

BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN

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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

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**BRIEF IN SUPPORT OF MOTION FOR FINAL DECISION**

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**INTRODUCTION**

Wisconsin Bell, Inc. d/b/a AT&T Wisconsin, Time Warner Cable LLC, the Wisconsin Cable Communications Association, tw telecom of wisconsin l.p., PAETEC Communications, Inc., McLeodUSA Telecommunications Services, LLC, and Norlight Telecommunications, Inc. (collectively the "ATU Petitioners"), pursuant to Wis. Stat. §§ 182.017(8) and 196.58(4), as amended by 2013 Wisconsin Act 20 ("Act 20"), and Wis. Admin. Code § PSC 2.23, file this Brief in Support of Motion for Final Decision. For the reasons set forth below, the ATU Petitioners request that the Commission move forward expeditiously to a final decision declaring void any municipal regulations requiring the ATU Petitioners to pay any facility relocation costs relating to the City of Milwaukee's proposed Streetcar Project.

**ARGUMENT**

**I. ACT 20 RENDERS THE CITY'S EFFORTS TO IMPOSE FACILITY RELOCATION COSTS ON THE ATU PETITIONERS UNREASONABLE AS A MATTER OF LAW.**

Act 20 expressly prevents the City of Milwaukee ("City") from imposing on the ATU Petitioners any facility relocation or modification costs associated with the proposed Milwaukee Streetcar Project. In particular, Act 20 revised Wis. Stat. § 182.017 to render unreasonable, as a matter of law, municipal efforts to impose facility relocation costs on companies to accommodate an urban rail transit system such as the Streetcar Project. Now, "a municipal

regulation is unreasonable if it requires a company to pay any part of the cost to modify or relocate the company's facilities to accommodate an urban rail transit system." *See* Wis. Stat. § 182.017(8)(as).

Act 20 revised Wis. Stat. § 196.58. Now, "a municipal regulation is unreasonable . . . if it requires a public utility, telecommunications provider, or video service provider to pay any part of the cost to modify or relocate the public utility's, telecommunications provider's, or video service provider's facilities to accommodate an urban rail transit system, as defined in s. 182.017(1g)(ct)." Wis. Stat. § 196.58(4)(c).

There is no ambiguity in these newly enacted provisions, and the Wisconsin Legislative Reference Bureau supports the express language as follows:

Current law also authorizes a city, village, or town (municipality) to impose reasonable regulations on use of rights-of-way by certain persons, including certain domestic corporations, cooperative associations, telecommunications providers, and video service providers. Under the bill, a municipal regulation under that authority may not require such a person to pay any part of the cost to modify or relocate the person's facilities to accommodate an urban rail transit system in a municipality if the system begins service on or after the bill's effective date. . .

Current law also allows the Public Service Commission (PSC) to review complaints about the reasonableness of a municipality's regulation of a public utility's product, service, or occupation of streets, highways, or other public places within the municipality. If the PSC finds that the regulation is unreasonable, the regulation is void. The bill specifies that such a regulation is unreasonable, and therefore void, if it requires a public utility to pay any part of the cost to modify or relocate the public utility's facilities to accommodate an urban rail transit system in a municipality if the system begins service on or after the bill's effective date. In addition, the bill specifies that the foregoing requirements apply to video service providers, as well as to public utilities regulated as alternative telecommunications utilities by the PSC. . . .

*See* Legislative Reference Bureau 2013 Drafting File LRBb0071, Draft Bill LRB-2056/6,

Analysis by Legislative Reference Bureau.

The Wisconsin legislature has spoken, clearly and directly, in Act 20's revisions to Wis. Stat. §§ 182.017 and 196.58. The effect of those revisions on the Streetcar Project is similarly

clear and direct—the City's efforts to impose on the ATU Petitioners any facility relocation costs relating to the Streetcar Project are unreasonable *per se* under those statutes and any City effort to do so, in whatever form, contract, ordinance, resolution, order, or other regulation, must be declared void.

