

2005 DRAFTING REQUEST

Bill

Received: 08/02/2005

Received By: jkreye

Wanted: Soon

Identical to LRB:

For: Mark Gottlieb (608) 267-2369

By/Representing: denise

This file may be shown to any legislator: NO

Drafter: jkreye

May Contact:

Addl. Drafters:

Subject: Shared Revenue

Extra Copies:

Submit via email: YES

Requester's email: Rep.Gottlieb@legis.state.wi.us

Carbon copy (CC:) to: joseph.kreye@legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Public utility mitigation payments

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	jkreye 08/03/2005	lkunkel 08/04/2005		_____			S&L
/1			rschluet 08/04/2005	_____	mbarman 08/04/2005	lemery 08/12/2005	

FE Sent For:

<END>

→ At Intro,

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/?	jkreye	1/mk 8/4					

FE Sent For:

<END>

STATE OF WISCONSIN - LEGISLATIVE REFERENCE BUREAU

LRB

Research (608-266-0341)

Library (608-266-7040)

Legal (608-266-3561)

LRB

8-2

Denise

Mark Gottlieb — undo veto regarding
mitigation payment

7-2370



Kreye, Joseph

From: Solie, Denise
Sent: Wednesday, July 27, 2005 10:39 AM
To: Kreye, Joseph
Subject: Mitigation payments

Importance: High



Scan001.PDF

Joe,

As you may already know, the Governor vetoed language in the budget regarding mitigation payments.

Attached is a scan of the relevant portion of a Supreme Court decision regarding mitigation payments. Rep. Gottlieb would like a bill drafted, as soon as possible, to correct their misinterpretation regarding the issue of retroactivity, contained in sections 272-274.

Please call me with questions. Thanks.

Denise Solie
Rep. Mark Gottlieb
(608) 267-2370

cases. Also, Wis. Stat. §§ 751.06 and 752.35 provide a procedural mechanism for discretionary appellate review and reversal on grounds not preserved in the circuit court.

Village of Trempealeau v. Mikrut, 2004 WI 79, ¶17, 273 Wis. 2d 76, 681 N.W.2d 190 (citation omitted).

¶271 We believe this case to be one of the "exceptional" cases where it is appropriate to relieve parties of any waiver. Given the public importance of the legal issues and ultimate result in this case, it is more important in this instance to settle the legal issues raised correctly, rather than hold parties to any waiver. We also note that if we were to hold the PSC to any waiver regarding the retroactive application of § 196.37, the City would be precluded from arguing that the agreement at issue falls within the exclusion to the statutory definition of "mitigation agreement" in § 196.20(7)(a). The circuit court specifically stated: "The parties agree that the agreement between the City of Oak Creek and WEC was submitted to the PSC before June 10, 2003 and involves a 'mitigation payment' within the meaning of sec. 196.20(7)" (emphasis added).

¶272 Wisconsin Stat. § 196.20(7)(c) provides: "The commission shall only approve a mitigation payment agreement that is received by the commission before June 10, 2003, and, if the commission finds the agreement to be reasonable, shall not subsequently modify the agreement." There is no dispute that the agreement in this case was received by the PSC before June

10, 2003.⁶³ However, the effective date of 2003 Wis. Act 89 was December 17, 2003, a full month after the PSC rendered its final decision and order.⁶⁴ Although § 51 of 2003 Wis. Act 89 contained three specific initial applicability provisions, § 196.20(7) was not listed in any of them.

¶273 Simply put, 2003 Wis. Act 89 was not in effect on November 10, 2003, the date the PSC rendered its final decision and order in this case. Thus, there simply was no way the PSC could have evaluated the mitigation payment agreement in this case under the standards set forth in § 196.20(7). Further, there is nothing in the text of 2003 Wis. Act 89 that expressly indicates the legislature intended § 196.20(7) to apply retroactively to PSC orders issued before the Act's effective date. Likewise, there is no "necessary implication" in the text of § 196.20(7) that the statute was intended to apply retroactively. State v. Chrysler Outboard Corp., 219 Wis. 2d 130, 162, 580 N.W.2d 203 (1998).

