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' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR FINAL DECISION

The City of Milwaukee's Response Brief could not make it more clear that the controversy that gave rise to this proceeding is not moot. The City is determined to find a way to force the affected utilities and their ratepayers and customers to pay the relocation or modification costs associated with the Streetcar Project. If the Commission will not go along – as it plainly cannot – the City now says its plan is to assert a claim in Circuit Court, on the entirely new and entirely bogus theory that "'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 City says, "the Commission's authority over municipal regulations plays no role in this controversy." City of Milwaukee Oct. 16, 2013 Response Brief, PSC Ref. 192013, at 2.

This is nonsense. Section 182.017(2) protects the public's use of rights of way, but it does not authorize the City to *do* anything. It is axiomatic that a City can act only when authorized to do so by law, and that it must act by way of a contract, ordinance, resolution, order or some other regulation. Sections 182.017 and 196.58 give the Commission the authority to review any such municipal enactment affecting public utilities and other companies authorized to use the public right of way, and to strike them down if they are found to be unreasonable. By way of the newly-enacted §§ 182.017(8)(as) and 196.58(4)(c), any municipal enactment that

requires affected companies to pay any of the costs to modify or relocate their facilities to accommodate the Streetcar Project is unreasonable. And in both §182.017(8)(am) and § 196.58(4)(c), the Legislature has specified that such enactments are unreasonable ***"notwithstanding"*** the provisions of §182.017(2). The Legislature has clearly spoken. The City cannot avoid its pronouncement. The Commission must strike down the municipal regulations at issue here.

I. MILWAUKEE ORDINANCE § 115-22 AND RESOLUTION NO. 110372 ARE PROPERLY BEFORE THE COMMISSION AND MUST BE DECLARED VOID

Once upon a time, the City of Milwaukee agreed that at the center of this proceeding was the question of the validity of Milwaukee Ordinance § 115-22 (the "Milwaukee Ordinance") as applied to utility relocation or modification costs associated with the Streetcar Project. The City argued that it was the Milwaukee Ordinance that permitted it to force utilities and other affected companies to absorb their costs, since the Streetcar Project represented a public work authorized by the City's police power. According to the City, it is "Milwaukee Municipal Code § 115-22…which requires that, upon receiving written notice from the City, a public utility must bear the cost of relocating its facilities to accommodate" a public work such as the Streetcar Project. City of Milwaukee July 9, 2012 Response Brief, PSC Ref. 168149, at 3.

And once upon a time, the City *agreed* that the Commission had the authority under Wis. Stat. §§ 182.017 and 196.58 to determine the reasonableness of municipal regulations that impose costs on utilities using the public right of way:

> By these statutes, the Legislature established the Commission's authority over municipal regulation of public utility use of local rights-of-way. The statutes authorize the Commission, in a complaint proceeding, to determine the reasonableness of a municipal regulation in the form of a contract, ordinance, or

> resolution that sets the terms and conditions upon which a public utility may occupy the rights-of-way within the municipality.

Id at 3.

But that was then, and now the shoe is on the other foot. The Legislature has amended §§ 182.017 and 196.58 to provide that any municipal regulation that requires public utilities or other affected companies to bear any of the costs of the Streetcar Project is unreasonable as a matter of law. So *now* the City says that the Milwaukee Ordinance is really beside the point because "there is no municipal regulation over which the Commission can make a reasonableness determination." City of Milwaukee Oct. 16, 2013 Response Brief, PSC Ref. 192013, at 2. Thus, the City says that the Commission should simply ignore the Milwaukee Ordinance that the City once upon a time said was the legal foundation for its case. According to the City, the utilities and other affected companies must pay for the relocations under Wis. Stat. § 182.017(2), apparently without the need for the City to require them to do anything at all by way of an contract, ordinance, resolution, order, or other regulation by the City itself. And if the utilities disagree, the City will take them to court. So, the City says, there is really nothing for the Commission to do here, and the matter should just be forgotten. These are not the 'droids you are looking for, in other and more famous words.

This is legal legerdemain that worked in *Star Wars* but should not work here. The statutes in question require that any action taken by the City be taken by way of a duly enacted contract, resolution ordinance, order, or other regulation. Section 196.58, which gives municipalities limited authority to govern the conduct of public utilities and other companies within their confines, requires that they do so by "contract, ordinance or resolution." § 196.58(1)(a). And it is precisely the municipal enactments authorized by this statute that are subject to Commission review under §198.58(4).

