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

CITY OF MILWAUKEE'S RESPONSE BRIEF

The City of Milwaukee (the "City" or "Milwaukee") submits this Response Brief pursuant to the Public Service Commission of Wisconsin's ("PSCW" or "Commission") April 25, 2012 Notice of Proceeding (PSC REF# 163713). The City's brief responds to the initial briefs submitted by: (1) the Individual Petitioners (PSC REF# 165165); (2) the Utility Petitioners -- i.e., Wisconsin Electric Power Company and Wisconsin Gas, LLC and American Transmission Company LLC and ATC Management Inc. (PSC REF# 165184); and (3) the ATU Petitioners (PSC REF# 165167).

INTRODUCTION

Milwaukee is one of the largest urban areas in the United States that does not have an intra-city passenger rail system. *See Letter from Housing Authority of the City of Milwaukee to Federal Transit Authority (February 2, 2010)*, attached at Appendix B-31 of the October 20, 2011 Environmental Assessment[1] ("EA"). The proposed $64.6 million Milwaukee Streetcar Project is a fixed guideway transit system designed in principal part to increase mobility, connect people to jobs, and stimulate economic development. The Streetcar is a modern public transit vehicle and one component of a comprehensive transit strategy. The Streetcar will run in mixed traffic on rails

[1] The EA is attached as Exhibit A to the Affidavit of Kevin Anderson filed with the ATU Petitioner's Initial Brief (PSC REF## 13428, 165155).

embedded into the street. It will be electrically powered using an overhead contact system. EA at xv.

Because the Streetcar will use rails embedded into the street, it is possible that utility structures located in City rights-of-way will need to be permanently relocated. Petitioners seek to use the declaratory ruling process to derail the Streetcar Project, requesting that this Commission ignore the longstanding common law rule that when a municipality exercises its police power to undertake a public work or improvement over public rights-of-way, then the utility is fully responsible for the cost to relocate its facilities to accommodate the public's use of those rights-of-way. *New Orleans Gaslight Co. v. Drainage Comm'n*, 197 U.S. 453, 461-462 (1905). The Petitioners' real quarrel, then, is not with the City's proposal to build a streetcar system, but with the common-law rule itself.

Petitioners are using the Commission as their forum in which to effect a change in the law. That can only be done at the legislative level. Petitioners attempt to persuade the Commission to exceed its statutory authority, change the common law and apply a new law to hold the City responsible for the utilities' relocation costs -- even though relocation may be necessary to accommodate a public transportation project undertaken by the City pursuant to its police powers.

Petitioners also hope that Wis. Admin. Code § PSC 130.09 will provide the key to reversing over a century of common law regarding utility relocation costs. This administrative rule provides that a "municipal regulation" governing the relocation of utility facilities at the utility's expense is "unreasonable": (1) if it lacks an adequate health, safety, or public welfare justification; or (2) if it requires a utility to relocate its facilities substantially for the benefit of a person other than the municipality. In Petitioners' view, this language permits the Commission to assume two roles: one, as a mass transit engineering and planning potentate, able to mandate the manner in which

Milwaukee may meet the public transportation needs of the community; and (2) as a public policy accountant, able to the assess the adequacy of the City's police power regulations in order to determine whether the degree of public benefit is sufficient to outweigh the cost of such regulation on public utilities and other for-profit enterprises.

The inappropriateness and unworkability of the roles Petitioners ask the Commission to take on underscore the fundamental problem with their case: it is untethered from either Wis. Stat. § 182.017(8) or Wis. Stat. § 196.58, the statutes to which § PSC 130.09 applies. By these statutes, the Legislature established the Commission's authority over municipal regulation of public utility use of local rights-of-way. The statutes authorize the Commission, in a complaint proceeding, to determine the reasonableness of a municipal regulation in the form of a contract, ordinance, or resolution that sets the terms and conditions upon which a public utility may occupy the rights-of-way within the municipality. The statutes require that the Commission give a high degree of deference to such municipal regulations, providing that such a regulation be presumed "on its face reasonable." Wis. Stat. § 196.58(1)(a); § 182.017(8)(a). In the event the Commission determines that the municipal regulation is unreasonable, the Legislature set forth a single remedy: the municipal regulation (i.e., the contract, ordinance or resolution) "shall be void." Wis. Stat. § 196.58(4); *see also* § 182.017(8)(a).

The only such regulation being challenged here is Milwaukee Municipal Code § 115-22 (the "Milwaukee Ordinance"), 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." Neither Wis. Stat. § 196.58 nor § 182.017 authorizes the Commission to second-guess the City's decisions regarding the desirability, necessity, or wisdom of undertaking a public works project, such as the Streetcar Project. Neither

statute authorizes the Commission to determine whether the City chose the best design for its project or if possible alternative designs exist that would obviate the need for a utility to relocate its facilities. There simply is no dispute that "a city may regulate a utility without compensation in valid exercise of its police power." *Northern States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 542 (Minn. Ct. App. 1999). Because the Streetcar Project is a City use of local streets for the public, is designed to facilitate travel over the streets and is for the public health, safety or welfare, Petitioners cannot show that the Milwaukee Ordinance is unreasonable either on its face or as may be applied. The Commission, therefore, should dismiss the Petitions with prejudice.

ISSUES AND ASSUMED FACTS

In its March 2, 2012 Order on Motion for Interlocutory Review and Amendment to Prehearing Conference Memorandum (PSC REF#: 160666)(the "March Order"), the Commission set the following issues for briefing:

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?

March Order at 5. The March Order states further that parties should assume the following facts: "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." *Id.*

STATEMENT OF FACTS

I. FUNDING OF THE STREETCAR PROJECT, ITS ORIGINS, AND ITS MOVEMENT THROUGH THE LEGISLATIVE PROCESS.

A. Origins and Funding of the Streetcar Project.

Like most metropolitan areas in the United States, the City of Milwaukee has had to respond to the impacts and needs of an increasing population, including transportation issues both within and outside Milwaukee. A statement on the City's webpage summarizes the genesis of the Streetcar Project as a means of addressing transportation needs resulting from a change in population:

> Milwaukee, which was once served by an extensive street railway and interurban system that was among the best in the country, has, since the early 1980's, been struggling with declining bus ridership, increasing freeway congestion, accelerating suburban sprawl, deteriorating urban neighborhoods, and the growing problem of connecting low income central city residents, who frequently do not own cars, with jobs in the suburbs.

*See Excerpt From City's Historical Background Webpage (*Affidavit of Thomas D. Miller[2] ("Miller Aff."), Exh. DD; http://city.milwaukee.gov/historicalbackground7220.htm)

To address these concerns, a major transportation study, known as the East-West Corridor Study, was initiated in the early 1990's, to evaluate mass transit and freeway improvements in the Milwaukee metropolitan area. *Id.* Ultimately, the East-West Corridor Study became one of the significant steps that culminated in forward movement of mass transit options. Because many of the original studies and planning efforts depended upon and were conducted in response to the

[2] The majority of the documents cited in this brief are attached to Attorney Miller's Affidavit.

availability of funding, this section describes the major studies as well as the funding mechanisms that allowed progression toward mass transit, including the Streetcar Project.

On December 18, 1991, the federal Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") was signed into law. P.L. 102-240 (Miller Aff., Exh. C). Section 1045 of the ISTEA authorized the Governor of Wisconsin to request approval of substitute highway, bus transit, and light rail transit projects, in lieu of constructing the I-94 East-West Transitway project in Milwaukee and Waukesha Counties. P.L. 102-240, § 1045 (a) and § 1045 (b), as amended by 1011(a)(1)(C), 105 Stat. 1915, at 1935. The ISTEA also made $289 million in federal Interstate Construction Estimate ("ICE") funds available to the Secretary of the United States Department of Transportation ("USDOT") to apply to the costs of substitute projects. *Id*.

Subsequently, the 1995 USDOT Appropriations Act allocated the $289 million, with $241 million going to the Federal Highway Administration ("FHWA") for the East-West Corridor, with $9.5 million going to the Federal Transit Authority ("FTA") also earmarked for the East-West Corridor, and $38.4 million to the FTA for other Federal Transit Act programs. *See* P.L. 103-331, § 335 (Miller Aff., Exh. C).

The 1999 USDOT Appropriations Act required that consensus between state and local officials be achieved for use of the remaining ICE funds. *Affidavit of David Windsor* ("Windsor Aff."), ¶8. As a result, the Governor, the Mayor of the City of Milwaukee, and the Milwaukee County Executive executed an April 20, 1999 Letter of Agreement on the Allocation of ICE dollars and on Milwaukee Transportation Projects allocating the remaining $241 million of ICE funds to the Marquette Interchange project, the Park East freeway demolition project, the 6th Street Viaduct project, and allocated $91.5 million to construction of the Downtown Connector transit project contemplated at the same time. *Letter Agreement on the Allocation of ICE Dollars and on*

Milwaukee Transportation Projects Between the City of Milwaukee, County of Milwaukee, and the State of Wisconsin, dated April 20, 1999 ("1999 ICE Agreement") (Miller Aff., Exh. E). *Id.*

In the 1999 ICE Agreement, regarding "Local Transportation Options," the City, County, and State agreed:

> that the City and County will allocate the bulk of the remainder of their allocated portion of ICE funds to the projects that result from the study of local transportation options as determined by the Wisconsin [Center] District's Transportation Study.

1999 ICE Agreement, at 2.

During this same time period, officials in Wisconsin were considering light rail as a transit project that could be funded with ICE funding. In 1997, the Wisconsin Department of Transportation ("WisDOT") recommended construction of a 15-mile light rail starter system connecting downtown Milwaukee to certain key locations in and around the City, including Downtown, the zoo and Miller Park. However, before preliminary engineering could take place on the starter system, further study of the proposed light rail system was stopped while efforts toward more freeway improvements moved forward. In response to this shift in focus, two administrative complaints were filed with the USDOT against Governor Thompson, Charles Thompson, and the Secretary of the WisDOT. The complainants alleged that the Governor and WisDOT unlawfully refused to evaluate use of light rail to serve mass transit needs, and instead advanced only highway projects that would unfairly benefit persons with access to automobiles. The complaints asked that federal funding for the highway components of the Milwaukee East-West Corridor Alternatives Analysis be terminated unless the Governor and WisDOT agreed to continue studying mass transit improvements, including the light rail system. Windsor Aff., ¶ 7; *Leah Wallace v. Tommy Thompson, et al.*, Docket No. 99-020, United States Department of Transportation, Office of Civil Rights; *Campaign for a Sustainable Milwaukee v. Tommy Thompson, et al.*, Docket No. 99-029,

United States Department of Transportation, Office of Civil Rights (collectively, the "Title VI Complaints")(Miller Aff., Exh. D).

The Title VI Complaints were resolved by settlement agreement on November 17, 2000, in which the state re-affirmed its support for the allocation of $91.5 million of the $241 million in ICE funding for a mass transit Local Transportation Option to be recommended by the Milwaukee Downtown Transit Connector Study ("Connector Study," Miller Aff., Exh. F), and agreed to cooperate to ensure the project's inclusion in the State's transportation plan. The settlement agreement stated in relevant part:

> Complainants, through their designated representatives…shall be entitled to participate in the [Connector Study]…in order to insure that any mass transit improvements recommended by the Study are designed to accommodate future expansion and/or integrating into a regional mass transportation system serving the transportation needs of not only the Milwaukee central business district, but low income, minority, elderly, and disabled residents of the City of Milwaukee….
>
> Upon completion of the Milwaukee Downtown Transit Connector Study the Wisconsin Department of Transportation shall cooperate in efforts to insure that the recommendations of the Study are fairly considered for inclusion in the local Long-Range Transportation Plan under 23 USC 134(g) and Metropolitan Transportation Improvement Program under 23 USC 134(h) prepared by the Southeastern Wisconsin Regional Planning Commission (SEWRPC), and include the recommended project, if consistent with applicable federal and state laws and approved by SEWRPC, in the state Transportation Improvement Program under 23 USC 135(f)(2)(C)(ii).

Settlement Agreement Resolving Title VI Complaints, ¶ 1, United States Department of Transportation, Office of Civil Rights, Docket Nos. 99-020 and 99-029 (November 17, 2000) (Miller Aff., Exh. F).

The Connector Study was initiated in 2000 to examine the feasibility of developing a downtown transit system that could connect major attractions in Milwaukee's Central Business District and encourage more people to work, shop, live and visit the downtown areas. Windsor Aff.,

¶ 11; *Milwaukee Downtown Connector Study Alternatives Analysis, Project Definition and Development of Route Alternatives Technical Memo #1 ("Tech Memo #1"),* at 7-10 (Miller Aff., Exh. M). The Connector Study was ultimately expanded to consider transit service beyond the Central Business District to outlying neighborhoods and outlying attractions. Windsor Aff., ¶ 12 . Because of the size and financial implications of the project, local policy makers rejected the expanded transit service plans in 2007. Windsor Aff., ¶ 13.

