CITY OF MILWAUKEE, a Municipal Corporation,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent.

DECISION AND ORDER

This administrative review action arises out of the August 29, 2014 Final Decision (the "Final Decision") of the Public Service Commission of Wisconsin (the "Commission") in Petition of Brett Healy for Declaratory Ruling to Determine Allocation of Costs for Relocation of Utility Structures for Milwaukee Streetcar Project, PSC Docket 5-DR-109. The City of Milwaukee (the "City"), seeks reversal of the Final Decision, which holds that the City must pay the cost of relocating or modifying existing utility facilities as may be required for the Milwaukee Streetcar Project (the "Streetcar Project"), or in the alternative, that the Urban Rail Amendments (defined below) are unconstitutional private laws under article IV, § 18 of the Wisconsin Constitution. The Court has reviewed the record and the briefs, and for the reasons stated herein, affirms in part and reverses in part the Commission’s decision and denies the City’s constitutional claim for lack of standing.

INTRODUCTION

This administrative review action arises out of the August 29, 2014 Final Decision in Petition of Brett Healy for Declaratory Ruling to Determine Allocation of Costs for Relocation of Utility Structures for Milwaukee Streetcar Project, PSC Docket 5-DR-109. The City seeks reversal of the Final Decision, which holds that the City must pay the cost of relocating or modifying existing utility facilities as may be required for the Streetcar Project.

The City plans to build a streetcar in downtown Milwaukee. The proposed Streetcar Project is a 2.1 mile fixed guideway transit system. There are underground utility lines and other
utility facilities that will need to be relocated or reinforced along the streetcar alignment. The City, in its planning for the Streetcar Project, did not include the cost of relocating or modifying existing utility structures located in public rights-of-way, which will be displaced by the Streetcar Project. The City estimates the cost of potential relocations and modifications at $10 million to $25 million.

While this matter was pending before the Commission, the Wisconsin Legislature amended the statutes at issue, Wis. Stat. §§ 182.017 and 196.58, as part of the 2013 biennial budget bill, 2013 Wisconsin Act 20. Those amendments (collectively, the “Urban Rail Amendments”) provide in part that it is unreasonable for a municipality to require companies or utilities to pay any part of the relocation or modification costs to accommodate an urban rail transit system.

Therefore, as to the responsibility for the relocation costs, the Decision holds as follows:

Any current or future municipal regulations as defined by Wis. Stat. § 182.017(1g)(bm) of the City that require the ATU Petitioners 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).

(Final Decision at 33).

BACKGROUND & PROCEDURAL HISTORY

On October 5, 2011, Brett Healy ("Healy") filed a petition with the Commission seeking a declaratory ruling under Wis. Stat. §§ 227.41 and 196.58(4). Healy’s petition sought a declaration that public utility ratepayers would not be responsible for the cost of modifying or relocating utility facilities to accommodate the Streetcar Project, and that the City must bear these costs instead. Subsequently, the Commission allowed the City, the ATU Companies,¹ the Utilities,² the League of Municipalities, and the Council for Small Business Executive to intervene.

¹ In this decision, “ATU Companies” refers to the following entities: Wisconsin Bell, Inc. (d/b/a AT&T Wisconsin), Time Warner Cable LLC, Wisconsin Cable Communications Association, tw telecom of Wisconsin I.P., PAETEC Communications, Inc., McLeodUSA Telecommunications Services, LLC, and Norlight Telecommunications, Inc. (n/k/a Windstream NTI, Inc.). The ATU Companies are referred to as the ATU Petitioners in the Final Decision.
² In this decision, “Utilities” refers to the following entities: Wisconsin Electric Power Company (d/b/a We Energies), Wisconsin Gas LLC, and American Transmission Company.
Healy had filed his petition on his own, seeking a ruling under Wis. Stat. § 196.58, which authorizes the Commission to act in response to a “qualified complainant,” a group of twenty-five or more people. Therefore, the Commission allowed Healy to supplement his petition with affidavits from additional affected utility ratepayers. Healy did so on May 3, 2012, adding thirty-five individuals as parties to the proceeding before the Commission. In its March 2, 2012 order, the Commission concluded that the ATU Companies could not participate under Wis. Stat. § 196.58 due to a recent statutory change, but invited them to seek a declaratory ruling pursuant to Wis. Stat. § 182.017(8). Each of the ATU Companies then filed verified petitions seeking relief under § 182.017(8). At that point, the Commission merged the legal issues under Wis. Stat. §§ 182.017(8) and 196.58.

The Commission instructed the parties to address the following three legal issues:

1. Assuming that Milw. Ord. § 115-22 was already in effect when the public utilities installed facilities that will be permanently modified or relocated as a result of the streetcar project, does the City of Milwaukee have the right to require permanent modification or relocation of the public utilities’ facilities at the utilities’ cost?

2. Is the City of Milwaukee’s Construction of a streetcar project the exercise of the municipality’s police powers?

3. Is Milw. Ord. § 115-22, or any other contract or resolution the City of Milwaukee uses to impose a permanent modification or relocation cost on a public utility for the streetcar project, unreasonable under Wis. Stat. § [sic] 182.017(8) or 196.58(4), the rules implementing Wis. Stat. §§ 182.017 or 196.58, or any other applicable statutes or rules cited in a petition?

