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 INITIAL BRIEF ADDRESSING JURISDICTIONAL ISSUES

The City of Milwaukee (the "City") provides this initial brief on the legal issues described in the Public Service Commission of Wisconsin's ("Commission") January 6, 2012 Notice of Prehearing Conference (PSC REF# 156725). That Notice set the following initial issues for briefing:

1. By filing a request for declaratory ruling under Wis. Stat. § 227.41, has petitioner triggered Commission jurisdiction to review the reasonableness of a municipal regulation under Wis. Stat. § 196.58(4), even though the petitioner is neither a public utility nor a qualified complainant under Wis. Stat. § 196.26?

2. If the Petition is insufficient to trigger Commission jurisdiction to review the reasonableness of a municipal regulation under Wis. Stat. § 196.58(4), what avenues, if any, exist to cure the deficiency?

For the reasons set forth below, the City requests dismissal of the Petition of Brett Healy for Declaratory Ruling (PSC REF# 154240) (“Petition”) on the basis that the Petition is insufficient to trigger the Commission's limited authority under Wis. Stat. § 196.58(4) to review MILW. ORD. § 115-22 (the “Ordinance”) and the potential rate issues that Mr. Healy raises in his Petition. Although Mr. Healy may have concerns about potential increases in the gas and electric rates he pays to Wisconsin Electric Power Company (“WEPCO”), his concerns are those of an individual ratepayer and, therefore, are more properly addressed in a rate case proceeding,

in which WEPCO seeks to recover through an increase in rates any relocation costs WEPCO may have incurred related to the Milwaukee streetcar project.

I. MR. HEALY'S § 227.41 PETITION FOR DECLARATORY RULING DOES NOT TRIGGER THE COMMISSION'S JURISDICTION TO REVIEW THE REASONABLENESS OF THE CITY'S ORDINANCE UNDER WIS. STAT. § 196.58(4).

It is well settled that the powers of the Commission derive from Wisconsin statutes. "The Commission does not exercise the entire regulatory power of the state. It may exercise only such powers as the legislature has seen fit to confer upon it and those powers must be exercised in the manner prescribed." *Friends of Earth v. PSC.*, 78 Wis. 2d 388, 400, 254 N.W.2d 299 (1977), *quoting Wisconsin Telephone Co. v. PSC.*, 232 Wis. 274, 326, 287 N.W. 122 (1939).

One must therefore look to the statutes Mr. Healy cites to determine whether the Legislature granted the Commission the authority to determine the reasonableness of the City's Ordinance based on a § 227.41 petition filed by a single ratepayer.

Wis. Stat. § 227.41(1) provides:

> **(1)** . . . [A]ny agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statutes enforced by it. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the agency and all parties to the proceedings on the statement of facts alleged, unless it is altered or set aside by a court. A ruling shall be subject to review in the circuit court in the manner provided for the review of administrative decisions.

Mr. Healy seeks to trigger the Commission's jurisdiction to review the Ordinance under Wis. Stat. § 196.58, which states in relevant 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.

Wis. Stat. § 196.26(1m) describes a qualified complainant as "any mercantile, agricultural, or manufacturing society, body politic, municipal corporation, or 25 persons. . . . ."

A. Mr. Healy Cannot Use the Declaratory Ruling Statute to Circumvent the Limits the Legislature Established on Who Can Initiate a Complaint Proceeding to Challenge a Municipal Ordinance Under § 196.58.

The first question posed by the Commission recognizes that Mr. Healy is neither a public utility nor other entity or group that would be qualified to file a complaint under Wis. Stat. § 196.58(4). Mr. Healy submitted his Petition as an individual WEPCO ratepayer. Verified Petition of Brett Healy, ¶ 1. By the express terms of Wis. Stat. § 196.58(4), an individual ratepayer, such as Mr. Healy, cannot invoke the Commission's complaint jurisdiction by filing a complaint pursuant to § 196.58(4) to obtain review of the Ordinance. The Legislature's grant of authority for such review is statutorily limited and can only be only triggered if either a public utility or a qualified complainant whose interests are intended to be protected by the statute files the requisite pleading. Mr. Healy is not such a qualified complainant.

Mr. Healy attempts to use a § 227.41 petition for declaratory ruling to circumvent the express limits the Legislature established on the Commission's jurisdiction to review a municipal ordinance. Wisconsin courts have long rejected this type of maneuvering and use of a

declaratory judgment type of proceeding to unlawfully expand a decision-maker's jurisdiction beyond limits that are specifically established by statute.