Similarly, § 182.017, which provides municipalities with limited authority to govern transmission facilities within their jurisdiction, requires that they do so by "regulation," which is defined as "any contract, ordinance, resolution, order, or other regulation entered into, enacted, or issued by a municipality before, on, or after July 2, 2013." § 182.017(1g)(bm). Thus, Section 182.017(1r) gives affected companies the right to construct transmission lines or systems under or across public rights of way, but provides that such rights are "subject to reasonable *regulation* made by the municipality though which its transmission lines or systems may pass." (Emphasis added.) And it is exactly those regulations that are subject to review by the Commission under § 182.017(8).

This statutory structure makes sense. General regulation of public utilities and other companies is a matter for the Commission under Wisconsin law. Municipalities are given limited authority to control the activities of utilities within their local jurisdiction, but they may do so only by way of municipal enactments that are subject to Commission review. Should the Commission determine that any such enactment is unreasonable, it must rule that it is void. *See* §§ 196.58(4), 182.017(8). This statutory scheme would be unworkable if municipalities could require public utilities or other affected companies to relocate or modify their facilities in some way that does not involve a contract, ordinance, resolution, order, or other regulation, and that therefore evades Commission review.

Yet the City says that it somehow has that power under § 182.017(2). The City's primary authority for this novel proposition is a decision by the New Jersey Supreme Court on a question of New Jersey law. The Wisconsin case on which the City relies, *Wisconsin Power & Light v. Gerke*, 20 Wis. 2d 181, 121 N.W.2d 912 (1963), does not refer to § 182.017. And to the extent it is relevant at all, that case appears to stand for the proposition that, under the statutes then in

force, utilities could be compelled to temporarily move their structures in the public right of way to accommodate public construction projects, but only upon duly obtained written authority from the commissioner of public works.

There is no Wisconsin case that says or even suggests that § 182.017 gives Wisconsin municipalities freestanding and non-reviewable authority to regulate utilities within their local jurisdiction. To the contrary, in *Weiss v. Holman*, 58 Wis. 2d 608, 207 N.W.2d 660 (1973), the supreme court held that § 182.017(2) is a "safety statute" that "can have but one purpose – that of preventing injury" to persons using the public right-of-way. *Id.* at 617.

Even if the City had some general form of authority to force public utilities and other affected companies to relocate their facilities under § 182.017(2), that authority cannot be used in this case. The recent amendments to Chapters 182 and 196, set forth below, make this clear. Section 182.017(8)(as) 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.

(Emphasis added.) Section 196.58(4)(c) provides that:

> ***Notwithstanding s. 182.017(2),*** a municipal regulation is unreasonable…if it requires a public utility, telecommunications provider, or video service provider to pay any part of the cost to modify or relocate the public utility's, telecommunication provider's, or video service provider's facilities to accommodate an urban rail transit system.

(Emphasis added.) The Legislature could not have made it more clear that section 182.017(2) does not provide the City with a convenient vehicle to avoid the Commission's jurisdiction.

There is thus no legal authority for the City's astonishing claim that § 182.017(2) requires utilities to relocate facilities at their own expense to accommodate a public works project and that they must do so whether or not the municipality in question has directed them to so do by

way of a contract, ordinance, resolution, order, or some other regulation. And even if there were some general rule to that effect as a matter of state law, it could not be applied here, since the Legislature has explicitly said that § 182.017(2) does not apply to a public works project if it is an urban rail transit system. The City's threat to take the affected companies to court to exercise its non-existent power under § 182.017(2) should not deter the Commission from what needs to be done here.

The law is clear. As a general rule, Wisconsin municipalities can require utilities and other affected companies to pay the relocation costs associated with public works projects, but they must do so by way of some contract, ordinance, resolution, order, or other regulation. If a complaint is filed challenging such an enactment, the Commission must review it to determine whether or not it is reasonable. But in this particular case, the Legislature has determined that any municipal enactment that requires utilities or other affected companies to pay **any part** of the cost to modify or relocate its facilities for an urban rail transit system such as the Streetcar project is *per se* unreasonable. The Commission has no choice, if relief is requested, but to declare any such enactment to be void.

