SERVICE DATE
Aug 29, 2014

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 — 5-DR-109

FINAL DECISION

This is the Final Decision denying the city of Milwaukee's (City) Motion to Dismiss (PSC REF#: 182343), and granting the motions of petitioners Brett Healy and 35 other persons (Individual Petitioners) (PSC REF#: 190894) and ATU Petitioners[1] (PSC REF#: 190875) for a Final Decision. The City proposes to build a 2.1 mile streetcar line as a downtown transit connector which will have a total estimated cost of appropriately $64.6 million (Streetcar Project). There are underground utility lines and other utility facilities that may need to be relocated or reinforced along the streetcar alignment. Costs to relocate the utility lines and facilities are not included in the estimated cost of $64.6 million.

Individual Petitioners filed an Amended Petition seeking, pursuant to Wis. Stat. §§ 227.41 and 196.58(4), "a declaratory ruling on whether the cost of moving certain utility structures to accommodate construction of a street car line in the city of Milwaukee can be imposed upon the utilities and their ratepayers." (Indiv. Amend. Pet. at 1.) (PSC REF#: 164192.) ATU Petitioners each filed verified petitions with the Commission pursuant to Wis. Stat. §§ 227.41 and 182.017, each seeking a declaratory ruling that it is unreasonable and unlawful for the City to impose by ordinance, resolution, or other action costs of modifying or

[1] The ATU Petitioners are: Wisconsin Bell, Inc. (d/b/a AT&T Wisconsin), Timer Warner Cable LLC, the Wisconsin Cable Communications Association, tw telecom of Wisconsin l.p. (tw telecom), PAETEC Communications, Inc., McLeodUSA Telecommunications Services, LLC, and Norlight Telecommunications, Inc.

moving certain utility facilities and structures that are maintained in public rights-of-way to accommodate the Streetcar Project.[2]

The Commission declares that any municipal regulation of the City, including without limitation Milwaukee Municipal Code § 115-22 (Milw. Ord. § 115-22) and Resolution #110372, and any other City contract, resolution, order or other regulation that requires Wisconsin Electric Power Company (WEPCO, d/b/a We Energies), Wisconsin Gas LLC (WG), American Transmission Company LLC (ATC),[3] or the ATU Petitioners, to pay any part of the cost to modify or relocate the companies' facilities to accommodate the Streetcar Project is unreasonable and void, as applied to the Streetcar Project, pursuant to Wis. Stat. §§ 196.58(4)(c) and 182.017(8)(as).

Introduction

The Streetcar Project

The proposed Streetcar Project is a 2.1 mile fixed guideway transit system in downtown Milwaukee. (City Resp. Brief at 1.) (PSC REF#: 168149.)[4] The total capital costs for the initial 2.1-mile streetcar system (Phase I) are estimated to be $64.6 million.[5] Of this amount of costs for Phase I, $54.9 million are covered by federal grant funds and $9.7 million funding through a

[2] Verified Petition of AT&T Wisconsin (PSC REF#: 161190); Verified Petition of tw telecom of wisconsin l.p. (PSC REF#: 163111); Verified Petition of PAETEC Communications, Inc., McLeodUSA Telecommunications Services, LLC, and Norlight Telecommunications, Inc. (PSC REF#: 163378); Verified Petition of Time Warner Cable LLC (PSC REF#: 163422).
[3] WEPCO, WG, and ATC will be collectively referred to as the Intervening Utilities.
[4] A detailed history of the Milwaukee Streetcar Project, its origins and approval process, is set forth in the City of Milwaukee's Response Brief dated July 9, 2012 (PSC REF#: 168149), and the supporting affidavit of Thomas Miller (PSC REF#: 168159).
[5] Affidavit of Jeffrey Polenske (Polenski Aff.) dated July 9, 2012, ¶ 32. (PSC REF#: 168111).

tax incremental district.[6] The capital costs of Phase 2 are an additional $48.1 million; however, Phase II is not being implemented because it is not yet funded.[7]

The City has an ordinance, Milw. Ord. § 115-22, which requires that, upon receiving written notice from the City, a public utility must bear the cost of relocating its facilities to accommodate "any public works or improvements of any nature whatsoever undertaken by the city." The City also passed a resolution, Resolution #110372, that approved the Streetcar Project, as described in the Environmental Assessment (EA), and authorized the Commissioner of Public Works to take various actions to advance the project and appropriate funds.[8] Among the actions authorized was working with public and private utilities to coordinate and resolve utility issues.

According to the EA that the City prepared in October 2011,[9] the project area includes an extensive public and private utility system. The EA stated that "underground utility lines would need to be relocated or reinforced on nearly all blocks along the streetcar alignment."[10] It also identified some overhead lighting lines in the right-of-way, but no other overhead utility lines. Funding for utility modification or relocation costs were not included in the City's budget for the project. (Polenske Aff., ¶ 34.) (PSC REF#: 168111.)

In this proceeding, the Intervening Utilities and certain ATU Petitioners submitted affidavits estimating their relocation or modification costs due to the Streetcar Project as follows:

[6] Polenske Aff., ¶ 33 (PSC REF#: 168111).
[7] Polenske Aff., ¶ 32 (PSC REF#: 168111).
[8] *See* AT&T Wisconsin Affidavit of Kevin Anderson (Anderson Aff., Ex. B) (PSC REF#: 165155, PSC REF#: 165159).
[9] *See* Anderson Aff., Ex. A (PSC REF#: 165155, PSC REF#: 165158).
[10] Anderson Aff., Ex. A at 141 (PSC REF#: 165155, PSC REF#: 165158).

- We Energies — $45 million[11]
- ATC — $10.5 to $15.7 million[12]
- AT&T Wisconsin — $10 million on Broadway Street, potentially tens of millions of dollars total[13]
- tw telecom — $1.7 million[14]
- Windstream — $0.5 million[15]

As tw telecom's Vice President Pamela Hollick noted, these costs were estimates because at the time the utilities filed their affidavits, the City was still in the process of forming a project team and had not yet begun any utility coordination efforts. (Hollick Aff., ¶ 7.) (PSC REF#: 165182.)

The City challenged all of these cost estimates, contending that the utilities overestimated relocation costs because they included costs for both Phase I and Phase II (even though only Phase I is now being planned), for upgrading facilities rather than replacing them, and for the relocation of facilities that will not be affected by Phase I.[16] The City also noted that as part of its utility coordination efforts it would evaluate a route alternative that "is expected to significantly reduce utility impacts" on Broadway Street, splitting the route onto Broadway and Milwaukee Streets rather than running in both directions on Broadway. Mr. Polenske stated that the utilities' cost estimates did not take into account this possible route alternative. (Polenske Aff., ¶¶ 9 and 11-30.) (PSC REF#: 168111.) While the City disputed the estimates provided, it did not dispute that the Intervening Utilities and one or more of the ATU Petitioners would incur some amount of relocation or modification costs.

[11] *See* Affidavit of John Harvie, dated May 24, 2012, ¶¶ 3-4 (PSC REF#: 165184).
[12] Affidavit of John F. McNamara, dated May 23, 2012 (PSC REF#: 165131, ¶ 7).
[13] Anderson Aff., ¶ 7 (PSC REF#: 165155).
[14] Hollick Aff., ¶ 7 (PSC REF#: 165182).
[15] Affidavit of Jeffrey L. Raymond, dated May 24, 2012, ¶ 7 (PSC REF#: 165183).
[16] Polenski Aff., ¶¶ 11-30 (PSC REF#: 168111).

