STATE OF WISCONSIN CIRCUIT COURT BRANCH 31 MILWAUKEE COUNTY

CITY OF MILWAUKEE,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent.

FILED
31 JUL 27 2015 31
JOHN BARRETT
Clerk of Circuit Court

Case No. 14-CV-9797
Case Code: 30607
Administrative Agency Review

ATU RESPONSE BRIEF IN OPPOSITION TO PETITION FOR REVIEW

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Respondents 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 Companies"), pursuant to the Court's April 15, 2015 Order Amending the Briefing Schedule, submit this Brief in Response to the City of Milwaukee's Initial Brief ("City Brief").

INTRODUCTION

During the over two and a half years of proceedings before the Public Service Commission of Wisconsin ("Commission") that preceded this judicial review proceeding, the parties extensively briefed and argued the issues in this case, navigating a series of procedural maneuvers by the City and providing the Commission with a substantial record upon which it based its decision. Following that extensive process and the Commission's Final Decision, the City raises two issues in its Petition for Review: whether the Commission had the jurisdiction and authority to issue the Final Decision and whether Act 20, upon which much of the Final Decision is premised, is constitutional. Those questions are readily addressed and disposed of by (i) the plain language of the applicable statutes, which explicitly grant the Commission the jurisdiction and authority to address and declare void the municipal regulations at issue here and (ii) fundamental Wisconsin law that bars a creature of the state, such a municipality, from attacking the constitutionality of the actions of its creator. This City, however, ignores that plain language and ignores that fundamental Wisconsin law.

Even if the Court looks past the City's express bases for its Petition, and reviews the merits of the Commission's Final Decision, it will find that the Commission correctly exercised its clear jurisdiction and authority under Wis. Stat. §§ 182.017(8) and 196.58(4) to void the City's municipal regulations *as applied* to the Streetcar Project. The Commission's ruling is

mandated by Wisconsin law, which has long held that utilities exercising their rights to occupy the public rights-of-way are not required to bear the costs of relocating their facilities to accommodate certain municipal uses of the rights-of-way. The Legislature has made crystal clear that an urban rail transit system is one of these municipal uses.

Despite the City's claims, (City Br. at 18), this case is not about the merits of the Streetcar Project, nor does the Commission's Final Decision prevent the City from constructing and operating the project. The Commission has made no attempt to prevent the City's construction and operation of the Streetcar Project. The Commission's Final Decision, consistent with its clear statutory authority, relates solely to the allocation of utility costs for facility modification and relocation to accommodate the project. The City's argument that the Commission is declaring the Streetcar Project unreasonable or voiding the Streetcar Project is a red herring.[1]

The City's constant maneuvering before the Commission and now before this Court is nothing more than an attempt to improperly avoid the legal implications of its actions. The Commission had the jurisdiction and authority to apply a constitutional statute, and the City's actions are barred by decades of Wisconsin law as correctly interpreted and applied by the Commission. Applicable law makes clear that the City cannot heave millions of dollars of facility relocation costs on utilities and their ratepayers and customers to accommodate the

[1] Earlier this year the City approved a resolution authorizing substantial additional funds to expand the original project scope and to cover all utility relocation costs. *See* City of Milwaukee Resolution No. 141313 (Feb. 10, 2015). The resolution provides, in part:

> Pending the outcome of the Petition for Judicial Review, the comprehensive project budget for the Phase 1 Starter System has been revised to incorporate estimated costs to modify or relocate privately-owned utility facilities (up to $22.8 million) to allow the project to go forward should the City be found responsible for such costs by a final decision issued by a court of competent jurisdiction, including appeals therefrom.

(*See* Appendix to ATU Response Brief in Opposition to Petition for Review ("ATU Appx."), Ex. 1, of which the ATU Companies ask the Court to take judicial notice pursuant to Wis. Stat. ch. 902.) Regardless of the outcome of this case, therefore, the City represents that it has the necessary funds to construct and operate the Streetcar Project.

Streetcar Project. Accordingly, the Court should reject the City's latest attempt to skirt this law and should uphold the Commission's Final Decision.

BACKGROUND

Factual Background

For more than six years, the City has been planning a two-mile downtown streetcar project funded by its own and federal funds (the "Streetcar Project"). In July 2011, that plan was codified in a several hundred page Environmental Assessment, which detailed the route, configuration, and budget of the Streetcar Project. (R.96, R.97.)[2] Although the Streetcar Project will indisputably require significant modification and relocation of utility facilities located in the public right of way, the City approved it with no budget to reimburse utilities for such costs. As a result, it is beyond question that the City plans to require the ATU Companies and other utilities to absorb the costs of facility modification and relocation caused by the Streetcar Project.

Specifically, on July 26, 2011, the Milwaukee Common Council passed and the Mayor signed a resolution that approved the Streetcar Project as described in a then-draft Environmental Assessment, which is substantially similar to the final Environmental Assessment released on October 22, 2011. (R.98, City of Milwaukee Resolution No. 110372, hereinafter the "Streetcar Resolution.") Among other things, the Streetcar Resolution authorizes the Commissioner of Public Works "to proceed with construction of the proposed streetcar system" as detailed in the Environmental Assessment. The Streetcar Resolution also authorizes final engineering for the line. The City also has an ordinance, Milw. Ord. § 115-22 (the "1936 Ordinance"), which requires that, upon receiving written notice from the City, a public utility must bear the cost of

[2] Citations to "R.__" refer to the "Tab No." set forth on the Record List of Respondent Public Service Commission of Wisconsin (the "Record List"), filed with the Court on February 18, 2015. For example, "R.96" refers to Tab No. 96 (AT&T Wisconsin: Initial Brief of the Joint ATUs - Affidavit of Kevin Anderson). Particular pages or paragraphs of a cited item are identified after a colon, *e.g.*, "R.96:2" means page two of record item 96.

relocating its facilities to accommodate "any public works or improvements of any nature whatsoever undertaken by the city . . ."

The Environmental Assessment and the Streetcar Resolution which approved it would strap utilities with the costs associated with facility relocations or modifications caused by the Streetcar Project. By the Streetcar Resolution, the Council approved the Streetcar Project's $64.5 million budget allocating zero dollars ($0.00) to reimburse utilities for facility relocation or modification costs. As a result, the City has made it clear that it intends for the ATU Companies and other utilities to bear these relocation and modification costs.

There is no doubt that the Streetcar Project will require the ATU Companies to relocate or modify utility facilities located in the public right-of-way. The final Environmental Assessment makes this fact abundantly clear: "Given the prevalence of underground facilities in the study area, preliminary engineering studies indicate that the underground utility lines would need to be relocated or reinforced on nearly all blocks along the streetcar alignment." (R.97:124, Final Environmental Assessment.) Indeed, the route approved by the Streetcar Resolution will require each of the ATU Companies to permanently move certain underground facilities from the public rights-of-way to accommodate construction of the streetcar line or because construction of the line will obstruct access to these facilities. (R.96:¶ 9; R.103; R.105:¶¶ 7-8; R.106:¶¶ 7-8.)

The City is actively implementing the Streetcar Resolution and the Streetcar Project as outlined in the Environmental Assessment approved by that Streetcar Resolution. The several affidavits provided by the City Engineer in this docket confirm that the City is moving forward with the design and implementation of the Streetcar Project as approved by the Streetcar Resolution and as detailed in the Environmental Assessment. (R.90, R.94.)

A number of parties representing a variety of stakeholder interests - including public utilities, public utility customers, and telecommunications companies with facilities that would

be affected by the Streetcar Project - challenged the City's attempt to impose utility relocation costs on utilities and their ratepayers and customers. They did so pursuant to the statutory mechanism created by the legislature for making these precise kinds of challenges, found in Wis. Stat. §§ 182.017 and 196.58.

While the Commission's review of the parties' submissions was ongoing, there was a law change. In the 2013 biennial budget bill, 2013 Wisconsin Act 20 ("Act 20"), the state Legislature clarified the statutes regarding the reasonableness of municipal regulations that require payment of modification or relocation costs to accommodate an urban rail transit system. By these amendments the Legislature declared:

> **SECTION 1978t.** 182.017(8)(as) of the statutes is created to read:
>
> 182.017(8)(as) 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.
>
> **SECTION 1989t.** 196.58(4)(c) of the statutes is created to read:
>
> 196.58(4)(c) Notwithstanding s. 182.017(2), a municipal regulation is unreasonable under par. (a) or (b) 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, telecommunications provider's, or video service provider's facilities to accommodate an urban rail transit system, as defined in s. 182.017(lg)(ct).

