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To: Shakopee City Council  
From: Jim Thomson, City Attorney   
Re: SPUC Rate-Setting and Payment to City Matters  
Date: January 16, 2020

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### INTRODUCTION

At its meeting on December 16, 2019, the Shakopee Public Utilities Commission (“SPUC”) took the following actions:

- Adopted Resolution #1254 adjusting water fees to \$0.42 per 1,000 gallons;
- Adopted Resolution #1255 adjusting electrical underground relocation fees to \$0.00030 per kWh;
- Adopted Resolution #1256 adjusting electrical distribution fees;
- Adopted Resolution #1257 establishing various fees, charges and rates; and
- Adopted Resolution #1261 modifying the method of calculating SPUC’s annual payment to the City’s general fund.

The first two resolutions were effective immediately; the last three resolutions were effective on January 1, 2020.

SPUC’s adoption of the above resolutions raises the following questions:

1. Is SPUC required to inform the City Council before SPUC changes its rates or fees? If so, did SPUC properly do so before modifying its rates and fees for 2020?
2. Is SPUC’s action to modify the method of calculating its annual payment to the City’s general fund effective without the City’s approval?

Attached for your information is a December 23, 2019 letter that I received from attorney Kaela Brennan summarizing SPUC's perspective on those two questions.

### **SHORT ANSWERS**

1. SPUC is required to inform the City Council before SPUC changes its rates. In this particular instance, SPUC informed the City Council before modifying its rates for 2020. That notification occurred, however, only because the mayor and city administrator requested the information. Going forward, I recommend that the City and SPUC agree on a specific process for SPUC to follow to inform the City of SPUC's intention to adopt new fees or rates.
2. SPUC's action on December 16, 2019 modifying the method by which its annual payment to the City is calculated is not effective without the City's approval. The current agreement, which was established in 2001, between the City and SPUC set SPUC's payment to the City at 2.71% of SPUC's gross annual electric sales and 23.77% of SPUC's gross water margin. Until the City approves the new method adopted by SPUC on December 16, 2019, the 2001 agreement remains the operative agreement between SPUC and the City, and SPUC's payment to the City should continue to be calculated pursuant to the terms of that agreement.

### **ANALYSIS**

#### **Background**

As I indicated in my July 2, 2019 memorandum to you, the City Council establish SPUC by a December 12, 1950 Resolution. That Resolution created a "Water, Light, Power and Public Building Commission" for the City. The Resolution gave the commission "full, absolute and exclusive control of and power over the water, light, power plants." The Mayor approved the Resolution on December 14, 1950. The Resolution was adopted pursuant to the authority created by Minnesota Statutes, Sections 453.01- 453.14. The legislature later repealed those sections. Minnesota Statutes, Sections 412.321-412.391 now govern municipal utility commissions. Section 412.331 states that a previously established "water, light, power and building commission" shall continue to operate as "a public utilities commission."

City Code Section 32.22 also governs SPUC. That section contains many of the same provisions as those in Minnesota Statutes, Sections 412.321-412.391. I am attaching a copy of Section 32.22.

The resolution, statutes, and City Code provisions grant broad powers to SPUC. Those powers , however, are not unlimited, and SPUC can only exercise those powers within the confines of the authority granted to it.

### **Question #1**

Section 32.22, Paragraph H states as follows (underlining is mine):

*Rates, rules, and regulations.* The Commission shall have power, after informing the Council, to fix rates and to adopt reasonable rules and regulations for utility service supplied by the municipally- owned public utilities within its jurisdiction. A joint meeting shall be held between the Commission and Council when requested by either body.

Ms. Brennan expresses concern in her letter regarding whether the City Council has the authority to impose the highlighted requirement on SPUC. I do not share her concern. SPUC was created by a City Council action. SPUC must therefore act within the confines of the powers granted by the City Council. Here, the power granted to SPUC to set rates was conditioned on the requirement that SPUC first inform the Council that SPUC would be doing so.

