BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of Brett Healy for Declaratory Ruling to Determine Allocation of Costs for Relocation of Utility Structures for Milwaukee Streetcar Project

Docket No. 5-DR-109

INDIVIDUAL PETITIONERS' REPLY BRIEF

INTRODUCTION

Much of the City of Milwaukee's response brief is devoted to two irrelevant propositions. The first is that the City, motivated by a complex web of state and federal requirements and inducements, has decided that the Streetcar Project – at least if someone else will pay for it – is a good idea. The City cites a series of conclusory sources to support its belief that adopting a technology rejected long ago will somehow produce a different result this time around. Many of these statements relate not to the Milwaukee Streetcar itself, but to rail transit in general or to earlier and broader iterations of the "Milwaukee Connector" – a concept that has now been reduced to a 2.1 mile trolley. Recalling Dr. Samuel Johnson's observations about how hope can triumph over experience, we are told that the City believes that the Streetcar will spur economic development along its route.

Of course, the Individual Petitioners disagree. We believe that such claims are facially implausible. But our disagreement is not the issue here. While it may be possible for a municipal action to be so lacking in merit as to be unreasonable within the meaning of Wis. Stat. § 196.58, it is not necessary for the Commission to reach the merits of the Streetcar Project to decide this case. The City may not compel utility relocations without compensation – not because the Streetcar is a *bad* project (although it is), but because of the *type* of project it is. It

lacks the particular type of justification – one based in the exercise of a "governmental" or, if properly understood, "police," power justification – that warrants an uncompensated relocation.

The second proposition – advanced by the City but not responsive to the Petitioners' claim – is that Milwaukee has the authority to build a Streetcar and it would be improper for the Commission to say that it "can't" do so. The City argues that the Commission cannot act as a "mass transit potentate" empowered to pick and choose among methods of public transportation in Milwaukee. Milw. Resp. Br. at2-3. The Commission, it says, cannot "override the City's legislative decisions as to whether a public works project serves primarily a public purpose." *Id.* at 46-47.

This is a straw man. Petitioners have not asked the Commission to stop the Streetcar. We agree that the Commission has no authority to do so. Folly as it may be, the City can have its trolley as long as it is willing to pay for it or can convince someone else to give it the money. Although the City wants to reduce the question to a matter of whether or not the City "may" build a Streetcar, we have invoked the Commission's jurisdiction to determine – now that the City has decided to move ahead – who must pay for the utility relocation costs associated with it. *That* question – as opposed to the irrelevant ones that the City constructs and dismisses – is squarely before the Commission by the plain language of Wis. Stat. § 196.58 and Wis. Admin. Code § PSC 130.09.

The City's confusion as to what it may do with what it must pay for is played out in the following way. It argues that it may impose relocation costs on the utilities as long as it does so by the exercise of its police power. It then attempts to define the police power to include anything that the City believes will benefit the public. In so doing, the City initially relies on cases offering generic descriptions of the police power, which it reads broadly without reference

to what these cases actually involved (*see* Part III.A., *infra*) or to what can be implied from the existence and structure of § 196.58(4) and § PSC 130.09. Because these cases use a definition of the police power which is virtually identical to the traditional definition of governmental powers, and because they involve activities that are readily characterized as "governmental," the City moves beyond "police power" cases to cite a series of decisions holding that municipal actions undertaken to promote economic development are, not the exercise of the police power, but permissible under the "public purpose" doctrine, *i.e.*, the notion that public funds may only be used to do things that benefit the public. Milw. Resp. Br. at49-50.

As we pointed out in our opening brief, the standard of review under § 196.58 cannot be limited to a determination of whether a municipal action benefits the public and, therefore, is permissible under the public purpose doctrine. Municipal actions that confer no public benefit are ultra vires and there would be no need to empower the Commission to review them. Ind. Pet. Br. at 12-13.

For the same reason, review of a government's justification for a proposed relocation cannot be reduced to whether it is an exercise of the "police power" if – as the City erroneously attempts to do here – the police power is equated with the "public purpose" doctrine, *i.e.*, read to include anything that benefits the public. Again, a city has no power to undertake actions that do not serve a public purpose. Section 196.58 and § PSC 130.09 – because they contemplate further review of valid municipal actions – set the bar higher. Not every valid municipal action – not everything that benefits the public – justifies the imposition of utility relocation costs.

The City cannot avoid the rule that in Wisconsin there are two types of lawful municipal powers – however they may be labeled – and only one of the powers permits the City to force the affected utilities and their ratepayers to bear the costs of the Milwaukee Streetcar Project. As

noted in our original brief, longstanding law makes clear that relocation costs may not be imposed when a municipality acts in its proprietary capacity, *i.e.*, when it engages in economic activity. Ind. Pet. Br. at 15-17. A proprietary action, while not susceptible of a single definition, is marked by some array of the following characteristics. It is something that a municipality voluntarily undertakes, *i.e.*, it is not something that all municipalities do or that is seen as a "core" municipal function or something imposed on a municipality as an agent of the state. It is designed to provide a "useful" service to its residents, as opposed to protecting them from harm. It is a decision to undertake economic activity, *i.e.*, something that could be undertaken by private party, or to compete with other providers. Its purpose is often to provide an economic advantage to its residents or to spur economic activity within its borders – again as opposed to ensuring public order or protecting the public from harm.

There is an easy-to-understand rationale for why this should matter in the context of utility relocations. When a city enters into the economic realm or for the particular benefit of its own residents, it ought to internalize its costs and may not shift them to outsiders. This is what the traditional "governmental-proprietary" distinction has been concerned with – not whether a municipal action was "proper." Section 196.58(4) and § PSC 130.09 are, among other things, designed to identify these circumstances and ensure that a municipality internalizes its costs rather than helping itself to an unfair subsidy from utilities and ratepayers who have been unable to participate in municipal decision-making.

