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

CITY OF MILWAUKEE'S RESPONSE BRIEF IN OPPOSITION TO MOTIONS FOR FINAL DECISION

The City of Milwaukee submits this brief in response to the ATU Petitioners' Motion for Final Decision filed on September 23, 2013 (PSC REF#: 190875) and the Individual Petitioners' Motion for Final Decision filed on September 24, 2013 (PSC REF#: 190894). The parties have agreed that this Response Brief must be filed by October 16, 2013 and that any Reply Briefs must be filed by October 30, 2013. *See* Gallucci E-mail to ALJ Re: Briefing Schedule, October 3, 2013 (PSC REF#: 191928).

I. INTRODUCTION

The ATU and Individual Petitioners confuse this declaratory ruling proceeding with a complaint proceeding. In a declaratory ruling proceeding, the Commission has the discretion to close the docket without issuing a final decision. Contrary to the Petitioners' arguments, 2013 Wisconsin Act 20 ("Act 20") does not mandate, require, or demand that the Commission issue a final decision in this docket.

There are good reasons for the Commission to close this docket. Primary among those reasons is that a decision by the Commission will not end the current controversy regarding whether the ATU Petitioners as well as Wisconsin Electric Power Company and the American Transmission Company must pay whatever costs each might incur to modify or relocate their own facilities so as not to incommode the public's use of public rights-of-way. As the City has

maintained, the issue of who pays the companies' relocation or modification costs is an issue for the circuit court to decide under Wis. Stat. § 182.017(2). The companies' obligation to relocate or modify their facilities at their own expense is one that flows from § 182.017(2) and not from any municipal regulation. Therefore, the Commission's authority over municipal regulations plays no role in this controversy because there is no relevant municipal regulation over which the Commission can make a reasonableness determination. Certainly, neither the petitioners nor the intervenors have identified a municipal regulation the invalidation of which would resolve the relocation or modification cost issue. Moreover, the Petitioners fail to explain how invalidating Milw. Ord § 115-22 or the City's July 26, 2011 Resolution[1] would resolve the controversy.

Another reason to close the docket is that the legality of Act 20 is questionable and also ultimately a question for the circuit court to decide. As both the ATU and the Individual Petitioners make clear, the legislative intent of Act 20 was to "kill the Milwaukee Streetcar project." The legislature, however, used the budget bill as its weapon of choice, thereby violating the prohibition against including private or local legislation in a multi-subject bill as well as the equal protection clause of the Wisconsin Constitution.

Finally, the Commission may not re-label the petitions as complaints and summarily issue a final decision because no final decision may be issued on a complaint pursuant to Wis. Stat. § 196.58(4) without a hearing. Indeed, the Commission may not issue a final decision in this docket whether it is declaratory ruling matter or a complaint matter because in either case the Commission must afford the parties full opportunity for a hearing and no such hearing has been held.

[1] City of Milwaukee Resolution No. 110372, July 26, 2011 (PSC REF#: 165159).

Accordingly, the City respectfully requests that the Commission close the docket and reject the ATU and Individual Petitioners' demands that the Commission issue a final decision in this matter without the requisite evidentiary hearing.

II. THE COMMISSION SHOULD EXERCISE ITS DISCRETION TO CLOSE THIS DOCKET

A. The Commission May Close This Docket Without Issuing a Final Decision, but It May Not Issue a Final Decision Without Affording the City a Full Opportunity for Hearing.

No complaint under Chapter 182 or 196, Wis. Stats., has been filed in this proceeding. Rather, this docket was opened based on a Chapter 227 petition for declaratory ruling. Thus, there can be no dispute that this is not a complaint proceeding but a declaratory ruling proceeding.

The ATU and Individual Petitioners ignore a very important distinction between these two types of proceedings. In a declaratory ruling proceeding under Wis. Stat. § 227.41(1), the agency has the discretion to take up and decide the matter or not. That statute provides that "any agency ***may***, on petition by any interested person, 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" (emphasis added). In contrast, in a complaint proceeding under Wis. Stat. § 196.58(4) or § 182.017(8), the Commission must hear the matter and ultimately issue a final decision, as those statutes provide that the Commission, upon receiving a complaint, "***shall*** set a hearing (emphasis added).[2] Thus, contrary to the ATU and Individual Petitioners' pleas, the Commission has the discretion to close this docket without issuing a final decision. *See McEwen v. Pierce County,* 90 Wis. 2d 256, 261 n.3, 279 N.W.2d 469 (1979) (Section 227.06, Wis. Stats., recodified at

[2] The general rule is that the word "may" is presumed to be permissive and the word "shall," mandatory. *See Heritage Farms Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 32 ("[W]hen interpreting a statute, we generally construe the word "may" as permissive. . . . By contrast, we presume that the word "shall" is mandatory." Citations omitted.).

