power failure

Was it deception, arrogance or CEO Dick Abdoo’s obstinacy that led the once admirable Wisconsin Energy to the biggest environmental pollution penalty in state history? The inside story of a major blunder.

BY MARY VAN DE KAMP NOHL

© Copyright 2001 Milwaukee Magazine
Buried under Wisconsin Energy’s high-tension lines in West Allis and at two other sites, state officials discovered 26,000 tons of cyanide-laced waste.
It was nearly closing time when the West Allis Fire Department called to report an oily blue sheen floating down Underwood Creek. Pam Mylotta, a Wisconsin Department of Natural Resources (DNR) spill investigator, promised to look into it on her way home.

The firefighters were waiting for her and together they tracked a foamy scum up a giant concrete sewage tunnel, exiting through a manhole south of I-94 and just west of Highway 100, behind the Giddings & Lewis plant.

Cattails grew around the edges of the site behind the heavy-equipment manufacturer's factory (now Quad/Graphics) and a rancid odor hung in the air. A firefighter traced the smell to a small pile of wood chips that looked as if they had been burned. A bubbling, frothy liquid coming from the pile formed a pond nearby and ran into Underwood Creek. “The vegetation around it had all been killed off,” recalls Mylotta.

Somebody grabbed a rusty shovel and plunged it into the pile. The rust magically melted away, revealing a shiny new metal surface. At the edge of the pile, there was a massive chunk of “what was obviously concrete, eight inches across with rock and little pebbles,” says Mylotta. “But when we touched it, it was like jelly.”

Mylotta ran to the car for a pH test kit, the kind high school chemistry classes use. She stuck the litmus paper into the liquid. The reading suggested nearly straight sulfuric acid. How could that be right? Mylotta wondered, opening another test kit. But the reading was just as acidic. She collected a sample in a clean Mason jar for the hazardous waste team and made a note, “Kids on dirt bikes playing nearby.”

Everyone at the site on April 17, 1992, knew they were dealing with something dangerous. What they didn’t realize was that they had found the tip of a legal iceberg: fifty-two million pounds of cyanide-laced wood chips. By 1999, the case would result in the largest punitive damage award for environmental pollution in state history. The groundbreaking $104.5 million verdict was only the beginning of a legal battle that may reach the U.S. Supreme Court. Ever before had there been such a huge punitive damage award for an act carried out four decades earlier. How the case came to be, and the legal maneuvering to overturn it, is the stuff of Hollywood movies.

More and more of the mysterious wood chips kept turning up— at Wisconsin Energy’s nearby substation, at its training station and on the City of West Allis’ land at 113th and Greenfield. The properties all had one thing in common: A high-tension transmission line Wisconsin Energy built in 1959 ran through them. Though the land was privately owned, state law allows utilities to put their lines on anyone’s property.

Given the contamination’s scope, DNR hazardous waste investigator Michael Ellenbecker ordered aerial photographs and sent some wood chips to the state lab with a warning: “This sample may have a low pH and contain a complex cyanide.”

Known as Prussian blue, the oxide box waste mingled with groundwater, creating a toxic brew that burned like battery acid.

When the guys at the lab saw that I wanted to test for cyanide, they thought I was crazy,” recalls Ellenbecker. But the lab identified iron cyanide. “By itself, that won’t do anything. But in a wet environment, with wood chips containing sulfur, it generates a low pH. That was what was pooling up… A low pH can burn you, like battery acid.” The acid freed the cyanide from the iron cyanide, contaminating the ground water.

There were 140 parts per million (ppm) of cyanide in the standing water on Giddings’ property. As little as .025 ppm had been found toxic to fish, and there were reports of cyanide fish kills going back to the turn of the century. The City of West Allis and Giddings hired a laboratory to study the liquid. Even after the lab neutralized the acid, the liquid damaged the reproductive ability of the test subjects, water fleas called daphnids. The DNR ordered all 155,000 gallons of the water at the site hauled away for treatment.

Giddings, the city and Wisconsin Energy were ordered to clean up the contaminants, and the three shared the expense of drafting a remediation plan.

Given the contamination’s scope, DNR hazardous waste investigator Michael Ellenbecker ordered aerial photographs and sent some wood chips to the state lab with a warning: “This sample may have a low pH and contain a complex cyanide.”

Known as Prussian blue, the oxide box waste mingled with groundwater, creating a toxic brew that burned like battery acid.

When the guys at the lab saw that I wanted to test for cyanide, they thought I was crazy,” recalls Ellenbecker. But the lab identified iron cyanide. “By itself, that won’t do anything. But in a wet environment, with wood chips containing sulfur, it generates a low pH. That was what was pooling up… A low pH can burn you, like battery acid.” The acid freed the cyanide from the iron cyanide, contaminating the ground water.

There were 140 parts per million (ppm) of cyanide in the standing water on Giddings’ property. As little as .025 ppm had been found toxic to fish, and there were reports of cyanide fish kills going back to the turn of the century. The City of West Allis and Giddings hired a laboratory to study the liquid. Even after the lab neutralized the acid, the liquid damaged the reproductive ability of the test subjects, water fleas called daphnids. The DNR ordered all 155,000 gallons of the water at the site hauled away for treatment.

Giddings, the city and Wisconsin Energy were ordered to clean up the contaminants, and the three shared the expense of drafting a remediation plan.

The wood chip material itself contained as much as 1,000 ppm of cyanide, provoking the DNR to give the sites its highest cleanup priority. DNR called the wood chips “characteristic hazardous waste” because of their extremely corrosive nature, but, it said, “Cyanide was the big kicker.”

