BEFORE THE PUBLIC SERVICE COMMISSION OF WISCONSIN

Verified Petition of Brett Healy to Determine Allocation of Costs for Relocation of Utility Structures for Milwaukee Streetcar Project

Requested to be made binding upon:

City of Milwaukee
200 E. Wells Street
Milwaukee, WI 53202

WE Energies
231 W. Michigan Street
Milwaukee, WI 53203

American Transmission Company
W234 N2000 Ridgeview Parkway Court
Waukesha, WI 53188

AT & T Wisconsin
722 N. Broadway St.
Milwaukee, WI 53202

Now comes the Petitioner, Brett Healy, by his attorneys, Richard M. Eisenberg and Thomas C. Kamenick of the Wisconsin Institute for Law & Liberty, to request, pursuant to Wis. Stat. §227.41, a declaratory ruling on whether the cost of moving certain utility structures to accommodate construction of a street car line in the city of Milwaukee can be imposed upon the utilities and their rate payers. In support of his request, the Petitioner alleges as follows:

1. He is an adult resident of the state of Wisconsin residing at 885 Burr Oak Lane, Oconomowoc, Wisconsin 53066. He is a customer and rate payer of WE Energies and is an interested party within the meaning of Wis. Stat. § 227.41(1).

2. The City of Milwaukee ("the City") is a Wisconsin municipal corporation with its principal place of business at 200 E. Wells Street, Milwaukee, Wisconsin 53202.
3. The City has proposed building a 2.1 mile streetcar line in downtown Milwaukee (the “Milwaukee Streetcar”). On July 26, 2011, the Milwaukee Common Council authorized final engineering for the line which is expected to begin operations in 2014. Further information on the Milwaukee Streetcar may be found at http://themilwaukeestreetcar.com/.

4. Upon information and belief, construction of the Milwaukee Streetcar will require certain regulated public utilities to permanently move certain underground facilities in order to accommodate construction of the streetcar line or because construction of the line will obstruct access to these facilities.

5. For example, WE Energies (“WE”) is a regulated public utility with its principal place of business at 231 W. Michigan Street, Milwaukee, Wisconsin 53203. WE provides, among other things, electrical and natural gas service to users throughout southeastern Wisconsin, including Petitioner.

6. As part of the construction of the Milwaukee Streetcar, WE will be forced to permanently move and modify underground electric, natural gas and steam lines. Upon information and belief, the preliminary estimated cost is $45 million.

7. American Transmission Company (“ATC”) is a regulated public utility with its principal place of business at W234 N2000 Ridgeview Parkway Court, Waukesha, Wisconsin 53188. Upon information and belief, ATC is owned by, and provides electrical transmission services to certain electrical utilities, including WE.

8. Upon information and belief, ATC will be forced to permanently move and modify certain underground electrical transmission facilities because of construction of the Milwaukee Streetcar. Preliminary estimates of the cost of doing so range from $0.5 million to $15.4 million, depending on the need for corrosion protection for the steel conduit holding
underground transmission lines because of proximity to direct current lines powering the proposed streetcars.

9. In addition, construction of the Milwaukee Streetcar will affect certain telecommunications utilities. For example, AT & T Wisconsin ("AT & T") is a regulated public utility with its local headquarters at 722 N. Broadway, Milwaukee, Wisconsin 53202. AT & T provides wired telecommunication services to users and other providers throughout southeast and south central Wisconsin.

10. Upon information and belief, AT & T and other telecommunication providers which co-locate facilities in AT & T’s Broadway Street switching station will be required to permanently move and modify certain communications line due to construction of the Milwaukee Streetcar. The preliminary estimate for the cost for AT & T alone is $10 million.

11. If the utilities are forced to bear these relocation costs (estimated as at least $55.5 to 70.4 million), they may be passed on to ratepayers throughout south east and south central Wisconsin – notwithstanding that these ratepayers live nowhere near and will not benefit from the Milwaukee Streetcar.

12. Although these cost estimates are likely to change, it is imperative that the public and relevant officials know who will bear them.

13. Chapter 196 of the Wisconsin statutes confers certain authority of the Public Service Commission to regulate matters concerning public utilities, including the authority to determine whether municipal ordinances setting forth the terms and conditions upon which a public utility may be permitted to occupy the streets, highways or other public places within the municipality are unreasonable and, therefore, void. See, e.g., Wis. Stat. § 196.58(4).
14. Pursuant to that and other grants of authority, the Commission has promulgated Wis. Admin. Code § PSC 130.09(1) which provides that a “municipal regulation that requires a utility to permanently relocate transmission or distribution facilities in a municipal right-of-way at the expense of the utility is unreasonable unless there is an adequate health, safety, or public welfare justification for the requirement.”