§ 227.41, "does not afford a declaratory ruling as a matter of right. . . . We have construed the word "may" in the context of sec. 227.06 as making it discretionary as to whether the agency will issue a declaratory ruling.").

Because this is not a complaint proceeding, the Commission is not obligated under the statutes (including Act 20) to take any particular action at all to decide the issues before it. Accordingly, the Commission is not required to issue a final decision in this matter.

However, if the Commission elects to issue a final decision, it may only do so after affording the City a "full opportunity for hearing." One thing the two types of proceedings share is the requirement for a hearing. Specifically, before an agency can issue a final decision under the declaratory ruling statute, the agency must allow the parties an opportunity for hearing. *See* Wis. Stat. § 227.41(1) (providing, in part, that a "[f]ull opportunity for hearing shall be afforded to interested parties"). Likewise, the Commission may not issue a final decision on a complaint brought pursuant to Wis. Stat. § 196.58(4) or § 182.017(8) without setting the matter for hearing. *See* Wis. Stat. § 196.58(4) or § 182.017(8)(a) (mandating that "the commission shall set a hearing."). As there has been no hearing set in this docket, the Commission would violate the City's due process rights by issuing a final decision without a hearing.

In sum, the Commission has the discretion under Wis. Stat. § 227.41 to close this docket without issuing a final decision. However, if the Commission chooses to issue a final decision, it may not do so without first affording the parties a fair opportunity for hearing.

B. There Are Good Reasons for the Commission to Close This Docket Without Issuing a Final Decision.

1. A Final Decision Would Have No Legal or Practical Effect and Would Not Resolve the Controversy.

Contrary to the suggestions of the ATU and Individual Petitioners, a Commission decision based on Act 20 (especially if issued without the requisite hearing) will not end the controversy because, even after Act 20, the Commission's jurisdiction is not broad enough to encompass the "who pays" issue as it is presented in this case. The Commission's authority is limited to reviewing municipal regulations that determine the terms and conditions upon which a public utility or company within the municipality "may be permitted to occupy the streets, highway or other public places within the municipality." Wis. Stat. § 196.58(1)(a); *see also*, § 182.017(8). If after hearing, the Commission determines the challenged municipal regulation is unreasonable, the challenged regulation is void. *Id*. For a final decision of the Commission to be meaningful, a municipal regulation within the scope of Wis. Stat. §§ 196.58 and 182.017 must be identified and the voiding of that regulation must have both legal and practical effect. No such municipal regulation has been identified here. That is because no such regulation exists.

As the City has argued, the key to understanding the reason the Commission does not have authority to decide the "who pays" issue is to examine the source of a company's obligation to relocate its facilities in the public right-of-way at its expense. The company's obligation is imposed by the State under Wis. Stat. § 182.017(2) and not by the municipality. If Milw. Ord. § 115-22 did not exist (or were void), companies and public utilities operating in Milwaukee would still have an obligation under Wis. Stat. § 182.017(2) 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).

Section 182.017(2), Wis. Stats., codifies over a hundred years of common law regarding the source of a utility's obligation to relocate its facilities in local right-of-way at the utility's expense. As the New Jersey Supreme Court succinctly stated:

> **The true connection between the police power and the relocation of facilities is not, as the companies urge, that the duty to relocate is generated in each specific instance by a decision under the police power to impose it. Rather the meaning is that the utility's interest in the street was intended to be subordinate to the police power,** that is to say, that government's authority to exert its police power in the street for the public welfare was not bargained away in the least by the legislative grant to the utility company. Hence, if government undertakes an activity in the street in the exercise of the police power, the utility must figuratively move over at its own expense to the end that the exercise of the police power will not be impeded or burdened. And this the utility must do because the law governing the basic arrangement obliges it to do so.