In 2008, the Connector Study was refocused to consider more fiscally-restrained options that included Bus Rapid Transit in combination with a downtown streetcar system. Windsor Aff., ¶ 14. In March, 2009, HR Bill 1105, the Federal Omnibus Appropriations Act of 2009 was signed into law, allocating the $91.5 million in ICE funds for an interstate substitution project authorized by ISTEA § 1045. Windsor Aff., ¶15. Forty percent ($36.6 million) of the funds were allocated to Milwaukee County to purchase energy efficient buses. Sixty percent ($54.9 million) of the funds were allocated to the City for "the downtown Milwaukee fixed rail circulator." Pub. L. 111-8 (2009); 111 Cong. Rec. H2435; 111 Cong. Rec. S2817 ("HR 1105") (Miller Aff., Exh. G); Windsor Aff., ¶ 15. The FTA thereafter explained that in order to obtain USDOT approval for a downtown fixed rail circulator project and for the release of appropriate funding, the Connector Study had to be approved and a preferred local transit option selected. In addition, the selected option needed to be included in the Metropolitan Transportation Plan ("MTP"), Transportation Improvement Plan (TIP), and the Statewide Transportation Improvement Program ("STIP"). If there was agreement at the state and local levels to include the project into these plans, the FTA could consider approving it as a substitute transit project in accordance with §1045 of ISTEA. *Letter from FTA Acting Deputy Administrator Matthew J. Welbes to Congresswoman Gwen Moore,* dated May 11, 2009 (the "Welbes Letter") (Miller Aff., Exh. H). Windsor Aff., ¶ 16.

Following the Congressional appropriation, the City of Milwaukee again reconfigured the Downtown Connector Alternatives Analysis to evaluate alternative downtown Streetcar alignments that would utilize the $54.9 million in ICE funds dedicated for the downtown fixed rail circulator (along with the $9.7 million required local share). Windsor Aff, ¶ 17. On July 23, 2009, at the specific request of the City of Milwaukee and Milwaukee County, the Southeastern Wisconsin Regional Planning Commission ("SEWRPC") unanimously approved Resolution No. 2009-07 (Miller Aff., Exh. I), amending the 2009 - 2012 TIP to include the energy efficient buses and the City-sponsored downtown rail project. Windsor Aff., ¶ 18. SEWRPC found that both projects conformed to the regional plan elements prepared and adopted by SEWRPC. *Id.* On July 27, 2009, the WisDOT Secretary wrote to the FHWA and FTA stating that SEWRPC's amendment to the 2009-2012 TIP was approved and that the State would include the two projects in the 2009 STIP. *Letter from WisDOT Secretary Frank J. Busalacchi to Federal Highway Administration and FTA*, dated July 27, 2009 (Miller Aff., Exh. I). Windsor Aff., ¶ 19.

On August 10, 2009, Milwaukee County Executive Scott Walker, City of Milwaukee Mayor Tom Barrett, and the WisDOT Secretary jointly wrote to the USDOT stating that they were prepared to "advance projects that satisfy the changes made in HR 1105" and that they were "requesting that the funds held at the FHWA be transferred to the FTA so that Milwaukee County and the City of Milwaukee may complete these projects in accordance with the direction of HR 1105." *Letter signed by Scott Walker, Milwaukee County Executive, Tom Barrett, City of Milwaukee Mayor, and Frank Busalacchi, Secretary WisDOT, to Raymond LaHood, Secretary, USDOT,* dated August 10, 2009 (Miller Aff., Exh. I). Windsor Aff., ¶ 20.

By letter dated October 7, 2009, the FTA notified Governor Jim Doyle that the USDOT Secretary approved the two substitute public transportation projects and that the $91.5 million would

be released to the FTA. This letter confirmed that the two projects had been included in the TIP, MTP and STIP. *Letter from Peter Rogoff, Administrator of FTA, to Governor Jim Doyle,* dated October 7, 2009 (Miller Aff., Exh. J). Windsor Aff., ¶ 22.

B. <u>The Locally Preferred Alternative - (the Route)</u>.

The Downtown Connector Alternatives Analysis was completed on May 6, 2010, with the Steering Committee's adoption of a Locally Preferred Alternative ("LPA"). More specifically, through that Alternatives Analysis the City developed three Streetcar route alternatives "that focused on improving the transit connection between the major business and entertainment areas of downtown Milwaukee with nearby neighborhoods that contain high density residential housing." *Milwaukee Connector Study, Locally Preferred Alternative for Streetcar, Summary Report,* dated May 3, 2010, at 8 ("LPA Summary Report") (Miller Aff., Exh. L).

Each route alternative was evaluated according to certain criteria, the most important of which included "public interest, ridership and economic development potential." *Id.* at 11, 13. The Alternatives Analysis utilized a comprehensive public outreach and involvement program, including a series of public meetings and also considered local and regional transportation and land use plans (discussed in more detail below) in developing and assessing preliminary route alternatives. *Tech. Memo #1*, at 10-17 (Miller Aff., Exh. M). The LPA Summary Report identified the transit improvement needs that the Streetcar Project was to address:

> The Milwaukee Connector Study has identified a series of transit improvement needs for Milwaukee County and downtown Milwaukee which have formed the basis for the proposed transit improvements to be studied. The Streetcar would improve mobility by providing a new type of transit service that currently does not exist within downtown. Providing transit service that is easy to understand and predictable would increase transit ridership. Linking residential areas with concentrations of employment would help connect people to jobs and promoting compact land development patterns that support transit would encourage planned economic development along the Streetcar route. Current transit routes provide trips

> to and from the downtown but do not provide circulation within the downtown; therefore the Streetcar is intended to provide improved connectivity within downtown Milwaukee and eventually expand to provide trips to and from downtown Milwaukee.

LPA Summary Report, at 4 (Miller Aff., Exh. L).

The LPA Summary Report set forth the following needs-based "Goals & Objectives" of the Streetcar Project:

1. Improving transit mobility to and between key residential, employment and activity centers.
2. Developing a connector system that is economical and efficient.
3. Increasing transit utilization.
4. Supporting and enhancing economic development.
5. Improving transit service to help attract conventions, tourists and residents.
6. Preserving and protecting the environment.

Within the framework of the general goals, specific objectives of the Streetcar Project include, among others:

1. Improving transit access to key origins and destinations.
2. Providing a downtown core system that can be expanded in the future to provide a larger, more effective transit network.
3. Maximizing transit accessibility and choices for residents, employees and visitors.
4. Providing transit service between residential areas and job centers.
5. Providing transit options for those people that depend on transit.
6. Promoting public/private partnerships.
7. Promoting transit-oriented developments.
8. Providing "branding" of the transit vehicles.
9. Providing intermodal connections.
10. Integrating way-finding to enhance the pedestrian environment.
11. Serving existing development and planned developments.
12. Contributing to job creation.
13. Promoting the "Park Once" concept for downtown visitors.
14. Reducing energy consumption and vehicle emissions through increased transit use.

Id. at 5 (Miller Aff., Exh. L).

The route chosen for the LPA was Alternative 1-2A. The portion of the Project that would be built with the available ICE funds includes an initial route between the Intermodal Stations at 4th Street and St. Paul Avenue and Ogden Avenue and Farwell Avenue. *Id.* at 16. This route was chosen "to serve high density residential areas just north of the Milwuakee Central Business District, the employment centers and attractions within the Central Business District, the Historic Third Ward neighborhood and the Milwaukee Intermodal Station located along the southwestern edge of the CBD." *Id.* at 19.

More specifically, addressing intermodal connections, the LPA Summary Report stated:

> An important focus of the Streetcar project has been to enhance existing and proposed transit in Milwaukee. Connecting to the Intermodal Station on St. Paul has been an important component of this focus…. The preferred Streetcar route will connect these additional transit users to downtown and nearby destinations, hotels, jobs, attractions, home and businesses….

Id. at 23.

Regarding utilities, the LPA Summary Report stated:

> Preliminary coordination with private utilities was initiated to identify any major conflicts along the preferred alignment. Some utility relocations are expected but no major conflicts have been identified at this time. Additional coordination and analysis would need to occur during subsequent engineering phases.

Id. at 25.

The LPA Summary Report further provided:

> Overall, the proposed Streetcar route is expected to provide several benefits. Potential benefits, among others, include:
>
> 1. Land use benefits through transit oriented development along the route.
> 2. Transportation benefits through improved mobility.
> 3. Mobility improvements for pedestrians, elderly and disabled.
> 4. Social benefits through improvements in accessibility and neighborhood connectivity.

5. Environmental justice benefits by serving significant minority and low income populations.

Id. at 33.

The Downtown Connector Steering Committee approved the LPA on a 3-1 vote.[3] Obtaining approval of the LPA was the next step in advancing the project; after which the City would begin preliminary engineering and environmental documentation and pursue commitments on financing and governance. *Id.* at 38.

C. Further Steps to Implement the LPA (WisDOT/City Agreement for Use of Land for Streetcar Maintenance Facility and WisDOT Support for Project).

On November 29, 2010, the City and WisDOT entered into an Intergovernmental Agreement ("2010 IGA") through which WisDOT agreed to make certain Interstate lands and rights-of-way to the City for purpose of building, operating and maintaining a streetcar maintenance facility. *Intergovernmental Agreement Between the WisDOT and the City of Milwaukee Regarding Use of Lands for Public Transit Purposes (Milwaukee Streetcar)*, dated November 29, 2010, (Miller Aff., Exh. P). The "Recitals" stated in the IGA provide in relevant part:

> Pursuant to 23 C.F.R. § 710.405(c) and 23 U.S.C. § 142(f), the DEPARTMENT has the authority to make Interstate lands and rights-of-way available without charge to a publicly owned mass transit authority for public transit purposes **whenever the public interest will be served**, and where doing so can be accomplished without impairing automotive safety or future highway improvements.
>
> The CITY is a public authority as defined by 23 U.S.C. 101(a)(23) with the statutory authority pursuant to Wis. Stats. 62.11(5), 66.0621(3), 66, 1021 [sic] and Wis. Const. Article XI, § 3¶(1) to finance, build, operate, and maintain mass transit facilities, and as such, qualifies as a publicly owned mass transit authority for purposes of 23 C.F.R. § 710.405(c).

[3] The Steering Committee was made up of four voting members: Jeffrey Mantes, City of Milwaukee Commissioner of Public Works; Brian Dranzik, Milwaukee County Public Works and Milwaukee County Transit System; Richard Geyer, Wisconsin Center District Executive Director; Peter Beitzel, Vice-President of Infrastructure and International Business, Milwaukee Metropolitan Association of Commerce. Windsor Aff., ¶ 23.

> The DEPARTMENT finds that making the subject Interstate right-of-way lands available to the CITY for purposes of building, operating and maintaining a streetcar maintenance facility **will serve the public interest as it will allow for the development, improvement and use of a public mass transportation system.**

2010 IGA, Recitals, ¶¶ 3-5 (emphasis added) (Miller Aff., Exh. P).

Further, in WisDOT's most recent long-range transportation plan for the state, the agency adopted a policy of supporting development of fixed-guideway transit services, such as the Milwaukee Streetcar and a separate streetcar in Kenosha. In adopting this policy, WisDOT articulated the following "[e]conomic and land use benefits of fixed-guideway transit systems[:]

- Attract economic development around station areas.
- Encourage investment due to their permanence and high passenger flow.
- Help promote land uses that meet a community's smart growth planning goals, such as compact, mixed-use, higher density, and pedestrian-friendly development around stations.
- Enhance economic competition in regions by improving access to jobs, goods and services, and expanding both the labor pool and market area for businesses."

Wisconsin Department of Transportation, *Connections 2030 Statewide Long-Range Transportation Plan*, at 8-13, adopted October, 2009 (Miller Aff., Exh. Q).

D. Further Steps to Implement the LPA (SEWRPC Plans Incorporating the Streetcar Project).

SEWRPC is the official metropolitan planning organization ("MPO") for the seven-county Southeastern Wisconsin region. On June 16, 2010, SEWRPC adopted Resolution No. 2010-09, which in pertinent part, reaffirmed and amended the Year 2035 Regional Transportation Plan as set forth in SEWRPC Memorandum Report No. 197. *Review, Update, and Reaffirmation of the Year 2035 Regional Transportation Plan* ("Year 2035 Plan Update") (Miller Aff., Exh. N). The Year 2035 Plan Update contained the following "vision for a regional transportation system:"

> *A multimodal transportation system with high quality public transit, bicycle and pedestrian, and arterial street and highway elements which add to the quality of life of Region residents and support and promote expansion of the Region's economy, by*

providing for convenient, efficient, and safe travel by each mode, while protecting the quality of the Region's natural environment, minimizing disruption of both the natural and manmade environment, and serving to support implementation of the regional land use plan, while minimizing the capital and annual operating costs of the transportation system.

Year 2035 Plan Update, at 4, 119 (italics in original).

The Year 2035 Plan Update further provides:

The public transit element of the plan envisions significant improvement and expansion of public transit in Southeastern Wisconsin, including development within the Region of … a rapid transit and express transit system…

The recommended expansion of public transit is essential in Southeastern Wisconsin for many reasons:

- Public transit is essential to provide an alternative mode of travel in heavily traveled corridors within and between the Region's urban areas, and in the Region's densely developed urban communities and activity centers. It is not desirable, and not possible, in the most heavily traveled corridors, dense urban areas, or the largest and densest activity centers of the Region to accommodate all travel by automobile with respect to both demand for street traffic carrying capacity and parking. To attract travel to public transit, service must be available throughout the day and evening at convenient service frequencies, and at competitive and attractive travel speeds.

- Public transit also supports and encourages higher development density and infill land use development and redevelopment, which results in efficiencies for the overall transportation system and other public infrastructure and services.

- Public transit also contributes to efficiency in the transportation system, including reduced air pollution and energy consumption.