For example, in *Superior v. Committee on Water Pollution*, 263 Wis. 23, 56 N.W. 501 (1953), the Wisconsin Supreme Court considered an analogous circuit court case in which a petitioner attempted to obtain, through a declaratory judgment action, relief that was not available through a more specific applicable statute. In this case, the City of Superior ("Superior") sought to challenge an order issued by the State of Wisconsin Committee on Water Pollution ("CWP") that required Superior to establish a program to finance construction of a sewage-treatment plant. Superior had an avenue through Wis. Stat. § 144.56 to file a petition within 60 days of the order being issued, asking for CWP to modify the order. A decision by CWP following such a petition would then have been reviewable by the circuit court via a Wis. Stat. Ch. 227 petition for review.

Superior did not utilize the specific statutory procedure available to it and instead sought relief through a general declaratory judgment action, asking the circuit court to find that CWP exceeded its authority in issuing the order. The Court would not allow Superior's claim, stating that "[w]here a specified method of review is prescribed by statute, *the method so prescribed is exclusive*." *Id.* 263 Wis. at 26 (emphasis added), *quoting State ex rel. Attorney General v. Fasekas*, 223 Wis. 356, 362, 269 N.W. 700 (1937); *Corstvet v. Bank of Deerfield*, 220 Wis. 209, 263 N.W. 687 (1936). Thus, when the Legislature sets forth by statute a specific procedure for review of an action, in this case an order issued by CWP, a claimant is limited to that specific procedure and cannot circumvent the limits of that procedure by use of a declaratory judgment proceeding. *Superior*, 263 Wis. at 27 ("a review in the manner attempted in this action may not be had through the medium of a declaratory-judgment action.").

Similarly, in *State v. WERC*, 65 Wis. 2d 624, 223 N.W.2d 543 (1974), an employee seeking to challenge his discharge from employment filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission ("WERC") seeking relief from both his employer and the labor union to which he belonged. The employer and union asked WERC to dismiss the complaint and also moved for summary judgment. WERC denied the motions in part because a contested case existed and required a full hearing. The employer appealed to the circuit court and requested a declaratory judgment that the unfair labor practice charge must be dismissed and that WERC must follow certain procedures in deciding a motion to dismiss.

The Court denied the employer's requests. It first determined that WERC's orders were not reviewable through a Wis. Stat. § 227.15 (now § 227.52) petition for review. It then addressed the employer's request for a declaratory judgment and concluded that such relief could not be granted at that time. Citing *Superior v. Committee on Water Pollution*, the Court reiterated that a declaratory judgment action could not be used to review orders that were specifically reviewable under another statute that established an exclusive remedy in the form of a Ch. 227 petition for review. *WERC*, 65 Wis. 2d at 633-634, 223 N.W.2d 543. By statute, because WERC's determinations would have been subject to a petition for review after completion of an administrative hearing and issuance of a final decision, the employer could not circumvent that process and the jurisdictional requirement that a final decision be issued by seeking review through a declaratory judgment proceeding.

In *Burke v. Madison*, 17 Wis. 2d 623, 117 N.W.2d 580, 118 N.W.2d 898 (1962), the Court addressed the Town of Burke's petition for a declaratory judgment seeking to have an annexation ordinance adopted by the City of Madison declared invalid. The Town alleged that a referendum election did not support the annexation and that the annexation ordinance was

therefore invalid. At issue in this case was Wis. Stat. § 6.66(1) (1957), a statute that included a procedure for contesting a referendum election through the board of canvassers, followed by a right of appeal to circuit court. The Town did not follow this process and the court accordingly denied relief in the action. The Court determined that the § 6.66 process was an exclusive remedy for challenging a referendum election. Although *candidates to office* maintained a separate means of challenging referendum election results through a *quo warranto* proceeding, the voters themselves were confined to the remedy of recount and appeal. The Court adhered to the general rule enunciated in *Superior v. Committee on Water Pollution*, that the specified method of review was exclusive. Since the time for appeal had expired, the Town could not challenge the propriety of the election and it could not use the *quo warranto* process that was available to candidates to bring a collateral challenge to the election and resultant annexation.

