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Public Service Commission of Wisconsin
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BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

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

Docket No. 5-DR-109

INDIVIDUAL PETITIONERS' INITIAL BRIEF

This is an action to determine whether the City of Milwaukee can force public utilities and their ratepayers, customers, and shareholders to bear the substantial costs of relocating or rebuilding their facilities to accommodate the Milwaukee Streetcar Project. The Streetcar Project has been aggressively promoted by the City as self-sustaining and virtually "free" to Milwaukee taxpayers because it will be paid for with the federal taxpayers' money and a modest amount of matching tax incremental financing. Indeed, the City has promised, more or less, that it will not build the Streetcar if City taxpayers would have to pay even a small part of the costs.

But there is no room in the City's approved budget for utility relocation costs. These are real costs involving real work and real resources. They may amount to close to *one half* of the cost of the Streetcar. Someone will have to pay them. The City has simply assumed that the costs that it is unwilling to impose on its own taxpayers can be shifted to someone else, *i.e.*, the affected utilities and their customers, ratepayers or shareholders.

If the City cannot force the utilities to pay the relocation costs, they will fall on the City's own taxpayers.[1] An open and transparent government would disclose the true costs of the Project to all concerned. The City taxpayers have a right to know if they may be made to pay them; utility customers, ratepayers and shareholders have a right if know if they can be forced to

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[1] This assumes that no other unit of government would step in and pay them.

pay. Since the City obviously wishes to obfuscate the true costs of the Project until it is well underway, it falls on the Public Service Commission of Wisconsin to take up the cause of honest government. And despite the City's efforts to claim otherwise, the issue raised by the Petitioners is ripe for consideration. Two things are clear.

First, the costs of utility relocation will not be zero and will almost certainly be many millions of dollars, representing as much as one half the actual total Project cost. Although the details of the final engineering configuration of the system have not been determined, the City has passed a resolution definitively selecting the final route and directing the Commissioner of Public works to proceed with construction of the streetcar system. Unless the streetcar can be made to levitate above the streets, utility facilities located beneath or adjacent to its tracks will have to be moved in order to accommodate the route and to permit access to the facilities once the tracks are in place. Indeed, in its Environmental Assessment, the City told the public and the federal government that utility facilities along virtually every block of the selected route would need to be relocated or rebuilt. Environmental Assessment dated October 20, 2011 ("EA") (Anderson Aff. Ex. A[2]) at 124, available at http://www.themilwaukeestreetcar.com/pdf/Milwaukee-Streetcar-Environmental-Assessment.pdf.

Second, it is evident that the City does not intend to bear these costs. Although the Common Council has authorized the Project to go forward, the budget as set forth in the Environmental Assessment included ***no*** costs to the City for utility relocation. The EA advised the public and federal authorities that these costs would be borne by the affected utilities. As

[2] Rather than burdening the record by resubmitting the lengthy Environmental Assessment and Finding of No Significant Impact, the individual Petitioners rely on the copy of those documents filed in conjunction with the ATUs' brief attached as Exhibits to Kevin Anderson's affidavit.

noted above, the City has repeatedly assured the public that neither the construction nor operation of the street car will require general tax revenue.

"When a municipality's actions may significantly impact a public utility's costs of doing business, which, in turn, affects the rates that utility's customers will pay, the Commission has authority and obligation to address those actions." *Wisconsin Public Service Corporation v. City of Manitowoc,* PSC Dkt. 9300-GI-102, Final Decision dated April 18, 2008. Plainly, there is no question that the City's action here will significantly impact the affected utilities. Although the exact costs of utility relocation associated with the streetcar line construction may not have been finally determined, there is no doubt that they will be substantial. As the Federal Transit Administration's recent submission on the Project has made clear, "[t]he issue of who pays the cost for utility relocation required by the Project is a matter of state law." Finding of No Significant Impact dated January 25, 2012 ("FONSI") (Anderson Aff. Ex. D) at 7, available at http://www.themilwaukeestreetcar.com/pdf/Signed-FONSI_1-25-12.pdf. It is precisely that issue that Healy is asking the Commission to decide. Milwaukee taxpayers and utility ratepayers are entitled to an answer now, not after construction has begun.

STATEMENT OF FACTS

1. Public Transportation in Milwaukee

The first horse drawn street railway system was constructed in Milwaukee in 1858. In 1890, the first electric streetcar began operation along Wells Street. That system was operated by a private company, the predecessor of today's Wisconsin Electric Power Company. The electric utility was separated from the streetcar operations in 1938, and the Milwaukee Electric Railway and Transport Company ("MERTC") became a wholly-owned subsidiary of WEPCO.