No one at Giddings or the city could remember dumping anything like this. But when the environmental consultants began unearthing the wood chips, it was apparent that they hadn’t been dumped one truckload at a time in some haphazard moonlit operation either. They had been spread in even layers three feet deep,
compacted, then covered with a thin layer of soil, another layer of wood chips and more soil. W hen Judge Patricia M C mahn saw a side view of the excavation later, it reminded her of a layer cake.

By 1993, everyone agreed that they were dealing with oxide box waste (OBW), a by-product of the manufactured-gas industry. Before natural gas was piped to the M idwest in the 1950s, gas for heat and light was manufactured by baking coal at high temperatures. But the raw gas contained hydrogen sulfide, cyanides, arsenic, coal tar and other chemicals so corrosive that it ate through steel pipes. The government required gas producers to purify their gas before sending it to customers.

To remove the impurities, plant operators pumped raw gas through giant purification boxes filled with rusted iron shavings layered between wood chips that acted as a fluffing material. The contaminants clung to the material, leaving clean gas for distribution. W hen the Brillo pad-like metal filings and wood chips became saturated, the material, called oxide box waste (or Prussian blue, for its distinctive color), would be replaced. But disposing of spent oxides was a vexing problem. The material was highly combustible, and municipalities didn’t want it in their dumps. So manufacturers often used their spent oxides as fill.

A llen H atheway, professor emeritus at the University of M is souri, who has spent his career studying old manufactured-gas plant sites and was not involved in this case, says, “W hen the soil is acidic, that’s where oxide box waste is dangerous. It forms the types of cyanide that are mobile, the forms hazardous to humans, and the worst case is when it forms blue water and bubbles up gas” — exactly what was happening in W est A llis.

ABOUT THE TIME 26,000 TONS OF OBW was being uncovered in W est A llis, officials at W isconsin Power and L ight, across the state in M adison, met with their attorneys to discuss their own oxide box waste. “It all started when we found it along the Rock River, blue crystals that a kid would find very interesting,” recalls N ino A mato, then a W P&L senior vice president (now a hospital executive).

“T here was an internal debate on whether oxide box waste is poisonous or not. T he lawyers said no. W e heard all the technical arguments that these things were not harmful.... But some of us thought we should put up a fence. M anage our sites. W e weren’t even sure where all of our oxide box waste was,” says A mato. “T he lawyers said that was good. If you don’t know where it is, that’s a great defense.”

A mato dropped a few blue crystals into a glass of water. “T hat’s what it’s for,” he said, “take a drink.” T he glass was passed around the table, but it never touched an attorney’s lips. T he company’s chairman, E roll B. D avis Jr., decided “W P&L will abide by the rule of law, if it’s in the public interest, we’ll do more,” remembers A mato.

W P&L merged to create A lliant E nergy, but a D N R manufactured-gas waste specialist says the utility is still one of the best at taking responsibility for its sites. T he worst? “W isconsin E nergy (W E) and Northern States Power (NSP),” says the source.

THERE ARE 111 FORMER MANUFACTURED-GAS PLANTS in the state, but only two in southeastern W isconsin generated the volume of waste found in W est A llis. O ne was a W isconsin E nergy predecessor located in downtown R acine. T he second was an early subsidiary of M ilwaukee’s other major local utility, W isconsin G as. It was located in M ilwaukee’s T hird W ard. T he R acine plant was demolished in 1960; the T hird W ard plant ended production in 1958.

Because the wood chips were discovered all along the corridor where W isconsin E nergy had built its transmission lines — property that belonged to G iddings, W est A llis and other land owners — G id-

the players

WISCONSIN ENERGY’S TEAM

Kevin J. Lyons: lead C ook & Franke attorney
James Zakrajscheck: W isconsin E nergy (W E) staff attorney in charge of the case
Walter Woelfle: W E attorney; Z akr ajsek’s boss
Richard Abdoo: W E president, chairman and C EO
James Lingle: W E engineer, expert on manufactured-gas plants
Michael Kaminski: head of W E’s insurance department
Hank J askulski: retired W E transmission line engineer
Sally Bentley: W E attorney who takes over after jury verdict
Barbara Wrubel: Skadden A rps attorney hired for appeal
Robert H. Friebert: M ilwaukee attorney working with Skadden A rps

THE OPPOSITION

J. Ric Gass: lead attorney for the City of W est A llis and G iddings & L ewis
J anette Bell: mayor of W est A llis
Paul Murphy: W est A llis common council president

THE BENCH

Patricia M cMahon: M ilwaukee County C ivil Court chief and trial judge
George A. Burns Jr.: retired judge who oversaw mediation
moglobin molecules and essentially suffocating a person.

At the city’s site, there was evidence of hydrogen cyanide gas. “Our workers were wearing cyanide detectors around their necks,” says Geoff Parish, the consulting engineer who oversaw the cleanup. “The alarms did go off – once when we were drilling a well and again when we were removing waste from the site.” The workers, wearing Tyvek protective suits, boots, hard hats, gloves and splash protection immediately stopped what they were doing and headed upward.

“It was the worst environmental site I’ve seen in my 11 years of this type of work,” says Parish. He would tell the jury it was a 9.5 on a 10-point scale.

The contaminated wood chips found in West Allis were trucked to a licensed landfill in Franklin. There, the thick clay liner and monitoring wells would make sure it stayed put and did not foul the ground water. The cost of the cleanup, not including Giddings & Lewis’s diminished property value or the city’s lost property taxes, was $2.5 million. In the spring of 1995, the City of West Allis and Giddings threatened to sue to recover some of those costs. Wisconsin Energy hired a Minneapolis firm, ENSR, to look for oxide box waste at five of its manufactured-gas plant sites. Its OBW as fill during construction of the 1959 transmission line. The workers were thorough but cautious. ENSR’s workers were thorough but cautious. ENSR President William M. Gass and his boss, attorney Walter Woelfle, immediately blamed Wisconsin Energy’s in-house attorney, James Zakrajsheck, and the company’s manufactured-gas plant expert, engineer James Lingle, formed a special investigation team that included top management.