While this proceeding was pending before the Commission, the City continued to pursue the Streetcar Project and continued to keep the Commission advised of the project status through the filing of affidavits from City Engineer Jeffrey Polenske.[17] In the final status report received by the Commission (PSC REF#: 197388), the City reported that the Federal Transit Administration had given its formal approval of a split-route alignment alternative on Milwaukee and Broadway Streets, significantly reducing what AT&T Wisconsin previously estimated to be approximately $10 million in relocation costs. The City also reported that the 60 percent plans were completed in August 2013, and that progress had been made with WEPCO and WG regarding identification of relocation criteria and resolving access issues. However, as WEPCO and WG noted, while its relocation costs may have been reduced by these changes, the potential costs have not been eliminated and that "the actual future relocation costs could vary based on future conditions and the execution of an operating agreement." (PSC REF#: 197670.)

Procedural History

On October 5, 2011, Brett Healy filed a petition with the Commission seeking a declaratory ruling under Wis. Stat. § 227.41. Mr. Healy requested that the Commission declare that public utility ratepayers would not be responsible for the cost of permanently modifying or relocating utility facilities to accommodate the construction of the Streetcar Project. He requested a ruling that the City must bear these costs. (PSC REF#: 154240.)

A Notice of Proceeding was issued by the Commission on December 5, 2011. (PSC REF#: 156725.) The opening of this proceeding by the Commission was conditioned upon

[17] Mr. Polenske submitted eight affidavits providing the Commission with project status updates: (PSC REF#: 158973, PSC REF#: 163449, PSC REF#: 168111, PSC REF#: 170182, PSC REF#: 179614, PSC REF#: 183889, PSC REF#: 184900, PSC REF#: 197388).

Mr. Healy's submission of an affidavit or other evidence demonstrating that he was a ratepayer of either Wisconsin Electric Power Company or Wisconsin Electric Gas Operations. Mr. Healy submitted the required documentation. (PSC REF#: 157139.)

A prehearing conference was held on February 2, 2012. Requests to intervene were granted to the Wisconsin Industrial Energy Group, Inc., Citizens Utility Board, Wisconsin Paper Council, AT&T Wisconsin, League of Municipalities, WEPCO, tw telecom inc., ATC, Wisconsin Cable Communications Association, Time Warner Cable LLC, Council for Small Business Executives, and the City.[18] The parties, for purposes of review under Wis. Stat. §§ 227.47 and 227.53, are listed in Appendix A. Pursuant to Wis. Stat. § 227.41(1), this declaratory ruling is binding on all parties to the proceedings on the statement of facts alleged.

Mr. Healy filed his petition on his own, but sought a Commission ruling that would apply Wis. Stat. § 196.58. Because that statute authorizes the Commission to act only in response to a complaint from a public utility or a "qualified complainant" (a group of 25 or more people, not a single person),[19] the Commission gave Mr. Healy ten days to supplement his petition with affidavits from at least 24 more affected utility ratepayers. (PSC REF#: 163712.) Mr. Healy did so, filing a Verified Amended Petition on May 3, 2012. (PSC REF#: 164192.)

In its Order on Motion for Interlocutory Review and Amendment to Prehearing Conference Memorandum, docket 5-DR-109 (March 2, 2012) (PSC REF#: 160666), the Commission concluded that alternative telecommunications utilities (ATUs) could not participate because recent statutory changes had eliminated their right to seek relief under

[18] Initially, the City intervened for limited purposes (PSC REF#: 158280), but subsequently requested and was granted full party status (PSC REF#: 159312).

[19] *See* Wis. Stat. § 196.26(1m), which refers to complaints from "any mercantile, agricultural, or manufacturing society, body politic, municipal organization, or 25 persons."

Wis. Stat. § 196.58. But the Commission noted that these utilities had another path to file complaints, under Wis. Stat. § 182.017(8). It invited telecommunications utilities to seek a declaratory ruling that applied Wis. Stat. § 182.017(8) to the Streetcar Project. The ATU Petitioners each filed verified petitions seeking such relief.[20] When the telecommunications utilities did so, the Commission merged the legal issues about Wis. Stat. §§ 182.017(8) and 196.58 that the different parties were briefing.

> The Commission instructed the parties to address 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. § 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?
>
> Assume the following facts for purposes of making the legal determinations set forth above: The City of Milwaukee will, by contract, ordinance, resolution, or some other means, require permanent modification or relocation of public utility facilities for the streetcar project and will impose some or all of the cost of permanent modification or relocation upon the utilities.

(Order on Motion for Interlocutory Review and Amendment to Prehearing Conference Memorandum at 5.) (PSC REF#: 160666.) In addition to its assumption that public utilities

[20] Verified Petition of AT&T (PSC REF#: 161190); Verified Petition of tw telecom of wisconsin l.p. (PSC REF#: 163111); Verified Petition of PAETEC Communications, Inc., McLeodUSA Telecommunications Services, LLC, and Norlight Telecommunications, Inc. (PSC REF#: 163378); Verified Petition of Time Warner Cable LLC (PSC REF#: 163422).

would incur at least some cost to relocate facilities, the Commission allowed parties to present other factual evidence by filing supporting documents with their briefs. (Prehearing Conference Memorandum, at 3, docket 5-DR-109 (February 7, 2012).) (PSC REF#: 159312.)[21]

Briefing on these threshold legal issues began on May 24, 2012. It continued through three rounds of response and reply briefs and finished on August 14, 2012.[22] After reviewing the information and legal briefs filed, at the open meeting of September 27, 2012, the Commission sent these petitions to the Administrative Law Judge (ALJ) for further proceedings. (PSC REF#: 173938.)

On January 24, 2013, the ALJ convened a second prehearing conference at which the ATU Petitioners proposed two issues for hearing, and the City submitted its own list as an alternative. (*See* Second Prehearing Conference Transcript, January 24, 2013.) (PSC REF#: 181534.) The ALJ resolved this dispute by accepting two issues that the ATU Petitioners presented and rejecting the City's issues list and its proposal to brief some issues prior to hearing. (PSC REF#: 180235.)

The City filed a Request for Interlocutory Review (PSC REF#: 181062) on February 18, 2013, seeking the Commission's review of certain aspects of the Second Prehearing Conference Memorandum. At the time it filed its request, the City was asking the Commission to accept more briefs on two additional legal issues. Individual Petitioners, ATU Petitioners, and the

[21] The Commission also required the Intervening Utilities and the City to file information about the 25 largest utility facility relocations or modifications in Wisconsin over the past five years. *Order on Motions for Clarification and on Threshold Legal Issue*, docket 5-DR-109, at 2 (April 25, 2012). (PSC REF#: 163712.)

[22] Initial Brief of Individual Petitioners (PSC REF#: 165165); Initial Brief of Intervening Utilities (PSC REF#: 165184); Initial Brief of ATU Petitioners (PSC REF#: 165167); Response Brief of the City (PSC REF#: 168149); Response Brief of League of Wisconsin Municipalities (PSC REF#: 168150); Reply Brief of Individual Petitioners (PSC REF#: 169227); Reply Brief of Intervening Utilities (PSC REF#: 169233); Reply Brief of ATU Petitioners (PSC REF#: 169237); Surreply Brief of City (PSC REF#: 170182); Surreply of League of Wisconsin Municipalities (PSC REF#: 170185).