Because Wisconsin law dictates that public transit is a proprietary (or if you prefer, "non-police power") function of local government, the Commission must declare that the City cannot force the utilities to pay those costs.

ARGUMENT

I. THE CITY ADMITS IT INTENDS TO FORCE THE UTILITIES TO PAY FOR SUBSTANTIAL UTILITY RELOCATION COSTS.

The simplest place to begin is where the parties are in agreement. The City has now finally admitted that it intends to force the affected utilities to pay for all of their relocation and modification costs associated with the construction of the Streetcar Project. Earlier in these proceedings, the City claimed that because the project had not passed the "30%" design stage, all utility relocation costs were speculative and that it was possible that there would be no utility relocation costs. Counsel for the City specifically stated that "[w]e have no idea whether there will be – at this point whether there will be any utility relocation costs." Transcript of February 22, 2012 prehearing conference at 27-28 (PSC Ref# 160035).

No longer. Faced with evidence introduced by the affected utilities that the inclusion of relocation costs may double the actual costs of the Streetcar Project, the City has adopted a new position. Now the City argues – essentially – that the cost might not be "so bad," and says that the utilities "are reckless in their wild estimates of the likely utility cost impacts." Milw. Resp. Br. at 24. However, the City provides no real evidence that the utilities have made cost estimates that are "reckless" or "wild." The affidavit from Mr. Polenske merely expresses his opinion, which is based on little-to-no independent review of the requirements for relocation and reinforcement, that their estimates might be high. This is, of course, possible. It is equally possible that their estimates are too low.

It is equally apparent from the City's submissions that, whatever the relocation costs turn out to be, it intends to force the affected utilities to pay all of them. Despite the initial representations of its counsel explaining that "the City has an 80 year history of having no

disputes over . . . utility relocation costs, and we are going through the process that we always have gone through" (2/22/12 Transcript at 28), the City's response brief and Mr. Polenske's affidavit make it clear that there is no basis for any kind of cost sharing or negotiation. "Funding for any private utility modification performed in conjunction with the Project are not included in the project budget." Polenske Aff. ¶ 34. "[T]he City is proceeding under the assumption that costs to modify WE Energies facilities to accommodate the Milwaukee Streetcar project shall be borne by WE Energies . . . ." *Id.*, ¶ 14. Thus, the record is clear that utility modifications will cost millions of dollars, *see* ATU Br. at 5-7, WE-ATC Br. at 2-4, and the City is determined to force the affected utilities to pay the costs.

The City admits, moreover, that these costs may be so substantial that it will not proceed if it must internalize them. It accuses us of attempting to "derail the Streetcar Project" through this proceeding. Milw. Resp. Br. at 3. But as outlined above – and as the City certainly knows – this proceeding cannot stop the project. It can only prevent the shifting of relocation costs to utility ratepayers. If that derails the Streetcar – as the City now concedes it might – it will only be because these costs are so substantial that the City itself believes that, notwithstanding federal munificence, they outweigh any benefit.

And that is significant to this proceeding. If a project that is principally designed to confer local and particularized economic benefits cannot be justified if the costs are imposed on those who will benefit, then shifting them to the ratepayers of regulated utilities is unreasonable and preventing such cost shifting is precisely what § 196.58 and § PSC 130.09 are intended to do.

II. THE COMMISSION HAS THE STATUTORY AUTHORITY TO REVIEW A MANDATE TO RELOCATE UTILITY FACITILITIES WITHOUT COMPENSATION.

The City concedes that by enacting § 196.58, "the Legislature established the Commission's authority over municipal regulation of public use of local rights of way." Milw. Resp. Br. at 3. Pursuant to § 196.58(1)(b), a Wisconsin municipality may require public utilities to add to or extend their facilities within the municipality, but only if their directives are "reasonable and necessary in the interest of the public." Section 196.58(4) gives the Commission jurisdiction to consider the validity of municipal enactments under this rule, and to strike down those that do not comply with this requirement of state law.

The Commission has exercised its unquestioned authority under § 196.58 by, among other things, enacting § PSC 130.09. That rule, in turn, provides that a municipal directive that requires a utility to relocate facilities in the municipal right of way is unreasonable unless "there is an adequate health, safety, or public welfare justification for the requirement." The Commission must consider and determine the validity of a municipal directive under this standard if asked to do so by a qualified complainant. § 196.58(4).

Petitioners are asking the Commission to declare both Milwaukee Ordinance § 115-22 and the Streetcar Resolution unreasonable and void, at least to the extent they impose project costs on the affected utilities. As the Petitioners argued in their initial brief on the merits, § 115-22 is on its face unreasonable in violation of Wis. Stat. § 196.58(1)(a) because it permits the City to shift utility relocation costs to affected utilities for *any* "public works or improvements of any nature whatsoever," regardless of whether those public works or improvements are undertaken using the City's police or governmental powers for health, safety, or welfare concerns. Ind. Pet. Br. at 9-12. This ordinance is unreasonable and therefore void as a matter of Wisconsin law. The City's brief ignores that argument and does not explain why an ordinance that goes beyond what is permitted under § 196.58 should nevertheless survive Commission scrutiny.

As the Petitioners also argued in their initial brief, the Streetcar Resolution is unreasonable to the extent it requires utilities to relocate or modify their facilities without compensation from the City, as the Project lacks an adequate health, safety, or welfare justification for doing so. Ind. Pet. Br. at 12-21.

