TO: Milwaukee Democratic Socialists of America, Inc.

FROM: Aaron Dumas

DATE: April 22, 2022

RE: Options for municipal direction of electric utility service in Milwaukee and similar cities

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You ask to what extent existing law allows for the City of Milwaukee ("the City") or another similarly-situated city to exercise its authority to acquire and operate the property of an investor-owned electric public utility (in Milwaukee's case, WE Energies). In brief, there are two ways to do it: condemnation and negotiated purchase. This memo describes those options, as well as concerns related to the City's acquisition, including the potential for transferring operations to a cooperative or for otherwise ameliorating potential labor union concerns.

I. Condemnation

The City may acquire the facilities of an investor-owned electric public utility[1] through the process of condemnation (i.e. taking by eminent domain) provided by Wis. Stats. Ch. 197. That process involves the successful accomplishment of several discrete steps.

A. Referendum

First, the City's electorate must approve, by public referendum, the acquisition of so much of the utility's property as is actually used and useful for the convenience of public. (It may not acquire utility property that is not actually used and useful for that purpose.) Wis. Stat. § 197.02; *Wisconsin Power & Light Co. v. Pub. Serv. Comm'n of Wisconsin*, 222 Wis. 25, 267 N.W. 386, 388 (1936).

B. Legal action by the City

[1] In Wisconsin there are three types of public utilities: investor-owned, municipal (i.e. those owned by government entities), and cooperatives.

The next step depends on the date that the utility was issued the indeterminate permit under which it operates. If that occurred ***after*** July 11, 1907, then this step is skipped because the utility will be deemed to have legally consented to this process.[2] However, if it occurred ***before*** that date, then the City will need to initiate a lawsuit in circuit court. Wis. Stat. §§ 196.54(2), (4); 197.02; 197.03. In that lawsuit, the City will need to prove the necessity of the taking. There is no clear legal standard for courts to apply to determine whether the taking is necessary. However, the court could conceivably apply a similar standard that states that "necessity means reasonably necessary, not absolutely imperative." *Chicago & Northwestern Railway Company v. City of Racine*, 200 Wis. 170, 175 (1929); *see also Falkner v. N. States Power Co.*, 75 Wis. 2d 116, 131–32, 248 N.W.2d 885 (1977). Further guidance that a court could potentially look to provides that

> [t]o determine whether a proposed condemnation is a public necessity, the [court] must consider whether there is a public purpose for the taking, and whether the taking will result in a public benefit. Public necessity exists for a taking if the [City] demonstrates a public purpose and that, on balance, the probable net benefit to the public will result if the taking occurs for the intended purpose. Public benefit, as a factor in determining whether a proposed condemnation is a public necessity, is measured by considering the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss of the property in its present form.

26 Am. Jur. 2d, Eminent Domain § 33.

C. Speedy notice

If the court finds for the City (or if the utility holds a post-1907 indeterminate permit and so has legally consented to the process), then the City must "give speedy notice" of the condemnation to the utility and the Public Service Commission ("PSC"). Wis. Stat. § 197.03. No legal definition is available for what timeline constitutes "speedy" in this context.

D. PSC public hearing and determination

After receiving notice, the PSC will hold a public hearing to determine the amount of the "just compensation" that the City must pay the utility for the property being condemned,

[2] I do not know when any applicable indeterminate permits in Milwaukee were obtained, and you might want to verify that information. However, I note that case law has mentioned that Milwaukee Electric Railway and Light Company, to which WE Energies traces its roots, obtained an indeterminate permit in 1911. *See Milwaukee Elec.*

Ry. & Light Co. v. City of Milwaukee, 173 Wis. 329, 181 N.W. 298, 301 (1921). If that is the only indeterminate permit that would be applicable here, therefore, the court action described in this section would not be necessary.

as well as all other terms and conditions of the purchase.[3] The PSC must give the parties at least 30 days' notice of the hearing. Wis. Stat. § 197.05(1), (2). At some point after the hearing, the PSC will issue its order and certification, and title will vest in the municipality. Wis. Stat. § 197.05(2), (3). Any party aggrieved by the PSC's order may appeal it to circuit court. Wis. Stat. § 197.06. Further, the City or its citizens may take action (by referendum or resolution) to discontinue a condemnation by taking certain actions within 90 days of the PSC's final order. Wis. Stat. § 197.04.

II. Negotiated Purchase

The main acquisition alternative to the condemnation process Wis. Stats. Ch. 197 would be negotiated purchase of property and/or operations.

A. Milwaukee-only

Notably, the statutes provide a for contractual option only applicable to the City of Milwaukee (as the state's only 1st class city, Milwaukee alone may utilize this method) as a means to gain operation of (or other involvement in) the utility works. This contractual method, of course, would require any agreement being fully negotiated with the utility. Under Wis. Stat. § 197.10, the parties may enter into a contractual agreement with the utility providing for many things, which may include, for example:

- the leasing, public operation or joint operation of any part or all of the properties of the utility by the City;
- the control, operation, service or management of such properties by either party or by both parties acting jointly;
- the purchase of all or any part of such properties by the City;
- the purchase by the City of mortgage or revenue bonds issued by such public utility.