A decade earlier, the Environmental Protection Agency had begun investigating manufactured-gas plant sites because of concern about toxic by-products. In 1986, Wisconsin Energy had hired a Minneapolis firm, ENSR, to look for oxide box waste at five of its former manufactured-gas plants, including the Racine site. ENSR’s workers were thorough but cautious. ENSR President W. Illiam M. Gass had seen a Duluth plant site where a worker cleaning out an old purification box was overcome by fumes and died.

Although ENSR’s engineers tested the ground water and did soil borings all over the Racine site looking for OBW, all they found was six inches of wood chips at the bottom of one old purification box. “I have done these tests at hundreds of old manufactured-gas plants all over the country,” Gass tells Milwaukee Magazine, “and the records are always incomplete, but the records at Racine were as good as any.” Based on Gregg’s report saying “no gas plant waste disposal activities were carried out on this property,” the DNR gave the Racine site a clean bill of health.

When the plaintiffs learned about Gregg’s report, Wisconsin Energy’s story changed. It hadn’t buried the oxide box waste in Racine after all. It had put it on the Lake Michigan shoreline “to stop erosion” and it had all washed away. By the time the case would get to court, the records Gass had seen would also be missing.

If the source of the waste wasn’t Wisconsin Energy, it had to be Wisconsin Gas. Like most regulated monopolies, which keep careful track of expenses in order to win rate hikes from the Public Service Commission (PSC), the gas company had records. Attorneys for the plaintiffs spent a day and a half examining them and concluded Wisconsin Gas was not the source of the Prussian blue. On July 5, 1996, the City of West Allis and Giddings & Lewis sued Wisconsin Energy’s subsidiary, WEPCO, charging that it had used its OBW as fill during construction of the 1959 transmission line. Wisconsin Energy hired Cook & Franke attorney Kevin J. Lyons, who was regarded as both smart and capable, as lead trial counsel, but its chief legal strategist remained in-house: Zakrajsheck and his boss, attorney Walter W. Oelfe. The pair immediately blamed Wisconsin Gas for the waste and sued. It was hardly a tactical move worthy of Julius Caesar. In fact, with two lawsuits tried at once, it guaranteed that Wisconsin Energy would be fighting a war on two fronts: one attacking the gas company, the other defending itself against the city and Giddings. It also fortified the enemy because now it was in the gas company’s interests to help West Allis and Giddings prove that Wisconsin Energy was to blame.

“Of the 780,000 cases like this filed each year, only 12,000, or 1.5 percent, ever face a jury. The whole idea of lawsuits is to settle. Trials are a corruption of the entire process and only fools with something to prove end up ensnared in them. When I say ‘something to prove,’ I don’t mean about the case but with something to prove about themselves.” — John Travolta in A Civil Action

It wasn’t long before attorneys for both Wisconsin Gas and the plaintiffs began drawing parallels to the Travolta movie (based on an award-winning book by Jonathan Harr) about an East Coast water pollution case. And indeed, there were some. Certainly, there were opportunities to settle.

On November 17, 1998, attorneys for Wisconsin Gas, West Allis and Giddings & Lewis sued Wisconsin Energy for the waste and Giddings & Lewis sued. It was hardly a tactical move worthy of Julius Caesar. In fact, with two lawsuits tried at once, it guaranteed that Wisconsin Energy would be fighting a war on two fronts: one attacking the gas company, the other defending itself against the city and Giddings. It also fortified the enemy because now it was in the gas company’s interests to help West Allis and Giddings prove that Wisconsin Energy was to blame.

“We were very confident we could blame the gas company,” recalls Burns. “And I told him, [Giddings’ lawyer.] Ric Gass is a pretty good lawyer. If there was a case against the gas company, he’d be suing them.” Gass taught evidence at Marquette University Law School, and he was, according to Burns, “a scholar as well as a good trial attorney and, justifiably, a little cocky.”
But it was a gas company witness who convinced Burns that Wisconsin Energy was the source of the cyanide-laced wood chips. The witness showed Burns the company’s own disposal records going back to 1931. Wisconsin Energy didn’t have any records and it couldn’t explain why not.

Burns told Wisconsin Energy’s lawyers: “You have nowhere to go. They were trying to tell me they put it in the lake—thousands of tons of the stuff in downtown Racine’s harbor within sight of the courthouse,” says Burns. “If you could believe that, you could believe in the Easter bunny!”

Burns told Wisconsin Energy to jump at the city and Giddings’ offer to settle for $3 million. But Wisconsin Energy offered “just $125,000. That was ridiculous,” says Burns. “It was a slap in the face... T hey had to know they would have to bring a huge mountain to climb in court.” It was “very poor judgment,” adds Burns. “I left there feeling they were gonna get whupped.”

Ironically, the gas company had gone to mediation prepared to settle. Big companies fare miserably before juries. Why risk it? Besides, it would cost less to settle the case than to bring in a fancy East Coast lawyer to try it. Company officials were still leaning toward settlement when Burns and then Wisconsin Gas President and Chief Executive Officer Bronson H. Aasle had lunch a few days later. Sources close to the meeting say the judge reassured H. Aasle that Wisconsin Energy had no case against his firm. Afterward, H. Aasle tried convincing Wisconsin Energy’s Chief Engineer C. Richard A. Bodo to settle, but Bodo refused, insisting that his company was innocent.