2013 Wisconsin Act 20 (effective July 2, 2013).[3]

The Commission's Final Decision

On August 29, 2014, following lengthy and comprehensive proceedings before the Commission, the Commission issued its Final Decision in this matter in which it declared, in part and consistent with Act 20 and applicable law, that:

[3] As explained below, the reference to Wis. Stat. § 182.017(2) in these provisions rendered the terms of that subsection ("But 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") inapplicable to the consideration of a project involving an urban rail transit system.

> Milwaukee Ord. § 115-22 and Resolution #110372 are unreasonable and void, as applied to an urban rail transit project such as the Streetcar Project.
>
> . . .
>
> Any current or future municipal regulations as defined by Wis. Stat. § 182.017(1g)(bm) of the City that require the ATU [Companies] or the Intervening Utilities to pay any amount of modification or relocation costs to accommodate the Streetcar Project, including without limitation Milw. Ord. § 115-22 and Resolution #110372, are unreasonable and void, as applied to an urban rail transit project such as the Streetcar Project, pursuant to Wis. Stat. §§ 182.017(8) and 196.58(4).

(R.78:33, Final Decision.)

In reaching this conclusion, the Commission's analysis began "with the language of the applicable statutes [*i.e.*, Wis. Stat. §§ 182.017(8) and 196.58(4)] as amended by Act 20." (R.78:24.) It succinctly summarized Act 20 as establishing that "a 'municipal regulation' that requires a company, public utility, telecommunications provider, or video service provider to pay any part of the cost to modify or relocate their facilities to accommodate an urban rail transit system is void." (R.78:26.)

The Commission then cataloged certain undisputed items:

- "[I]t is undisputed that that [the 1936 Ordinance] and [the Streetcar Resolution] both constitute a 'municipal regulation' as defined by Wis. Stat. § 182.017(1g)(bm)." (R.78:26.)
- "It is also undisputed that the ATU [Companies] and Intervening Utilities meet the definition of company, public utility, telecommunications provider, and/or video service provider and are therefore afforded protection from unreasonable regulations under these statutes." (R.78:26.)
- "It is further undisputed that the City is attempting to require these entities to pay at least some portion of the costs associated with modifying or relocating their facilities to accommodate the Streetcar Project." (R.78:26.) The Commission noted that ". . . the City has made clear in its filings with the Commission that whatever those [modification or relocation] costs are, they believe those are the responsibility of the utilities -- not the City." (*Id.*)
- "The precise amount of [modification and relocation] costs need not be known because the statute precludes the shifting of 'any part of' the facility modification

> or relocation costs to the ATU [Companies] and Intervening Utilities to accommodate an urban rail transit project." (R.78:26.)

- "There is also no dispute that the Streetcar Project is an 'urban rail transit system' as defined in Wis. Stat. § 182.017(1g)(ct)." (R.78:26.)

Given these undisputed items, the Commission identified the "disputed legal issue" as a narrow one: "whether the City is seeking to impose relocation costs upon the ATU [Companies] and Intervening Utilities pursuant to a 'municipal regulation' or, as the City now argues, it has that power independent of any 'municipal regulation.'" (R.78:27.) The Commission found the broad definition of "municipal regulation" in the statute, which includes "any contract, ordinance, resolution, order, or other regulation entered into, enacted, or issued by a municipality. . .", to be dispositive. (*See* R.78:27) (quoting Wis. Stat. § 182.017(1g)(bm)) (underlining in original).) Accordingly, the Commission concluded that "[a]ny ability the City has to require action, whether by Wis. Stat. § 182.017(2) or the common law, falls within the broad catch-all of 'other regulation' that was specifically included by the Legislature when defining 'municipal regulation.'" (R.78:27.)

The Commission further found that the structure and context of the applicable statutes, canons of statutory construction, and their legislative history supported its conclusion. (R.78:28-32.) The Commission rejected the City's contrary interpretation of the applicable statutes as improperly viewing them "in isolation" and in a manner that "would improperly render Wis. Stat. §§ 182.017(8) and 196.58(4) meaningless and would be unreasonable." (R.78:29.) The Commission also noted the absurdity of the City's position, pursuant to which:

> "There would be no circumstance where a municipal action forcing utilities to pay facility relocation or modification costs caused by an urban rail transit project would be unreasonable because the municipality would simply claim, as the City does here (despite having a specific ordinance on the books covering utility facility relocations) that the obligation to move arises from Wis. Stat. § 182.017(2) [rather than a 'municipal regulation']."

(R.78:29-30.) In this regard, the Commission found the express language of Act 20, which applied its terms "notwithstanding [Wis. Stat. § 182.017] sub. (2)," compelling. (R.78:30.)

The Commission cited precedent - both its own prior decisions in other cases and rulings by the Wisconsin Supreme Court - that confirmed its conclusions. Specifically, the Commission found that it had previously applied a broad definition of "municipal regulation" to include - and therefore invalidate - a city resolution and contract bid documents that had the effect of requiring utility facility relocation at the utility's expense. (R.78:28.)[4] The Commission also determined that the two chief cases relied upon by the City in its incorrect interpretation of Wis. Stat. § 182.017(2), *City of Marshfield v. Wisconsin Telephone Co.*, 102 Wis. 604, 78 N.W. 735 (1899) and *Wisconsin Power & Light Co. v. Gerke*, 20 Wis. 2d 181, 121 N.W.2d 912 (1963), actually supported the position of the ATU Companies. (R.78:31-32.) The Commission appropriately declined to address the City's argument that Act 20 is unconstitutional on its face, concluding that "administrative agencies do not have the power to declare statutes unconstitutional. . ." (R.78:19) (citing *Warshafsky v. Journal Co.*, 63 Wis. 2d 130, 147, 216 N.W.2d 197 (1974).)

In rejecting each and every one of the City's arguments, the Commission reached the inescapable conclusion that "[i]t is these statutes and the underlying policy expressed by the Legislature that controls," and that "[t]he City's attempt to narrowly interpret Act 20 is inconsistent with the language of the statute, the tenets of statutory construction, and is contrary to legislative intent." (R.78:32.) The Commission held that "there is no independent basis upon which the City can require the utilities to relocate their facilities other than through a municipal regulation as that term is broadly defined," and appropriately voided the 1936 Ordinance, the Streetcar Resolution, and any other similar municipal regulation as applied to an urban rail

[4] The Commission cited *Complaint by Wisconsin Public Serv. Corp. against the City of Manitowoc*, Final Decision, Docket 9300-GI-102 (Wis. PSC Apr. 18, 2008) and *Complaint by Wisconsin Public Serv. Corp. against the City of Oconto*, Final Decision, Docket 9300-EI-102 (Wis. PSC Apr. 18, 2008).

transit project such as the Streetcar Project. (R.78:32-33.) On November 17, 2014, the City commenced this judicial review proceeding.

ARGUMENT

I. THE APPLICABLE SCOPE OF REVIEW IS LIMITED AND THE COMMISSION IS ENTITLED TO GREAT WEIGHT DEFERENCE.

A. The Court's Review Of The Commission's Final Decision Is Limited.

The scope of judicial review of an administrative agency's decisions under Wis. Stat. ch. 227 is limited to the administrative record. *See* Wis. Stat. § 227.57(1). In effect, the circuit court acts as an appellate court and not as a trier of fact. *See Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977). The decision of the agency is presumed to be correct, so it may be reversed or modified only if the reviewing court affirmatively finds one or more of the limited number of reasons specifically enumerated in Wis. Stat. § 227.57(4)-(8). *See* Wis. Stat. § 227.57(2); *Nielsen v. Waukesha Cnty. Bd. of Supervisors*, 178 Wis. 2d 498, 511, 504 N.W.2d 621 (Ct. App. 1993). Moreover, the result reached by the agency can be upheld upon any legal rationale, including one not argued to or decided by the agency. *See Cnty. of La Crosse v. WERC*, 174 Wis. 2d 444, 455, 497 N.W.2d 455 (Ct. App. 1993), *rev'd on other grounds*, 182 Wis. 2d 15, 513 N.W.2d 579 (1994). The burden of persuasion is on the party petitioning for review. *Sterlingworth Condo. Ass'n, Inc. v. DNR*, 205 Wis. 2d 710, 726, 556 N.W.2d 791 (Ct. App. 1996).

Here, the City has identified two discrete challenges to the Final Decision: (i) that the Commission lacked jurisdiction over the 1936 Ordinance and Streetcar Resolution and, therefore, lacked the authority to issue the Final Decision, and (ii) Act 20 is an unconstitutional

private law.[5] (City Br. at 2.) This Court's review is limited in scope to these issues, and the City has the burden of persuading this Court that the Commission erred in the Final Decision.

B. The Court Should Defer To The Commission On The Narrow Questions Of Law At Issue In This Case; The Constitutional Question Should Be Addressed By The Court *De Novo*.

