



Office of the City Attorney

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MEMORANDUM

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

TO: Alderman Robert J. Bauman

FROM: Thomas D. Miller, Assistant City Attorney

DATE: April 19, 2012

RE: Proposed statutory changes to amend state law to permit the City to charge annual franchise fee for utility's occupancy of public right-of-way

On April 3, 2012, you asked what amendments to state statutes would be required to permit the City to charge public utilities an annual franchise fee for their occupation of the public right-of-way. The Wisconsin Supreme Court has held that absent a specific delegation from the state, a municipality has no authority to exact from a utility a price for the privilege of using the public right-of-way. *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.*, 6 Wis. 2d 299, 313, 94 N.W.2d 584 (1959). Wis. Stat. §§ 196.58(1)(a) and 182.017(1r) authorize public utilities to occupy the public right-of-way, subject to reasonable municipal regulations. Wisconsin courts have long held that these statutes do not permit a municipality to exact a license or franchise fee for the privilege of installing, maintaining, or operating utility facilities in the right-of-way. *Wisconsin Tel. Co. v. City of Milwaukee*, 126 Wis. 1, 104 N.W. 1009 (1905); *City of La Crosse v. La Crosse Gas & Elec. Co.*, 145 Wis. 408, 130 N.W.530 (1911); *Milwaukee Elec. Ry. & Light Co. v. City of Milwaukee*, 173 Wis. 329, 181 N.W. 298 (1921).

Other relevant statutes include Wis. Stat. § 66.0611 (prohibiting municipalities from levying a tax on income or measured by income) and § 66.0425(6) (exempting public utilities from special privileges statute). In addition, following enactment of 2007 Wis. Act 42, the City no longer regulates cable television

systems and instead receives a video service provider fee set forth in Wis. Stat. § 66.0420(7).

With that background, we respond with the following proposed statutory changes, though there are likely several ways to achieve the stated objective.

1. The following statutory changes would allow the City to impose an annual fee for electric, gas, and telecommunications utilities' occupation of the public right-of-way. The proposed language would permit a franchise fee based on a percentage of the utility's gross revenues. Here, a 5% cap has been used as an illustration because that is the maximum percentage authorized for video service provider fees under § 66.0420(7). Other jurisdictions have imposed fees calculated on per-foot usage.

Amend Wis. Stat. § 182.017(1r) (amendments underlined):

RIGHT-OF-WAY FOR. Any company may, subject to ss. 30.44 (3m), 30.45, 86.16, and 196.491 (3) (d) 3m. and to reasonable regulations made by any municipality, including any franchise or license fee imposed for revenue purposes under par. (1t), through which its transmission lines or systems may pass, construct and maintain such lines or systems with all necessary appurtenances in, across or beneath any public highway or bridge or any stream or body of water, or upon any lands of any owner consenting thereto, and for such purpose may acquire lands or the necessary easements; and may connect and operate its lines or system with other lines or systems devoted to like business, within or without this state, and charge reasonable rates for the transmission and delivery of messages or the furnishing of heat, power, or electric light.

Create Wis. Stat. § 182.017(1t):

Notwithstanding ss. 66.0611, 66.0425, and except as provided in s. 66.0420(7), a municipality may require a public utility to compensate the municipality for the privilege of using or occupying the public right-of-way. The franchise or license fee authorized by this paragraph shall be no more than 5 percent of the company's gross revenues as defined in s. 76.28(1)(d) and shall be in addition to any cost-based permit fee for occupation of or work within the public right-of-way.

Amend Wis. Stat. § 182.017(8) (amendments underlined):

(8) COMMISSION REVIEW. (a) Upon complaint by a company that a regulation by a municipality under sub. (1r) is unreasonable, the commission shall set a hearing and, if the commission finds that the regulation is unreasonable, the regulation shall be void. A franchise or license fee imposed under sub. (1t) that does not exceed 5 percent of a company's gross revenues as defined in s. 76.28(1)(d) shall be deemed reasonable. If the commission determines that a municipal regulation that was in effect on January 1, 2007, and immediately prior to January 9, 2008, or that a community standard, as demonstrated through consistent practice and custom in the municipality, that was in effect on January 1, 2007, and immediately prior to January 9, 2008, is substantially the same as the municipal regulation complained of, there is a rebuttable presumption that the latter regulation is reasonable.

