conveyed, or assigned to any person,
12 including an affiliate of the energy utility, and may be pledged to secure
13 environmental trust bonds issued pursuant to the order. Each such transfer, sale,
14 conveyance, assignment, or pledge by an energy utility or affiliate of an energy utility
15 is considered to be a transaction in the ordinary course of business.

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

23 5. The interest of an assignee or pledgee in environmental control property
24 specified in a financing order issued to an energy utility, and in the revenue and
25 collections arising from that property, are not subject to setoff, counterclaim,

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1 surcharge, or defense by the energy utility or any other person or in connection with
2 the bankruptcy of the energy utility or any other entity.

3 6. Any successor to an energy utility, whether pursuant to any bankruptcy,
4 reorganization, or other insolvency proceeding, or pursuant to any merger or
5 acquisition, sale, or transfer by operation of law, as a result of energy utility
6 restructuring or otherwise, shall perform and satisfy all obligations of the energy
7 utility under a financing order in the same manner and to the same extent as the
8 energy utility including collecting and paying to the person entitled to receive them
9 revenues with respect to the environmental control property.

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

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

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

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

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

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

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

14 1. The sale, assignment, or transfer is an absolute transfer of, and not a pledge
15 of or secured transaction relating to, the seller's right, title, and interest in, to, and
16 under the environmental control property, if the documents governing the
17 transaction expressly state that the transaction is a sale or other absolute transfer.
18 After such a transaction, the environmental control property is not subject to any
19 claims of the seller or the seller's creditors, other than creditors holding a prior
20 security interest in the environmental control property perfected under par. (b).

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

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

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

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

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

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

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

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

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

18 (a) The state, the investment board, public officers, municipal corporations,
19 political subdivisions, and public bodies.

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

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

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1 **(8) STATE PLEDGE.** (a) In this subsection, “bondholder” means a person who
2 holds an environmental trust bond.

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

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

7 2. Except as allowed under this section, reduce, alter, or impair environmental
8 control charges that are imposed, collected, and remitted for the benefit of the
9 bondholders until any principal, interest, premium, or other charge incurred, or
10 contract to be performed, in connection with environmental trust bonds held by the
11 bondholders are paid or performed in full.

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

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

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

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