Intervening Utilities filed responses to the City's Request for Interlocutory Review.[23] On March 18, 2013, the City filed a Reply Brief in support of its Request for Interlocutory Review (PSC REF#: 182341) and simultaneously filed a Motion to Dismiss (PSC REF#: 182343) contending that "the Verified Petitions filed by the ATU Petitioners must be dismissed because the ATUs lack standing to pursue, and the Public Service Commission of Wisconsin . . . lacks subject matter jurisdiction to grant, the relief they each request under Wis. Stat. §§ 182.017 and 227.41." (Motion to Dismiss at 1.) (PSC REF#: 182343.)

The City maintained in these filings that no Commission decision about City regulations could resolve the essential dispute among the parties in this proceeding. It alleged that the utilities must relocate their facilities if they conflict with the Streetcar Project, not because of any City regulations, but because of a separate statutory mandate under Wis. Stat. § 182.017(2). According to the City, that statute by itself forces the utilities to move at their own expense. (City Reply at 6.) (PSC REF#: 182341.) This issue about the purported application of Wis. Stat. § 182.017(2) triggered a cascade of additional briefs, motions and affidavits.[24] The City requested that the Commission render a decision on the merits, stating:

> The City believes that the issues that have been briefed are ready for Commission decision, that the issues are dispositive of the entire matter before the Commission, and that an evidentiary hearing on the amount of the relocation costs is not necessary and would be a waste of agency and party resources.

[23] Individual Petitioners' Response (PSC REF#: 181763); ATU Petitioners' Response (PSC REF#: 181785); Intervening Utilities' Response (PSC REF#: 181790).

[24] On March 28, 2013, the Intervening Utilities filed a Motion for Leave to File Surreply Brief and attached a copy of the surreply brief to their motion. (PSC REF#: 182658, PSC REF#: 182659.) ATU Petitioners also filed a Motion for Leave to Respond to the City of Milwaukee's Reply Brief. (PSC REF#: 182663.) Although the City opposed both of these motions (PSC REF#: 183017), on April 8, 2013, the ATU Petitioners submitted their last brief. (ATU Petitioners Response Brief.) (PSC REF#: 184065.) The Intervening Utilities filed a Joint Reply Brief. (PSC REF#: 183213.) The City responded with a motion for leave to file a sur-surreply brief, a copy of its sur-sureply brief, and an affidavit submitting the informal "transcript" of the Commission's open meeting discussion of September 27, 2012. (PSC REF#: 183524, PSC REF#: 183525, PSC REF#: 183526.) On April 29, 2013, the ATU Petitioners filed a further response to the City. (PSC REF#: 184065.)

(City's Motion for Leave to Respond and Request for Decision, at 2 (April 15, 2013).) (PSC REF#: 183525.) The City concluded this briefing by its letter dated May 7, 2013, waiving opportunity for further briefing and renewing its request for Commission action on its pending motion to dismiss. (PSC REF#: 184502.)

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

> **SECTION 1978t.** 182.017(8)(as) of the statutes is created to read:
>
> 182.017(8)(as) Notwithstanding sub. (2), a municipal regulation is unreasonable if it requires a company to pay any part of the cost to modify or relocate the company's facilities to accommodate an urban rail transit system.
>
> **SECTION 1989t.** 196.58(4)(c) of the statutes is created to read:
>
> 196.58(4)(c) Notwithstanding s. 182.017(2), a municipal regulation is unreasonable under par. (a) or (b) if it requires a public utility, telecommunications provider, or video service provider to pay any part of the cost to modify or relocate the public utility's, telecommunications provider's, or video service provider's facilities to accommodate an urban rail transit system, as defined in s. 182.017(1g)(ct).

2013 Wisconsin Act 20 (effective July 2, 2013).

This change in law resulted in the filing of additional motions and briefs. Individual Petitioners and the ATU Petitioners each filed motions seeking a Final Decision from the Commission.[25] These Petitioners contended that the Commission must render a decision

[25] Individual Petitioners' Motion for Final Decision (PSC REF#: 190894); ATU Petitioners' Motion (PSC REF#: 190875); Brief in Support of Motion for Final Decision) (PSC REF#: 190876.

applying Act 20. The City responded, opposing the motions. (PSC REF#: 192013.) The City argued that Act 20 did not require the Commission to issue a Final Decision and that the Commission should decline to do so because any such decision would not end the controversy. Specifically, the City reiterated its argument that it is allegedly Wis. Stat. § 182.017(2)—not any municipal ordinance arguably covered by Act 20—that requires utilities to relocate their facilities to accommodate the Streetcar Project. The City also argued that the Commission should not issue a Final Decision based upon Act 20 because the "legality of Act 20 is questionable and ultimately a question for the circuit court to decide." (City's Response at 2.) (PSC REF#: 192013.) Further, according to the City, the Commission could not summarily issue a Final Decision without first having a hearing. (*Id*. at 4.)

Individual Petitioners and the ATU Petitioners responded, countering the City's arguments.[26] The ATU Petitioners argued that "[t]he City's argument is not only directly contrary to the plain terms of Wis. Stat. § 182.017 and longstanding case law, but it renders Wis. Stat. § 182.019(8)(as) (adopted as part of Act 20) meaningless, contrary to the Legislature's intent." (ATU Petitioners Reply Br. at 4.) (PSC REF#: 192503.) Individual Petitioners similarly argued that Wis. Stat. § 182.017(2) does not give the City the power to require relocation—those powers are derived, pursuant to Wis. Stat. § 196.58, only through contract, ordinance, or resolution. (Pet. Reply Br. at 3.) (PSC REF#: 192489.) Individual and ATU Petitioners also disputed the City's claim that a hearing was required, noting that there were no disputed questions of fact for hearing, and the briefing completed in this docket

[26] Individual Petitioners' Reply Br. (PSC REF#: 192489);(ATU Petitioners' Reply Br. (PSC REF#: 192503).

provided ample opportunity for all parties to state their case. (ATU Petitioners Reply Br. at 13) (PSC REF#: 192503); (Pet. Reply Br. at 7-8) (PSC REF#: 192489).

The Commission discussed the pending motions at its open meeting of April 23, 2014.

Findings of Fact

1. The Streetcar Project is intended to provide transportation by rail within the City of Milwaukee to the public on a regular or continuing basis.

2. One or more of the ATU Petitioners and the Intervening Utilities have utility facilities along the proposed route of the Milwaukee Streetcar Project that may require modification or relocation to accommodate the project.

3. The City has in place or may attempt to put in place contracts, ordinances, resolutions, orders, or other regulations, including without limitation Milw. Ord. § 115-22 and Resolution #110372, to require companies, public utilities, telecommunication providers, or video service providers to pay modification or relocation costs associated with the Streetcar Project.

4. While the exact amount is unknown, one or more of the ATU Petitioners and the Intervening Utilities could incur some amount of modification or relocation costs in connection with the Streetcar Project.

Conclusions of Law

1. The Commission has jurisdiction to render this declaratory ruling pursuant to Wis. Stat. §§ 182.017, 196.58, and 227.41.

2. Individual Petitioners are customers and ratepayers of WEPCO and/or WG.

3. AT&T Wisconsin, tw telecom of wisconsin l.p., PAETEC Communications, Inc., McLoedUSA, and Time Warner Cable LLC are each a "company" under Wis. Stat. § 182.017(1g)(b) and a "public utility, telecommunications provider, or video service provider" under Wis. Stat. §§ 196.58(4)(c) and 196.01(5).

4. Intervening Utilities are each a "public utility" as defined in Wis. Stat. § 196.01(5).

5. The Streetcar Project is an "urban rail transit system" under Wis. Stat. §§ 85.063(1)(c), 182.017(1g)(ct) and 196.58(4)(c).