The overriding principal in each of these cases is that a complainant cannot utilize a declaratory judgment procedure to circumvent the limits or prerequisites of review that are set forth in a separate, more specific statute. Mr. Healy attempts to do just that in this case. The Legislature set forth a specific grant of authority in Wis. Stat. § 196.58(4), pursuant to which the Commission has jurisdiction to review a municipal contract, resolution or ordinance. Only a public utility or qualified complainant can trigger the Commission's jurisdiction to determine the reasonableness of an ordinance. In order to trigger that authority a public utility or qualified complainant must either file a complaint under § 196.58(4) or a petition for declaratory ruling under § 227.41. Mr. Healy is not a qualified complainant capable of triggering that review authority, and he cannot now do an end run around that limitation by filing a § 227.41 petition for declaratory ruling. The Commission's authority is specifically limited by statute and the limits of that authority cannot be breached through the declaratory ruling statute. If the

Commission acts on Mr. Healy's Petition, it would violate the Legislature's directive that challenges to municipal ordinances subject to Commission review under § 196.58 be brought only by public utilities or a qualified complainant under Wis. Stat. § 196.26. Accordingly, while a public utility or a qualified complainant can trigger the Commission's jurisdiction to review a municipal regulation pursuant to a complaint under § 195.58(4) or a § 227.41 petition, an individual ratepayer, such as Mr. Healy, cannot.

B. Mr. Healy's Interests as a Ratepayer Are Adequately Protected Through the Rate Setting Process.

Mr. Healy's sole stated concern in this proceeding is that if WEPCO must pay its own relocation costs to accommodate construction of the City's streetcar project, those costs could be passed on to WEPCO ratepayers, such as he. *See* Verified Petition of Brett Healy, ¶¶ 11, 22.

Even if the Commission assumes that WEPCO will incur relocation costs related to the streetcar project, that WEPCO will include those costs in its revenue requirement *and* that inclusion of those costs would result in an unlawful rate impact on residential ratepayers, such as Mr. Healy, the proper forum in which Mr. Healy may challenge those costs is in a rate case proceeding. As an individual ratepayer,[1] Mr. Healy cannot seek to eliminate such costs from WEPCO's revenue requirement through a petition for declaratory ruling challenging the reasonableness of the Ordinance. Rather, he may seek to intervene in any WEPCO rate case proceeding in which any streetcar project related relocation costs are sought to be included in rates.

WEPCO, as a public utility, has the explicit right to file a complaint under Wis. Stat. § 196.58(4) or a § 227.41 petition to seek Commission review of the Ordinance. Assuming that the requisites are met for a justiciable controversy (e.g., that the matter is ripe for decision),

[1] A group of 25 persons, as opposed to a single ratepayer, could constitute a qualified complainant under Wis. Stat. § 196.26.

WEPCO's complaint or petition could be sufficient to trigger the Commission's complaint jurisdiction to consider the reasonableness of the Ordinance. The issues in Mr. Healy's Petition would in that way be brought before the Commission in either a complaint or declaratory ruling proceeding. If, however, WEPCO decided not to pursue a § 196.58(4) complaint or to seek a declaratory ruling itself, Mr. Healy's concerns of a rate increase caused by the utility paying relocation costs are still capable of being addressed in a rate case.

That precise situation was before the Wisconsin Court of Appeals in *Wisconsin Public Serv. Corp. v. PSCW*, 156 Wis. 2d 611, 457 N.W.2d 502 (1990). In this case, Wisconsin Public Service Corporation ("WPS") challenged a Commission rate decision that in effect precluded the utility from passing on certain tax expenses the utility had incurred. WPS paid certain taxes during a time when there was a constitutional challenge pending on the legality of legislation that repealed a tax credit. WPS knew of the challenge and could have paid the taxes under protest to preserve its right to a refund if the challenge succeeded. WPS paid the taxes, but not under protest. Consequently, it was not reimbursed for the tax payments it made when the credit repeal was later found unconstitutional. The utility attempted to include the costs of its tax payments in rates.

The Citizen's Utility Board challenged the rate increase associated with these tax payments, and the Commission ultimately adjusted the utility's return on equity on the basis that WPS's failure to pay its taxes under protest was imprudent. Essentially, because of WPS's imprudence in not preserving its right to a tax refund by paying the taxes under protest, WPS was not allowed to include those costs in rates.

This same avenue for relief exists for Mr. Healy. If it comes to pass that the City and WEPCO do not reach an agreement regarding engineering decision and relocation costs, and the

City requires WEPCO to relocate its facilities at the company's expense and if WEPCO does not challenge that requirement at an appropriate time, Mr. Healy would be able to challenge an attempt by the utility to pass those costs on to customers. Mr. Healy, therefore, has the means of asserting and protecting his interests should there ever be an actual impact on his rates. However, he is not a qualified complainant to seek the review that he seeks now.