(Final Decision at 7). Briefing on these issues began on May 24, 2012 and concluded on August 14, 2012. The matter was thereafter referred to the Administrative Law Judge (“ALJ”) for further proceedings. The ALJ convened a second prehearing conference on January 24, 2013, at which the ALJ determined the issues for the hearing. The ALJ accepted the issues presented by the ATU Companies and rejected the City’s issues list. After the second prehearing conference, the City filed a request for interlocutory review and a motion to dismiss. In these filings, submitted on February 18, 2013 and March 18, 2013, the City argued for the first time that no municipal regulation requires the utilities to relocate their facilities, but that Wis. Stat. § 182.017(2), by itself, forces the utilities to move at their own expense. After another round of briefing on this new issue, the City requested that the Commission render a decision on the merits on April 15, 2013.
The Urban Rail Amendments became effective on July 2, 2013. The law change resulted in the parties filing additional motions and briefs. The Commission discussed the pending motions at its open meeting on April 23, 2014, and issued its final decision on August 29, 2014. On September 17, 2014, the City petitioned the Commission for a rehearing pursuant to Wis. Stat. §§ 196.39 and 227.49. The Commission took no action on the petition for rehearing, and therefore, it was denied by operation of law on October 17, 2014. The City filed its petition for judicial review with the Court on November 17, 2014.

In order to comply with the requirements of Wis. Stat. § 227.47 and 227.53, the City served all parties listed in Appendix A to its petition. The statutory deadline for the Commission to file a statement of position and return the record was amended twice by stipulation of the parties before the Commission filed them on February 5, 2015 and February 18, 2015, respectively. A briefing schedule was issued by the Court on March 13, 2015. The briefing schedule was amended twice in April of 2015 at the request of the parties.

On July 6, 2015, the Attorney General filed a motion to intervene on behalf of the Wisconsin Department of Justice in order to defend 2013 Wisconsin Act 20, which contains the Urban Rail Amendments. No party objected to the Attorney General’s motion to intervene, and the Court therefore granted the motion on July 20, 2015. The briefing schedule was amended again to allow the Attorney General to file a brief on behalf of the State. Briefing in this matter would have concluded on August 31, 2015, with the City filing its reply brief. However, supplemental briefs were filed on September 21, 2015 and September 24, 2015 to address the recent Court of Appeals decision in Black v. City of Milwaukee, 2015 WI App 60, 364 Wis. 2d 626, 869 N.W.2d 522 review granted sub nom. Milwaukee Police Ass’n v. City of Milwaukee (Wis. Nov. 4, 2015), which the City cited in its reply brief.

This case was assigned to this Court, effective December 1, 2015. Oral arguments limited to the issues presented in the briefs were held on December 7, 2015.

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3 Wis. Stat. § 227.53(1)(c) provides that “[a] copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party’s attorney of record.”
STANDARD OF REVIEW

A. The Scope of the Commission’s Jurisdiction is Reviewed De Novo

The City challenges the Commission’s jurisdiction to declare the Resolution and the Ordinance unreasonable and void. Review of an agency’s decision as to whether it has the authority to hear an appeal presents a question of law, which is reviewed de novo. Kriska v. Wisconsin Employment Relations Comm’n, 2008 WI App 13, ¶ 7, 307 Wis. 2d 312, 745 N.W.2d 688 (citing Loomis v. Wisconsin Pers. Comm’n, 179 Wis. 2d 25, 30, 505 N.W.2d 462 (Ct.App.1993)). Under de novo review, the reviewing court affords no weight to the agency’s decision. Barron Elec. Co-op. v. Pub. Serv. Comm’n of Wis., 212 Wis. 2d 752, 763, 569 N.W.2d 726 (Ct. App. 1997).

ANALYSIS

I. Whether the Commission Exceeded the Scope of its Jurisdiction

The City argues that the Commission exceeded the scope of its jurisdiction in reviewing the Resolution and the Ordinance. The Commission’s power to act is limited by statute. Friends of the Earth v. Public Serv. Comm’n, 78 Wis. 2d 388, 400, 254 N.W.2d 299 (1977). The Commission “has only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates.” City of Oak Creek ex rel. Water & Sewer Util. Comm’n v. Pub. Serv. Comm’n of Wisconsin, 2006 WI App 83, ¶ 22, 292 Wis. 2d 119, 716 N.W.2d 152 (quoting Kimberly–Clark Corp. v. Public Serv. Comm’n, 110 Wis. 2d 455, 461–62, 329 N.W.2d 143 (1983)). The Commission “may exercise only such power ‘as is expressly or by inference conferred upon it’ by statute.” Friends of the Earth, 78 Wis. 2d at 400 (quoting Eau Claire v. Wisconsin-Minnesota Light & Power Co., 178 Wis. 207, 215, 189 N.W. 476 (1922)).