6. Milwaukee Ord. § 115-22, Resolution #110372, and any other City contract, ordinance, resolution, order or other regulation are each a "municipal regulation" under Wis. Stat. §§ 182.017(8) and 196.58(4).

7. 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).

Opinion

There are several pending and inter-related motions before the Commission. There are four motions that have been fully briefed and await Commission review and action. These motions are in chronological order by date of filing: (1) City of Milwaukee's Request for Interlocutory Review filed February 18, 2013 (PSC REF#: 181062); (2) City of Milwaukee's

Motion to Dismiss filed March 18, 2013 (PSC REF#: 182343); (3) ATU Petitioners' Motion for Final Decision filed September 23, 2013 (PSC REF#: 190875), Brief in Support of Motion for Final Decision filed September 23, 2013 (PSC REF#: 190876); and (4) Individual Petitioners' Motion for Final Decision filed September 24, 2013 (PSC REF#: 190894).

Act 20 changed the procedural posture of some of the earlier-filed motions. The pending motions, when reviewed in light of this change in law, present three inter-related issues for Commission decision. The threshold issue relates to the standing of ATU Petitioners and the Commission's jurisdiction to adjudicate those petitions and those of the Individual Petitioners. The second issue is whether the Commission can or should exercise its authority to adjudicate this dispute and whether a hearing is required before it takes further action. The final issue is the application of Act 20 to this dispute and adjudication on the merits.

ATU Petitioners' Standing and Commission Jurisdiction

In the City's Reply in support of its Motion for Interlocutory Review (PSC REF#: 182341) and in its Motion to Dismiss (PSC REF#: 182343), both filed prior to Act 20, the City questioned "whether the ATUs have standing to bring their relocation cost claims and whether the Commission has the jurisdictional authority to grant the ATU Petitioners' requested relief under Wis. Stats. § 182.017(8)." (City's Motion to Dismiss at 3.) (PSC REF#: 182343.) According to the City, the ATUs lacked standing and this Commission lacks review authority under Wis. Stat. § 182.017(8) because:

> [T]he legislature limited that authority to only those municipal right-of-way regulations that might: (1) have "the effect of creating a moratorium on the placement of company lines or systems" in the public right-of-way or on the "entrance into the municipality of a video service provider;" or (2) require a

> company to pay more than the actual cost of right-of-way management function costs; or (3) require the company to be responsible for the municipality's diggers hotline/one-call system fees. Wis. Stat. § 182.017(8)(am)-(e).

Id. at 7. The City argued that this enumeration of types of complaints is the entire universe of municipal regulations that the Commission may review under Wis. Stat. § 182.017(8). Because the statute's list did not, at that time, include complaints about utility relocation costs, the City argued that the Commission lacks jurisdiction to hear a complaint from an ATU about relocation costs.

Act 20 created Wis. Stat. § 196.58(4)(b) which specifically gives ATUs the right to file a complaint under Wis. Stat. § 196.58 and request that the Commission review the reasonableness of "any municipal regulation relating to any product or service rendered by any such provider within a municipality or relating to the terms and conditions upon which such provider occupies the streets, highways, or other public places within the municipality . . . ." Further, Act 20 created Wis. Stat. § 196.58(4)(c) which voids any municipal regulation "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 . . . ."

The City, in post-Act 20 filings with the Commission, did not challenge the ATUs' standing. The Commission concludes that these changes, which occurred after the City filed its Motion to Dismiss, resolve any question relating to the standing of the ATUs to challenge a municipal regulation that requires the payment of relocation costs associated with an urban rail transit project. AT&T Wisconsin, tw telecom of wisconsin l.p., PAETEC Communications, Inc., McLoedUSA, and Time Warner Cable LLC, are each a "company" under Wis. Stat.

§ 182.017(1g)(b) and a "public utility, telecommunications provider, or video service provider" under Wis. Stat. §§ 196.58(4)(c) and 196.01(5) and therefore have standing to pursue relief in this proceeding.

The City and Petitioners[27] have differing views regarding the Commission's jurisdiction to adjudicate this dispute. In the City's Reply in Support of its Motion for Interlocutory Review (PSC REF#: 182341), the City argued that because "the relocation requirement does not come from the City but from the legislature through the mandate of Wis. Stat. § 182.017(2)," the Commission lacks jurisdiction to consider the amount of relocation costs to be incurred where the relocation, says the City, is necessary for utilities to comply with mandate of Wis. Stat. § 182.017(2). (City's Reply Br. at 6.) (PSC REF#: 182341.) In its post-Act 20 filings, the City continued to question the Commission's authority, but re-cast its prior argument which focused on whether the Commission could act,[28] to whether the Commission should act in light of the City's contention that no Commission decision about City regulations can resolve the essential dispute among the parties.[29] The City maintained that the proper venue for this dispute is the circuit court, not the Commission, and urged the Commission to close this docket without rendering a decision on the merits.

The Petitioners, in their post-Act 20 filings, argued that the Commission not only has jurisdiction, but that the exercise of this jurisdiction is non-discretionary. Stated another way, Petitioners argued that the Commission is legally obligated to render a Final Decision in this

[27] Individual Petitioners and ATU Petitioners are collectively referred to as Petitioners.
[28] *See* City's Reply in Support of Motion for Interlocutory Review at 2-10 (PSC REF#: 182341) and City's Reply in Support of Motion to Dismiss and Sur-Surreply Brief on its request for Interlocutory Review at 2-12 (PSC REF#: 183524).
[29] *See* City's Response in Opposition to Motion for Final Decision at 2-9 (PSC REF#: 192013).

proceeding. Petitioners offered three primary arguments in support of their position that the Commission must reach a decision on the merits. First, they argued, since they have brought complaints under Wis. Stat. §§ 196.58 and 182.017(8), they are legally entitled to a decision. Second, they contend that Act 20 is "not self-executing" and both the language of the statutes, as amended, and the Legislative intent compel the Commission to render a Final Decision applying the new law. Finally, they submit the Commission must or should act because the controversy is not moot and only a Final Decision will resolve the dispute.

The Petitioners have requested a declaratory ruling.[30] The Commission has also consistently identified the nature of the remedy sought in this proceeding as a "declaratory ruling."[31] The City also agrees that this is a declaratory judgment proceeding. (City's Resp. at 1.) (PSC REF#: 192013.) As a declaratory judgment proceeding, the Commission has discretion as to whether to issue a ruling. Wis. Stat. § 227.41. ("[A]ny agency **may**, on petition by an interested party, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statue enforced by it.") (Emphasis supplied.)

As the Commission concludes that it should issue a Final Decision on the merits, it declines to address Petitioners' arguments that Wis. Stat. §§ 196.58 or 182.017, as amended by Act 20, are self-executing or whether any action by the Commission is necessary or otherwise legally required. The Commission finds that it is reasonable to exercise its discretion and issue this Final Decision because, for the reasons discussed below, it will be dispositive of the issues.

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[30] *See, e.g.,* Amended Petition of Brett Healy (PSC REF#: 164192); Verified Petition of AT&T (PSC REF#: 161190).

[31] Minutes and Informal Instructions of the Open Meeting of Thursday, December 1, 2011 (PSC REF#: 159693); Minutes and Informal Instructions of the Open Meeting of Friday, February 17, 2012 (PSC REF#: 165869); Order on Motion for Interlocutory Review and Amendment to Prehearing Conference Memorandum (PSC REF#: 160666); Order on Motions for Clarification and on Threshold Legal Issue (PSC REF#: 163712); Minutes and Informal Instructions of the Open Meeting of Thursday, September 27, 2012 (PSC REF#: 173938).