## **II. THE COMMISSION HAS A COMPLETE RECORD.**

Uncontroverted facts presented by both the ATU Petitioners and by the City trigger the mandatory voiding provisions of Wis. Stat. §§ 182.017 and 196.58. Just three elements of those statutes must be present for ATU petitioners to prevail in this case 1) that there is a “municipal regulation” that has the effect of imposing costs for facility relocation; 2) that those costs are being imposed in connection with an “urban rail transit system,” and; 3) that those costs are being imposed on an entity which has been afforded protection under the statute. As demonstrated below, all three elements are present.

### **A. The City Is Seeking To Impose Facility Relocation Costs By Means Of Municipal Regulations.**

A "municipal regulation" is defined as "any contract, ordinance, resolution, order, or other regulation entered into, enacted, or issued by a municipality before, on, or after July 2, 2013." Wis. Stat. § 182.017(1g)(bm). Act 20 expanded the scope of municipal actions subject to Commission review by adding orders and "other regulation[s]," demonstrating the Legislature's intent to sweep all municipal regulatory efforts within the statute's reach. Similarly, the Legislature expanded the definition of “municipal regulation” so that it includes not just those regulations adopted previously, but also those regulations entered into, enacted or issued in the *future*. Therefore, there can be no dispute regarding the Commission's authority to declare as void any existing regulation of the City or any future effort by the City to impose any part of the costs of relocating or modifying utility facilities.

The City's efforts to impose facility relocation costs on the ATU Petitioners fall well

within the broad scope of the statute. For example, Milw. Ord. § 115-22 requires utilities to bear the cost of relocating facilities to accommodate "any public works or improvements of any nature whatsoever undertaken by the city on its own behalf, or any public board, commission, authority or agency." The City has argued unequivocally that this ordinance applies to construction of the Streetcar Project and its requirement for utilities to modify or relocate their facilities.<sup>1</sup> The ordinance is therefore a "municipal regulation" being used by the City to force utilities to modify or relocate their facilities.

The City also passed a resolution approving the "Locally Preferred Alternative" route and authorizing final engineering and construction for the Streetcar Project as detailed in the Draft Environmental Assessment for the project.<sup>2</sup> The EA states that engineering studies indicate that several public utility facilities would need to be modified or relocated to accommodate the project. Consistent with the City's view – that utilities are obligated to absorb facility relocation and modification costs caused by the Streetcar Project – the budget contained in the EA omits any City funding to pay for those modifications and relocations. The City's Public Works Department has been proceeding and continues to proceed with the Streetcar Project as outlined in the EA and resolution approving it,<sup>3</sup> and has done nothing yet to affirm that the costs of facility relocation would be borne by the City. The resolution is therefore a "municipal regulation" requiring utilities to modify or relocate their facilities. Similarly, any other contract, ordinance, resolution, order, or other regulation through which the City requires utilities to modify or relocate their facilities would also be a "municipal regulation" under the statute.

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<sup>1</sup> See, e.g., City of Milwaukee's Response Brief at 60 (July 9, 2012) (PSC REF#: 168149).

<sup>2</sup> See Affidavit of Kevin Anderson, Exhibits A and B (May 24, 2012) (PSC REF#: 165158, 165159).

<sup>3</sup> Seventh Affidavit of Jeffrey S. Polenske, ¶ 3 (May 15, 2013) (PSC REF# 184900) ("The City of Milwaukee Department of Public Works ("DPW") is continuing with ongoing utility design coordination in conjunction with final design activities in an effort to minimize utility impacts.").

**B. The ATU Petitioners Are Entitled To The Protection Of The Statutes.**

There can also be no dispute that ATU Petitioners are “companies” that come within the remedial ambit of the statute. A “company” is defined as “a corporation, limited liability company, partnership, or other business entity organized to furnish telegraph or telecommunications service or transmit heat, power, or electric current to the public or for public purposes.” Wis. Stat. § 182.017(1g)(b)1. Each of ATU Petitioners comprises a “company” as that term is defined in the statute.<sup>4</sup> There is also no dispute that each ATU Petitioner is a “public utility, telecommunications provider, or video service provider” within the meaning of Wis. Stat. § 196.58(4)(c).

