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

PETITIONER, BRETT HEALY’S, BRIEF ON THE ISSUE
OF STANDING TO SEEK A DECLARATION

This is an action to determine the allocation of certain utility costs associated with the
proposed Milwaukee Streetcar. The Streetcar Project, which has been aggressively promoted by
the city of Milwaukee as virtually self-sustaining and “free” to taxpayers (save for a relatively
small amount of tax incremental financing), will require the relocation of certain utility
infrastructure located beneath the streets in which tracks for the new trolley must be laid. While
the final design of the street car line may not have been completed, the route it will travel has
been decided. Two things are clear.

First, the costs of utility relocation will not be zero and will almost certainly be
substantial. Unless the streetcar can be made to levitate above the streets, facilities located
beneath its tracks will have to be moved in order to accommodate the route and to permit access
to the facilities once the tracks are in place. Indeed, in its Environmental Assessment, the city
told the public and the federal government that there would be a need for utility facilities to be
relocated.

Second, it is evident that the city does not intend to bear these costs. Although the
Common Council has authorized the project to go forward, the Environmental Assessment
included no costs to the city for utility relocation and told the public and federal authorities that
these costs would be borne by the affected utilities. As noted above, the city has repeatedly
assured the public that neither the construction nor operation of the street car will require general tax revenue.

In light of these facts, the petitioner, Brett Healy, believes that it is critical that the allocation of these costs be determined before the project becomes a fait accompli. Both city taxpayers and utility ratepayers deserve to know if they will be asked to pay for this train before it leaves the station.

INTRODUCTION

Healy filed his petition pursuant to § 227.41 Wis. Stat. This statute authorizes an interested party to seek a declaration from an administrative agency in circumstances where it is necessary or desirable for the agency to decide a matter within its jurisdiction. Here, the question raised by the petition is whether the City of Milwaukee can force public utilities to bear the substantial costs associated with the construction of its Streetcar Project and pass those costs along to utility ratepayers like Healy. The Commission opened a proceeding to consider Healy's petition by order dated December 5, 2011.

By order dated January 6, 2012, the Commission requested briefing on the following issue:

By filing a petition for declaratory ruling under Wis. Stat. § 227.41 has the petitioner triggered Commission jurisdiction to review the reasonableness of a municipal regulation under Wis. Stat.§ 196.58(4), even though the petitioner is neither a public utility nor a qualified complainant under Wis. Stat. § 196.26? If the petition is insufficient to trigger Commission jurisdiction to review the reasonableness of a municipal regulation under Wis. Stat. § 196.58(4), what avenues, if any, exist to cure the deficiency?

Healy does not contend that he has triggered the Commission's jurisdiction under § 196.58(4) Wis. Stat. He has no remedy under that statute because he is not now a qualified
complainant as that term is defined by § 196.26 Wis. Stat. But § 196.58 is not exclusive; it does not limit the full extent of the Commission’s authority. Nowhere does it limit the Commission’s jurisdiction to consider the matter raised by Healy’s petition to those cases in which a qualified complainant has filed a formal complaint. To the contrary, Chapter 227 provides an alternative, albeit discretionary, basis for jurisdiction. Even though no complaint has been filed under § 196.58(4), the Commission has jurisdiction to issue a declaratory ruling under § 227.41 Wis. Stat.

“When a municipality’s actions may significantly impact a public utility’s costs of doing business, which, in turn, affects the rates that utility’s customers will pay, the Commission has authority and obligation to address those actions.”


Plainly, the City’s action here will significantly impact the affected utilities. Although the exact costs of utility relocation associated with the streetcar line construction may not have been finally determined, there is no doubt that they will be substantial. As the Federal Transit Administration’s recent submission on the project has made clear “[t]he issue of who pays the cost for utility relocation required by the Project is a matter of state law.” It is precisely that issue that Healy is asking the Commission to consider. Milwaukee taxpayers and utility ratepayers are entitled to an answer now, not after construction has begun.

