

PUBLIC SERVICE COMMISSION OF WISCONSIN

Memorandum

February 28, 2020

FOR COMMISSION AGENDA

TO: The Commission

FROM: Denise Schmidt, Division Administrator
Andy Galvin, Bureau Director
Andrew Fisher, Public Utility Rate Analyst
Division of Water Utility Regulation and Analysis

RE: Application of City of Fond du Lac, as a Water Public Utility, 2010-LS-100
for Authority to Implement a Financial Assistance Program
for Customer-Side Lead Service Line Replacement, in the
City of Fond du Lac, Fond du Lac County, Wisconsin

Suggested Minute: The Commission (approved/modified and approved/did not approve) the City of Fond du Lac's application for authority to implement a financial assistance program for customer-side lead service line replacement (with/without) conditions.

INTRODUCTION

On August 16, 2019, the Fond du Lac Water Utility (FWU), a water public utility, filed an application seeking Commission approval to implement a financial assistance program for replacing lead service lines (LSLs) owned by FWU's retail customers. ([PSC REF#: 374262](#), [PSC REF#: 374263](#), [PSC REF#: 374264](#), [PSC REF#: 374265](#), [PSC REF#: 374266](#), [PSC REF#: 374283](#), [PSC REF#: 374284](#), [PSC REF#: 374285](#), [PSC REF#: 374288](#), [PSC REF#: 374289](#).) On February 21, 2018, the Legislature enacted 2017 Wisconsin Act 137 (Act 137), which allows a utility to provide financial assistance to the owner of a property to which water service is provided for the purpose of assisting the owner in replacing a customer-side water service line containing lead if certain conditions are met, including approval by the Commission.

On February 13, 2020, the Commission issued a Notice of Investigation in this docket. ([PSC REF#: 383783](#).) No party requested intervention in this docket, and a hearing was not required or held. Wisconsin Stat. § 196.372(3)(d) provides that “[i]f a hearing is not held on an application, the commission shall take final action on the application within 90 days after the commission issues a notice opening a docket on the application. The chairperson of the commission may extend the time period for an additional 90 days for good cause. If the commission fails to take final action within the initial 90-day period, or the extended 90-day time period, the commission is considered to have granted its approval.” In this docket, the initial 90-day deadline for Commission action is May 13, 2020.

Background

The presence of lead in drinking water utility infrastructure was identified decades ago as a public health concern, as lead can leach into water over time through corrosion of water pipes, plumbing fittings and fixtures, solder, and flux. The history of the use of lead in water utility distribution systems and premise plumbing and a review of federal and state regulation of lead in drinking water have been detailed in prior memoranda to the Commission and will not be repeated here.¹

According to 2018 data filed with the Commission, lead is present in the utility-side service lines² in 132 Wisconsin communities. This data indicates more than 183,000 utility-side

¹ See, e.g., Memorandum, *Application of the City of Menasha, as a Water Public Utility, for Authority to Implement a Customer-Side Lead Service Line Replacement Program, in the City of Menasha, Winnebago County, Wisconsin*, docket 3560-LS-100 (Wis. PSC April, 17, 2019) ([PSC REF#: 364324](#), at 2-5).

² The most common service line ownership arrangement, both nationwide and in Wisconsin, is partial ownership by the utility and partial ownership by the property owner. Typically, the utility owns the portion of the service line from the main to and through the curb stop, while the customer owns the portion from the curb stop to the meter inside the property. In all but three instances, standard language found in Wisconsin water utility tariffs includes the following: “The service lateral from the main to and through the curb stop will be maintained and kept in repair and, when worn out, replaced at the expense of the water utility. The property owner shall maintain the service lateral from the curb stop to the point of use.”

LSLs remain in the state. However, it is important to note that these figures may underestimate the scope of the issue, as the utilities' self-reported data does not necessarily account for all utilities whose infrastructure includes lead goosenecks, which have been identified as contributing to increased lead levels in water.