The fact that the City may disagree with the Commission's decision or may seek judicial review of any such decision are not compelling reasons for this Commission to "step out of the way" as urged by the City. (City Resp. Br. at 9.) (PSC REF#: 192013.) A Commission decision applying Act 20 will add finality to these proceedings and provide guidance to any reviewing court.

The Exercise of the Commission's Discretion

The City made three primary arguments in support of its position that the Commission cannot or should not render a Final Decision. According to the City, the Commission should not render a Final Decision applying Act 20 because (1) the act is unconstitutional, (2) a hearing is required before a final decision is rendered, and (3) because Wis. Stat. § 182.017(2) requires the utilities to move their facilities from the right-of-way independent of any municipal ordinance, any Final Decision by this Commission applying Act 20 will have no legal or practical effect and would not resolve the controversy. The City posits that the proper venue for this dispute is the circuit court, not the Commission, because "Petitioners' beef is with Wis. Stat. § 182.017(2) and the over 100 years of common law represented by that statute." (City Resp. Br. at 9.) (PSC REF#: 192013.) For the reasons discussed below, none of these arguments have merit.

Constitutionality of Act 20

The City has questioned the legality of Act 20, contending that Act 20 violates the equal protection clause (Art. I, § 1) and Art. IV, § 18 of the Wisconsin Constitution. (City Resp. at 10-14.) (PSC REF#: 192013.) The City acknowledges that the constitutionality of Act 20 is a question for the court. (City Resp. at 2.) (PSC REF#: 192013.) Presumably, the City has raised this issue for purposes of a subsequent appeal and to avoid a challenge that, should it failed to

have raised the issue, it is precluded from seeking judicial review under the doctrine of exhaustion of administrative agencies.

The exhaustion doctrine is typically applied when a party seeks judicial intervention before completing all the steps in the administrative process. *Sauk County v. Trager*, 118 Wis. 2d 204, 210, 346 N.W.2d 756 (1984). The general rule is that a party must complete all administrative proceedings before coming into court. *Id.* The purpose of the exhaustion doctrine is to allow the administrative agency to perform the functions the Legislature has delegated to it and to employ its special expertise and fact-finding facility. *Id.* at 210–11. Courts have declined to apply the exhaustion doctrine where, as is the case here, the administrative body does not have the authority to provide the relief sought. *Metz v. Veterinary Examining Bd*., 2007 WI App 220, ¶ 15, 305 Wis. 2d 788, 741 N.W.2d 244.

Petitioners seek a Commission decision applying Act 20 and declaring that any City regulation requiring the utilities to pay any facility relocation costs relating to the proposed Streetcar Project is void. The City responds, challenging the constitutionality of Act 20 on its face. The City is not challenging the manner in which the statute is being applied, but attacks the validity of the enactment itself. As administrative agencies do not have the power to declare statutes unconstitutional, the Commission cannot grant the relief requested by the City. *Warshafsky v. Journal Co.*, 63 Wis. 2d 130, 147, 216 N.W.2d 197 (1974). *See also Kmiec v. Town of Spider Lake*, 60 Wis. 2d 640, 645–46, 211 N.W.2d 471 (1973) (where the claim is that a zoning ordinance is unconstitutional, review by the board of adjustment is inadequate relief because it has no authority to declare the ordinance unconstitutional, and the party may file an action in circuit court seeking a declaratory ruling on that issue); *Omernick v. DNR*,

71 Wis. 2d 370, 374–75, 238 N.W.2d 114 (1976) (the question whether that statute violated due process could not be litigated before the agency).

For these reasons, the Commission cannot and does not address the merits of the City's constitutional arguments or Petitioners' responses thereto. Act 20 is presumed to be constitutional, and the Commission may exercise those powers granted to it by this law and effectuate the will of the Legislature.

Hearing Requirements

The City argues that the Commission may not issue a Final Decision in this docket because the Commission must afford the parties full opportunity for a hearing and, says the City, no such hearing has been held. (City Resp. at 2.) (PSC REF#: 192013.) According to the City, because there has been no hearing set in this docket, "the Commission would violate the City's due process rights by issuing a final decision without a hearing." *Id.* at 4.

Wisconsin Stat. § 227.41(1) requires that "[f]ull opportunity for hearing shall be afforded to interested parties." Wisconsin Stat. § 196.58(4) and § 182.017(8)(a) provide that the Commission "shall set a hearing . . . ." Generally, the fundamental or essential requirement of procedural due process of law is notice and hearing—that is opportunity to be heard either before a court or the administrative agencies. *Mid-Plains Tel., Inc. v. Pub. Serv. Comm'n*, 56 Wis. 2d 780, 785-86, 202 N.W.2d 907 (1973). "The cardinal test of the presence of absence of due process of law in an administrative proceeding is the presence or absence of the rudiments of fair play long known to law." *Id.* at 787 (citations omitted). Procedural due process requires an opportunity to be heard at a reasonable time and in a meaningful manner. *Bunker v. Labor & Indus. Review Comm'n*, 2002 WI App 216, ¶ 19, 257 Wis. 2d 255, 650 N.W.2d 864. There can

be no dispute that the parties in this docket have had ample notice of the issues contested and an opportunity to be heard. There have been two prehearing conferences, [32] more than 20 affidavits filed,[33] numerous briefs submitted on the various legal issues presented,[34] and six open meeting discussions on these issues.[35] The plethora of written submissions in this docket more than satisfies any due process requirements. *See Waste Mgmt. of Wisconsin, Inc. v. State Dep't of Natural Res.*, 128 Wis. 2d 59, 78, 381 N.W.2d 318 (1986) (the opportunity to present reasons, either in person or in writing, why proposed action should not be taken satisfies due process requirements).

The City's contention that a judicial-type hearing—or something more than the extensive opportunity which has been provided here to be heard—is required not only contradicts its earlier position, but is without merit as a matter of law. "Due process is flexible and requires procedural protections as the particular situation demands." *State v. Hardwick*, 144 Wis. 2d 54, 58,

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[32] Notice of Hearing Conference (PSC REF#: 157968) and Notice of Second Prehearing Conference (PSC REF#: 178898).

[33] *See, e.g.*, PSC REF#: 158973, PSC REF#: 163449, PSC REF#: 168111, PSC REF#: 168112, PSC REF#: 168159, PSC REF#: 170182, PSC REF#: 179614, PSC REF#: 182344, PSC REF#: 183526, PSC REF#: 183889, PSC REF#: 184900, PSC REF#: 197388,PSC REF#: 165131, PSC REF#: 165155, PSC REF#: 165166, PSC REF#: 165168, PSC REF#: 165177, PSC REF#: 165182, PSC REF#: 165183, PSC REF#: 197670.

[34] Briefs on issues identified in February 7, 2012, Prehearing Conference Memorandum: PSC REF#: 165165, PSC REF#: 165167, PSC REF#: 165184, PSC REF#: 168149, PSC REF#: 168150, PSC REF#: 169227, PSC REF#: 169233, PSC REF#: 169237, PSC REF#: 170182, PSC REF#: 170185; Briefs on Motion for Interlocutory Review regarding binding effect of declaratory ruling: PSC REF#: 159158, PSC REF#: 159389, PSC REF#: 159391, PSC REF#: 159393, PSC REF#: 159398, PSC REF#: 159399; Briefs on Motion for Interlocutory Review regarding issues identified in Second Prehearing Conference Memorandum and City's Motion to Dismiss: PSC REF#: 181062, PSC REF#: 181763, PSC REF#: 181785, PSC REF#: 181790, PSC REF#: 182341, PSC REF#: 182343, PSC REF#: 182659, PSC REF#: 182663, PSC REF#: 183017, PSC REF#: 183212, PSC REF#: 183213, PSC REF#: 183524, PSC REF#: 183525, PSC REF#: 184065; and Briefs on Petitioners' Request and City's Opposition thereto, for final decision: PSC REF#: 190876, PSC REF#: 190894, PSC REF#: 192013, PSC REF#: 192489, PSC REF#: 192503.