Courts have developed three levels of judicial deference with respect to legal questions that have been addressed by an agency in a matter under judicial review: great weight, due weight, and *de novo*. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 539 N.W.2d 98 (1995). The Supreme Court of Wisconsin has repeatedly recognized that "[t]he 'great weight' standard has been called the general rule in Wisconsin." *Clean Wis., Inc. v. Pub. Serv. Comm'n*, 2005 WI 93, ¶ 135, 700 N.W.2d 768.

Here, the Commission's application of Act 20 as described in the Final Decision is entitled to great weight deference because, as the Commission has demonstrated in its Brief Opposing Petition for Judicial Review, the factors that call for great weight deference are all present. (*See* Commission Br. at 17-20.)[6] In short, great weight deference is due because: (1) the Commission is charged with administration of the statute being interpreted; (2) its interpretation "is one of long-standing"; (3) it employed "its expertise or specialized knowledge" in arriving at its interpretation; and (4) its interpretation "will provide uniformity and consistency in the application of the statute." Harnischfeger Corp., 196 Wis. 2d at 660. The passage of Act 20 does not change this result because, even with the passage of Act 20, the Commission is simply continuing to exercise the jurisdiction and authority it has long held to hear complaints relating to facilities in municipal rights of way. *Compare* Wis. Stat. §§ 182.017(8)(a), 196.58(4)

[5] In the proceedings before the Commission, the City challenged certain of the procedures employed by the Commission and contended that Act 20 violated the guarantee of equal protection under the constitution. The City has not advanced those arguments in this judicial review proceeding, and has therefore abandoned those positions.

[6] The ATU Companies incorporate by reference the position of the Commission with regard to the level of deference that is appropriate.

(2011-2012) with Wis. Stat. §§ 182.017(8)(a), 196.58(4) (2013-2014). At a minimum, the Commission's Final Decision merits due weight deference. (*See* Commission Br. at 21.)

The City attempts to avoid the deference that is due to the Commission by characterizing the issue in this case as one of the Commission's jurisdiction and authority. The City cites as its sole support a case relating to employment relations and wage and hour issues. (City Br. at 6.) Accepting the City's claim that its challenge relates to the Commission's jurisdiction and authority, however, should result in the prompt denial of the City's petition because the text of the applicable statutes expressly require the Commission to take action. This is not a case where the Commission acted in the absence of a legislative grant of authority. *See Wisconsin Power & Light Co. v. Pub. Serv. Comm'n*, 181 Wis. 2d 385, 392, 511 N.W.2d 291 (1994) (commission jurisdiction implicated because "[n]o provision in ch. 196, Stats., expressly authorizes the commission to order a utility to refund money to its customers . . .").

Finally, with regard to the City's constitutional challenge, the constitutionality of a statute is a question of law that a Court reviews *de novo*. *Brown v. Dep't of Children & Families*, 2012 WI App 61, 341 Wis. 2d 449, 819 N.W.2d 827.

II. THE COMMISSION CORRECTLY CONCLUDED THAT THE STREETCAR RESOLUTION AND THE 1936 ORDINANCE ARE UNREASONABLE AND UNLAWFUL UNDER WISCONSIN LAW.

A. The Commission Has Jurisdiction To Consider The ATU Companies' Complaints Regarding The Streetcar Resolution And The 1936 Ordinance.

The City's argument that the Commission exceeded its jurisdiction in reviewing the Streetcar Resolution and the 1936 Ordinance can be disposed of quickly. The legislature expressly granted the Commission jurisdiction to decide a "complaint by a company that a regulation by a municipality under sub. (1r) is unreasonable . . ." Wis. Stat. § 182.017(8)(a). Subsection (1r) grants "company[ies] the right to install their lines in and under public highways,

"subject to . . . reasonable regulations made by any municipality through which its transmission lines or systems may pass . . ." Wis. Stat. § 182.017(1r).

There is no dispute that the ATU Companies are telecommunications providers and/or video service providers, and each is a "company" within the meaning of Wis. Stat. § 182.017(8)(a).[7] The ATU Companies filed complaints with the Commission alleging, *inter alia*, that the City (a municipality) had adopted regulations (including the 1936 Ordinance and the Streetcar Resolution) that concern the ATU Companies' use of the public highways, and alleging that those regulations are unreasonable. (*See* R.56, R.59, R.60, and R.61.) Section 182.017(8)(a) plainly gave the Commission authority to decide those complaints.

The City argues that the Streetcar Resolution and the 1936 Ordinance are not regulations governing use of the rights-of-way within the meaning of the statute. But that goes to the *merits* of the ATU Companies' complaints, not the authority of the Commission to hear and decide those complaints. In any event, as explained in Sections II.B through E, below, the City's criticism of the merits of the Commission's Final Decision is baseless.

B. The Streetcar Resolution And The 1936 Ordinance Constitute Unreasonable Regulations Under Wisconsin Law To The Extent They Impose Facility Relocation Or Modification Costs on Utilities.

1) <u>The Streetcar Resolution.</u>

The City concedes, as it must, that the Streetcar Resolution is a "municipal regulation" as defined in Wis. Stat. § 182.017(1g)(bm). (City Br. at 11.) That provision broadly defines a "municipal regulation" 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." The

[7] Because there is no question that all of the ATU Companies fall within the scope of § 182.017, this brief focuses on that section. However, Wis. Stat. § 196.58 contains parallel provisions governing the use of public rights-of-way by a "public utility." This section also applies to the ATU Companies to the extent any of them are a public utility, and the arguments set forth herein regarding § 182.017 apply equally to § 196.58.

Streetcar Resolution is a "resolution" adopted by the City's Common Council on July 26, 2011 (City Br. at 3), and hence is a "municipal regulation."

The City argues, however, that the Streetcar Resolution is not a municipal regulation that falls under Wis. Stat. § 182.017(1r), and hence is not one that the Commission can determine is unreasonable under Wis. Stat. § 182.017(8)(a). The City is wrong. Subsection (1r) makes the rights of a telecommunications and/or video service provider to use the public rights-of-way "subject to . . . reasonable regulations made by any municipality through which its transmission lines or systems may pass . . ." Wis. Stat. § 182.017(1r). On its face, this provision is not limited to regulations directed solely at use of the rights-of-way by such a provider, or to regulations that purport to be adopted solely under the authority of this subsection. Rather, this subsection makes clear that the providers' statutory right to use the rights-of-way subjects them to "reasonable regulations" a municipality may otherwise apply.

More to the point, the City's suggestion that the Streetcar Resolution is a "public works" project adopted under the authority of Wis. Stat. § 62.11(5) (City Br. at 11), and hence cannot constitute a regulation of providers' use of the rights-of-way under subsection (1r), is a false dichotomy. Wis. Stat. § 62.11(5) makes no such distinction. In its July 9, 2012 Response Brief, the City explained that "the Streetcar Project is a City use of local streets for the public, is designed to facilitate travel over the streets and is for the public health, safety or welfare." (R.29:4.) The Streetcar Resolution thus is part and parcel of the City's regulation and control of its "highways" in order to promote "the health, safety, and welfare of the public . . ." Wis. Stat. § 62.11(5).

The Streetcar Resolution necessarily is a regulation (which is defined to include resolutions) that the ATU Companies' right to use the public rights-of-way is "subject to" (Wis. Stat. § 182.017(1r)), because the direct effect of that Resolution is to require the ATU

Companies to move their facilities without reimbursement to accommodate the City's planned use of those same rights-of-way. In other words, the City has made the ATU Companies' maintenance of their facilities in the public streets "subject to" the requirement that they now modify and/or relocate those facilities (without reimbursement) for the Streetcar Project.

Further, the Commission correctly concluded that the Streetcar Resolution is an unreasonable regulation under Wis. Stat. § 182.017 because it would require the ATU Companies to pay the costs of relocating their facilities. *See* Wis. Stat. § 182.017(8)(as) ("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"). The City asserts that nothing on the face of the Streetcar Resolution "requires" the ATU Companies to bear the costs of modifying or relocating their facilities. (City Br. at 12.) Once again, the City is exalting form over substance. The Streetcar Resolution, as the City must concede, does not authorize the payment of *any* funds for the utility relocations that the City also concedes are required to accommodate the streetcar project. The Streetcar Resolution nevertheless directs the Commissioner of Public Works to "[p]roceed[] with construction of the streetcar system." The Streetcar Resolution thus has the effect of requiring the ATU Companies to bear the costs of modifying or relocating their facilities. That runs directly afoul of Wis. Stat. § 182.017(8)(as), as the Commission correctly concluded.

