

WISCONSIN SUPREME COURT
TUESDAY, APRIL 17, 2012
1:30 p.m.

This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Dane County Circuit Court, Judge John C. Albert, presiding.

2010AP2762

[Wis. Industrial Energy Group v. PSC](#)

This certification involves a dispute over the Wisconsin Public Service Commission's (PSC) approval process and whether a certificate of public convenience and necessity was needed for a Wisconsin public utility to construct a wind electric generating facility in Minnesota.

Specifically, the District IV Court of Appeals asks the Supreme Court to review if the PSC erred in concluding that a Wisconsin public utility may construct an out-of-state large electric generating facility with a capacity greater than 100 megawatts without such a certificate.

Some background: In June of 2008, Wisconsin Power and Light Company filed an application with the PSC to construct a 200 megawatt wind electric generating facility in Minnesota, to be known as the Bent Tree Wind Farm. The Minnesota public utilities commission also investigated and approved the project under Minnesota law.

After requesting comments addressing whether it should review Wisconsin Power and Light's application under § 196.49, the certificate of authority statute, or under 196.491, the more demanding certificate of public convenience and necessity statute, the PSC concluded by a two-to-one majority that it was appropriate to proceed under § 196.49. A contested case proceeding was held in April of 2009, and on July 30, 2009, the PSC unanimously approved the construction.

On April 30, 2010, Wisconsin Power and Light filed for approval to increase its electric rates by re-opening its prior year rate case for the limited purpose of presenting the costs of, among other things, the Bent Tree Wind project. After a contested case proceeding, the PSC unanimously approved recovery of the costs associated with the Bent Tree Wind project.

Wisconsin Industrial Energy Group, Inc. and Citizens Utility Board, rate payer advocacy organizations with members who are customers of Wisconsin Power and Light, petitioned Dane County Circuit Court to review the PSC's decisions.

The circuit court denied the petition for review; the Industrial Energy Group and Citizens Utility Board appealed.

District IV notes that the consumers take the position that rate payer protection criteria is mandatory in large facility approval situations because large facilities inherently have greater potential to significantly affect rate payers. District IV says the question arises whether the legislature intended to give the PSC the discretion to approve a large facility without considering rate payer protection criteria. The consumers argue

there is no apparent reason why rate payers should lose their mandatory safeguard when a large facility is built out of state.

District IV says it is left with two problematic interpretations in resolving this appeal. It says one view would apply § 196.491 to the wind farm because it is sufficiently large, but that would bring into play some specific § 196.491 requirements that cannot be literally applied to an out-of-state facility. It says this view would treat similar facilities the same way for purposes of rate payer protection, regardless of where a facility is located. District IV says the contrary view would avoid misfits in some of the subsections of § 196.491, but that would deprive rate payers of mandatory protections and would produce a seemingly illogical distinction based on a facility's location.

District IV notes that in this case it looks like the PSC did more than was necessary under § 196.49 but did less than would be required under § 196.491.