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

ATU PETITIONERS REPLY BRIEF IN SUPPORT OF MOTION FOR FINAL DECISION

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 Reply Brief in Support of Motion for Final Decision.

The Legislature has commanded the Commission to void the City's efforts to impose facility modification or relocation costs on the ATU Petitioners. The ATU Petitioners demonstrated in their Brief in Support of Motion for Final Decision that the time for the Commission to comply with the Legislature's directive is now. The City's response to the ATU Petitioners' brief (the "Response") comprises yet another iteration of the unsupported and inconsistent positions the City has adopted throughout this proceeding baselessly challenging the authority of the Commission and the clear mandate of the Legislature:

- In one of the City's first filings in this matter, it admitted that the Commission has authority under Wis. Stat. § 196.58(4) to review the municipal regulation that has been

cited throughout this proceeding: Milw. Ord. § 115-22.[1] Now, however, the City claims that the ATU Petitioners have not identified any "municipal regulation" within the scope of the Commission's authority. (Response, p. 5).

- The City previously conceded that the Commission has authority to review challenges to municipal regulations under Wis. Stat. § 182.017(8), and argued that the Commission's authority is limited to voiding a regulation based upon any one of the circumstances identified in the subsections to Wis. Stat. § 182.017(8).[2] However, when Act 20 added a new subsection to Wis. Stat. § 182.017(8) which requires the Commission to void the regulations at issue in this proceeding, *i.e.*, Wis. Stat. § 182.017(8)***(as)***, the City shifted its position to contend that Wis. Stat. § 182.017(8) does not apply because Wis. Stat. § 182.017(2) governs this controversy. (Response, pp. 5-7).

- The City previously accused the ATU Petitioners of "using the Commission as their forum in which to effect a change in law" to void a municipal regulation that "can only be done at the legislative level."[3] Yet now that the Legislature has acted through Act 20, the City claims this had no effect on the City's efforts. (Response, p. 5).

- The City previously argued that the municipal regulations related to the Streetcar Project were an exercise of the police power. (*See* City of Milwaukee Response Brief, p. 48 (Jul. 9, 2012) (PSC REF#:168149). Now, the City argues (incorrectly) that Wis. Stat. § 182.017(2) is dispositive and that the police power and the City's regulations are irrelevant. (Response, p. 6).

- Act 20 expressly subjugated the provisions of Wis. Stat. § 182.017(2) to the Commission's voiding authority under Wis. Stat. § 182.017(8). Yet in its Response the City does not even acknowledge this express feature of Act 20 and instead claims that Wis. Stat. § 182.017(2) trumps Wis. Stat. § 182.017(8), despite Act 20. (Response, p. 5).

- Finally, in a last-ditch effort, the City challenges the constitutionality of the Act 20 urban rail provisions, despite the Commission's lack of authority to hear such challenges and despite the City's lack of standing to bring such challenges.

The City's constant maneuvering, which is aimed at avoiding Commission review of its actions and depriving the ATU Petitioners the relief to which they are entitled, offends the directives of the Legislature and inappropriately encourages the Commission to eschew its

[1] *See* City of Milwaukee's Initial Brief Addressing Jurisdictional Issues (Feb. 6, 2012) (PSC REF#: 159190). The City argued that this authority was "limited" under that statute, but only in terms of the persons able to invoke Commission jurisdiction pursuant to that statute, i.e., a "public utility" or "qualified complainant." *Id.* at 6-7.

[2] *See* City of Milwaukee's Motion for Leave to Respond and Request for Decision, par. 3.a. (Apr. 15, 2013) (PSC REF#: 183525).

[3] *See* City of Milwaukee's Response Brief, p. 2 (Jul. 9, 2012) (PSC REF#: 168149).

statutory obligations. The City has inappropriately played "fast and loose with the [Commission] by asserting inconsistent positions," and on that basis alone, the Commission could reject the City's latest arguments. *See State v. Fleming*, 181 Wis. 2d 546, 557, 510 N.W.2d 837 (Ct. App. 1993) (describing doctrine of judicial estoppel). Moreover, as described below, the City's current position simply lacks merit.

Refraining from issuing a final decision in this proceeding at this time is not only unwarranted under the law, it also would only delay the inevitable legislatively-mandated action that the Commission must take pursuant to Act 20. The Commission opened this docket to protect utilities and their ratepayers from absorbing the unprecedented, tens of millions of dollars in utility relocation and modification costs caused by the Streetcar Project. Those concerns still exist today, as the City's Response makes its intent clear: to ignore the law, proceed with the Streetcar Project, and attempt to force utilities and their ratepayers to pay for the costs of facility relocations and modifications. Through Act 20, the Legislature has clarified the Commission's authority to prevent the City from doing just that. The Commission should exercise that Legislative authority, reject the City's arguments and issue a final decision as requested by the ATU Petitioners.

