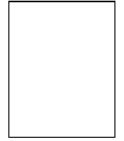


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Municipal Matters

Timely news in the area of municipal law

promotional material

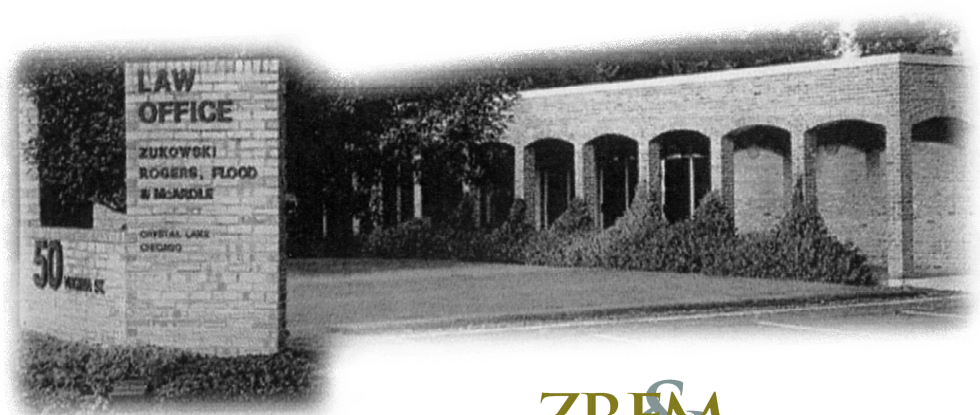
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INSIDE THIS ISSUE

Zukowski, Rogers, Flood & McArdle's quarterly newsletter that allows units of government and their employees to stay up-to-date on legal matters in an ever-changing legal climate.

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- Employment Implications of the Civil Union Act
- Dates to Remember
- ZRFM Attorney Speaking Engagements and News

Purchasing Power to Purchase Power? How Electric Power Aggregation May Lower Electric Costs for Municipalities, Businesses, and Residents

By Carlos Arévalo and Ruth A. Schlossberg

Increasing deregulation of the electric utility industry has begun to have real implications for local governments. In the mid-2000's, the State of Illinois began to permit changes which essentially separated the power generation business from the power transmission business. This meant that power purchasers, such as municipalities, had the option of buying power from suppliers other than their long-term, traditional franchise supplier—although that power would continue to be delivered over existing transmission lines. At the time, there were fierce debates about whether conditions really existed for genuine competition in the industry, but the intent was to create a competitive electric power market giving end-users the opportunity to reduce their power costs if they could take advantage of market prices.

In response, a number of municipalities in northern Illinois banded together in groups in an effort to negotiate more favorable electric rates than those they had traditionally received, without competitive bidding, from their existing franchise suppliers such as Commonwealth Edison. As a result, some municipalities have been able to reduce their electric costs by competitively bidding for power purchases. In this area, the largest municipal power purchasing group is the Northern Illinois Municipal Electric Collaborative ("NIMEC") which presently represents over 100 municipalities in northern Illinois. A NIMEC consultant organizes the members' bidding, and the consultant is compensated by an origination fee from the suppliers rather than by the municipalities themselves. A second smaller initiative in this area is the Northern Illinois Government Electric Cooperative ("NIGEC") made up of approximately a dozen municipalities which have coordinated their own power purchases without an outside consultant.

In August 2009 (effective January 1, 2010), the Illinois Power Agency Act (20 ILCS 3855/1-92) was amended to give non-home rule municipalities the authority to aggregate their electric load purchases as a group, instead of each municipality negotiating its own individual electric contract. The Act also allowed municipalities to aggregate

those loads for their residential and small commercial retail establishment end-users. In other words, the bill permits residents and small retail establishments to "ride on the coat-tails" of the municipality's power purchases and to obtain or increase the benefits of any cost-savings the municipality might enjoy for the purchase of power.

The statute contemplates two different types of aggregation programs. One is an "opt-in" program in which residents may simply choose to participate in a power purchasing program set up by the municipality. The second type of program is known as an "opt-out" program. Under an opt-out program, all residential and small commercial retail customers will be required, at least initially, to be part of the program and can only make their own electric utility purchases, outside of the program, if they formally opt-out of the program.

