

**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' MOTION FOR FINAL DECISION

The undisputed facts and Wisconsin law as set forth in the recent 2013 Act 20 amendments to the applicable statutes require the Commission to decide this case. There is no question that the relevant municipal regulations at issue, including the Milwaukee Ordinance and Common Council Resolution, will impose costs on utilities and other affected companies in connection with the relocation or modification of their facilities to accommodate the Milwaukee Streetcar Project. Wisconsin law, as modified by Act 20, now provides that any such municipal regulation is unreasonable as a matter of law. But Act 20 is not self-executing and does not by its terms invalidate such ordinances or resolutions. Rather, the Commission retains its jurisdiction and must declare pursuant to Wis. Stat. §§ 182.017(8), 196.58(4), and 227.41 that such regulations, including Milwaukee Ordinance § 115-22 and Common Council Resolution No. 110372, are void and of no force and effect. That is the relief that the Individual Petitioners requested, and that is the relief that they are now entitled to receive from the Commission. Accordingly, the Individual Petitioners respectfully submit this Motion for Final Decision pursuant to Wis. Admin. Code § 223(1). The grounds for the motion and the relief requested are as follows:

1. This case is not moot.

Individual Petitioner Healy originally sought the declaratory relief requested in this proceeding under Wis. Stat. § 227.41. Healy asserted that as a utility ratepayer he was an “interested person” entitled to seek a declaration as to the matters put at issue in this case. The City claimed that Healy lacked standing to make such a claim, as he was not a “qualified complainant” under Wis. Stat. § 196.58(4) and should not be permitted to evade the requirements of the statutory complaint procedure by seeking a declaration under Chapter 227. *See* City of Milwaukee’s Initial Brief, PSC Ref. 159190.

Rather than reach the merits of the standing issue as raised by the City and extensively briefed by the parties, the Commission invited Healy to put an end to the controversy by the simple expedient of becoming a “qualified complainant.” This he could do if he could find at least 24 other utility ratepayers who were willing to join in his request for declaratory relief. *See* Order on Motions for Clarification and on Threshold Legal Issue, PSC Ref. 163712. He did so, and an Amended Petition on behalf of Healy and 35 additional ratepayers was filed on May 3, 2012. *See* Amended Petition of Healy with 35 attached Affidavits per PSC Request, PSC Ref. 164192. The Commission accepted this filing as establishing that the Individual Petitioners as a group were “qualified complainants.” The Amended Petition filed by the Individual Petitioners seeks relief under §196.58(4) as well as under §227.41. *See* Amended Petition at 1. Having invited Healy and his fellow Petitioners to become qualified complainants under §196.58(4), it would be ironic, to say the least, for the Commission to exercise its discretion to dismiss this proceeding because his original Petition was brought under Chapter 227.

More to the point, there is no question that the underlying controversy is continuing and that it has not been finally resolved by the passage of Act 20. The Ordinance and Resolution are

still in place. The City has announced that despite the passage of Act 20 the project will proceed. See “Federal DOT Rejects Milwaukee’s Request for More Streetcar Money,” Milwaukee Journal Sentinel, September 6, 2013, available at <http://www.jsonline.com/news/milwaukee/federal-dot-rejects-milwaukees-request-for-more-streetcar-money-b9992561z1-222734741.html>. The Common Council Resolution directing that construction proceed with no funds budgeted to pay the inevitable modification and relocation costs is still on the books.

The issues presented by the City’s actions have been fairly joined in this proceeding and Commission action is necessary. The City is unquestionably on notice as to the nature of the claims asserted and, like the rest of the parties, has already devoted substantial time and resources to briefing the legal issues, including the jurisdiction of the Commission to decide the case under Wis. Stat. § 196.58(4) and other statutes affected by Act 20. Nothing would be gained by the Commission opening a new docket and requiring the Individual Petitioners or anyone else to file new pleadings with a different label. Wisconsin law does not favor form over substance. See, e.g., *Public Service Corp. v. Arby Const., Inc.*, 2012 WI 87, ¶37, 342 Wis. 2d 544, 818 N.W. 2d 863.

2. Petitioners are entitled to the relief requested.

Act 20 amended Wis. Stat. §196.58 to provide that “a municipal regulation is unreasonable 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, a defined in s. 182.017(1g)(ct).” Wis. Stat. §196.58(4)(c). Section 182.017, which covers the ATU Petitioners in this proceeding, was amended to the same effect. The Milwaukee Streetcar is an urban rail transit system as defined by the amended statutes.

From the outset of this proceeding, the City of Milwaukee has contended that Milwaukee Ordinance §115-22 requires utilities and other affected companies to bear the costs of modifying or relocating their facilities to accommodate public works undertaken by the City, including the Streetcar Project. *See, e.g.*, City of Milwaukee’s Response Brief, PSC Ref. 168149. Common Council Resolution No. 110372 directs the Commissioner of Public Works to begin construction of the Streetcar Project and directs that the Project be constructed within the constraints of the approved project budget as set forth in the Final Environmental Assessment. Resolution, PSC Ref. 165169, and Final Environmental Assessment, PSC Ref. 165168. The City has conceded that the approved budget makes no provision for payment by the City of the inevitable modification and relocation costs that will be imposed on utilities and other affected companies. *See* Affidavit of Jeffrey S. Polenske in Support of City of Milwaukee’s Response Brief, ¶ 34, PSC Ref. 168611.

Although the final amount of such costs may not have determined, the record is clear that there will be *some* relocation costs. There is no doubt that the Ordinance and the Resolution constitute “municipal regulations” for purposes of Act 20 and the amended statutes and that they therefore impose modification or relocation costs on utilities and other affected companies that the legislature has declared are unreasonable. The Petitioners believe that those costs will be substantial. But whether or not that is true, the existing record establishes that there will be some costs and Wisconsin law now provides that *any* such costs are unreasonable. As a result of the Act 20 amendments, an argument about the final *amount* of modification and relocation costs is now beside the point.

The record on these issues is clear and no further factual development is necessary. To the extent that Milwaukee Ordinance § 115-22, Common Council Resolution No. 110372, or any

other municipal regulation authorizes the City to impose any modification or relocation costs on utilities and other affected companies in connection with the Streetcar Project, it imposes costs that are unreasonable as matter of law.

But Act 20 does not itself invalidate the municipal regulations at issue here. As the Legislative Reference Bureau made clear in its analysis of Act 20, the Commission retains jurisdiction to review challenged municipal regulations and it is up to the Commission to invalidate them. “*If the PSC finds* that such a regulation is unreasonable, the regulation is void.” Legislative Reference Bureau 2013 Drafting File LRBb0071, Draft Bill LRB 2056/6, Analysis by Legislative Reference Bureau (emphasis added). The Commission cannot avoid that responsibility here. It must make a finding that the municipal regulations at issue are unreasonable and grant the Individual Petitioners’ request for a declaration to that effect.

Accordingly the Individual Petitioners respectfully request that the Commission enter a Final Order:

- (a) declaring that Milwaukee Ordinance 115-22, Common Council Resolution No. 110372, and any other municipal regulations are void and of no force and effect to the extent that they may be applied to cause utilities or other affected companies to bear any modification or relocation costs associated with the Milwaukee Streetcar Project; and
- (b) granting Petitioners such other and further relief as the Commission deems appropriate.