¶274 That the statute provides the PSC "shall only approve a mitigation payment agreement that is received by the

⁶³ We note that the City's position on appeal is somewhat inconsistent. On the one hand, it argues that Wis. Stat. § 196.20(7) applies to the agreement at issue because the agreement was filed before June 10, 2003. Yet, the City also argues that the agreement at issue is not subject to the provisions of Wis. Stat. § 196.20(7)(c) because the agreement is not a "mitigation agreement" as defined in Wis. Stat. § 196.20(7)(a).

⁶⁴ Pursuant to Wis. Stat. § 991.11, every act of the legislature takes effect the day after its date of publication unless the act specifically provides otherwise.

commission before June 10, 2003" does not "necessarily implicate" an intent that the statute apply retroactively. Given the effective date of 2003 Wis. Act 89 and the absence of § 196.20(7) from the initial applicability provisions of § 51 of the Act, the only "necessary implication" in the statute is that the statute applies to mitigation payment agreements received by the PSC prior to June 10, 2003, that are considered by the PSC on or after December 18, 2003. A contrary conclusion would require every mitigation payment agreement approved or rejected by the PSC issued prior to December 18, 2003, to be reconsidered. Therefore, we conclude that Wis. Stat. § 196.20(7) does not apply to the agreement at issue in this case.⁶⁵

¶275 The City concedes that if § 196.20(7) does not apply to this case, then the PSC decision in relation to the agreement between the City and WEC is to be evaluated under § 196.37, governing the PSC's ratemaking authority. As noted supra, under

⁶⁵ Even if we assume, *arguendo*, that the statute does apply retroactively to the PSC's order in this case, under the City's argument, the statute nonetheless would not apply to the agreement at issue here. The City argues that the agreement here is not a "mitigation payment agreement" as defined in § 196.20(7)(a) because the agreement here relates to "health and safety impacts." If we were to accept the City's argument, then § 196.20(7)(c) simply has no bearing in this case because the statute applies only to "mitigation payment agreement[s]." Rather than excepting agreements related to "health and safety impacts" from the reasonableness standard in § 196.20(7)(c), as the City argues, the statute simply does not apply at all to agreements that fail to meet the definition of "mitigation payment agreement" in § 196.20(7)(a).

the agreement, the mitigation payments from WEC are contingent upon the PSC approving the payments as part of WEC's "Facility Lease." Given that the "Facility Lease" is part of WEC's PTF expansion project, which is designed to provide adequate service to ratepayers, the PSC would be required to allow WEC to pass the costs of the lease onto ratepayers, Wis. Pub. Serv. Corp. v. PSC, 109 Wis. 2d 256, 263, 325 N.W.2d 867 (1982), assuming such increased rates were not "unjust" or "unreasonable." Wis. Stat. § 196.37(2).

¶276 Wisconsin Stat. § 196.37(2) provides:

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.

¶277 The City agrees that in analyzing the PSC's determination under the framework of § 196.37(2), the appropriate inquiry is whether the PSC's decision had a rational basis. The PSC's final decision and order notes that due to a substantial change in the state's shared revenue law, the City will receive an annual sum of money exceeding the sum the City would receive from WEC ratepayers once the first proposed power plant is scheduled to be in service. Under the new law, municipalities hosting a power plant are to be paid double and sometimes triple what they receive under the current law.

¶278 The PSC concluded that "mitigation payments are not required while compensating shared revenue dollars for ERGS are forthcoming." The PSC further concluded that the increased money in shared revenue would "partially offset the city's costs" once the first plant is in service and once both plants were in service "the shared revenue payments will fully replace any mitigation payment under the Development Agreement[.]" The PSC further noted "the annual state shared revenue payments to the City of Oak Creek when ERGS is completed will exceed the amount the city is requesting in the form of mitigation payments from [WEC] ratepayers." Therefore, the PSC ruled that "it is appropriate to reduce the annual mitigation payment by the amount of shared revenue that the city receives for ERGS."