- Public transit permits choice in transportation, enhancing the Region's quality of life and economy. A portion of the Region's population and businesses would prefer to have public transit alternatives available and to travel by public transit. High quality public transit helps provide a high quality of life and contributes to the maintenance and enhancement of the Region's economy.

- Public transit is essential in the Region to meet the travel needs of persons unable to use personal automobile transportation. In the year 2000,

> approximately 80,000 households, or 11 percent of the Region's households, did not have a personal vehicle available and were dependent upon public transit for travel. The accessibility of this portion of the Region's population to the metropolitan area – jobs, health care, shopping and education – is almost entirely dependent upon the extent to which public transit is available, and is reasonably fast, convenient, and affordable.

Id. at 121, 124-25.

Importantly, the Year 2035 Plan Update's recommended express service explicitly includes the City's Streetcar Project. *Id.* at 127. The Year 2035 Plan Update recommended upgrading express transit service from bus service to bus guideway or light rail, stating:

> Public transit cannot offer convenient accessibility to metropolitan area services for those without an automobile, offer an attractive alternative in heavily traveled corridors and dense urban activity centers, or provide a true choice for travel if it is caught in traffic congestion and its travel times are not comparable to those of automobile travel. Upgrading to exclusive guideway transit may also be expected to promote higher density land development and redevelopment at and around the stations of the exclusive guideway transit facilities, promoting implementation of the regional land use plan.

Id. at 128. The Year 2035 Plan Update also cited the Streetcar Project as one effort underway to upgrade to fixed guideway transit. *Id.*

On February 17, 2011, SEWRPC adopted Resolution No. 2011-02, endorsing the document entitled *A Transportation Improvement Program for Southeast Wisconsin: 2011-2014,* as the TIP for Southeastern Wisconsin Region (Miller Aff., Exh. O). The 2011-14 TIP includes the Streetcar Project. *Id*. at Table A-31.

E. <u>Further Steps to Implement the LPA (Streetcar Project Environmental Assessment)</u>.

As a further step toward implementing the LPA, the City and FTA prepared an Environmental Assessment to evaluate the potential social, environmental, and economic impacts of the Milwaukee Streetcar Project. *FTA, Region V, Finding of No Significant Impact,* dated January

25, 2012, at 1 ("FONSI") (Attached as Exhibit D to the Affidavit of Kevin Anderson filed with the ATU Petitioners' Initial Brief, PSC REF# 165161). The FTA and the City issued the EA for public comments on October 31, 2011.

The EA describes the purpose of the Streetcar Project:

> The purpose of the project is to implement a starter streetcar system with modern vehicle technology that circulates people around downtown, links downtown destinations, activity centers and neighborhoods and supports planned development.

EA, at 11.

The EA also describes the needs for the Streetcar Project:

a. Project Need 1 -- Large Downtown with Dispersed Activity Centers. Downtown Milwaukee has experienced development of new housing, retail and entertainment facilities. However, because of the large downtown area, residents and visitors often find it challenging to reach their destinations. EA, at 11.

b. Project Need 2 -- Lack of High Quality Transit Circulator. There is currently a lack of high quality transit that circulates people around downtown and nearby destinations. EA, at 23.

c. Project Need 3 -- Support Planned Development. Improved transit services and facilities are needed to support local land use and development goals and objectives. EA, at 25.

The EA describes the livability and sustainability measures of the Streetcar Project:

> The City of Milwaukee is investing in the community's livability with the Milwaukee streetcar project. The Federal Transit Administration defines livability investments as projects that deliver not only transportation benefits, but also are designed and planned in such a way that they have a positive impact on qualitative measures of community life.
>
> The streetcar project would add a new convenient transportation option that circulates residents, visitors and employees throughout downtown Milwaukee and nearby neighborhoods. This would support Milwaukee's compact neighborhoods and improve access to goods and services, employment, housing, recreation and entertainment. It would also improve connections to other modes of transportation by providing a direct link to the Milwaukee Intermodal Station.

> The project's improved transportation access is particularly important for the streetcar study area because its population tends to have less access to automobiles and relies on public transit and walking more frequently. As discussed in Section 5.1.3, Environmental Justice, a larger number of households, 77%, have only one vehicle or no vehicles compared to 65% citywide and 58% countywide. Also, over 35% carpool, use transit, bike or walk compared to 28% citywide and 22% countywide.
>
> The streetcar project is a coordinated land use and transportation decision that is a critical component of the City's Downtown Area Plan. The plan emphasizes land use policies to increase density and intensity within downtown and encourages improved connectivity between high density residential neighborhoods, the Intermodal Station, cultural and entertainment facilities, retail districts and office buildings. The plan recognizes a streetcar system is needed to support these development and connectivity goals.

EA, at 127-28.

Regarding sustainability measures, the EA recognizes that the Streetcar Project would reduce automobile travel and reduce greenhouse gas emissions. EA, at 128.

The EA describes the public outreach efforts during the scoping phase of the Milwaukee Connector study that began in February 2009. EA, at 145-50. The EA included "Public Comments" in Appendix B1-36, many of which discussed the need for an improved transit system in Milwaukee to enhance connections, improve the quality of life for residents, and encourage economic development.

F. <u>Further Steps to Implement the LPA (Consistent with Comprehensive Land Use Planning)</u>.

Both the LPA and EA cite, are consistent with, and rely on the City's comprehensive land use plans. Wisconsin's comprehensive planning statute, Wis. Stat. § 66.1001 ("Smart Growth Law"), requires that every political subdivision adopt a comprehensive plan by January 1, 2010. The municipality's adoption of the comprehensive plan is itself a police power action as the comprehensive plan of a city consists of a master plan that will "best promote public health, safety,

morals, order, convenience, prosperity or the general welfare." Wis. Stat. §§ 66.1101(1)(a)(2) and 62.23(3)(a). Each comprehensive plan must contain certain enumerated elements including transportation. Wis. Stat. § 66.1001 (2)(c) provides:

> "(c) *Transportation element*. A compilation of objectives, policies, goals, maps and programs to guide the future development of the various modes of transportation, including highways, transit, transportation systems for persons with disabilities, bicycles, electric personal assistive mobility devices, walking, railroads, air transportation, trucking and water transportation. The element shall compare the local governmental unit's objectives, policies, goals and programs to state and regional transportation plans. The element shall also identify highways within the local governmental unit by function and incorporate state, regional and other applicable transportation plans, including transportation corridor plans, county highway functional and jurisdictional studies, urban area and rural area transportation plans, airport master plans and rail plans that apply in the local governmental unit.

The Milwaukee Common Council adopted a 2010 Downtown Comprehensive Area Plan Update on October 12, 2010 ("2010 Downtown Plan"), by Common Council Resolution No. 100235 (Miller Aff., Exh. T). The 2010 Downtown Plan identifies the Streetcar Project as one of eight "Catalytic Projects" in the Downtown Area. 2010 Downtown Plan, at 181-186. The 2010 Downtown Plan further states:

> Mass transit is a vital component for a successful downtown, adjacent neighborhoods, and an overall region. Mass transit works best when it takes a multi-modal approach including fixed rail and buses. Within Downtown, a streetcar network, buses, bus rapid transit, commuter rail and heavy rail all play a part to this mix.

2010 Downtown Plan, at 99.

The Milwaukee Common Council adopted a March, 2010 Milwaukee Comprehensive Citywide Policy Plan ("Citywide Plan") on March 2, 2010, by Common Council Resolution No. 090882 (Miller Aff., Exh. S). In a chapter devoted solely to transportation, the Citywide Plan cites the following transportation issues facing the City of Milwaukee:

(a) Growing and aging population that expects greater mobility than previous generations;

(b) 25% of all households in the City of Milwaukee did not have access to a car compared to only 8% statewide, according to 2000 census;

(c) 43% of public transit riders use public transit to get to and from work; 75% of whom do not have a car.

Citywide Plan, at 80. The City also outlines in the Citywide Plan several transportation policies, including:

1. To "Promote transportation improvements that enhance health and quality of life" including promoting multi-modal transportation options as part of an urban lifestyle. *Id.* at 83.

2. To "Support the expansion of public transit options and service" including supporting the development of bus rapid transit, streetcar, or an express bus network. *Id.* at 85.

3. To "Support the expansion of public transit options and service" by developing a sustainable fixed guideway transit system, such as a streetcar, to initially circulate people in downtown and nearby neighborhoods, with a plan to fund the initial segment, guide future expansion and allow Milwaukee to be more competitive in receiving federal transportation funds. *Id.* at 85.

II. STREETCAR DESIGN PROCESS AND COMMUNICATIONS BETWEEN THE CITY AND THE POTENTIALLY AFFECTED UTILITIES.

A. The City Is Taking Steps to Mitigate Utility Impacts.

As early as October 2009, Milwaukee and the project consultant began outreach to potentially affected utilities and companies regarding the potential streetcar routes. Discussions with all potentially affected utilities regarding the current proposed route and rail alignment and their potential impacts on utility facilities were held throughout the Preliminary Engineering phase beginning in July 2010 through the completion of the 30% design plan. The utilities were made fully aware of Milwaukee's plans, including the proposed preliminary location of the streetcar route. Affidavit of Jeffrey S. Polenske ("Polenske Aff."), ¶ 4.

Currently, the Project is at a 30% design level (or 30% plan). Polenske Aff., ¶ 5. On June 28, 2012, the City executed a contract for services with the selected owner's representative. The owner's representative will assist the City with establishing the Final Design RFQ (request for qualifications) and selecting a final design consultant. The owner's representative will also assist the City in continuing the utility coordination process. However, full utility coordination efforts will not be underway until a final design consultant is under contract. Polenske Aff., ¶ 5.

Pursuant to the City's contract with the owner's representative and in advance of securing a final design consultant, the owner's representative is to perform the following utility coordination tasks:

- Review utility design criteria from preliminary engineering
- Review utility plans based on the 30% design as may be available from the utilities
- Prepare a peer review memorandum regarding the treatment of utilities in conjunction with streetcar projects from across the country incorporating utility relocation design criteria, practices for evaluating potential stray current impacts, stray current mitigation measures, and policies for performing utility work within or adjacent to the track zone during streetcar operation
- Review City utility franchise information and current coordination documentation
- Conduct a meeting with public/private utility owners to discuss the proposed utility coordination process during final design, the establishment of utility relocation standards by the utilities, potential efforts to reduce utility impacts, and potential policies for treatment of utilities performing utility work during streetcar operations
- Solicit input from the utilities on the peer review memorandum and prepare a summary memorandum documenting responses
- Draft City of Milwaukee policy for stray current measures to be performed by the City of Milwaukee and the treatment of utilities performing utility work during streetcar operations
- Prepare draft recommendations for utility coordination next-steps to be performed by the Department of Public Works ("DPW"), the final design consultant, and the owner's representative team.

Polenske Aff., ¶ 6.

Now that the owner's representative is under contract and the Project is set to proceed to the final design phase, the City provided notice in a July 3, 2012 letter ("July 3rd Letter") to each of the affected utilities that the next utility coordination meeting will be held on July 17, 2012 ("July Utility Coordination Meeting"). Polenske Aff., ¶ 7. A copy of the July 3rd Letter is attached to the Polenske Aff. as Exhibit A.

As explained in the July 3rd Letter, the July Utility Coordination Meeting has been scheduled "to discuss with the utilities the proposed utility coordination process during final design, the establishment of utility relocation criteria by the utilities, potential mitigation efforts to reduce utility impacts, and potential policies for treatment of utilities performing utility work during streetcar operations." *See* Polenske Aff., Exh. A.

In its efforts to reduce utility impacts through the design process, the City notified the utilities of the following:

> **Among other potential mitigation measures to be evaluated during final design, please be aware that the City will evaluate a split route streetcar alternative on Milwaukee and Broadway between St. Paul Avenue and Wells Street as an alternative to two-way streetcar operation on Broadway. This measure is expected to significantly reduce utility impacts in Broadway that were discovered during preliminary engineering. Initial concept plans showing this alternative will be provided.**

July 3rd Letter at 1 (Polenske Aff., Exh. A (bold in original)).

Utility coordination efforts can be expected to be substantially completed for design purposes by the 60% plan. The 60% plan is not expected to be completed until early 2013. Advance utility relocations to accommodate the Project will begin thereafter after utilities secure regulatory authorization and complete final design of necessary relocations.

Construction of Project components not dependent on completion of advance utility relocation is expected to begin in late 2013. Polenske Aff., ¶ 10.

B. The Utilities' Relocation Cost Estimates Are Not Founded on Fact; They Are Largely Speculative.

The affidavits submitted by the Utility and ATU Petitioners are reckless in their wild estimates of the likely utility cost impacts. Not until the final design stage of the Project, when the utility coordination efforts have been completed and a final track alignment determined, will it be possible to estimate the likely cost of utility impacts caused by the necessary permanent relocation of facilities. Until then, any such estimates are worthless because they are based on very preliminary stages of the Streetcar Project design, are unverifiable, and based on pure speculation. Indeed, it is simply not possible for anyone to provide an accurate estimate of impacts at this stage of the design process. *See* Polenske Aff., ¶¶ 11-30.