Gurda, *Path of a Pioneer: A Centennial History of the Wisconsin Electric Power Company* 174 (1996) (Kamenick Aff. Ex. A); Milwaukee County Transit System, *History – Milwaukee County Transit System*, http://www.ridemcts.com/About-MCTS/History/ ("MCTS History") (Kamenick Aff. Ex. B) (last accessed May 24, 2012).

The first gasoline powered motor bus came into use in 1920, and WEPCO began to replace the fixed rail streetcar system with more efficient trackless trolleys – electric-powered, rubber-tired buses – in 1936. Even more efficient and flexible diesel buses were put into operation in 1950. Gurda, *supra* at 176-77; MCTS History.

MERTC promoted its trackless trolleys and diesel buses as a response to the traffic congestion caused by the fixed rail streetcar system. By 1948, fixed rail streetcars were viewed as a thing of the past – "dinosaurs" of public transportation that "caused passengers and motorists delays and annoyance" and "d[id] not belong in modern traffic." The City of Milwaukee itself requested the replacement of streetcars with buses and trackless trolleys. Gurda, *supra* at 176.

WEPCO offered to sell MERTC and the transit system to the City of Milwaukee, then led by Socialist Mayor Frank Zeidler, in 1951. The City said "no," viewing the operation of the system as a proprietary function it did not wish to assume: "It is the judgment of the committee that ownership and operation of the community's transit system by the present private company or an equally stable private company is undoubtedly preferable to any type of municipal operation." *Id.* at 176.

In October 1952, a private buyer, the newly-formed Milwaukee & Suburban Transport Corporation, was found. But this did not save the streetcar system. Hundreds of decommissioned Milwaukee streetcars made their final run to an old quarry east of Waukesha,

where they were burned and then cut apart for scrap. The last of the streetcars crossed the Wells Street viaduct in 1958. Trackless trolleys had vanished by 1965. Gurda, *supra* at 175-76; MCTS History.

Milwaukee had a privately owned and operated public transportation system until 1975, when Milwaukee County bought the system and began operating the newly formed Milwaukee County Transit System ("MCTS"). Gurda, *supra* at 176-78; MCTS History.

MCTS currently provides public transportation to the City of Milwaukee, Milwaukee County and parts of the surrounding metropolitan area. It operates 411 diesel powered buses over 52 routes and serves a weekday daily ridership of 138,000 people. MCTS operates several routes that serve the downtown Milwaukee area, including Route 30, a portion of which already serves a nearly-identical route as the proposed streetcar would.[3] Milwaukee County Transit System, *FAQs – Milwaukee County Transit System*, http://www.ridemcts.com/About-MCTS/FAQs/ (Kamenick Aff. Ex. D) (last accessed May 24, 2012).

2. Back to the Future: the Milwaukee Streetcar Project

Having apparently failed to learn the lessons of history, the City of Milwaukee has authorized the construction of a 2.1 mile fixed-rail streetcar line in downtown Milwaukee. The route has been selected, federal funds have been applied for and approved, and the City is proceeding with the final design and engineering work. The City, in cooperation with the Federal Transit Administration, prepared and submitted for public comment a detailed Environmental Assessment of the Project in accordance with the National Environmental Policy Act. *See* Environmental Assessment dated October 20, 2011, available at http://www.themilwaukeestreetcar.com/pdf/Milwaukee-Streetcar-Environmental-Assessment.pdf

[3] *See* Milwaukee County Transit System, *Route 30 Sherman-Wisconsin – Milwaukee County Transit System*, http://ridemcts.com/Routes-Schedules/Routes/30/#View%20Route%20Map, (Kamenick Aff. Ex. C) (last accessed May 24, 2012).

(“EA”). Construction is expected to begin in the Fall of 2012, last 26 months, and be completed by the end of 2014. *See* EA at 117. On January 25, 2012 the Federal Transit Administration issued its findings of no significant impact with respect to the Environmental Assessment, clearing the way for construction. *See* FONSI.

The Common Council passed and the Mayor signed a Resolution that approves the Milwaukee Streetcar Project as outlined in the EA as filed and later approved. *See* City of Milwaukee Resolution No. 110372, 7/26/ 2011, (Exhibit A to PSC Docket #159180) (“City Resolution”). The EA discloses in detail the City’s consideration of various alternative routes in connection with the long-running Milwaukee Connector study and the eventual development of the Streetcar Project. EA at 145-49. Three route alternatives, each with an alternative sub-option route, were carefully considered. EA at 29-36. Evaluation of the route alternatives included technical analysis, public meetings and community outreach with respect to the various possibilities, and the eventual ranking of the alternatives considered based on specified criteria including public interest, ridership, engineering, capital cost, operations, environmental impacts, land use and economic development and long range City goals. *See* EA at 29-46. The final route selected was judged superior to the alternatives based on this extensive decision matrix. It is that route that was the subject of the federally required EA and that has been approved by the Department of Transportation.

