

CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

MEMORANDUM

TO: Jeanne Hoffman, Facilities and Sustainability Manager

FROM: Doran Viste, Assistant City Attorney

DATE: August 16, 2017

RE: Franchise Agreements and Municipalization; Issues Relating to the Collaboration MOU

I have been informed that some questions have been raised by the Sustainable Madison Committee (SMC) in regards to the ongoing discussions surrounding Legistar File No. [47645](#), a resolution approving the Collaboration Memorandum of Understanding (MOU) between the City of Madison and Madison Gas & Electric (MGE). This purpose of this memo is to address these questions.

A specific inquiry raised before the SMC during discussions of the MOU has been whether the City can pursue the option of “municipalizing” MGE and its operations. Municipalization of MGE would mean that the City would take over MGE’s operations and run it as a municipal utility—at least within the City limits. This issue has arisen in the context of SMC discussions about municipalization efforts in Minneapolis and Boulder, and particularly how Minneapolis used that threat to gain concessions from its energy providers to help achieve its future energy goals.¹ However, it is important to point out that both of these cities used this option in the context of determining whether to renew their franchise agreements with their local energy provider(s). Under a franchise agreement, a specific party is given the contractual right to serve a specific territory. Without a franchise in place, the utility cannot operate in the municipality and the utility would either have to abandon or sell its assets, with the City or another franchise stepping in to provide service. But in Wisconsin, there are no franchise agreements. Hence, while demonstrative of options other municipalities have taken, the paths taken in Minneapolis and Boulder are not applicable here. The City does not have the same leverage as those cities had/have to force MGE to make changes through a franchise renewal process.

Due to a variety of issues that arose under the municipal franchise model of utility regulation then in place, in 1907 Wisconsin eliminated franchises for public utilities and made all public utilities, including MGE, subject to state regulation. Under the regulated structure that has been generally in place ever since, at least for gas and electric utilities, utilities (including municipally owned utilities) are granted monopolies over specified territory and required to provide certain standards of service. Their operations

¹ In Minneapolis, the City pursued municipalization but ultimately reached a resolution of energy related issues with the energy providers and re-extended the franchise agreements. In Boulder, the municipalization effort remains ongoing and appears to be more serious, the finances of the effort proving to be the most difficult aspect.

are subject to State laws and regulations that are intended to protect the interests of the consumer, but also the utility and its investors. Under state law, Cities are limited in their ability to regulate public utilities and generally are preempted from doing so by the State and the Public Service Commission (the PSC). Some exceptions remain, such as the ability of a City to impose reasonable regulations on a utility's occupation of the right-of-way, but for the most part, in Wisconsin, Cities have little ability to exercise any control over the operations of a utility.

Recognizing that our options are not the same as those pursued by Minneapolis and Boulder, it warrants noting that under Wisconsin Law municipalities do actually have the express authority to acquire a public utility following the procedures outlined in Wis. Stats. [Ch. 197](#), essentially exercising their condemnation authority to do so. Under the procedure established in that chapter, following a majority vote of the City's residents, the City would have to bring an action in circuit court against MGE for an adjudication as to the necessity of the taking of the utility. If a jury found the taking was necessary (or the court if both parties waived a jury), the PSC would then determine the just compensation to be paid to MGE by the City for its assets/operations, along with all other terms and conditions of the acquisition. It is not known how the PSC would value MGE, but MGE's market value at the end of 2016 was \$2.26 billion, with assets of approximately \$1.8 billion. Suffice to say that the City would have to pay a significant sum if it wanted to "municipalize" MGE. Hence, while technically an option, it would be an uphill, and very expensive, battle. Moreover, even if that was successful, the City would be subject to the same rules and energy related policies of the Public Service Commission as MGE. Our goals and interests could not be pursued unilaterally through the municipal utility, but would require the PSC's approval, thereby limiting the potential benefit of such a municipalization effort.

Finally, you asked whether the current draft MOU with MGE has created a formal City committee subject to the open meetings laws. It is the City Attorney's Office's opinion that, as currently described in Section 3 of the MOU, the meetings of City staff and representatives of MGE would not constitute a City committee under the test set forth in *Krueger v. Appleton Area School District* (2017 WI 70). Of particular note, the MOU does not establish any defined membership for this "workgroup", which is an essential element in the determination of whether a committee has been established. In addition, the "workgroup" is not delegated any collective powers, duties and/or responsibilities. Rather, the MOU states:

The purpose of the meetings will be to prioritize the focus areas identified in the Collaboration Framework and gather information, identify projects and develop strategies for jointly implementing projects identified in the Collaboration Framework.

Accordingly, as currently drafted, the "workgroup" MOU falls well short of establishing a City committee under the *Krueger* test.

Please let me know of any other questions you may have.