Although the City suggests otherwise, the Petitioners do not dispute the general proposition that as a matter of Wisconsin law, a city may in some circumstances impose costs on utilities without compensation, assuming the valid exercise of its "police" or "governmental" power. *See* Milw. Resp. Br. at 4. That rule was the rule at common law. It is the rule that the Legislature has codified in § 196.58 and the rule that the Commission has set forth in more detail in § PSC 130.09. In Wisconsin, the law requires an adequate health, safety, or public welfare justification before a municipality can force utilities to pay costs for a public work project. And in Wisconsin, it is up to the Commission to determine whether a public works project meets that test.

In response, the City says that nothing in the statutes or PSC regulations authorizes the Commission to "second guess the City's decision regarding the desirability, necessity, or wisdom of undertaking a public works project." Milw. Resp. Br. at 3. The Commission, the City says, may not sit as a "mass transit engineering and planning potentate" or "public policy accountant" to decide whether the Streetcar Project is a good idea. *Id.* The individual Petitioners agree. The Commission has no jurisdiction to prevent or interfere with the City's decision to build the Streetcar Project. Milwaukee can have whatever form of mass transit it desires. The question before the Commission is whether the City can force the affected utilities to pay for a substantial part of the Project.

While the Commission may not have the authority to "second-guess" the Project, it does have the authority – and the duty – to "second-guess" the City's decision to impose a substantial part of the costs of the Project on the affected utilities and their ratepayers and customers. The law is clear that the City can do so only if there is an adequate health, safety or public welfare justification for the City's decision, and it is the Commission – not the City – that must decide that question.

III. WISCONSIN LAW STILL FOLLOWS THE GOVERNMENTAL-PROPRIETARY DISTINCTION

A. Not All Permissible Municipal Actions Justify the Imposition of Relocation Costs.

The City suggests that, if it has the authority to undertake an action requiring utility relocations, then it may force utilities to bear the cost of those relocations. In its view, the question of what is reasonable within the meaning of § 196.58 or what has an adequate "health, safety or public welfare justification" under § PSC 130.09 can be reduced to a question of whatever a municipality has the power to do. The City goes on to suggest that it has the power to do anything that is in the public interest (and, presumably, that is not prohibited by some constitutional or statutory restriction on its power). *See, e.g.*, Milw. Resp. Br. at 46-47.

In so doing, the City confuses the public purpose doctrine with the more limited and particular concept of "governmental" or "police" powers. It argues that numerous cases support the proposition that a municipality has broad power to do things that it believes will spur or attract economic development within its borders. *See* Milw. Resp. Br. at 49-50. These cases, however, go only to a city's authority to undertake such projects, not whether such projects were within the more limited "governmental" or "police" powers.. *See Town of Beloit v. County of Rock*, 2003 WI 8, ¶ 20-21, 259 Wis. 2d 37, 657 N.W.2d 344 (expenditure of tax monies to

develop and sell municipally-owned property in order to spur economic activity was "public purpose"); *Libertarian Party of Wis. v. State*, 199 Wis. 2d 790, 808-813, 546 N.W.2d 424 (1996) (creation of local baseball park districts was a "public purpose"); *Alexander v. City of Madison*, 2001 WI App. 208, 247 Wis. 2d 576, 634 N.W.2d 577 (collection of liquor license fee to increase the tax base and generally enhance the economic climate of the community was "public purpose"); *Bishop v. City of Burlington*, 2001 WI App. 154, ¶ 11, 246 Wis. 2d 879, 61 N.W. 2d 656 (city's construction of a parking lot to promote rehabilitation of the downtown area was "public purpose"). Each of these cases dealt with the public purpose doctrine, *i.e.*, the rule that any expenditure of government funds at any level must serve a public purpose. *See Town of Beloit*, 2003 WI 8, ¶20. If a governmental action does not serve a public purpose, then it may not be done; it is ultra vires. *See id.* This has significant implications for this case.

First, it cannot be true that anything that serves a public purpose and is a permissible municipal action has an adequate "health, safety or public welfare justification" within the meaning of § PSC 130.09. If an action does not serve a public purpose and may not be done at all, there would be no need to authorize the Commission to review it. The "public purpose" cases do not help the City.[1]

Second, if not everything that serves the public in some way passes muster under § 196.58(4), then simply showing that a project might, at least in the City's view, serve the public interest does not justify shifting utility relocation costs to a utility or its rate payers. This proceeding requires a more exacting review.

B. Municipal Actions that Are "Proprietary" Do Not Justify Uncompensated Utility Relocations

[1] As noted in our opening brief, the absence of an adequate "health, safety and public welfare" justification does not require that an action be undertaken primarily for a private benefit. Ind. Pet. Br. at 17.

As the individual Petitioners pointed out in their initial brief, Ind. Pet. Br. at 14-17, a municipal action undertaken in furtherance of a city's "proprietary" – as opposed to "governmental" – powers lacks an adequate health, safety, or welfare justification as a matter of law. As explained in our opening brief, the Wisconsin Supreme Court has held that the exercise of a "proprietary power" – in that case the operation of a municipal water utility – could not justify forcing a utility to relocate facilities without compensation. *Milwaukee E. R. & L. Co. v. City of Milwaukee*, 209 Wis. 656, 245 N.W. 856, 859-60 (1932). Obviously, the provision of water serves the public. It might even promote health and sanitation. But, as an economic activity designed to provide a particularized benefit to City residents and not undertaken in the City's capacity as an agent of the state, it was proprietary.[2] While the City was free to provide water, it had to bear the cost of doing so.