There is no question that the final route for the streetcar line has been decided. The City has neither the intention nor the ability to turn on a dime and propose some other route, repeating the public outreach and engineering work that has already been done and seeking new environmental and other federal approvals. Although additional engineering work may remain to be done, the selected “locally preferred alternative” route – and the impact on utility facilities

that will result from construction along the route selected – will not change. The City Resolution directs the Commissioner of Public Works "to proceed with construction of the proposed streetcar system" as described in the EA. City Resolution at 4. The Director of Public Works is authorized by the resolution to contract with vendors for vehicles, system maintenance and system operation and to acquire any necessary real estate interests for the construction or extension of the streetcar system. *Id.* at 3.

The City Resolution directs that the $64.6 million Project costs be funded by a $9.7 million contribution from Tax Increment District No. 49, with the remaining $54.9 million coming from the Federal Interstate Cost Estimate Substitute funding. *Id.* at 2-3. The Final EA states that the capital costs for the initial streetcar system are estimated to be $64.6 million, consistent with the amount authorized by the Common Council. EA at 2.

3. Utility Relocation Costs

But the EA also makes clear that the route selected for the streetcar Project will require private utility companies to relocate or reinforce underground utility lines. "Given the prevalence of underground utilities in the study area, preliminary engineering studies indicate that underground utility lines would need to be relocated or reinforced on nearly all blocks along the streetcar alignment." *Id.* at 124. The costs of relocating or reinforcing these underground utility lines are likely to be substantial. The Final EA assumes that these costs will be borne by the affected utilities. "Utility adjustments would be made according to standard utility construction practices. The privately owned utilities would be relocated or adjusted *by the facility owner.*" *Id.* at 124 (emphasis added).

We Energies has estimated the costs of relocation its steam, gas, and electric utility facilities to be in excess of $45 million.[4] The other affected utilities have estimated very substantial relocation costs as well.[5] AT&T Wisconsin's estimated costs are in excess of $10 million.[6] Together with the smaller but not insignificant cost estimates from others, it is more than possible that the utility relocation will almost *double* the overall costs of the Project. The City's plan is obviously that the utilities themselves will pay almost as much for the Project as the City itself expects to pay with the "free" money it has been awarded by the federal taxpayers. Incredibly, the City's effort to fit this Project to its goals and the welfare of the Milwaukee community completely fails to consider the impact of the millions of dollars in costs that will be incurred and paid by the utilities and thus – one way or another – by their ratepayers, customers, shareholders, or employees.

4. The Petitioners

Brett Healy is a citizen of the State of Wisconsin and a customer of Wisconsin Energy for both gas and electric service. On October 4, 2011 Healy filed a Petition for declaratory ruling with the PSC pursuant to §227.41 Wis. Stat., seeking a ruling that the City of Milwaukee cannot force utility companies to bear the relocation and reinforcement costs associated with the Milwaukee Streetcar Project, because its plan to do so is unreasonable in that there is no adequate health, safety or public welfare justification for such a requirement under the circumstances presented by the Project. Petition at ¶¶ 13-17 (PSC Docket #154240).

By order dated April 25, 2012, the Commission directed Healy to seek additional persons to join in his petition, so that the jurisdiction of the Commission to consider his petition under

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[4] Joint Initial Brief on Behalf of Wisconsin Electric Power Company, Wisconsin Gas, LLC, American Transmission Company LLC and ATC Management Inc. at 3.
[5] *Id.* at 3-4; ATU Petitioners' Initial Brief at 5-6.
[6] ATU Petitioners' Initial Brief at 5.

§196.58(4) Wis. Stat., would be clear. Order on Motions for Clarification and on Threshold Legal Issue at 3 (PSC Docket #163712). 35 persons have joined Healy as Petitioners in this matter, all affirming that they are customers and ratepayers of Wisconsin Energy. Amended Petition of Brett Healy and 35 Other Persons (PSC Docket #164192).

There is no question that Healy and the other Petitioners have a legitimate economic interest in the outcome of this proceeding. They will incur the costs of increased utility bills if We Energies is forced to absorb the costs of the utility relocation associated with the Streetcar Project. The PSC staff has already estimated that the increased costs to Wisconsin Energy ratepayers could be as much as 1.5%. PSC Open Meeting Transcript, December 1, 2011, at 5.

ARGUMENT

I. MILWAUKEE ORDINANCE 115-22 IS UNREASONABLE ON ITS FACE

The Public Service Commission of Wisconsin has plenary authority to regulate Wisconsin public utilities under state law. "The Commission has jurisdiction to supervise and regulate every public utility in this state and do all things necessary and convenient to its jurisdiction." Wis. Stat. § 196.02(1). Wisconsin municipalities have no authority to regulate public utilities unless their enactments are permitted by and consistent with the rules established by statute and by the Public Service Commission.