In short, the Streetcar Resolution necessarily constitutes a regulation that requires the ATU Companies to move their facilities, and to do so at their own expense. As the Supreme Court of Wisconsin stated in an analogous context, any requirement that the City "issue a specific finding stating that" the ATU Companies must move their facilities at their own expense in order for the Commission to review the City's municipal regulation "would exalt form over substance." *Larsen v. Munz Corp.*, 167 Wis. 2d 583, 600, 482 N.W.2d 332 (1992). The City's

"actions speak louder than the absence of its words," and its actions "reveal an implicit determination" that the ATU Companies must move their facilities at their own expense. *Id.* "This determination . . . is fully reviewable." *Id.*

2) <u>The 1936 Ordinance.</u>

The Commission also correctly held that the 1936 Ordinance is a "municipal regulation" that is unreasonable under Wis. Stat. 182.017(8) because it purports to require the ATU Companies to bear the costs of modifying or relocating their facilities to accommodate the Streetcar Project.

There is no question that the 1936 Ordinance is an "ordinance," and thus a "municipal regulation" within the meaning of Wis. Stat. § 182.017(1g)(bm). Further, the 1936 Ordinance plainly regulates the ATU Companies' use of the rights-of-way, and hence is a municipal regulation that falls under Wis. Stat. § 182.017(1r). In fact, it is specifically directed at the use of the rights-of-way by utilities, providing that a public utility with facilities in the public ways that "shall at any time interfere with or obstruct or be in the path of any public works or improvements of any nature whatsoever undertaken by the city," must "upon written notice from such city . . . make such changes in the construction or location, or both, of the structures and/or facilities at the cost and expense of said utility as will permit such public works or improvements." Finally, as the Commission correctly concluded, the 1936 Ordinance on its face runs afoul of Wis. Stat. § 182.017(8)(as), insofar as 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."

Abandoning its prior arguments to the Commission, the City now suggests that the Commission should not have addressed the 1936 Ordinance because it is a "relic" that the City "had no intention of trying to apply . . . to the Streetcar Project," as evidenced by the alleged fact

that the City never issued "written notices" under the 1936 Ordinance. (City Br. at 13, 14.) The City's suggestion is baseless.[8]

Here, the City has on multiple occasions given the ATU Companies notice, in writing, that the City expects them to relocate their facilities as necessary to accommodate the Streetcar Project, and that it expects the ATU Companies to bear their own relocation costs. Nothing more is required to invoke the 1936 Ordinance, which does not require any particular form of "written notice."

For example, the Streetcar Resolution itself comprises such notice. Moreover, the City's filings in the Commission proceeding were in writing, and were served upon the ATU Companies. In its July 9, 2012 Response Brief, the City asked the Commission to "affirm the validity of [the 1936 Ordinance] and declare that the Utility and ATU [Companies] should bear whatever relocation costs they might incur to accommodate construction of the Streetcar Project." (R.29:61.) The City asserted:

> This is not to say that the Milwaukee Ordinance has no force. On the contrary, the ordinance . . . put all right-of-way users on notice that, if they chose to lay or erect their facilities in Milwaukee streets, that right is limited and that they will have to relocate their facilities at their expense to accommodate 'any public works or improvements of any nature whatsoever undertaken by the city . . .'. Given that the Ordinance was in effect at the time some, if not all, of the facilities at issue were placed in the Milwaukee right-of-way, the Petitioners cannot now argue that they are not subject to its requirements.

(*Id.* at R.29:60-61.) The City also asserted that the Streetcar Project is within the scope of the 1936 Ordinance: "[T]he Streetcar Project must be seen as . . . a public work within the scope of the [1936] Ordinance." (*Id.* at R.29:44.) And the City even devoted a section of its brief to arguing that the 1936 Ordinance "lawfully requires right-of-way users to relocate their facilities

[8] In a footnote, the City claims for the first time that the 1936 Ordinance does not apply to those ATU Companies that are cable TV companies because it only applies to public utilities. (City Br. at 14, n.9.) Wisconsin law, however, defines a "public utility" to include a telecommunications utility. Wis. Stat. § 196.02(5)(a)2. All of the ATU Companies are "Alternative Telecommunications Utilities" and therefore are affected by the 1936 Ordinance.

at their expense." (*Id.* at R.29:59.) In short, the City undeniably put the ATU Companies on notice, in writing, that the City believed the 1936 Ordinance applied, and required the ATU Companies to relocate their facilities at their own expense.

While the City has now changed its position, and disclaims any reliance on the 1936 Ordinance, the City's reversal does not moot the issue nor make it improper for the Commission to have addressed the 1936 Ordinance's application to the Streetcar Project. A governmental entity can in some circumstances moot a challenge to a law or ordinance, for example by repealing the challenged ordinance. But the City has not repealed nor amended the 1936 Ordinance. Short of repeal, a governmental entity might moot a challenge where it "acknowledges that it will not enforce a statute because it is plainly unconstitutional, in spite of the failure of the legislature to remove the statute from the books," and its "assertions that it will not now enforce the statute are extremely credible." *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 492 (7th Cir. 2004). Here, however, the City has not provided such assurance. In particular, the City does not concede that it may not lawfully enforce the 1936 Ordinance; in the case on review it expressly took the position that the 1936 Ordinance applies to the Streetcar Project and requires the ATU Companies to relocate their facilities at their own expense; and the City's subsequent attempt to disclaim reliance on the 1936 Ordinance plainly is nothing more than a post hoc assertion by counsel made as part of the City's ever-shifting litigation strategy.

C. The Commission Decisions Highlighted By The City Are Beside The Point.

The City points to two prior Commission decisions involving challenges to municipal undergrounding ordinances, and asserts that the Streetcar Resolution and 1936 Ordinance are not like these undergrounding ordinances. (City Br. at 15-17) (citing *City of Racine v. Wis. Tel. Co.*, 28 Wis. R.R.Comm'n Report 251 (Nov. 6, 1924) and *Complaint of WPSC against Town of Sevastopol*, PSC Docket No. 9327-EI-100, 1989 Wisc. PUC LEXIS 75 (May 25, 1989).)

However, in neither case did the Commission make any findings or construe Wisconsin law in a manner that is inconsistent with the Commission's exercise of jurisdiction in this case.

Nor did the Commission suggest that its authority to review municipal regulations regarding use of the public rights-of-way by utilities is somehow limited to undergrounding ordinances like the ones addressed in these two prior cases. Indeed, any such suggestion could not be squared with Wisconsin law, which expressly gives the Commission broad authority to review the reasonableness of *any* municipal contract, ordinance, resolution, order, or other regulation that governs use of the public rights-of-way by telecommunications and video service providers. Wis. Stat. § 182.017(8)(a).

More on point are the Commission's decisions in the *Manitowoc* and *Oconto* cases.[9] Both involved municipal resolutions authorizing street improvements that required the relocation of gas facilities, but made no provision for the payment of any portion of the cost of relocation. While the Commission ultimately dismissed the gas utility's complaints because the work had been completed, the gas utility was not seeking monetary damages, and the utility failed to identify any meaningful relief the Commission could grant, the Commission correctly concluded that it had jurisdiction because the municipal regulations had the effect of requiring the utility to relocate. *Manitowoc* and *Oconto* Orders at 6. As the Commission cogently explained, the resolutions were "municipal regulations," and "were resolutions determining terms and conditions under which the City would continue to permit" the utility to occupy the streets at issue "within the meaning of Wis. Stat. § 196.58(1)."[10] *Id.* at 4. Similarly, there is no question here that the Streetcar Resolution and 1936 Ordinance are "municipal regulations" as defined in

[9] *See* footnote 4, *supra*.

[10] As noted above, Wis. Stat. § 196.58, governing use of the public rights-of-way by certain utilities, tracks Wis. Stat. § 182.017, governing use of the public rights-of-way by telecommunications and video service providers.

Wis. Stat. § 182.017(1g)(bm), and the ATU Companies' continued use of the City streets at issue are "subject to" these regulations under Wis. Stat. § 182.017(1r). As a result, as in the *Manitowoc* and *Oconto* cases, the Commission properly exercised jurisdiction.

D. The Commission Did Not Purport To Second-Guess The City's Decision To Construct A Streetcar.

The City next argues that Wisconsin law does "not grant the Commission any authority to review and declare unreasonable municipal decisions to undertake public works projects." (City Br. at 18.) That is a red herring. The Commission did not review the reasonableness of the City's determination that a streetcar should be constructed, or purport to have "authority to second guess the Streetcar Project." *Id*. The Commission's decision does not "declare a public works project unreasonable" (*id.* at 19), or overrule the City's decisions regarding whether, where, when, or how a streetcar should be constructed. Rather, consistent with its statutory authority, the Commission determined that it is unreasonable and unlawful under the plain terms of Wisconsin law for the City to "require[] a company to pay any part of the cost to modify or relocate the company's facilities to accommodate [the] urban rail transit system." Wis. Stat. § 182.017(8)(as).