ARGUMENT

I. THE CITY'S ATTEMPTS TO AVOID THE EFFECTS OF ACT 20 ARE BASELESS.

In their initial brief, the ATU Petitioners established that Act 20 and the uncontested facts provide the substantive basis for the Commission to resolve this matter and find that the City's continuing efforts to impose on the ATU Petitioners facility relocation and modification costs caused by the Streetcar Project are unreasonable *per se* under Wis. Stat. §§ 182.017 and 196.58 and must be declared void. Act 20 renders unreasonable, as a matter of law, any municipal efforts to impose facility relocation or modification costs on companies to accommodate an

urban rail transit system such as the Streetcar Project: "[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); *see also* Wis. Stat. § 196.58(4)(c). Moreover, the uncontested facts trigger the mandatory voiding provisions of Wis. Stat. §§ 182.017 and 196.58. The City does not dispute that the Streetcar Project is an "urban rail transit system," and that the City is attempting to impose facility relocation or modification costs on the ATU Petitioners. In short, all the legal and factual elements are present for the Commission to issue a final decision. For the same reasons the Commission opened this docket nearly two years ago, it should issue a final decision now.

In response, rather than complying with the law, the City attempts to dodge it. The City does so by relying on a contorted interpretation of Wis. Stat. § 182.017(2). The City's argument is not only directly contrary to the plain terms of Wis. Stat. § 182.017 and longstanding case law, but it renders Wis. Stat. § 182.017(8)(as) (adopted as part of Act 20) meaningless, contrary to the Legislature's intent. The one thing the City's arguments do demonstrate, however, is that there is certainly still a case and controversy needing Commission action to resolve. The Commission should exercise its authority and grant the ATU Petitioners' Motion for Final Decision.

A. The City's Construction of Wis. Stat. § 182.017(2) Is Contrary To The Plain Meaning Of The Statute, The Intent Of Act 20, And Longstanding Precedent.

The City argues that the Commission should close this docket because a final decision "will not end the controversy" over who should pay for utility relocation and modification costs caused by the Streetcar Project. (Response, pp. 1 and 5). The City's argument, however, is based solely on a tortured reading of Wis. Stat. § 182.017(2). While the City (mis)reads much more into it, that subsection simply provides that no utility "line or system or any appurtenance thereto shall at any time obstruct or incommode the public use of the highway, bridge, stream, or body of water." *See* Wis. Stat. § 182.017(2). The City contends that the newly promulgated,

specific provisions of Wis. Stat. § 182.017(8)(as) are negated by the general terms of Wis. Stat. § 182.017(2) which, the City claims, obligates utilities "to relocate their facilities in the public rights-of-way at their expense to accommodate a public works project in the right-of-way including an urban rail project." (Response, p. 5).

The City's argument is contrary to the plain terms of Wis. Stat. §§ 182.017(8)(as) and 196.58(4)(c), which make clear that their provisions trump the requirements of Wis. Stat. § 182.017(2). *See Wisconsin Indus. Energy Group, Inc. v. Public Service Comm'n*, 2012 WI 89, ¶ 15, 342 Wis. 2d 576, 819 N.W.2d 240 ("Statutory interpretation begins with the language of the statute at issue."). Section 182.017(8)(as) specifically provides that: "***Notwithstanding sub. (2)***, 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." Wis. Stat. § 182.017(8)(as) (emphasis added); *see also* Wis. Stat. § 196.58(4)(c). The "notwithstanding sub. (2)" language, adopted as part of Act 20, means that Wis. Stat. § 182.017(2) is not relevant to the question of who pays for the costs associated with facility relocation or modification caused by an urban rail transit system, such as the Streetcar Project. In determining that legal question, the only relevant statutes are Wis. Stats. §§ 182.017(8)(as) and 196.58(4)(c), which dictate that the City pay for those costs. The City, however, does not address, and in fact fails to even mention, the existence of the "notwithstanding" clause in Wis. Stat. § 182.017(8). Rather, the City improperly acts as if that clause does not exist.

Moreover, the City's construction of Wis. Stat. § 182.017(2) would improperly render Wis. Stat. §§ 182.017(8)(as) and 196.58(4)(c) meaningless. Accepting the City's flawed logic, Wis. Stat. § 182.017(2) would require utilities to pay for the costs of facility relocation or modification associated with *all* public works projects, which the City contends includes *any* urban rail transit system. If the City were right, then there would *never* be an instance when a

municipal action forcing utilities to pay facility relocation or modification costs caused by an urban rail transit system would be unreasonable under Wis. Stat. §§ 182.017(8)(as) or 196.58(4)(c). That is because (again, accepting the City's argument) the municipality could always claim, as the City does here, that the obligation of the utility and their ratepayers to absorb such costs is contained in subsection (2) and not in a municipal regulation. As such, the City's position would extinguish the authority expressly granted to the Commission pursuant to Wis. Stat. §§ 182.017(8)(as) and 196.58(4)(c), rendering those provisions legal nullities. That result is contrary to the Legislature's intent in adopting those statutory sections within Act 20, and would violate the canon of statutory construction that a statute should not be construed to be rendered meaningless. *See State v. Wis. Tel. Co.*, 91 Wis. 2d 702, 284 N.W. 2d 41, 46 (1979).