It is well-established as a matter of Wisconsin law that a municipal ordinance is preempted by state regulation if *any* of the following tests apply: "(1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation." *Lake Beulah Mgmt. Dist. v. Vill. of E. Troy*, 2011 WI 55, ¶15, 335 Wis. 2d 92, 799

N.W.2d 787. Where "the state has entered the field of regulation, municipalities may not make regulation inconsistent therewith," because "a municipality cannot lawfully forbid what the legislature has expressly licensed or authorize what the legislature has expressly forbidden." *Fox v. Racine*, 225 Wis. 542, 545, 275 N.W. 513 (1937). Municipal statutes that purport to regulate the conduct of Wisconsin utilities contrary to the requirements of the PSC are therefore void and unenforceable.

In this case, it is Wis. Stat. § 196.58 that specifically limits the scope of municipal conduct and governs the validity of any municipal rules or directives that may require regulated utilities to incur costs by being forced to relocate their facilities at their own expense. That statute provides that the governing body of a Wisconsin municipality may require a utility to make an "addition or extension to its physical plant within the municipality as shall be *reasonable and necessary in the interest of the public.*" § 196.58(1)(b) (emphasis added.) The statute makes it equally clear, however, that the Commission has jurisdiction to review the question whether any such directive by a Wisconsin municipality is "reasonable and necessary in the interest of the public" under § 196.58(4). That section provides, that if on review a municipal directive requiring a utility to relocate or rebuild its facilities is found by the Commission to be unreasonable, "it shall be void." No municipal ordinance can avoid this requirement of state law or deprive the Commission of jurisdiction.

Duly enacted PSC regulations define what municipal directives relating to utility relocation are considered by the Commission to be unreasonable under § 196.58(4). One test is whether the Commission determines that there is an "adequate health, safety or public welfare justification for the requirement." Wis. Admin. Code § PSC 130.09(1). Absent an adequate health, safety or public welfare justification, as determined by the Commission, Wisconsin

municipalities cannot force utilities to absorb the costs of relocating or rebuilding their facilities in connection with a public works project. *See id.* PSC 130.09(2) further provides that *any* municipal regulation is unreasonable if it requires a public utility to relocate facilities in a municipal right of way at its own expense "substantially for the benefit of a person other than the municipality."

Milwaukee Ordinance 115-22 is inconsistent with these controlling provisions of state law. First, it provides that public utilities may be forced "at the cost and expense of such utility" to "make changes in the construction or location"…of their "structures and/or facilities" to permit ***any*** public works or improvements, whether or not the work in question has an adequate health, safety or public welfare justification. The Milwaukee Ordinance forces utilities to absorb the costs associated with "public works or improvements of any nature whatsoever undertaken by the city in its own behalf." This requirement applies regardless of whether or not the public works or improvements in question have an adequate "health, safety or public welfare justification" as required by PSC 130.09(1). The Milwaukee ordinance is thus overly broad and clearly inconsistent with controlling state law, and therefore unreasonable and void under §196.58(4).

Second, the ordinance applies not only to the City of Milwaukee "in its own behalf" but to utility relocation costs incurred in connection with public works or improvements undertaken by others, namely "any public board, commission, authority or agency." As noted above, PSC 130.09(2) states clearly that any municipal ordinance that requires public utilities to modify their facilities at their own expense for the benefit of persons other than the municipality itself is per se unreasonable. The boards, commissions, authorities and agencies referenced in the Milwaukee ordinance are distinct and different from the City "in its own behalf", as the language

of the ordinance makes clear. Under the terms of PSC 130.09(2), the ordinance is unreasonable and therefore void under §196.58(4).

The only reading of the Milwaukee ordinance that would permit it to survive PSC scrutiny is one that would require the term "public works" to mean those works having an adequate "health safety or public welfare justification" as required by state law. But even if the ordinance is interpreted in a way that makes it consistent with state law, the Commission must then consider whether on the merits the Streetcar Project satisfies the §196.58(4) test. Because the Streetcar is essentially a proprietary project in which the City is operating a business, it cannot do so.

II. IMPOSING RELOCATION COSTS ON WE ENERGIES IS UNREASONABLE

Even if Ord. 15-122 is facially valid, it is not dispositive here. Whether as a matter of legislative intent, preemption, or the simple matter that the state can limit the ways in which one of its municipal creations deals with regulated utilities, the ordinance is subject to the strictures of §196.58(4) and PSC regulations. Forcing a utility to absorb relocation costs must be reasonable, and the statute and its implementing regulations provide the definition of what is reasonable under the circumstances. No ordinance, contract or resolution imposing such costs is reasonable *unless* there is an adequate health, safety or public welfare justification. *Complaint by Wisconsin Public Service Corporation Against City of Manitowoc*, PSC Docket No. 9300-61-102 (April 18, 2008).