In order for such a contract to be binding, it would have to be agreed to by the common council, the utility, the PSC, and a majority of the electorate through a referendum. Wis. Stat. § 197.10(2).

B. All municipalities

There is also a statutory mechanism for voluntary sale by the utility to any municipality under Wis. Stat. § 66.0803(1). That process also involves the successful accomplishment of multiple steps.

[3] Because of the timing of this procedure, these terms would be unknowable at the time of the referendum.

First, the City and the utility would need to come to an agreement on price and all other terms and conditions of the acquisition. Wis. Stat. § 66.0803(1)(a). (By comparison, these same terms would be determined by the PSC in a condemnation action.) The municipality may pay for the property from its general fund or from the proceeds of municipal obligations, including revenue bonds. Wis. Stat. § 66.0621(3).

Next, the common council would need to adopt, at a regular meeting preceded by at least a one-week official newspaper notice, a resolution specifying the method of payment for the purchase and submitting approval of the purchase on the specified terms to a public referendum. Wis. Stat. § 66.0803(1)(b). (By contrast, the purchase price and terms would not be specified in the referendum in a condemnation action, because the PSC would decide on those terms *after* the referendum is successful.) Such a referendum election may not be held more than once per year. Wis. Stat. § 66.0803(1)(d). If the referendum succeeded, the City would proceed to purchase the utility property.

III. Purchase Price, Utility Rates, Bonding, and Management Issues

Regardless of whether a utility is acquired by condemnation or negotiated purchase, the issue of how the City would pay for the acquisition looms large. Presumably, the City would wish to finance the cost with the revenue obtained from electric rates—i.e., revenue bonding.[4] However, the PSC sets the amount of revenue that a utility can collect from these rates. In determining the allowable electric rates, the PSC assesses the value of the capital assets and allows the utility to collect depreciation and a rate of return on those assets. Under standard PSC practice, the PSC sets the value of the capital assets at original cost, less depreciation. As a result, a utility is typically only able to recover a rate of return in the range of 6-7% and depreciation on assets valued at their original cost less depreciation.

Thus, if a utility is sold for more than its original cost less depreciation, the PSC would typically continue to value the capital assets at original cost less depreciation, and the rest would be treated as an acquisition adjustment. The question would be how much (if any) of the acquisition adjustment could be recovered in rates. Such a question may come down to the PSC's assessment of whether there is a cost benefit to ratepayers from the acquisition even with the acquisition adjustment being included in rates.

Generally, if a municipality were to acquire a utility,[5] thereby converting it into a municipal public utility, it would be required to either create a nonpartisan board of

[4] Generally speaking, the City could issue general obligation bonds for public-purpose utility projects that do

not constitute municipal operating expenses. However, the related indebtedness would come under the City's indebtedness cap. That said, depending on the method of acquisition, revenue bonding may by and large be available that would not be subject to the cap. *See* Wis. Stat. §§ 67.01-67.04; 66.0621; Wis. Const. art. XI, § 3(5). [5] Although I do not expect that doing so would be likely to be an arrangement agreeable to WE Energies, I also note that the statutes allow for contracts that provide for the leasing, public operation, joint operation, extension

commissioners to manage it or have the utility managed by a board of public works or by another officer or officers. Wis. Stat. §§ 66.0805(1), (6). However, Milwaukee would not be allowed to choose management by a board of public works or other officers. Further, although unclear, it appears that Wis. Stat. § 62.69(3) imposes a requirement that supersedes the board of-commissioners provision altogether. This other statute requires Milwaukee, upon deciding to acquire an electric plant or other public utility, to install (by mayoral appointment and common council approval) a seven-person board of directors. That board would wield great power and could, in turn, appoint its own managers.

IV. Issues with Other Jurisdictions

The City could potentially utilize either of the methods described above to acquire utility facilities that are outside its jurisdiction. And, in Milwaukee's case, that might well be necessary in order to acquire enough of WE Energies' properties to form the basis of a viable municipal electric utility for Milwaukee. However, the issue would likely be complicated by the integration in WE Energies' operations. WE Energies essentially provides power for all of southeastern Wisconsin, and although further investigation may be warranted, I get the impression that a high proportion of its facilities that generate power for its Milwaukee customers are situated outside the municipal limits, and that many of these facilities *also* generate power for other municipalities. Thus, putting together a reasonable plan for the acquisition of WE Energies operations by the City might require the formation of a municipal power district under Wis. Stat. Ch. 198 with one or more nearby municipalities so as not to deprive the other municipalities. Alternatively, multiple municipalities could combine by contract to create a municipal electric company under Wis. Stat. § 66.0825. Both of these arrangements would give the created entities similar powers to those held by lone municipalities described above to acquire, operate, and finance their utilities. Further, municipalities may agree to arrangements whereby one provides utility services to another. Wis. Stat. § 66.0813. In light of the above, one possibility worth exploring for a municipal utility might also be the purchase of energy wholesale from another public utility.