**Jury Selection Began on June 14, 1999 in Judge Patricia M. C. ahon’s courtroom.** Reading the things Wisconsin Energy called M. C. Ahon later in its appeal — “an irrational, vindictive tyrant”— you wonder why the company didn’t demand a substitute judge. M. C. Ahon’s peers thought considerably more of her; they’d chosen her as Chief Judge of Milwaukee County Circuit Court’s civil division. M. C. Ahon had graduated first in her class at Antilbs’ E. Moy School of Law and, unlike some judges, she read every document filed in her court. Every short list for appointment to the U.S. District Court that circulated included M. C. Ahon’s name.

Until 1983, M. C. Ahon had served as executive director of Legal Action of Wisconsin, an association that caused some conservatives to view her as a bleeding-heart liberal. But lifelong liberals, some burned in M. C. Ahon’s court, saw her more as a “moralistic judge” and a stickler for the rules of the judicial system. No one considered Pat M. C. Ahon a “settling judge,” one who would spot a tough issue and force the sides to settle lest the case end up on appeal. Shed rather try the case.

On the eve of the trial, Wisconsin Energy increased its settlement offer to $2 million, $1 million less than the plaintiffs wanted and offered to settle for $3 million. But Wisconsin Energy offered “just $125,000. That was ridiculous,” says Burns. “It was a slap in the face... They had to know they would have a huge mountain to climb in court.” It was “very poor judgment,” adds Burns. “I left there feeling they were gonna get whupped.”

Ironically, the gas company had gone to mediation prepared to settle. Big companies fare miserably before juries. Why risk it? Besides, it would cost less to settle the case than to bring in a fancy East Coast lawyer to try it. Company officials were still leaning toward settlement when Burns and then Wisconsin Gas President and Chief Executive Officer Bronson H. Aasle had lunch a few days later. Sources close to the meeting say the judge reassured H. Aasle that Wisconsin Energy had no case against his firm. Afterward, H. Aasle tried convincing Wisconsin Energy’s Chief Engineer C. Richard A. Bodo to settle, but Bodo refused, insisting that his company was innocent.

**Jury Selection Began on June 14, 1999 in Judge Patricia M. C. Ahon’s courtroom.** Reading the things Wisconsin Energy called M. C. Ahon later in its appeal — “an irrational, vindictive tyrant” — you wonder why the company didn’t demand a substitute judge. M. C. Ahon’s peers thought considerably more of her; they’d chosen her as Chief Judge of Milwaukee County Circuit Court’s civil division. M. C. Ahon had graduated first in her class at Antilbs’ E. Moy School of Law and, unlike some judges, she read every document filed in her court. Every short list for appointment to the U.S. District Court that circulated included M. C. Ahon’s name.

Until 1983, M. C. Ahon had served as executive director of Legal Action of Wisconsin, an association that caused some conservatives to view her as a bleeding-heart liberal. But lifelong liberals, some burned in M. C. Ahon’s court, saw her more as a “moralistic judge” and a stickler for the rules of the judicial system. No one considered Pat M. C. Ahon a “settling judge,” one who would spot a tough issue and force the sides to settle lest the case end up on appeal. Shed rather try the case.

On the eve of the trial, Wisconsin Energy increased its settlement offer to $2 million, $1 million less than the plaintiffs wanted and offered to settle for $3 million. But Wisconsin Energy offered “just $125,000. That was ridiculous,” says Burns. “It was a slap in the face... They had to know they would have a huge mountain to climb in court.” It was “very poor judgment,” adds Burns. “I left there feeling they were gonna get whupped.”
dumped into an old storm water retention pond on city property and into an intermittent pond on Giddings’ land.

By agreeing with Gass’ account of manufactured-gas plant history, Lingle told the jury the plaintiffs weren’t trying to apply today’s environmental standards to 1959. They were applying the standards of the day. Lingle also admitted that before he knew his employer planned to use the “we dumped it in the lake” alibi, he called it “unreasonable” to suggest that the gas company might have done exactly that.

At the end of the first week of the trial, Lyons drove to Gass’ condo on Fowler Lake in Oconomowoc to suggest a $5 million settlement. The trial was going better than expected for the plaintiffs, and Gass refused.

BACK IN COURT, WISCONSIN ENERGY’S other star witnesses, two Racine plant retirees, Gottlieb Schafer and William J. Boutell, also failed to support the company’s case. Schafer admitted that before the lawsuit began, he couldn’t even remember how the Racine plant disposed of its OBW. He agreed that the notion of using wood chips, “stuff that floats away,” for erosion control was “laughable” and confessed that the OBW was put on the shore just to “get rid of it.” In his deposition, Schafer revealed that “everybody in the company” knew OBW was “bad stuff,” and he said, “We were not really pigs. We were polluters.”

Together, Schafer and Boutell could account for only a few cubic yards of the more than 36,000 tons of the spent oxide the Racine plant generated. And W illiam Simon, a longtime Racine plant draftsman whose office oversaw the supposed dumping site for decades, testified that he never saw wood chips there. In fact, he often fished on the shore, something he said he never would have done if he’d seen OBW dumped into the lake.

Bottell was supposed to testify that the Racine plant’s waste was brown, not blue like that found on the plaintiffs’ properties, but on cross-examination, he admitted he was color blind. “E very one of WEPCO’s so-called experts turned out not to be such an expert after all,” recalls juror Robert L. Polinske, a retired H arley-D avidson assembly line worker.