[35] Minutes and Informal Instruction of the Open Meeting of December 1, 2011 (PSC REF#: 159693); Minutes and Informal Instruction of the Open Meeting of February 17, 2012 (PSC REF#: 165869); Minutes and Informal Instruction of the Open Meeting of March 1, 2012 (PSC REF#: 166030); Minutes and Informal Instruction of the Open Meeting of April 20, 2012 (PSC REF#: 166517); Minutes and Informal Instruction of the Open Meeting of September 27, 2012 (PSC REF#: 173938); and Minutes and Informal Instruction of the Open Meeting of April 23, 2014 (PSC REF#: 203959).

422 N.W.2d 922 (Ct. App.1988). In this matter, the parties all agreed that written submissions would satisfy the hearing requirements of Wis. Stat. §§ 196.58(4) and 227.41(4). The Prehearing Conference Memorandum provided that "briefing shall constitute the hearing required under Wis. Stat. §§ 196.58(4) and 227.41(4)." (Prehearing Conf. Memo at 3.) (PSC REF#: 159312.) The City reaffirmed this position in its April 15, 2013, Motion for Leave to Respond and Request for Decision, stating:

> The City believes that the issues that have been briefed are ready for Commission decision, that the issues are dispositive of the entire matter before the Commission, and that an evidentiary hearing on the amount of the relocation costs is not necessary and would be a waste of agency and party resources.

(PSC REF#: 183525.)

The City makes no effort to reconcile or explain its sudden about-face on the need for a hearing. If anything, the change in law makes it even more clear that a hearing as to the amount of the relocation costs is not required because Act 20 makes any municipal regulation *per se* unreasonable if it requires a public utility, telecommunications provider, or video service provider to pay any part of the cost to modify or relocate their facilities to accommodate an urban rail transit project. All the facts necessary to apply Act 20 are undisputed, and the parties have had more than sufficient opportunity to be heard on the legal issues.

The City has identified no material facts that are in dispute, no new legal issues that require further argument, and offered no suggestions as to what a hearing would even address that has not already been covered in the written submissions of the parties. The Commission concludes that the City has failed to articulate a legal basis entitling it to a hearing under either Wis. Stat. §§ 227.41 or 227.42 and that the process followed here, as originally agreed to by the parties, provided ample due process.

Application of Act 20

The City argued in response to the Petitioners' Motions for Final Decision, that "the Commission's jurisdiction is not broad enough to encompass the 'who pays' issues as it is presented in this case." (City's Resp. Br. to Motions for Final Decision at 5.) (PSC REF#: 192013.) According to the City:

> [T]he key to understanding the reason the Commission does not have authority to decide the "who pays" issue is to examine the source of the company's obligation to relocate its facilities in the public right-of-way at its expense. The company's obligation is imposed by the State under Wis. Stat. § 182.017(2) and not by the municipality. If Milw. Ordinance § 115-22 did not exist (or were void), companies and public utilities operating in Milwaukee would still have an obligation under Wis. Stat. § 182.017(2) to relocate their facilities in the public rights-of-way at their expense to accommodate a public works project in the right-of-way (including an urban rail project).

Id. at 5. Wisconsin Stat. § 182.017(2), says the City, is simply a codification of over one hundred years of common law regarding the source of a utility's obligation to relocate its facilities in local rights-of-way at the utility's expense. *Id.* at 6. (PSC REF#: 192013.) The City further argued that Act 20 does not change this analysis:

> Accordingly, because the source of the companies' obligations to relocate at their own expense is a state statute and not a municipal regulation and because, even after Act 20, the Commission's authority is limited to making reasonableness determinations with respect to municipal regulations, no final decision issued in this docket will resolve the controversy. No legal or practical effect will result from the Commission's declaring any Milwaukee regulation, deed, action or intent unreasonable and void. The Petitioners' beef is with Wis. Stat. § 182.017(2) and over 100 years of common law represented by that statute. The proper venue to have their complaints heard is circuit court, not the Commission. A court is the proper authority to determine whether the utilities should bear their own relocation costs and, should the court conclude that those costs are the City's responsibility, the court would be the proper authority to determine the amount of relocation and modification costs that are attributable to the Streetcar Project. For this reason, the Commission should "step out of the way" and close the docket.

(City Resp. Br. at 9.) (PSC REF#: 192013.)

The Commission's analysis begins with the language of the applicable statutes as amended by Act 20. The relevant statutory provisions provide:

196.58 Municipality to regulate utilities; appeal.

196.58(1g) In this section, "municipal regulation: has the meaning given in s. 182.017(1g)(bm).

196.58(1r) The governing body of every municipality may:

196.58(1r)(a) 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.

. . . .

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.

196.58(4)(b) Notwithstanding any provision of this chapter, upon complaint by a telecommunications provider, including an alternative telecommunications utility, or a video service provider, the commission shall set a hearing and, if it finds to be unreasonable any municipal regulation relating to any product or service rendered by any such provider within a municipality or relating to the terms and conditions upon which such provider occupies the streets, highways, or other public places within the municipality, the municipal regulation shall be void.

196.58(4)(c) Notwithstanding s. 182.017 (2), a municipal regulation is unreasonable under par. (a) or (b) if it requires a public utility, telecommunications provider, or video service provider to pay any part of the cost to modify or relocate the public utility's, telecommunications provider's, or video service provider's facilities to accommodate an urban rail transit system, as defined in s. 182.107 (1g) (ct).

. . . .

182.017 Transmission lines; privileges; damages.

182.017(1g) DEFINITIONS. In this section:

182.017(1g)(a) "Commission" means the public service commission.

182.017(1g)(b) "Company" means any of the following:

182.017(1g)(b)1. A corporation, limited liability company, partnership, or other business entity organized to furnish telegraph or telecommunications service or transmit heat, power, or electric current to the public or for public purposes.

182.017(1g)(bm) “Municipal regulation” means any contract, ordinance, resolution, order, or other regulation entered into, enacted, or issued by a municipality before, on, or after July 2, 2013.

. . . .

(ct) “Urban rail transit system” means a system, either publicly or privately owned, which provides transportation by rail in a municipality to the public on a regular and continuing basis and which begins service on or after July 2, 2013.

. . . .

182.017(1g)(c)

(1r) RIGHT-OF-WAY FOR. 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.

(2) NOT TO OBSTRUCT PUBLIC USE. But no such line or system or any appurtenance thereto shall at any time obstruct or incommode the public use of any highway, bridge, stream or body of water.

. . . .

182.017(8) COMMISSION REVIEW.

182.017(8)(a) 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.

. . . .

(as) Notwithstanding sub. (2), a municipal regulation is unreasonable if it requires a company to pay any part of the cost to modify or relocate the company's facilities to accommodate an urban rail transit system.

