

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 21, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP1182**

**Cir. Ct. No. 2014CV1084**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**CITY OF KAUKAUNA,**

**PETITIONER-APPELLANT**

**v.**

**PUBLIC SERVICE COMMISSION OF WISCONSIN,**

**RESPONDENT-RESPONDENT,**

**WISCONSIN PUBLIC SERVICE CORPORATION,**

**INTERVENOR-RESPONDENT.**

---

APPEAL from an order of the circuit court for Outagamie County:  
MITCHELL J. METROPULOS, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brash, JJ.

¶1 BRASH, J. The City of Kaukauna appeals an order of the circuit court affirming the Public Service Commission's (PSC) order granting Wisconsin

Public Service Corporation’s (WPSC) request for a declaratory ruling that it is entitled to self-supply electric power to the Fox Energy Center. Kaukauna argues that a territorial agreement between Kaukauna and WPSC prohibits WPSC from supplying electric power to the Fox Energy Center. Specifically, Kaukauna argues that: (1) we should review the PSC’s decision under the *de novo* standard of review; and (2) the PSC erroneously determined that in entering into a territorial agreement, the parties did not waive their ability to provide electric service to their own property or facilities under WIS. STAT. § 196.495(3) (2013-14).<sup>1</sup> We affirm.

### BACKGROUND

¶2 Kaukauna, a city in Outagamie County, Wisconsin, owns and operates a public utility—Kaukauna Utilities<sup>2</sup>—regulated by the PSC under WIS. STAT. ch. 196. Kaukauna provides retail electric service within its electric service territory. WPSC is an investor-owned public utility also regulated by the PSC and provides retail electric service within its electric service territory. Kaukauna’s and WPSC’s service territories are adjacent to each other.

¶3 On September 20, 2004, Kaukauna and WPSC entered into a territorial agreement (Agreement) “to allow each Party to extend its distribution system and provide electric utility service in portions of Outagamie County, Wisconsin.” The Agreement establishes a geographical boundary line that fixes each party’s respective service territory. The Agreement gives Kaukauna the

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

<sup>2</sup> For the purpose of this decision, going forward, all references to Kaukauna include Kaukauna Utilities.

“exclusive right to provide electric utility service to customers located to the west of the Boundary Line,” and WPSC the “exclusive right to provide electric utility service to customers located to the east of the Boundary Line.” The parties also agreed that each party shall have the right to continue providing services to all of their existing customers, regardless of where those existing customers are located in relation to the boundary line.

¶4 Section 10 of the Agreement states as follows:

**Retention of Rights.** Except as specifically set forth herein, this Agreement does not modify or limit the legal rights of either party, including but not limited [to] [Kaukauna’s] right under Chapter 197 of the Wisconsin Statutes. [Kaukauna] and WPSC may exercise all rights not inconsistent with this Agreement.

¶5 Section 11 of the Agreement states as follows:

**Other Agreements.** This Agreement constitutes the entire agreement and understanding of the Parties, and supersedes all offers, negotiations, and other agreements of any kind related to the subject matter of this Agreement. There are no representations or understandings of any kind not set forth herein. Any modification of or amendment to this Agreement must be in writing and executed by both Parties.

Kaukauna and WPSC jointly filed the Agreement with the PSC, and it was approved on November 11, 2004.

¶6 At the time the Agreement was executed, Kaukauna was supplying electric service to the Fox Energy Center, which was originally owned by Fox Energy Center, LLC. The electric services Kaukauna provided to the Fox Energy Center included station power to the facility itself, and power for the facility’s water pumping station. Station power includes the electricity used for heating, lighting, air conditioning, and office equipment needs of the buildings on a generating facility’s site, and for operating the electrical equipment that is on that

site. It is undisputed that the Fox Energy Center is located within Kaukauna's electric service territory, as defined by the Agreement.