In *Wisconsin Public Service Corp. v. Marathon County*, 75 Wis. 2d 442, 249 N.W.2d 543 (1977), the Wisconsin Supreme Court explained that the cost of utility relocation to accommodate an airport expansion – something traditionally regarded as a proprietary function[3] – must be borne by a municipality. The supreme court did not use the language of proprietary and governmental functions, speaking, instead, in terms of the reason for relocation being either a (compensable) taking or a (noncompensable) "reasonable exercise of the police power." *Id.* at 448-49. It made clear, however, that the latter does not include anything that serves the public or

[2] Again, the test for what is "governmental" and "proprietary" is multi-faceted. One could might say, for example, that the provisions of streets provides a service and local economic benefit. But, as *Milwaukee Electric Railway & Light Co.* demonstrates, the maintenance of streets and roads is a governmental function and the provision of transit is not. As noted in that case, courts generally find public transit systems to be proprietary, 245 N.W. at 859, and the individual Petitioners are aware of no case that has held the provision of streets to be proprietary. There are many reasons. All municipalities provide streets, and they almost always connect beyond the municipal boundaries, benefitting the area as a whole. The provision of roads by private parties, while perhaps not impossible, is very difficult and public roads facilitate, rather than compete with, private forms of transit.

[3] *See Bargo Foods North, Inc. v. Department of Revenue*, 141 Wis. 2d 589, 597, 415 N.W.2d 581, 585 (1987) (citing cases that predate *Marathon County*, and noting that "[t]he weight of authority from other jurisdictions is that a municipality's operation of an airport is a proprietary function"); *see also Anderson v. Jackson Municipal Airport Authority*, 419 So. 2d 1010 (Miss. 1982).

that a municipality is empowered to do, observing that "[I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful ." *Id.* at 449, *quoting Just v. Marinette County*, 56 Wis. 2d 7, 16, 201 N.W.2d 761, 767 (1972). The *Marathon County* Court, citing *Milwaukee Electric Railway & Light Co.* with approval, made clear that not everything that is "useful" justifies the imposition of relocation costs on a utility and its ratepayers. *Id.* at 449. The court concluded that operation and expansion of the airport – without doubt beneficial to the public[4] – was not an exercise of the police power and held in favor of the utility. *Id.* Its treatment of what constitutes an exercise of the "police power" is comparable to the analysis distinguishing "governmental" from "proprietary" powers:

> Here, the forced removal was because it was useful to the public in that it facilitated enlargement of the airport. The wires were not removed because they harmed the public. The removal was more like a taking than the exercise of the police power.

Id.. As we will see, whether we speak in terms of "police" or "governmental" and "proprietary" powers, the question remains the same.

1. The Governmental-Proprietary Distinction Has Not Been Rejected.

The City's claim that the governmental-proprietary distinction has been "long eschewed" is false. To "eschew" something is to shun or avoid it. Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/eschew (last accessed July 30, 2012). The Petitioners' initial brief cited numerous cases that applied the distinction between 1927 and 1993. Ind. Pet. Br. at 17. As recently as 2005, the Wisconsin Court of Appeals used the distinction to describe the two types of power that may be exercised by Wisconsin municipalities. *See Town of*

[4] Indeed, the City's expansive view that any relocation that "primarily serves a public purpose" is a reasonable regulation under the police power and noncompensable, *see* Milw. Resp. Br. at 46-47, would make the operation or expansion of an airport a police power, contrary to binding Wisconsin precedent.

Brockway v. City of Black River Falls, 2005 WI App 174, ¶21, n. 8, 285 Wis. 2d 708, 702 N.W.2d 418 ("A municipality acts in its governmental capacity when its primary objective is health, safety, and the public good. It acts in its proprietary capacity when engaged in business with primarily private concerns, even if some elements are governmental.").[5]

It is inconsequential that other cases applied the governmental-proprietary test to circumstances other than those present in *Milwaukee Electric Railway & Light Co., i.e.,* the shifting of utility relocation costs. It is hard to see how the Wisconsin courts' use of a well-established test in other applications could detract from its vitality. If the City could demonstrate a pattern of Wisconsin courts avoiding – and acting in a manner that is inconsistent with – this test, it might have a point. But it cannot show such a pattern. We have *Milwaukee Electric Railway & Light Co.* and *Marathon County* at the beginning and end of the line of cases applying the test to allocate utility relocation costs. The former applies the distinction explicitly. The latter applies it in substance. There are other cases applying the test to other situations. No case abandons it.

Utility relocation cases are rare. Although the City cites a law review article to the effect that the governmental/proprietary distinction has been abandoned in "modern" cases, the author cites exactly two cases – the Oregon and Colorado cases relied on by the City – as evidence of this supposedly definitive and widespread "repudiation." *See* Michael L. Stokes, *The Common Law of Utility Relocation*, 45 Val. U. L. Rev. 457, 480 (2011); Milw. Resp. Br. at 37. The article ignores other cases applying the distinction in utility relocation cases. *See, e.g., City of Baltimore*

[5] As is apparent from the cases cited here, there are numerous recent cases from many jurisdictions applying – and not eschewing – the distinction. *See, e.g., Peak v. City of Tuscaloosa*, 73 So. 3d 5, 14-15 (Ala. Crim. App. 2011); *Bennartz v. City of Columbia*, 300 S.W.2d 251, 259 (Mo. App. 2009); *Martinez v. City of San Antonio*, 220 S.W.3d 10, 15 (Tex. App. 2006); *Martel v. Metropolitan District Commission*, 275 Conn. 53 (2005); .

v. Baltimore Gas & Electric Co.,192 A.2d 87, 94-95 (Md. App. Ct. 1963) (applying the governmental-proprietary distinction to find that the city must pay for utility relocation costs associated with the building of a public market for economic development);*State v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) ("This court has held that the operation of a governmentally owned transit system is a proprietary and not a governmental function."). *In re Gillen Place, Borough of Brooklyn, City of New York*, 106 N.E.2d 897, 899-900 (N.Y. App. Ct. 1952) (city must pay a gas company for removal of facilities to accommodate the city's building of a bus garage and shop because, although a mass transit bus system may be "operated in the public interest," it is "nevertheless proprietary in nature").