Further, Wis. Stat. § 182.017(2) does not even come close to saying what the City claims it does. That section does not address who pays for the costs of moving or modifying a facility to accommodate a public works project. It only states that utilities may not "obstruct or incommode the public use of any highway." While the City argues that subsection (2) really means that utilities not presently obstructing the right-of-way must move their facilities, at their cost, for a public works project, that is not how the statute plainly reads, nor is it how the courts have interpreted it. The Supreme Court of Wisconsin has long held that Wis. Stat. § 182.017(2) is a "safety statute" intended solely to protect public safety. In the over 150 years that Wis. Stat. § 182.017(2) and its predecessor provisions have been law, the Court has never applied subsection (2) as a shield against all reasonableness challenges to municipal regulations governing existing facilities in a municipal rights-of-way, and the Court has never applied subsection (2) to utility facilities that are not creating a public safety issue. Indeed, the City cites no authority for its argument that this safety statute can be used to require the relocation or modification of utility facilities at the utility's expense, nor can it.

On the other hand, the Court has made clear that subsection (2) applies only in situations where a utility facility creates a public safety issue in the initial placement and construction of the facility in the right-of-way. For example, in *Gray v. Wis. Tel. Co.*, 30 Wis. 2d 237,140 N.W.2d 203 (1966), the Court applied subsection (2) to a situation where the plaintiff struck a guy wire installed by the defendant telephone company that sagged and obstructed the highway. The plaintiff argued that subsection (2) imposes strict liability on utilities as to the maintenance of facilities, beyond the common law duty. The court disagreed, finding that based upon "the history of the statute . . . the statutory command of sec. 182.017(1) and (2) goes to the construction of the line and its appurtenances and not to inspection and maintenance." The Court explained that there was no evidence that the guy wire "as erected and strung over the highway in any way obstructed or incommoded the public use of the highway" and, as such, the Court concluded that "the construction of the line and its appurtenances did not violate the statute." *Id.* at 248-49. In *Weiss v. Holman*, 58 Wis. 2d 608, 207 N.W.2d 660 (1973),[4] the Court, following *Gray*, reiterated that subsection (2) only calls for a determination of "whether the utility company may have violated its statutory duty not to obstruct or incommode the highway *in the initial placement* of its power pole." *Id.* at 617-18 (emphasis added). Here, there is no contention that the ATU Petitioners' facilities, as initially constructed or as currently placed, are obstructing or incommoding the public's current use of the streets.

Following this precedent, the Commission also confirmed the limited scope of subsection (2) in a recent transmission line CPCN case, in which the Wisconsin Department of Transportation ("WisDOT") argued that subsection (2) could be used to address non-safety issues, such as aesthetics.

[4] Declined to follow on other grounds *E.J.H. v. State*, 112 Wis. 2d 439, 334 N.W.2d 77 (1983).

> WisDOT asserted that it has authority to withhold overhead permits under Wis. Stat. § 182.017(2), which states that 'no such line or system or any appurtenance thereto shall at any time obstruct or incommode the public use of any highway, bridge, stream or body of water.' WisDOT interpreted this to mean that a line cannot disturb or inconvenience. Such an interpretation is not only unreasonably narrow, it conflicts with the Wisconsin Supreme Court's interpretation of this statute. In *Weiss v. Holman*, 58 Wis. 2d 608, 619,207 N.W.2d 660 (1973), the court held that this statute is 'concerned with the safety of those traveling upon the highways who are subject to injury should a utility pole or similar appurtenance be placed on the highway.'[5]

The purpose of subsection (2), therefore, is not to create a superior right of municipalities that extinguishes the right of utilities to seek relief from the Commission under Wis. Stat. § 182.017(8)(as). Instead, subsection (2) addresses public safety concerning the initial placement of utility facilities, creating a duty that utilities must construct their facilities so as not to "obstruct or incommode" a highway at the time of installation. That is a far cry from what the City argues now—that in all instances utilities must move their facilities at their own costs to accommodate public works projects. The City's interpretation is wrong. Utilities have no obligation under subsection (2) to accommodate later modifications to a highway, such as the construction of the Streetcar Project. Therefore, the ATU Petitioners' facilities do not "obstruct or incommode" the highway, as those terms must be interpreted under binding Wisconsin Supreme Court precedent, and subsection (2) has no applicability in this case. The Commission should reject the City's unprecedented interpretation of Wis. Stat. § 182.017(2).