15. The City of Milwaukee has passed an ordinance, MILW. ORD. § 15-122, which requires utilities to bear the cost of relocating facilities to accommodate “public works or improvements.” But whether or not the Milwaukee Streetcar can be considered a “public work or improvement” under § 15-122, and whether or not “there is an adequate health, safety, or public welfare justification,” for § 15-122 are subject to the standard established by PSC § 130.09(1).

16. There is no “adequate health, safety or public welfare justification” to require the utilities to permanently move their facilities in order to accommodate the Milwaukee Streetcar line. There is nothing about the existence or location of these facilities which threatens the public health, safety or welfare. The only reason that they have to be moved is construction of the Milwaukee Streetcar line.

17. This cannot constitute an “adequate health, safety or public welfare justification” as a matter of law. Such a justification must involve, at minimum, an exercise of the City’s police power. Building and operating a street car is not such an exercise.

18. For example, in Milwaukee Electric Railway & Light Co. v. City of Milwaukee, 209 Wis. 656, 245 N.W. 856 (1932), the Wisconsin Supreme Court held that the City could not compel a public utility (one of the predecessors to WE) to move underground utility wires at its own expense in order to accommodate the City’s installation of additional water mains.
19. The installation of water mains as part of the City’s operation of a water utility was not an exercise of the municipality’s police powers, but was undertaken in its proprietary capacity.

20. Of particular note here is the Court’s citation, with approval, of the observation that “[t]he law is reasonably well settled that, when the city engages in the construction of a rapid transit line, it is not performing a governmental act but acting in a proprietary capacity.” 45 N.W. at 859, quoting New York & Queens Electric Power & Light Co. v. City of New York, 221 App. Div. 544, 224 N.Y.S. 564, 568

21. The Milwaukee Streetcar will be a transit utility that will charge fares and presumably engage in economic competition with other forms of transportation such as private automobiles and bicycles, taxis and limousine services, and private automobiles. As such, its construction and operation by the City is action in the City’s proprietary capacity, i.e., “engaging in business with primarily private concerns, even if some efforts are governmental.” See generally State ex rel. Hammermill Paper Co. v. LaPlante, 58 Wis.2d 32, 80-81, 205 N.W.2d 784, 811 (1973). Thus, under the teaching of Milwaukee Electric Railway & Light Co., construction and operation of the Milwaukee Streetcar cannot be considered an adequate “health, safety or public welfare” justification.

22. Even were this not so, Wis. Stat. § 196.58(4) and PSC 130.09(1) are intended to protect rate payers from attempts by municipalities to shift the cost of municipal initiatives away from the users and municipal residents who will benefit them to the broader group of public utility rate payers under circumstances when utility facilities do not threaten or impair public health, safety and welfare. This avoids takings without just compensation, protects ratepayers from the imposition of costs over which they have no influence and ensures that those who
benefit from a proposed undertaking will bear its costs. For these reasons, there is no “health, safety or public welfare” justification for imposition of the costs necessary to accommodate the Milwaukee Streetcar on utility rate payers.

WHEREFORE, Petitioner requests a declaratory ruling that utility rate payers are not responsible for the costs of permanently modifying and relocating utility facilities to accommodate the Milwaukee Streetcar and that these costs must be borne by the City of Milwaukee.

Dated this __ day of October, 2011.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Petitioner

Richard M. Eisenberg
Wisconsin Bar No. 1005622
rick@will-law.org

Thomas C. Kamenick
Wisconsin Bar No. 1063682
tom@will-law.org

Wisconsin Institute for Law & Liberty, Inc.
225 E. Mason Street, Suite 300
Milwaukee, WI 53202
(414) 727-9455
(414) 727-6385 (fax)
VERIFICATION

STATE OF WISCONSIN  
MILWAUKEE COUNTY  

Brett Healy, being duly sworn says: I am the Petitioner in the above request for a declaratory ruling pursuant to Wis. Stat. § 227.41. I have read the above Verified Petition and the factual statements therein and know the contents to be true of my own knowledge, except those matters stated to be on information and belief, which I believe to be true.

Brett Healy  
885 Burr Oak Lane  
Oconomowoc, Wisconsin 53066

Subscribed and sworn to before me this 5th day of Oct., 2011.

Stacy Stueck  
Notary Public, State of Wisconsin  
My Commission expires 02/29/14