Id. at 96-97, *citing New Orleans Gaslight Co. v. Drainage Comm.,* 197 U.S. 453, 461, 25 S. Ct. 471, 49 L. Ed. 831, 835 (1905)[3] (emphasis added). The Wisconsin Supreme Court has recognized these common law principles in, for example, *Wisconsin Power & Light Co. v. Gerke*, 20 Wis. 2d 181, 188 n.6, 121 N.W.2d 912 (1963) ("The fact that poles in a street or highway were located in a certain place by an electric company pursuant to permission of the authorities creates no absolute, indefeasible right or irrevocable license to have such poles remain at the particular spot for all time.").[4] Thus, in Wisconsin, a utility's duty to relocate its facilities at its expense to accommodate a public works project in the right-of-way comes from § 182.017(2) and not any municipal regulation. That is the reason that a Commission decision to void a City regulation will not relieve the companies affected by the Streetcar Project of their duty to relocate and modify their facilities at their own expense.

[3] As the City stated in its July 9, 2012 Response Brief, at 32, (PSC REF#: 168149), and elsewhere: "*New Orleans Gaslight* is recognized as the seminal case regarding the responsibility for payment of relocation costs, expressing both the common-law rule that a utility company must bear the cost of relocating its facilities where relocation is occasioned by an exercise of the police power and the rationale underlying that rule."

[4] *See also City of Marshfield v. Wisconsin Telephone Company*, 102 Wis. 604, ***5, 78 N.W. 735 (1899).

Without a doubt both Wisconsin Electric Power Company and AT&T are currently engaged in various self-funded relocation projects throughout the state in communities that have no regulations pertaining to relocation costs. The reason that the companies pay their own relocation costs in such communities is because Wis. Stat. § 182.017(2) mandates that they do so. Thus, whether Milw. Ord. § 115-22 exists or not does not have any bearing whatsoever on the companies' obligation to pay for their own relocation costs. As shown above, state law, not municipal regulation, requires that the companies take whatever steps are necessary so as not to "obstruct or incommode the public use of any highway" in the City of Milwaukee. Wis. Stat. § 182.017(2).

Moreover, a Commission decision would not resolve factual issues regarding the amount of the relocation costs to be paid. Since the Commission's jurisdiction is limited to reviewing the reasonableness of a municipal regulation, a court would be the proper venue in which to try such issues. For example, there is a potential controversy over the City's relocation criteria because of the impact those criteria have on relocation costs. The City has adopted Utility Coordination Guidelines, dated April 17, 2013 ("Guidelines") (e.g., 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," which extends 6 feet on either side of the track centerline, and adjust manholes as reasonably necessary to facilitate access). *See Sixth Affidavit of Jeffrey S. Polenske* (PSC REF#:183889). The Guidelines are to be used by the utilities to determine which of their facilities should be relocated or modified.

There is no guarantee that the utilities will agree to follow the City's Guidelines. If one or more utilities do not follow the Guidelines and relocate or modify facilities that the Guidelines

would allow to remain in place as is, this could lead to significant disputes between the City and the utilities regarding the extent of relocation costs directly attributable to accommodating the Streetcar Project. The City should not have to pay for facilities that the utilities intend to relocate or modify if that work is not necessary under the Guidelines. Another cost issue would develop and need to be dealt with if the utilities take advantage of the Streetcar Project to upgrade facilities that otherwise would have been too costly to upgrade. The City should not have to pay for such upgrades.

Finally, if the Commission does as the ATU and Individual Petitioners ask and issues a final decision declaring Milw. Ord. § 115-22 and the City's July 26, 2011 Resolution unreasonable, thereby voiding those two municipal regulations, not only will such a decision not resolve the controversy currently before the Commission, but it also will not resolve the "who pays" issue with respect to future urban rail projects in other Wisconsin cities. For example, suppose the City of La Crosse Common Council approves by resolution an urban rail project to be constructed in the city's downtown area. A review of La Crosse's ordinances reveals that La Crosse has no ordinance similar to Milw. Ord § 115-22, requiring that utilities pay their own relocation costs to accommodate public works projects in the right-of-way. Assuming that utilities will need to relocate or modify their facilities to accommodate the project, there would be nothing to prevent La Crosse from carrying out its project and expecting that the utilities will meet their statutory obligation to pay their own relocation costs. Nothing in Act 20 would prevent this, and a final decision in the present docket would not bind La Crosse nor the utilities, such as Northern States Power Company, that may be affected by La Crosse's urban rail project.