For example, the Affidavit of John Harvie (PSC REF# 165184) indicates that the cost estimate to modify WE Energies electric, natural gas, and steam facilities to accommodate Phase I of the Milwaukee Streetcar Project is $45.4 million dollars based on the June 24, 2011 conceptual cost estimate prepared by WE Energies. The June 24, 2011 conceptual cost estimate does not identify specific relocations for independent verification; accordingly, it is simply impossible that this estimate is even close to accurate for several reasons. Polenske Aff., ¶¶ 11-13.

First, the June 24, 2011 conceptual cost estimate prepared by WE Energies is based on the initial Streetcar alignment developed during the preliminary engineering phase of project development. The final alignment will be developed during the final design phase and will include alignment and other design refinements, as well as stray voltage mitigation measures as necessary, specifically intended to reduce utility impacts. Polenske Aff., ¶ 13.

Among other potential mitigation measures to be evaluated during final design phase, the City intends to evaluate a split route streetcar alternative on Milwaukee and Broadway between St. Paul Avenue and Wells Street as an alternative to the two-way streetcar operation on Broadway proposed during the preliminary engineering phase. While reasonable estimates of the impacts to WE Energies facilities cannot be made until the final design phase has progressed to the 60% design level, this measure is expected to significantly reduce direct impacts to WE Energies steam facilities located in Broadway. Polenske Aff., ¶ 13.

Second, the June 24, 2011 conceptual cost estimate prepared by WE Energies reflects relocations significantly beyond those necessitated by direct conflicts with the proposed track section. Polenske Aff., ¶ 14. The estimate includes relocation/replacement of underground gas mains, gas services that cross perpendicular to the track zone, steam facilities and electric duct packages, including manholes, located within 12-14 feet from the centerline of the proposed streetcar track. Furthermore, based on discussions between the City Engineer and WE Energies during the Preliminary Engineering Phase, the cost estimate may reflect replacement of additional gas services and cast iron gas mains beyond 12-14 feet from the centerline of the track with polyethylene gas mains. These relocation standards established solely by WE Energies may reflect an overly conservative approach compared to common practice employed in other modern streetcar projects throughout the country. The City's hired representative will develop relocation criteria based on peer reviews of utility relocation experiences in conjunction with streetcar projects across the nation and solicit input from the utilities impacted by the Project. Polenske Aff., ¶ 14.

Moreover, the June 24, 2011 conceptual cost estimate prepared by WE Energies includes significant upgrades to WE Energies' facilities that are not attributable to the Project. Polenske Aff., ¶ 15. The cost estimate includes replacement of clay tile electrical conduit beyond the 12-14 foot

relocation criteria established by WE Energies in conjunction with manhole relocations within the 12-14 foot relocation criteria. The cost estimate also includes increasing existing electrical duct capacity "where circuit congestion is excessive (as determined by WE Energies)" as well as increasing existing cable sizes where electrical demand warrants. The cost estimate also includes complete reconstruction of an existing steam tunnel where less extensive modifications may adequately address direct conflicts. Polenske Aff., ¶ 15.

These are but a few criticisms of just one of the cost impact estimates. A more thorough analysis is presented in the City Engineer's Affidavit. *See* Polenske Aff., ¶¶ 11-30.

III. CURRENT FUNDING OF THE STREETCAR PROJECT.

The Commission has directed the City to "submit information regarding project funding, including whether local, state, or federal funding is available sufficient to cover the costs of utility facility relocation or modification." March Order, ¶ 5.

The total capital costs for the initial 2.1-mile Streetcar system (Phase I) are estimated to be $64.6 million. The capital costs of Phase 2 would add $48.1 million and will be pursued as funding becomes available. The estimated costs for Phase I will continue to be refined during final design. Polenske Aff., ¶ 32.

Capital costs of $54.9 million for Phase I of the Project are covered by the federal ICE funds allocated pursuant to § 1045 of ISTEA (Pub. L. 102-240 (1991), as amended and Pub. L. 111-8 (2009), 111 Cong. Rec. H2435; 111 Cong. Rec. S2817; Miller Aff, Exhs. C and G). The $9.7 million balance of the Project will be provided by Tax Incremental District ("TID") No. 49 (Cathedral Place) per City of Milwaukee Common Council Resolution No. 110324. Polenske Aff., ¶ 33.

Funding for any private utility modifications performed in conjunction with the Project are not included in the project budget. Polenske Aff., ¶ 34.

IV. PROCEDURAL BACKGROUND.

The Commission opened this docket in response to Petitioner Brett Healy's October 5, 2011 Petition for Declaratory Ruling to Determine Allocation of Costs for Relocation of Utility Structures for Milwaukee Streetcar Project (PSC REF# 154240). The Commission granted numerous requests for intervention (PSC REF# 157910), as well as the City's request to intervene for the limited purpose of addressing an initial legal issue regarding the Commission's jurisdiction to consider Healy's petition (PSC REF# 158603)[4]. The threshold legal issue was whether Petitioner Healy triggered Commission jurisdiction to review the reasonableness of a municipal regulation under Wis. Stat. § 196.58(4), even though he was neither a public utility nor a qualified complainant under Wis. Stat. § 196.25. The Commission addressed this legal issue in its April 25, 2012 Order on Motions for Clarification and On Threshold Legal Issue (PSC REF# 163712). The Commission concluded that if Petitioner Healy was not a public utility or a qualified complainant, he could still trigger Commission jurisdiction if he had standing under Wis. Stat. § 227.41. The Commission did not decide that standing issue and instead allowed Healy time to obtain additional petitioners so that the group would be a qualified complainant. Healy filed an Amended Petition with 35 affidavits of WEPCO electric and gas customers, with the group thereby becoming a qualified complainant and resolving the initial question of whether the Commission had jurisdiction to consider the requests for declaratory ruling.

[4] The Commission later changed the City's intervention status from limited party to full party. *Prehearing Conference Memorandum*, dated Feb. 7, 2012 (PSC REF# 159312).

This proceeding also included initial questions on the applicability of any declaratory ruling the Commission would issue. In a March 2, 2012 Order on Motion for Interlocutory Review and Amendment to Prehearing Conference Memorandum (PSC REF # 160666) the Commission concluded that a declaratory ruling in this proceeding could apply to ATC, but not to the intervening telecommunications utilities ("ATUs"). Because the intervening ATUs did not have authority to trigger Commission jurisdiction under Wis. Stat. § 196.58, the Commission advised this group that they could file their own petition for declaratory ruling under Wis. Stat. § 227.41 to determine how relocation costs are to be allocated under Wis. Stat. § 182.017. Accordingly, the ATU Petitioners filed their own Petition for Declaratory Ruling which opened PSC Docket 5-DR-110 (PSC REF# 163713). By email, the Commission closed PSC Docket No. 5-DR-110, and consolidated it into PSC Docket 5-DR-109 (PSC REF# 165060).

On May 24, 2012, the Individual Petitioners (PSC REF# 165165), the ATU Petitioners (PSC REF# 165167) and the Utility Petitioners (PSC REF# 165184) filed their Initial Briefs in response to the issues raised in the Commission's March Order. Today, the City files its Response Brief.

ARGUMENT

I. THE STREETCAR PROJECT IS A REASONABLE EXERCISE OF THE CITY'S POLICE POWER; THEREFORE, THE COMMISSION MAY NOT INVALIDATE THE MILWAUKEE ORDINANCE OR REQUIRE THE CITY TO PAY THE UTILITIES' RELOCATION COSTS.

A. The City's Authority over Public Utility Use of Local Right-of-Way Under Wis. Stat. § 196.58.

The Public Utility Law, first adopted in 1907, grants Wisconsin cities explicit statutory authority to regulate a utility's use of local rights-of-way. That authority is set out in Wis. Stat. § 196.58, which provides in pertinent part:

> (1) The governing body of every municipality may:

> (a) Determine by contract, ordinance or resolution 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 contract, ordinance or resolution shall be in force and on its face reasonable.
>
> ….
>
> (4) 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 contract, ordinance or resolution under sub. (1) to be unreasonable, the contract, ordinance or resolution shall be void.

The Commission set out its standards for interpreting Wis. Stat. § 196.58 in *City of La Crosse*[5]:

> The Commission considers that s. 196.58, Stats., acknowledges the authority of a city to enact reasonable Ordinances and resolutions regulating the operations of utilities within the city, including reasonable terms and conditions under which a utility will be permitted to occupy and use streets, highways and other public places within the city. Accordingly, a presumption of validity attaches to an Ordinance or resolution that is not, on its face, unreasonable.
>
> The "reasonableness" test to be applied by the Commission must also be understood in the context of the Commission's legislatively prescribed authority. When a utility petitions the Commission to void an Ordinance or resolution, the petitioner has the burden of overcoming the presumption of validity by convincing the Commission that the Ordinance or resolution is so unreasonable that the Commission should exercise its extraordinary discretion under s. 196.58, Stats., to void the disputed Ordinance or resolution . . . .

City of La Crosse at 3.

[5] *Complaint of Northern States Power Company Against the City of La Crosse Regarding Municipal Ordinances*, Docket No. 9314-EI-100 (November 16, 1996)("*City of La Crosse*").

Thus, Wis. Stat. § 196.58 authorizes the Commission to determine the reasonableness of any ordinance or resolution adopted by a municipality that sets the terms and conditions upon which a public utility is permitted to occupy the streets, highways, or other public places within the municipality. *City of La Crosse* confirms that a challenger has a heavy burden of overcoming the presumption of validity that attaches to such municipal regulations. The Petitioners here must prove to the Commission that the Milwaukee Ordinance is "so unreasonable that the Commission should exercise its extraordinary discretion" to void it. In order to prevail, the Petitioners must show that the City's ordinances requiring Petitioner to pay their relocation costs when the City uses its governmental or police power authority for purposes of public transportation is unreasonable. If Petitioners meet this heavy burden, invalidation of the Milwaukee Ordinance would be the sole remedy afforded under the statute.[6] Wis. Stat. § 196.58(4).

B. The Utilities' Right to Use Local Rights-of-Way Is Subordinate to the Public's Use.

1. The Common Law.

Streets belong to the public for travel, and the use of rights-of-way for private business is "special and extraordinary" because it so radically departs from their ordinary use. *Gateway City Transfer Co. v. Public Service Comm.*, 253 Wis. 397, 413, 34 N.W.2d 238 (1948). Thus, the common law has long recognized that a public utility's privilege to occupy rights-of-way is subordinate to the right of the public to use the right-of-way for public purposes, and that the utility's

[6] The Commission has exercised its authority under Wis. Stat. § 196.58 to review municipal ordinances requiring, for example, the undergrounding of certain electric lines. *See, e.g., Complaint of Northern States Power Company Against the City of La Crosse Regarding Municipal Ordinances,* Docket No. 9314-EI-100 (November 5, 1996) (concluding there was no basis under § 196.58 to void the challenged ordinances); *Complaint of Wisconsin Power and Light Company Against the Town of Burke*, Docket No. 6680-DR-102 (November 27, 1990) (declaring the challenged ordinance void); *In the Matter of the Complaint of Madison Gas and Electric Company Against Ordinances and Resolution of the City of Madison, Dane County, with Respect to the Undergrounding of Electric Transmission Lines*, 63 Wis. PSC 271 (1978) (declaring the challenged ordinance void). The City is not aware of any cases in which the Commission has reviewed a contract within the scope of § 196.58.

interest must give way to that of the public in the event of a conflict. *See, e.g., Wisconsin Power & Light Co. v. Gerke,* 20 Wis. 2d 181, 188 n.6, 121 N.W.2d 912 (1963) ("The fact that poles in a street or highway were located in a certain place by an electric company pursuant to permission of the authorities creates no absolute, indefeasible right or irrevocable license to have such poles remain at the particular spot for all time.") (citations omitted). Accordingly, a utility must relocate its facilities at its own expense when necessary to accommodate a governmental decision to exercise its police power to undertake a public improvement project, or when the governmental body determines that such action is required by public necessity. *See Milwaukee E.R.&L., Co. v. Milwaukee*, 209 Wis. 656, 667, 245 N.W. 856 (1932) ("'Unquestionably had such removal [of utility facilities] been required by a regrading of the street by the city **or for any other purpose required for the use of the street by the public**, the [utility], if required, would have been compelled, at its own cost and expense, to relocate its said poles and wires to conform with such changed conditions.'" (emphasis added)).

This common law rule has been articulated in longstanding precedents of the United States Supreme Court. Specifically, in *New Orleans Gaslight*, 197 U.S. 453 (1905), the Supreme Court recognized the paramount public interest in using public rights-of-way to further the public health, safety, and welfare. The Court held that New Orleans Gaslight could not recover the costs it incurred in relocating its gas facilities to accommodate a new city drainage system because:

> [i]t would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the State might require for a necessary public use that changes in location be made.

Id. at 461. The Court went on to hold that "uncompensated obedience to a regulation enacted for the public safety under the police power of the state [is] not taking property without due compensation. … In complying with [the] requirement [that it move its facilities] at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria* [a loss or damage without injury]." *Id.* at 462.

