

VILLAGE OF MAZOMANIE, WISCONSIN
A Municipal Corporation

Petitioner,
Vs.

Case No.: 14CV2723

WISCONSIN PUBLIC SERVICE COMMISSION,

Respondent.

DECISION AND ORDER

This is a Petition for Judicial Review filed by the Village of Mazomanie (Village) seeking review of a written order by the Wisconsin Public Service Commission (PSC) dated September 10, 2014. The parties fully briefed this matter, and oral argument was heard on April 13, 2015. Based on the submissions of the parties and arguments of counsel, the Court makes the following Decision and Order.

FACTS

This case arises out of a complaint filed by Kristy L. Boehnen against the Village regarding a frozen lateral serving 413 West Hudson Street, Mazomanie, Wisconsin. There are numerous facts in the record surrounding the review process and the denial of a hearing, and the Court will supplement the facts in the analysis section as needed.

Ms. Boehnen's mother resides at the subject property. The winter of 2013-14 was particularly cold, and the Village was concerned about frozen water lines. The Village sent a letter to residents of the Village, including Ms. Boehnen's mother, and advised them that they needed to run water to prevent frozen water pipes. It is undisputed that Ms. Boehnen's mother was notified of the need to run water, and did not run water as directed by the Village. The lateral froze sometime between February 7 and February 14, 2014.

Ms. Boehnen contacted the Village on February 17, 2014, and was told that because water was not run so as to prevent freezing of the lateral, the Village was not responsible for thawing the lateral. The Village relied on PSC sec. 185.88(2)(c):

PSC 185.88 Frozen laterals.

- (1) Thawing of a customer's lateral shall be at the utility's expense if:
 - (a) The freeze-up is a direct result of a utility disconnect and the disconnection occurs during a time when conditions are such that freeze-up could reasonably be expected to occur or;
 - (b) The customer's portion of lateral is electrically conductive and:
 - 1. It is the first thaw for the customer at the location and;
 - 2. The utility has not provided the customer with seasonal notice of the corrective actions to be taken for a known condition.
- (2) **Lateral thawing shall be at the customer's expense if:**
 - (a) The customer's lateral is not electrically conductive and the freeze-up is not a direct result of a utility disconnect as set forth in sub. (1) (a) or;
 - (b) The customer neglected to provide or maintain proper insulation or protection for the lateral according to standard accepted practice, or specific utility instructions

on, for example, the required depth of burial needed to prevent freezing, or;

(c) The utility advises the customer of the corrective measures to be taken and the customer does not follow the utility's advice. (See s. [PSC 185.35 \(7\)](#) for bill adjustment where a utility requests a customer to let water flow to prevent freezing), or;

(d) If the utility disconnects for a dangerous condition.

Ms. Boehnen contacted Hometown Plumbing, LLC, and a plumber went to the property on February 18, 2014 to thaw the lateral. On the invoice he provided after doing the work, he stated that slush ice had formed “at the very end” of a 45 foot length of water jetter hose, and, “we assume that the source of water freezing is upstream, under Hudson Street and towards the municipal main pipe.” Ms. Boehnen paid a \$693.75 invoice to Hometown Plumbing, and sought reimbursement from the Village because of her contention that the lateral freeze occurred on the utility side of the lateral, not on the customer side.

There was initially an informal review process under PSC 185.39(2)(c). This provision states, in relevant part:

Based on information provided by the utility and the customer, the commission staff shall make an informal determination for settlement of the dispute and communicate that determination to both parties. Either party to the dispute may request and receive the commission staff determination, and the basis for it, in writing. Commission staff shall inform any customer disputing an informal determination of the right to pursue a formal review.

After reviewing the information from both sides, the PSC staff determined that the Village was responsible for thawing the utility-owned portion of the lateral and could not hold the property owner responsible for the cost of thawing the lateral. The PSC determined that the Village must reimburse Ms. Boehnen \$693.75, because it determined that based on the language on the plumber's invoice, the freeze was on the utility side of the lateral.¹ Ms. Boehnen contacted the PSC after that determination and claimed that the Village was ignoring the PSC recommendation. The PSC contacted the Village on June 9, 2014 and told it that the informal review recommendation could not be ignored, and the Village must comply or request formal review. The Village filed a timely written request for formal review on June 19, 2014.