**C. The Facility Relocation Costs That The City Seeks To Impose On ATU Petitioners Are Related To An Urban Rail Transit System.**

It is similarly beyond question that the facility relocation costs that are the subject of this case are directly related to an “urban rail transit system,” which is defined as “a system, either publicly or privately owned, which provides transportation by rail in a municipality to the public on a regular and continuing basis and which begins service on or after the effective date of this paragraph.” Wis. Stat. § 182.017(1g)(ct). There is no dispute that the Streetcar Project comprises an “urban rail transit system” as that term is defined in the statute (renumbered from Wis. Stat. § 85.063(1)(c) by Act 20). The City itself has argued that the Streetcar Project is an “urban rail transit system,” as that term has been defined under Wisconsin law for the past three decades.<sup>5</sup>

Therefore, all facts required for the Commission to issue a final decision in this proceeding are present. The City has consistently contended that it has in place “municipal

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<sup>4</sup> See City of Milwaukee’s Response Brief at 34, n. 9.

<sup>5</sup> See City of Milwaukee’s Response Brief at 36, 52-53.

regulations” requiring “companies” and “public utilities, telecommunications providers, or video service providers” to pay modification or relocation costs to accommodate an “urban rail transit system.” Though the City has argued throughout this proceeding that the exact value of utility relocation and modification costs have not yet been established, the legislation makes clear that a determination of exact costs is neither relevant nor required for the Commission’s decision. Indeed, Act 20 mandates the voiding of any municipal regulation that "requires a company to pay *any part of the cost* to modify or relocate the company’s facilities to accommodate an urban rail transit system." *See* Wis. Stat. § 182.017(8)(as) (emphasis supplied).

Further, the City has never argued that utility relocation and modification costs will be zero; to the contrary, the City’s own statements demonstrate there will be costs, euphemistically referred to as "utility coordination efforts" and "utility impacts":

“Utility coordination efforts can be expected to be substantially completed for design purposes by the 60% plan. The 60% plan is not expected to be completed until early 2013. Advance utility relocations to accommodate the Project will begin thereafter after utilities secure regulatory authorization and complete final design of necessary relocations.”<sup>6</sup>

“Not until the final design stage of the Project, when the utility coordination efforts have been completed and a final track alignment determined, will it be possible to estimate the likely cost of utility impacts caused by the necessary permanent relocation of facilities.”<sup>7</sup>

The City concedes that, even after several months of "utility coordination efforts," there will be utility relocation costs at the conclusion of the process.<sup>8</sup> Accordingly, there is no need for the

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<sup>6</sup> City of Milwaukee’s Response Brief at 23.

<sup>7</sup> City of Milwaukee’s Response Brief at 24.

<sup>8</sup> *See* Seventh Affidavit of Jeffrey S. Polenske, ¶ 7.

Commission to wait for the completion of the 60%<sup>9</sup> design plan or until the selection of the final route; the relevant facts have been the same throughout this proceeding and will not change.

**III. THE COMMISSION SHOULD DECLARE ANY CITY REGULATIONS VOID TO THE EXTENT THEY WOULD IMPOSE, OR HAVE THE EFFECT OF IMPOSING, ANY FACILITY MODIFICATION OR RELOCATION COSTS ON THE ATU PETITIONERS RELATED TO THE STREETCAR PROJECT.**

Following the Commission's invitation, the ATU Petitioners filed pleadings alleging that the facility modification or relocation cost allocation efforts relating to the Streetcar Project, as adopted by City regulations, violated Wis. Stat. §§ 182.017 and 196.58 and are void.<sup>10</sup> For the same reasons the Commission initially decided to open this proceeding and address those claims, *i.e.*, to protect utility ratepayers, it should now issue a final decision addressing the unresolved dispute concerning utility facility relocation costs caused by the Streetcar Project. While Act 20 answered a number of questions raised in this case, its provisions relating to utility facility relocation costs are not self-executing. A Commission decision is necessary and in the public interest. Indeed, the disputes that gave rise to the ATU Petitioners' filings remain unresolved, and Act 20 mandates that the Commission resolve those issues by granting the ATU Petitioners the relief they seek.

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<sup>9</sup> The Administrative Law Judge has required the City to certify when the Streetcar Project has reached the 60% design plan phase level of engineering after which further scheduling is to occur for this proceeding. *See* Second Prehearing Conference Memorandum, 1-3 (February 4, 2013)(PSC REF#: 180325). The ATU Petitioners recently learned from the City that it has reached this design plan phase, and is perhaps even beyond it.