In this matter, the extent of the Commission’s jurisdiction is established by Wis. Stat. §§ 182.017 and 196.58, which set out the rights and duties of public utilities and telecommunication companies to use the public rights-of-way, the authority of municipalities to regulate such use of the public rights-of-way, and the Commission’s authority to determine the reasonableness of municipal regulations. Specifically, § 196.58 grants authority to municipalities to regulate “public utilities,” which are defined as:

[E]very corporation, company, individual, association, their lessees, trustees or receivers appointed by any court, and every sanitary district, town, village or city that may own, operate, manage or control any toll bridge or all or any part of a plant or equipment, within the state, for the production,
transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public.

Wis. Stat. § 196.01(5)(a). The definition of “public utility” specifically excludes telecommunication companies. On the other hand, § 182.017 lays out the rights and obligations of “companies,” which includes both public utilities and telecommunication companies.

Under Wis. Stat. § 196.58(1r)(a), a municipality may:

Determine by municipal regulation the quality and character of each kind of product or service to be furnished or rendered by any public utility within the municipality and all other terms and conditions, consistent with this chapter and ch. 197, upon which the public utility may be permitted to occupy the streets, highways or other public places within the municipality. The municipal regulation shall be in force and on its face reasonable.

“Municipal regulation” is defined as “any contract, ordinance, resolution, order, or other regulation entered into, enacted, or issued by a municipality before, on, or after July 2, 2013.” Wis. Stat. § 182.017(1g)(bm). The statute grants the Commission jurisdiction to review the reasonableness of such regulations upon complaint made by a public utility. Wis. Stat. § 196.58(4)(a) (“Upon complaint made by a public utility or by any qualified complainant under s. 196.26, the commission shall set a hearing and if it finds a municipal regulation under sub. (1r) to be unreasonable, the municipal regulation shall be void.”). While municipal regulations are presumed reasonable under sub. (1r), the legislature amended § 196.58, effective July 2, 2013, to provide that:

[A] municipal regulation is unreasonable . . . if it requires a public utility, telecommunications provider, or video service provider to pay any part of the cost to modify or relocate the public utility's, telecommunications provider's, or video service provider's facilities to accommodate an urban rail transit system.”

Wis. Stat. § 196.58(4)(c).

Wis. Stat. § 182.017 is identical to § 196.58 in operation, as pertains to this case. It allows for “companies” to use public rights-of-way, subject to “reasonable regulations” imposed by municipalities.

Any company may, subject to ss. 30.44(3m), 30.45, 86.16, and 196.491(3)(d)3m, and to reasonable regulations made by any municipality through which its transmission lines or systems may pass, construct and maintain such lines or systems with all necessary appurtenances in, across or beneath any public highway or bridge or any stream or body of water, or upon any lands of any owner consenting thereto, and for such purpose may acquire lands or the necessary easements; and may connect and operate its
lines or system with other lines or systems devoted to like business, within or without this state, and charge reasonable rates for the transmission and delivery of messages or the furnishing of heat, power, or electric light.

Wis. Stat. § 182.017(1r) (emphasis added). Immediately following the above, the statute provides 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.” Wis. Stat. § 182.017(2). Section 182.017 also provides for review by the Commission:

Upon complaint by a company that a regulation by a municipality under sub. (1r) is unreasonable, the commission shall set a hearing and, if the commission finds that the regulation is unreasonable, the regulation shall be void. Subject to pars. (am) to (c), if the commission determines that a municipal regulation that was in effect on January 1, 2007, and immediately prior to January 9, 2008, or that a community standard, as demonstrated through consistent practice and custom in the municipality, that was in effect on January 1, 2007, and immediately prior to January 9, 2008, is substantially the same as the municipal regulation complained of, there is a rebuttable presumption that the latter regulation is reasonable.

Wis. Stat. § 182.017(8)(a).

Further, the Urban Rail Amendments added that despite Wis. Stat. § 182.017(2), a municipal regulation is considered unreasonable if it requires the utilities to pay any part of the cost to modify or relocate its facilities to accommodate an urban rail transit system. Wis. Stat. § 182.017(8)(am) (“Notwithstanding sub. (2), a municipal regulation is unreasonable if it requires a company to pay any part of the cost to modify or relocate the company’s facilities to accommodate an urban rail transit system.” (emphasis added)).

The City argues that it has taken no action over which the Commission has jurisdiction, but that the utilities are responsible for the relocation and modification costs by virtue of Wis. Stat. § 182.017(2). The City claims that the Utilities and ATU Companies must move their facilities at their expense so as not to “obstruct or incommode” public works projects. However, the text of the statute makes no mention of payment and does not allocate responsibility for the cost of relocating. Moreover, the plain language of the amendments takes § 182.017(2) into account, specifically stating that in spite of sub. (2), it is unreasonable for municipalities to require a “company” to pay relocation costs to accommodate urban rail transit systems.