Ms. Brennan correctly points out that Paragraph H does not state how the “informing” is to occur. The paragraph does, though, clearly state that SPUC’s power to fix rates exists only “after” it informs the Council. Ms. Brennan states that in this situation the following events constituted “informing”:

- A copy of the Commission’s November 26, 2019 staff report was given to the city administrator, mayor, and council liaison;
- The Commission’s signed resolution and the minutes of the December 2, 2019 meeting were routed to city hall on December 18<sup>th</sup>;

- The rate modifications were discussed “in some detail” at the December 17<sup>th</sup> City Council meeting; and
- The Commission’s meeting materials are available on-line.

The Merriam-Webster dictionary definition of “inform” is “to communicate knowledge to.” In the context of Paragraph H, the “informing” is to take place *before* SPUC exercises its power to set rates. Posting meeting materials on-line does not, in my opinion, meet the “informing” requirement in Paragraph H. In addition, the fact that SPUC’s rate modifications were briefly<sup>1</sup> discussed by the City Council at its December 17<sup>th</sup> City Council meeting also does not meet the “informing” requirement, because the Council discussion occurred only after SPUC acted to change its rates. Similarly, the fact that SPUC’s signed resolution and minutes of its December 2<sup>nd</sup> meeting were routed to city hall on December 18<sup>th</sup> does not meet the “informing” requirement, because that action also occurred after SPUC took its actions on December 16<sup>th</sup>.

I have been advised that the November 26<sup>th</sup> SPUC staff report was provided to the mayor and city administrator on or about December 5<sup>th</sup>. That report dealt with SPUC’s proposed overall budget for 2020, not only the proposed rate changes. The report was provided to the City only after the mayor and city administrator requested the information. Nevertheless, because the November 26<sup>th</sup> staff report contains information relating to the proposed rate changes and because the report was received by the City before SPUC took its actions on December 16<sup>th</sup>, the “informing” requirement in Paragraph H was met. In the future, however, it would be advisable if the City and SPUC could agree upon a specific process that will be used by SPUC to inform the City Council before SPUC adopts any changes to its rates.

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<sup>1</sup> I reviewed the video of the December 17<sup>th</sup> City Council meeting. The City Council did not discuss SPUC’s rate changes “in some detail.” Council Member Lehman did advise the Council of SPUC’s action. Most of the ensuing discussion, however, involved the Council’s concern over the lack of advance notice to the City of the rate changes.

## **Question #2**

Minnesota Statutes, Section 412.361, Subdivision 5 states (underlining is mine):

**Subd 5. Relations, finances with city.** The Commission shall have power to enter into agreements with the Council for payments by the city of utility service; compensation for the use by either the Commission or the city of buildings, equipment, and personnel under the control of the other; payments to the city in lieu of taxes; transfers of surplus utility funds to the General Fund; and also agreements on other subjects of relationships between the Commission and the Council

City Code Section 32.22, Paragraph G (entitled “Agreement with city”) is identical to the statutory provision, except that it also includes the following two sentences:

The Commission shall also have any and all power and authority provided by law.  
All existing agreements between the Commission and Council are preserved.

Ms. Brennan is correct that simply because a statute grants power to a government entity does not typically mean that the governmental entity is obligated to exercise that power. Section 412.361, Subdivision 5 is, however, somewhat unique. Unlike the other subdivisions in Section 412.361, the legislature specified in Subdivision 5 the precise manner by which a utilities commission must exercise the powers listed in that subdivision – i.e. by entering “into agreements with the council.” In other words, unlike the powers granted to a utilities commission by the other subdivisions in Section 412.361, when a utilities commission exercises any of the powers enumerated in Subdivision 5, the legislature stated that the commission must do so pursuant to an agreement with the city.

Ms. Brennan states that since 1993, SPUC has adopted resolutions establishing the method by which SPUC funds would be transferred to the City without an agreement being “negotiated or signed”<sup>2</sup> with the City. My review of the history does not support that conclusion, either before or after 1993.

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<sup>2</sup> Neither the City Code provision nor the statute requires “signed” agreements. Those provisions simply state that SPUC has the power “to enter into agreements” with the City.