Amend Wis. Stat. § 196.58(1)(a) as follows (amendments underlined):

(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, including any franchise or license fees the municipality may prescribe pursuant to s. 182.017(1r) and (1t), 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. A franchise or license fee imposed under s. 182.017(1t) that does not exceed 5 percent of a company's gross revenues as defined in s. 76.28(1)(d) shall be deemed reasonable.

2. Alternatively, proposed legislation could establish a required payment in the statutes rather than grant authority to municipalities to establish a franchise or license fee. That is how the video service provider fee was established by 2007 Wis. Act 42. To accomplish this, it would be necessary to create Wis. Stat. § 182.017(1t) as follows:

Notwithstanding ss. 66.0611 and 66.0425 and except as provided in s. 66.0420(7), for the privilege of using or occupying the right-of-way a company shall, on an annual basis, calculate and pay to each

municipality through which its transmission lines or systems may pass, a franchise or license fee equal to 5 percent of the company's gross revenues as defined in s. 76.28(1)(d).

1033-2012-956:180176

TDM:tdm



MEMORANDUM

LEGISLATIVE REFERENCE BUREAU

WWW.MILWAUKEE.GOV/LRB

To: Ald. Robert Bauman
From: Jeff Osterman, Legislative Fiscal Analyst
Date: May 31, 2012
Subject: CITY FEES FOR PRIVATE USE OF PUBLIC RIGHT-OF-WAY

The following table lists the various fees that the City of Milwaukee charges for private use or occupancy of the public right-of-way. Please note that there is an additional \$3 "processing fee" for issuance of most of the permits listed in the table.

Code Section(s)	Description	Fee Amount(s)
81-50-1	Excavation permit (all companies except utilities), 90 days	\$109
81-50-2,3,4	Excavation permit (utility companies), 90 days	\$84
81-50-5-a	Inspectional services fee for either of the above excavation permits	\$62
81-102	Temporary occupancy permits – relating to construction work on abutting private property (for each 30 feet or fraction thereof): Sidewalks (7 days or less) Completely closed \$104 Leave 4-foot pedestrian access open \$52 Sidewalks (8 to 30 days) Completely closed \$161 Leave 4-foot pedestrian access open \$81 Parking lane (7 days or less) Arterial street \$121 Collector street \$81 Local street \$40 Parking lane (8 to 30 days) Arterial street \$196 Collector street \$131 Local street \$65 Inspection fee, per month, for any of the above \$55 Traffic lane or alley (7 days or less) Arterial street \$138 Collector street \$92 Local street \$46	

Code Section(s)	Description	Fee Amount(s)
	Temporary occupancy permit (cont'd) Traffic lane or alley (8 to 30 days) Arterial street Collector street Local street Inspection fee, per month, for traffic lane or alley	 \$253 \$169 \$84 \$90
81-41	Direct seller license (person who sells goods or solicits orders for goods on the public right-of-way)	\$129 for new permit; \$50 for annual renewal
81-78	Newspaper vending box permit	\$50 for new permit; \$35 for annual renewal
81-106.7	Sidewalk area dining permit	\$115 initial fee plus annual rental fee of \$0.28 per sq. ft.
81-131.3	Vehicle for sale on the public way (permit)	\$40
81-115	Special privilege (from Common Council, to allow long-term occupancy or installation and maintenance of privately-owned improvements in the public right-of-way; e.g., entrance canopies, raised planters, handicapped pedestrian ramps, direct sales) Fee for introduction of a Common Council resolution to grant a special privilege Fee for introduction of a Common Council resolution to amend a special privilege Annual fee to occupy the public right-of-way (based on the amount of right-of-way being occupied and the per-square-foot value of abutting private land)	 \$250 \$125 varies
200-33-1	Air and subterranean space lease	\$200 application fee
200-33-6	Permit fee for a hood, canopy or marquee to project beyond the street line, or for a roofed sidewalk	1% of the cost of construction (\$60 minimum)
200-33-55	Permit fee for new construction or alteration of a street-walk basement	1% of the cost of construction (\$50 minimum)
200-33-56	Permit fee for street-walk covered openings	\$5 per foot of openings (\$50 min.) plus an annual inspection maintenance fee of \$5 for each covered opening (\$40 min.)



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Murphy's Law

Monopoly Greed

By **Bruce Murphy** - Jul 31st, 2012 10:00 am



We Energies

These are good times for We Energies chief executive Gale Klappa. According to Forbes magazine, **he earned a whopping \$17.27 million in compensation** last year, and nearly \$49 million in the last five years.