The City asserts that neither the Ordinance nor the Resolution requires the utilities to move their facilities to accommodate the Streetcar Project or otherwise dictates the terms and conditions under which the utilities may occupy public rights-of-way. However, for a
municipality to impose on the utilities rights under § 182.017(1r), it must pass a “regulation.” The statutory scheme does not authorize municipalities to curtail or impact utilities’ rights in any other way. Wis. Stat. § 182.017(2) simply confirms that the public’s use of rights-of-ways takes priority over the companies’ use. Stated another way, if the public’s use and the companies’ use are in conflict, the utilities must give way, or “accommodate” the public’s use. There is no mention of responsibility for the costs if the public's use causes the companies to relocate their facilities. Sub. (2) simply establishes the priority of use of the public rights-of-ways. Therefore, any action or declaration by the City that requires the utilities to modify or relocate their facilities for the Streetcar Project must be considered a “municipal regulation,” or the action has no authority over the companies.

The Commission frames this case as a routine exercise of its statutory obligation to review complaints as to the reasonableness of municipal regulations that dictate the terms and conditions upon which a public utility may be permitted to occupy the streets. It simply applied the legislature’s clear policy determination in § 182.017 and declared unreasonable the Resolution and the Ordinance because they attempt to shift the costs of relocations and modifications to the utilities. Ultimately, the Commission contends that it was obligated to declare void any such unreasonable municipal regulations.

A. The Resolution

The City argues that the Resolution is not a municipal regulation subject to the Commission’s review authority because it authorizes a public works project and does not dictate or establish the terms and conditions under which utilities may occupy public rights-of-way. The Resolution approves the Streetcar plan as described in the Draft Environmental Assessment. As to utilities, the Resolution specifically directs the Commissioner of Public Works and the City to continue during the final design to “work with public and private utilities to coordinate and resolve utility issues.” The City claims that the Resolution does not by its terms regulate a Company’s use of the public rights-of-way, as it does not direct, order, or require the utilities to do anything. The City concedes that the Resolution is a “municipal regulation” as defined by Wis. Stat. § 182.017(1g)(bm), but contends that it is not the type of municipal regulation that the City may adopt pursuant to its authority under Wis. Stat. §§ 196.58(1r) and 182.017(1r) to determine the terms and conditions under which a utility may occupy the public rights-of-way. Instead, the City argues that the Resolution is a municipal regulation adopted pursuant to the
City's statutory home rule authority under Wis. Stat. § 62.11(5) to undertake a public works project.

The City also argues that the Urban Rail Amendments do not apply to the Resolution because it does not "require[ ] a company to pay any part of the cost to modify or relocate the company's facilities to accommodate an urban rail transit system" as provided in Wis. Stat. § 182.017(8)(as). The City's position seems to be that if it avoids passing a regulation that overtly "requires" utilities to pay to modify or relocate their facilities to accommodate the Streetcar Project, it's actions will never run afoul of Wis. Stat. § 182.017(8)(as). The Commission responds that the Resolution, which authorizes the Streetcar Project, confirms that its footprint includes an extensive public and private utility system, and budgets no funds for necessary utility relocations and modifications. The resolution also directs the City's Commissioner of Public Works to coordinate with public and private utilities to resolve impeding issues.

The Commission characterizes the City's argument as claiming that it has the authority, absent any "contact, ordinance, resolution, order, or other regulation" to require the utilities to bear the relocation costs. In fact, the City claims that it doesn't have to take any action other than to begin the Streetcar Project, and the utilities, by virtue of statute, will relocate and modify their facilities at their own expense. The issue of the Commission's jurisdiction over the Resolution boils down to whether the Resolution establishes the "terms and conditions" for a public utility's occupation of public places or regulates a utility's "lines or systems."

As the Commission argues, for the Court to accept the City's position, it would have to rule that the Resolution in no way determines any "terms and conditions . . . upon which the public utility may be permitted to occupy the streets . . . within the municipality." The City cannot put off indefinitely the inevitable outcome in this matter by failing to specifically enact any municipal regulation that explicitly requires the utilities to relocate or modify their facilities and bear the costs associated. If the Resolution does not exercise the City's authority over the utilities, they would be able to refuse to relocate their lines to accommodate the Streetcar Project. Thus, the Resolution clearly requires the utilities to relocate and/or modify their facilities to accommodate the Streetcar Project, even if it does not contain an explicit mandate. As the Resolution includes "terms and conditions" upon which the Utilities and ATU Companies may occupy the street, the Commission has jurisdiction over the Resolution.
It follows that because the Commission had jurisdiction, its Decision as to the reasonableness of the Resolution is entitled great weight deference. The City attacks the meaning of the Commission’s Decision, which states:

Any current or future municipal regulations as defined by Wis. Stat. § 182.017(1g)(b)(m) of the City that require the ATU Petitioners 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).

(emphasis added). The City argues that the Decision is vague and attempts to invalidate the entire Streetcar Project because it seems to say that the Resolution is void as to the Streetcar Project. However, the intent of the Commission is clear, despite the error in wording. The Decision holds that the Resolution is void inasmuch as it “require[s] the ATU Petitioners or the Intervening Utilities to pay any amount [of] modification or relocation costs to accommodate the Streetcar Project.” The Commission replies that it did not intend to void the entire Streetcar Project. Indeed, the City has not interpreted its decision to mean that the Streetcar Project is void because the City has continued to pursue the project. The City’s argument is without merit. A simple mistake in wording does not invalidate the Decision.