The City urges the Commission to abandon Wisconsin's longstanding governmental-proprietary approach based on two decisions from other jurisdictions. But neither of these courts has gone so far as to say, as the City suggests, that since "whatever local government is authorized to do constitutes a function of government", *see* Milw. Resp. Br. at 40, a city may order utilities to move their facilities at their own expense whenever and under whatever circumstances the city decides are appropriate. To the contrary, the Colorado Supreme Court held that "some limitation on the right of municipalities to compel a utility to relocate its facilities at its own expense is necessary…we hold that a municipality may compel public utilities to relocate their facilities from the public right of way at their own cost whenever such relocation is necessitated by the municipality's reasonable exercise of police power to regulate the health safety or welfare of its citizens." *Denver v. Mountain States Tel. & Tel.*, 754 P. 2d 1172, 1176 (Colo. 1988). In other words, the Colorado Supreme Court adopted exactly the standard that is set forth in Wis. Stat. § 196.58, the same standard that the city asks the Commission to ignore in the case before it.

Nor does the *Mountain States* Court's application of the police power concept differ from *Milwaukee Electric Railway & Light Co.* and *Marathon County*. It permitted an uncompensated relocation for a classic protective and non-economic function, sewage treatment – a function recognized as a governmental, and not proprietary, power in Wisconsin Law. *See Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 542, 314 N.W.2d 321 (1982) ("The city, in providing sewage services, is performing a governmental rather than a proprietary service.").

Even the Oregon Supreme Court's treatment of the issue is inapposite here. Oregon law did not provide for the review of relocation costs by an administrative agency to determine whether Portland's actions met a statutory test to permit the shifting of utility relocation costs. *See Northwest Natural Gas Co. v. Portland*, 711 P.2d 119 (1985) (declaratory relief sought at the trial court level). No analogue of § 196.58(4) or § PSC 130.09 played a part in the Oregon court's decision. The Oregon court, moreover, operating without mandated Commission review, appears to have reduced the question of "who must pay" to whether the city of Portland "could" build a light rail system. Id. at 129-130.

2. The Distinction Between Governmental and Proprietary Powers Makes Sense in the Context of Utility Relocations.

The distinction between "governmental" and "proprietary" powers has long been used to assess various claims of municipal immunity and entitlement. While most cases have arisen in the context of municipal claims for immunity from tort liability, the distinction has also played a role in assessing whether a municipality is immune from zoning regulations, or when one municipality may tax another. *See generally Peak v. City of Tuscaloosa*, 73 So. 3d 5 (Ala. Crim. App. 2011). Here in Wisconsin, the distinction has come into play in assessing municipal tort

liability,[6] determining when a municipality may impose a special assessment on property,[7] deciding what functions can be delegated to private parties and,[8] of course, utility relocation.[9]

While the distinction is not always easy to apply, its animating principle has been to strip unfair advantages from municipalities that are engaging in economic activity, seeking to obtain benefits for it or its residents (as opposed to the broader public) or entering into competition with other public and private actors.

In determining whether an action is governmental or proprietary, courts have applied a variety of tests. While one is, as the City notes, whether an activity has traditionally been performed by the government, this is not the only test, nor is it dispositive. Courts have, for example, also looked to whether a proposed activity is necessary, *i.e.*, something that virtually every municipality must do, or voluntary. *See, e.g., Bargo Foods North, Inc. v. Dept. of Revenue,* 141 Wis. 2d 589, 597, 415 N.W.2d 581 (1987) (explaining *Piper v. City of Madison,* 140 Wis. 311, 122 N.W. 730 (1909), as a recognition that distributing water to a city's residents is proprietary because it is of a "private nature, voluntarily assumed by the city for its residents"); *Christian v. City of New London*, 234 Wis. 123, 290 N.W. 621, 623 (1940) (New London "voluntarily undertook" operation of an electric utility for the benefit of its residents and, therefore, was not engaged in a governmental function); *McPhee v. Dade County*, 362 So. 2d 74, 80 (1978) ("[T]he permissive proprietary versus governmental distinction [is] clear. A governmental function is necessary; a proprietary function, such as maintaining a recreation area,

[6] Wisconsin has abrogated the common law doctrine of municipal immunity, *see Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), and so no longer uses the distinction for that purpose. This is consistent with what has happened in other states. *See Hillerby v. Town of Colchester*, 706 A.2d 446, 454 (Vt. 1997) ("[M]ost jurisdictions abrogated general municipal immunity between the late 1950s and the early 1980s.").Even those states have, however, used the distinction for other purposes, See, e.g., City of Selma v. Dallas County, 964 So.2d 12, 17 (2007).

[7] *See City of De Pere v. PSC*, 266 Wis. 319, 63 N.W.2d 764 (1954).

[8] *See Save Elkhart Lake v. Village of Elkhart Lake*, 181 Wis. 2d 778, 512 N.W.2d 202 (1993).