A. Not All Authorized Municipal Actions Justify the Imposition of Relocation Costs

There are many circumstances in which a municipality has the legal authority to act in furtherance of some public purpose. All municipal actions must serve a public purpose. *See,*

e.g., *Hopper v. City of Madison*, 79 Wis. 2d 120, 128, 256 N.W.2d 139 (1977); *State ex rel. Singer v. Boos*, 44 Wis. 2d 374, 381, 171 N.W.2d 307 (1969). But not all permissible municipal actions implicate public health, safety or welfare concerns. Thus, the question whether there is an *adequate* health, safety or public welfare justification is not the same as asking whether a municipality has the authority to undertake a project that will require the relocation of utility facilities. If Wis. Stat. § 196.58(4) applies only to actions that no municipality is ever authorized to do under the public purpose doctrine, it would be superfluous. To avoid redundancy, § 196.58(4) and PSC 130.09(1) clearly contemplate that not every public work or project with a public purpose justifies forcing a regulated public utility to absorb the cost of a required relocation. A statute ought not to be read to render it meaningless and unnecessary. *Liberty Grove Town Bd. v. Door County Bd. of Supervisors*, 2005 WI App 166, 284 Wis. 2d 814, 824, 702 N.W.2d 33, 38; *see Wagner v. Milwaukee County Election Comm'n,* 2003 WI 103, ¶ 33, 263 Wis. 2d 709, 666 N.W.2d 816.

Thus, not every undertaking that can be said to benefit a municipality or serve some public purpose constitutes a reasonable justification to impose costs on Wisconsin utilities within the meaning of § 196.58(4). Nor can the question of "reasonableness" under § 196.58(4) be reduced to asking whether or not a project will "benefit" the municipality. PSC 130.09(1) identifies two circumstances in which imposing relocation costs is per se unreasonable:

> **(1)** A municipal regulation that requires a utility to permanently relocate transmission or distribution facilities in a municipal right-of-way at the expense of the utility is unreasonable unless there is an adequate health, safety, or public welfare justification for the requirement.
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> **(2)** A municipal regulation that requires a utility to permanently relocate transmission or distribution facilities in a municipal right-of-way at the expense of the utility substantially for the benefit of a person other than the municipality is unreasonable.

This regulation clearly imposes the requirement for an adequate health, safety and public welfare justification as distinct from, and in addition to, the requirement that a justification for imposing relocation costs upon a utility involve a project benefitting the municipality and not some other person. *See State v. Popenhagen*, 2008 WI 55, ¶35, 309 Wis. 2d 601, 749 N.W.2d 611 (Statutes must be interpreted to give effect to each word and to avoid "surplusage.") As the Wisconsin Supreme Court has explained, "[w]hen construing statutes, meaning should be given to every word, clause and sentence in the statute, and a construction which would make part of the statute superfluous should be avoided wherever possible." *Hutson v. Wis. Pers. Comm'n*, 2003 WI 97, ¶49, 263 Wis. 2d 612, 665 N.W.2d 212; *see also State v. Dibble*, 2002 WI App 219, ¶15, 257 Wis. 2d 274, 650 N.W.2d 908 (statutes must not be interpreted to read distinct clauses as identical, rendering one superfluous).

A public works project requiring relocation may be within a municipality's legal authority and purportedly beneficial to it, and yet it may still be unreasonable to impose related relocation costs on a utility under § 196.58(4). While a finding that the Streetcar Project is *ultra vires* or not rationally related to a permissible public purpose would certainly prohibit the imposition of relocation costs, such a finding is not necessary to determine that the imposition of such costs on WE Energies is unreasonable. The mere fact that a public works project may be appropriate and that a utility may be forced to make changes to its facilities does not mean that the utility can be made to absorb the cost. In appropriate circumstances, the municipality may require relocation, but only at its own expense.

B. The Imposition of Utility Relocation Costs Resulting from Proprietary Activities Is per se Unreasonable

The reasons for imposing these limits on the power of local authorities to force utilities to absorb the costs of any public project are not hard to understand. Permitting forced relocation is

comparable, if not identical, to a taking of private property. State law appropriately permits a municipality to avoid the payment of compensation to the affected property owner, but only in limited circumstances. It may not do so simply because it decides that whatever project forces the utility relocation is a good idea.

The municipal and rate-paying communities are not necessarily identical. Ratepayers outside the municipality are "captive" to municipally-forced relocations. They may not – and in this case the overwhelming majority of We Energies customers do not – have any influence over Milwaukee's decisions and may have no choice but to pay the utilities' approved rate. Section 196.58 and PSC 130.09(1) reflect a legislative judgment that a municipality cannot impose costs on ratepayers simply because it wants to – and can – engage in some project for which it does not wish to pay the full cost.