Applying Wis. Stat. §§ 196.58 and 182.017, a "municipal regulation" that requires a company, public utility, telecommunications provider, or video service provider to pay any part of the cost to modify or relocate their facilities to accommodate an urban rail transit system is void. While the ultimate applicability of Milw. Ord. § 115-22 and Resolution #110372 is now contested, as will be discussed further below, it is undisputed that this ordinance and resolution both constitute a "municipal regulation" as defined by Wis. Stat. § 182.017(1g)(bm). It is also undisputed that the ATU Petitioners[36] and Intervening Utilities meet the definition of company, public utility, telecommunications provider, and/or video service provider and are therefore afforded protection from unreasonable regulations under these statutes. It is further undisputed that the City is attempting to require these entities to pay at least some portion of the costs associated with modifying or relocating their facilities to accommodate the Streetcar Project. The City passed a resolution approving the "Locally Preferred Alternative" route and authorizing final engineering and construction for the Streetcar Project as detailed in the EA for the project.[37] Even though the EA notes that public utility facilities will need to be modified or relocated for the project, the budget contained in the EA omits any City funding to pay for those modifications or relocations. While the City has made efforts to minimize these costs through route modification and by other means,[38] there will be some costs, and the City has made clear in its filings with the Commission that whatever those costs are, they believe those are the responsibility of the utilities—not the City. The precise amount of costs need not be known because the statute precludes the shifting of "any part of" the facility modification or relocation

[36] *See* discussion at 14-15.
[37] *See* Anderson Aff., Exs. A and B (PSC REF#: 165158, PSC REF#: 165159).
[38] *See* Seventh and Eight Affidavits of Jeffrey S. Polenske (PSC REF#: 184900, PSC REF#: 197388).

costs to the ATU Petitioners and Intervening Utilities to accommodate an urban trail transit project. There is also no dispute that the Streetcar Project is an "urban rail transit system" as defined in Wis. Stat. § 182.017(1g)(ct).

The disputed legal issue in this proceeding is whether the City is seeking to impose relocation costs upon the ATU and Intervening Utilities pursuant to a "municipal regulation" or, as the City now argues, it has that power independent of any "municipal regulation." The City can only escape the application of Act 20 if this Commission finds that the City has the power to require relocation by something other than a "municipal regulation."

"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) (emphasis added). "Regulation" is not defined in the statute, but the beginning point of every statutory analysis is to give words their common meaning, unless a technical definition is indicated, *State ex rel. Kalal v. Circuit Court for Dane Co.*, 2004 WI 58, ¶¶ 45–48, 271 Wis. 2d 633, 681 N.W.2d 110, and a dictionary may be used to establish the common meaning. *State v. Sample*, 215 Wis .2d 487, 499-500, 573 N.W.2d 187 (1998). Webster's Dictionary defines "regulation" broadly to mean, "a rule, ordinance, or law by which conduct, etc. is regulated." *Webster's New World College Dictionary* 1207 (4th edition 2005). Any ability the City has to require action, whether by Wis. Stat. § 182.017(2) or the common law, falls within the broad catch—all of "other regulation" that was specifically included by the Legislature when defining "municipal regulation."

In the Commission's prior decisions involving utility relocation disputes under Wis. Stat. § 196.58,[39] the Commission has also broadly interpreted what constitutes a "municipal regulation." In a dispute between Wisconsin Public Service Corporation and the cities of Manitowoc and Oconto, the Commission agreed with the Administrative Law Judge's broad interpretation that a resolution authorizing the preparation of plans and specifications and the contract bid documents which had the effect of requirement utility relocation constituted a "municipal regulation," stating:

> [I]n his Proposed Final Decision, the Administrative Law Judge reasonably concluded that it is sufficient under both Wis. Stat. § 196.58 and Admin. Code § PSC 130.09 that the municipal regulation has the *effect* of requiring a utility to relocate. This reading of the statute and rule is consistent with the Commission's broad regulatory authority over public utilities. When a municipality's actions may significantly impact a public utility's cost of doing business, which, in turn, affect the rates that utility's customers will pay, the Commission has the authority and obligation to address those actions.

Manitowoc and *Oconto* Orders at 6-7.

Additionally, the language of Wis. Stat. § 182.017(2), when read in the context of the entire statute, also confirms that the City can only act through municipal regulation. Wisconsin Stat. § 182.017(2) simply protects the public's use of rights-of-way, it does not authorize the City to do anything. And, this statutory provision, by virtue of the language used and the rules of construction, must be read in conjunction with the entire statute. *Kalal*, 271 Wis. 2d 633, ¶ 46. Subsection (2) of the statue must be read in conjunction with subsection (1r) which limits the

[39] *Complaint by Wisconsin Public Service Corporation against the City of Manitowoc, pursuant to Wis. Stat. § 196.58, as to Reasonableness of the City's Practices Requiring Relocation of Utility Facilities at Utility Expense*, docket 9300-GI-102 (Wis. PSC April 18, 2008) (PSC REF#: 93063); and Final Decision, *Complaint by Wisconsin Public Service Corporation against the City of Oconto, pursuant to Wis. Stat. § 196.58, as to Reasonableness of the City's Practices Requiring Relocation of Utility Facilities at Utility Expense*, docket 9300-EI-102 (Wis. PSC April 18, 2008) (PSC REF#: 93057).

placement of any "line, or system or any appurtenance" referred to in sub. (2) to reasonable municipal regulation per sub. (1r).

Interpreting Wis. Stat. § 182.017(2) in isolation as proposed by the City would improperly render Wis. Stat. §§ 182.017(8) and 196.58(4) meaningless and would be unreasonable. *Kalal*, 271 Wis. 2d 633, ¶ 46 (statutory language is to be interpreted reasonably, to avoid absurd or unreasonable results.) Such an interpretation would deprive the Commission of its jurisdiction to review municipal activities that could have significant impact on public utilities and their ratepayers. A municipality could require utilities to pay for the costs of facility relocation in all public works projects and side-step Commission review, simply by claiming that the relocation obligation stems from the statute or common law and not a municipal regulation. The Commission rejects such an unreasonable interpretation that could have significant ratepayer impact. As it has previously held in in other relocation disputes, "[w]hen a municipality's actions may significantly impact a public utility's cost of doing business, which, in turn, affect the rates that utility's customers will pay, the Commission has the authority and obligation to address those actions." *Manitowoc* and *Oconto* Orders at 6-7.

The Commission also rejects the City's interpretation of Wis. Stat. § 182.017(2) because, if accepted, then Wis. Stat. §§ 182.017(8)(as) and 196.58(4)(c) would be meaningless and mere surplusage. *Kalal*, 271 Wis. 2d 633, ¶ 46. There would be no circumstance where a municipal action forcing utilities to pay facility relocation or modification costs caused by an urban rail transit project would be unreasonable because the municipality would simply claim, as the City

does here (despite having a specific ordinance on the books covering utility facility relocations)[40] that the obligation to move arises from Wis. Stat. § 182.017(2).

Further, Wis. Stat. §§ 182.017(8)(as) and 196.58(4)(c) are not separate and distinct from Wis. Stat. § 182.017(2). The Legislature linked these statutes together, and intended to negate the application of Wis. Stat. § 182.017(2) when it enacted Wis. Stat. §§ 182.017(8)(as) and 196.58(4)(c) through the use of the phrase "notwithstanding sub. (2)," meaning that Wis. Stat. § 182.017(2) does not apply to disputes involving actions by municipalities to pass on the costs associated with the facility relocation or modification caused by an urban rail transit project. The Legislature clearly intended that any relocation costs associated with the Streetcar Project be borne by the City—not the utility or its ratepayers.