The *Racine* case demonstrates the fallacy of the City's attempt to rely on its authority to undertake public works projects in the rights-of-way to avoid the Commission's authority. There, the city directed a telephone utility and an electric utility to relocate their facilities in light of a city public works project, namely a paving project. The utility poles at issue had been placed in the parkway between the sidewalk and the street gutters, but in connection with a paving project the city moved the gutters back such that the poles were then located directly in the gutters. 28 Wis. R.R.Comm'n Report at 251-52. The city argued that it was unsightly and dangerous for the poles to remain, and hence the facilities should be undergrounded at the utilities' expense. *Id.* The Commission reviewed the city's demand and found it to be

unreasonable and hence unenforceable. Here, the City admits that the Commission "properly exercised jurisdiction" in the *Racine* case to void the utility relocation requirement. (City Br. at 15.) The same is true of the public works project at issue here.

In addition, the City ignores the fact that the 1936 Ordinance is not a municipal decision to undertake a public works project. Rather, it is an ordinance specifically directed at use of the rights-of-way by utilities, which expressly requires utilities to relocate facilities at their own expense to accommodate public works projects.

Further, the Streetcar Resolution directs the Commissioner of Public Works to "coordinate and resolve utility issues" and allocates *no* funds to pay for utility relocation. While the Streetcar Resolution may not directly state that the affected utilities must relocate at their own expense, it does not have to, both because (a) the 1936 Ordinance already says that, and (b) the City has made clear that, in the City's view, that is the effect of their decision to authorize a "public works project" such as the Streetcar Project. (City Br. at 12-13, 28.) Thus, contrary to the City's suggestion (City Br. at 19-20), the Commission did not engage in any tenuous "chain of events" to assert jurisdiction over the municipal regulations at issue here. The impact of those regulations on the ATU Companies' right to use the rights-of-way is clear and direct.[11]

The meaning of the Commission's Final Decision is clear: the City cannot, in connection with the Streetcar Project, force the ATU Companies to relocate their facilities at their own expense. This is the result mandated by Wis. Stat. § 182.017(8)(as). The City asks illogical questions, contradicted by the clear language of the Final Decision, about whether this means the "entire" Streetcar Resolution is void, such that there is no authority remaining for the City to

[11] The City's hypothetical regarding a rezoning ordinance to permit a shopping mall is inapposite. If the mall were to increase traffic and that in turn required a road to be widened, forcing utilities in the right-of-way to relocate, the municipal resolution or order authorizing the road widening and forcing the utilities to relocate, not the earlier rezoning ordinance, would be subject to the Commission's review.

proceed at all or make any expenditure of funds, but the Court need not address those hypothetical questions. The City has not presented any ripe case or controversy regarding its hypothetical questions, and is merely asking the Court for an impermissible advisory opinion. *See, e.g., State v. Smith*, 2012 WI 91, ¶ 62 n.19, 342 Wis. 2d 710, 817 N.W.2d 410.

E. The Commission Properly Declared That Any Future City Regulations Requiring The ATU Companies To Bear Their Relocation Costs In Connection With The Streetcar Project Are Unreasonable And Void.

The City also complains about the portion of the Commission's decision declaring unreasonable and void any future City regulations that would require the ATU Companies to bear their relocation costs in connection with the Streetcar Project. (City Br. at 22-23.) The City's complaint misses the mark for a number of reasons.

First, the City has waived and is estopped from challenging this aspect of the Commission's decision, as the City itself asked the Commission to decide the reasonableness (and hence validity) of such future regulations. For example, in its August 14, 2012 Surreply Brief, the City expressly asked the Commission to "declare that the [1936 Ordinance] or *any other City regulation* that would require the Utility or ATU [Companies] to bear whatever relocation costs they might incur to accommodate construction of the Streetcar Project is not unreasonable." (R.34:21) (emphasis added). Having received an answer it did not like, the City cannot now turn around and suggest the Commission had no authority to make such a declaratory ruling.

Second, in Act 20 the Legislature clarified the definition of "municipal regulation" subject to Commission review to include regulations entered into, enacted, or issued in the future. In particular, the Legislature defined "municipal regulation" 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) (emphasis added).

Third, in asserting that the Commission lacked authority to address future regulations, the City ignores the Commission's authority to "issue a declaratory ruling with respect to the applicability to any person, property or state of facts or any rule or statute enforced by it." Wis. Stat. § 227.41(1). The controversy raised by the parties concerned not just the Streetcar Resolution and the 1936 Ordinance, but more broadly the question of "who pays" for utility relocations necessitated by the Streetcar Project. The Commission properly resolved that controversy by deciding the applicability of Wis. Stat. § 182.017(8)(as) to the persons and state of facts presented. The parties' rights are already fixed by statute (namely Wis. Stat. § 182.017), and hence the Commission properly declared that *any* City regulation that would require the ATU Companies to bear utility relocation costs in connection with the Streetcar Project would run afoul of Wis. Stat. § 182.017(8)(as).

Finally, the sole case the City relies upon has no application here. In *Rose Manor Realty Co. v. City of Milwaukee*, 272 Wis. 339, 344-45, 75 N.W.2d 274 (1956), no ordinance impacting the plaintiff had been enacted at all, and the plaintiff's claim was based solely "in anticipation of any event that may never happen," namely the potential future enactment of an ordinance. Here the parties' controversy is no mere hypothetical, because the 1936 Ordinance and the Streetcar Resolution are already on the books.

III. WIS. STAT. § 182.017(2) DOES NOT APPLY TO THIS CASE.

While the City argues that Wis. Stat. § 182.017(2) requires utilities not presently obstructing the right-of-way to 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 City argues in its initial brief that Wis. Stat. §§ 182.017(8)(as) and 196.58(4)(c) have no applicability to the

issues in this proceeding.[12] Even though each of those sections begins with the phrase "[n]othwithstanding s. 182.017(2),"[13] the City nonetheless argues that Wis. Stat. § 182.017(2) trumps those sections and establishes a superior right of municipalities to require utilities to relocate their facilities within the municipal right-of-way and pay all relocation costs. (City Br. at 23-30.) The Court should reject the City's argument, which is contrary to the plain language of the applicable statutes and is contrary to case law.

A. Wis. Stat. § 182.017(2) Has No Applicability To The Present Issue On The Allocation Of Utility Relocation And Modification Costs.

Contrary to the City's contention, Wis. Stat. § 182.017(2) does not address the question of which party should pay utility relocation costs. Again, the City confuses the issue of whether a utility must *relocate or modify* its facilities to accommodate a municipal project with the issue of whether the utility must *pay* for such relocation or modification. (City Br. at 24.) The Commission's Final Decision relates only to the allocation of *costs* for such relocation or modification.

The simple fact is that Wis. Stat. § 182.017(2) provides only 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 specific provisions of Wis. Stat. § 182.017(8) are negated by the general terms of Wis. Stat.

[12] The City has been inconsistent on this point during the course of these proceedings, before the Commission and now before this Court. In one of the City's first filings with the Commission in this matter, it admitted that the Commission has authority under Wis. Stat. § 196.58(4) to review the municipal regulations at issue in this proceeding, including Milw. Ord. § 115-22. (*See* R.6, City of Milwaukee's Initial Brief Addressing Jurisdictional Issues (Feb. 6, 2012).) However, in its final arguments to the Commission and again in its initial brief to this Court, the City claims that the ATU Companies have not identified any "municipal regulation" within the scope of the Commission's authority. (*See* R.48:5, City of Milwaukee's Response Brief in Opposition to Motions for Final Decision (Oct. 16, 2013); City Br. at 9.)

[13] To be precise, the first clause of Wis. Stat. § 182.017 reads "[n]othwithstanding sub. (2);" the first clause of Wis. Stat. § 196.58(4)(c) reads "[n]othwithstanding s. 182.017(2)".

§ 182.017(2) which, the City claims, obligates utilities to relocate their facilities in the municipal right-of-way at their expense to accommodate a public works project.

The City's argument is contrary to the plain terms of Wis. Stat. §§ 182.017(8) and 196.58(4), which make clear that those provisions trump the requirements of Wis. Stat. § 182.017(2). *See Wis. Indus. Energy Grp., Inc. v. Pub. Serv. 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. Stat. §§ 182.017(8)(as) and 196.58(4)(c), which prohibit such costs being imposed on certain users of municipal rights of way. The City, however, completely ignores the existence of the "notwithstanding" clause in Wis. Stat. §§ 182.017(8)(as) and 196.58(4)(c). Moreover, the City's attempted distinction between the terms "obstruct" and "incommode" in Wis. Stat. § 182.017(2) and the term "accommodate" in Wis. Stat. §§ 182.017(8) and 196.58(4) is a distinction without a difference and, further, is not supported by any legal authority. (City Br. at 29-30.)