Based on 2018 PSC Annual Report data, 113 Wisconsin utilities reported just under 154,000 customer-side LSLs. However, as with utility-side LSLs, it is important to note this data likely under-reports the scope of the issue.

Early Commission Consideration of Utility Funded Customer-Side LSL Replacement

The Madison Water Utility (MWU) LSL replacement program was the first program in the nation designed to eliminate both utility-side and customer-side portions of LSLs. On April 26, 2000, MWU applied for a rate increase that would have included use of ratepayer funds to pay for a portion of the cost to replace the customer-side portions of the service lines. While the Commission indicated that it “is supportive of [MWU’s] decision to replace the lead laterals as a means to achieve compliance with the Lead and Copper Rule,...” the Commission determined “...that it would be unreasonable and unjustly discriminatory if public program dollars generated through utility rates were to be authorized as a subsidy to furnish a direct benefit to an exclusive group of private property owners.”³ The Commission further explained that “if the [City of Madison] believes subsidies are necessary for the success of this program, it should provide the funding mechanism to support its decision.” In 2002, the Wisconsin Court of Appeals upheld this decision. *City of Madison v. Pub. Serv. Comm'n of Wisconsin*, 2002 WI App 102, 253 Wis. 2d 846, 644 N.W.2d 293. As suggested by the Commission, the City of Madison, rather than the utility, ultimately used municipal funds to reimburse customers for

³ *Application of the City of Madison, Dane County, as a Water Public Utility, for Authority to Increase Water Rates*, Docket No. 3280-WR-106, 2000 WL 36274762, Final Decision (Wis. PSC, October 17, 2000)([DL: 1644693](#)).

replacing their portions of the service lines. It took more than a decade to remove the utility-side and customer-side LSLs from Madison's system.

Commission staff is aware of no legal restriction on the use of non-utility funds from a political subdivision to reimburse or subsidize customers for these purposes. Therefore, it is likely political subdivisions maintain funding mechanisms that are separate from utility funds and can be utilized to support their decisions regarding LSL replacement programs.

LEGAL AUTHORITY

In addition to the availability of non-utility funds to address the issue, the Wisconsin Legislature took action to facilitate the use of utility funds for customer-side LSL replacement under certain circumstances. Enacted on February 21, 2018, 2017 Wisconsin Act 137 created a process in Wis. Stat. § 196.372 for water public utilities to apply to the Commission for authorization to provide financial assistance to the owner of a property to which water utility service is provided, for the purpose of assisting the owner in replacing customer-side water service lines containing lead. The financial assistance provided may be in the form of a grants and loans to property owners. While the replacement of most utility-side infrastructure containing lead, including mains, goosenecks, and service lines, generally does not require approval from the Commission, providing utility financed assistance to help customers replace their side of LSLs does require Commission approval.

Wisconsin Stat. § 196.372 defines "Customer-side water service line" to mean "the portion of a water service line owned by a property owner." Wis. Stat. § 196.372(1)(a).

"Financial assistance" means a grant, loan, or combination thereof." Wis. Stat. § 196.372(2)(b).

"Utility-side water service line" means the portion of a water service line owned by a water public utility." Wis. Stat. § 196.372(2)(c).

The statute expressly requires that the city, town, or village in which the utility provides financial assistance must enact an ordinance that permits the utility to provide financial assistance to private property owners and requires that customers replace their service lines containing lead. Wis. Stat. § 196.372(2)(a). The law further establishes that, when a customer-side LSL is replaced, the utility must ensure the utility-side service line and the main either do not currently contain lead or are replaced at the same time as the portion owned by the property owner. Wis. Stat. § 196.372(2)(b).

Act 137 also included a revision to Wis. Stat. § 66.0901(11)(b) that states “[e]xcept for work ancillary to replacing a utility-side water service line, as defined in s. 196.372 (1) (c), containing lead that is performed with the consent of a private property owner and that does not involve replacing the customer-side water service line, as defined in s. 196.372 (1) (a), containing lead, a political subdivision may not use its own workforce to perform a construction project for which a private person is financially responsible.” Under Wis. Stat. § 66.0901(1)(bm), a “‘political subdivision’ means a city, village, town, or county.”