The following is a summary of the history of the changes to the method by which SPUC's annual payment to the City's general fund has been calculated:

- 1950** City Council Resolution creating SPUC established the payment at “not less than 4% of the fixed assets” of SPUC
- 1965** State legislature adopted a special law regulating the City; the law required 6% of SPUC's gross receipts to be transferred to the City's general fund
- 1967** City Council Ordinance No. 265 increased the payment to 12% of SPUC's gross receipts
- 1977** City Council Ordinance No. 413 repealed Ordinance No. 265 and provided that SPUC's payment into the City's general fund shall be established by the City by resolution. SPUC Resolution No. 193 and City Council Resolution No. 1144 set the payment amount at the greater of \$240,383.00, or 23.77% of SPUC's “gross margin” effective as of January 1, 1978
- 1984** SPUC Resolution #272 established the factors to be used to calculate “gross margin” based on an agreement reached during a joint meeting between SPUC and the City Council
- 1992** SPUC Resolution #385 stated that SPUC and the City Council agreed that for a period of four years SPUC's payment to the City would not include revenue derived by SPUC in 1990 from its acquisition of the territory previously served by Minnesota Valley Electric Cooperative
- 1993** SPUC Resolution #409 adjusted how the monthly payment was to be calculated based on a discussion at a joint City Council/SPUC meeting in 1992. The monthly payment will be 1/12<sup>th</sup> of the actual total annual amount based on the SPUC's audited financial reports for the previous two years rounded down to the nearing one thousand. The Resolution did not change the total annual amount established by the City Council and SPUC in 1977
- 1999** SPUC Resolution #553 capped the payment from SPUC's electric fund at \$727,102 pending the City's adoption of a franchise fee; the Resolution did not change the method of calculating the payment from SPUC's water fund
- 2001** SPUC Resolution #672 set the payment from electric fund at 2.71% of gross electric sales and payment from the water fund at 23.77% (same percentage as set in 1977) of gross water margin; the change to 2.71% for electric was based on a rate study conducted by the City
- 2019** SPUC Resolution #1261 set the payment at 4.4% of electric sales and 4.4% of water sales; no previous SPUC discussion with City

The above history<sup>3</sup> demonstrates the following:

- In three instances (1950, 1965, 1967) SPUC's payment to the City's general fund was established either by the City or by the legislature without any action by SPUC
- In one instance (1977) SPUC's payment to the City's general fund was established by the City and SPUC jointly adopting resolutions
- In five instances (1984, 1992, 1993, 1999, 2001) SPUC's payment to the City's general fund was modified based on previous discussions with, and agreement by, the City
- In one instance (2019) SPUC changed the method of calculating its payment to the City's general fund without prior consultation with the City

The above history demonstrates that SPUC's adoption of Resolution #1261 on December 16, 2019 is the first time that SPUC unilaterally changed the method of calculating its payment to the City's general fund. It is worthwhile noting that the change in the percentage of water sales (from 23.77% to 4.4%) modified the method by which SPUC's payment from the water fund had been calculated for 42 years.

Another point worth noting is that the last sentence in Section 32.22, Paragraph G, which the City Council adopted in 1978, states that all "existing agreements between the Commission and the Council are preserved." As demonstrated by the above history, the 1977 agreement was the agreement that was in effect when Section 32.22 was adopted. Although the City and SPUC later changed that agreement, Paragraph G clearly indicates that there were existing "agreements" in place between SPUC and the City as of 1978.

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<sup>3</sup> I compiled the history by reviewing City and SPUC documents. I do not believe that I overlooked any significant events. The minutes of a joint SPUC/City Council meeting on January 10, 1989 include a statement by a councilmember "that the action taken to reduce the 12% was illegal." I am not sure what that statement is referring to. I have not found any action by either SPUC or the City to reduce the 12% established by the City Council in 1967 by Ordinance 265. As shown in the timeline, the next action after 1967 that occurred was the 1976 action establishing the payment as the greater of \$240,383.00, or 23.77% of SPUC's "gross margin."