In addition to protecting utilities and ratepayers, requiring that a purported justification be subject to PSC approval serves the interest of good government by restricting the ability of a municipality to act as a free rider. It limits a city's ability to shift the costs of a project from those who stand to benefit from it and who are entitled to participate in the political processes that lead to it to those who can do neither.

One of the ways in which these objectives are served and the prerogative of municipalities limited is by prohibiting a city from engaging in commerce or obtaining economic advantage for its residents by imposing costs on others. That is the impact of PSC 130.09(1). The use of the phrase "health, safety, or public welfare justification" in that regulation is not accidental. It mirrors longstanding definitions of a municipality's "governmental" – as opposed to its "proprietary" – powers. *See, e.g.*, *Save Elkhart Lake, Inc. v. Village of Elkhart Lake*, 181 Wis. 2d 778, 789, 512 N.W.2d 202 (Ct. App. 1993) ("A municipality acts in its governmental

capacity when its primary objective is health, safety and the public good."); *Wausau Joint Venture v. Redevelopment Authority*, 118 Wis. 2d 50, 347 N.W.2d 604 (Ct. App. 1984); *see generally State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 205 N.W.2d 784 (1973).

Proprietary activities are concerned, not with the prevention of harm or the preservation of public order, but with the promotion of economic activity within and for the benefit of the municipality and its residents. As our Supreme Court has explained:

> Municipal corporations . . . possess a double character—the one *governmental, legislative,* or *public*; the other, in a sense, *proprietary* or *private* . . . . *In its governmental or public character* the corporation is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. . . . But *in its proprietary or private character* the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct *legal personality* or *corporate individual*; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the Legislature over it or the rights represented by it is omnipotent.

Piper v. City of Madison, 140 Wis. 311, 314, 122 N.W. 730 (1909), *quoting* 1 Dill. Mun. Corp. § 66 (39) (emphasis added, omissions in original).

A municipality acts in its proprietary capacity when an "activity … places [the municipality] in the commercial world" and is without "distinction between a utility owned by a corporation, a company, or an individual and a utility owned by a village or a city …." *Christian v. City of New London*, 234 Wis. 123, 290 N.W. 621 (1940). It is an activity "voluntarily assumed by the city for its residents." *Bargo Foods North, Inc. v. Dep't of Revenue*, 141 Wis. 2d 589, 597, 415 N.W.2d 581 (1987), *citing Piper*, *supra*, 140 Wis. at 314.

That is not to say that the activity must "pay for itself" in order to be considered proprietary. The fact that an activity is subsidized does not remove its proprietary character and

make it governmental. *Flesch v. City of Lancaster*, 264 Wis. 234, 236, 58 N.W.2d 710 (1953). What is critical is the nature of the activity; not how it is paid for. The point is not that a city pay for an activity through fees or taxes, but that, if it wishes to engage in commerce for the benefit of its citizens, that it pay for it somehow.[7] It must internalize its costs.

The distinction between a "governmental" and "proprietary" function thus is not that the former "benefits" the public and the latter does not, but that proprietary activity involves, in principal part, the entry of a municipality into the economic realm, either by engaging in competitive economic activity or seeking to facilitate commercial activity by others. *See, e.g.*, *Save Elkhart Lake, supra*, 181 Wis. 2d 778 (design of public restroom in private development is proprietary); *Bargo, supra*, 141 Wis. 2d 589 (operation of Milwaukee county airport is proprietary); *Wausau Joint Venture*, *supra*, 118 Wis. 2d 50 (construction and operation of parking structure is proprietary); *Wis. Public Service Corp. v. Marathon County*, 75 Wis. 2d 442, 249 N.W.2d 543 (1977) (construction of airport runway extension is not an exercise of police power); *Carlson v. Marinette County*, 264 Wis. 423, 59 N.W.2d 486 (1953) (operation of hospital is proprietary); *Christian v. City of New London*, *supra,* 234 Wis. 123 (light and power utility operation is proprietary); *Milwaukee Electric Railway & Light Co. v. City of Milwaukee*, 209 Wis. 656, 245 N.W. 856 (1932) (water utility operation is proprietary); *Chicago, St. Paul, M & O Ry. Co. v. City of Black River Falls*, 193 Wis. 579, 214 N.W. 451 (1927) (furnishing electric power and lights is proprietary), *modified on unrelated grounds*, 215 N.W. 455.