B. The City Is Seeking To Impose Facility Relocation And Modification Costs By Means Of Municipal Regulations.

The City further contends that Wis. Stat. § 182.017(8)(as) does not apply because no municipal regulation has been identified for the Commission to void. (Response, p. 5). The City

[5] *Joint Application of Dairyland Power Cooperative, Northern States Power Company-Wisconsin, and Wisconsin Public Power, Inc,, for Authority to Construct and Place in Service 345 kV Electric Transmission Lines and Electric Substation Facilities for the CapX Twin Cities-Rochester-La Crosse Project, Located in Buffalo, Trempealeau, and La Crosse Counties, Wisconsin*, Docket No. 05-CE-136, Final Decision at 21 (May 30, 2012) (PSC REF# 165332).

is turning a blind eye to the ATU Petitioners' pleadings, which specifically and repeatedly identify the regulations that must be voided. Moreover, the City's argument here is directly at odds with its long-stated position that its current ordinances require utilities to move their facilities at their own expense.[6]

The ATU Petitioners have identified multiple City regulations that have the effect of imposing on utilities the cost of facility relocation and modification to accommodate the Streetcar Project. First, the ATU Petitioners have identified Milw. Ord. 115-22 (which requires utilities to bear the cost of relocating facilities to accommodate "public works or improvements").[7] The City has long argued that this provision requires utilities to relocate their facilities at their own cost.[8] Second, the ATU Petitioners have also cited the City's resolution approving the Streetcar Project, which directs the City's Department of Public Works to move forward with the Streetcar Project with no budget to reimburse utilities for relocation or modification costs.[9] Resolutions are included within the definition of "regulation" under Wis. Stat. § 182.017(1g)(bm). Finally, in addition to those regulations, the City's Public Works Department has now issued Utility Coordination Guidelines (dated April 17, 2013), which by the City's own description, order that *at their own cost "*utilities are to relocate any mainline facilities in direct conflict with the track slab, relocate any mainline facilities parallel and under the horizontal limits of the City's 'Recommended Underground Utility Review Zone' . . . and adjust

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[6] Act 20 expanded the scope of municipal actions subject to Commission review by adding orders and "other regulations" to the list of actions that are subject to review under both Wis. Stats. §§ 182.017 and 196.58. The Legislature also chose to include regulations entered into, enacted or issued in the *future.* Now, the term "municipal regulation" is broadly defined to include "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).

[7] ATU Petitioners' Brief in Support of Motion for Final Decision, p. 9 (Sep. 23, 2013) (PSC REF#:190876).

[8] *See* City of Milwaukee's Initial Brief Addressing Jurisdictional Issues (Feb. 6, 2012) (PSC REF#: 159190).

[9] ATU Petitioners' Brief in Support of Motion for Final Decision, p. 9 (Sep. 23, 2013) (PSC REF#:190876).

manholes as reasonably necessary to facilitate access." (Response, p. 7 (citing *Sixth Affidavit of Jeffrey Polenske* (PSC REF#: 183889)). Those guidelines and any other "contract, ordinance, resolution, order, or other regulation" are "municipal regulations" by which the City is regulating access to the public rights-of-way and, as such, are subject to review and voiding under Wis. Stat. § 182.017(8)(as).

In short, any current or future City regulation that requires or has the effect of requiring a company to "pay any part of the cost to modify or relocate the company's facilities to accommodate" the Streetcar Project would be a municipal regulation of access to rights-of-way under Wis. Stat. § 182.017(1g)(ct) and subject to review under Wis. Stat. § 182.017(8)(as). And, as requested by the Motion, any such regulation must be voided.

C. A Final Decision Would Resolve All Issues Raised By The ATU Petitioners.

The City also argues that a Commission decision "would not resolve factual issues" regarding the amount of relocation and modification costs to be paid, such as a "potential controversy" over what facilities would need to be relocated or modified. (Response, p. 7). While that is true, these "potential controversies" were not raised by the ATU Petitioners and are not germane to this proceeding. Rather, the ATU Petitioners, as well as the individual petitioners, each ask the Commission to determine "who should pay" not "how much should be paid." *See, e.g.*, AT&T Wisconsin Petition (seeking "a declaratory ruling that AT&T Wisconsin is not responsible for the costs of permanently modifying and relocating its facilities to accommodate the Milwaukee Streetcar Project and that under governing law these costs must be borne by the City of Milwaukee") (PSC REF#: 161190) (Mar. 14, 2012); *Verified Petition of Brett Healy to Determine Allocation of Costs for Relocation of Utility Structures for Milwaukee Streetcar Project*, p. 6 (PSC REF#:154240) (October 4, 2011). While questions concerning how much should be paid and what facilities must be moved may (or may not) become an issue in

some new proceeding in the future, these are issues not relevant to this proceeding because Act 20 requires the Commission to void municipal regulations that require utilities to modify or relocate their facilities to accommodate an urban rail transit system, regardless of the amount of such modification or relocation costs. If such issues arise in the future and are not resolved between the parties, then they can be addressed in a proper legal forum.