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 any "public works project," 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 reviewable under Wis. Stat. §§ 182.017(8) or 196.58(4). That is because the municipality could always claim, as the City does here, that the obligation of the utility and its ratepayers to absorb such costs is contained in subsection (2) and not in a municipal regulation. 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).

In short, Wis. Stat. § 182.017(2) does not address the issue of who pays for the costs of modifying or relocating a utility facilities to accommodate a "public works project." As such, it does not allow the City to impose facility relocation costs on others.

B. Wisconsin Courts Have Uniformly Interpreted Wis. Stat. § 182.017(2) As A "Safety Statute" That Requires The Relocation Of Utility Facilities Only Where Necessary To Protect Public Safety.

Case law establishes Wis. Stat. § 182.017(2) has no applicability in this case because it is a "safety statute." 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.

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 plaintiff struck a guy wire installed by the defendant telephone company that sagged and obstructed the highway. The court found 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." *Id.* at 249. 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 29; see also *Weiss v. Holman*, 58 Wis. 2d 608, 617, 207 N.W.2d 660 (1973), *declined to follow on other grounds, In re E.J.H.*, 112 Wis. 2d 439, 334 N.W.2d 77 (1983) (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*.") (emphasis added).

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:

> 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.'[14]

Subsection (2) addresses public safety, 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

[14] *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). (*See* ATU Appx., Ex. 2.)

their own cost to accommodate a "public works project." The City's interpretation is contrary to the interpretation applied by Wisconsin courts, and must be rejected.

C. The City Misconstrues And Incorrectly Applies What It Refers To As The "Common Law" Applicable To This Case.

As it did before the Commission, the City makes the unsupported assertion that Wis. Stat. § 182.017(2) "embodies" case law, primarily from other jurisdictions, dating back to the early 1900s that required utilities to relocate their facilities located in the municipal right-of-way. (City Br. at 25-27.) The City contends that this earlier case law supports its argument regarding the interpretation of Wis. Stat. § 182.017(2). However, the City cites no authority, nor can it, for the assertion that Wis. Stat. § 182.017(2) itself "embodies" that case law or requires anything more than that utility use of the right-of-way cannot "obstruct or incommode" the public use. The City's digression into that earlier case law does not support its argument. In fact, applicable case law directly contradicts the City's position.

As a threshold matter, the City's suggestion that "common law" creates any duty here is unsupported. The rights of utilities to use the public rights-of-way do not stem from the common law, but are governed by statute, such as Wis. Stat. § 182.017. And, in enacting Wis. Stat. § 182.017(8)(as), the Legislature determined that an urban rail transit system is not the sort of municipal project for which utilities (and ultimately utility customers) should be required to bear the costs of relocating existing facilities in the public rights-of-way.

In any event, whatever the rule may be in other jurisdictions, in Wisconsin the common law rule has never broadly required utilities to bear relocation costs in connection with all municipal projects. To the contrary, the Supreme Court of Wisconsin held that municipalities have no inherent right to require utilities to bear relocation costs when they are acting in a proprietary capacity. *Milwaukee Electric*, 209 Wis. 656, 666, 245 N.W. 756 (1932). In reaching this conclusion, the Court quoted with approval: "'The 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.'" *Id.* at 666 (quoting *N.Y. & Queens Elec. Light & Power Co. v. City of N.Y.*, 224 N.Y.S. 564 (App. Div. 1927)). Several decades later, the decision in *Milwaukee Electric* was followed when the Supreme Court of Wisconsin held that Marathon County was required to reimburse utilities for the costs of relocating power lines for the construction of an airport. *Wis. Pub. Serv. Corp. v. Marathon Cnty.*, 75 Wis. 2d 442, 249 N.W.2d 543 (1977).

The City cannot contest this clear, binding precedent that requires the City to pay utility relocation costs to accommodate the Streetcar Project. The Commission succinctly and correctly distinguished the other authorities relied on by the City:

> The City's reliance on *Wisconsin Power & Light Co. v. Gerke*, 20 Wis. 2d 181, 121 N.W.2d 912 (1963) also does not support its position. There is no mention of Wis. Stat. § 182.017(2) (or its predecessor statute) in this case; the dispute was between a utility and a state contractor (not a municipality), and its relevance to the present dispute questionable. Even less helpful is the citation to the New Jersey supreme court decision, *Port of N.Y. Auth. v. Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1, 5 (1963). While the Commission may consider case law in other jurisdictions, it is not binding precedent. *See State v. Muckerheide*, 2007 WI 5, ¶ 7, 298 Wis. 2d 553, 725 N.W.2d 930.

(R.78:32.) The City also selectively omitted key language from *Port of New York Authority v. Hackensack Water Co.*, which noted that the utilities in that case "placed their property in the public ways under the authority of acts of the Legislature" and that "the utilities must pay the costs here involved unless . . . the Legislature has decreed that the [municipality] absorb the costs . . ." 41 N.J. 90, 95, 101, 195 A.2d 1, 4, 7 (N.J. 1963). Here, that is precisely what the Legislature had decreed in Wis. Stat. § 182.017(8)(as).

Rather than refer to these binding Wisconsin authorities, the City looks to other authorities that do not reach the specific issue in this case. The *New Orleans Gaslight* case was a takings case and did not involve the interpretation of state statutes as in the present case. The

City further overstates the holding in that case, which simply found that construction of a drainage system was undertaken consistent with the city's police power because it was "in the interest of the public health and welfare . . ." *New Orleans Gaslight Co. v. Drainage Comm'n*, 197 U.S. 453, 460 (1905). *New Orleans Gaslight* is consistent with the common law in Wisconsin for at least the past 80 years that public utilities are not required to pay the costs to relocate their facilities in the municipal right-of-way to accommodate proprietary municipal projects such as a streetcar project. *See Milwaukee Elec. ,* 209 Wis. 656.

Here, in Wis. Stat. §§ 182.017 and 196.58, the Legislature defined when municipalities should bear the costs of utility relocation, including specifically when those costs are caused by the construction of an urban rail transit system, such as the Streetcar Project. Nothing in the "common law" cited by the City supports its position that utilities must, in all cases, pay to relocate their facilities in the municipal right-of-way to accommodate a so-called "public works project."

D. The City's Inconsistent Positions Regarding Wis. Stat. § 182. 017(2) Undermine Its Current Interpretation of That Statute.

The City has not always supported the broad interpretation of Wis. Stat. § 182.017(2) that it now espouses. In fact, the City's position with regard to that subsection has been so inconsistent as to destroy any credibility it seeks to attach to its most recent position:

- The City initially did not cite Wis. Stat. § 182.017(2) in support of its position at all. [15] 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, 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.[16]

- The City also previously accused the ATU Companies of "using the Commission as their forum in which to effect a change in law" to void a municipal regulation

[15] *See* R.71:¶ 3.a, City of Milwaukee's Motion for Leave to Respond and Request for Decision (Apr. 15, 2013).

[16] *See* R.48:5-7, City of Milwaukee's Response Brief in Opposition to Motions for Final Decision (Oct. 16, 2013).

that "can only be done at the legislative level."[17] Yet after the Legislature acted through Act 20, and expressly subjugated the provisions of Wis. Stat. § 182.017(2) to the Commission's voiding authority under Wis. Stat. § 182.017(8), the City claimed this had no effect on the City's efforts.[18]

- The City initially argued that the municipal regulations related to the Streetcar Project were an exercise of the police power.[19] Later, the City argued (incorrectly) that Wis. Stat. § 182.017(2) is dispositive and that the police power and the City's regulations are irrelevant.[20]

Therefore, City first conceded the Commission's jurisdiction then challenged it. The City treated Wis. Stat. § 182.107(2) as inapposite and then dispositive.. The fact that the City at one time made arguments that would have fully supported the Commission's Final Decision underscores the reasonableness and propriety of the Final Decision, which must be affirmed.

IV. THE CONSTITUTIONAL ISSUE RAISED BY THE CITY HAS NO MERIT.

The City argues that certain provisions of Act 20 violate the Wisconsin Constitution's prohibition on private or local bills under Article IV, Section 18. (City Br. at 31-39.) The Court should reject this argument for at least two reasons. First, as an arm of the State, the City does not have standing to challenge the constitutionality of Act 20. Second, substantively, the City's argument lacks merit. Consequently, the Court should affirm the Final Decision.

A. The City Lacks Standing To Challenge The Constitutionality Of Act 20.

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); *Columbia Cnty. v. Bd. of Trs. 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.").