The affected utilities presumably would have to file a complaint with the Commission, but they would have the same problem of identifying a La Crosse regulation the invalidation of

which would have any effect. As the parties all agree, a municipal regulation that the Commission determines is unreasonable becomes void. As is the case here, however, it is unclear what, if any, impact voiding La Crosse's resolution would have since the Commission has no authority to disapprove an urban rail project that a municipality has approved. Thus, not only will a final decision in the Milwaukee Streetcar docket not resolve the controversy among the parties currently before the Commission, it also will not resolve potential future controversies that may arise with respect to future urban rail projects.

Accordingly, because the source of the companies' obligation to relocate at their own expense is a state statute and not a municipal regulation and because, even after Act 20, the Commission's authority is limited to making reasonableness determinations with respect to municipal regulations, no final decision issued in this docket will resolve the controversy. No legal or practical effect will result from the Commission's declaring any Milwaukee regulation, deed, action or intent unreasonable and void. The Petitioners' beef is with Wis. Stat. § 182.017(2) and the over 100 years of common law represented by that statute. The proper venue to have their complaints heard is circuit court, not the Commission. A court is the proper authority to determine whether the utilities should bear their own relocation costs and, should the court conclude that those costs are the City's responsibility, the court would be the proper authority to determine the amount of relocation and modification costs that are attributable to the Streetcar Project. For this reason, the Commission should "step out of the way" and close the docket.

2. The Act 20 Sections Relied on by Petitioners Violate the State Constitution's Prohibition on Private Legislation.

The sections of Act 20 relied on by the ATU and Individual Petitioners were adopted as part of the multi-subject 2013-15 state budget bill.[5] Article IV, § 18 of the Wisconsin Constitution states: "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." The Wisconsin Supreme Court has identified three purposes underlying this constitutional provision:

> 1) [T]o encourage the legislature to devote its time to the state at large, its primary responsibility; 2) to avoid the specter of favoritism and discrimination, a potential which is inherent in laws of limited applicability; and 3) to alert the public through its elected representatives to the real nature and subject matter of legislation under consideration.

Davis v. Grover, 166 Wis. 2d 501, 519, 480 N.W.2d 460 (1992) (citation omitted).

Whether the Act 20 provisions violate art. IV, § 18 involves a two-fold analysis: (1) whether the process in which the legislation was enacted deserves a presumption of constitutionality; and (2) whether the legislation is private or local. *Lake Country Racquet & Ath. Club, Inc. v. Morgan*, 2006 WI App 25, ¶ 10, 289 Wis. 2d 498, 710 N.W.2d 701.

The process by which the legislature enacted the Act 20 sections is not entitled to a presumption of constitutionality. *City of Brookfield v. MMSD*, 144 Wis. 2d 896, 918-19 n.6, 426 N.W.2d 591 (1988). The Act 20 provisions were introduced at an executive session of the Joint Finance Committee. No members of the public were afforded the opportunity to testify regarding the content of the bill. It ultimately passed as part of the budget bill, which contained many hundreds of unrelated provisions. Therefore, "[t]he statute did not receive the required legislative consideration necessary to assure [a] court that the legislation was not 'smuggled or

[5] The particular provisions are 2013 Wis. Act 20 §§ 1564m, 1564s, 1978d, 1978h, 1978p, 1978t, 1989c, 1989g, 1989L, 1989p, and 1989t.

logrolled through the legislature without the benefit of deliberate legislative consideration.'" *City of Oak Creek v. DNR*, 185 Wis. 2d 424, 438-39, 518 N.W.2d 276 (Ct. App. 1994) (citation omitted) (contrast *Davis*, where legislation creating the Milwaukee Parental Choice Program was included by the Senate in a multi-subject budget bill but had been passed separately by the Assembly as a single subject bill and "debated extensively by the legislature and its various committees and agencies." 166 Wis. 2d at 522-24).