B. The Ordinance

The second municipal regulation at issue in this case is the Ordinance, which provides as follows:

115-22. Utilities to Change Structures Upon Request. Any public utility operating under a franchise, privilege or permit whether under the ordinances of this city or of the statutes of the state of Wisconsin, owning and maintaining any structures and/or facilities under such franchise, privilege or permit on, under, or over any public way or public place or any property owned by the city or any public board, commission, authority or agency which 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 in its own behalf, or any public board, commission, authority or agency, shall, upon written notice from such city, public board, commission, authority, or agency or the commissioner of public works, or their duly authorized agents, 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.

Milw. Ord. § 115-22 (emphasis added). The City passed the above ordinance in 1936. The City maintains that the reason for the ordinance was historical—the proprietary/governmental
distinction—and its main purpose was to require the City to provide written notice when it was acting in a proprietary capacity rather than a governmental capacity. The City argues that the proprietary/governmental distinction died with the 1962 decision in Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). Accordingly, the City no longer relies on the Ordinance and claims that it had no intention of trying to apply it to the Streetcar Project.

The City also contends that the Ordinance was not in play here because it requires the City to provide written notice to the utilities, and it has not issued written notices pursuant to the Ordinance in conjunction with the Streetcar Project. However, the Commission claims that the City, during the administrative proceedings, both acknowledged the Commission’s jurisdiction and asserted that the Ordinance required the utilities to bear relocation and modification costs. The City maintained throughout the preliminary hearings and determinations that it was attempting to limit its exposure to paying any of the relocation or modification costs. It was only after the determination of the ALJ that the City began to argue that the Commission lacked jurisdiction and that § 182.017(2), not any municipal regulation, compelled utilities to pay the cost to relocate or modify their facilities.

The City’s attempt to escape the Commission’s jurisdiction on the Streetcar Project is disingenuous. The City began by claiming that the Ordinance required the utilities to pay the entirety of the relocation costs, and when that argument failed, the City began to argue that it never intended to invoke the Ordinance in this matter. Regardless of the significance of the Ordinance in this day and age, it is a municipal regulation that creates “terms and conditions” under which the utilities may occupy public rights-of-ways in Milwaukee, and as such, it is subject to review by the Commission. Further, the Commission had no choice, in light of § 182.017(8)(as) but to declare the Ordinance void as applied to the Streetcar Project.

C. Future Ordinances/Actions by the City

The Commission’s decision also declares unreasonable any “future municipal regulations” that would require the utilities to pay their own relocation costs in connection with the Streetcar Project. The City argues that the Commission exceeded its jurisdiction with respect to future unspecified actions of the City that might relate to this project. There is no authority to allow the Commission to invalidate a nonexistent municipal regulation. In fact, the Wisconsin Supreme Court has rejected the concept of restraining future rights in anticipation of an event
that may never happen. *Rose Manor Realty Co. v. City of Milwaukee*, 272 Wis. 339, 75 N.W.2d 274 (1956).

In *Rose Manor Realty*, a landowner sought a declaratory judgment restraining the City of Milwaukee from passing an ordinance which would allegedly move a dock line onto its property. *Id.* at 340–42. The Supreme Court held that under the declaratory judgment statute, courts will not “declare rights until they have become fixed under an established state of facts, and will not determine future rights in anticipation of an event that may never happen.” *Id.* at 343 (citing *Heller v. Shapiro*, 1932, 208 Wis. 310, 242 N.W. 174, 87 A.L.R. 1201). In this case, the individuals, Utilities and ATU Companies did not bring their complaint as a declaratory judgment action, but pursuant to Wis. Stat. §§ 196.58 and 182.017, and the decision was made by the Commission rather than a circuit court. Nevertheless, the proposition that a future, nonexistent law cannot be invalidated is applicable here. The Commission has only those powers granted to it by statute, and nothing in § 196.58 or § 182.017 permits the Commission to invalidate future actions of the City in adopting a resolution or ordinance.

The Commission argues that its Decision should be affirmed as to future municipal regulations because they are still “municipal regulation[s]” under the plain language of § 182.017. The Commission may consider any current municipal regulation and determine its reasonableness under the statute. However, the Commission does not have the authority under Wis. Stat. §§ 182.017 or 196.58 to determine the reasonableness of nonexistent, possible future regulations. The Commission’s jurisdiction pursuant to Wis. Stat. §§ 182.017 or 196.58 applies only to existing municipal regulations. Therefore, the Final Decision is reversed as to future municipal regulations.

**D. Statutory & Common Law Arguments**

Next, the City argues that the utilities’ obligation to pay the relocation and modification costs arises from Wisconsin statutes and common law, not from any “municipal regulation.” This argument is based on § 182.017(1) and (2), which provide that a utility’s right to place its “lines and systems” within local rights-of-way is conditional. Wis. Stat. § 182.017(1r) grants the utilities the right to use public rights-of-way “subject to . . . reasonable regulations made by any municipality through which its transmission lines or systems may pass.”