Wisconsin Stat. § 196.372(3), titled “Commission Approval,” lays out what the Commission must do. The law requires that a utility must submit an application to obtain Commission approval for its replacement program. Wis. Stat. § 196.372(3). The application must include certain statutorily-required information, as well as any other information relevant to the Commission’s decision on the application that the Commission requests. Wis. Stat. § 196.372(3)(a). The Commission has limited bases on which it could deny such an application; the statute mandates that the Commission shall grant its approval of a customer-side lead service line replacement (LSLR) program if it finds the actions described in the utility’s application are not unjust, unreasonable, or unfairly discriminatory. Wis. Stat. § 196.372(3)(e). The

Commission may not, however, approve an application unless the application satisfies both of the following conditions:

1. Grants provided as financial assistance to a property owner may not exceed 50 percent of the cost to replace the customer-side water service line. Wis. Stat. § 196.372(3)(e)2.a.
2. Any loan provided to a property owner may not be forgiven by the utility or the municipality. Wis. Stat. § 196.372(3)(e)2.b.

Additionally, the Commission may not approve an application unless the application satisfies one of the following provisions:

1. If the utility intends to provide financial assistance as a percentage of the cost of replacing the property owner's portion of the service line, the percentage must be the same for each owner in a class of customers. Wis. Stat. § 196.372(3)(e)3.a.
2. If the utility intends to provide financial assistance as a specified dollar amount, the amount must be the same for each owner in a class of customers. Wis. Stat. § 196.372(3)(e)3.b.

ANALYSIS OF APPLICATION

FWU is a Wisconsin water public utility that provides drinking water to approximately 16,050 retail customers in Fond du Lac County. In 2018, FWU's revenue from retail water sales totaled \$12,547,638. FWU filed an application with the Commission on August 16, 2019 seeking authority to implement a customer-side LSL replacement program. ([PSC REF#: 374262](#), [PSC REF#: 374263](#), [PSC REF#: 374264](#), [PSC REF#: 374265](#), [PSC REF#: 374266](#), [PSC REF#: 374283](#), [PSC REF#: 374284](#), [PSC REF#: 374285](#), [PSC REF#: 374288](#), [PSC REF#:](#)

[374289](#).) On January 24, 2020, the utility responded to Commission staff's data request. ([PSC REF#: 382783](#).)

FWU's application materials include maps of the customer-side service lines as well as estimates of the number of LSLs in FWU's system. ([PSC REF#: 374264](#).) According to these documents, as of mid-year 2019, FWU estimates approximately 2,641 of the 13,631 utility-side service lines that were connected and in service were made of lead or galvanized materials. This estimate represents approximately 19.4 percent of the system's utility-side service lines.

FWU has much more limited information about the customer-side service lines. According to its application ([PSC REF#: 374262](#)), FWU collects and records customer-side service line material information in coordination with its water meter change outs, plumbing permit process, street and utility construction activities, distribution system maintenance, and water utility billing questionnaires. As of mid-year 2019, FWU identified 846 customer-side service lines made of lead or galvanized material. However, FWU estimates that, once its inventory process is more complete, its program will result in replacement of approximately 3,000, or just under 20 percent of its customer-side LSLs. With regard to water main, FWU's 2018 Annual Report to the Commission indicates there are no lead water main pipes in the utility's distribution system.

In support of its application, FWU filed information describing its process and steps for replacing LSLs. FWU applied for and was awarded \$500,000 for LSL replacements in 2017 and 2018 as part of the DNR's Private LSL Replacement Program. As a result, FWU already has experience working with customers to replace customer-side LSLs. FWU anticipated it will have used most of its DNR LSL program funds by the end of 2019. With its application to the

Commission, FWU is requesting to build on its original LSLR program, with a goal of replacing all lead or galvanized service lines within thirty years, beginning in Spring 2020.