**STATEMENT OF FACTS**

1. The Milwaukee Streetcar Project

The City of Milwaukee proposes to construct and operate a 2.1 mile fixed-rail streetcar line in downtown Milwaukee. The route has been selected, federal funds have been applied for and approved, and the City is proceeding with the final design and engineering work. The City,

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1 Healy could become a qualified complainant if 24 other ratepayers joined the petition.
in cooperation with the Federal Transit Administration, has prepared and submitted for public comment a detailed Environmental Assessment of the project in accordance with The National Environmental Policy Act. See Environmental Assessment dated October 20, 2011, copy available at www.themilwaukeeestreetcar.com ("Final EA"). Construction is expected to begin in 2012 and to be completed by 2014. On January 25, 2012 the Federal Transit Administration issued its findings of no significant impact with respect to the Environmental Assessment.

The Common Council has passed and the Mayor has signed a Resolution that approves the Milwaukee Streetcar project as outlined in a draft Environmental Assessment substantially identical to the filed and approved Final EA. The final route for the streetcar line has been decided and, although additional engineering work remains to be done, that route – and the impact on utility facilities that will result from construction along the route selected – will not change. The City Resolution directs the Commissioner of Public Works “to proceed with construction of the proposed streetcar system.” See City of Milwaukee Resolution No. 110372 (7/26/2011) (attached, Exhibit A). The Director of Public Works is authorized by the resolution to contract with vendors for vehicles, system maintenance and system operation and to acquire any necessary real estate interests for the construction or extension of the streetcar system.

The Resolution directs that the $64.6 million project costs be funded by a $9.7 million contribution from Tax Increment District No. 49, with the remaining $54.9 million coming from the Federal Interstate Cost Estimate Substitute funding. The Final EA states that the capital costs for the initial streetcar system are estimated to be $64.6 million, consistent with the amount authorized by the Common Council.

2. Utility Relocation Costs
But the Final EA also makes clear that the route selected for the streetcar project will require private utility companies to relocate or reinforce underground utility lines. "Given the prevalence of underground utilities in the study area, preliminary engineering studies indicate that underground utility lines would need to be relocated or reinforced on nearly all blocks along the streetcar alignment." Final EA at 124. The Final EA assumes that these costs will be borne by the affected utilities. "Utility adjustments would be made according to standard utility construction practices. The privately owned utilities would be relocated or adjusted by the facility owner." Final EA at 124 (emphasis added).

The costs of relocating or reinforcing these underground utility lines are likely to be substantial. The utilities that will be affected by the project include Wisconsin Energy, American Transmission Company, and AT&T Wisconsin. In a letter dated July 13, 2011, and submitted to the Common Council in connection with its consideration of Resolution 110372, AT&T estimated the costs of relocating its facilities to accommodate the streetcar project as in excess of $10 million. (Letter attached, Exhibit B.) AT&T noted, correctly, that the draft Environmental Assessment that formed the basis for the City's decision to approve the project simply did not appear to take these very substantial costs into consideration or to include them in the project's capital budget. Similarly, American Transmission Company submitted a letter to the City in which it estimated that the possible costs of its utility line relocation or reinforcement could be as much as $10-15 million. (Letter dated August 11, 2011 attached, Exhibit C.) WE Energies submitted a report to the City that estimated the costs of relocating underground steam, gas and electric lines along the streetcar right of way to be approximately $45 million. (WE Conceptual Cost Estimate dated June 24, 2011 attached, Exhibit D.) As noted above, the Federal Transit Administration has approved the Final EA without taking these costs into consideration,
acknowledging that the question of who will pay utility relocation costs is a matter needing resolution under state law. (FTA Finding of No Significant Impact dated January 25, 2012 attached, Exhibit E.)