The City also argues that a final decision will not resolve issues "with respect to future urban rail projects in other Wisconsin cities." (Response, p. 8). Of course, that argument assumes that other cities will not comply with the law. However, to the extent another municipality engages in an urban rail project without reimbursing utilities for facility relocation and modification costs caused by the project, then a decision here would stand as strong precedent to dissuade such unlawful action. As a result, Commission action here would provide certainty and allow parties to avoid similar future litigation.

Finally, the City continues to contend, without explanation, that the circuit courts are the "proper forum" to resolve this controversy and not the Commission. (Response, p. 9). The Legislature clearly disagrees. In originally adopting Wis. Stat. § 182.017, and in modifying it through Act 20, the Legislature has made its intent clear: it expects the Commission to hear and resolve complaints that a municipality's regulations violate the requirements of Wis. Stats. §§ 182.017(8)(as) and 196.58(4)(c). The Commission should resolve this matter, as the Legislature intended, and as the Commission itself intended when it first took up the petitions in this docket.

II. THE COMMISSION SHOULD ISSUE A FINAL DECISION NOW.

The ATU Petitioners demonstrated in their initial brief that they appropriately invoked the Commission's authority under Wis. Stat. §§ 182.017(8) and 196.58(4), and triggered the legislative mandate that the Commission void the municipal regulations at issue in this

proceeding.[10] Specifically, the ATU Petitioners invoked the very "complaint mechanism" identified by the Commission as being embodied in Wis. Stat. § 182.017(8), and filed pleadings premised upon Wis. Stat. §§ 182.017(8) and 196.58(4). Based upon these filings, the Commission is now required to issue a final decision declaring the City's efforts to impose any facility modification or relocation costs on the ATU Petitioners unreasonable and void.

The City's claim in its Response that issuing a final decision would be procedurally inappropriate is another attempt to avoid the effects of Act 20, and lacks merit. First, the City notes a purported distinction between complaint and declaratory ruling proceedings. The City, however, fails to distinguish or otherwise address the cases cited by the ATU Petitioners that reject the kind of "form over substance" argument the City makes. The City has, in effect, admitted that the ATU Petitioners' arguments are sound. *See Hoffman v. Econ. Preferred Ins. Co.*, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590 (arguments that are not addressed are deemed admitted). The City's efforts to convince the Commission to exercise "discretion" to eschew the legislative mandate that it void certain municipal regulations should be rejected.

Second, the City contends that the Commission cannot issue a final decision because no hearing has been held in this proceeding. (Response, p. 4). The City's position is wrong. The City's current position is contrary to the position it took in its own "Request for Decision":

> The City believes that the issues that have been briefed are ready for Commission decision, that the issues are dispositive of the entire matter before the Commission, and that an evidentiary hearing on the amount of the relocation costs is not necessary and would be a waste of agency and party resources.[11]

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[10] See ATU Petitioners' Brief in Support of Motion for Final Decision, pp. 12-16 (Sep. 23, 2013) (PSC REF#:190876).

[11] City of Milwaukee's Motion for Leave to Respond and Request for Decision, p. 2 (Apr. 15, 2013) (PSC REF#: 183525). The ATU Petitioners opposed the City's Request for Decision because, at that time, before the passage of Act 20, the Commissioners ordered that an evidentiary hearing take place to explore a number of facts related to the reasonableness determination required by the prior versions of Wis. Stat. §§ 182.017(8) and 196.58(4). Act 20 rendered that anticipated evidentiary hearing moot because Act 20 compels a determination that facility relocation or modification costs imposed upon companies in relation to an urban rail transit system are *per se* unreasonable.

The City's current claim that a hearing is necessary is disingenuous at best.

Moreover, the City's demand that the Commission conduct a hearing before rendering any final decision ignores the effect of Act 20. As the ATU Petitioners explained in their initial brief, Act 20 limited the scope of material facts to a few undisputed matters: that the ATU Petitioners are afforded protection under Act 20, that the City's actions will have the effect of imposing costs for facility modification or relocation on the ATU Petitioners, and that those costs are being imposed in connection with an "urban rail transit system." There are no disputed issues of material fact that ordinarily are required before a right to an administrative hearing accrues. *See* Wis. Stat. § 227.42(1)(d). Therefore, a determination on written submissions—similar to a summary judgment procedure—is an appropriate way to conclude this matter. *See Balele v. Wis. Pers. Comm'n*, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998).