¶279 The PSC, noting the City would incur costs during the construction of ERGS, left intact the mitigation payments in full while the first SCPC is being constructed and merely reduced mitigation payments during the construction of the second SCPC in proportion to the amount of money the City would receive in increased shared revenue. Bearing in mind that one of the purposes of judicial review of final orders of the PSC is to "protect the interests of the ratepayer," Algoma, 91 Wis. 2d at 265, we cannot conclude that the PSC's decision that ratepayers in this state should not be double-taxed for the ERGS project is without a rational basis.

¶280 While the City argues that the costs of ERGS project to the City are far in excess of the amount requested as mitigation payments, the PSC specifically found that "mitigation

payments are not required while compensating shared revenue dollars for ERGS are forthcoming." Given the public hearing testimony that the increased shared revenue payments are "almost exactly the same amount as the city is requesting in the form of mitigation payments[,] " we cannot conclude the PSC's finding was without "substantial evidence." Therefore, we uphold the PSC's determination that the mitigation payments to the City from ratepayers under its agreement with WEC should be reduced in an amount corresponding to the increased monies the City will receive in the form of shared revenue. As such, we reverse that part of the circuit court's decision reversing and remanding this issue to the PSC.

V. CONCLUSION

¶281 In sum, we hold as follows. First, we uphold the PSC's determination that WEC's application was "complete." In reaching this conclusion, we hold: that the PSC's determination of completeness is judicially reviewable; that the PSC reasonably concluded that WEC's application contained two distinct site alternatives; that WEC's application contained all necessary information relating to DNR permits; and that WEC's application contained all necessary information relating to transmission line agreements.

¶282 Second, we conclude that the PSC's approval of WEC's CPCN application was not contrary to law or unreasonable. When it approves an application for a power-generating facility like the one WEC proposed, the PSC must interpret, harmonize, and apply the provisions of the EPL, the Plant Siting Law, and WEPA.

Applying a deferential standard of review, we conclude that the PSC reasonably performed all these tasks in issuing the CPCN. We also conclude that the PSC did not exceed its authority in conditionally issuing the CPCN.

¶283 Third, we conclude the PSC did not erroneously reduce the mitigation payments from WEC to the City of Oak Creek, as we conclude this decision was a proper exercise of the PSC's ratemaking authority.

¶284 Thus, we uphold the PSC's order in all respects.

By the Court.—The decision of the circuit court is reversed.

¶285 N. PATRICK CROOKS, J., did not participate.

Kreye, Joseph

From: Musser, Terry

Sent: Friday, July 22, 2005 1:48

To: Kreye, Joseph

Subject: LRB-3353/P1dn

Joe,

Terry is circulating LRB 3353/P1 for cosponsors.

Please have it drafted as 3353/1.

Thanks!

Kathie @ Rep Musser's Office

08/02/2005

Kreye, Joseph

From: Sabatino, Connor
Sent: Thursday, July 21, 2005 1:55 PM
To: Kreye, Joseph
Subject: Drafting Request for Rep. Zepnick

Joe,

I have a drafting request from Rep. Zepnick regarding taxation in Milwaukee and I think you're probably the one to talk to.

In short:

Josh would like a bill requiring that any increase in revenue for Milwaukee County Parks would have to result in a credit towards property tax bills.