New Orleans Gaslight is recognized as the seminal case regarding the responsibility for payment of relocation costs, expressing both the common-law rule that a utility company must bear the cost of relocating its facilities where relocation is occasioned by an exercise of the police power and the rationale underlying that rule. *See, e.g.*, *Norfolk Redevelopment and Housing Auth. v. Chesapeake 33 Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983), citing *New Orleans Gaslight*, 197 U.S. at 462. ("Under the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities"). This widely-recognized rule rests both on the basic tenet of property law that an owner holds rights superior to those of a licensee, and on the government's inherent police power to act in furtherance of the public health, safety, and welfare. Because public rights-of-way exist to serve the public, the public's interest in their use and disposition is paramount. Utilities and other non-public entities may be authorized to use public rights-of-way by franchise, license, or statute, but the pursuit

of their profit-seeking activities[7] is secondary to the government's non-negotiable power to promote the public health, safety, and welfare.[8]

The New Jersey Supreme Court succinctly described the common law rule as follows:

> A utility company is permitted to locate its lines within the public right-of-way as a use ancillary to the principal and primary use of the way by the public. It is permitted to use the public way because it serves a public interest, but since its venture is for gain and since in any event the primary purpose of the public easement is the public's own use of it, the utility's interest in the public way is subordinate to the public's enjoyment of it. Hence the utility runs the risk that the public welfare may require changes in the road which will call for relocation of its facilities.
> ….
>
> … The true connection between the police power and the relocation of facilities is not, as the companies urge, that the duty to relocate is generated in each specific instance by a decision under the police power to impose it. Rather the meaning is that the utility's interest in the street was intended to be subordinate to the police power, that is to say, that government's authority to exert its police power in the street for the public welfare was not bargained away in the least by the legislative grant to the utility company. **Hence, if government undertakes an activity in the street in the exercise of the police power, the utility must figuratively move over at its own expense to the end that the exercise of the police power will not be impeded or burdened. And this the utility must do because the law governing the basic arrangement obliges it to do so**.

[7] Utilities benefit significantly from being granted access to public rights-of-way, without being required to purchase expensive private rights-of-way or easements. To the extent they are required to spend funds in relocating their facilities, those are costs which may be anticipated and planned for by utilities whose operations are often statewide, regional, or national in scope. *See, e.g., Norfolk Redevelopment & Housing Auth.*, 464 U.S. at 42-43 (recognizing that such expenses are included in rate requests).

[8] *See Northern. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1053-1055 (8th Cir. 2004); *U.S. West Communications, Inc. v. City of Longmont*, 948 P.2d 509, 521 (Colo. 1997); *State ex rel. Rich v. Idaho Power Co.*, 346 P.2d 596, 601-603 (Id. 1959); *Interstate Power Co. v. Dubuque County*, 391 N.W.2d 227, 230 (Iowa 1986); *City of Wichita v. Kansas Gas & Elec. Co.*, 464 P.2d 196, 202 (Kan. 1970); *N. States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 542 (Minn. Ct. App. 1999); *Pine Belt Chevrolet, Inc. v. Jersey Cent. Power & Light Co.*, 626 A.2d 434, 438 (N.J. 1993); *City of Albuquerque v. N.M. Pub. Reg. Comm'n*, 79 P.3d 297, 301 (N.M. 2003); *New York City Tunnel Auth. v. Consolidated Edison Co. of New York*, 68 N.E.2d 445, 448 (N.Y. 1946); *Northwest Natural Gas v. City of Portland*, 711 P.2d 119, 128-129 (Or. 1985); *Vermont Gas Sys., Inc. v. City of Burlington*, 571 A.2d 45, 48-49 (Vt. 1989); *City of Edmonds v. General Tel. Co.*, 584 P.2d 458, 460-461 (Wash. Ct. App. 1978); *Appalachian Power Co. v. City of Huntington*, 210 S.E.2d 471, 475 (W. Va. 1974); *State Highway Comm'n of Wyo. v. Sheridan-Johnson Rural Elec. Assoc.*, 784 P.2d 588, 591 (Wyo. 1989). *See also* 12 Eugene McQuillin, *Municipal Corporations* § 34:92, at 331 (Rev. 3d. 2006).

Port of N.Y. Auth. v. Hackensack Water Co., 41 N.J. 90, 96-98, 195 A.2d 1, 5 (1963) (citations omitted) (emphasis added).

The utility's burden to pay relocation costs is present from the time the utility lays its facilities in the right-of-way. *See New Orleans Gaslight Co.*, 197 U.S. at 461 ("[W]hen it located its pipes" in the right-of-way, a gas company assumed the risk that it may need to relocate the pipes for a necessary public use.). That is, the utility's obligation to relocate at its expense does not originate in a specific order to relocate. Rather it antedates the occasion for relocation and rests upon the common law's view of the rights and responsibilities of the recipient of a franchise or permit to use the public streets. *Port of N.Y. Auth.*, 41 N.J. at 96-98.

2. Wisconsin Statutory Law.

Just as the common law recognizes the paramount right of the public to use the public streets, so too do the Wisconsin statutes. Under Wis. Stat. § 182.017(1r), a "company"[9] may place facilities in municipal rights-of-way with the consent of the municipality and subject to the "reasonable regulations" of such municipality. Section 182.017(2) further provides that such facilities occupying the right-of-way "shall not at any time obstruct or incommode the public use of any highway." By conditioning a company's occupancy of the public right-of-way on the local government's regulation, and by explicitly stating that the company's facilities may not "obstruct or incommode" the public's use of streets, the Wisconsin Legislature has made clear that the public's right to use or improve public rights-of-way is superior to any company's interest in occupying them for private gain. *Brown v. Thomas*, 127 Wis. 2d 318, 323, 379 N.W.2d 868 (Ct. App. 1985) (Statutes should be read in harmony with the common law.).

[9] All of the Utility and ATU Petitioners would likely meet the definition of "company" under Wis. Stat. § 182.017(1g).

Under both the common law and the Wisconsin Statutes, public utilities and other companies must relocate their facilities at their own expense to accommodate public works projects. This is not necessarily strictly a matter of local, municipal regulation. Rather, the common and statutory law governing the basic relationship among the municipality, the public, and the utility/company vis-à-vis local rights-of-way dictates this result.

C. The Regulation of City Streets for Public Transit Purposes Is a Reasonable Exercise of the City's Police Powers.

1. The proprietary/governmental distinction has no validity in the context of utility facilities relocation law.

To shift the cost of relocating facilities located in the public right-of-way to the City, the Petitioners must prove that the Milwaukee Streetcar Project is not a reasonable exercise of the City's police powers to act for the public health, safety, and general welfare. Petitioners rely principally on a 1932 Wisconsin Supreme Court decision that referred to an earlier 1927 New York decision. *Milwaukee E. R.& L., Co. v. Milwaukee*, 209 Wis. 656, 667, 245 N.W. 856 (1932) ("*1932 Milwaukee Case*"), citing with approval *New York and Queens Electric Light & Power Co. v. New York*, 224 N.Y.S. 564 (1927) (Construction of an elevated train is a proprietary, not a governmental, act). The Petitioners would have this Commission resurrect the long eschewed governmental/proprietary distinction the Wisconsin Supreme Court relied on in its 1932 decision, apply that distinction without analysis, and, ultimately, turn back the clock to a time when, unlike today, public mass transportation was not an arena dominated by municipal and other governmental providers.

In doing so, Petitioners ask this Commission to pretend that the intervening 80 years have seen no change in the public's transportation needs and the resulting changes in federal and state law. However, the question whether the construction and operation of public transportation systems, including urban rail projects such as the Milwaukee Streetcar, is related to the public health, safety,

and general welfare has been settled since 1964, at the very latest, with the adoption of the Urban Mass Transportation Act of 1964, in which Congress made the following findings:

> (2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and
>
> (3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

Urban Mass Transportation Act of 1964, P.L. 88-365, 78 Stat. 302 (1964) (Miller Aff., Exh. A).

Indeed, the Wisconsin Legislature has declared that "development of urban rail transit systems [such as the Streetcar Project] to serve urban areas of this state will enhance the welfare of all of the citizens of this state through conservation of fuel, enhancement of the development of alternative transportation modes and improvement of air quality." Wis. Stat. § 85.063(3)(a). Further, the Milwaukee Streetcar Project is specifically enumerated as one of two major transit capital improvement projects that the Legislature has authorized to be constructed using state transportation funds. *See* Wis. Stat. § 85.062(3)(b).

One author has described this evolution in public transportation as follows:

> At the start of the 1950s, many of the nation's transit systems – the vast majority of which were privately owned and operated – were on the brink of fiscal and physical collapse. After a decade of neglect during the Great Depression and being overburdened by an upsurge in ridership during the gas rationing and full employment of the World War II years, many transit systems were in desperate need of a physical overhaul…
>
> With bankruptcy almost unavoidable for many systems, the prospect of public subsidization and even ownership seemed more and more inevitable to municipal officials who were eager to maintain transit services for their constituents, the most influential of whom were transit-supportive downtown interests…Just after World War II, only five major cities – Cleveland, Detroit, New York, San Francisco,

> and Seattle – owned and operated their transit systems. By the 1970s, after significant public sector intervention, most big-city transit systems were publicly run…
>
> * * *
>
> Between 1965 and 1974, the number of publicly owned transit systems skyrocketed from 58 to 308, helping to solidify the reality of transit as a public service dependent on financial support from public coffers rather than a private industry reliant solely on farebox revenues.
>
> * * *
>
> Taking advantage of the massive outlay of federal funds, particularly for capital programs, cities such as Atlanta, Baltimore, Buffalo, Miami, Portland, Sacramento, and Washington, D.C., built new rail systems.

Daniel B. Hess, Ph.D., & Peter A. Lombardi, *Governmental Subsidies for Public Transit: History, Current Issues, and Recent Evidence*, 10 Public Works Mgmt. & Policy, 138, 139-41 (2005) (Miller Aff., Exh. B).

It is no wonder then that contemporary courts considering the issue of utility relocation costs have soundly rejected the governmental/proprietary distinction. *See* Michael L. Stokes, *Moving the Lines: The Common Law of Utility Relocation*, 45 Val. U. L. Rev. 457, 480 (2011) (available at: http://scholar.valpo.edu/vulr/vol45/iss2/2/) (While the governmental/proprietary distinction has been adopted in other non-tort contexts, "where it proved to be equally difficult to apply[,]" . . . "modern courts have rejected it in utility relocation cases.") (Miller Aff., Exh. CC).

In this regard, a noteworthy case is *Northwest Natural Gas Co. v. Portland*, where, after a careful, in-depth analysis, the Oregon Supreme Court rejected the governmental/proprietary distinction and held that the complaining utilities must bear their own relocation costs where relocation was necessary to accommodate construction of the City of Portland's light rail transit system. 300 Or. 291, 711 P.2d 119, 127 (1985) ("We conclude that the governmental/proprietary distinction is equally unworkable, untenable and unhelpful in deciding mass transit/utility relocation

cases."). The court rejected this "untenable" distinction, based in part, on the recognition that mass transit has evolved from a private to a public function, stating as follows:

> The cases supporting the view that operation of mass transit systems is not a traditional governmental function date back to the turn of the century up through the Depression era, when most mass transit systems were privately operated. However, . . . by 1964 many mass transit systems in this country were publicly operated and most privately owned mass transit companies were either bankrupt or required substantial federal aid to survive. This economic situation prompted the passage of the Urban Mass Transportation Act of 1964…. Obviously, changes in economics and the demands on government change which activities are traditionally and customarily engaged in by government.

Id. at 126-27.

Rather than rely on the "unhelpful" proprietary/governmental distinction in deciding the case, the Oregon Supreme Court analyzed the "who pays" issue "under state statutes, applicable municipal charters and ordinances, and the specific agreements entered into by the parties." *Portland*, 711 P.2d at 127. The court first examined the City of Portland's authority to regulate utilities. *Id.* at 128-130. That authority was found in the city's charter (similar to Wisconsin cities' statutory home rule authority under Wis. Stat. § 62.11(5)[10]) and in a state statute, ORS 22.420, which is essentially identical to Wis. Stat. § 196.58(1). The court also examined a Portland ordinance, similar to the Milwaukee Ordinance, which was adopted pursuant to Oregon's version of § 196.58(1) and which requires utilities to pay their own relocation costs "whenever [such relocation is] required by the City Engineer for a public improvement or for the public safety." Portland City Code § 17.56.060.

[10] Wisconsin's municipal home rule statute, § 62.11(5)(emphasis added), provides:

> Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, **highways**, navigable waters, and the public service, and **shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the publi**c, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

With respect to the city charter, the court noted that the charter authorized the city to "exercise governmental powers, to locate certain utility fixtures, and to improve, repair and regulate the streets and other public rights-of-way," concluding that "[s]uch regulation necessarily would include the ordering of utility relocation to accommodate a public improvement such as a light rail transit system." *Portland*, 711 P.2d at 128-129.

The court next turned to the ordinance, concluding that because the light rail system "was planned for the general welfare and public convenience[,] . . . . [i]t is a public improvement within the ordinance." *Id.* at 129. The court rejected the argument that the ordinance did not apply because it was enacted after the utility had been granted its franchise to use the streets, stating:

> There is no question and the parties do not dispute that the utility could never take away the municipality's authority to act for the public's general welfare; this is a power that cannot be bargained away." *Id. Highway Com. v. Clackamas W. Dist.*, 247 Or. 216, 220, 428 P.2d 395 (1967); *New Orleans Gas Co. v. Drainage Comm.*, 197 U.S. 453, 25 S.Ct. 471, 49 L.Ed. 831 (1905). **The regulation of city streets for purposes of transportation is a proper exercise of the city's governmental authority**.
>
> The 1969 city ordinance, based on these well-entrenched principles of municipal law, merely articulated preexisting rights. **The ordinance also codified the general principle that courts applied to utility relocations before the ordinance existed. This general principle was that utilities must bear the expense of utility relocation when such relocation is required to accommodate a public work.** *New Orleans Gas Co. v. Drainage Comm., supra,* 197 U.S. at 462, 25 S.Ct. at 474; see also *Norfolk R & H Auth. v. Chesapeake and Potomac Tel*., 464 U.S. 30, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983) (favorably citing the common law principle enunciated in the *New Orleans Gas* case).