On August 14, 2014, during an open meeting of the PSC, the PSC determined that the Village's request for hearing was without merit. It refused to give the PSC a formal hearing on the issue, and issued its Final Order on September 10, 2014, which is the subject of this judicial review. Additional facts necessary to develop the analysis are set forth infra.

STANDARD OF REVIEW

There are two issues that require review, and the parties disagree on what standard to apply. The Order this Court is reviewing has two substantive parts: 1) the PSC ordered the Village to reimburse Ms. Boehnen for the \$639.75 in costs she incurred

¹ It is interesting to note that there was never any actual proof, even to a preponderance of the evidence that the lateral freeze was on the "utility side" versus the "customer side."

in thawing the frozen lateral; and 2) the PSC's determination that the Village's request for a formal review of the complaint was without merit.

The first issue is whether the PSC has the statutory authority under its enabling statutes. to order the Village to reimburse Ms. Boehnen for the plumber bill. The nature and scope of an agency's powers are issues of statutory interpretation. Wisconsin Citizens Concerned for Cranes & Doves v. Wisconsin Dep't of Natural Res., 2004 WI 40, ¶ 6, 270 Wis. 2d 318, 329, 677 N.W.2d 612, 617. In interpreting statutes, the Supreme Court has held:

When interpreting a statute, our goal is to discern the intent of the legislature, which we derive primarily by looking at the plain meaning of the statute. The language of a statute is read in the context in which it appears in relation to the entire statute so as to avoid an absurd result. Words and phrases are generally accorded their common everyday meaning, while technical terms or legal terms of art are given their accepted legal or technical definitions. Wis. Stat. § 990.01(1). Words that are defined in the statute are given the definition that the legislature has provided. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." Thus, if the statute is unambiguous, we do not consult extrinsic sources such as legislative history to ascertain its meaning; we simply apply its plain meaning.

Id. (citations omitted). The Court is not bound by an agency's decision about the scope of its own power. Id. at 332. The review of the power granted by the enabling statute is de novo.

The second issue for review, that the PSC determined that the Village is not entitled to a formal hearing is founded on the PSC's interpretation of PSC 185.88. The

Court must determine what weight to give to the agency's interpretation of PSC 185.88 which relates to responsibility for thawing the lateral. An agency may benefit from great weight deference if four factors are met:

(1) [the] agency was charged by the legislature with the duty of administering the statute; (2) [the] interpretation of the agency is one of long-standing; (3) [the] agency employed its expertise or specialized knowledge in forming the interpretation; and (4) [the] agency's interpretation will provide uniformity and consistency in the application of the statute.

Brauneis v. State, Labor & Indus. Review Comm'n, 236 Wis. 2d 27, 32, 612 N.W.2d 635, 640 (Wis. 2000). Great weight deference is not mandated here, because the interpretation of PSC 185.88 is not long-standing, and in fact the PSC reached an opposite conclusion in a complaint against a Reedburg utility regarding the same issue – responsibility for a frozen lateral (PSC characterizes this interpretation as a “mistake.”). From the record, the Court cannot discern that the interpretation of sec. 185.88 required any specialized or technical knowledge—in fact, the interpretation adopted by the PSC was that of its legal counsel. While the PSC asserts a long-standing interpretation of the rule, there is no evidence in the record to suggest that is the case. Great weight deference is not required.

The Court will apply a de novo review to the PSC's interpretation of 185.88, because after a review of the entire record, this is really a question of statutory interpretation – interpreting what the rule means using the rules of statutory interpretation. Presumably this is why this PSC relied on the interpretation of its legal counsel regarding the meaning of the rule, not the interpretation of its technical staff

members. In fact, the PSC’s Order from which the Village appeals contains a statutory interpretation analysis of PSC 185.88. This case is unique in its scope of review, and all issues will be decided under a de novo standard.