However, the City claims that due to sub. 2, which states that “no such line or system or any appurtenance thereto shall at any time obstruct or incommode the public use” of such
rights-of-way, the utilities must give way whenever there is a conflict between the public’s use and their use. Citing to City of Marshfield v. Wisconsin Tel. Co., 102 Wis. 604, 78 N.W. 735 (1899), Milwaukee Elec. Ry. & Light Co. v. City of Milwaukee, 209 Wis. 656, 245 N.W. 856 (1932) and Wisconsin Power & Light Co. v. Gerke, 20 Wis. 2d 181, 121 N.W.2d 912 (1963), the City argues that the utilities’ use of city streets is subordinate to the public’s use. However, the City cites no authority for the proposition that utilities must also pay the relocation costs under circumstances in which their use of the streets conflict with the public’s use.

In fact, in Milwaukee Elec. Ry. & Light Co. v. City of Milwaukee, the Supreme Court held that the City of Milwaukee could not require a public utility, lawfully occupying a street, to remove or relocate its facilities at the utility’s expense. 245 N.W. at 859. Specifically, the court explained:

In this action we have a situation where the construction plans of a public utility owned and operated by a city in its proprietary capacity interfere with the properties of another public utility lawfully occupying a street which properties the city insists should be removed or relocated at the expense of its owner. In such a situation justice would seem to demand and the law seems clearly to require us to hold that such removal would amount to an appropriation of property without just compensation.

Id. (emphasis added). City of Marshfield v. Wisconsin Tel. Co. on the other hand, is inapplicable to this case. Marshfield deals with a utility company that requested permission from the city to construct a line of poles along a street, and when it could not get an immediate response, the utility proceeded with the construction until forced to stop. 78 N.W. 735, 736–37. The Supreme Court held that cities have the right to dictate the terms and conditions under which a utility occupies their streets, and that the utilities’ rights to place their lines in public rights-of-ways are not absolute. Id. Marshfield is immaterial because the present action is not a case of a rogue utility taking action to occupy the streets without the City’s permission.

Wisconsin Power & Light Co. v. Gerke is also distinguishable from this case. Gerke is a dispute between a highway construction contractor and a power company that resulted from the contractor knocking down one of the company’s poles and disrupting an electric transmission line. Gerke, 20 Wis. 2d at 182. The decision interpreted Wis. Stat. § 66.047, which addressed the authority of contractors authority to interfere with structures of a public utility when doing work
on a public street or highway.\textsuperscript{4} \textit{Id.} at 185–90. The facts and analysis in \textit{Gerke} have no application to the present case.

The City also claims that the common law, in addition to Wis. Stat. § 182.017, prohibits utilities from obstructing or incommoding the public’s use of streets. It argues that the Supreme Court’s holding in \textit{City of Marshfield v. Wisconsin Tel. Co.}—that a utility’s use of the streets is subordinate to the public’s use—is consistent with the common law rule that a utility company must bear the cost of relocating its facilities where relocation is occasioned by an exercise of the police power (such as the Streetcar Project). The City ignores \textit{Milwaukee Elec. Ry. & Light Co. v. City of Milwaukee}. Instead, the City cites to a US Supreme Court case, \textit{New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans}, 197 U.S. 453, 25 S. Ct. 471, 49 L. Ed. 831 (1905), which held that requiring a utility to move its facilities and pay the costs was not a taking, and a New Jersey Supreme Court case, \textit{Port of New York Auth. v. Hackensack Water Co.}, 41 N.J. 90, 195 A.2d 1 (1963), which held that utilities had to bear the relocation costs when the Port Authority of New York made improvements to the George Washington Bridge, the Holland and Lincoln Tunnels, and the Port Newark Marine Terminal. The Court need not consider these cases, which have no bearing on Wisconsin law. The City points to no Wisconsin common law in its favor on the issue of costs.

Moreover, this entire argument is disingenuous. The City is both claiming that it is not requiring the utilities to do anything under the Resolution and the Ordinance, and contending that the utilities must relocate their lines and pay the associated costs to accommodate the Streetcar Project by operation of law. Wis. Stat. §§ 182.017 and 196.58 clearly state that utilities may use public rights-of-way and that municipalities may enact reasonable regulations to prescribe the terms and conditions upon which the utilities may do so. That is what occurred here. Therefore, the Commission had jurisdiction to hear the matter. The City cannot avoid the jurisdiction of the Commission and achieve the necessary relocation and modification of the utilities’ facilities for the Streetcar Project. There is no authority for the City to require the utilities and companies to relocate or modify their facilities, except by “municipal regulation.” Absent a municipal regulation, the utilities and companies are under no obligation to relocate or modify their facilities, which are currently occupying the streets where the City intends to build the Streetcar.