Based on my analysis of the applicable law and of the history between SPUC and the City,  
my conclusion is:

1. In adopting Section 412.361, Subdivision 5, the legislature clearly contemplated that the powers granted by that provision to a public utilities commission were to be implemented pursuant to an agreement with the city that established the commission.
2. One of the powers granted to a local public utilities commission by Section 412.361, Subdivision 5 is to make payments to a city in lieu of taxes pursuant to an agreement with the city.
3. The SPUC/City history since 1950 demonstrates that SPUC's payment to the City in lieu of taxes has been determined either by agreement between the parties or by a separate action of the City or the state legislature.
4. The City and SPUC agreed in 2001 that SPUC's annual payment to the City from SPUC's electric fund would be 2.71% of SPUC's gross electric sales and the annual payment from its water fund would be 23.77% of SPUC's gross water margin. The City has not agreed to modify that agreement.
5. Until the City approves the action taken by SPUC on December 16, 2019 by Resolution #1261, the 2001 agreement remains the operative agreement between SPUC and the City.

# **MCGRANN SHEA CARNIVAL STRAUGHN & LAMB, CHARTERED**

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~~~~~  
December 23, 2019

Jim Thompson  
Kennedy and Graven, Chartered  
200 South Sixth Street  
Minneapolis, MN 55402

Re: Shakopee Public Utilities Commission – Rate Setting, Transfer to  
City General Fund  
Our File No.: 13889-0067

Dear Mr. Thompson:

This letter follows our recent discussion concerning some pending issues between our clients. You asked me to provide some further information of the Shakopee Public Utilities Commission's (the "Commission") perspective. The two issues that have emerged concern: (1) the Commission's authority to modify utility fees/rates with respect to informing the City Council; and (2) the Commission's ability to apportion between the water and electric utilities to determine the transfer of funds to the City's general fund. This letter provides a summary of the Commission's perspective. It is important to note that the transfer to the City's general fund remains constant, so the true issue is the authority of the Commission to set rates.

### **FACTUAL BACKGROUND**

In terms of communications between the Commission and the City of Shakopee (the "City"), I understand that a member of the City Council is appointed as liaison (the "Liaison") to the Commission, attends Commission meetings (although does not vote as a Commissioner), and provides regular updates at City Council meetings. The Liaison receives both a hard copy and electronic copy of the Commission packet. After a Commission meeting, the City receives a copy of all signed resolutions and minutes of the meeting. In addition, the Commission is subject to the Open Meeting Law and its agenda and meeting information are publicly available.

In terms of transfers, the Commission has a long history of transferring funds to the City's general fund. Since 1951, the Commission has passed 29 resolutions authorizing transfer of funds to the City; only three (namely, resolutions approved in 1977,

The purpose was to create a . . . commission . . . and to clothe it with exclusive authority, acting by itself, and independently of the city council, or mayor, to operate, control and manage a city water and light plant. This authority is expressed in clear and unambiguous language and effectually creates a department of village or city government responsible only to the people. No revisory control is vested in the council or mayor. . . . *State ex rel Briggs v McIlraith*, 129 N.W. 377, 378 (Minn. 1911) (emphasis added).

The Minnesota Supreme Court later emphasized in strong terms the intent for a utilities commission to be independent from a city council. *State ex rel Chisholm v Borgeran*, 194 N.W. 624 (Minn. 1923) (stating “[t]he duties and powers of the commission emphasizes the legislative intent to create a body free from any coercion or control by the village council. . . . free from the baneful influences which so often result from the frequent changes of the political complexion of an elective village council.”).

Even assuming, for the sake of argument, that Section 32.22(G) applies, the Commission has “informed” the City of the adjustment in rates that will take effect on January 1, 2020. The Code does not detail how the “informing” must occur. Of course, the Code does not reference any “approval” by the City Council. The Commission staff report dated November 26, 2019 was specifically provided to the City Administrator and the Mayor, as well as to the Liaison. The Commission’s signed resolutions along with the minutes of the December 2, 2019 meeting were routed to City Hall on December 18, 2019. The rate modifications take effect on January 1, 2020. The rate modifications were discussed in some detail at the City Council meeting on December 17, 2019, as part of the Liaison report and the City Administrator’s report. The Commission meeting materials are available on-line. In short, it is difficult to see how the City Council was not “informed” of rate adjustments before the January 1, 2020 effective date.