Also, the Commission already has appropriately determined that "[b]riefing shall constitute the hearing required under Wis. Stat. §§ 196.58(4) and 227.41(4)."[12] Contrary to the City's claim, such a manner of "hearing" fulfills the requirements of due process. Due process requires an opportunity to be heard "at a reasonable time and in a meaningful manner." *See Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 324 (1976). The type of hearing required depends on the nature of the case. *Goldberg*, 397 U.S. at 268-69. The hearing requirement is satisfied if a party is provided "[t]he opportunity to present reasons, either in person ***or in writing***, why proposed action should not be taken. . ." *Waste Mgmt. of Wis., Inc. v. Dep't of Natural Res.*, 128 Wis. 2d 59, 381 N.W.2d 318, 327 (1986)

[12] *See* Prehearing Conference Memorandum, p. 3 (Feb. 7, 2012) (PSC REF#:159312). Although the City sought interlocutory review by the Commission of other aspects of the Prehearing Conference Memorandum, *see* City of Milwaukee's Motion for Interlocutory Review (Feb. 3, 2012) (PSC REF#:159158), it did not challenge the manner of hearing. Moreover, there is no reason to treat the hearing provision contained in Wis. Stat. § 182.017(8) any differently than the hearing provision contained in Wis. Stat. §§ 196.58(4) and 227.41.

(emphasis added). In *Waste Management*, for example, the Supreme Court of Wisconsin concluded that an exchange of correspondence between a company and an administrative agency satisfied the due process hearing requirement. *Id*.

Here, over the past two years, the parties have submitted extensive pleadings, briefs, affidavits, motions, and other papers addressing the legal issues raised by the petitioners. The City has had ample opportunity to address the ATU Petitioners' positions, and in fact has used that opportunity to make its ever-changing positions known. Given the passage of Act 20, the City's opportunity to make its positions known on the remaining legal issues—in writing—easily satisfies the "fair play" concerns of due process, which include the right to know the issues, the right to address the issues, and the right to be heard by counsel. *See Laberee v. Labor and Indus. Review Comm'n*, 2010 WI App 148, ¶ 29, 330 Wis. 2d 101, 793 N.W.2d 77. In short, the hearing in this matter has already occurred.

Finally, refraining from issuing a final decision in this case would inefficiently delay the action the Commission must take. The City claims that Wis. Stat. § 182.017(2) is dispositive of the issues identified by the parties, and that the Commission lacks jurisdiction under that subsection. (Response, pp. 5-9). However, the City can only make this claim by ignoring the statutory text by which Act 20 mandated that, "***Notwithstanding sub. [182.017](2),***" the Commission must void certain regulations such as those identified by the ATU Petitioners. *See* Wis. Stat. § 182.017(8)(as) (emphasis added). Based upon the plain language of the statute, and pursuant to the doctrine of primary jurisdiction, the Commission's determination pursuant to Wis. Stat. § 182.017(8) must be made "notwithstanding" Wis. Stat. § 182.017(2). *See Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 491 N.W.2d 484, 492 (1992) ("When an issue falls squarely in the very area for which the agency was created, it is sensible to require prior administrative recourse before a court decides the issue.").

Accordingly, the ATU Petitioners properly invoked the Commission's jurisdiction under Wis. Stat. §§ 182.017(8) and 196.58(4), which require the Commission to void the municipal regulations that would impose facility relocation or modification costs on the ATU Petitioners. There is no requirement that the Commission conduct any further hearings in this proceeding because Act 20 has eliminated any disputed material facts. Instead, the hearings conducted thus far, in the form of briefing and other submissions of the parties, provide the appropriate record on which the Commission should render a final decision. Moreover, Act 20 eliminated any doubt that the Commission has primary jurisdiction over the issues relating to facility relocation or modification costs "notwithstanding" the City's baseless attempt to reframe this matter as falling under a court's jurisdiction pursuant to Wis. Stat. § 182.017(2). Therefore, putting off a final decision based upon the City's suggestion that it will seek relief under that subsection in circuit court will only delay the Commission's obligation to issue a final decision on the issues that the parties have fully and exhaustively briefed. The time for the Commission to render a final decision is now, and it should do so based upon the record before it.[13]

III. THE CONSTITUTIONAL ISSUES RAISED BY THE CITY HAVE NO MERIT AND CANNOT BE ADDRESSED IN THIS PROCEEDING.

The City argues that certain provisions of Act 20 ("Urban Rail Provisions") violate two provisions of the Wisconsin Constitution: (1) the prohibition on private or local bills under Article IV, Section 18 and (2) the equal protection clause under Article I, Section 1. (Response, pp. 10-13). The Commission should reject those arguments. The Commission has no authority to hear challenges to the constitutionality of state law and the City has no standing to bring such

[13] Alternatively, to conclusively resolve any doubt regarding the sufficiency of the proceedings conducted thus far, and in the interest of efficiently bringing this matter to an appropriate conclusion, the ATU Petitioners suggest that any further hearing be comprised of oral argument by counsel regarding the legal issues raised by the parties.

challenges. Further, the City's constitutional arguments fail on the merits. Thus, the constitutionality of the Urban Rail Provisions is not an issue in this case.