\textsuperscript{4} Wis. Stat. § 66.047 has since been renumbered and amended by 1999 Act 150 § 116, eff., as Wis. Stat. § 66.0831.
II. Constitutional Arguments

The City makes an alternative argument attacking the constitutionality of the Urban Rail Amendments. The City argues that the Urban Rail Amendments were adopted as part of the multi-subject 2013-15 state budget bill with the sole purpose of “killing” the City’s Streetcar Project. Given this legislative intent and manner in which the Amendments were adopted, the City contends that the amendments violate the prohibition against private legislation under article IV, § 18 of the Wisconsin Constitution.

The Commission responds only by stating that the City’s constitutional challenge was not appropriately before the Commission, and is without merit. The Commission joins the brief of the State of Wisconsin (the “State”) as to the City’s constitutional claim. The State argues that the Court should reject the City’s constitutional challenge to the Urban Rail Amendments because the City lacks standing to make this challenge and because the amendments are constitutional.

First, the State argues that as a creature of the state, the City has no standing to challenge the actions of the state. This is a well-established principle of law in Wisconsin.

Agencies, municipal corporations and quasi-municipal corporations are all creatures of the state and their powers are only those ascribed to them by the state. They have no standing to challenge the actions of their creator, such as drawing into question the constitutionality of legislation the state has enacted.

*Silver Lake Sanitary Dist. v. Wisconsin Dep’t of Nat. Res.*, 2000 WI App 19, ¶ 8, 232 Wis. 2d 217, 607 N.W.2d 50; *see also, Dane Cty., Through Dane Cty. Dep’t of Soc. Servs. v. Wisconsin Dep’t of Health & Soc. Servs.*, 79 Wis. 2d 323, 330, 255 N.W.2d 539 (1977) (“[T]he state may direct [the county’s] action as it deems best and the county cannot complain or refuse to obey . . . . as a creature of the state, it is not permitted to `censor or supervise’ the activities of its creator.” (citations omitted)); *Buse v. Smith*, 74 Wis. 2d 550, 562, 247 N.W.2d 141 (1976) (“The general rule is that a political subdivision of the state does not have the legal right or status as against the state or another state agency to contest the constitutionality of a statute.” (citations omitted)).

In its reply brief, the City concedes that generally, municipalities lack standing to challenge the actions of the legislature. However, the City argues that an exception applies in this case. There are two exceptions to no-standing rule that may apply when a private litigant is a party: “(1) If it is the agency's official duty to [question the constitutionality of the statute], 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.’” *Silver Lake*, 2000 WI App 19, ¶ 8 (alteration in original) (quoting *State ex rel. City of La Crosse v. Rothwell*, 25 Wis. 2d 228, 233, 130 N.W.2d 806 (1964)). As the City did not address the standing issue until its reply brief, the State addressed each exception. The first exception does not apply because the City “is not charged by any statute with the duty of determining the validity” of this statute, nor would the City or its employees be held personally liable if they failed to do so. *See Fulton Found. v. Wisconsin Dep't of Taxation*, 13 Wis. 2d 1, 13, 108 N.W.2d 312 (1961). The City does not dispute this point.

The City’s argument focuses on the second exception for issues of “great public concern.” This exception has been used to allow governmental entities to challenge statutes causing an alleged diversion of public funds for private purposes (*State ex rel. Singer v. Boos*, 44 Wis. 2d 374, 171 N.W.2d 307 (1969); *Fulton*, 13 Wis. 2d 1); a statutory tax exemption allegedly violating the uniformity and equal protection clauses (*Associated Hosp. Serv., Inc. v. City of Milwaukee*, 13 Wis. 2d 447, 109 N.W.2d 271 (1961)); and an alleged violation of the one man, one vote principle of the fourteenth amendment (*Unified Sch. Dist. No. 1 of Racine Cty. v. Wisconsin Employment Relations Comm'n*, 81 Wis. 2d 89, 104, 259 N.W.2d 724 (1977)). However, it did not allow a city to challenge a retrospective extension of a statute of limitations only affecting a handful of people. *Ayers*, 85 Wis. 2d at 546–47. The City contends that this case presents a matter of great public concern because the Urban Rail Amendments would cause a diversion of public funds for private purposes, as in *Fulton* and *Singer*.

For a municipality to have standing to challenge state legislation, one of the two exceptions must apply, and there must be a private litigant involved in the lawsuit. *Silver Lake*, 2000 WI App 19, ¶ 8. The City argues that the private litigation requirement is satisfied because this case was initiated by private parties who petitioned the Commission for relief. While the State concedes that the private litigation element is satisfied, the Court disagrees. The City’s argument that the exception applies because private citizens are present in this case is an oversimplification of the Supreme Court’s holdings on the great public concern exception.

The Wisconsin Supreme Court’s decision in *Columbia County v. Board of Trustees of Wisconsin Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962) is particularly instructive. In *Columbia County*, the Supreme Court held that the great public concern exception applied “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." *State ex rel. City of La Crosse v. Rothwell*, 25 Wis. 2d 228, 233, 130 N.W.2d 806 (1964). Here, we have a suit between a municipality and a state agency, in addition to various private litigants. While at first glance it may seem that the private litigant requirement of the great public concern exception applies, the application of this rule in *Columbia County* demonstrates that the exception is not available to the City in this matter.