The Milwaukee Ordinance is a municipal regulation. This is the regulation that the City said it had passed in the wake of the 1932 decision of the supreme court in *Milwaukee E.R. & L., Co. v Milwaukee*, 209 Wis. 656, 245 N.W. 856 (1932), "so as to ensure that any utility facilities that interfered with a public work in the right-of-way would need to be relocated at the owner's expense." City of Milwaukee July 19, 2012 Response Brief, PSC Ref. 168149, at 60. To the extent the Milwaukee Ordinance requires utilities and other affected companied to relocate or modify their facilities for the Streetcar Project at their own expense, it is unreasonable as matter of law and the Commission declare it to be void.

The same is true of Milwaukee Common Council Resolution No. 110372. This is the only municipal enactment that authorizes the Streetcar Project. There is no dispute that the City's project budget as adopted by this resolution does not provide any funds to pay for the relocation or modification of facilities owned by the utilities or other affected companies. Although the City continues to dispute what those costs might be and how they should be determined, there is no dispute that the construction authorized by this resolution will cause the utilities and other affected companies to pay some part of the costs for relocation or modification. Indeed, the City's most recent brief makes it quite clear that the City still expects substantial relocation and modification costs and that it expects the utilities and other affected companies to make the changes "at their own expense." City of Milwaukee Oct. 16, 2013 Response Brief, PSC Ref. 192013, at 2. The Resolution thus requires that some part of the relocation or modification costs will be paid by the utilities and under the amendments to Chapters 182 and 196; that is all that is required to find the Resolution and any other similarly-purposed municipal regulation unreasonable as a matter of law. The Commission must declare it to be void.

II. THE FACTS ARE UNDISPUTED AND NO FURTHER HEARING SHOULD BE REQUIRED

The City claims that the Commission may not make a final decision in this matter without affording it a fair opportunity for a hearing. It does not say what an evidentiary hearing – if that is what the City is asking for – would be about. Of course, the City has already had ample opportunity to present its case to the Commission, and the record contains no fewer than ten substantive affidavits and seven substantive briefs filed by the City. As shown above, the

City does not dispute any of the simple facts that are pertinent here and indeed has conceded that they are true.

Because there is no dispute as to any material fact, Wisconsin administrative law does not require an evidentiary hearing. Wis. Stat. § 227.42(1)(d); *Balele v. Wisconsin Personnel Comm'n*., 223 Wis. 2d 739, 589 N.W. 2d 418 (Ct. App. 1998). And there can be no serious question that the City has had an ample opportunity to make its case before the Commission. The City's due process concerns are utterly lacking in merit. *See Waste Management of Wisconsin, Inc. v. DNR*, 128 Wis. 2d 59, 381 N.W. 2d 318 (1986).

III. THE CITY'S CONSTITUTIONAL CLAIMS ARE NOT WITHIN THE COMMISSION'S JURISDICTION

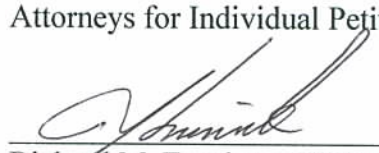
The Commission is bound to apply the Wisconsin statutes to the matter before it and has no jurisdiction to consider the constitutionality of legislative enactments. It is well-established that the Commission, like every Wisconsin administrative agency, has only those powers that the Legislature has given it. *Brown County v. Dep't. of Health and Soc. Serv.,* 103 Wis. 2d 37, 307 N.W. 2d 247 (1981). The power to rule on the constitutionality of Wisconsin statutes is not among the powers delegated to the Commission.

CONCLUSION

The Individual Petitioners join in the Brief submitted by the ATU Petitioners on this motion. For the reasons set forth above, the Commission should grant the Individual Petitioners' Motion for a Final Decision.

Dated this 30th day of October, 2013.

Respectfully submitted,
WISCONSIN INSTITUTE FOR
LAW & LIBERTY
Attorneys for Individual Petitioners



Richard M. Esenberg, WBN 1005622
(414) 727-6367; rick@will-law.org
Thomas C. Kamenick, WBN 1063682
(414) 727-6368; tom@will-law.org
CJ Szafir, WBN 1088577
(414) 727-6373; cj@will-law.org
Michael Fischer, WBN 1002928
(414) 727-6371; mike@will-law.org
Brian W. McGrath, WBN 1016840
(414) 727-7412; brian@will-law.org
1139 E. Knapp St.
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385