Portland, 711 P.2d at 129 - 130 (emphasis added).

The Colorado Supreme Court has likewise rejected the proprietary/governmental distinction in the context of utility relocations. In *City and County of Denver v. Mountain States Telephone & Telegraph Co*., 754 P.2d 1172, 1173 (Sup. Ct. Colo. 1988), the municipality required the phone company to relocate its lines to accommodate a sanitary sewer project. The court rejected the

utility's argument based on the governmental/proprietary distinction, concluding that the distinction was "analytically unsound because it assumes that functions which were once relegated to the private sector could not later be undertaken by municipalities in support of the health, safety and welfare of its [sic] citizens." *Id*. at 1175. Indeed, the court noted that

> . . . . many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people--acting not through the courts but through their elected legislative representatives--have the power to determine as conditions demand, what services and functions the public welfare requires.

Id. at 1175-1176, citing *Helvering v. Gerhardt, 304 U.S. 405, 427, 82 L. Ed. 1427,* 58 S. Ct. 969 (1938) (Black, J., concurring); s*ee also Washington Township v. Ridgewood Village*, 26 N.J. 578, 141 A.2d 308, 311 (1958) ("whatever local government is authorized to do constitutes a function of government").

The court went on to conclude that "the governmental/proprietary distinction has no continuing validity in the context of utilities relocation law." *Id*. at 1176. According to the court,

> The distinction has been imported into many other legal contexts, often with less than satisfying results. Cases[11] and commentators[12] have criticized the

[11] *See Indian Towing Co. v. United States, 350 U.S. 61, 65, 100 L. Ed. 48, 76 S. Ct. 122 (1955)* (describing the governmental/proprietary distinction as a "quagmire that has long plagued the law of municipal corporations" and "inherently unsound"); *Pacific Tel. & Tel. Co. v. Redevelopment Agency of City of Redlands, 75 Cal. App. 3d 957, 968, 142 Cal. Rptr. 584, 591 (1977)* ("The labels 'governmental function' and 'proprietary function' are of dubious value in any context."); *Clark v. Town of Estes Park, 686 P.2d 777, 779 (Colo. 1984)* (The governmental/proprietary distinction "is often an arbitrary and unpredictable means of resolving disputes."); *New York Tel. Co. v. City of Binghamton, 18 N.Y.2d 152, 159, 219 N.E.2d 184, ___ , 272 N.Y.S.2d 359, 361 (1966)* ("The distinction between 'governmental function' and 'proprietary function' is a sort of abstraction difficult to make meaningful in a day when municipalities continually find new ways to exercise police power in their efforts to cope with the pressing needs of their citizens."); *Northwest Natural Gas Co. v. City of Portland, 300 Or. 291, ___, ___, 711 P.2d 119, 123, 126 (1985)* ("The governmental/proprietary distinction has led a less than tranquil life" and is "unworkable, untenable and unhelpful in deciding mass transit/utility relocation cases.") . . . .

> governmental/proprietary distinction as unhelpful, inherently unsound, and "probably one of the most unsatisfactory known to the law, for it has caused confusion not only among the various jurisdictions but almost always within each jurisdiction." [Citations omitted.] The distinction nevertheless retains its vitality in a number of states and a variety of contexts. [Citations omitted.] Our cases have criticized the governmental/proprietary distinction in the context of municipal employee negligence, *Evans v. Board of County Comm'rs, 174 Colo. 97, 100-01, 482 P.2d 968, 969-70 (1971),* and municipal zoning ordinances, *Clark v. Town of Estes Park, 686 P.2d 777, 779 (Colo. 1984),* while recognizing the distinction in other contexts, *see City of Northglenn v. City of Thornton, 193 Colo. 536, 569 P.2d 319 (1977)*; *County of Larimer v. City of Ft. Collins,* 68 Colo. 364, 189 P. 929 (1920)(citations omitted).

754 P.2d at 1173-1174.

Having rejected the governmental/proprietary distinction, the court addressed the relocation issue at hand, applying the following framework:

> Because some limitation on the right of municipalities to compel a utility to relocate its facilities at its own cost is necessary, and because the governmental/proprietary distinction is no longer cognizable in the utilities relocation context, **we hold that a municipality may compel public utilities to relocate their facilities from the public right-of-way at their own cost whenever such relocation is necessitated by the municipality's reasonable exercise of police power to regulate the health, safety, or welfare of its citizens**.

754 P.2d at 1176 (emphasis added). Accordingly, the court concluded that the phone company was responsible for the cost to relocate its lines to accommodate the city's sewer construction project because the project furthered the health and welfare of the city's citizens and, therefore, was a reasonable exercise of the city's police powers. *Id*. at 1176-1177.

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[12] *See* Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-law Tort Liability of Municipal Corporation,* 16 Or. L. Rev. 250, 250 (1937) (distinction "originated chiefly in a combination of misguided logic and misapplied precedent"); Davis, *Tort Liability of Governmental Units,* 40 Minn. L. Rev. 751, 779 (1956) ("nothing short of complete excision of the governmental-proprietary distinction from the law can be wholly satisfactory"); Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test,* 22 Va. U. L. Rev. 910, 938 (1936) ('**rules concerning the [governmental/proprietary] distinction 'are as logical as those governing irregular French verbs**'"). (Emphasis added.) *See also Northwest Natural Gas Co. v. City of Portland, 300 Or. 291, ___ n.5, 711 P.2d 119, 123 n.5 (1985)* (listing other scholarly comment on the subject).

2. The governmental/proprietary distinction cases on which the Petitioners rely are inapposite.

Other than the *1932 Milwaukee Case,* Petitioners cite no other cases relying on the governmental/proprietary distinction in the context of utility relocations. Rather, the Petitioners cite cases that rely on the distinction in wholly unrelated contexts: *e.g., Save Elkhart Lake, Inc. v. Village of Elkhart Lake*, 181 Wis. 2d 778, 789-791, 512 N.W.2d 202 (Ct. App. 1993) (It is lawful for village to contract away its right to design the "aesthetic features" of a public restroom to a private developer where the restroom would be located in the developer's development.); *Bargo Foods North Inc. v. DOR,* 141 Wis. 2d 589, 415 N.W.2d 581 (Ct. App. 1987) (The operation of the Milwaukee county airport is a proprietary function such that the fees Milwaukee County charged a food vendor for use of the airport were not taxes such that the food vendor's " gross receipts need not be adjusted by excluding those fees before computing the sales tax" to be paid to the state.); *Wausau Joint Venture v. Redevelopment Authority,* 118 Wis. 2d 50, 60-61, 347 N.W.2d 604 (Ct. App. 1984) (Construction of a public parking structure can be a proprietary or governmental function depending on whether the primary purpose of the structure was private or public in nature.); *Carlson v. Marinette County*, 264 Wis. 423, 427-428, 59 N.W.2d 486 (1953) (Whether or not operation of a municipal hospital is a government or proprietary function depends on whether the hospital is operated as a charitable organization or not.). These and the other Wisconsin governmental/proprietary cases on which the Petitioners rely arose outside the context of utility relocation. Each of these cases is on an entirely different footing and, consequently, has no applicability to the present case.

The Utility Petitioners give particular attention to the *Wausau Joint Venture* case. *Utility Petitioners' Brief*, at 6-7. That case, if anything, supports the City's position. The issue was whether

the City of Wausau could legally curtail by contract its right to set parking rates for two public parking structures, given that a municipality cannot contract away its right to exercise a governmental function. In upholding the contract at issue, the court observed:

> A function is governmental when its primary objective is for health, safety, and the public good. *See Town of Hallie v. City of Chippewa Falls, 105 Wis.2d 533, 542, 314 N.W.2d 321, 326 (1982)*. When the primary objective is to alleviate traffic congestion, the provision by a municipality of off-street parking facilities for use by the general public is generally considered a public or governmental, rather than a private, purpose. *See 56 Am. Jur. 2d Municipal Corporations § 214* (1971).

Wausau Joint Venture, 118 Wis.2d at 60. The court looked at the facts and considered whether the parking structures were operated primarily for a private or a public purpose. The court found ample evidence to conclude that the parking structures at issue were being operated primarily for a private purpose and that any public purpose was merely incidental. In reaching this conclusion, the court stated:

> In this case, however, **the city's primary objective in providing and operating the parking structures was for the private convenience of the mall patrons and the private gain of the Wausau Center enterprises.** The parking structures doubtless serve to alleviate traffic congestion. **Other factors, however, convince us that the primary purpose for the parking structures was private.** The initial rate structure applied only to the two Wausau Center structures and not to municipal parking facilities in general. The contracts require that the structures be physically connected to the shopping center. The documents provide specifications of construction of the structures, including requirements that they contain stairwells "in accordance with the department store exiting requirements," and that the exteriors of the structures be "architecturally harmonious" with the department store exteriors. The developers agreed by contract to reimburse the authority at least $65,000 per year for the costs of the parking facilities. As discussed earlier, availability of parking in the structures for shopping center patrons was a concern written into the parking rate section of the contracts. The contracts cover the construction and operation of the parking structures in great detail.

Id. at 60-61 (emphasis added).

The Utility Petitioners attempt to fashion an argument based on *Wausau Joint Venture* that the primary purpose of the Streetcar is for private benefit, quoting the City's website as stating that

the project will "creat[e] and provid[e] access to jobs," and "serv[e] as a demand generator for hotels, retail, office and housing." *Utility Petitioners' Brief*, at 8. They also site to the EA and state that "'Economic Impact' [is] one of the primary benefits of the project." *Id*.

Comparing the Streetcar Project to the Wausau parking structures is a classic case of comparing apples to oranges. The Petitioners identify no private business concerns that the project is designed to benefit, and there is no evidence that Milwaukee undertook the Streetcar Project primarily to benefit any specific downtown business enterprises. Based on *Wausau Joint Venture*, Petitioners would have to provide evidence that the City undertook the Streetcar project for the economic benefit of specific businesses. No such evidence has been or can be produced.

To the contrary, the project was, in part, an outgrowth of the East-West Corridor Study, which showed that a mass transit solution was needed to address issues of freeway congestion, accelerating urban sprawl, deteriorating urban neighborhoods and a need to connect lower income residents of the inner-city areas (many of whom do not own cars) to jobs in the suburban areas. *Excerpt From City's Historical Background Webpage* (Miller Aff. Exh. DD). With regard to the Streetcar Project itself, the City has determined that the project is needed to, among other things, improve transit mobility between dense residential areas and employment and activity centers, provide transit options for the significant number of City residents who depend on transit, improve connectivity within downtown Milwaukee and adjoining neighborhoods, and preserve and protect the environment by reducing energy consumption and vehicle emissions through increased transit use. LPA Summary Report, at 4-5 (Miller Aff., Exh. L); EA, at 127-128. Thus, even applying *Wausau Joint Venture* to this case, the Streetcar Project must be seen as primarily for public, rather than private, purposes and as a public work within the scope of the Milwaukee Ordinance.

Accordingly, Petitioners have failed to meet their burden under Wis. Stat. §§ 196.58 and 182.017, and as a result, the Ordinance cannot be found unreasonable.

3. Under the "police powers" test, the appropriate question is whether the City's Streetcar Project is a reasonable exercise of the City's police power to regulate for the health, safety or welfare of its citizens.

No Wisconsin appellate court has applied the governmental/proprietary distinction in the context of a municipal public transit project, and no modern day Wisconsin appellate court has applied the distinction with respect to utility relocations. Notably, the only other Wisconsin right-of-way utility relocation case besides the *1932 Milwaukee Case* is the 1977 *Marathon County* case, which never once mentions the proprietary/governmental distinction in holding that the utility should be reimbursed for the costs it incurred to relocate its lines to accommodate a runway extension at a municipal airport. *Wis. Public Service Corp. v. Marathon County*, 75 Wis. 2d 442, 249 N.W.2d 543 (1977). There, the Court's analysis was similar to the analysis applied by the Colorado Supreme Court, as the court considered whether the extension of the municipal airport was "a reasonable exercise of the police power" or a compensable taking of the utility's property. *Id*. at 447-449, 249 N.W.2d 543.

While the *Marathon County* case provides the proper framework for a court to determine whether the Streetcar Project is a reasonable exercise of the City's police power, there are significant factual differences between the two cases such that the outcome in the *Marathon County* case is not controlling here. The main difference is that, in the present case, the utility's right to maintain its facilities in their current location is governed by Wis. Stat. §§ 182.017(1r) and (2), which place strict limitations on that right. That is, the utility must relocate it facilities within the right-of-way at its expense when a public works project requires such relocation. Although the Individual Petitioners point out (at page 18 of their Initial Brief) that an airport concerns transportation, a mass transit

project using public rights-of-way is a totally different type of project because it makes use of public rights-of-way. In contrast, the municipalities in *Marathon County* had vacated the road to extend the airport runway and were, therefore, no longer using the right-of-way for the paramount purpose of public travel. *Marathon County*, 75 Wis. 2d at 445-449. Moreover, the relationship between the Utility and ATU Petitioners and the City is not governed by contract as it was in *Marathon County*, but rather by statute and over a 100 years of common law concerning the respective rights and obligations of the utility, the municipality, and the public. *See also Town of Portland v. Wisconsin Elec. Power Co.*, 198 Wis. 2d, 775, 781, 543 N.W.2d 559 (1995) (noting that "[t]he Town could have excluded WEPCO from the setback area and forced it to use the highway right-of-way where it would have been required by state and common law to bear the expense of relocation if improvement of CTH I became necessary.").