3. The Petitioner

Brett Healy is a citizen of the State of Wisconsin. Healy is a customer of Wisconsin Energy for both gas and electric service. On October 4, 2011 Healy filed a petition for declaratory ruling with the PSC pursuant to § 227.41 Wis. Stat. He seeks a ruling that any effort by the City of Milwaukee to force utility companies to bear the relocation and reinforcement costs associated with the Milwaukee Streetcar project is unreasonable in that there is no adequate health, safety or public welfare justification for such a requirement under the circumstances presented by the streetcar plan. Petition at ¶¶ 13-17.

Healy has a legitimate economic interest in the outcome of this proceeding. He will incur the costs of increased utility bills if Wisconsin Energy is forced to absorb the costs of the utility relocation associated with the streetcar project. The PSC staff has already estimated the increased costs to Wisconsin Energy ratepayers could be as much as 1.5%. See PSC Open Meeting Transcript dated December 1, 2011 at 5.

4. The Intervenors

The question of “who will pay” the costs of relocation or reinforcement of utility facilities in connection with construction of the Milwaukee Streetcar project is obviously a question of considerable public interest. Since the filing of the Petition, all of the Wisconsin utility companies that may be adversely affected by the project have intervened in this proceeding. The interested utilities include AT&T Wisconsin, American Transmission Company, tw telecom and Time Warner Cable as well as Wisconsin Energy. The City of
Milwaukee has also intervened, as have a number of trade associations representing interested parties such as the Wisconsin League of Municipalities, the Wisconsin Industrial Energy Group, the Wisconsin Cable Communication Association, the Milwaukee Metropolitan Association of Commerce and the Wisconsin Paper Council. The Citizen's Utilities Board, representing consumers, has also intervened.

ARGUMENT

I. The PSC has jurisdiction to consider the Petition under § 227.41 Wis. Stat.

Section 227.41 Wis. Stat. provides that any agency "may, on petition by any interested party, 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." There is no question that the Commission has the authority to determine whether a municipal law that requires a utility to relocate transmission or distribution facilities is unreasonable, given the municipality's asserted health, safety or public welfare justification for the requirement. See Wis. Admin. Code § PSC 130.09(1). The Commission thus has jurisdiction to consider Healy's petition and to issue the declaration that he has requested. The only remaining issue is whether Healy is an "interested person" for purposes of Wis. Stat. § 227.41.

II. Healy is an interested person and therefore has standing to seek a declaration.

Chapter 227 Wis. Stat. does not define the term "interested person" for purposes of § 227.41. As a general matter Wisconsin law provides that "'the gist of the requirements relating to standing' is to assure that the party seeking relief has alleged 'such a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues for illumination.'" Madison General Hospital v City of Madison, 71 Wis. 2d 259, 265 (1976), quoting Moedern v. McGinnis, 70 Wis. 2d 1056 (1975).
The “personal stake” necessary to confer standing can be indirect as well as direct. In *Madison General Hospital*, for example, the plaintiff hospital sought a judicial declaration that certain equipment it leased from third parties was exempt from taxation because the hospital itself was exempt from taxation under Wisconsin law. The City defended on the ground that the hospital had no direct interest in the outcome, since the owners of the equipment and not the hospital were liable for the tax assessed. The hospital was only indirectly liable in the sense that the lease required it to reimburse the owners for any taxes actually paid by them. The Supreme Court held that despite the indirect nature of its interest, the hospital had alleged a “personal stake” in the outcome sufficient to confer standing. *See also Ramme v. City of Madison*, 37 Wis. 2d 102 (1967) (residents of mobile homes have standing to contest tax imposed on owners of mobile home parks).

Healy has a sufficient “personal stake” in the outcome of this proceeding to confer standing to seek the declaration requested. He is a customer of Wisconsin Energy and is likely to pay higher rates for gas and electric service if Wisconsin Energy is forced to incur the costs of utility relocation and permitted to pass some or all of those costs on to its ratepayers. A real economic stake in the result, even if indirect, is sufficient to confer standing under Wisconsin law. Plainly, Healy is an “interested person” for purposes of Chapter 227. The Commission may properly consider his request for a declaration and issue the ruling that he requested.