V. Cooperatives, Sale of Municipal Utilities, and Competition

Once the City has acquired a utility, it could, in theory, sell a complete public utility plant to another entity such as a cooperative. However, the process would not be simple. First, the City would have to negotiate a preliminary agreement for the sale and adopt it by ordinance or resolution. Wis. Stat. § 66.0817(1)-(2). Then, it would submit it to the PSC, which would have to "determine whether the interests of the municipality and its residents will be best served by the sale or lease, and if it so determines, shall fix the price and other terms."

Wis. Stat. § 66.0817(3). If it does so, the arrangement would have to be approved by referendum. Wis. Stat. § 66.0817(4).

and improvement of a privately owned public utility (including a cooperative) by the City. Wis. Stat. § 66.0807(2).

One potential practical impediment to any PSC approval, however, would be PSC reluctance to find public interest in any arrangement where the City would effectively be relying on a cooperative to provide power to its citizens. Unlike other utilities, of course, cooperatives by definition only provide power to people who join them as members. In this way, cooperatives as a service model are better suited to—and indeed only exist in Wisconsin in—more rural settings.[6]

A further issue stands as a legal obstacle to any arrangement by which the City might try to set up a utility to compete with WE Energies within its service area: the PSC may not grant a license, permit, or franchise for an electric operation, if there is already another utility providing the same service under an indeterminate permit, unless the PSC rules that "public convenience and necessity require the delivery of service" by the City. Wis. Stat. § 96.50(1)(a). Securing such a ruling by the PSC would likely be an uphill fight.

VI. Labor Issues

Municipal employees—as the employees of a utility acquired and controlled by the City would likely be deemed—are subject to the strict employment relations provisions of 2011 Wisconsin Act 10. *See* Wis. Stat. § 111.70.[7] Non-municipal employees are not. However, because of the importance of the stability of public utilities, a different statutory regime provides some regulation of their labor relations. That regime provides for the resolution of labor disputes through collective bargaining, conciliation, and if necessary, arbitration. It prohibits the use of strikes, work stoppages, slowdowns, and lockouts. *See* Wis. Stat. §§ 111.50- 64.

It is unclear, but at least arguable, that the type of cooperative that you envision taking over operations here would constitute the type of "public utility employer" subject to the above regime. The regime expressly applies to any employer furnishing, among other things, electric power "to the public in this state." Wis. Stat. § 111.51(5)(a). In a different context, a similar phrase has been held to mean sale to the public *at large* and not merely a defined membership group. *See, e.g., Cawker v. Meyer*, 147 Wis. 320, 325, 133 N.W. 157 (1911)(holding that offering service "to or for the public" means generating power "intended for and open to the use of all the members of the public who may require it."; *City of Sun Prairie v. PSCW*, 37 Wis. 2d 96, 154 N.W.2d 360 (1967); *City of Milwaukee v. Pub. Serv. Comm'n*, 241 Wis. 249, 5 N.W.2d 800 (1942) (providing service to defined customers through exclusive contracts is "precisely what it was necessary for it to do to prevent it from becoming a public utility");

[6] Certain other features of cooperatives would also make them unwieldy with a massive, Milwaukee-sized

membership base.

[7] A potential successor agreement in a union collective bargaining agreement, if one exists, could largely determine what becomes of the agreement if a utility is acquired by another entity. However, the application of Act 10 could not be superseded by contract.

Union Falls Power Co. v. City of Oconto Falls, 221 Wis. 457, 460-61, 265 N.W. 722 (1936); *Ford Hydro-Elec. Co. v. Town of Aurora*, 206 Wis. 489, 240 N.W. 418 (1932); *Schumacher v. R.R. Comm'n of Wis.*, 185 Wis. 303, 201 N.W. 241 (1924). Again, those cases were examining a different statute, so the context is not necessarily applicable here. To the extent that it is applicable, however, it might indicate that a cooperative is not subject to the public utility labor statutory regime because it does not truly sell power "to the public." However, that type of exclusivity in service provision is, as mentioned above, something that presents a serious impediment to the feasibility and likelihood of the PSC allowing sale of a municipal utility in Milwaukee to a cooperative.

A simpler way to avoid coming under Act 10 might be to have an arrangement by which the utility's workers are employed by an entity contracted by the municipality to manage the operations and assets such that they are not municipal employees themselves. However, although that might alleviate some concerns of present members of utility labor unions, it might feed a potentially broader and equally serious political concern regarding the privatization of public employment.

I hope that the above answers your questions. Please let me know if you have any follow-up questions and if I can be of further help on this or any other issue.