Accordingly, the proper analysis to determine the "who pays" issue is whether the Streetcar Project is a reasonable exercise of the City's police power to regulate for the health, safety or welfare of its citizens. *See Marathon County*, 75 Wis. 2d at *447-450; City and County of Denver*, 754 P.2d at 1176. As discussed in the next section, the city, the state and the federal governments have all declared that the Streetcar Project is needed to regulate the health, safety and welfare of the Milwaukee community. As the record evidence makes clear that the Streetcar Project primarily serves a public purpose, the project is a reasonable exercise of the City's police powers.

4. The Commission cannot "second guess" the City's exercise of its police power or its determinations of what actions are for the health, safety or welfare of the public.

The City's decision to undertake the Streetcar Project to meet the transportation needs of the community is a decision squarely within the City's police power to promote the public health, safety or welfare. Inherent in Petitioners' arguments to the contrary is the misconception that this

Commission is authorized to override the City's legislative decisions as to whether a public works project serves primarily a public purpose. Petitioners fail to appreciate the level of deference the Commission must give to the legislative decisions of the City and the heavy burden they must meet before the Commission may exercise its extraordinary authority to void the Milwaukee Ordinance. *See City of La Crosse, at 3.* Like a court, the Commission must defer to a City's legislative determination of what projects are for the public good and serve to promote the public health, safety or welfare. *Id.*

The source of the City's powers to regulate use of its rights-of-way and to decide on the manner in which the City will promote the public health, safety, or welfare of its citizens comes from Wisconsin's municipal home rule statute, Wis. Stat. § 62.11(5),[13] as well as Wis. Stat. § 196.58(1) . The Wisconsin courts have long indicated that, if the legislature was capable of granting the authority to a municipality to take certain action, the home rule statute grants the municipality that authority. For example, shortly after the home rule statute was adopted, the court stated in *Hack v. Mineral Point*, 203 Wis. 215, 219, 233 N.W. 82 (1931), a city under the home rule statute has "**all the powers that the legislature could by any possibility confer upon it**" (emphasis added). *See also*, *Wis. Environmental Decade v. DNR*, 85 Wis.2d 518, 532-33, 271 N.W.2d 69 (1978) ("'. . . cities possess all powers not denied them by the statutes or constitution. Instead of the powers being specified, as formerly, the limitations are now enumerated.'").

Moreover, it is well established that the police power of the state, exercised by municipalities pursuant to Wis. Stat. § 62.11(5), extends not only to public health and safety, but also to the

[13] Pursuant to Wis. Stat. § 62.03(2) and by Milwaukee Ord. File No. 50790, enacted February 6, 1933, the City has adopted the statutory home rule statute, Wis. Stat. § 62.11(5), such that it applies to the City.

"promotion of the public welfare, convenience, and general prosperity..." *Highway 100 Auto Wreckers, Inc. v. City of West Allis*, 6 Wis. 2d 637, 643, 96 N.W.2d 85 (1959) (citations omitted). The broad and flexible nature of the police power has been described as follows: "the police power has a dynamic or progressive capacity to be applied to new subjects or to be exercised by new or revised measures as economic or social changes require." 6A McQuillin, *The Law of Municipal Corporations*, § 24:8, at 32 (3d Ed. 2007).

Rather than preempt a city's authority over its right-of-way, as argued by the Petitioners, the Legislature, by virtue of Wis. Stat. § 196.58, granted cities specific authority to regulate public utility use of local rights-of-way. Indeed, the Legislature has made clear that not only may a city set the terms and condition upon which public utilities may use local rights-of-way (Wis. Stat. § 196.58(1)), but also that the PSCW and cities have "**concurrent jurisdiction** . . . to require extensions of service and to regulate service of public utilities." Wis. Stat. § 196.58(5) (emphasis added). Thus, § 196.58 is a specific grant of authority to municipalities to regulate service of public utilities and recognizes that, with respect to such regulation, municipalities and the Commission have co-equal powers.

Accordingly, the Commission must presume that an ordinance adopted under a city's police power, such as the Milwaukee Ordinance, is valid. *Froncek et al. v City of Milwaukee et al.*, 269 Wis. 276, 69 N.W.2d 242 (1955); *City of La Crosse at 3*; Wis. Stat. § 196.58(1). The burden of proving to the contrary is on the challenger. *Id.* In *Froncek*, the Wisconsin Supreme Court considered a challenge to the City's decision to add fluoride to its water system, and explained the citizens' burden in seeking to override that decision: "[I]t is well settled that courts will not interfere with the legislative authority in the exercise of [the city's] police power unless it is **plain and**

palpable that such action has no real or substantive relation to the public health or safety or general welfare." *Froncek,* 269 Wis. at 283-84 (emphasis added).

In *Town of Beloit v. County of Rock,* 2003 WI 8, ¶ 20-21, 259 Wis. 2d 37, 657 N.W.2d 344, the Court further confirmed a city's discretion in deciding how to exercise its police power and what projects it will undertake for the health, safety or welfare of its citizens. In that case, the Town of Beloit decided to develop a subdivision with public funds. When the Town's development project was challenged, the court reiterated that it must "give great weight and afford very wide discretion to legislative declarations of public purpose." *Id*., *citing State ex rel. Hammermill Paper Co. v. La Plante,* 58 Wis. 2d 32, 205 N.W.2d 784 (1973). The court stated that, under the public purpose doctrine,

> [w]e are not concerned with the "wisdom, merits or practicability of the legislature's enactment." Rather we are to determine whether a "purpose can be conceived which might reasonably be deemed to justify or serve as a basis for the expenditure." A court can conclude that no public purpose exists **only if it is "clear and palpable" that there can be no benefit to the public**.

Id. at ¶ 20, *quoting, Jackson v. Benson,* 218 Wis. 2d 835, 896, 578 N.W.2d 602 (1998) (emphasis added). In *Town of Beloit,* the court concluded that the town's goals of creating jobs, promoting orderly growth, increasing the tax base and preserving an environmentally sensitive area for the benefit of its citizens were valid public purposes. *Town of Beloit,* 2003 WI at ¶ 2, 259 Wis. 2d at 43. The court emphasized,

> [I]t is a well-settled rule that the legislative body determines what constitutes a public purpose, and that "[C]ourts will not interfere unless at first blush the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use."

Id. at ¶ 27, *quoting State ex rel. Bowman v. Barczak,* 34 Wis. 2d 57, 64, 148 N.W. 2d 683 (1967). *See also Bishop v. City of Burlington,* 2001 WI App. 154, ¶ 11, 246 Wis. 2d 879, 61 N.W. 2d 656

(city's construction of a parking lot to promote rehabilitation of the downtown area was a public purpose); *Alexander v. City of Madison,* 2001 WI App. 208, 247 Wis. 2d 576, 634 N.W.2d 577 (city's expenditure of funds to increase the tax base and generally enhance the economic climate of the community satisfied the public purpose doctrine). *Libertarian Party of Wis.*, 199 Wis. 2d at 826, 546 N.W.2d 424 (public funds to construct the Milwaukee Brewer's Miller Park satisfied the public purpose doctrine because it would promote the welfare and prosperity of the state by maintaining and increasing career and job opportunities; "Creation of new jobs is of vital importance to the State of Wisconsin and **economic development is a proper function of government**.")(emphasis added).

As discussed below, decisions and actions at the local, state and federal levels that ultimately led to the City's adoption of the Streetcar Project clearly establish that the Streetcar Project not only has a public purpose, but also was undertaken for the health, safety or welfare of Milwaukee citizens.

Federal level pronouncements and actions.

The Streetcar Project is funded by federal ICE (highway) dollars appropriated by Congress through its authority to regulate interstate commerce. The Streetcar Project fulfills the purpose of spending dollars provided for unbuilt segments of the Interstate system to fulfill public mass transit needs, which serves the national interest by contributing to the development of multimodal transportation systems.

While the Streetcar Project is funded by federal ICE dollars, the Project is administered by the FTA. The Federal Transit Act, 49 U.S.C. §5301, *et seq.* (previously known as the Urban Mass Transit Act of 1964) contains Congressional findings that confirm the country's need for mass transit projects. In that Act, Congress specifically found that:

> (2) the welfare and vitality of urban areas, the satisfactory movement of people and goods within those areas, and the effectiveness of programs aided by the United States Government are jeopardized by deteriorating or inadequate urban

transportation service and facilities, the intensification of traffic congestion, and the lack of coordinated, comprehensive, and continuing development planning;

(3) transportation is the lifeblood of an urbanized society, and the health and welfare of an urbanized society depend on providing efficient, economical, and convenient transportation in and between urban areas;

(4) for many years the public transportation industry capably and profitably satisfied the transportation needs of the urban areas of the United States but in the early 1970's continuing even minimal public transportation service in urban areas was threatened because maintaining that transportation service was financially burdensome;

***

(7) significant public transportation improvements are necessary to achieve national goals for improved air quality, energy conservation, international competitiveness, and mobility for elderly individuals, individuals with disabilities, and economically disadvantaged individuals in urban and rural areas of the United States;

(8) financial assistance by the Government to develop efficient and coordinated public transportation systems is essential to solve the urban transportation problems referred to in clause (2) of this subsection . . . .

49 U.S.C. § 5301(b). These same policies were relied on by Congress in adopting the ISTEA of 1991, P.L. 102-240 (Miller Aff., Exh. C), one of which includes the development of a transportation system that provides a foundation for the United States to compete in the global economy and to move people and goods in an energy efficient manner. The Act was also based on the need for improvements in public transportation "necessary to achieve national goals for improved air quality, energy conservation, international competitiveness, and mobility for elderly persons, persons with disabilities and economically disadvantaged persons in urban and rural areas of the country." ISTEA, H.R. 2950, § 2.

Similar congressional declarations are set forth in regard to metropolitan transportation planning requirements. Congress declared that it is in the national interest to:

> Encourage and promote the safe and efficient management, operation, and development of surface transportation systems that will serve the mobility needs of people and freight and foster economic growth and development within and between States and urbanized areas, while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes . . .

49 U.S.C. § 5303(a)(1), *see* 23 U.S.C. § 134(a)(1) for the corresponding Federal Highway Act provision.

Additionally, when the FTA and USDOT announced the availability of $130 million for urban circulators, including streetcars, the FTA declared:

> Public transportation supports the development of communities, providing effective and reliable transportation alternatives that increase access to jobs, health and social services, entertainment, educational opportunities, and other activities of daily life, while also improving mobility within and among these communities.

74 Fed. Reg. 64989 (Dec. 8, 2009).

> Urban circulator systems such as streetcars provide a transportation option that connects urban destinations and fosters the redevelopment of urban spaces into walkable mixed use, high density environments.

74 Fed. Reg. at 64990.

State level pronouncement and actions.

Wis. Stat. § 85.063 specifically addresses urban rail transit systems and is based on the following legislative findings:

> The legislature finds that development of urban rail transit systems to serve urban areas of this state will enhance the welfare of all of the citizens of this state through conservation of fuel, enhancement of the development of alternative transportation modes and improvement of air quality. The legislature further finds that private capital is unavailable and local government resources are insufficient for development of urban rail transit systems. The legislature finds that providing grants for the development of urban rail transit systems is consistent with the state's support of other modes of mass transit and that the grant program authorized under this subsection is therefore a valid governmental function serving proper public purposes.

Wis. Stat. § 85.063(3)(a). Not only has the Wisconsin Legislature declared that the development of urban rail transit systems to serve urban areas of this state will enhance the welfare of all of the citizens of this state through conservation of fuel, enhancement of the development of alternative transportation modes and improvement of air quality, but the Legislature has also designated the Milwaukee Streetcar Project as one of two major transit capital improvement projects eligible to be constructed using state transportation funds. *See* Wis. Stat. § 85.062(3)(b).

Local level pronouncement and actions.

In the early 1990's, the City was facing issues of freeway congestion, accelerating urban sprawl, deteriorating urban neighborhoods and a need to connect lower income residents of the inner-City areas to jobs in the suburban areas. Because many of the residents did not own cars for their own travel, the City needed to investigate mass transit options to address these needs. Consequently, the City advocated to include transit improvements in the East-West Corridor Study initiated by WisDOT.

Further, as shown by the November 17, 2000 settlement agreement that resolved the Title VI Complaints, Governor Thompson and WisDOT agreed to ensure that mass transit projects recommended by the Connector Study accommodated future expansion of and/or integration in a "regional mass transportation system serving the transportation needs of [the Milwaukee Central Business District] and low income, minority, elderly and disabled residents of the City." *Settlement Agreement Resolving Title VI Complaints*, ¶1 (Miller Aff., Exh. F).