OPT-OUT PROGRAM: Because the opt-out program has a more "mandatory" aspect, the statute provides more procedures before one can be implemented. Most significantly, in order to create an opt-out program, the question must first be submitted to a referendum to determine whether this program shall be created. This referendum must be submitted to the electors at a regular election and must be passed by a majority of all those electors voting on the question. The question must be presented to the electors in the following form:

"Shall the {municipality or county in which the question is being voted upon} have the authority to arrange for the supply of electricity for its residential and small commercial retail customers who have not opted out of such program?"

If a majority of voters vote in favor of the referendum, then the municipality may implement an opt-out aggregation program. In order to do this, a majority of the municipality's corporate authorities will be required to approve an ordinance implementing the aggregation program. Thereafter, all residents and small retailers are automatically included in the program unless they opt-out. However, under the Act, the municipality has a duty to fully inform the resi-

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Welcome

In this issue, Carlos Arévalo and Ruth Schlossberg highlight the options municipalities have in collaborating to purchase electric service. Also, Kelly Cahill explores some of the implications that the recently passed Civil Union Act may have on employers.

Some important dates are also included from July 2011 to October 2011.

If you have any questions, comments, or suggestions for articles in upcoming issues, please contact us.

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Annual Treasurer's Report 2011 Legislation

When 2011 draws to a close units of government will no longer be required to publish a treasurer's report in their local newspaper. PA 97-146, which was signed into law in mid-July, includes an amendment to 30 ILCS 15/2 and becomes effective January 1, 2012. Instead of the treasurer's report a notice will have to be published on the availability of the audit report. The notice of availability must include, at a minimum, "the time period covered by the audit, the name of the firm conducting the audit, and the address and business hours of the location where the audit report may be publicly inspected."

Purchasing Power to Purchase Power?- continued from page 1

dents and retailers in advance that they have the right to opt-out of the program.

After approving an opt-out ordinance, the municipality with assistance from the Illinois Power Agency (IPA) will need to develop a plan of operation and governance for the aggregation program. Before adopting such a plan, municipalities are required to hold at least two public hearings. Before the first hearing, they will be required to publish a notice of the hearings at least once a week for two consecutive weeks in a newspaper of general circulation in the municipality. The notice needs to provide a summary of the potential plan and state the date, time and location of the hearings.

After all this has been completed, an aggregation plan can be adopted. Such plan must provide for universal access and equitable treatment, provide each class of customers with information describing electricity demand management and energy efficiency and meet any additional requirements established by law regarding aggregated service.

After the referendum, ordinances, and a plan of operation and governance for the aggregation program have all been passed, Illinois law then provides a process for soliciting bids and awarding contracts for electricity and other related services. This must happen in a specific prescribed order. The corporate authorities may ask electric utilities to submit, in electronic format, all the names and addresses of residential and small commercial retail customers in the area that are reflected in that electric utility's records at the time of the request. Any such information collected by the municipality will be subject to the limitations on disclosure outlined in the Public Utility Act and Consumer Fraud and Deceptive Practices Act. Municipalities should use care with any such confidential information provided to them.

For opt-out programs, the municipality will need to fully inform residential and small commercial retail customers in advance that they have the right to opt-out of the program. They must prominently state all the charges that will be made and will include full disclosure of the costs to obtain service under the Public Utility Act, how to access it, and the fact that it is available to them without penalty if they are currently receiving service under the Public Utility Act. The Illinois Power Agency is required to furnish citizens a list of all supply options available to them in a format that allows comparison of prices and product.

OPT-IN PROGRAM: In contrast, for opt-in programs, residential and small retail customers are given sixty (60) days after bids are received to commit to the terms of a bid that has been selected by the corporate authorities. Anyone who opts-in to the program will be committing to the terms agreed upon between the corporate authorities and the winning bidder.