<sup>10</sup> *Verified Petition of AT&T Wisconsin to Determine Allocation of Costs for Relocation of Utility Structures ) for Milwaukee Streetcar Project* (PSC REF#: 161190) (Mar. 14, 2012); *Verified Petition of tw telecom of wisconsin l.p. to Determine Allocation of Costs for Relocation of Utility Structures for Milwaukee Streetcar Project* (PSC REF#: 163111) (Apr. 11, 2012); *Verified Petition of PAETEC Communications, Inc., McLeodUSA Telecommunications Services, LLC, and Norlight Telecommunications, Inc. to Determine Allocation of Costs for Relocation of Utility Structures for Milwaukee Streetcar Project* (PSC REF#: 163378) (Apr. 18, 2012); *Verified Petition for Declaratory Ruling* (PSC REF#: 163422) (Apr. 18, 2012).

**A. Act 20 Requires the Commission To Void The City's Efforts to Impose Facility Relocation and Modification Costs On The ATU Petitioners.**

Consistent with Act 20, the ATU Petitioners request that the Commission declare as a matter of law that City municipal regulations that require the ATU Petitioners to pay for the cost of the modification or relocation of their facilities to accommodate the Streetcar Project are unreasonable, unlawful, and void to the extent they impose relocation costs related to the Streetcar Project. The Commission should further declare that the City is therefore precluded from undertaking any further action that would impose or have the effect of imposing upon the ATU Petitioners the costs of modifying or relocating their facilities to accommodate the Streetcar Project.

Both Wis. Stat. §§ 182.017 and 196.58 require the Commission to void unreasonable regulations such as those deemed unreasonable in Act 20. This mandate is set forth in clear and unambiguous terms: ". . . if the commission finds that the regulation is unreasonable, the regulation *shall be void*." (Wis. Stat. § 182.017(8)(a) (emphasis supplied)); ". . . if [the commission] finds to be unreasonable any municipal regulation . . . relating to the terms and conditions upon which such provider occupies the streets, highways, or other public places within the municipality, the municipal regulation *shall be void*." (Wis. Stat. § 196.58(4)(b) (emphasis supplied)). The Commission "must conform precisely to the statutes from which it derives power," and therefore must honor this statutory command. *See Mid-Plains Tel., Inc. v. Public Service Comm'n of Wisconsin*, 56 Wis. 2d 780, 202 N.W.2d 907, 910 (1973).

**B. Act 20 Mandates The Result In This Dispute, But A Commission Final Decision and Order Are Required To Void The City's Efforts To Impose Costs On The ATU Petitioners.**

While Act 20 provides the express legal standard by which this case is to be resolved, it does not dispose of this controversy by simple operation of law. This matter, therefore, is not moot but must be addressed by the Commission. A moot case is one that seeks to determine an

“abstract question” or a “pretended controversy” or one that seeks a judgment that “cannot have any practical legal effect upon the existing controversy.” *La Crosse Tribune v. Circuit Court for La Crosse County*, 115 Wis. 2d 220, 228, 340 N.W.2d 460, 464 (Wis. 1983) (quoting *Wisconsin E.R. Bd. V. Allies-Chalmers W. Union*, Wis. 436, 440-441, 32 N.W.2d 190 (Wis. 1948)). This case, on the contrary, addresses an active controversy that is neither “abstract” nor “pretended,” and which requires Commission action to resolve by applying the unambiguous requisites of the statutes.

First, the City has certainly made no commitment that it will adhere to the provisions of Act 20. The City still has in place Milw. Ord. § 115-22 that, according to the City, requires utilities to bear facility relocation or modification costs to accommodate the Streetcar Project. Moreover, as it stands, City Council Resolution #110372 is still in place and approves a Streetcar Project that budgets no monies (\$0.00) for reimbursement for utility facility relocation or modification costs. The resolution further directs the Commissioner of Public Works “to proceed with construction of the proposed streetcar system” as detailed in the Council-approved Environmental Assessment – which budgets no monies for reimbursement of utility relocation or modification costs. While the City is purportedly taking steps to reduce relocation costs, it has not suggested (let alone proven) that the costs will be \$0. Thus, the Streetcar Project and the City’s regulations implementing it wrongfully require--in violation of Act 20-- utilities and their ratepayers to absorb such costs. As a result, this is not a “pretended controversy,” but one that is still very much alive and requiring Commission action to resolve.