A. The Commission Lacks Authority To Declare State Laws Unconstitutional.

In an apparent effort to avoid future arguments about waiver or exhaustion of remedies, the City argues that the Urban Rail Provisions are unconstitutional. The Commission must reject these arguments due to its inability to hear and address complaints about constitutional issues. As an administrative agency, the Commission has no authority to provide the relief sought by the City—to declare the Urban Rail Provisions unconstitutional. *See Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶ 15, n. 14, 305 Wis. 2d 788, 741 N.W.2d 244 (citing *Omernick v. Dep't of Natural Res.*, 71 Wis. 2d 370, 238 N.W.2d 114 (1976) (DNR has no authority to determine whether a statute violates constitutional due process rights)).

Instead, the Commission must apply the law of the state and cannot make an independent determination that a law is unconstitutional and decline to apply it on that basis. *See Wis. Bell, Inc. v. Pub. Serv. Comm'n*, 2003 WI App 193, ¶ 12, 267 Wis. 2d 193, 670 N.W.2d 97 ("[T]he commission has only such powers as the legislature expressly confers upon it."); *Brown County v. Dep't of Health and Soc. Serv.*, 103 Wis. 2d 37, 307 N.W.2d 247 (1981) ("[A]n administrative agency has only those powers as are expressly conferred or necessarily implied from the statutory provisions under which it operates, but acting within that grant of delegated power, an agency effectuates the will of the legislature."). Accordingly, the Commission lacks the authority to hear the City's constitutional claims.

B. The City Lacks Standing To Challenge The Constitutionality Of A Statute.

Even if the Commission had authority to declare state laws unconstitutional, the City has no standing to raise such issues before any court or administrative agency. A city, as a municipal corporation created by the state, cannot challenge the constitutionality of a state statute. *See City*

of Kenosha v. State, 35 Wis. 2d 317, 330, 151 N.W.2d 36 (1967) ("Municipal corporations, being creatures of the state, are not permitted to censor or supervise the activities of their creator."); *Columbia County v. Bd. of Trustees of Wis. Ret. Fund*, 17 Wis. 2d 310, 317, 116 N.W.2d 142 (1962) (A municipal corporation "has no right to question the constitutionality of the acts of its superior and creator or of another arm or governmental agency of the state.").

Likewise, a city "may not invoke privileges and immunities under the federal constitution in opposition to the will of the state." *City of Marshfield v. Towns of Cameron, Etc.*, 24 Wis. 2d 56, 63, 127 N.W.2d 809 (1964). For example, a city cannot claim the denial of equal protection as to the effect of a state statute under either the state or federal constitutions. *Id*.

Therefore, the City has no standing to challenge the constitutionality of the Urban Rail Provisions. The issue of whether the Urban Rail Provisions are constitutional is not before the Commission in this proceeding, cannot be brought before the Commission by the City, and cannot be addressed by the Commission in any event. Accordingly, the constitutionality of the Urban Rail Provisions has no bearing on the Commission's decision in this proceeding.

C. Act 20 Is Not A Private Or Local Bill And Does Not Violate The Equal Protection Clause.

Putting aside, for purposes of argument, the lack of Commission authority to declare state laws unconstitutional and the lack of City standing to challenge the constitutionality of state statutes, the City's arguments also fail on the merits. The City argues first that the Urban Rail Provisions constitute "private or local" legislation that is required by Article IV, Section 18 of the Wisconsin Constitution to be passed as a single-subject bill. (Response, pp. 10-13). However, the City misapplies the five-part *Brookfield* test in determining whether a bill is private or local and is thus required to be included in a stand-alone bill.