Now, let me explain as best I can:

Right now Milwaukee County Parks are funded through Milwaukee County, with the money coming out of a general fund (or whatever it is called). For our example, let's say that amount is \$30 million. There are some proposals floating around, including one we drafted, which would allow Milwaukee County to tack on an additional 0.5% sales tax, with the new revenue going exclusively to pay for Milwaukee County Parks. Let's say the new revenue of a 0.5% bump would be \$60 million. This \$60 million would replace the \$30 million being taken out of the general fund, now leaving an extra \$30 million to play with in the general fund. Plenty of people would have plenty of ideas on how to now spend this extra \$30 million. Josh would like a bill that requires this extra \$30 million in the general fund to go 100% toward property tax relief, showing up as a credit on property tax bills.

If I had to think of a more technical way to describe it myself it would be something like: Any decrease in general fund revenue spent by Milwaukee County on Milwaukee County Parks because of a supplemental source of income, requires a dollar-for-dollar credit on the property tax bills of Milwaukee County residents.

This will undoubtedly raise some questions, and if you want to call or email I will do my best to see if Josh can help or track down someone at the County who can.

The biggest hurdle I can think of is whether or not this bill works in theory. Can we even adequately draft legislation that does nothing, instead simply addressing a *potential* future situation? Also, how much can we dictate what the County does with their general fund?

On another note - thanks for all the work on the gas tax holiday draft you did for us. Unfortunately, it turned out that we were creating and trying to fill a hole with a chunk of money that wasn't even big enough to fill it. Gas tax revenue far exceeded any sales tax collections from new car dealerships. So... we're regrouping on it for now trying to decide if that killed our idea or if maybe we could do a 25% holiday instead of 50%.

Connor
Office of Rep. Zepnick
608-266-1707



State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-3438/2

JK.....

mk
RM/mtk

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

in 8-3-05

due FRIDAY 8-5

GenCat

1 AN ACT ...; relating to: mitigation payment agreements. ✓

Analysis by the Legislative Reference Bureau

Under current law, the Public Service Commission (PSC) may only approve a mitigation payment agreement that it received before June 10, 2003, and, if the PSC found the agreement to be reasonable, may not modify the agreement. ✓ A mitigation payment is, generally, an amount that a public utility pays to a community where a power production plant is located to mitigate the effects of the plant on the community. ✓

Under this bill, ✓ If the PSC receives a mitigation payment agreement before June 10, 2003, and does not determine that the agreement is unreasonable before November 11, 2003, ✓ mitigation payments in accordance with the terms of the agreement are recoverable in rates charged to consumers. ✓

✓ For further information see the **state and local** 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:

2 SECTION 1. 196.20 (7) (c) of the statutes is renumbered 196.20 (7) (c) 1. and
3 amended to read:

4 196.20 (7) (c) 1. The Except as provided in subd. 2., the commission shall only
5 approve a mitigation payment agreement that is received by the commission before

1 June 10, 2003, and, if the commission finds the agreement to be reasonable, shall not
2 subsequently modify the agreement.

3 **History:** 1981 c. 148; 1983 a. 27, 53, 461, 502; 1985 a. 182 s. 57; 1985 a. 297; 1989 a. 344; 1993 a. 496; 1995 a. 27, 363; 1997 a. 27; 2003 a. 89.

3 **SECTION 2. 196.20 (7) (c) 2. of the statutes is created to read:**

4 196.20 (7) (c) 2. If the commission receives a mitigation payment agreement
5 before June 10, 2003, and does not determine that the agreement is unreasonable
6 before November 11, 2003, mitigation payments in accordance with the terms of the
7 agreement shall be recoverable in rates, notwithstanding any subsequent
8 limitations imposed by the commission on the mitigation payments.

9 **SECTION 3. Initial applicability.**

10 (1) This act ^efirst applies retroactively to agreements received before June 10,
11 2003, and to determinations made before the effective date of this subsection.

12

(END)

Emery, Lynn

From: Solie, Denise
Sent: Thursday, August 11, 2005 4:59 PM
To: LRB.Legal
Subject: Draft review: LRB 05-3438/1 Topic: Public utility mitigation payments

It has been requested by <Solie, Denise> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 05-3438/1 Topic: Public utility mitigation payments