¶7 On March 28, 2013, WPSC purchased the Fox Energy Center. On May 31, 2013, WPSC told Kaukauna that it no longer wished to receive electric service from Kaukauna and gave notice of its intent to provide electric service to the Fox Energy Center from one of WPSC's remote generating units. On June 10, 2013, Kaukauna informed WPSC in writing that, if WPSC began to provide power to the Fox Energy Center, such action would be in breach of the Agreement.

¶8 On March 5, 2014, WPSC petitioned the PSC for a declaratory ruling, asking that it be allowed to provide electric service to the Fox Energy Center. Kaukauna opposed WPSC's request on the grounds that the Agreement gave Kaukauna the exclusive right to provide electric service to the Fox Energy Center. The parties stipulated to the facts relied on by the PSC. On September 25, 2014, the PSC issued its Final Decision granting WPSC's request for a declaratory ruling. The PSC held that the Agreement did not prohibit WPSC from self-supplying electric service to the Fox Energy Center.

¶9 On October 23, 2014, Kaukauna sought judicial review of the PSC's decision pursuant to WIS. STAT. § 227.52. On April 28, 2015, the circuit court filed its decision and order affirming the PSC's Final Decision. Applying a *de novo* standard of review to the PSC's decision, the circuit court found that WPSC had a right under WIS. STAT. § 196.495(3) to provide electric service to the Fox Energy Center once WPSC bought the facility. This appeal follows.

## DISCUSSION

¶10 On appeal, Kaukauna argues that: (1) we should review the PSC’s decision under the *de novo* standard of review; and (2) the PSC erroneously determined that in entering into the Agreement, the parties did not waive their ability to provide electric service to their own property or facilities.

¶11 In an appeal of an administrative agency decision, we review the decision of the agency, not that of the circuit court. *See Wisconsin Power & Light Co. v. PSC*, 2009 WI App 164, ¶18, 322 Wis. 2d 501, 777 N.W.2d 106. We uphold the PSC’s findings of fact if they are supported by substantial evidence. *See Wisconsin Cent. Ltd. v. PSC*, 170 Wis. 2d 558, 568, 490 N.W.2d 27 (Ct. App. 1992). Here, Kaukauna and WPSC stipulated to a set of facts. Accordingly, the PSC’s findings of fact are not at issue in this appeal.

¶12 We grant an agency’s conclusions of law and statutory interpretations one of three levels of deference: great weight, due weight, or no deference. *See Wisconsin Indus. Energy Grp., Inc., v. PSC*, 2012 WI 89, ¶19, 342 Wis. 2d 576, 819 N.W.2d 240. The applicable level of deference depends upon multiple considerations, including the “agency’s experience, technical competence, and specialized knowledge.” *Clean Wisconsin, Inc. v. PSC*, 2005 WI 93, ¶38, 282 Wis. 2d 250, 700 N.W.2d 768 (citation and one set of quotation marks omitted).

¶13 Great weight deference, the highest level of deference, is appropriate when:

- (1) the agency was charged by the legislature with the duty of administering the statute;
- (2) the interpretation of the statute 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.

*Wisconsin Indus. Energy Grp., Inc.*, 342 Wis. 2d 576, ¶20 (citations omitted). These factors do not require the agency to have examined the statute under the precise facts presented in a given case. *See id.*, ¶21. Rather, great weight deference is appropriate when “the agency has substantial experience interpreting the statutory scheme at issue.” *See id.* Under great weight deference, we will uphold the agency's interpretation if it “is reasonable, even if a more reasonable interpretation exists.” *See id.*

¶14 Due weight deference is appropriate “where an agency has some experience interpreting the statutory scheme at issue, but the agency has not developed any particular expertise interpreting and applying the statutes to place the agency in a better position than a reviewing court.” *Id.*, ¶22. We grant due weight deference to an agency decision not based on the agency's experience, but rather because the legislature granted the agency authority to interpret the statute at issue. *See id.* Under due weight deference, we will uphold an agency's interpretation where it “is reasonable, and where there is not a more reasonable interpretation.” *See id.*

¶15 No deference, or a *de novo* standard of review, is appropriate when “an interpretation of the statute is a first for the agency, or where the agency's interpretation of the statute has been so inconsistent that it provides a court no real guidance.” *Id.*, ¶23. Under *de novo* review, we give no weight to an agency's decision. *See id.*

¶16 Kaukauna argues that we should follow the circuit court and apply a *de novo* standard of review to the PSC's decision because it involves the

construction and interpretation of a contract—the Agreement—which presents a question of law. After our analysis of the relevant considerations, however, we conclude that great weight deference is the appropriate standard of review.