The Act 20 provisions are general on their face instead of expressly involving a specific person, place, or thing. Accordingly, to survive scrutiny under art. IV, § 18, they must satisfy the five-part *Brookfield* test:

> First, the classification employed by the legislature must be based on substantial distinctions which make one class really different than another.
>
> Second, the classification adopted must be germane to the purpose of the law.
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> Third, the classification must not be based on existing circumstances only. Instead, the classification must be subject to being open, such that other cities could join the class.
>
> Fourth, when a law applies to a class, it must apply equally to all members of the class.
>
> …[F]ifth, the characteristics of each class should be so far different from those of the other classes so as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Davis, 166 Wis. 2d at 526, (quoting *Brookfield*, 144 Wis. 2d at 907-09).

The Act 20 provisions' failure to satisfy all five of the *Brookfield* factors demonstrates that the "'generalness' is a surface sham hiding its true private or local nature." *Brookfield*, 144 Wis. 2d at 921. As the Petitioners have argued, the Act 20 sections were included in the budget to "kill the Milwaukee Streetcar," the true private or local nature of the legislation. *See ATU Petitioners' Motion for Final Decision*, Ex. A ("Rep. Kooyenga's Statement on the Milwaukee

Streetcar") (PSC REF#: 190875). Because the proponents chose to use the budget bill as their vehicle to try to stop the Streetcar, the enactments violate art. IV, § 18.

The Act 20 provisions create a new classification: those urban rail transit systems that began service before July 2, 2013, the effective date of the statute, and those that begin service after July 2, 2013. This classification fails the first and second factors of the *Brookfield* test.

First, there is nothing so substantially distinct about an urban rail transit system already providing service before July 2, 2013 and all other future planned urban rail systems. The fact that the former is already in operation cannot be material; the costs to modify or relocate utility facilities are irrelevant where the project has already been constructed. However, for purposes of utility modification and relocation costs, the existing system that seeks to expand its rail routes and the planned system are not distinct. In both cases, utility modifications or relocations may need to be made to accommodate the new route. For example, the City of Kenosha owns and operates an urban rail system that provided service before July 2, 2013. *See City of Milwaukee Response Brief*, at 55 (PSC REF#: 168149). If the City of Kenosha decides to go forward with an expansion of its urban rail transit system, it will be able to do so without paying for the costs of utility modifications and relocations to accommodate the new route. However, the City of Milwaukee, according to Petitioners' interpretation of the applicable Act 20 sections, must pay for these relocation costs. There is nothing substantially distinct about these two planned projects to justify the legislative classification.

Second, for the same reasons, the classification is not germane to the purpose of the law. While the City and the Petitioners dispute the purpose of the Act 20 provisions and none is evident from the face of the legislation due to its adoption as part of the multi-subject budget bill, assuming that the purpose is to shield ratepayers from any utility relocation or modification costs

to accommodate an urban rail transit system, it is irrelevant if the particular project is an expansion of a system currently providing service or a new urban rail system not yet in service as of July 2, 2013.

Because the Act 20 sections are private laws enacted as part of the multi-subject budget bill, they are enacted in violation of art. IV, § 18 of the Wisconsin Constitution.

3. The Act 20 Sections Violate the Equal Protection Clause of the Wisconsin Constitution.

The distinct classifications shown above violate the equal protection clause of the Wisconsin Constitution, Article I, § 1, because the Act 20 sections treat this class significantly different from all others similarly situated and because there is no rational basis for this significantly different treatment. *Metropolitan Assocs. v. City of Milwaukee* 2011 WI 20, ¶ 23, 332 Wis. 2d 85, 796 N.W.2d 717.

As shown above, the Act 20 sections subject urban rail transit systems not yet in service as of July 2, 2013 to significantly different treatment than those providing service before that date. Namely, if the Petitioners' interpretation is correct, the former will be required to pay all costs to modify or relocate facilities to accommodate the urban rail system, while the latter can continue to expand their rail routes according to the law on utility relocation costs that has been in effect for the last 100 years. As shown above, there is no rational basis for this significantly different treatment because it is irrelevant whether the particular rail project is an expansion of a system currently providing service or a new urban rail system not yet in service as of July 2, 2013. Lacking a rational basis for this treatment, the Act 20 sections fail under the equal protection clause.

CONCLUSION

For the reasons stated above, the City respectfully requests that the Commission close this docket. Alternatively, if the Commission does not close the docket, the Commission should set the matter for hearing before issuing a final decision.

Dated this 16th day of October, 2013.

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