ANALYSIS: Because this Act is still new, it is difficult to predict how many municipalities will choose to participate or how effective such participation will be in keeping costs down. According to the Executive Director for NIMEC, David Hoover, at the April 15, 2011 election, twenty-three (23) municipalities submitted aggregation questions for referendum and nineteen (19) of those passed.

At least two very interesting questions are raised by this power purchasing initiative. Perhaps most significantly is the question of whether this is an appropriate business for municipalities to be getting into in this economic time when increasingly limited resources are available to municipalities. While it is true that bulk purchasing could benefit both municipalities and residents, municipalities typically do not possess special expertise in the electric service industry much less in bidding on electric service contracts, thus making municipalities largely reliant on outside consultants to negotiate the bids. Tangentially, it is also fair to ask what special skills municipalities have in identifying a competent consultant. The reality is that the legislation is in effect, and that the local government's role is ultimately a political question and one that will be easier to answer with more experience as more data is collected.

The second question is whether, in fact, bulk purchasing of this sort will result in meaningfully lower costs. Certainly it has the potential to do that, particularly if the right consultant or project leader is involved, if bidding is done correctly, and if everyone manages to purchase contracts at the right point in the market. However, because electric power is a commodity, we would need to see more data showing that bulk purchases actually influence or reduce fixed commodity prices. Certainly, transaction costs should be reduced or spread among general parties, and monitoring and predicting the market could result in lower costs, but whether bulk purchases of the type contemplated by this authority can, by themselves, reduce commodity prices is a legitimate question.

Over time we will see more answers to all of these questions, and the economics of that are beyond the scope of this article. Nonetheless, we urge municipalities to think about these issues if they consider moving forward. The involvement of a consultant or qualified consortium leader plays a crucial role. Some sort of specialist is needed to formulate the aggregation plan and work with the Illinois Power Agency, as well as to organize a number of members to increase the buying power and ultimately the bidding leverage of any consortium.

Our firm will make an effort to keep up to date on these power purchasing initiatives going forward. If you have any questions, please contact Carlos Arévalo or Ruth Schlossberg.

Illinois' Civil Union Act and Its Impact on Employers

By Kelly Cahill

Illinois passed the Civil Union Act in February of this year, and it has gone into effect as of June 1, 2011. The primary purpose of the law is outlined in Section 5 of the Act which states it is to "provide persons entering into a civil union with the obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses." According to Section 20 the Act, a party to a civil union will enjoy the same benefits afforded to spouses, "whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law." While opposite sex couples can also be parties to a civil union, it is Illinois' inclusion of same sex couples that most pronouncedly sets this Act apart from other legislation regarding the legal recognition of couples, such as marriage statutes that are still defined in Illinois as between one man and one woman.

The Civil Union Act is, however, a creature of state law, and therefore it does not necessarily impact any rights or benefits conveyed by federal law. In fact, the Civil Union Act is limited by the federal Defense of Marriage Act (DOMA) which defines marriage as a "legal union between one man and one woman as husband and wife." So under DOMA the term "spouse" refers to "a person of the opposite sex who is a husband or a wife," whereas the Civil Union Act more broadly includes Civil Union partners under "any definition used in state law where the term 'spouse', 'family', 'immediate family', 'dependent', 'next of kin', and other terms that denote the 'spousal relationship.'"

The Civil Union Act impacts the workplace in several ways, most notably, employee benefits. However, the Act only impacts state governed employee benefits and not benefits derived from federal law. So, for example, if an employer's health and benefits plan is subject to ERISA, then the Act would not apply (government entities, including municipal governments, as well as churches are exempted from ERISA, therefore the Act would generally apply to benefit plans of those entities unless particular benefits therein are governed by federal law). However, when an insurance company issues a policy in Illinois, coverage may now have to be offered to a civil union partner of the employee. On the other hand, any pre-tax benefits would not fall under the Act as those are all governed by federal law.

Other examples of state benefits would include the following: sick leave, if allowed to be taken to care for a dependent (however, the Family Medical Leave Act (FMLA) would not apply, because it is a federally mandated benefit); the Victims' Economic Security and Safety Act (VESSA); The Illinois Family Military Leave Act; state spousal benefits such as workers' compensation, pension, state tax benefits; and Illinois mini COBRA under the Insurance code.