The needs identified in the East-West Corridor Study, the resolution of the Title VI Complaints , and the federal funding made available through the ISTEA also influenced the selection of the Streetcar route. As explained in the LPA, the route alternatives were evaluated according to several important criteria, including the "public interest, ridership and economic development

potential." LPA Summary Report, at 11, 13 (Miller Aff., Exh. L). The LPA outlines numerous specific goals that the selected Streetcar route is to address. Just of few of these goals include:

1) Improving transit mobility to key residential, employment and activity centers;
2) Supporting and enhancing economic development;
3) Improving transit service to attract tourism; and
4) Preserving and protecting the environment.

Id. at 5. Further, the proposed Streetcar route is expected to provide land use and transportation benefits, mobility improvements for pedestrians, the elderly and the disabled, social benefits through neighborhood connectivity and environmental justice benefits by serving minority and low income populations. *Id.* at 33; EA at 11-27, 127-128.

The public interest benefits of the proposed Streetcar Project are further illustrated in the state's land use authority and policies. As illustrated above, the WisDOT has authority to make interstate lands and rights-of-way available to a publicly owned mass transit authority when the public interest will be served by doing so. *See IGA Recitals* (Miller Aff., Exh. P) and 23 C.F.R. §710.405(c) and 23 U.S.C. § 142(f). In that Intergovernmental Agreement, WisDOT specifically found that making Interstate rights-of-way available to the City in order to build, operate and maintain a streetcar maintenance facility "will serve the public interest as it will allow for the development, improvement and use of a public mass transportation system." IGA, at 1. WisDOT has also articulated that fixed-guideway transit systems, such as the City's Streetcar Project, provide economic and land use benefits by meeting a community's smart growth planning goals and enhancing economic competition by improving access to jobs, goods and services and expanding the labor pool and market area for business. WisDOT, *2030 Connections Long-Range Multimodal Transportation Plan*, at 8-13 (Miller Aff., Exh. Q).

Further, WisDOT, as the agency responsible for awarding Congestion Mitigation and Air Quality ("CMAQ") grants, has recognized the efficacy of streetcars in reducing traffic congestion and air pollution through WisDOT's award of $4.2 million CMAQ grant to fund the City of Kenosha Streetcar Expansion Project.[14] *See* Miller Aff., Exh. R; http://www.dot.wisconsin.gov/localgov/docs/cmaq-grants.pdf.

In addition, SEWRPC, as the official metropolitan planning organization for the southeastern Wisconsin region expressed a "vision" in its 2035 Regional Transportation Plan. The Plan cites the benefits flowing from a multimodal transportation system, such as the Streetcar Project, which benefits include: adding to the quality of life of residents in the region, promoting expansion of the region's economy, providing safe, convenient and efficient travel and protecting the natural and manmade environment. *Year 2035 Plan Update at 4, 119* (Miller Aff., Exh. N). SEWRPC specifically stated:

> "[t]he accessibility of this portion of the Region's population to the metropolitan area - jobs, health care, shopping and education - is almost entirely dependent upon the extent to which public transit is available, and is reasonably fast, convenient, and affordable."

Id. at 124-125. The Year 2035 Plan Update's recommended express service explicitly included the Streetcar Project. *Id*. at 127.

The EA also describes the public benefits the Streetcar Project will provide. As the EA explains, not only does the Project provide transportation benefits, but it is also to have a positive impact on "qualitative measures of community life." The Project will improve access to goods and

[14] Pursuant to Wis. Stat. § 85.245, WisDOT administers the CMAQ program which provides federal funds for transportation projects to improve air quality and reduce traffic congestion in counties, such as Milwaukee County, that are classified as air quality non-attainment and maintenance areas for the federal criteria pollutant ozone.

services, employment, housing, recreation and entertainment, and will reduce automobile use resulting in the reduction of greenhouse gas emissions. *EA* at 127-28.

The Milwaukee Common Council also recognized the benefits of the Streetcar Project in its 2010 Downtown Plan and 2012 Citywide Plan. The City's transportation plans, including the Streetcar Project, are based on policies that "promote transportation improvements that enhance health and quality of life." Citywide Plan at 85, (Miller Aff., Exh. S). Ultimately, the City determined that the project would benefit the Milwaukee community by improving transit mobility between dense residential areas and employment and activity centers, providing transit options for the significant number of City residents who depend on public transit, improving connectivity within downtown Milwaukee and adjoining neighborhoods, and preserving and protecting the environment by reducing energy consumption and vehicle emissions through increased transit use. EA, at 11-27, 127-128; LPA Summary Report, at 4-5 (Miller Aff., Exh. L).

Finally, numerous studies support the reasonable relationship between public transportation, such as the Streetcar Project, and public health, safety and welfare. *See CDC Recommendations for Improving Health Through Transportation Policy* (Miller, Aff., Exh. Z); Todd Litman, *Evaluating Public Transportation Health Benefits, Victoria Transportation Policy Institute (June 14, 2010)* (Miller Aff., Exh. Y).

The policies, goals and decisions outlined above establish unequivocally that the City, the state and the federal government have funded and made plans for the Streetcar Project to provide widespread public benefits and to meet the health, safety and welfare of the City's residents. The Project has been designed to promote economic development, provide mobility for disabled and elderly persons, connect lower income persons with jobs, improve air quality and energy efficiency, promote tourism and provide safe and economic travel. Combining these unquestionable benefits

and goals with the City's discretion in determining what actions it will take to promote the health, safety or welfare of the public should conclusively establish that the decision to implement the Streetcar Project is well within the reasonable exercise of the City's police power.

D. Wis. Admin. Code § PSC 130.09 Cannot Expand the Commission's Authority Beyond That Granted in Wis. Stat. § 196.58.

The Petitioners look to Wis. Admin. Code § PSC 130.09 to argue that the Milwaukee Ordinance is unreasonable on its face (Individual Petitioners' Brief, at 9-12) and unlawful as applied to the facts (Individual Petitioners' Brief, at 18-20; ATU Petitioners' Brief, at 17-19; Utility Petitioners Brief, at 8). However, Petitioners' arguments completely ignore well-established law that the Commission's rules cannot expand the scope of the Commission's authority. *Capoun Revocable Trust v. Ansari*, 2000 WI App. 83, ¶ 14, 234 Wis. 2d 335, 610 N.W.2d 129 ("[A]n agency's jurisdiction is established by the legislature. It is not created by the agency, itself …"). Thus, "[w]hen a conflict occurs between a statute and a rule, the statute prevails. An agency charged with administering a law may not substitute its own policy for that of the legislature." *DeBeck v. Department of Natural Resources*, 172 Wis. 2d 382, 388, 493 N.W.2d 234 (Ct. App. 1992) (citations and internal quotations omitted); *see also Seider v. O'Connell*, 2000 WI 76, ¶ 26, 236 Wis. 2d 211, 612 N.W.2d 659 ("'A rule out of harmony with [a] statute is a mere nullity.'") (citation omitted). In other words, if the challenged municipal regulation is reasonable within the meaning of Wis. Stat. § 196.58, the Commission cannot rely on its own rules to determine that the challenged regulation is otherwise void.

The Commission's rules in Wis. Admin. Code Ch. 130 are intended to assist the Commission in evaluating the reasonableness of a contract, ordinance, or resolution challenged under Wis. Stat. § 196.58. *See* Wis. Admin. Code § PSC 130.02 ("This chapter applies to complaints involving utility

access to and use of municipal rights-of-way within a municipality under ss. 196.499(14)[15] and 196.58(4), Stats.). The rules serve as guidelines, not policy pronouncements by the Commission.

Regarding the reasonableness of municipal regulations pertaining to the permanent relocation of utility facilities, § PSC 130.09 provides:

> (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.
>
> (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 rule essentially is no different than what the common law and Wis. Stat. § 196.58 require. That is, a municipal ordinance or resolution that requires uncompensated utility relocations must be upheld unless the complainant can show that (1) the requirement to relocate was not the result of the reasonable exercise of the municipality's police power to act for public health, safety, or general welfare or (2) the police power was exercised for primarily a private purpose.

An example will help illustrate the relationship between Wis. Stat. § 196.58 and Chapter PSC 130.09. Suppose that a city adopted an ordinance within the scope of the statute that required all existing gas mains located under the roadway to be relocated outside the roadway at the utility's expense, whenever the city reconstructs a street. Further suppose that, in adopting this ordinance, the city made a legislative finding that such gas main relocations were in the public interest because such relocations would allow for the repair of such facilities without the need to dig up the roadway,

[15] Wis. Stat. § 196.499(14) does not apply here because none of the Petitioners is a "telecommunications carrier." *See* Wis. Stat. § 196.01(8m) (ATUs, by definition, are not "telecommunications carriers."). The statute extends to telecommunications carriers the same rights as public utilities have under § 196.58(4) to challenge municipal regulations.

thereby extending the life of reconstructed streets. Suppose also that a gas utility, forced to comply with the relocation ordinance, incurs $2 million in relocation costs and then challenges this ordinance pursuant to § 196.58.

In addressing the complaint, the Commission would look to § PSC 130.09 in determining the reasonableness of the challenged gas main relocation ordinance. Specifically, the Commission would determine, based on the record at hearing, whether the complaining utility had proven: (1) that the gas main relocation ordinance was not a reasonable exercise of the city's police power or (2) that the ordinance was adopted substantially for the benefit of a private party, rather than the public. While it is likely the Commission would uphold such an ordinance, if the Commission were to determine that the challenged ordinance was unreasonable under either subsection of the rule, the Commission would void the ordinance and take no further action. The Commission would not have authority to order the municipality to pay damages to the utility (presumably the measure of damages would be the $2 million in relocation costs). The utility would need to file a complaint in circuit court so that the circuit court could resolve the "who pays" issue under the common law.[16]

II. THE MILWAUKEE ORDINANCE REFLECTS LONG-STANDING COMMON LAW AND LAWFULLY REQUIRES RIGHT-OF-WAY USERS TO RELOCATE THEIR FACILITIES AT THEIR EXPENSE.

The March Order requested briefing on the issue of the effect of the Milwaukee Ordinance on utility facilities installed after the adoption of the Milwaukee Ordinance. This issue presumably was raised by the Wisconsin Supreme Court's holding in the *1932 Milwaukee Case*. It was important to

[16] As suggested above, the "who pays" issue is essentially a question of damages. The Commission would not have authority to order the municipality in the example to reimburse the utility for its relocation expenses because the only relief the Commission may grant under Wis. Stat. § 196.58(4) is to void the challenged municipal regulation. Moreover, the availability of damages in the utility relocation context requires resolution of a constitutional issue; namely, whether the requirement that the utility permanently relocate its facilities is a taking within the meaning of Art. I, § 13 of the Wisconsin Constitution ("The property of no person shall be taken for public use without just compensation therefor."). *See Marathon County*, 75 Wis. 2d at 447. Wis. Stat. § 196.58(4) does not grant the Commission authority to consider such constitutional issues.

the Court's decision that the City, at that time, had not adopted an ordinance, such as the Milwaukee Ordinance, that requires utilities to pay their own relocation costs when the relocation was necessitated by a public work. *See e.g., 1932 Milwaukee Case,* 209 Wis. at 662; 245 N.W.2d at 859 ("We now come to the real question in this case: May the city, acting in its proprietary capacity, in the absence of a right retained by it in an applicable franchise, and in the absence of an ordinance requiring a public utility so to do, compel a public utility to relocate, at its own cost, such of its conduits as may interfere with the installation of new water mains?"). Subsequent to this case, the City adopted the Milwaukee Ordinance so as to ensure that any utility facilities that interfered with a public work in the right-of-way would need to be relocated at the owner's expense.

On the City's view, the Milwaukee Ordinance is not necessary to require utilities to relocate their facilities at their expense to accommodate a public works project in the streets. Both the common law and Wis. Stat. § 182.017(2) provide as much. As the U.S. Supreme Court made clear more than a century ago, when a utility lays its facilities in the right-of-way, the company assumes the risk that it may need to relocate those facilities for a necessary public use. *New Orleans Gaslight Co.*, 197 U.S. at 461. So even if the City had not adopted the Milwaukee Ordinance, the utilities' relocation burden would exist by virtue of the common law and Wisconsin statute.

That is not to say that the Milwaukee Ordinance has no force. On the contrary, the ordinance, especially in light of the *1932 Milwaukee Case*, puts all right-of-way users on notice that, if they chose to lay or erect their facilities in Milwaukee streets, that right is limited and that they will have to relocate their facilities at their expense to accommodate "any public works or improvements of any nature whatsoever undertaken by the city on its own behalf, or any public board, commission, authority or agency." Milw. Municipal Code § 115-22. Given that the Ordinance was in effect at the time some, if not all, of the facilities at issue were placed in

Milwaukee right-of-way, the Petitioners cannot now argue that they are not subject to its requirements. This would be contrary to the maxim *qui sentit commodum sentire debet et onus* (which literally means "he who enjoys the benefit ought also to bear the burden"). In other words, a privilege (use of local rights-of-way) is subject to its conditions (relocation at the user's expense). *Cf. Phillips Petroleum Co. v. Taggart*, 271 Wis. 261, 274, 73 N.W.2d 482 (1955), *quoting* 19 Am. Jur., Estoppel, p. 650, sec. 50 ("Generally speaking, a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action.").

III. CONCLUSION.

For the reasons stated above, the Commission should affirm the validity of the Milwaukee Ordinance and declare that the Utility and ATU Petitioners should bear whatever relocation costs they might incur to accommodate construction of the Streetcar Project.

Dated July 9, 2012.

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