II. THE DEFICIENCIES IN MR. HEALY'S PETITION CANNOT BE CURED.

The Commission asks whether the deficiencies in Mr. Healy's Petition can be cured. The answer is no. Mr. Healy is not a qualified complainant and cannot trigger the Commission's jurisdiction to review the City's Ordinance under Wis. Stat. § 196.58(4). Mr. Healy's sole avenues for relief are to either join with 24 other persons and become qualified to file a complaint or to challenge in a rate case any relocation costs that WEPCO actually seeks to pass on to ratepayers.

However, even if Mr. Healy joined with 24 others to become a qualified complainant and then sought review by the Commission of the Ordinance, the Commission could not take up the matter because a justiciable controversy does not exist.

As in a request for declaratory judgment filed with a circuit court, certain facts or conditions must exist before it is appropriate for this Commission to entertain a request for a declaratory ruling. *See, e.g., Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991) (the "*Miller Case*"). Specifically, there must be a justiciable controversy, which means:

(1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.

(2) The controversy must be between persons whose interests are adverse.

(3) The party seeking declaratory relief must have a legal interest in the controversy – that is to say, a legally protectable interest.

(4) The issue involved in the controversy must be ripe for judicial review.

Id. (*citing Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982)).

None of these four prerequisites to bringing a petition for a declaratory ruling is met here. First, because Mr. Healy is asserting his rights and interests as a WEPCO ratepayer, whatever controversy there may be is one between Mr. Healy and WEPCO, and not between Mr. Healy and the City. Mr. Healy's "claim of right" is that he be charged just and reasonable rates by WEPCO. The City has no legal interest in the electric and gas rates Mr. Healy pays to WEPCO.

Second, the interests of the City and Mr. Healy are not adverse, at least with respect to matters over which the Commission has jurisdiction. Their interests are perhaps politically adverse, but that is not the type of adversity that can give rise to a justiciable controversy before the Commission. It is apparent that the real "controversy" Mr. Healy seeks to address is whether the City's streetcar project best meets the community's needs and interests in public transportation in Milwaukee. That is certainly not an issue the Commission has the legal authority to determine. In other words, Mr. Healy's real interest is not in his rates, rather his apparent interest is, for whatever reason, to kill the City's streetcar project. However, because his interest in his rates is the only interest he, as an individual WEPCO ratepayer, may assert before the Commission, this is a controversy over rates. That can only mean that the "controversy" is between Mr. Healy and WEPCO. Accordingly, it is Mr. Healy's and WEPCO's interests that are potentially adverse, not Mr. Healy's and the City's.

The third condition – i.e., that Mr. Healy assert a legally protectable interest -- is intertwined with the first two conditions. As explained, Mr. Healy, as an individual ratepayer of WEPCO, has a "legally protectable interest" in being charged just and reasonable electric and

gas rates. But the interests of an individual ratepayer are not the interests the Legislature intended to protect under Wis. Stat. § 196.58(4). By its terms, that statute protects only the interests of public utilities and qualified complainants and these are the only entities that would have standing under the statute to invoke the Commission's authority to review a municipal ordinance, resolution or contract. The Commission has already determined that Mr. Healy is neither a public utility nor a qualified complainant. It follows then that, for the purposes of this proceeding, Mr. Healy has not asserted a legally protectable interest.

The fourth condition, ripeness, also is not satisfied here. Even if Mr. Healy were a qualified complainant under Wis. Stat. § 196.26, his Petition is based on assertions that his interests (i.e., the rates he pays to WEPCO) "may" or "could" be unlawfully impacted (i.e., that the streetcar project could result in WEPCO charging Mr. Healy unjust and unreasonable rates in violation of Wis. Stat. § 196.37).

In the *Miller Case*, Miller Brands sought a declaratory judgment that trade spending did not violate Wisconsin's so-called "tied-house" law. In its complaint, the company provided a definition of "trade spending," and that definition constituted the "sole 'facts'" provided to the circuit court. 162 Wis. 2d at 688-689. The Wisconsin Supreme Court ruled that the case was not ripe for adjudication, stating:

> The fourth component of justiciability, ripeness, requires that the facts be sufficiently developed to avoid courts entangling themselves in abstract disagreements. While this does not mean that all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment, facts must not be "so contingent and uncertain."
>
> The DOR argued to the circuit court that the case was not ripe for adjudication because no action had been threatened or taken against Miller Brands, and the "facts" provided the court were merely hypothetical. We agree that the case was **not ripe for adjudication on the hypothetical "facts"** on which Miller based its action.
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> * * * *

> The actual facts of this case, as they relate to Miller Brands, are uncertain. What Miller Brands has done is create a definition of trade spending and ask the court, "Is it legal to do this?" We agree with this court's statement in *Waukesha* and apply it to the case before us: "the facts of this case are too shifting and nebulous for the invocation of the remedy of declaratory judgment." For this reason we reverse the decision of the court of appeals and hold that summary judgment on the declaratory judgment action was not proper.