[9] *See Milwaukee E.R. & L. Co. v. City of Milwaukee*, 209 WIs. 656, 245 N.W. 856 (1932).

is not."). They have asked whether an activity is undertaken primarily for government's own corporate benefit or that of its inhabitants. *See, e.g., Piper v. City of Madison*, 140 Wis. 311, 122 N.W. 730, 731 (1909) (operation of municipal waterworks undertaken "for the private advantage of compact community" is proprietary); *Bennartz v. City of Columbia*, 300 S.W.2d 251, 259 (Mo. App. 2009) (Proprietary functions "often involve the provision of services or conveniences to a municipality's own citizens."); *Martel v. Metropolitan District Comm'n*, 881 A.2d 194, 205 (Conn. 2005) ("It is well established that a proprietary function is an act done in the management of a municipality's property rights for its own corporate benefit or profit or that of its inhabitants."); *Hickman by Womble v. Fugua*, 422 S.E.2d 449, 451 (N.C. Ct. App. 1992) (proprietary activities are commercial or chiefly for the private advantage of the compact community). They have asked whether an activity is of a type that only a government may engage in, or whether it involves economic competition. *See, e.g., Greenhalgh v. Payson City*, 530 P.2d 799, 801 (Utah 1975).

A municipal action is proprietary The governmental-proprietary distinction applies where, as here, a city voluntarily enters into competition with other providers of transportation to provide a service for a fee for the primary purpose of conferring economic benefits on its own residents. As such, it ought to pay its own way. It ought to internalize its costs and not help itself to a subsidy from utility ratepayers who will not benefit from – and have no political input into – the Streetcar Project. That is precisely what § 196.58(4) and § PSC 130.09 are designed to ensure.

These concerns are precisely why the governmental-proprietary distinction has been applied in utility relocation cases. In *City of Baltimore*, for example, the court explained that the intent of the governmental-proprietary distinction is to ensure that a "proprietary exercise of

power which requires the moving of utility facilities from public ways or lands puts the sovereign in competition with, or on an equal basis with, the utility, and therefore the [municipality] may not exercise its usual superior governmental right to regulate [utilities] without cost to itself." *City of Baltimore*, *supra*, 192 A.2d at 94.

This is not to say that proprietary activities do not have public benefits. (Indeed, almost all successful economic activity confers benefits.) As one court has noted:

> Of course all municipal "proprietary" functions are also "public" and "governmental" in the common use or understanding of those words. These proprietary functions are for the public good, and, indeed, sometimes of public necessity. They are part of the city's government and the city may levy taxes to support them. They are not private in the ordinary sense of the word. Thus, function of a municipality may be of public necessity and convenience, of public good and "governmental" in every sense of the word, but it is still not within the special meaning of "governmental" as used in court decisions.

Anderson v. Jackson Municipal Airport Authority, 419 So. 2d 1010, 1015 (Miss. 1982). This is also apparent from the Wisconsin cases. Providing water[10] or electricity[11] or running a hospital[12] or airport[13] all promote economic development and serve the public. Each can have ancillary health and safety benefits. Yet all are proprietary.

3. Emphasis on the Police Power Does Not Change the Analysis.

The City would replace the governmental-proprietary distinction with the concept of "police power." But, as *Marathon County* demonstrates, there is really no difference – at least in contexts in which the "governmental" and "proprietary" distinction has been important. The "police power" – like the "governmental power" – is exercised to regulate conduct and to prevent harm as opposed to conferring an economic or other particularized benefit on a city's inhabitants; it seeks to prevent that which is "harmful" as opposed to doing what is "useful."

[10] *See Milwaukee E. R. & L. Co. v. City of Milwaukee*, 209 Wis. 656, 245 N.W. 856 (1932).
[11] *See Christian v. City of New London*, 234 Wis. 123, 290 N.W. 621 (1940).
[12] *See Carlson v. Marinette County*, 264 Wis. 423, 59 N.W.2d 486 (1953).
[13] *See Public Serv. Corp. v. Marathon County*, 75 Wis. 2d 442, 249 N.W.2d 543 (1977).

Marathon County, 75 Wis. 2d at 449. Each of the cases cited by the City involved such a prevention of harm. *Froncek v. City of Milwaukee*, 269 Wis. 276, 69 N.W.2d 242 (1985), for example, involved fluoridation of drinking water to protect the public from the disease of tooth decay and cavities. *Highway 100 Autowreckers, Inc. v. City of West Allis*, 6 Wis. 2d 637, 96 N.W.2d 85 (1959), dealt with the regulation of automobile salvage yards to protect against smoke, soot, fire and "crime and hazards to traffic."

Indeed, it is hard to see how the City's definition of the "police power" – regulation to serve the "health, safety or welfare of the public," Milw. Resp. Br., p. 45, – differs from the traditional definition of a governmental power – something undertaken to advance "health, safety and the public good." *See Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 542, 314 N.W.2d 321, 326 (1982).

While one can read each definition expansively to apply to just about anything, Wisconsin courts – and those of other states – have never done that. As noted above, all of the things that Wisconsin courts have found to be proprietary provided public benefits (including, in many cases, ancillary health and safety benefits) but the mere fact that a municipal undertaking is "useful" does not make it either governmental or reasonable regulation under the police power. *Marathon County*, 75 Wis. 2d at 449 (noting that the expansion of an airport was "useful" but still concluding it was proprietary).

IV. THE CITY HAS FAILED TO JUSTIFY A DEPARTURE FROM BINDING CASE LAW THAT LABELS TRANSIT A PROPRIETARY FUNCTION OF GOVERNMENT.

A. Transit Is a Proprietary Function.

The Petitioners' initial brief demonstrated that Wisconsin case law supports a conclusion that the Streetcar Project is an exercise of the City's proprietary power. Ind. Pet. Br. at 18-21.

The *Milwaukee Electric Railway & Light Co.* court certainly thought so, and the Streetcar Project bears all of the indicia of a proprietary function. It is a voluntary undertaking – something that most cities do not do and are not required to do. Its primary purpose is to engage in a commercial activity – the City will charge a fare – that is in competition with other public and private vendors, *e.g.*, public and private busses or shuttles, taxis, car services, and private automobiles. It is a service for local residents that could be provided privately. It provides transit services to residents of the "compact community" and its principal purpose is the promotion of economic development.