[7] This does not mean that one unit of government; say the federal government or the state may not make a grant to a city. While those grant funds may be raised by taxing persons outside the city's boundaries, they were presumably approved in a political process in which all of the effected taxpayers were represented or through fees on freely chosen activities. That is not so when a city imposes costs on utilities and their ratepayers living outside the city's boundaries.

C. Construction and Operation of a Streetcar Is Proprietary.

The Streetcar Project is very much like the parking structure in *Wausau Joint Venture*. That structure was found to be proprietary because it was "for the private convenience of mall patrons and the private gains of [mall] enterprises." 118 Wis. 2d at 60. The Streetcar Project is much like the operation of an airport in *Bargo* and *Marathon County*, as both streetcars and airports are transit functions. While each of these endeavors was a permitted activity, none of them were essential or core municipal functions such as sewer or police and fire protection. None are distinct from what may be done by a private company. In fact, as noted above, streetcars in Milwaukee were operated by private businesses for more than 100 years. In 1952, when offered a chance to buy and operate the then-existing transit system – which still included streetcars – the City declined, saying that it ought to be operated privately. The City is, of course, free to change its mind, but the traditional treatment of public transit and general – and streetcars in particular – underscores the proprietary nature of these endeavors.

Wisconsin courts have not directly examined the governmental/proprietary interest dichotomy in the context of public transit other than, as noted above, airports. But courts in other states have consistently held that the operation of a public transit system is a proprietary function. One of these cases, involving the same question posed here of whether or not a city can force a utility to move utility lines at its own expense to accommodate public transit, was cited by the Wisconsin Supreme Court with approval in *Milwaukee Electric Railway*, supra, 209 Wis. at 859, citing *New York & Queens Elec. Light & Power Co. v. City of New York,* 221 A.D. 544, 547 (N.Y. App. Div. 1927).

In *New York & Queens Elec. Light*, the Appellate Division noted that "[t]he law is reasonably well settled that, when the city engages in the construction of a rapid transit line, it is

not performing a governmental act, but acting in a proprietary capacity." 221 A.D. at 547. In that case, the City of New York ordered a utility to move wires and poles located in a public right-of-way to accommodate construction of an elevated train line. *Id.* at 544-545. The court held that building public transit was "a business enterprise of the city through which money may be made or lost the same as if it were owned by an ordinary railroad corporation" and therefore proprietary. *Id.* at 548. Because a private transit could not require a utility to move its facilities at its own cost, neither could the city. *Id.* at 549, *citing Sinsheimer v. Underpinning & Foundation Co.*, 178 App. Div. 495, 504, 165 N.Y.S. 645 (N.Y. App. Div. 1917). The city must, in other words, internalize its costs for a proprietary project. If a city seeks to promote commerce, it must pay for it.

Similarly, in *Lehman v. City of Shaker Heights*, the United States Supreme Court held that for purposes of speech restrictions imposed on advertising in buses, a city's transit system was not a public forum but rather a commercial venture, 418 U.S. 298, 303 (1974). Because by operating a public transit system the "city is engaged in commerce," reasonable advertising restrictions were nothing more than "reasonable legislative activities advanced by the city *in a proprietary capacity*."[8] *Id.* at 304 (emphasis added).

The Washington Supreme Court, while interpreting an arbitration clause in a collective bargaining agreement, described a municipality as "acting in its proprietary capacity to operate a transit system." *Metro Seattle v. Transit Union*, 118 Wash. 2d 639, 646, 826 P.2d 167 (1992). According to the Court:

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[8] *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir. 1998), is not to the contrary. In that case, a divided panel of the Second Circuit cited *Lehman* but distinguished it on other grounds. *Id.* at 130. As the dissent noted, there was no question that "the MTA operates its bus system as a commercial venture. Thus, this function of government is not conducted in the authority's role of lawmaker, but rather in a proprietary function." *Id.* at 133-34 (Cardamone, J., dissenting).

> The operation of utilities has been classified as a proprietary function. The operation of a transit system is similar. Indeed, [the Municipality of Metropolitan Seattle] was formed to provide 'essential services' to the population it serves, including garbage disposal, water supply, and transportation. These types of functions are more proprietary than governmental in nature.

Id. at 645 (citations omitted).

In building and operating the Streetcar Project, Milwaukee seeks to engage in economic activity and stimulate economic development. The City's Environmental Assessment repeatedly extols the alleged economic virtues of the Project, calling it "an economic development tool that will provide confidence for real estate investors," EA at 26, and "create both short-term and long-term jobs that will benefit the local and regional economy," EA at 64. The EA anticipates "[e]conomic benefits . . . from development and redevelopment potentially induced along the streetcar routes." EA at 141. "[L]ong range land use planning goals" that will allegedly be achieved "include facilitating new housing development, encouraging new commercial development, improving tourism and the entertainment industry, increasing economic development potential and increase property values" through the "growth inducing effects" of a streetcar. EA at 135. Even the City's Resolution claims that the Project can bring in "up to 9,000 new housing units, 13,500 new residents, 1,000,000 square feet of new occupied retail space, 4,000,000 square feet of new occupied office space, 20,500 new jobs, and $3.35 billion in new tax base." City Resolution at 3.