Miller Case, 162 Wis. 2d at 694-695, 697 (emphasis added), *quoting*, *Loy v. Bunderson*, 107 Wis. 2d at 412; *Waukesha Memorial Hosp. v. Baird*, 45 Wis. 2d 629, 643-644, 173 N.W.2d 700 (1970).

Likewise, the "facts" on which Mr. Healy relies are too contingent and uncertain. Because of the very preliminary nature of the project design, utility impacts, cost estimates, and potential rate impacts are completely speculative. The streetcar project is at a 30% design level (or 30% plan). *Affidavit of Jeffrey S. Polenske on Behalf of the City of Milwaukee* (PSC REF. # 158973) *("Polenske Aff.")* at ¶ 7. Utility coordination efforts will continue as part of the final design phase once a final design consultant team is selected and under contract. *Id.* at ¶ 6. On public works projects such as the streetcar project, utility impacts and cost impacts regarding utility adjustments and relocations are determined as part of the final design process. *Id.* at ¶ 7. Design changes to the proposed track alignment and track structure and other measures to mitigate utility impacts will be the subject of discussions between the City, the project consultant, and the utilities throughout the next phase of design.

The 30% plan has been provided to the utilities, including WEPCO, so that the utilities can examine the plan and provide feedback to the City regarding the impact of the plan on their utilities. *Id.* at ¶ 8. Final utility cost estimates cannot be determined until the utilities complete their own design work. *Id.* at ¶ 7. However, the utilities have indicated that they are reluctant to begin any design work of their own until the streetcar project reaches a 60% design level, the

point at which the track alignment will be finalized. *Id.* As with all public works projects, these estimates are constantly evolving as the engineering process proceeds. *Id.*

The next design level (or 60% plan) is not expected to be completed until late 2012 or early 2013. At that time, the project will have a final track alignment selected and the utilities can better estimate their costs related to any adjustments or relocations. Construction of the project is not expected to begin until possibly Spring or Summer of 2013. *Id.* at ¶ 7.

Given the state of the actual facts, the matter is not ripe for determination. The Commission would have to base its ruling on a long series of hypothetical "facts." Mr. Healy is asking the Commission to assume the following facts: (1) that, contrary to 80 years of past experience (See, *Polenske Aff.* at ¶ 9), the City will not be successful in coming to an agreement with WEPCO regarding engineering decisions and track structure that could impact possible utility relocation costs; (2) that WEPCO will actually incur relocation costs for which it will seek reimbursement from the City; (3) that, if not reimbursed, WEPCO will seek to include such costs in its revenue requirement; (4) that the inclusion of such costs in WEPCO's revenue requirement will result in unjust and unreasonable rates; and (5) that the inclusion of such costs in rates will be the direct cause of a rate increase to Mr. Healy. Clearly, the facts are not such that this matter is ripe for adjudication, and the Commission cannot base its decision on the hypothetical facts Mr. Healy's Petition would require the Commission to assume.

The process of determining potential utility impacts as engineering progresses is a process in which the City and the utilities have historically had significant success in coming to agreement without the need for Commission or court intervention. If the Commission now, at this very preliminary stage, inserts itself into the process that is not ripe for adjudication, it will

not have concrete facts to evaluate and could unwittingly interfere with positive negotiations and mutually beneficial outcomes between the City and the utilities.

III. CONCLUSION

In this proceeding, the Commission is not required by Wis. Stat. § 227.41 to hold a hearing or render a declaratory ruling on Mr. Healy's Petition. Indeed, the Commission lacks the authority to do so. Mr. Healy's Petition is not sufficient to trigger the Commission's jurisdiction. However, even if the Commission concludes that the Petition does trigger its jurisdiction to determine the reasonableness of the Ordinance under Wis. Stat. § 196.58(4), this matter is not ripe for adjudication. The Commission may not proceed where there is no justiciable controversy.

For these reasons, the City requests that the Commission issue an order dismissing Mr. Healy's Petition with prejudice.

Dated this 6th day of February, 2012.

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