Second, unlike a moot case, a Commission decision in this case will have the “practical effect” of resolving it. The Commission still has before it municipal regulations that have the effect of forcing utilities to pay for the cost of utility facility modifications or relocations caused by an urban rail transit system. Such regulations are now prohibited by Act 20, and that same

law requires that the Commission void such regulations. Only if the Commission acts will there be a finding that is the basis for voiding City regulations that require utilities to bear facility relocation or modification costs in violation of the law. The Commission has the authority and duty to issue a Final Decision in this case-- *see e.g.*, Wis. Stat. §§ 227.41, 182.017, 196.58, 196.02, and Wis. Admin. Code §§ PSC 2.04(2)(c) and 2.23-- and the Commission should proceed to issue a Final Decision that makes the requested determination.

**C. Commission Inaction Or Dismissal Of This Case Would Be Contrary To The Legislative Intent of Act 20.**

Commission inaction or dismissal of this proceeding would be contrary to the language and intent of Act 20.<sup>11</sup> The Legislature acted with full knowledge of this case and with the expectation, expressed in the unambiguous language of the Act, that the Commission would apply the new law to prevent the City from strapping Wisconsin utility ratepayers with the massive and unprecedented facility modification or relocation costs caused by the Streetcar Project. The legislation expressly provides that “upon complaint” by a “qualified complainant,” “public utility” or “alternative telecommunications utility”, “if [the Commission] finds to be unreasonable any municipal regulation . . . the municipal regulation shall be void.” Wis. Stat. §§ 196.58(4)(a), 196.58(4)(b); *see also* Wis. Stat. § 182.017. Nothing in the legislation strips the Commission of authority to act. The fact that the Legislature has passed a law declaring a particular type of municipal ordinance unreasonable does not render moot a case involving violation of that law, or the need for the Commission to address the continued violation of it. For

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<sup>11</sup> The coauthor of Act 20's changes to Wis. Stat. §§ 182.017 and 196.58 anticipated and intended that the Commission would apply the new standards in this proceeding: "This legislation is imperative in order to clarify the Legislature's intent prior to a Public Service Commission (PSC) decision regarding the Milwaukee streetcar project." State Representative Dale Kooyenga's Statement on the Milwaukee Streetcar (March 27, 2013) [http://www.thewheelerreport.com/wheeler\\_docs/files/0327kooyenga.pdf](http://www.thewheelerreport.com/wheeler_docs/files/0327kooyenga.pdf), also attached as Exhibit A; *see Foerster, Inc. v. Atlas Metal Parts Co.*, 105 Wis. 2d 17, 24, 313 N.W.2d 60 (1981) (statements by bill's sponsor, including a press release regarding the bill, provide evidence of legislative intent).

example, the fact that speeding is clearly unlawful does not extinguish the need for the government to prosecute speeders.

Act 20 compels action, if not directly on its terms, then in consideration of the context in which its provisions were enacted and of its evident purpose to protect utilities and ratepayers from what otherwise would be an unfair allocation of costs they neither caused nor created. The ATU Petitioners in particular have relied upon the Commission's directive in its order with respect to filing petitions under Wis. Stat. § 182.017. Given the roadmap so provided, the ATU Petitioners have incurred substantial legal and opportunity costs to their detriment, reasonably anticipating that the Commission would now rule on the merits of this proceeding. They have invested their time and resources to create a record upon which this Commission can and should issue a decision.

The same facts and reasons that initially caused the Commission to open this proceeding still exist. It is still undisputed that the Streetcar Project will cause facility modification or relocation costs. It is equally undisputed that the City is moving forward with a Streetcar Project based on a City Council Resolution that budgets \$0 to reimburse utilities for such costs. Based on these same facts, the Commission opened this proceeding to address the effect on ratepayers who could eventually be obligated to absorb the tens of millions of dollars in facility relocation costs caused by the Streetcar Project. That concern is equally true today. The Legislature has now provided the Commission every power necessary to act in this case and protect the interests of utilities and their ratepayers. It should do so now by granting the Motion for Final Decision.