The Legislature's Joint Committee on Finance, during its budget deliberations, adopted the language regarding utility relocation costs incurred to accommodate an urban rail transit system. When it did so, it was clearly aware of this docket and unequivocally clear regarding the Legislature's intent. The note on the Joint Finance Committee motion[41] states:

> The PSC currently has an open docket (5-DR-109) the purpose of determining "whether the City of Milwaukee or We Energies is responsible for any costs of modifying or relocating utility facilities in order to accommodate the construction of a Milwaukee streetcar line." A number of other entities, including other public utilities, filed requests for intervention with the Commission, and the PSC subsequently recognized them as parties in the docket. <u>This proposal would make the docket moot because the proposal would require all such relocation costs to be borne by the City</u>.

[40] The existence of Milw. Ord. § 115-22 undermines the City's position that it can require relocation absent any such ordinance. If it could, then it is reasonable to question why it has the ordinance in the first place.
[41] The legislative drafting file is evidence of legislative intent. *Kalal*, 271 Wis. 2d 633, ¶¶ 67-69 (Abrahamson, C.J. concurring).

(Emphasis supplied.) The Legislature's unambiguous intent was that all Streetcar Project relocation costs are not to be borne by ratepayers.

The case law cited by the City also does not support its contention that the City's power to mandate relocation is pursuant to Wis. Stat. § 182.017(2). In fact, the City's reliance on *City of Marshfield v. Wisconsin Telephone,* 102 Wis. 604, 78 N.W. 735 (1899) is misplaced as that case supports the opposite conclusion—namely that the power of the municipality to regulate is pursuant to municipal regulation and not Wis. Stat. § 182.017(2). That case involved § 1778, Rev. St. 1898, which subsequently became Wis. Stat. § 182.017(2) where a telephone company desired to construct poles along the main business street of the City of Marshfield. The City of Marshfield objected to the telephone company's requested action. In *City of Marshfield,* a municipal regulation existed (*i.e.*, a charter) which provided:

> No building shall be moved through the streets or obstructions be placed therein without a written permit therefor granted by the board of public works. Said board shall have the power to determine the time and manner of using the streets for laying or changing water pipes, or placing and maintaining electric lights, telegraph and telephone poles: Provided, however, that the decision of said board in this regard may be appealed to the common council.

Marshfield, 102 Wis. at 611. The court concluded that, while no specific ordinance had been enacted, the City of Marshfield's charter (and not simply the police power) prohibited the telephone company from obstructing the public right of way:

> The defendant had no right to enter upon the streets of the city, even though no prohibitory ordinances had been passed, and occupy them as it pleased, and set up poles that were obstructions, at will. Its right to go upon the streets with its structures was limited by the charter provisions mentioned, and, until it had complied with their requirements, it was without legal justification.

Id. at 613.

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

To the extent there was any common law applicable to this dispute, it has been superseded by and is embodied in Wis. Stat. §§ 196.58 and 182.017, as amended by Act 20, and the clear legislative intent that utilities, and their ratepayers, not be required to pay facility relocation costs associated with an urban rail transit project. *LePoidevin v. Wilson*, 111 Wis. 2d 116, 129-130, 330 N.W.2d 555 (1983). It is these statutes and the underlying policy expressed by the Legislature that controls. The City's attempt to narrowly interpret Act 20 is inconsistent with the language of the statute, the tenets of statutory construction, and is contrary to the legislative intent.

For these reasons, the Commission concludes that there is no independent basis upon which the City can require the utilities relocate their facilities other than through a municipal regulation as that term is broadly defined. Any municipal action that would require the ATU Petitioners or the Intervening Utilities Petitioners to pay any part of the relocation costs to accommodate the Streetcar Project is unreasonable pursuant to Wis. Stat. §§ 182.017(8)(as) and 196.58(4)(c).

Order

1. The City's Motion to Dismiss is denied.

2. The motions of the ATU Petitioners and Individual Petitioners for a Final Decision are granted.

3. The City has been afforded due process and was provided a full opportunity for hearing and is entitled to no further hearing.

4. Milwaukee Ord. § 115-22 and Resolution #110372 are unreasonable and void, as applied to an urban rail transit project such as the Streetcar Project.

5. 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 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).

Dissent

Commission Callisto dissents and writes separately (see attached).

Dated at Madison, Wisconsin, this 29th day of August, 2014.

By the Commission:

Sandra J. Paske
Secretary to the Commission

SJP:CES:hms:DL: 00927187
See attached Notice of Rights

Docket 5-DR 109

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of the date of service of this decision, as provided in Wis. Stat. § 227.49. The date of service is shown on the first page. If there is no date on the first page, the date of service is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of the date of service of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of the date of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission serves its original decision.[42] The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: March 27, 2013

[42] *See State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

Appendix A
SERVICE LIST

In order to comply with Wis. Stat. § 227.47, the following parties who appeared before the agency are considered parties for purposes of review under Wis. Stat. § 227.53.

PUBLIC SERVICE COMMISSION OF WISCONSIN
(*Not a party but must be served*)
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PUBLIC SERVICE COMMISSION OF WISCONSIN

5-DR-109

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

DISSENT OF COMMISSIONER ERIC CALLISTO

I dissent from the Final Decision. The Commission's action in this proceeding is unnecessary and superfluous to what the Legislature and Governor have already accomplished through 2013 Wisconsin Act 20 (Act 20). That law expressly provides that municipal regulations which require utilities to pay the relocation costs associated with urban rail transit projects are unreasonable and void, by statute. Act 20 couldn't be clearer: there is no role for the Commission when it comes to adjudicating the reasonableness of municipal regulations involving urban rail. In a declaratory ruling proceeding under Wis. Stat. § 227.41, the Commission has discretion as to whether it should weigh in. We should have exercised restraint here and, consistent with Act 20, closed the proceeding as moot.

Both Wis. Stat. §§ 196.58(4)(c) and 182.017(8)(as) make municipal regulations that require public utilities (and other telecommunications and cable providers) to pay any part of the cost of relocating facilities to accommodate urban rail transit systems automatically unreasonable and void as a matter of statutory law. Those subsections, enacted as part of Act 20, are different from Wis. Stat. §§ 196.58(4)(a) and (b) and 182.017(8)(a), which, by contrast, specifically contemplate and spell out a process for Commission determinations regarding the reasonableness of municipal regulations affecting public utilities. Commission action is neither expressly called

for, implicitly assumed, nor logically required in the portions of Wis. Stat. §§ 196.58 and 182.017 relating to urban rail transit systems. Act 20 constitutes a *legislative* determination of unreasonableness, independent of Commission involvement. Indeed, the Legislature's motion that accompanied the changes to Wis. Stat. §§ 196.58 and 182.017 which became part of Act 20 explicitly references the Commission's Streetcar proceeding, stating that Act 20 "would make the docket 'moot' because the proposal would require all such relocation costs to be borne by the City."

Weighing in now is not only unnecessary, it is unwise. The Streetcar project, and the question of how to allocate the various associated utility relocation costs, no longer fits within the reach of utility regulation. What started as a regulatory policy discussion about what represents a fair allocation of project-related costs to utility customers morphed into a legislative debate, and now appears headed for the courts. By issuing a substantive decision, the Commission guarantees its ongoing involvement in what could be time-consuming and costly litigation, needlessly so. I don't believe that's a good use of our resources, and given the automatic operation of Act 20's urban rail provisions, I think that principles of administrative and regulatory efficiency strongly dictate in favor of the Commission simply stepping aside and closing the docket as moot, as the Legislature intended.

Having concluded that the Commission need not exercise jurisdiction here, I take no position on the constitutionality of Act 20, possible procedural deficiencies regarding administrative hearing requirements, or the effect of Wis. Stat. § 182.017(2).

I respectfully dissent.

DL: 00941973