**III. Petitioner has not asserted and need not have a claim under § 196.58(4)**

Sections 227.41 and 196.58(4) create two separate avenues to seek the same relief. The only pertinent difference between the two is that § 196.58(4) permits a small class of claimants to bring a claim the Commission *must* rule on, while § 227.41 permits a much larger class of interested petitioners to bring a claim the Commission has the *discretion* to rule on or not.
As noted above, the only requirements set forth in sec. 227.41 are that Petitioner be an “interested party” and that the Commission have jurisdiction to consider and rule on the question presented. Those requirements are satisfied here.

Once those requirements are met, Chapter 227 provides that the Commission “may” consider the request and issue a declaratory ruling. Section 227.41 thus confers on the Commission discretion as to whether or not a hearing is required. Section 227.41(d) provides that the agency may deny the petition or schedule the matter for hearing. The Commission has authority to schedule a hearing on Healy’s petition under § 227.41, and no further statutory authorization is required.

Section 196.58(4), in contrast, requires the Commission to set a hearing in response to a formal complaint by a public utility or by a “qualified complainant.” Healy is neither a public utility nor a qualified complainant for purposes of § 196.58(4) and therefore cannot force the Commission to set a hearing on the subject of his Petition.

There is no reason to conclude, however, that because Healy is not authorized to initiate a proceeding under § 196.58(4), the Commission lacks jurisdiction to issue a declaration under § 227.41. Nothing in § 196.58(4) suggests that it limits the Commission’s jurisdiction to consider the impact of municipal regulation on public utilities within its jurisdiction to those situations in which a formal complaint has been filed. To the contrary, § 196.58(5) specifically provides that “[n]othing in this section shall limit the power of the commission to act on its own motion . . . to regulate the service of public utilities.” The fact that § 196.58 provides a means for certain persons to require Commission action cannot be read to preclude the Commission from exercising the discretionary authority clearly granted by § 227.41.
Indeed, it is well established that the agency has jurisdiction to rule on a § 227.41 petition even in circumstances where the petitioner could have asserted an alternative claim. See State ex rel. Thomas v. State, 55 Wis. 2d 343 (1972) (noting that the precursor to § 227.41 would have been an alternative avenue of relief to a writ of mandamus); Wis. Fertilizer Assoc. v. Karns, 39 Wis. 2d 95 (1968) (holding that the precursor to § 227.41 would have been an alternative avenue of relief to a declaratory judgment). Thus, even if Healy alone could bring a complaint under § 196.58(4), the Commission would not be precluded by that statute from consideration of his request for a declaration under § 227.41.

And more to the point, in this case Healy has no remedy under § 196.58 because he is excluded from the definition of qualified complainants. Unless the Commission entertains his request for a declaration under § 227.41, he will be left with no remedy at all. Nothing in § 196.58(4) suggests that it was intended to prevent the Commission from considering requests by interested persons for a declaration pursuant to § 227.41.

IV. The Commission has authority to conduct this proceeding under sec. 196.28

Section 196.28 authorizes the Commission to investigate “any matter” relating to any public utility and to conduct a hearing on the matter if it concludes that sufficient grounds exist to do so. The Commission should do so in this case, whether or not in concludes that Healy has standing to seek a declaration under § 227.41. This not only undercuts any suggestion that § 196.58 is exclusive, it provides an independent basis for jurisdiction. It is clear that the matter presented is one of great public concern, as is amply demonstrated by the numerous interested parties who have been granted leave to intervene.

CONCLUSION
The Commission will be required to consider the allocation of utility costs associated with the Streetcar Project at some point in any event, and it would be in the public interest for it to do so now. There is no question that the costs of utility relocation associated with the Streetcar Project will be very substantial in light of the project’s overall costs, and Milwaukee taxpayers and the affected utility ratepayers have a right to know, in advance, who will be expected to pay them.

Dated this 6th day of February, 2012.

Respectfully submitted,
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