¶17 There are four requirements that must be met for an agency’s decision to receive great weight deference. *See id.*, ¶20. We address each requirement in turn.

¶18 First, the agency must be “‘charged by the legislature with the duty of administering the statute.’” *Id.* (citations omitted). “[T]he Public Service Commission has been charged with administration and enforcement of the antiduplication provisions of § 196.495, STATS., since the statute’s adoption in 1955.” *Barron Elec. Coop. v. PSC*, 212 Wis. 2d 752, 765, 569 N.W.2d 726 (1997). Furthermore, WIS. STAT. § 196.495(4) states in relevant part that: “[t]he commission shall enforce an agreement if the agreement has been filed with the commission and approved by the commission.” Here, Kaukauna and WPSC jointly filed the Agreement with the PSC, and it was approved on November 11, 2004. We conclude, therefore, that it is clear that the PSC has the authority to administer § 196.495.

¶19 The second requirement is that the agency’s “‘interpretation of the statute is one of long-standing.’” *Wisconsin Indus. Energy Grp., Inc.*, 342 Wis. 2d 576, ¶20 (citations omitted). As stated in *Barron Electric*, the PSC has been routinely interpreting and applying WIS. STAT. § 196.495 since 1955. *See Barron Electric*, 212 Wis. 2d at 765-66. The PSC itself acknowledged this long-standing approval and enforcement role in its decision in this case. We conclude that the PSC’s interpretation of § 196.495 is long-standing.

¶20 Third, the agency must “employ[] its expertise or specialized knowledge in forming [its] interpretation.” *Wisconsin Indus. Energy Grp., Inc.*, 342 Wis. 2d 576, ¶20 (citations omitted). Here, the PSC did just that when interpreting the Agreement. The application of this specialized knowledge, expertise, and experience is evident from the text of the PSC’s Final Decision, which states in part:

The purpose of [WIS. STAT.] § 196.495 generally is the avoidance of duplication of facilities. The public policies underlying that goal are clear. First, the avoidance of duplication of facilities helps to control costs that ratepayers pay for those facilities. Second, the statute also prevents the physical construction of unnecessary facilities. These are indeed important public policy objectives.

The provision of station power by WPSC, though, will not interfere with those objectives. [Kaukauna] currently provides retail electric service, but the Facility takes power directly from the transmission system. No additional lines will be built for WPSC to begin providing station power. In any event, while the general policy of the avoidance of duplication of facilities is clearly expressed in that statute, the statute also makes a direct exception to that general policy goal for the provision of electric service to a utility’s own facilities. [WIS. STAT.] § 196.495(3). Thus, the general purpose of the remainder of the statute is largely irrelevant

The PSC recognized that WPSC self-supplying its needs was also consistent with the statutory scheme in WIS. STAT. § 196.495, because a utility that chooses to self-supply can generally realize cost savings for the benefit of its customers. As such, we conclude that the PSC employed its expertise and specialized knowledge in forming its interpretation of the Agreement.

¶21 The final requirement for great weight deference is that “the agency’s interpretation will provide uniformity and consistency in the application of the statute.” *Wisconsin Indus. Energy Grp., Inc.*, 342 Wis. 2d 576, ¶20 (citations omitted). Each case presents its own unique set of facts. It is not



difficult, therefore, to envision different tribunals reaching different conclusions on the same set of facts based on their experience with interpreting territorial agreements. As discussed above, in addition to being charged by the legislature with the duty of administering WIS. STAT. § 196.495, the PSC also has a long-standing history of utilizing its expertise and specialized knowledge in administering the statute. We conclude, therefore, that consistency and uniformity would be advanced by applying great weight deference to PSC decisions regarding the interpretation of territorial agreements under § 196.495. Accordingly, we grant the PSC's Final Decision great weight deference.