Two weeks into the five-week trial, M cm ahon ruled that the jury would consider punitive damages, and things went from bad to worse. T he scientist Wisconsin Energy had nothing “more than supposition” to link the gas company to this OBW. E ven if all of the gas company waste sent to “unspecified dumps” in its records ended up on the plaintiffs’ property, it would account for only a fraction of what was found.

ON MONDAY JUNE 28, 1999, shocking news surfaced in the newspaper. Wisconsin Energy was buying W isconsin G as’ parent,
Wisconsin Energy promptly moved for dismissal, saying the news biased jurors.

Back in court, Wisconsin Energy tried another strategy. Lyons said that everyone was demanding more money.

"They won't pay it," Wisconsin's Gerry's in-house attorney, Zakrajsheck, as part of the company's investigation team to "find out who did this," but Jaskulski's findings troubled him. In a May 1995 memo to Zakrajsheck, Jaskulski wrote: "The chip dumpsters are allegedly unknown - that seems too convenient." And later, noting that the Racinia plant had no records of the disposal sites for its wood chips, he wrote, "I wonder if this isn't a little too self-serving." Jaskulski concluded that the wood chips were put in a landfill somewhere, but Wisconsin Energy never called him to testify, nor did it call the company's librarian to verify, nor did it call the company's librarian to verify.

Zakrajsheck later testified that he was "out of town chairing an industry insurance conference." But A bdo's attorneys told the court that he was not the proper person to testify about insurance.

Still, Lyons promised that A bdo's subpoena would be "hand-delivered." One of Lyons' colleagues faxed the subpoena and the insurance question to Zakrajsheck, who was to give it to A bdo.

Zakrajsheck later testified that he was leaving for vacation, merely glanced at the fax and left it in his in-basket. No one delivered the subpoena to A bdo.

Lyons offered to give the court a sworn statement about insurance coverage instead of having A bdo appear. After nine days, Lyons still had no response on the insurance question. Facing a court deadline the morning of July 9, he phoned Zakrajsheck's boss, who referred him to M ichael Kaminiski, the head of Wisconsin Energy's insurance department. Kaminiski sat on important industry insurance committees, did complicated insurance coverage testing using Wisconsin Energy's various policies under hypothetical disaster scenarios and maintained a database within the company's policies. But when Lyons, fighting a big environmental pollution case on the company's behalf, asked if Wisconsin Energy had punitive damage insurance, Kaminiski spent no more than 30, and perhaps as few as six minutes, researching the answer. He reviewed a single policy - which expressly covered punitive damages - but, he said later, skipped over that section and read that fines and penalties were excluded. He told Lyons...
Lyons conveyed the information to the court in a sworn stipulation. Jurors were told that Wisconsin Energy's pre-merger net worth was $1.7 billion and that the company's post-merger nearly two million gas and electric customers wouldn't end up paying for punitive damages. “We didn’t want the rate payers to suffer,” says a juror who works as a property assessor. “But the stockholders, yes, they should know what kind of management they have running their company.”

On July 14, 1999, all of the parties involved agreed to allow the two alternates to join the 12 jurors in deciding the case. Twelve of the 14 would have to agree in order to reach a verdict. One elderly male juror couldn’t point his finger at either the gas or electric company, and he sat out of the deliberations, say four jurors who spoke to Milwaukee Magazine. A twentysomething man faulted the gas company for the OBW on the city’s land, but he blamed Wisconsin Energy’s electric subsidiary for the waste on Giddings’. For the rest, says Harley-Davidson retiree Polinske, “Mr. Gass’ witnesses were so good it was almost an open-and-shut case that the electric company did it.” Twelve jurors quickly agreed to award $4.5 million to cover cleanup costs and the diminished value of Giddings’ property. For punitive damages, each juror threw a piece of paper into the center of the table with an amount on it. The young juror joined in because he thought WEPCO was responsible for the waste on Giddings’ property. The amounts ranged from $15 million to $300 million. The group negotiated its way to $100 million, an amount equal to Wisconsin Energy’s average annual earnings in the years since 1959.

One juror, a quiet, middle-aged woman who worked at M&I Data, dissented. A hundred million dollars is a lot of money, she said. With that much on the line, Wisconsin Energy would appeal, and she wanted the plaintiffs to get their money. “That was the only reason I voted against it — not because Wisconsin Energy didn’t deserve to pay that much,” she says now. The jurors counted the remaining votes, and with the twentysomething juror, they had the needed 12.

If Wisconsin Energy had punitive damage insurance, several jurors say, they would have awarded even more. “We were convinced they did it, and a slap on the wrist was not going to solve anything. We still aren’t convinced they got the message about accepting responsibility, yet,” says the former motorcycle assembler. Another juror, a 1972 University of Wisconsin-Madison graduate, says, “We definitely wanted to hurt them enough that it would be painful. That was the only way we thought we could get their attention. They must have spent a couple million dollars defending that case, when they could have paid to clean it up... but they never took responsibility for anything... Management seemed to just want to buy that company and get its profits, not its liabilities.”

The Journal Sentinel article the following day quoted Michael John, Wisconsin Energy’s vice president of public relations, saying the company had insurance but that it was unclear whether the $104.5 million verdict would be covered. When Gass saw the quote, he fired off a letter to Lyons asking, “Does Wisconsin Energy have punitive damage insurance?” If it does, he told Lyons, you have an obligation to tell the judge. Lyons’ partners immediately faxed Gass’ letter to Zakrajsheck, but it would be months before the court would learn the answer.

July 15, 1999, the day of the verdict, would go down in Wisconsin Energy history as “the day of the fiasco.” The entire internal legal department was shell-shocked. The in-house attorneys had insisted “there would be no punitive damages,” says a Wisconsin Energy board member.