ANALYSIS AND DECISION

I. THE ENABLING STATUTES DO NOT GIVE THE PSC EXPRESS OR IMPLIED AUTHORITY TO ORDER THE VILLAGE TO REIMBURSE A CUSTOMER FOR EXPENSES RELATING TO THAWING A FROZEN LATERAL.

The PSC relies on sec. 196.02, 196.03(1), 196.26, Stats. and chapter PSC 185 for its authority to order the Village to reimburse Ms. Boehnen for her damages relating to thawing the lateral. In determining whether an administrative agency exceeded the scope of its authority, the Court must examine the enabling statute to ascertain whether the statute grants express or implied authorization for the rule. See Wis. Hosp. Ass'n v. Natural Res. Bd., 156 Wis. 2d 688, 705, 457 N.W.2d 879 (Ct. App. 1990). Because the legislature creates administrative agencies as part of the executive branch, these agencies have “only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates.” Kimberly–Clark Corp. v. PSC, 110 Wis.2d 455, 461–62, 329 N.W.2d 143 (1983). An agency's enabling statute is to be strictly construed, and the Court resolves any reasonable doubt pertaining to an agency's implied powers against the agency. Id. at 462.

Sec. 196.02, Stats. states:

(1) Jurisdiction. 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.

This statute is broad, and contains no express authority for the PSC to order the Village to reimburse a resident for damages after the fact. The power to order a utility to reimburse a customer under these unique circumstances cannot be said to be a necessarily implied power of the PSC. This statute is to be strictly construed, and reasonable doubt regarding implicit authority must be resolved against the agency. This statute does not confer jurisdiction on the PSC to order the Village to reimburse Ms. Boehnen for her plumber expenses.

The next statute relied upon by the PSC, sec. 196.03(1), Stats. states:

(1) Subject to s. 196.63, a public utility shall furnish reasonably adequate service and facilities. The charge made by any public utility for any heat, light, water, telecommunications service or power produced, transmitted, delivered or furnished or for any service rendered or to be rendered in connection therewith shall be reasonable and just and every unjust or unreasonable charge for such service is prohibited and declared unlawful.

This statute clearly relates to rates and charges, and this not a rate or charge for services case. There is no express or implied authority to order payment of damages to Ms. Boehnen, who is not even a customer of the utility seeking reimbursement—the home where the frozen lateral was located was her mother’s home. No reasonable construction of this statute confers jurisdiction to the PSC.

Finally, the PSC relies on 196.26, Stats., and Chapter PSC 185 for jurisdiction. These statutes and administrative regulations relate primarily to the definition of a

complaint and process. In a review of all of the cases involving these statutes, none of them confer power on the PSC to order reimbursement for a complainant's damages for frozen laterals or general damages. The PSC's summary argument on these statutes for jurisdiction over this dispute between Ms. Boehnen and the Village is not persuasive, and the Court finds nothing that would confer jurisdiction on the PSC under these circumstances.

On a policy note, such a broad grant of authority would allow the PSC to become involved in all third-party actions involving utility companies. For example, assume a utility had a complaint for damages against a third-party, or a third-party had a claim for damages against a utility company. Under the PSC's interpretation, if a party made an informal complaint about the dispute, the PSC would have the power to adjudicate the dispute and circumvent the normal course of litigation. The PSC could order an informal dispute process binding and decide not to provide the parties a hearing on the issues. This could not have been the intention of the legislature when it granted regulatory powers to the PSC. The PSC has no jurisdiction to order the Village to reimburse Ms. Boehnen for her damages.

II. THE PLAIN MEANING OF 185.88 DOES NOT SEPARATE RESPONSIBILITY FOR EXPENSES BETWEEN “CUSTOMER OWNED” AND “UTILITY OWNED” PORTIONS OF THE LATERAL, SO THE ISSUE OF WHETHER THE VILLAGE WAS ENTITLED TO FORMAL REVIEW OF THE COMPLAINT IS MOOT.