[17] *See* R.29:2, City of Milwaukee's Response Brief (Jul. 9, 2012).

[18] *See* R.48:5, City of Milwaukee's Response Brief in Opposition to Motions for Final Decision (Oct. 16, 2013).

[19] *See* R.29:48, City of Milwaukee Response Brief (Jul. 9, 2012).

[20] *See* R.48:6, City of Milwaukee's Response Brief in Opposition to Motions for Final Decision (Oct. 16, 2013).

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.*; *see also Associated Hosp. Serv., Inc. v. City of Milwaukee*, 13 Wis. 2d 447, 109 N.W.2d 271 (1961).

Although certain exceptions to this rule exist, none of those exceptions are applicable in a proceeding involving a municipality seeking judicial review of a determination by a state agency. *See State ex rel. City of La Crosse v. Rothwell*, 25 Wis. 2d 228, 233, 130 N.W.2d 806 (1964) ("these exceptions apply only to cases between private litigants and a municipality or state agency and not to suits between agencies of the state, or between an agency or municipal corporation and the state.") In *City of Eau Claire v. Dept. of Nat. Resources*, 60 Wis. 2d 751, 210 N.W.2d 771 (1973), the Supreme Court of Wisconsin held, in the context of a judicial review proceeding under Wis. Stat. ch. 227, that "[i]n a case between a state agency and a municipal corporation, the constitutionality of a statute may not be questioned by either party." *Id*. at 751-52.

The involvement of other interested parties does not change this result. In *County of Dane v. Dept. of Health & Social Servs.*, 79 Wis. 2d 323, 255 N.W.2d 539 (1977), a county sought judicial review of a determination by the Department of Health and Social Services. Citing multiple authorities, the court concluded that the "no-standing" rule applied to bar any challenge to the constitutionality of the Department's action by an arm of the state, such as a municipality or a county. The county sought to exploit an exception to this rule by arguing that the "real parties in interest" in the case were the private individuals who originally challenged the county's actions. The Supreme Court of Wisconsin rejected that argument, holding that "although the Pabsts may or may not benefit by its outcome, this suit concerns the power of the

DHSS in relation to the county, and not the rights of the Pabsts. Thus, the exceptions to the no-standing rule, . . . cannot be applied in this case." *Id*. at 331.

The Supreme Court of Wisconsin's holding in *City of Kenosha* is dispositive here, and demonstrates that the City does not have standing to challenge the constitutionality of Act 20. In *City of Kenosha*, a state statute required cities and villages over 10,000 in population to purchase voting machines. The common council of the city of Kenosha passed an ordinance pursuant to the home-rule provisions of the Wisconsin Constitution which provided that the City of Kenosha "elected not to be governed by" that statute. The City of Kenosha then commenced an action for a declaratory judgment to determine the validity of the ordinance and challenging the constitutionality of the statute. On appeal, the Supreme Court of Wisconsin addressed the city's standing to challenge the constitutionality of a statute *City of Kenosha*, 35 Wis. 2d at 330 (quoting *Columbia Cnty.*, 17 Wis. 2d 310). The court confirmed that the exceptions to the no standing rule did not apply because the action involved a matter between a municipality and a state agency, and affirmed the dismissal of the City of Kenosha's action. *Id*. at 332.

Here, this chapter 227 judicial review proceeding involves the City's appeal of a final decision by another arm of the state, *i.e.*, the Commission. This circumstance falls squarely within the "no standing" rule as described in the multiple cases cited above, which involved actions (including chapter 227 judicial review proceedings) between municipalities and state agencies. The fact that certain "municipal regulations" are implicated does not change the applicability of the "no standing" rule, as the *City of Kenosha* case demonstrates. Consequently, the City lacks standing to challenge the constitutionality of Act 20.

Even if the exceptions to the "no standing" rule are considered, they would not apply to allow the City to challenge the constitutionality of Act 20. There are two exceptions to the no standing rule: an arm of the state can challenge the constitutionality of a statue in a case

involving a private litigant if (1) it is the agency's official duty to do so, or the agency will be personally affected if it fails to do so and the statute is held invalid, and (2) if the issue is of "great public concern." *Rothwell*, 25 Wis. 2d at 233. The first exception has been applied where personal or property rights of government officials are involved. *See Fulton Foundation v. Wis. Dep't of Taxation*, 13 Wis. 2d 1, 11-12, 108 N.W.2d 312 (1961). Further, procedural statutes that grant a municipality the capacity to sue to protect its interests do not comprise a statement of an agency's "official duty" to challenge a statute. *See City of Madison v. Ayers*, 85 Wis. 2d 540, 544, 271 N.W.2d 101 (1978). Here, the City does not have an official duty to challenge an act of the Legislature that created it, and the City and its officials will not be "personally affected" if they fail to challenge the statute yet it is ultimately held invalid.

Moreover, the "great public concern" exception also does not apply. The "great public concern" exception can be invoked only in "exceptional situations" and "has been applied sparingly." *See Fulton*, 13 Wis. 2d at 13 and Ayers, 85 Wis. 2d at 545-46. For example, it has been considered and held inapplicable in cases involving a town's challenge to the constitutionality of a statute providing for annexation of town islands, (*Town of Germantown v. Vill. of Germantown*, 70 Wis. 2d 704, 235 N.W.2d 486 (1975)); a challenge to statute requiring that all territory within the state be within school districts operating high schools, *Rothwell*, 25 Wis. 2d 228; a challenge to mandatory inclusion of twenty-six counties in retirement program which had not voluntarily become subject to the Wisconsin Retirement Fund, *Columbia County* , 17 Wis. 2d 310; and a challenge to the negative aid provisions of the school finance law as violative of the rule of uniform taxation mandated by the state constitution, *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

In *Associated Hospital v. City of Milwaukee*, a hospital commenced an action against the City of Milwaukee to recover real and personal property taxes that had been paid under protest,

on the basis that a state statute exempted the hospital's property. The city responded to the complaint by contending, among other things, that the statute was unconstitutional. The Supreme Court of Wisconsin addressed the applicability of the "great public concern" exception to the no standing rule. The court opined that under the narrow circumstances of that case, in a lawsuit seeking a tax refund from the city, the city "stands here in a representative capacity and in behalf of its resident taxpayers, who might be adversely affected if such statute is made effective as to plaintiff's property . . ." 13 Wis. 2d at 469. The court, therefore, found under that specific set of facts the issue involved a matter of "great public concern" in those limited circumstances, and allowed the city to challenge the property tax exemption.

Associated Hospital is inapposite; the narrow "great public concern" exception crafted by the court in that case has no applicability here. In this case the City is not acting in a representative capacity on behalf of taxpayers challenging a taxation regulation. This case does not present a situation where existing funds held by the City will be involuntarily depleted unless the court allows the City to challenge Act 20. Rather, this case involves a construction project that the City has freely chosen to pursue. Moreover, the mandate of Act 20 will not affect the costs to the City of the Streetcar Project, given the additional funds already allocated for utility costs under the revised resolution and the significant alternative funding sources that the City already has tapped into. Although the City may claim that its costs will increase if Act 20 stands, it could make that same argument in attacking any statute that affects how the City operates. Yet, allowing such circumstances to comprise a "great public concern" would cause that exception - which has been used only "sparingly" - to swallow the "no standing" rule.

Pursuant to the "no standing" rule, the City lacks standing the challenge the constitutionality of the Act. None of the exceptions to the "no standing" rule are available in the context of this proceeding for judicial review of a state agency determination. Even if they were

available, none of them would apply. Accordingly, the Court should reject the City's attack on the constitutionality of Act 20.

B. Act 20 Is Not A Private Or Local 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." The City argues that the provisions of Act 20 at issue in this case 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. This constitutional provision addresses the form in which legislation is enacted and not its substance. *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998). A court must address two issues in determining whether a bill violates Article IV, Section 18: (1) whether the bill carries a presumption of constitutionality and (2) whether the bill is "private or local." *Davis v. Grover*, 166 Wis. 2d 501, 520, 480 N.W.2d 460 (1992). Here, the City fails to afford Act 20 a presumption of constitutionality and then misapplies the five-part *Brookfield* test for determining whether a bill is private or local. Under an appropriate application of the five-part *Brookfield* test, Act 20 should be found constitutional.

1) Act 20 is presumptively constitutional.

The first part of the test asks whether the legislature adequately considered and discussed a measure included in a multi-subject bill before it was passed; if so, the legislation carries a presumption of constitutionality. *Id*. at 524. The general rule in Wisconsin is that a statute is presumed to be constitutional and "the burden of establishing the unconstitutionality of a statute is on the person attacking it, who must overcome the strong presumption in favor of its validity." *Id*. (quoting *ABC Auto Sales v. Marcus*, 255 Wis. 325, 330, 38 N.W.2d 708 (1949)). This

presumption of constitutionality was recognized in the article IV, section 18 context in *Soo Line Railroad Co. v. Department of Transportation*, 101 Wis. 2d 64, 76, 303 N.W.2d 626 (1981).