The legal shock wave set off fireworks in
Wisconsin Energy's boardroom over "the idiot strategy" the company had taken. "It was nuts to ever let it come to a trial," says one board member. A nother, Robert A. Cornog, the real power on the board, had gotten his job as chief executive officer of Snap-on Incorporated after his predecessor screwed up a lawsuit, says the first W.E. board member, so Cornog was acutely aware of the seriousness of the situation. The board intervened just as it had in the past when it forced A.bdoo to hire former shadow governor James Kauzer to provide lobbying help after the aborted NSP merger, and Paul Donovan, former Sunstrand Corp. executive vice president, as chief financial officer (and A. bdoo's understudy).

This time, the board ordered A. bdoo to dismiss the local Coo & Franke law firm and hire "the best law firm in the business." He brought in the 1,424-attorney New York firm Skadden A rps. In the legal world, Skadden was known as "a shark tank on speed."

"When the legal strategy blew up, D ick [A. bdoo] didn't point a finger within the organization. H e said the buck stops here," recalls the board member. Earlier, when W isconsin E nergy's nuclear reactor went down, A. bdoo had gotten no bonus. "That's like ringing a bell in this business," says the board member. He then faiced "definitely impact ed Dick's bonus," too, but in 1999, his income was still close to $1 million.

A. bdoo was already embattled, his 10-year tenure as CEO marked by one public corporate mistake after another. W hen he took over, the company appeared on lists of the nation's best-run utilities, but under his guidance, it had sunk to The Wall Street Journal's "corporate 'laggards'" list. A nd now this.

Some of A. bdoo's peers likened him to the Pigpen character in the Peanuts comic strip -- a cloud of dust followed him everywhere. A cadre of former employees called the "Phoenix G roup" barraged W isconsin E nergy's directors with letters saying, "Kill A. bdoo." "When they recounted all his public sins," says one board member, "I felt sorry for the poor guy, getting lambasted by them in addition to the whole world, but I did not feel sorry for him on this lawsuit."

The board was irked. "It's not that Dick is arrogant. It's just that he's a true believer," adds the board member. "H e looks at the world only through his glasses.... W ell, you've got to look at it other ways, too, like how the jury would see it. If he doesn't change, he won't keep his job."

A. torne y Sally Bentley joined W isconsin E nergy only one year earlier. S he had no courtroom, appellate or insurance experience, but in the wake of the disaster, she took over as legal director. W ithin 24 hours of the jury's verdict, she hired a N ew York law firm specializing in insurance to review the company's policies. T he firm got back to Bentley five days later with a preliminary finding: It looked like W isconsin E nergy had coverage for the $100 million.

During pretrial discovery, W isconsin E nergy told the court it had just one policy, but nine days after the verdict, Kaminisk i -- the executive who said the company had no coverage for punitive damages -- notified 40 insurance carriers on 150 policies that W isconsin E nergy believed the $104.5 million verdict was covered. T he company had $937 million in liability coverage. N o one would t ell Judge M. cm ahon for another three months.

But W isconsin E nergy did tell the state, which had to approve its merger. O n July 29, Bentley reassured officials that the $100 million verdict would not interfere with the company's ability to close the deal. She said W isconsin E nergy's "initial belief" had been that it did not have coverage but that it was now reviewing "all policies which might... provide coverage for all or part of the award."

Four days later, Bentley was in court with Skadden A rps attorney Barbara W rubel, who asked M. cm ahon to decrease the $104.5 million award. M. cm ahon had yet to approve the jury's findings. "N o one was hurt or killed," said W rubel. M. cm ahon asked whether W rubel knew how the waste was discovered. W rubel confessed that she hadn't finished reading the transcript. "Judge M. cm ahon ate her up and spit her out for not doing her homework," says one W isconsin E nergy attorney, gloat ing at the hotshot outsider's comeuppance.

W rubel was back in M. cm ahon's court later that August -- again, not to explain that the stipulation about the insurance had been wrong but because W isconsin E nergy wanted a second crack at suing the gas company out of the $104.5 million. M. cm ahon denied the motion, saving shareholders from once again suing themselves. (P R man W hite refuses to discuss that "legal strategy.")

In early November 1999, G ass met with Bentley's boss, attorney L arry Salustro. G ass had a surprise for him. H e had had four former Supreme Court justices review the case and speculate on how it would fare on appeal. A ll concluded that the verdict would stand. G etting such an opinion was unheard of, but it was similar to the mock tri al jury testing done by insurance lawyers. W hen Salustro asked G ass if he had "any more surprises," G ass joked, "O ne a day."

The next day, W isconsin E nergy planned to tell the court it was filing an appeal. Per haps fearing another surprise from G ass, it also made a confession. I n a strained moment where it tried unsuccessfully to make its former attorney, L yons, the scapegoat, W isconsin E nergy told the court its insurance stipulation had been "made in error."

G ass promptly asked M. cm ahon to sanction W isconsin E nergy for lying about coverage. H e r decision to consider whether W isconsin E nergy should be punished would trigger another 18 depositions, three more days of testimony and more than 100 pages of exhibits. It would also push the case into February of 2000.

W ith Judge M. cm ahon's pending ruling hanging over his head, A. bdoo arranged to meet the plaintiffs at the M ilwaukee Athletic C lub. H e insisted that W est A llis M ayor Jeannette B ell, C ommon C ouncil President P aul M urphy and G iddings & L ewi's C EO come alone, without their attorneys.

In his somewhat tarnished tenure as W isconsin E nergy's CEO, A. bdoo had had one shining moment. A decade earlier, he had personally settled another major lawsuit for the company. T o this day, A. bdoo's public announcement that his company would accept responsibility for an accident where 5-year-old M athew Brown was badly burned after he got into an unlocked Electric C ompany transformer box is regarded as a model of civic responsibility.