The Court next reviews the PSC’s determination that the Village was not entitled to a hearing on the merits. A condition precedent would necessarily be that the PSC properly interpreted the meaning of PSC 185.88 in determining that the Village was not entitled to a hearing, and that Ms. Boehnen had presented enough evidence to justify her claim. As noted supra, the Court reviews the PSC’s interpretation of 185.88 de novo. The Court finds the PSC’s interpretation is contrary to the plain meaning of the rule, and formal review of the complaint is moot.

The rule at issue here is:

PSC 185.88 Frozen laterals.

- (1) Thawing of a customer's lateral shall be at the utility's expense if:
 - (a) The freeze-up is a direct result of a utility disconnect and the disconnection occurs during a time when conditions are such that freeze-up could reasonably be expected to occur or;
 - (b) The customer's portion of lateral is electrically conductive and:
 1. It is the first thaw for the customer at the location and;
 2. The utility has not provided the customer with seasonal notice of the corrective actions to be taken for a known condition.
- (2) Lateral thawing shall be at the customer's expense if:

- (a) The customer's lateral is not electrically conductive and the freeze-up is not a direct result of a utility disconnect as set forth in sub. [\(1\) \(a\)](#) or;
- (b) The customer neglected to provide or maintain proper insulation or protection for the lateral according to standard accepted practice, or specific utility instructions on, for example, the required depth of burial needed to prevent freezing, or;
- (c) The utility advises the customer of the corrective measures to be taken and the customer does not follow the utility's advice. (See s. [PSC 185.35 \(7\)](#) for bill adjustment where a utility requests a customer to let water flow to prevent freezing), or;
- (d) If the utility disconnects for a dangerous condition.

The PCS's interpretation in its Order inserts words that are not in the rule itself. For example, at page 5 of the Order, the PSC states that "185.88(1) provides that the thawing of the customer-owned portion of the lateral is at the expense of the utility if the customer-owned portion of the lateral is electrically conducive. . . ."

and it goes on to use the phrase "customer-owned portion of the lateral" throughout its Order. This is the foundation of the PSC's interpretation of the rule. However, a close reading of the rule only uses the phrase "customer's portion" in one section – 185.88(1)(b), and does not use it anywhere else in the rule. Only the phrase "customer's lateral" is used.

Statutory interpretation begins with the text of the statute. [State v. Popenhagen](#), 2008 WI 55, ¶ 35, 309 Wis. 2d 601, 621, 749 N.W.2d 611, 620. Statutory language is interpreted in the context in which it is used and in light of the surrounding or closely related statutes. [Id.](#) Statutes are interpreted to give effect to each word, to avoid

surplusage, to fulfill the objectives of the statute, and to avoid absurd or unreasonable results. Id.

Had the intent of the rule been to delineate responsibility for thawing the lateral between the customer-owned portion and the utility-owned portion, those words could have been used throughout the rule. Furthermore, the rule clearly uses “customer-owned portion” when it intends to refer to the customer’s portion of the lateral. The PCS’s order attempts to circumvent the plain language of the rule, and insert what it believes must have been the intent. This is not an appropriate analysis.

In this case, it is clear that lateral thawing shall be at the customer’s expense if the utility advises the customer of corrective measures to be taken and the customer does not follow the utility advice. It is undisputed that the Village advised Ms. Boehnen’s mother to run water during the particularly cold weather, and it is undisputed that she did not do that. The clear language mandates that the thawing of the lateral—not just the customer owned portion—is the customer’s responsibility under that circumstance.

Because the PSC did not correctly interpret PSC 185.88, whether a hearing was granted to the Village or not is moot.

ORDER

Based on the foregoing, it is hereby ordered that the Final Order of the PSC dated September 10, 2014 is vacated.

Dated this 10th day of July, 2015.

BY THE COURT:

_____/s/_____
HONORABLE RHONDA L. LANFORD
CIRCUIT JUDGE, BRANCH 16

cc: Carl Sinderbrand, Attorney for Village of Mazomanie
Andrew Cardon, Attorney for Wisconsin Public Service Commission