Article IV, Section 18 of the Wisconsin Constitution provides: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be

expressed in the title." To determine whether a bill is "private or local" where the legislation is not specific on its face, but instead involves classifications, the courts analyze the five elements of the *Brookfield* test, including whether (1) "the classification employed by the legislature [is] based on substantial distinctions which make one class really different from another," and (2) "the classification adopted [is] germane to the purpose of the law." *Davis v. Grover*, 166 Wis. 2d 501, 525, 480 N.W.2d 460 (1992); *Brookfield v. Milwaukee Sewerage*, 144 Wis. 2d 896, 912, 426 N.W.2d 591 (1988). The Urban Rail Provisions satisfy all five elements.[14]

First, the City argues that the Urban Rail Provisions create a new classification for urban rail transit systems that began service before July 2, 2013 and those that began service on or after July 2, 2013, and that there is no substantial distinction between the two. (Response, p. 12). However, classifications based on the date when a facility is operational are permissible under Article IV, Section 18. *See, e.g.*, *Pace v. Oneida County*, 212 Wis. 2d 448, 454-56, 569 N.W.2d 311 (Ct. App. 1997) (first factor satisfied where law established classification based upon date boathouse was destroyed). Indeed, the Urban Rail Provisions protect the investment-backed expectations of urban rail transit systems in operation before the effective date of the law by continuing to subject them to the regulatory scheme in effect at the time the system was constructed.[15] Subjecting systems already in service to different standards than the standards in place when the system was constructed could create investment risk and additional costs not

[14] There is a significant question whether Act 20 even created classes subject to scrutiny under Article IV, Section 18. The ATU Petitioners maintain that the Commission is required to void the municipal regulations at issue in this case, whether the reasonableness analysis is conducted under the prior or current versions of Wis. Stat. §§ 182.017 and 196.58; thus, the result is the same for both "classes" of urban rail transit systems. For purposes of argument, however, the ATU Petitioners address the elements of the *Brookfield* test in relation to the Urban Rail Provisions. Because the City does not challenge whether Act 20 satisfies the third, fourth, and fifth elements of the *Brookfield* test, the ATU Petitioners only address the first two elements.

[15] Although the ATU Petitioners maintain that the Commission was required to void the applicable municipal regulations even prior to the passage of Act 20, to the extent a court could interpret any differences in the law before and after Act 20, the Urban Rail Provisions assure that systems operational prior to passage of the bill remain subject to the then-existing regulatory regime.

contemplated at the time the system was constructed. Accordingly, distinguishing between projects operational before and after the effective date of the bill is reasonable.

Second, to be "germane," the classification "must be closely akin to, or have a close relationship with, the purposes of the provisions." *City of Brookfield*, 144 Wis. 2d at 917; *see, e.g.*, *Davis*, 166 Wis. 2d at 535 (second factor satisfied where law addressed matter of statewide importance); *Pace*, 212 Wis. 2d at 455 (second factor satisfied where bill was part of an overall legislative scheme). In this case, the clarification of the law applicable to utility relocation and modification costs is consistent with a matter of statewide importance and part of an overall legislative scheme: the regulation of public utilities and their use of municipal rights-of-way. The rights and regulation of public utilities have long been matters of statewide importance, including the privilege of public utilities to use highway rights-of-way and the regulation of such use. *See Wis. Tel. Co. v. City of Milwaukee*, 223 Wis. 251, 270 N.W. 336, 339 (1936). Indeed, among the Legislature's first enactments was granting franchises to telegraph companies to use public rights-of-way subject to reasonable regulation by municipalities. *See State ex rel. Wis. Tel. Co. v. City of Sheboygan*, 111 Wis. 23, 86 N.W. 657, 659 (1901). Equally true is that the reasonableness of municipal right-of-way regulations is also a matter of statewide concern. *See Wis. Tel. Co. v. City of Oshkosh*, 62 Wis. 32, 21 N.W. 828, 832 (1884). Clarifying state law relating to utility relocation and modification costs, and establishing a clear regulatory regime for urban rail transit systems, is thus germane to the overall legislative scheme of regulating public utilities and their use of municipal rights-of-way.

For the same reasons, the City's argument that the Urban Rail Provisions violate the Equal Protection Clause of the Wisconsin Constitution also fails. A law violates the Equal Protection Clause only where a classification created by the law is "irrational or arbitrary," with "no reasonable purpose or relationship to the facts or a proper state policy." *Metro. Assoc. v.*

City of Milwaukee, 2011 WI 20, ¶ 61, 332 Wis. 2d 85, 796 N.W.2d 717 (internal citations omitted). "Any doubts must be resolved in favor of the reasonableness of the classification." *Id*. The five-part test for determining whether a law is a private or local bill under Article IV, Section 18 is the same as the five-part test for determining whether a classification has a rational basis. *Id*. at ¶ 64. As discussed above, the Urban Rail Provisions satisfy that test.

Accordingly, the City's constitutional arguments fail. The Commission, as an administrative agency, lacks the authority to declare state laws unconstitutional. Further, the City, as a municipal corporation, lacks the standing to challenge the constitutionality of state laws. Additionally, even on the merits, the Urban Rail Provisions do not constitute a private or local bill and do not violate equal protection.

CONCLUSION

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.

Dated this 30th day of October, 2013.

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