In *Columbia County*, eight counties (Columbia, Buffalo, Burnett, Portage, Sauk, Sawyer, Vernon and Waupaca), and Carl C. Frederick, a taxpayer of Columbia County, brought a declaratory relief action against the Board of Trustees of the Wisconsin Retirement Fund, challenging the constitutionality of a law that required the plaintiff counties to become members of the Wisconsin Retirement Fund. Applying the private litigant rule, "the court held that the eight counties could not question the constitutionality of the statute, as against the Retirement Fund; however, the individual taxpayer whose interests were affected by the statute could do so." *Silver Lake*, 2000 WI App 19, ¶ 10. Thus, the City cannot question the constitutionality of the Urban Rail Amendments, whereas the private litigants are free to do so. This case presents a new configuration of litigants and arguments not addressed by any of the case law on the great public concern exception. Here, the "creature of the state," the City, is challenging the actions of the state by suing a state agency, while the private litigants involved in the suit are in support of the legislation being challenged. Although this specific configuration of parties has not been previously considered, the Court is bound by the Supreme Court’s reasoning in *Columbia County*, *Silver Lake* and *Rothwell*. Alone, the City has no standing to raise the constitutionality of a statute in its suit against a state agency. *Id.*, ¶ 11 (citing *Rothwell*, 25 Wis. 2d 228).

Regardless of whether the State waived the private litigant issue, this situation does not rise to the level of a "great public concern." The great public concern exception is "applied sparingly" to issues of broad statewide concern. *City of Madison v. Ayers*, 85 Wis. 2d 540, 546–47, 271 N.W.2d 101 (1978). The City is attempting to apply the great public concern exception because, as it argues, the Urban Rail Amendments require public funds to be diverted to private interests pursuant to *Fulton* and *Singer*. However, in both *Fulton* and *Singer*, "the fundamental question to be resolved [was] whether public funds [were] being diverted for a private purpose." *Singer*, 44 Wis. 2d at 379; see also, *Fulton*, 13 Wis. 2d at 9.
In *Fulton*, the Wisconsin Supreme Court established that “[t]he issue of whether public funds are being diverted to a private purpose clearly is a matter of great public interest.” 13 Wis. 2d at 13. The agency brought two constitutional challenges in *Fulton*, claiming that the tax law (1) constituted an expenditure of public funds for a private purpose; and (2) constituted a denial of the equal protection of the laws under the Fourteenth amendment. *Id.* at 9. As the court concluded that the first constitutional challenge is a matter of great public concern, the agency had standing to bring this claim. *Id.* at 13. However, the court determined that the second constitutional challenge did not meet the threshold of the great public concern exception. *Id.* Therefore, the *Fulton* court did not address the second constitutional challenge. *Id.* (“Therefore, with respect to such latter issue we approve the holding of the trial court that the department is not permitted to raise such issue.”).

Now that the State has raised the issue of standing, the City is attempting to use the great public concern exception so that the Court will consider its claim that the Urban Rail Amendments violate article IV, § 18 of the Wisconsin Constitution, the prohibition against private legislation. However, it has not been established that an alleged violation of article IV, § 18 is a “matter of great public concern.” Nor does the City argue that a private law challenge is a matter of great public concern. Pursuant to *Fulton* and *Singer*, the great public concern exception applies where the ultimate question to be resolved is whether public funds are being diverted for a private purpose. Other constitutional claims cannot be considered under this exception. *Fulton*, 13 Wis. 2d at 13. The City is only arguing that public funds are being diverted to a private purpose in order to achieve standing in response to the State’s arguments. However, the City never raised the public funds question as a constitutional challenge. Moreover, it is clear from *Fulton* that even if the issue of public funds being used for a private purpose were also before the Court, the City would not be permitted to raise the private law issue. *See id.*

As the private law challenge is not a “matter of great public concern,” the Court finds that the City lacks standing to challenge the constitutionality of the Urban Rail Amendments. Therefore, the Court need not reach the merits of the City’s article IV, § 18 challenge.
CONCLUSION

Based on the record and briefs submitted by the parties, IT IS HEREBY ORDERED that the decision of the Public Service Commission is AFFIRMED in part and REVERSED in part as follows:

1. The Commission’s declaration that the Ordinance and the Resolution are unreasonable and void inasmuch as they require the Utilities and ATU Companies to pay any part of the costs to relocate and/or modify their facilities in connection with the Streetcar Project is affirmed; and

2. The Commission’s declaration that any future municipal regulation, as defined by Wis. Stat. § 182.017(1g)(bm), on the part of the City that requires the Utilities or ATU Companies to pay any amount of modification or relocation costs to accommodate the Streetcar Project are unreasonable and void is reversed.

In addition, the City of Milwaukee’s constitutional challenge is hereby DISMISSED for the reasons stated in this Decision and Order.

Dated this 1 day of February, 2016, in Milwaukee, Wisconsin.

BY THE COURT:

[Signature]

Honorable William Sosnay
Milwaukee County Circuit Court Judge

THIS IS A FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL