

MUNICIPAL UTILITY OVERSIGHT: GOVERNING BODY OPTIONS AND RESPONSIBILITIES

How Should You Govern and Manage Your Municipally Owned Utilities ?

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WHAT I WILL TALK ABOUT TODAY

- A. Introduction.
- B. Nature of the Industry.
- C. Regulation by the Public Service Commission.
- D. Municipal Authority and Options.
 - 1. General Authority.
 - 2. Operation with a Utility Commission.
 - 3. Operation by Board of Public Works or Other Body.
 - 4. Duties.

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BIAS OF THE SPEAKER



- A. Twenty Five Years in Private Practice.
- B. Represented Many Municipal Utilities.
- C. Fifteen Years as Madison City Attorney.

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NATURE OF THE INDUSTRY

- A. The Public Utility Concept.
 - 1. Defined, Monopoly service territories.
 - 2. Obligation to serve and to provide reasonable and adequate service.
 - 3. Reasonable rates, usually set by government regulation.
 - 4. Delivery of an important commodity or service.
 - 5. Return on investment.



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Municipally Owned Utilities

- A. Not investor-owned. Profits stay in the community.
- B. Local control.
- C. Many more than large, investor-owned utilities.
 - 1. 575 Wisconsin water utilities.
 - 2. 81 Wisconsin electric utilities.
 - 3. 1 Wisconsin gas utility.
 - 4. 600 wastewater utilities.
 - 5. Storm water – are they utilities?



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REGULATION OF MUNICIPAL UTILITIES BY THE PUBLIC SERVICE COMMISSION OF WISCONSIN

- A. One of the few states with state regulation of municipal utilities. In most states, regulation by the local unit of government is considered effective – regulation in effect by the owners.
- B. All municipal water and electric utilities are fully regulated by the PSCW.
 - 1. Approval of most construction and scrutiny of final costs.
 - 2. Approval of rate changes.
 - 3. Approval of the authorized rate base.
 - 4. Approval of rate of return.
 - 5. Establishment of service rules for reasonable and adequate service.
 - 6. Consumer protection rules.

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PSCW Regulation, cont.

- B. All municipal water and electric utilities are fully regulated by the PSCW, cont.
- 8. Environmental regulation.
 - 9. Safety rules and reporting of accidents.
 - 10. Use of specialized reporting, such as the uniform system of accounts.
 - 11. See Wis. Adm. Code ch. PSC:

Chapter PSC 102

ACCOUNTING FOR DISBURSEMENTS BY PUBLIC UTILITIES

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PSCW Regulation, cont.

- C. PSCW Regulation of Wastewater and Storm water Utilities.
- 1. Not subject to full regulation by the PSCW.
 - 2. Separate statutes for these entities give the PSCW jurisdiction only in the event of a complaint over rates, rules or practices. Wis. Stat. sec. 66.0821(6).
 - 3. If PSCW takes jurisdiction over a complaint, may then set reasonable rates and rules.
 - 4. Separate law governs the formation and operation of these utilities, but they may be governed in the manners discussed later.
 - 5. Rates established by action of the governing body.

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Some Impacts of PSCW Regulation

A. Greater Scrutiny of Rates, Construction Costs and Practices.

- 1. PSCW had a long history of regulation; staff have great expertise.
- 2. Muni electrics familiar with hearings and PSCW staff testimony on level and design of rates, scrutiny of construction projects and the costs.
- 3. This higher level of scrutiny is now coming to muni water utilities.
- 4. Get accustomed to administrative hearings and the need for your own expert testimony on issues.

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PSCW Impacts, cont.

B. Water Utility Infrastructure.

- 1. Many water utilities, especially in older, larger cities, have aging infrastructure.
- 2. In Madison, a long program of replacing water and sewer mains, some as old as 100 years.
- 3. City growth means more pipes must be laid to further locations and more wells constructed.
- 4. At the same time, consumers are responding to calls for conservation, meaning higher costs must be spread over fewer units of sale.
- 5. All of these things put great pressure on rates, forcing annual increases of 5-10%.



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PSCW Impacts, cont.

A. The Tax Equivalent or PILOT.

- 1. State law allows rates to include a tax equivalent, to be paid to the general fund to offset the tax exemption of the muni utility property.
- 2. Some controversy about the amount, and whether governing body should ask for more from the utility.
- 3. Some of us (Madison) has the opposite problem, of having to advance funds to the water utility.

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PSCW Impacts, cont.

B. Fire Charges.

- 1. Wis. Stat. sec. 196.03(3)(b) gives the municipality the choice of including Public Fire Protection charges in the water rates, or paying the utility from the general fund.
- 2. PSCW waded into the weeds of exactly how to structure this charge in a recent Madison water rate case.
- 3. Sometimes a controversial local issue.

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PSCW and Municipal Rights of Way

- A. Wis. Stat. sec. 196.58 appears to give municipalities broad power over municipal rights of way. But sub. (4) and (5) give PSCW right to overrule.
- B. PSCW has adopted Wis. Adm. Code ch. 130, essentially asserting full control over municipal rules on rights of way.

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PSCW: What Does it All Mean?

- A. You don't have full control of your water, electric and to some extent, your sewer and storm water utilities.
- B. This oversight by the state may impinge at times on the options for management and governance I discuss below.
- C. Should municipalities lobby to get out of PSCW regulation? Be careful what you wish for.



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MUNICIPAL OPTIONS FOR MANAGEMENT OR GOVERNING

A. General Municipal Powers: Statutory Home Rule.

- 1. The broadest authority for cities and villages.
- 2. Sec. 61.34(1) and 62.11(5):

“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 public, 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.”

Nearly identical language in each statute.

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Statutory Home Rule, cont.

B. Extremely broad grant of power: “...management and control of ... the public service,” “... by ... other necessary or convenient means.”
“...limited only by express language.”

C. Early case of *Hack v. Mineral Point*, 203 Wis. 215, 219, 233 N.W. 82 (1931):

“[A] city operating under the general charter finding no limitations in express language has under the provisions of this chapter all the powers that the Legislature could by any possibility confer upon it.” (My emphasis).

D. Reverses the “Dillon Rule.”

E. Will not rant about the Legislature and the Courts taking a lot of this power away.

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Statutory Home Rule, cont.

- F. If this were the only statute, cities and villages would have almost a free hand to organize and manage the utilities as they desired.
- G. Keep in mind this vast source of power as you look at various other management options.

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Municipal Utility Subchapter

- A. Subchapter VIII of chapter 66 of the Wisconsin Statutes.
- B. List of section titles:

- 66.0801 Definitions; effect on other authority.
- 66.0803 Acquisition of public utility or bus transportation system.
- 66.0805 Management of municipal public utility by commission.
- 66.0807 Joint operation of public utility or public transportation system.
- 66.0809 Municipal public utility charges.
- 66.0811 Municipal public utility revenues.
- 66.0813 Provision of utility service outside of municipality by municipal public utility.
- 66.0815 Public utility franchises and service contracts.

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Municipal Utility Subchapter, cont.

B. List of section titles:

- 66.0817 Sale or lease of municipal public utility plant.
- 66.0819 Combining water and sewer utilities.
- 66.0821 Sewerage and storm water systems.
- 66.0823 Joint local water authorities.
- 66.0825 Municipal electric companies.
- 66.0827 Utility districts.
- 66.0829 Parking systems.
- 66.0831 Interference with public service structure.

C. Will not look at each one, but to show the breadth.

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Management by a Utility Commission Under sec. 66.0805

A. Wis. Stat. sec. 66.0805(1):

- (1) Except as provided in sub. (6), the governing body of a city shall, and the governing body of a village or town may, provide for the nonpartisan management of a municipal public utility by creating a commission under this section. The board of commissioners, under the general control and supervision of the governing body, shall be responsible for the entire management of and shall supervise the operation of the utility. The governing body shall exercise general control and supervision of the commission by enacting ordinances governing the commission's operation. The board shall consist of 3, 5 or 7 commissioners. [My emphasis].

B. Creates a quasi-independent public body. The commission is charged with the “entire management and control of and shall supervise the operation of the utility.”

C. Governing body’s role is limited.

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Utility Commissions, cont.

D. Further independence shown in subsection (3) of the law:

- 3) The commission shall choose a president and a secretary from its membership. The commission may appoint and establish the compensation of a manager. The commission may command the services of the city, village or town engineer and may employ and fix the compensation of subordinates as necessary. The commission may make rules for its proceedings and for the government of the department. The commission shall keep books of account, in the manner and form prescribed by the department of transportation or public service commission, which shall be open to the public. [My emphasis].