¶22 Kaukauna argues that *Barron Electric* is distinguishable because, in that case, there was no territorial agreement between the parties. *See id.*, 212 Wis. 2d at 755-56. The PSC, however, is not required to have examined WIS. STAT. § 196.495 under the precise facts presented in the case to be entitled to great weight deference. *See Wisconsin Indus. Energy Grp., Inc.*, 342 Wis. 2d 576, ¶21. We therefore reject this argument.

¶23 Kaukauna further argues that the issue in the case is strictly one of contract interpretation, which presents a question of law that appellate courts review *de novo*. This argument is misguided. While it is true that interpretation of the Agreement plays a role, as discussed above, interpretation of the Agreement is subject to the PSC's regulatory powers under WIS. STAT. § 196.495, to which we afford great weight deference. We will uphold the PSC's interpretation of the Agreement, therefore, if it is reasonable. *See Wisconsin Indus. Energy Grp., Inc.*, 342 Wis. 2d 576, ¶21.

¶24 WISCONSIN STAT. § 196.495(3) states: “[n]othing in this section shall preclude any public utility or any cooperative association from extending

electric service to its own property or facilities or to another cooperative association for resale.” In its Final Decision, the PSC concluded that WPSC’s right to self-supply has not been waived or modified by the Agreement because:

(1) the provision of station power within another utility’s service territory is an unusual circumstance; (2) the Facility was not owned by WPSC at the time the Agreement was executed; and (3) the text of the Agreement does not indicate in any manner that either party contemplated that it would govern the provision of station power.

As a result, the PSC concluded that “[t]he Agreement does not prohibit WPSC from remotely self-supplying the Facility.” We conclude that this interpretation is reasonable.

¶25 The fundamental question raised in this appeal is whether WPSC has, by execution of the Agreement, waived its right to remotely self-supply the Fox Energy Center. “The primary objective in interpreting a contract is to ascertain and carry out the intentions of the parties.” *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶30, 264 Wis. 2d 60, 665 N.W.2d 257 (citation omitted). In doing so, the PSC was required to begin with a review of the four corners of the contract. *See Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476. Kaukauna argues that several clauses in the Agreement support its argument that WPSC has waived its right to self-supply the Fox Energy Center. We disagree.

¶26 Waivers of statutory rights must be clear and unambiguous. *See Mulvaney v. Tri State Truck & Auto Body, Inc.*, 70 Wis. 2d 760, 768, 235 N.W.2d 460 (1975). “Waiver of a statutory right must be an intentional and voluntary relinquishment of a known right, and it must be accomplished by a clear and specific renunciation of that right.” *State v. Lewis*, 2004 WI App 211, ¶14, 277 Wis. 2d 446, 690 N.W.2d 668.

¶27 Kaukauna points to Section 2 of the Agreement, which grants each party the exclusive right to provide electric service to customers on its respective side of the boundary line, and Section 4, which gives each party the right to continue providing service to all its existing customers as of the date of the Agreement. Kaukauna argues that because the Fox Energy Center is within its boundary, and because Kaukauna was providing service to the Fox Energy Center on the date of the Agreement, WPSC has waived any right to serve that property. Waivers of statutory rights, however, must be clear and unambiguous. *See Mulvaney*, 70 Wis. 2d at 768. Neither Section 2 nor Section 4 identifies how the parties will treat utility-owned property, station power, or the rights of utilities to self-supply under WIS. STAT. § 196.495(3).