Another interesting twist is that DOMA only prohibits federal benefits for parties of the same sex. If the parties are opposite sex, many federal laws define spouse by looking to state law. In Illinois, partners in a civil union are defined as a "spouse," so that an opposite sex couple in a civil union may very well qualify for federal benefits such as FMLA leave, health insurance, social security tax benefits, etc., while same sex partners in a civil union would not.

It should be noted that this entire issue is extremely new, and there is little exact guidance as to how the Civil Union Act will be judicially interpreted to interplay with other laws. Thus, the primary guideline is to determine whether the benefit in question is derived from state or federal law:

- If it is an Illinois state benefit, the benefit would generally apply to partners in a civil union regardless of whether they are the same or opposite sex.
- If the couples are opposite sex and the benefit is based on federal law, the federal law must be examined to see how it defines "spouse." If the law refers back to the state's definition, then the employment benefit would arguably be granted because the Civil Union Act considers partners in civil unions to be spouses.

Dates to Remember:

July 31: If your fiscal year started May 1, this is the deadline for passing your annual appropriation ordinance. Prior to passage of the appropriation ordinance, a public hearing is required. Municipalities with a population under 2,000 do not require a public hearing. Notice of the hearing must be published 10 days prior to the hearing for municipalities and 30 days prior to the hearing for fire and sanitary districts. Within 30 days of the passage of the appropriation ordinance (or budget ordinance), it must be filed with the county clerk, along with an estimate of revenues anticipated to be received for the new fiscal year.

Aug. 1: On or before August 1 law enforcement agencies are required to submit racial profiling information and other data that is collected from traffic stops between January and June to the Dept. of Transportation.

Oct. 1: Last day to file a certified copy of any ordinance or resolution imposing or discontinuing a retailer's occupation tax (or home rule sales tax), or changing the rate, with the Dept. of Revenue to take effect Jan. 1.

Oct. 31: If your fiscal year started May 1, the municipal treasurer should have filed an annual account of moneys received and expenditures incurred during the preceding fiscal year with the municipal clerk. The clerk is required to publish the annual account if your population exceeds 500. (If your fiscal year started Jan. 1, the deadline is June 30.)

- If the couples are same sex and the benefit is federal law, DOMA will most likely preclude the partners from the benefit. Even if the federal law refers back to the state definition, DOMA's definition of spouse as "one man and one woman" preempts any state definition that includes same sex couples as spouses.

To illustrate this process, if FMLA is at issue—a federal benefit—we would look to the definition of spouse under that Act to see if civil union opposite sex partners apply. The FMLA definition refers to the Defense of Marriage Act definition which states: "Spouse" means an individual who is a husband or wife pursuant to a marriage that is a legal union between one man and one woman, including common law marriage between one man and one woman in States where it is recognized." Thus, an argument could be made that opposite sex partners in a civil union fall under this definition whereas same sex partners do not.

As a new law, we encourage questions about application being referred to our office.

Speaking Engagements and Attorney News:

Richard Flood and Ruth Schlossberg conducted presentations for the Illinois Municipal League's Newly Elected Officials Workshops in June.

Carlos Arévalo was a speaker at an Illinois State Bar Association Local Government Law Section Council's seminar, on the topic of Fiscal Responsibility and Termination of Employees as a cost cutting measure. Carlos has also been reappointed to the Labor and Employment Law Section Council of the Illinois State Bar Association and has been appointed as Secretary of the McHenry County Bar Association.

Ryan Farrell was named 2011/2012 Chairman of the Board of the Crystal Lake Chamber of Commerce.

In June, Regan Daniels Shepley was reappointed to the Board of the McHenry County College Foundation. She was also appointed to chair the scholarships and grant committee. Regan was appointed to the Development Advisory Committee for Pioneer Center in 2010, and she was appointed to co-chair DAC's VOICE Sexual Assault Program subcommittee in 2011.