The provision of a commercial service to city residents in competition with other providers of transportation for the principal purpose of local economic development – and not the protection of the public – bears all the marks of a proprietary function. Indeed, numerous courts in many jurisdictions have, both historically and recently, held the provision of public transportation to be proprietary.[14] The City's assertions to the contrary – none of which, it should be noted, rely on any binding Wisconsin authority declaring that transit systems are no longer proprietary functions of government – are without merit.

The City argues that times have changed and the Commission should discount the fact that 80 years ago the Wisconsin Supreme Court stated that transit systems were a proprietary

[14] In addition to the cases cited in our opening brief, *see Smith v. Martin*, 892 N.E.2d 971, 979 (Ct. App. Ohio 2008) (Even if statutory definition of proprietary functions including the operation of a bus line or other transit company did not apply, establishing a bus-stop pad, while it may promote public safety, is primarily for the benefit of bus patrons and is not an obligation of sovereignty nor a function for the common good of all citizens of the state and is not unique to government. Therefore, it is proprietary.); *People v. Schrader*, 617 N.Y.S.2d 429, 437 (Crim. Ct. 1994) ("The transit system is engaged in a proprietary function of providing safe and efficient transportation to the vast number of passengers that pass through it every day." The "safe movement and transportation of passengers" is a proprietary function."); *Municipality of Metropolitan Seattle v. Division 587, Amalgamated Transit Union*, 826 P.2d 167, 170 (Wash. 1992) (Even if it is "essential," provision of transportation services and operating a transit system is proprietary.); *Board of Commissioners of Chatham County v. Chatham Advertisers*, 371 S.E.2d 850, 851 (Ga. 1988) ("The operation of a . . . fixed-route transit bus system – which includes the placement of bus benches – is a proprietary or ministerial function."); *LePore v. Rhode Island Public Transit Authority*, 524 A.2d 574 (R.I. 1987) (Activities of a public transportation authority could easily be performed by a private business corporation and are proprietary.)

function of local government. Most transit systems in the interim have come to be publicly rather than privately owned, the City says, and transit has therefore somehow been transmuted from a proprietary function of local government to one that is essential for public health and safety.

But the status of a particular activity as often, usually, or even always undertaken by government cannot change the underlying nature of the activity. Many hospitals are owned or operated by government entities, yet operating a hospital is a proprietary function. *Carlson v. Marinette County*, 264 Wis. 423, 59 N.W.2d 486 (1953). Every major airport in Wisconsin is owned and operated by a government entity, yet that, too, is a proprietary function. *Bargo Foods North, Inc. v. DOR*, 141 Wis. 2d 589, 415 N.W.2d 581 (1987).

This is particularly so here where there has been no change in the nature of transit systems and their relationship to public health and safety. To the extent that they have are more likely to be publicly operated, it is because demand for them has fallen precipitously. That does not change the nature of the function.

B. Claiming a Project Will Result in Some Quality of Life Improvements Cannot Transform a Proprietary Function into a Governmental One.

The City devotes almost half of its response brief to a detailed discussion of the origins and development of the Project and the manner in which the City has and will be funded by various grants from the federal government. Milw. Resp. Br. at 5-27, 50-57. The story is replete with descriptions of the expert studies and re-studies of the City's ever-changing transportation and development plans, the various ways in which the federal government has funded planning for light rail, fixed rail, high speed rail, and similar mass transit initiatives, and the consideration and encouragement given to the Project by the seemingly endless number of governmental and quasi-governmental agencies or boards with some role to play in the process. The government

bureaucracy cannot transform a proprietary undertaking into a governmental one by penning such a "parade of wonderfuls" as the City has placed before the Commission. The City has made clear that it wants to return to an outmoded form of conveyance – a fixed rail car in the middle of the street – because it believes that a fixed route will spur economic development along the route and attract both businesses and residents to the affected area. Indeed, it is precisely such benefit that enabled it to use tax incremental financing for its (relatively small) local share.

Consider how the City justifies the Streetcar Project in its brief:

> Providing transit service that is easy to understand and predictable would increase transit ridership. Linking residential areas with concentrations of employment would help connect people to jobs and promoting compact land development patterns that support transit would encourage planned economic development along the Streetcar route. Current transit routes provide trips 12 to and from the downtown but do not provide circulation within the downtown; therefore the Streetcar is intended to provide improved connectivity within downtown Milwaukee and eventually expand to provide trips to and from downtown Milwaukee.
>
> The LPA Summary Report set forth the following needs-based "Goals & Objectives" of the Streetcar Project:
>
> 1. Improving transit mobility to and between key residential, employment and activity centers.
> 2. Developing a connector system that is economical and efficient.
> 3. Increasing transit utilization.
> 4. Supporting and enhancing economic development.
> 5. Improving transit service to help attract conventions, tourists and residents.
> 6. Preserving and protecting the environment.
>
> . . .
>
> Further, in WisDOT's most recent long-range transportation plan for the state, the agency adopted a policy of supporting development of fixed-guideway transit services, such as the Milwaukee Streetcar and a separate streetcar in Kenosha. In adopting this policy, WisDOT articulated the following "[e]conomic and land use benefits of fixed-guideway transit systems[:]
>
> - Attract economic development around station areas.
> - Encourage investment due to their permanence and high passenger flow.

- Help promote land uses that meet a community's smart growth planning goals, such as compact, mixed-use, higher density, and pedestrian-friendly development around stations.
- Enhance economic competition in regions by improving access to jobs, goods and services, and expanding both the labor pool and market area for businesses."

. . .