¶28 Kaukauna also points to Section 5 of the Agreement, which addresses exceptions to the Agreement. This section requires all exceptions to be in writing and signed by both parties. While it is true that Kaukauna and WPSC did not agree in writing that the Fox Energy Center is an exception, Section 5 is silent on the issue of self-supply under WIS. STAT. § 196.495(3).

¶29 Kaukauna also argues that Section 11 of the Agreement effectively covers self-supply. Section 11 states:

**Other Agreements.** This Agreement constitutes the entire agreement and understanding of the Parties, and supersedes all offers, negotiations, and other agreements of any kind related to the subject matter of this Agreement. There are no representations or understandings of any kind not set forth herein. Any modification of or amendment to this Agreement must be in writing and executed by both Parties.

Kaukauna, however, fails to show that the waiver of WPSC’s right of self-supply under WIS. STAT. § 196.495(3) was clearly expressed as part of the subject matter of the Agreement. *See Mulvaney*, 70 Wis. 2d at 768.

¶30 Finally, Kaukauna argues that Section 10 gives it the exclusive right to supply power to the Fox Energy Center. Section 10 states:

**Retention of Rights.** Except as specifically set forth herein, this Agreement does not modify or limit the legal rights of either party, including but not limited [to] [Kaukauna’s] right under Chapter 197 of the Wisconsin Statutes. [Kaukauna] and WPSC may exercise all rights not inconsistent with this Agreement.

The first sentence of Section 10 clearly states that each party retains all legal rights “[e]xcept as specifically set forth herein.” Therefore, absent a clear and unambiguous waiver of WIS. STAT. § 196.495(3), that statutory right is expressly retained by both parties. The Agreement contains no such waiver.

¶31 In conclusion, we agree with the PSC that the language of the Agreement simply does not address—let alone establish a waiver of—the parties’ right to self-supply under WIS. STAT. § 196.495(3). Accordingly, we conclude that the PSC’s decision and order granting WPSC’s declaratory relief to self-supply the Fox Energy Center was reasonable.

¶32 While we conclude that the PSC’s decision is entitled to great weight deference, we would still affirm under a *de novo* standard of review. ““The primary objective in interpreting a contract is to ascertain and carry out the intentions of the parties.”” *Johnson Controls, Inc.*, 264 Wis. 2d 60, ¶30 (citation omitted). In doing so, we begin with a review of the four corners of the contract. *See Town Bank*, 330 Wis. 2d 340, ¶33. Waivers of statutory rights must be clear and unambiguous. *See Mulvaney*, 70 Wis. 2d at 768.

¶33 As discussed above, the Agreement is silent on a utility's right to self-supply under WIS. STAT. § 196.495(3). Under a *de novo* standard of review, therefore, we would conclude that, based on the unambiguous language contained within the four corners of the Agreement, it is clear that neither party intended to waive its right to self-supply under § 196.495(3).

¶34 We note that the PSC, recognizing the impact of the loss Kaukauna will suffer as a result of no longer supplying energy to the Fox Energy Center, delayed implementation of its Final Decision until after Kaukauna had a chance to adjust its rates. As such, the PSC ordered:

In order to avoid financial harm to [Kaukauna], it is reasonable to require WPSC to continue to receive station power from [Kaukauna] until [Kaukauna] has had the opportunity to adjust its rates. Any rate case must be filed within six months after the effective date of this Final Decision and shall be timely prosecuted by [Kaukauna]. If [Kaukauna] does not file a rate case within six months of this Final Decision, WPSC may begin self-supplying the day following [Kaukauna's] deadline to file its rate case. If [Kaukauna] files a timely rate case, WPSC may begin self-supplying the Facility on the effective date of the order adjusting [Kaukauna's] rates.

In doing so, the PSC recognized that the Fox Energy Center is a significant customer of Kaukauna. By allowing Kaukauna to continue supplying electric service to the Fox Energy Center during this transition period, the PSC sought to avoid financial harm to Kaukauna. While neither party addressed this issue on appeal, we conclude that, under great weight deference, this order is reasonable.

¶35 For the foregoing reasons, we affirm.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