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Utility Commissions, cont.

E. The Schroeder Case.

- 1. *Schroeder v. City of Clintonville*, 90 Wis. 2d, 457, 280 N.W. 2d 166 (1979).
- 2. Dispute over authority to set wages.
- 3. Wisconsin Supreme Court: A utility commission established under sec. 66.0805, not the common council, has authority to set utility employee wages.
- 4. Sub. (6) of the law says:
 - “In a 2nd, 3rd, or 4th class city, a village or a town, the council or board may provide for the operation of a public utility or utilities by the board of public works or by another officer or officers, in lieu of the commission provided for in this section.”

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Utility Commissions, cont.

F. Clintonville argued that it relied on sub. (6) to create a “hybrid” commission.

G. Supreme Court said, “No, if you create a utility commission under this law, you get all the attributes and independence of that commission. It is either fish or fowl, but not a hybrid.”

H. Upshot: You cannot “sort of” create a quasi-independent commission.

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Impact of a Utility Commission

A. Utility Commission has the power to contract in the name of the City or Village for utility purposes. Exception to the general rule that only the governing body may enter into contracts.

B. Commission may retain its own attorney.

C. Commission may be given authority over construction that otherwise would be with the board of public works.

D. Commission is not a separate legal entity. It is part of the municipality with some independence. *Roberts v. City of Madison*, 250 Wis. 317, 27 N.W. 2d 233 (1941); 65 OAG 243 (1976).

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Impact of a Utility Commission, cont.

E. Commission may not tax or borrow. The governing body must do those things; municipality may issue revenue bonds secured by utility income which does not count against debt limit. Wis. Stat. sec. 66.0621.

F. Members of the governing body must be a minority on the commission. Due to the admonition that commission is to be “non-partisan.”

G. Commissions tend to run utilities more like a business, separated from the political winds. Commissions tend toward continuity and expertise in management.

H. Commission must understand the politics of the city or village. Without a good relationship, the governing body may eliminate the commission.

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Options Other than a Utility Commission

A. Board of Public Works.

- 1. Mentioned as an option in sec. 66.0805.
- 2. A natural fit. Very common in Wisconsin.
- 3. Many utility directors are the city or village engineer or director of public works. More control for the governing body.
- 3. Wis. Stat. sec. 62.14(5)(a):
 - “(a) In general. It shall be the duty of the board, under the direction of the council, to superintend all public works and keep the streets, alleys, sewers and public works and places in repair.”
 - What is a municipal utility if not part of the “public works?”

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Options Other than a Utility Commission, cont.

B. Committee of the Governing Body.

- 1. Another common method in Wisconsin.
- 2. Allows for building some of the expertise of a utility commission without loss of control by the governing body.
- 3. May be made up of members of the governing body, or may wish to add resident members.

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Options Other than a Utility Commission, cont.

C. A separate board or commission expressly NOT a utility commission.

- 1. Nothing prevents the city or village from setting up a new body, calling it a utility board or commission, but expressly not giving it the powers of a sec. 66.0805 commission.
- 2. Madison had a very confusing ordinance the screamed of the possibility of Schroeder type litigation. Amended to make the Water Board subject to Council control like other boards.
- 3. Put in the ordinance that this was not a commission under sec. 66.0805.
- 4. Like a separate committee, allows the governing body to pick and choose what sorts of powers it grants to the utility board.

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Options Other than a Utility Commission, cont.

D. Another City Department.

- 1. Designate another officer to run the utility, like public works director or city engineer and they report to whatever board or committee they normally report to.

E. The Governing Body.

- 1. The Council or Board can manage the utility or utilities.
- 2. Maximizes control.
- 3. Minimizes expertise. Governing body members tend to be generalists and utility operations tend to be complex.

F. Other Ideas?

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DUTIES OF GOVERNING BODIES

A. Act for the common good of the municipality.

B. Even more than in other areas, think of yourself as a trustee of a property that your predecessors have built and protected for the benefit of the public.

C. Know about rules of operation, rate setting, regulation, and environmental protection.

D. If you delegate, respect the expertise of your advisors, especially on details. Keep your eye on the big picture.

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CONCLUSION

Governing Bodies Have a Wide Range of Options in Management and Governance of Your Utilities. Choose What Best Fits Your Local Situation and Will Lead to the Greatest Benefit for Your Residents.



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Who Was That Guy?

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