A. bdoo might never have "taken responsibility" if the boy's attorneys hadn't had proof that the unlocked transformer had not been checked since its installation 14 years earlier and that the utility ignored a warning that it was unlocked. N ot only that, says a source close to the little boy who lost his arms, "T he company had 300 more boxes that it couldn't prove had been inspected either." T he utility's attorneys conducted a mock jury trial, says another source, and knew "they'd get killed in court." W isconsin E nergy paid $28 million. T his critical information never became public until now, and the company's stature for doing the right thing grew.

On the day A. bdoo went to the Athletic C lub, sources inside the company say he carried a carefully prepared settlement offer, and perhaps, once again hoped to come to his company's rescue.

H e had recently rejected two settlement offers. G ass and the plaintiffs believed that A. bdoo was keeping his board in the dark. T o make sure the board knew what was going on, they agreed to wait for payment of the $104.5 million provided each board member got a copy of their offer, along with a summary of the case. W hen that failed, G ass prepared a second, more palatable offer on videotape. A t least some of the directors never saw it.

A. bdoo met the plaintiffs in a private dining room on the MAC's fifth floor. M ayor B ell had been so upset by W isconsin E nergy's "failure to act responsibly with this site
and pay a third of the cleanup costs,” she’d testified publicly against the company’s proposed NSP merger. But when she entered the meeting room, she thought Abdoo wanted to “get back on good terms.”

Abdoo was calm, reserved and methodical, but he wasn’t ready to put the case behind him. “He kept saying, ‘The judge got it wrong. The jury got it wrong. I pointed out some of the evidence,’” says council president Murphy, a practicing attorney, “and he seemed familiar with the case, but he was absolutely in denial.”

Giddings & Lewis’ CEO tried to get Abdoo back on track, saying, “The trial is over. Let’s get this settled.” But Abdoo was stuck. He couldn’t stop talking about the case. The three blamed Abdoo for the failed $7.5 million settlement. After all, they had all approved it. They were flabbergasted when Abdoo said, “It never happened,” denying there had been any settlement offers. Murphy was struck by Abdoo’s “professed lack of knowledge of any settlement negotiations.” This was more than revisionist history. Abdoo’s behavior reminded Murphy of the disconnected “Where am I? Why am I here?” performance of Ross Perot’s running mate, retired Navy Vice Adm. James Stockdale in the 1992 presidential debate.

“Abdoo was just obsessed with the case, saying how unfair it was,” adds Murphy. “I said, ‘Do you realize Judge CM ahon is considering motions that could cause you great harm in terms of any recovery from your insurance carriers?’ He didn’t care.”

Abdoo left the room to talk to his people and came back with a proposal. “It was totally unacceptable,” says Bell. “He didn’t even acknowledge that we’d won the case.” Abdoo didn’t apologize; he kept saying, “We didn’t do anything wrong.” Finally, the other three gave up and left.

DÉJÀ VU. THAT’S WHAT Judge CM ahon must have been thinking. She and Wisconsin Energy had already crossed paths, just before the West Allis case went to trial. Another case involving Wisconsin Energy had been referred to her by a higher court. It involved the death of a 36-year-old truck driver named Glenn DeRuyter, who’d been killed when his tanker truck of jet fuel exploded after a Wisconsin Energy lineman, high on drugs and alcohol and speeding to work, passed in the icy right emergency lane and triggered a multicar accident. DeRuyter’s widow and her two small boys sued.

Before Wisconsin Energy turned over the lineman’s employment records during discovery in another judge’s court, it removed a pre-hiring drug test the lineman had failed. The missing document came to light only after an anonymous Wisconsin Energy employee tipped off the widow’s attorney. CM ahon’s job was to consider a charge of litigation fraud. A gain, Wisconsin Energy blamed its outside attorney for the “oversight.” CM ahon didn’t buy it, and she ruled that a jury should decide. Wisconsin Energy settled before it could.

Now, CM ahon had to consider the insurance stipulation in the current case – and more. Discovery on the sanction question had revealed other documents Wisconsin Energy had withheld, documents the company claimed were “misfiled.” Some revealed that Kaminski, the insurance chief who checked a single policy, was well aware the company had numerous policies. He’d personally filed claims against seven of them for the cleanup of the same OBW on Wisconsin Energy’s land. Other documents showed that Wisconsin Energy had ignored letters from its insurers asking whether they faced any more environmental litigation even though the cyanide wood chip case was pending.

If what Wisconsin Energy was arguing was true, CM ahon would have to believe that a hired lawyer (Lyons) was the only one to ask about insurance coverage and that there was no internal inquiry in a billion-
dollar company whose CEO was active in insurance matters. Shed have to believe that the head of the insurance department couldn’t read a policy – since the one he looked at expressly covered punitive damages – and that he forgot that the company had scores of policies. Or that he didn’t think a case involving 52 million pounds of cyanide-laced waste was a big deal and that all of that was fine with his superiors, since he still works there.

MCM ahon would also have to believe that the in-house attorney, Zakrajshcek, would leave town and not tell his boss there was a subpoena for the CEO on his desk. And that his boss wouldn’t be checking on the case while he was away. Or that Zakrajshcek, who’d prepared five years for the case, would be allowed to go on vacation in the middle of it.

The picture that emerges from Wisconsin Energy’s explanation of how the “mistaken” insurance stipulation came about is not one of a finely tuned billion-dollar corporate enterprise but a disturbing image of rampant incompetence in a company that also oversees sensitive nuclear reactors. “I had this unshakable image of people working with blinders on,” MCM ahon said after reviewing the testimony. “People who didn’t want answers, people who never asked questions. They were curiously unconcerned and deliberately indifferent. The picture that was painted was of an organization consciously avoiding having information.”