Just as Wausau wanted to stimulate economic growth by providing parking for the patrons of a downtown development, the Streetcar Project is intended to move people between private businesses and downtown attractions. It seeks to compete with public and private buses, taxis, car services and private automobiles. It intends to direct economic activity to the City – in fact to a certain part of the City. It does not seek to promote health or safety or to serve the public welfare in the more limited sense as it does when acting in a "governmental" capacity.

Building a street car to spur commercial activity is the equivalent of the City deciding that a new enterprise, say a multiplex cinema, is needed to spur economic development in downtown Milwaukee. No one doubts that the City could run a movie theatre. But certainly it could not force utilities to relocate their facilities at their own expense to accommodate construction of the multiplex. Section 196.58(4) and PSC 130.09(1) reflect a judgment that, however permissible it might be for a city to seek to promote economic activity for its residents and within its borders, it ought to internalize its costs. It should not be able to use its sovereign authority to obtain an advantage over private actors, including regulated public utilities. A city may not seek its own economic benefit at the expense of those who are not able to participate in its decision making processes and are bound to pay whatever costs the City seeks to place upon them.

III. EVEN IF THE CITY HAS A PUBLIC WELFARE JUSTIFICATION, THE RECORD DOES NOT ESTABLISH THAT IT IS ADEQUATE TO JUSTIFY SHIFTING ITS COSTS TO THE UTILITIES

Even if the Commission were to conclude that the Streetcar Project does represent an exercise of the City's power to promote health, safety or public welfare, it must then consider whether that justification is "adequate" to support the imposition of the costs involved on the utilities. PSC 130.09(1). The record is clear that the City is unwilling to spend any of its own taxpayers' dollars on the project. Many of the participants in the public meetings arranged by the City/DOT Streetcar Project team in connection with the EA asked whether the project could lead to an increase in property taxes. Concerned citizens were advised that it would not. "No property taxes are planned to be used to fund the Streetcar project." *See* FONSI, Appendix A. Indeed, Mayor Barrett has been promising for a number of years that the streetcar project will not involve any general or property tax increases for Milwaukee taxpayers. *See, e.g.*, The Barrett

Report, June 21, 2007 ("I am pleased to report that my plan [including the Streetcar Project, then known as the Downtown Circulator and budgeted at $53 million] improves the local transit service … without increasing the burden on Milwaukee property tax payers.") (Kamenick Aff. Ex. E) *available at* http://city.milwaukee.gov/Jun.21.07NewsFromTheMayor.htm (last accessed May 24, 2012).

In other words, the Mayor's position is that the Streetcar Project will be good for the City but is not of sufficient urgency or importance to ask the City taxpayers who would benefit from it to pay for it. To the contrary, it has apparently been imperative to assure them that they won't.

This is further illustrated by the City's treatment of utility relocation costs in the City Resolution and the Environmental Assessment. As the Commission observed in *City of Manitowoc*, even where the imposition of relocation costs is not per se invalid, a municipality cannot be indifferent to the needs of affected utilities and ratepayers. In this case, the City has decided to move forward without the slightest acknowledgement that it might have to pay for or contribute to massive utility relocation costs. The consideration it is willing to give to the needs of utilities and ratepayers is – at the very most - whatever won't cost it a dime.

It is difficult to see how this constitutes an adequate justification for a project that allegedly involves public health or safety. And it is even more difficult to see how a Project that would be nice to have but too unimportant to pay for can justify the imposition of millions of dollars in very real costs on local utilities and their ratepayers**.**

IV. RESPONSE TO ISSUES IDENTIFIED BY THE COMMISSION.

The conclusions presented in this Brief are consistent with the appropriate determination of the issues identified by the Commission in its Notice of Proceeding:

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?

Response: No. The Milwaukee Ordinance does not require the utilities to agree in advance to move or modify facilities in City right of way as a condition of their use.

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

   Response: No. For the reasons set forth in this Initial Brief, the City's construction of the Streetcar Project is the exercise of a proprietary function rather than governmental function, which renders the City's cost allocation efforts *per se* unreasonable and void.

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. § 182.017(8), the rules implementing Wis. Stat. § 182.017, or any other applicable statutes or rules cited in a petition?

   Response: Yes. For the reasons set forth in this Initial Brief, the City's cost allocation is *per se* unreasonable and void, as well as being unreasonable as a matter of fact.

Dated this 24th day of May, 2012.

Respectfully submitted,
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