Therefore, the Commission should find and conclude the following:

- (1) The ATU Petitioners are each a “company” under Wis. Stat. § 182.017(1g)(b) and a “public utility, telecommunications provider, or video service provider” under Wis. Stat. §§ 196.58(4)(c) and 196.01;

- (2) Milw. Ord. § 115-22, City Resolution #110372, and any other City contract, ordinance, resolution, order or other regulation are each a “municipal regulation” under Wis. Stat. §§ 182.017(1g)(bm) and 196.58(1g);
- (3) The Streetcar Project is an “urban rail transit system” under Wis. Stat. §§ 182.017(1g)(ct) and 196.58(4)(c);
- (4) City municipal regulations that require the ATU Petitioners to pay modification or relocation costs to accommodate the Streetcar Project are unreasonable and void as a matter of law under Wis. Stat. §§ 182.017(8) and 196.58(4).

The pleadings filed by the ATU Petitioners initiated a procedure that affords the Commission the authority to make these declaratory rulings. Once issued, these declaratory rulings would effectively bar the City from foisting facility relocation or modification costs on the ATU Petitioners, consistent with the letter and intent of Act 20. The changes in law brought about by Act 20, the interplay between Wis. Stat. §§ 227.41, 182.017 and 196.58, and the continuing justiciable controversy regarding the Streetcar project compels the Commission to issue a final decision making the declaratory rulings identified above.

#### **IV. COMMISSION ACTION ON THE ATU PETITIONERS' PLEADINGS IS DIRECTLY REQUIRED BY WIS. STAT. §§ 182.017 and 196.58.**

As demonstrated in Section III, above, the Commission ought to issue a final decision based upon the ATU Petitioners' initial pleadings. The propriety of such Commission action is further and directly compelled by the procedural mechanisms identified in the statutes affected by Act 20, *i.e.*, Wis. Stat. §§ 182.017 and 196.58. Those statutes conclusively establish the impropriety of the City's cost allocation efforts. *See* Sections I-III, *supra*. Moreover, the ATU Petitioners explicitly based their claims on those statutes and invoked the procedures set forth in those statutes that compel Commission action. Regardless of the labels attached to the ATU Petitioners' pleadings, Wisconsin's rules of notice pleading establish that the ATU Petitioners

raised the applicability of the mandatory voiding provisions of Wis. Stat. §§ 182.017 and 196.58, and the Commission is therefore required to grant the relief sought by the ATU Petitioners.

The Commission identified the manner in which the ATU Petitioners could invoke Wis. Stat. § 182.017, and in doing so interchangeably used the terms "complaint" and "petition." In its March 2, 2012 Order on Motion for Interlocutory Review and Amendment to Prehearing Conference Memorandum (the "March 2 Order," PSC REF#: 160666), the Commission identified the "complaint mechanism" available to the ATU Petitioners by which they could seek the application of Wis. Stat. § 182.017(8) to the City's efforts to impose facility relocation costs upon them, then referred to the filing of petitions:

Four years ago, the state Legislature created Wis. Stat. § 182.017(8), a separate statute that duplicates the Commission's authority to review the reasonableness of a municipal regulation about the use of highway right-of-way. This statute applies to all public utilities, including ATUs. *See* Wis. Stat. § 182.017(1g)(b)1. The three intervening telecommunications utilities could file their own petition for a declaratory ruling under Wis. Stat. § 227.41, seeking a ruling that applies Wis. Stat. § 182.017 to their potential costs of modifying or relocation their telecommunications facilities and to any city of Milwaukee regulation that allocates those costs.

March 2 Order at 4.

Accordingly, the ATU Petitioners utilized the "complaint mechanism" identified by the Commission and filed verified petitions that were explicitly premised, in part, on Wis. Stat. § 182.017(8) and that sought a ruling that applied the mandatory voiding provision of Wis. Stat. § 182.017(8), *i.e.*, ". . . if the commission finds that the regulation is unreasonable, the regulation shall be void."<sup>12</sup> The ATU Petitioners have clearly "complained" about the City's regulations and, by their filings, they have each detailed the City's violations of both Wis. Stat. §§ 182.017 and 196.58.

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<sup>12</sup> Moreover, in these filings each of the ATU Petitioners cited to and reserved its right to pursue claims under the similar complaint mechanism set forth in Wis. Stat. § 196.58. The passage of Act 20 made clear that the ATU Petitioners have standing to pursue their claims under Wis. Stat. § 196.58.

Therefore, each of the ATU Petitioners' initial pleadings appropriately initiated the "complaint mechanism" found in these statutes by which the Commission is now required to grant them the relief they seek.<sup>13</sup> Whether the ATU Petitioners styled their pleadings as petitions or complaints is immaterial. Indeed, the Wisconsin Supreme Court has held that ". . . Wisconsin has abandoned the highly formal concepts of common law form pleading in favor of a more functional concept of notice pleading." *Tews v. NHI, Inc.*, 2010 WI 137, ¶ 62, 330 Wis. 2d 389, 793 N.W.2d 860. The ultimate goal of a pleading, in administrative proceedings as in court actions, is to satisfy the fair play and notice requirements of due process. *Wisconsin Tel. Co. v. Dep't of Indus. Labor & Human Rel.*, 68 Wis. 2d 345, 359, 228 N.W.2d 649, 657 (1975).

Accordingly, the law of Wisconsin is to reject "form over substance" arguments and positions, particularly as they relate to pleadings, in favor of adjudications on the merits:

. . . the entire tenor of modern law is to prevent the avoidance of adjudication on the merits by resort to dependency on non-prejudicial and non-judicial technicalities." *Cruz v. Dep't of Indus. Labor & Human Relations*, 81 Wis. 2d 442, 449, 260 N.W.2d 692 (1978). Courts now look beyond "hypertechnical" defects in the pleadings such as *mislabeling* or *miscaptioning* parts of a pleading. *Id.* at 446, 449, 260 N.W.2d 692. They look beyond the *form* of a pleading to the *substance* of the pleading in order to decide a matter on the merits. *Bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983).

*Wisconsin Public Serv. Corp. v. Arby Constr., Inc.*, 2012 WI 87, ¶ 37, 342 Wis. 2d 544, 818 N.W.2d 863 (treating an affirmative defense as "the functional equivalent" of a cross claim for the purposes of claim preclusion). The Wisconsin Supreme Court has employed this reasoning in rejecting the form and "look[ing] to the substance of the matter" in adjudicating the merits of

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<sup>13</sup> Certain of those pleadings used the terms "petition" and "complaint." *See, e.g.*, PSC REF#: 163422, ¶¶ 8 and 9 (Apr. 18, 2012), which states:

8. The Commission has authority pursuant to Wis. Stat. § 227.41, upon petition by an interested person, to "issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it."

9. The Commission has authority pursuant to Wis. Stat. §§ 182.017(1r) and 182.017(8)(a) to hear a complaint by a "company" that challenges the reasonableness of any municipal requirement relating to the maintenance of a "transmission line or system" in public rights of way.

an issue. *McEwen v. Pierce County*, 90 Wis. 2d 256, 270, 279 N.W.2d 469 (1979). In *McEwen*, the court ruled that "[f]or this court to decline to reach the issue of primary jurisdiction . . . would be to cause delay, additional expense, and unnecessary multiplicity of appeals. . . The issue of primary jurisdiction has been thoroughly briefed by the parties in this court, and there is an adequate record for review. We therefore shall review the circuit court's order. . ." *Id.*; see also *State v. Schaefer*, 2008 WI 25, ¶ 54, 308 Wis. 2d 279, 307, 746 N.W.2d 457.

Moreover, the Court of Appeals of Wisconsin has rejected a hypertechnical parsing of claimed differences between a "petition" and a "complaint."<sup>14</sup> In *Wisconsin Dept. of Nat. Res. v. Walworth County Board of Adj.*, 170 Wis. 2d 406, 417, 489 N.W.2d 631 (Ct. App. 1992), the DNR filed a "petition" for certiorari appeal even though the applicable statute called for the filing of a "complaint" for certiorari appeal. The court quickly dispatched an argument that the label attached to the pleading had any substantive effect:

We reject Friedman's argument as to the DNR. The information supplied in the "petition" was the same kind of information that would be supplied in a "complaint." It served the same purpose-notice to the other parties of claims for relief. The only difference is in the label. As such, the fact that the appeal was commenced by service of a summons and petition rather than a summons and complaint is precisely that kind of hypertechnical defect that the law chooses to ignore unless there is prejudice.

*Walworth County*, 170 Wis. 2d at 489.

The rejection of hypertechnical distinctions between pleadings is, if anything, even more appropriate in administrative proceedings. Wisconsin appellate courts have directed that "[p]leadings are to be treated as flexible and are to be liberally construed in administrative proceedings." *Loomis v. Wisconsin Personnel Comm'n*, 179 Wis. 2d 25, 505 N.W.2d 462, 464 (Ct. App. 1993). Finding dispositive the labeling of a pleading as a petition rather than a

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<sup>14</sup> Compare Wis. Admin. Code §§ PSC 2.02(5) and 2.02(12) defining these terms.

complaint-- even where the governing statute or rule explicitly identifies a particular form of pleading-- is the sort of inflexible, hypertechnical, form over substance holding decried by the courts. *See Walworth County*, 170 Wis. 2d at 489. The Commission should grant the relief that the ATU Petitioners specifically requested in their initial pleadings.

### **CONCLUSION**

For the foregoing reasons, the ATU Petitioners ask that the Commission issue a Final Decision declaring as a matter of law that "any contract, ordinance, resolution, order, or other regulation entered into, enacted, or issued by [the City] before, on, or after the effective date of [Act 20]" that requires the ATU Petitioners to pay for the cost of the modification or relocation of their facilities to accommodate the Streetcar Project is unreasonable, unlawful, and void to the extent it imposes, or has the effect of imposing, facility modification or relocation costs related to the Streetcar Project, and that the City is therefore precluded from imposing upon the ATU Petitioners the costs of modifying or relocating their facilities to accommodate the Streetcar Project. The Commission should also deny the motions filed by the City that are pending before the Commission.<sup>15</sup>

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<sup>15</sup> The City's Motion to Dismiss, filed March 18, 2013 (PSC REF#: 182343) should be denied on the merits because the City's standing argument is directly and expressly refuted by Act 20. The City's Request for Interlocutory Review, filed February 18, 2013 (PSC REF#: 181062), Motion to Strike, filed April 1, 2013 (PSC REF#: 183017), and Motion for Leave to Respond and Request for Decision, filed April 15, 2013 (PSC REF#: 183525) should be denied as moot.

Dated this 23rd day of September, 2013.

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## Rep. Kooyenga's Statement on the Milwaukee Streetcar

Madison – State Representative Dale Kooyenga (R-Brookfield) will introduce legislation that will clarify Wisconsin's statutes regarding the cost incurred by utilities when forced to comply with streetcar projects. **This legislation is imperative in order to clarify the Legislature's intent prior to a Public Service Commission (PSC) decision regarding the Milwaukee streetcar project.**

"Forcing utility companies and ultimately taxpayers to pay for the cost of moving the lines will increase utility cost for all residents in the Milwaukee metropolitan area.

"Wisconsin already has high utility rates and additional, unnecessary increases in utility rates will hurt Wisconsin's businesses.

"The streetcar may be used by 1% of the Milwaukee area residents, but will be paid for by 100% of the residents in the Milwaukee area. It is my intent to ensure we are not wasting local, state and federal taxpayer's money on 19th century infrastructure," said Rep. Kooyenga.

A recent study by the MacIver and CATO Institutes noted that traditional bus routes offer the same service for a fraction of the price. You can find their joint report at <http://www.cato.org/sites/cato.org/files/articles/streetcarscam-otoole.pdf>

Rep. Kooyenga, a member of the Joint Finance Committee, intends to introduce the legislation as a standalone bill and as a budget motion. Rep. Kooyenga proudly serves the 14th Assembly District which includes Brookfield, Milwaukee and Wauwatosa.

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