Utility executives, Forbes reports, are at the low end of the pay scale for CEOs, with a mere \$6.1 million average in annual compensation. Klappa is the third-best paid utility CEO in the nation — this, in a market (the Milwaukee metro area) that ranks 39th in the nation.

How can the company afford to pay him such a kingly salary? By driving its electric rates ever higher. As recently as 1990, Wisconsin's rates were 12 percent lower than other Midwestern states and well below the national average.

Not any more. A new study by the state Public Service Commission (PSC) shows electric rates are now 21 percent higher than other Midwestern states and 10 percent higher than the national average.

Keep in mind that electricity providers in Wisconsin are public monopolies, overseen by the taxpayer-funded PSC, whose actions in turn are watch guarded by the nonprofit Citizens Utility Board (CUB). And yet Wisconsin utilities have been allowed to jack up electric rates by 55 percent from 2002-2010, during a period when inflation rose by just 20 percent. One can only imagine how high rates might have risen without all this oversight.

As dramatic as all these figures are, a Milwaukee Journal Sentinel story covering the report **did not include any of the statistics**. It's the sort of data a reporter would kill for — unless his editors would prefer to soft pedal the study.

We Energies is a big part of these rising rates. A study by the UW-Milwaukee Employment & Training Institute found that the average cost of heat and electricity for city of Milwaukee renters, all customers of We Energies, nearly doubled in just six years, rising from \$1,318 in 2000 to \$2,227 in 2006.

These ever-higher rates have helped drive profits for We Energies: year after year the company has reaped profits of 10 to 12 percent. A study by the non-profit Wisconsin Industrial Energy Group, an advocacy group representing some 30 companies, mostly manufacturers, did a study which found Wisconsin utilities had the second-highest profit margin among 26 states studied. The rise of energy costs here has contributed to the loss of manufacturing jobs in Wisconsin, the group's executive director Todd Stuart has argued.

Those generous profits, in turn, help pay for huge bonuses for We Energies executives, which amounted to \$77 million over the last three years, according to annual reports it files with the PSC.

Company officials are quick to note that ratepayers cannot be charged for any stock options or incentive pay awarded to executives — a point that was reiterated twice by Kristin Ruesch, spokesperson for the PSC. In reality, says CUB executive director Charles Higley, "it all does come from rate payers."

Every increase in gas and electric rates helps increase company profits, which shareholders can do what they want with, and every year they chose to award some whopping incentives to executives. Perhaps all that profit leaves the company's board members feeling generous, or maybe it's the fact that their annual director fee is in turn paid by Klappa and the executives.

Those profits have also been good for the company's stock price, which has risen by 17 percent year-to-date (33% over the past calendar year). We Energies enjoyed record earnings in the first quarter of 2012 (and will announce its second quarter results on Wednesday.)

What's most remarkable about the rate hikes the PSC keeps awarding We Energies is that the company is a legal monopoly that faces none of the risks a normal for-profit business faces. If

it runs into troubles, it can simply petition the PSC for a rate hike to pay for the problem. Investing in utilities has long been known as a very safe investment, yet year after year we hear that the company needs high enough rates to assure a good return for stockholders.

May I suggest we needn't worry about the poor shareholders? In the last 22 years, the profit margin for the company has been more than 10 percent in all but two years — this, during a period when the stock market has had many flat to simply dreadful years. Meanwhile, We Energies rate payers are getting killed, hurting the state's manufacturers and making energy horribly expensive for low-income Milwaukeeans.

Yet We Energies would like to see more increases in the years to come. Company officials are requesting an annual increase of 3.6 percent for both 2013 and 2014, though the estimated rate of inflation for those years is 2.2 percent and 2.3 percent respectively. Those shareholders and executives, you see, must be assured their customary rewards.

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3 comments

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1. Dick Blau [July 31st, 2012 10:47 am](#) :

What would we do without ya! All the Best from Blau

2. Stacy Moss [July 31st, 2012 10:57 am](#) :

This ruined my day.

Really? This along with the Brewer's tax. Such blatant examples of corruption in the name of the public interest.

3. Tyrell Track Master [July 31st, 2012 12:51 pm](#) :

What is the real argument for private utilities? I mean, I know the government isn't always that efficient, but still.... is there any real evidence that the current system works better than a true public utility?

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