The law, said MCM ahon, doesn’t excuse collective corporate stupidity. She called Zakrajshcek’s sworn testimony “unbelievable” and Kaminski’s “evasive.” (Zakrajshcek has taken early retirement; his boss, Walter Woeble, transferred to another division.)

The plaintiffs’ explanation was far more plausible. Wisconsin Energy didn’t admit it had covered because there would have brought to court its other insurers – all of whom had clauses in their policies saying there is no coverage for intentional acts – to help prove Wisconsin Energy’s subsidiary had known what it was doing.

Even if the stipulation was made in error, “which I decline to find,” MCM ahon said, “the failure to disclose the truth during [Weibel’s] motions after verdict… is equally egregious.” MCM ahon blamed Wisconsin Energy management, not the dismissed Cok & Franke attorneys, for “the callous and cavalier” conduct. She said the utility “acted in bad faith” and “with reckless disregard for the truth” when it filed the false stipulation, which “not only harmed the plaintiffs but undercut the entire system of justice.”

“I think the message is one we should be sending… if we do impose serious sanctions on one who violates… that promise to tell the whole truth and nothing but the truth?” She called Wisconsin Energy’s assertion that “one doesn’t know one has insurance until a court or arbitrator says so” a position that “defies common sense.”

MCM ahon said Wisconsin Energy had ignored the warning of the DeRuyter case, continuing its “pattern of deciding to withhold or provide information based on what was in the company’s best interest,” not according to what was the truth or its obligation to the judicial system. At the conclusion of a steamy 77-page tirade, she ordered Wisconsin Energy to withdraw all of its claims of insurance coverage. She would make the company live by the stipulation it had offered. It would now have no coverage.

One day after the jury sent it a $104.5 million message, MCM ahon said, Wisconsin Energy “once again placed itself above the law” by pursuing the insurance it said it did not have, and she slapped the company with a default judgment equal to the jury’s $104.5 million verdict. “If on appeal, the original punitive damage award is overturned, Wisconsin Energy will still owe $104.5 million.

If Wisconsin Energy management was shocked by the original verdict, it was staggered by the second. Only two cases in Wisconsin jurisprudence came remotely close to the sanction and both involved Judge MCM ahon, though the largest had been for $1.6 million. “The insurance thing was an honest mistake,” says one board member. “The trouble is, it was one of many.”

Wisconsin Energy insists it will get the verdict and “draconian sanctions” thrown out on appeal. I visited attorney Robert H. Friebert, Skadden Arps’ local legal contact, to talk about that in his 12th-floor office at the Park East building, and he offered to show me what oxide box waste looks like. “I’ve sniffed it, the stuff found on these properties, and I’m still alive to talk about it,” he boasted. Friebert produced a small glass jar containing finely decomposed blue wood chips. “They argued one whiff of this stuff can kill you, but they couldn’t produce so much as a single dead fish. We would have done an autopsy.”

He held the jar at arm’s length, closer to my face than his. Then, without warning, he opened it. A downdraft carried the strong offensive odor across the table to my nose. “Smells like shit,” Friebert said. When I complained that my eyes and throat burned, he shut the jar, but the area beneath my nose stayed chapped for days.

Wisconsin Energy still insists this waste is safe. A mining group filed a friend of the court brief on Wisconsin Energy’s behalf, arguing that the iron cyanide in oxide box waste is so benign that it is used in eye shadow. “The stuff in eye shadow is a processed form with very different properties,” says William Gregg, the environmental chemist hired by Wisconsin Energy in 1986. “It’s used as a dye, and it’s not going to leech into someone’s skin or eyeballs.”

The raw skin around my nose, he says, is typical of exposure to sulfuric acid fumes.

Wisconsin Energy’s appeal argues that iron cyanide isn’t even technically hazardous waste. Of course, it never mentions the recent Illinois Supreme Court case where particulate matter from an oxide box waste site was found to have caused a rare form of childhood cancer in the offspring of pregnant women who lived within four miles of the site.

Friebert says Wisconsin Energy’s strongest argument is that the jury did not have the 12 votes it needed for the damage award: that the young juror, who felt Wisconsin Energy contaminated only Guidings’ property, shouldn’t have voted on damages. As precedent, Skadden Arps cites a case where the Wisconsin Supreme Court ruled that an “inconsistent verdict” requires a new trial. Former Supreme Court Chief Justice Nathan Heffernan wrote that opinion, but he has no difficulty distinguishing it from the current case because Wisconsin Energy never objected to the form of the questions given the jury. “The award should stand in toto,” Heffernan wrote when he reviewed this case for the plaintiffs.

Wisconsin Energy will also argue legal technicalities and that the $100 million award is “grossly excessive.” But all four of the former state Supreme Court justices who reviewed the case say that argument won’t fly. His case “is a textbook example of the proper application of both federal and state constitutional law as it relates to punitive damages,” wrote one in a typical comment.

Retired Justice William Callow, one of the four, told Milwaukee Magazine that an appellate court is not allowed to question a damage amount: “unless it shocks the conscience, and this does not. Oh, it’s big bucks to me, but… T his could have killed all kinds of people. It was like hiding a loaded gun.”

A conservative-friendly to business, Callow has trouble believing the case even got this far. “I can’t imagine why Wisconsin Energy wouldn’t have settled this case for almost any amount they could have,” he says. “Fighting this case was like jumping off a cliff hanging onto a spider web.”

Mary Van de Kamp Nohl is a senior editor of Milwaukee Magazine.