## **II. Transfers to the City’s General Fund.**

As to the issue of apportioning between utilities for a transfer to the City’s general fund, Minnesota Statutes, Section 412.361 lists a number of powers of a municipal utilities commission, including the power to enter into agreements with a city council. “The commission shall have power to enter into agreements with the council for payments by the city for utility service, compensation for the use by either the commission or the city of buildings, equipment, and personnel under the control of the other, payments to the city in lieu of taxes, transfers of surplus utility funds to the general fund, and also agreements on other subjects of relationships between the commission and the council.” Minn. Stat. § 412.361, subd. 5 (emphasis added). (City Code Section 32.22(H) contains similar language).

In statutory interpretation, the Courts typically construe the surrounding language within a statute. The remaining four provisions in Section 412.361 include a reference to the “power” of a municipal utilities commission, using similar permissive language. Each of these sections confers the authority or “power” upon a commission, but does not

1984, and 1992), referenced a joint meeting.

Most recently, the Commission adopted Resolution 672 on December 3, 2001. Resolution 672 set Commission transfers of 23.77% of water utility sales less energy costs for pumping and 2.71% of electric utility sales to the City's general fund. Neither Resolution 672 nor the minutes references any joint agreement with the City.

I understand that, over the years, the Commission has discussed the ability of the water utility to sustain the level of the transfer. In preparing the Commission's budget for 2020, staff considered the Commission's transfer of funds to the City's general fund in light of projected revenues, expenses, rate-setting, and utility reserves. Staff concluded that "[t]o continue with the current water municipal contribution will either require a significant increase in rates for our water customers, a significant reduction in costs, or a change to [the] municipal contribution transfer." (Nov. 26, 2019 Memo. at 11). The 2020 budget proposed revising the transfer to the City's general fund to apply the same 4.4% rate to both water and electric utilities. Significantly, the revisions "would maintain a consistent amount" in the total transfer of funds to the City's general fund. *Id.*

## **ANALYSIS**

### **I. Informing the City.**

At its December 16, 2019 meeting, in Resolutions 1254, 1255, 1256, and 1257, the Commission adjusted certain utility fees/rates. I understand that a question arose as to the Commission's authority to modify rates, particularly with respect to City Code Section 32.22(G), which states "The Commission shall have power, after informing the Council, to fix rates . . . ."

It bears noting that Minnesota Statutes broadly grant a municipal utilities commission the power to set rates without any reference to informing a city council. "The commission shall have power to fix rates . . . . " Minn. Stat. § 412.361, subd. 4. Considering the lack of statutory authority for the City to add requirements to the Commission's power to set rates, it is unclear whether the additional language in the City Code provision is valid. See, e.g., *Harstad v. City of Woodbury*, 916 N.W.2d 540, 545 (Minn. 2018) (noting city powers must be "expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred"); Minn. Stat. § 412.321, subd. 1 ("the [city] council, except as its powers have been limited through establishment of a public utilities commission in the city . . . ."). City Code Section 32.22(H) also broadly states that "[t]he Commission shall also have any and all power and authority provided by law."

Indeed, the Minnesota Courts have long emphasized the importance of maintaining the independence and autonomy of the municipal utilities commission, particularly in matters relating to rates.

require a commission to so act. For example, the commission has the “power” to “modify or rebuild any public utility” but it is not required to rebuild or to modify. Similarly, a commission has “power to employ” staff, but it is not required to only employ persons and may instead engage consultants. A commission has the “power to buy all fuel and supplies,” but it may also generate electricity or otherwise arrange power or supplies. And a commission has “power to fix rates and adopt reasonable rules and regulations for utility service” but it is not required to establish minimum rates, or rates according to specific terms, and it is not required to adopt regulations. It would be illogical to interpret subdivision 5 of Section 412.361 (power to enter agreements) to undermine a commission’s ratemaking determinations in subdivision 4.

In interpreting statutes, the Courts also consider the common and ordinary meaning of terms that are not defined. The definition of “power” encompasses an ability or capacity: “The ability or capacity to act or do something effectively. . . . The ability or official capacity to exercise control; authority.” *American Heritage Dictionary* (5<sup>th</sup> ed. 2020). This common meaning supports the interpretation of a municipal utilities commission having the ability or capacity to enter agreements with a city council, but not the obligation.

This interpretation comports with past practices. Since 1993, the Commission has adopted resolutions establishing the method and procedure to transfer funds to the City’s general fund. No joint agreement was negotiated or signed. The minutes from these meetings reflect no discussion or agreement with the City Council. Moreover, the Commission’s resolution is rooted in ratemaking, including reducing or avoiding rate increases and in establishing prudent reserves. As noted above, the Minnesota Courts accord independence and autonomy to a municipal utilities commission in determining rates.

I trust that this letter provides further explanation of the Commission’s perspective of these issues. Please feel free to contact me if you have any questions.

Sincerely,  
/s/

Kaela Brennan

### **32.22 Public Utilities Commission**

1. *Generally.* The City Public Utilities Commission, heretofore established, continues. The Commission shall have the full, absolute, and exclusive control of, and power over, all city water plants and systems, and all light and power plants and systems. The Commission shall also have control of, and power over, such public buildings that by agreement between the Council and the Commission, are placed under the jurisdiction of the Commission. This control and power shall extend to all parts, buildings, attachments, and appurtenances thereto; and to all apparatus, machinery, and material of every kind used in operating these plants and systems. The Commission is empowered to operate and control any other utilities subsequently acquired.
2. *Membership.* In accordance with 2002 Minnesota Session Laws, Ch. 226, as it may be amended from time to time, the Commission shall consist of 5 members appointed by the Council, and their compensation shall be set by the Council. No more than 1 member shall be a member of the Council. Each member shall serve for a term of 3 years. Commission members must reside within the corporate limits of the city at the time of their appointment to the Commission, and if they move outside of the corporate limits during their term of office, they shall tender their resignation to the Council who may accept or reject it. If the Council rejects the resignation, said Commissioner may complete the Commissioner's term of office.
3. *Procedures.* The Commission shall adopt rules for its own proceedings which shall provide for, among other things, at least 1 regular meeting by the Commission each month. It shall annually choose a President from among its own members. It shall appoint a Secretary who need not be a member of the Commission, for an indefinite term. The Secretary shall receive a salary fixed by the Commission.
4. *Powers.* The Commission shall have power to extend and to modify or rebuild any public utility and to do anything it deems necessary to its proper and efficient operation; and it may enter into necessary contracts for these purposes.
5. *Employees.* The Commission shall have power to employ all necessary help for the management and operation of the public utility, prescribe duties of officers and employees and fix their compensation.
6. *Purchases.* The Commission shall have power to buy all fuel and supplies, and it may purchase wholesale electric energy, steam heat, gas, or water, as the case may be, for municipal distribution,
7. *Rates, rules, and regulations.* The Commission shall have power, after informing the Council, to fix rates and to adopt reasonable rules and regulations for utility service supplied by the municipally- owned public utilities within its jurisdiction. A joint meeting shall be held between the Commission and Council when requested by either body.
8. *Agreement with city.* The Commission shall have power to enter into agreements with the Council for payments by the city of utility service; compensation for the use by either the Commission or the city of buildings, equipment, and personnel under the control of the other; payments to the city in lieu of taxes; transfers of surplus utility funds to the General Fund; and also agreements on other subjects of relationships between the Commission and the Council. The Commission shall also have any and all power and authority provided by law. All existing agreements between the Commission and Council are preserved.
9. *Disposition.* No utility, or portion thereof, shall be transferred from under the jurisdiction of the Commission and no utility, or portion thereof, shall be sold, rented, leased, or otherwise disposed of except as by law.