A court can apply the presumption of constitutionality "even where such legislation was passed as part of a voluminous bill." *See City of Oak Creek v. Dep't of Nat. Res.*, 185 Wis. 2d 424, 437-38, 518 N.W.2d 276 (Ct. App. 1994). The fact that a provision is included as part of the multi-subject biennial budget bill is not determinative. *Lake Country Racquet & Athletic Club, Inc. v. Morgan*, 2006 WI App 25, ¶¶ 19-20, 289 Wis. 2d 498, 710 N.W.2d 701. Instead, if legislation is "passed after full consideration . . . that will be the proper time to engage in the presumption of constitutionality" and the party challenging the statute bears the burden of overcoming that presumption. *Davis*, 166 Wis. 2d at 524 (quoting *Brookfield v. Milwaukee Sewerage*, 144 Wis. 2d 896, 918-19, 426 N.W.2d 591 (1988)). Attaching the presumption of constitutionality to a statute honors the judicial interest in not erring "by substituting our judgment for that of an attentive legislature. . ." *Id.* (quoting *Brookfield*, 144 Wis. 2d at 918-19 n.6.

In this case, Rep. Dale Kooyenga announced on March 27, 2013 his intention to introduce legislation to clarify Wisconsin law relative to urban rail transit systems. (*See* R.47:Ex. A, ATU [Companies]' Br. in Support of Motion for Final Decision.) The potential effect of this legislation on the Streetcar Project was clear, and Rep. Kooyenga's announcement gained immediate attention in the media, including in the Milwaukee market by Milwaukee's largest newspaper, The Milwaukee Journal Sentinel.[21] The office of the Mayor of Milwaukee, the primary proponent of the Streetcar Project, immediately reacted to and provided comment

[21] *See* ATU Appx. Exs. 14 and 15, comprised of newspaper articles publicizing Rep. Kooyenga's proposed legislation. The ATU Companies respectfully request that the Court take judicial notice of these newspaper articles and the other newspaper articles, press releases, and voting records identified in the ATU Appendix. *See Sliwinski v. City of Milwaukee*, 2009 WI App 162, ¶ 4 n.2, 777 N.W.2d 88, 321 Wis. 2d 774 (Court of Appeals takes judicial notice of a payment approved by the City of Milwaukee Common Council, based upon media reports of that event, including a report by the online version of the Milwaukee Journal Sentinel).

concerning Rep. Kooyenga's legislation.[22] Other local elected officials similarly immediately reacted to Rep. Kooyenga's well-publicized announcement.[23] Approximately six weeks later, on May 9, 2013, the Wisconsin Legislature's Joint Finance Committee considered and acted on Rep. Kooyenga's legislation,[24] and passed it on a 12-4 vote. It took another six weeks before the Wisconsin Assembly and Senate voted in favor of Act 20 on June 20 and 21, 2013, respectively.[25] A press release, robust media coverage, engagement by opponents of proposed legislation, and weeks of legislative process is hardly indicia of legislation being "smuggled" into a general bill, as the City baselessly contends. Act 20, therefore, carries a presumption of constitutionality.

2) <u>Act 20 is not a private or local law.</u>

After the presumption has been determined, the second part of the test considers whether the legislation is "private or local." *Davis*, 166 Wis. 2d at 520. Challenges pursuant to Article IV, Section 18 include both cases under which the challenged legislation is specific on its face to a particular person, place, or thing and cases challenging legislation that, while not specific on its face, creates a classification that is so limited in scope as to constitute a private or local law. *Grp. Health Coop. of Eau Claire v. Wis. Dept. of Revenue*, 229 Wis. 2d 846, 601 N.W.2d 1 (Ct. App. 1999). Where legislation involves classifications, courts analyze the five elements of the *Brookfield* test, of which only three are at issue:

1) The classification employed by the legislature is based on substantial distinctions which make one class really different from another.

2) The classification adopted is germane to the purpose of the law.

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[22] *Id.*

[23] *See* ATU Appx. Ex. 13.

[24] *See* ATU Appx. Exs. 16 and 17.

[25] *See* ATU Appx. Exs. 18 and 19.

3) When a law applies to a class, it applies equally to all members of the class. *Davis v. Grover*, 166 Wis. 2d at 525; *Brookfield*, 144 Wis. 2d 896.

First, the City contends that Act 20 created two kinds of classifications that, the City argues, are not based on "substantial distinctions": (i) urban rail transit systems versus all other public works projects, and (ii) urban rail transit systems that began service before July 2, 2013 and those that began service on or after July 2, 2013. (City Br. at 36-38).[26] In support of its contention regarding the first classification, the City claims that urban rail transit systems are no different than other public works projects, like municipal sewer construction projects, "for which the Companies must pay their own relocation costs." The City is wrong, however, in assuming that companies would have to pay their own relocation costs for every sewer construction project. Rather, the same process involving Commission consideration of reasonableness as has been applied in this case could be applied with regard to such projects upon an appropriate complaint.

In addition, it is difficult to imagine two more different projects than a sewer and an urban rail system, in terms of purpose, location, design, impact, need, and ultimate use, all of which affect whether and how the public right of way and its users would be impacted, and the reasonableness of those impacts. The Legislature has made a reasonable determination that urban rail transit systems merit consideration that is different than that applicable to other kinds of public works projects (such as sewers), and there is no basis for this Court to overturn that determination.

[26] The ATU Companies 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. Accordingly, the result is the same for both "classes" of urban rail transit systems. For purposes of argument, however, the ATU Companies address the elements of the *Brookfield* test in relation to Act 20.

Moreover, as for the temporal classification, classifications based on the date when a facility is operational are permissible under Article IV, Section 18. For example, in *Pace v. Oneida County*, 212 Wis. 2d 448, 454-56, 569 N.W.2d 311 (Ct. App. 1997), the Court of Appeals applied Article IV, Section 18 and upheld the validity of a statute that differentiated between boathouses destroyed before 1984 and after 1984, finding that owners of boathouses destroyed before 1984 likely has already accommodated that loss. The court concluded that:

> This classification is reasonable and does not violate the *Brookfield* criteria because it is a classification based upon meaningful factors that distinguish pre-1984 owners from those who have suffered a loss of their boathouse by natural forces since that date.

Id. at 455

Similarly, Act 20 protects the investment-backed expectations of urban rail transit systems in operation before the effective date of the law - such as the Kenosha urban rail system identified by the City in its Initial Brief (City Br. at 38) - by continuing to subject them to the regulatory scheme in effect at the time the system was constructed.[27] 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 contemplated at the time the system was constructed. Moreover, had the Legislature not included an express prospective application provision in Act 20, the statute would have been subject to attack as having a prohibited retrospective effect. *See State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 172, 580 N.W.2d 203 (1998). Accordingly, distinguishing between projects operational before and after the effective date of the bill is reasonable and constitutional.

[27] The City's argument that a proposed extension of the Kenosha urban transit system will not be subject to Act 20 and, that this demonstrates unacceptably different treatment, is not supported and purely speculative. (*See* City Br. at 38.) Nothing in Act 20 suggests that extensions of existing urban rail systems are somehow immune from Act 20.

Second, to be "germane," the classification "must be closely akin to, or have a close relationship with, the purposes of the provisions." *Pace*, 212 Wis. 2d at 455 (germaneness factor satisfied where bill was part of an overall legislative scheme). In this case, both classifications identified by the City are germane to the purpose of Act 20 because the clarification of the law applicable to utility relocation and modification costs that Act 20 provided is part of an overall legislative scheme: the regulation of users of municipal rights-of-way. The rights and regulation of utilities have long been addressed in an overall legislative scheme. *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). 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.

Finally, the City contends that the classification based upon the "in service" date of an urban rail system fails to treat all members of that class equally. (City Br. at 39.) This argument simply does not make sense. All urban rail transit systems that begin service after July 2013 are necessarily within the class created by Act 20 and all are treated equally. The City does not identify or even theorize how such class members are treated unequally. The *Brookfield* factor, requiring a law that applies to a class apply equally to all members of the class, is satisfied. *See, e.g., Davis*, 166 Wis. 2d at 536 (factor satisfied even though there was only currently one member of the class, where the benefits and obligations of the law would apply equally to additional members).

Accordingly, the City's constitutional argument fails. Act 20 does not constitute a private or local bill. The Court should therefore affirm the Final Decision.

CONCLUSION

For the foregoing reasons, the ATU Companies ask that the Court affirm the Final Decision in its entirety.

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