The EA included "Public Comments" in Appendix B1-36, many of which discussed the need for an improved transit system in Milwaukee to enhance connections, improve the quality of life for residents, and encourage economic development.

Milw. Resp. Br. at 11-12, 15, 19 (internal citations omitted). On the Streetcar Project's website, on a page tabbed "Why," the City offers this justification for the trolley:

The Milwaukee Streetcar will:

- Spur significant **ECONOMIC DEVELOPMENT** because the infrastructure created by a fixed route provides a framework for making investment decisions, as experienced in every city that has built a streetcar system.
- Strengthen and promote downtown Milwaukee as the premier office and business location in the region, creating and providing **ACCESS TO JOBS** for Milwaukee residents.
- Connect commuters and visitors arriving via high-speed rail, commuter rail and regional bus service at the Milwaukee **INTERMODAL STATION** to jobs and attractions in Milwaukee.
- **EXPAND THE TAX BASE** through new development, new and expanded businesses and higher occupancy rates, resulting in a lower tax burden for everyone and allowing important city services to continue.
- Tap into the potential of underutilized properties by **MAKING CONNECTIONS** to important residential, business and cultural centers.
- **ATTRACT AND RETAIN YOUNG TALENT** needed to grow Milwaukee's economy, support the creative class and fuel a culture of entrepreneurship.
- Provide a new perspective on quality transit in Milwaukee, encourage people who previously did not see themselves as transit patrons to consider using all forms of transit and establish excellent transit as an important aspect of a high **QUALITY OF LIFE**.
- Establish a successful initial system that will allow for practical expansions in the future as funding allows and market demand dictates. Without this start, a modern, fixed-rail transit system that connects people to jobs and daily needs will never **EXPAND CITY-WIDE**.

- Shape the **BRAND AND IDENTITY** of Milwaukee, which has been established as an important city-wide priority and will attract residents, businesses, visitors and investors.
- Provide an **ENVIRONMENTALLY RESPONSIBLE** transportation alternative that is energy-efficient, quiet, clean, comfortable and has the potential to use renewable, locally created, energy sources.
- Increase the overall economic activity in downtown Milwaukee, serving as a **DEMAND GENERATOR** for hotels, retail, office and housing, as experienced in every city that has built a streetcar system.

"Why the Milwaukee Streetcar," http://www.themilwaukeestreetcar.com/why.php (last visited July 30, 2012) (capitalizations in original).

Again, we believe that these claims are far-fetched and the product of an ideological predisposition in favor of rail transit – there is no similar system anywhere that actually achieves these goals[15] – but that is not the point here. What is clear is that the City wants to build the Streetcar primarily to provide economic benefits – transit and development – to its own residents – in fact, to a relatively small number of its residents.

Not only is this function traditionally treated as "proprietary," it ought to be. If the City wants to attract development – perhaps at the expense of other parts of the metropolitan area – it ought to have to pay the cost of the localized benefits it seeks (or persuade other units of government to help out). It ought not be permitted to shift its costs to a captive group that is unable to participate in the City's political process and who will not benefit from the project. The regulation of public utilities and the Commission review mandated by § 196.58(4) and § PSC 130.09 are designed to prevent this type of "free riding."

Although the City has alluded to environmental benefits and now asserts that the Streetcar will relieve traffic congestion, neither claim has played a primary role in justification of

[15] See, e.g., Randal O'Toole, "Defining Success: The Case against Rail Transit," Cato Policy Analysis no. 663, March 24, 2010 (available on-line at http://www.cato.org/publications/policy-analysis/defining-success-case-against-rail-transit) (last visted on July 30, 2012); *See also* Randal O'Toole, "The Great Streetcar Conspiracy," Cato Policy Analysis no. 699, June 14, 2012 http://www.cato.org/publications/policy-analysis/great-streetcar-conspiracy)(last visited on July 30, 2012).

the Project as reflected in the City's own documents. As pointed out in the Petitioners' initial brief, Ind. Pet. Br. at 17, tangential benefits – even substantial ones – to health, safety, and welfare do not transform a proprietary exercise of power into a governmental one. *See, e.g.*, *Wausau Joint Venture v. Redevelopment Authority*, 118 Wis. 2d 50, 347 N.W.2d 604, 609 (Ct. App. 1984) (Although a project whose "primary objective" was alleviation of traffic congestion would be "governmental," fact that parking structure would "doubtless serve to alleviate traffic congestion" is, nevertheless, "proprietary" where its "primary purpose" was to facilitate downtown development.). It would be hard to argue that a hospital does not improve the health and general welfare of a community, but the operation of as hospital is considered to be a proprietary function of government. *Carlson v. Marinette County*, 264 Wis. 423, 59 N.W.2d 486 (1953).

CONCLUSION

The Commission must follow binding Wisconsin case law and should declare the Project to be a proprietary function of government, making it unlawful for the City to require the Utilities to relocate or modify their facilities at their own expense. Wis. Stat. § 196.58 permits the Commission to invalidate municipal enactments that unreasonably shift utility relocation costs onto utilities. Wis. Admin. Code § PSC 130.09 interprets unreasonable enactments to include those that shift utility relocation costs onto utilities for projects lacking an adequate health, safety, or public welfare justification – the same language used to define a government function as "governmental" rather than "proprietary." Because Milwaukee Ordinance § 115-22 permits the City to shift utility relocation costs for <u>any</u> public works project, regardless of whether it is undertaken using governmental or proprietary powers, it is facially unreasonable. Because the Streetcar Resolution shifts utility relocation costs for a mass transit project, and

transit has already been determined to be a proprietary function by Wisconsin courts, that Resolution is unreasonable. The Commission should strike down both the Ordinance and the Resolution.

Dated this 30th day of July, 2012.

Respectfully submitted,
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