Financial Assistance Description

According to its ordinances, the City of Fond du Lac (City) will offer financial assistance for customer-side LSLR under three circumstances. The existing ordinances do not provide for the utility to offer financial assistance. The three circumstances under which the City will offer financial assistance include: 1) as part of a FWU planned main replacement project; 2) on an emergency basis because a leak or failure has been discovered in either the customer-side or utility-side service line; and, 3) at a customer's request, based on the priorities outlined in the ordinance and the availability of funding in a given year. At the time a customer-side LSLR is replaced, the utility will replace any meter determined to contain brass or otherwise pose a lead exposure risk. According to the City's ordinances, a property owner is eligible for financial assistance if the property owner submits to the City documentation that all the following conditions are met:

1. The owner agrees to have the work performed by a prequalified plumbing contractor. In working with the DNR program, FWU created a list of prequalified plumbers which it has maintained and updated over time. ([PSC REF#: 374265.](#))
2. The owner signs a hold harmless agreement holding the City harmless and free from any claim or liability for damage done in performance of the LSLR.
3. If necessary, the owner executes a temporary right of entry and construction easement authorizing the City and its contractor access into the dwelling as needed in order to complete the connection.

4. The property qualifies for the financial assistance under the applicable funding rules.

Once the customer-side LSLR is complete, FWU staff will confirm the contractor used proper materials, installed the service line at proper depth, made the proper connection, used proper backfilling and compaction, and met all other utility standards. Utility staff will also provide customers with information on the importance of and proper procedures for flushing the system following service line replacement to ensure public health.

According to its ordinances, the City will offer 100 percent financial assistance to property owners that are required by ordinance to replace a customer-side lead or galvanized water service line. Financial assistance will consist of two components:

1. The City will provide eligible property owners with a grant for up to 50 percent of the cost of the privately-owned portion of the lead or galvanized service line. The grant will not exceed \$2,000.
2. The property owner will contribute the remaining cost of replacing the privately-owned portion of the lead or galvanized water service line. If the amount of the remaining cost is in excess of \$500, the property owner would be eligible for a low interest loan.

The City will levy the amount of the loan as a special assessment, and, if in excess of \$500, the special assessment may be paid in installments over a ten-year period. That is the structure of the loan portion of the financial assistance. If any installment so entered in the tax roll is not paid with the other taxes to the City Treasurer, or his or her designee, it will be returned to the county as delinquent and accepted and collected by the county in the same manner as delinquent general taxes on real estate. If an installment becomes delinquent, the sum

of the remaining installments shall become due and payable and entered in the next succeeding tax roll. Any installments remaining upon transfer of property shall be paid upon closing and prior to recording of such transfer. FWU states the proposed program will have a 0 percent administrative (interest) fee, because the program will be handled by existing utility staff, and labor costs are already included in water rates. Customers would be charged an interest rate that is based on the City's most recent bond borrowing interest rate plus 2 percent. The City will not forgive special assessment loan. The application proposes using utility cash reserves to initially fund the financial assistance.

City ordinances state the City will provide financial assistance in accordance with the following priority:

1. Properties with leaking or failed customer-side or utility-side service lines.
2. Properties where the utility is replacing the utility-owned portion of the water service line on a planned basis.
3. Properties with licensed child care facilities and schools.
4. Properties where children under the age of seven or pregnant women reside.
5. All remaining properties with privately-owned lead water service lines.

Customer Communication Plan

In the event of a failure or leak on the utility-side LSL, the Director of Public Works will notify the property owner of the replacement requirement. In the event of a failure or leak on the customer-side LSL, the property owner must notify the utility immediately. Under either circumstance, the property owner is required to replace the LSL as soon as reasonably practical, but no later than 30 days of receiving written notice. In the event of a planned replacement of the utility-side LSL, the Director of Public Works will provide written notice to the property

owner at least 45 days prior to the commencement of the planned replacement. The property owner is required to schedule customer-side LSLR within 30 days of receiving written notice and must schedule replacement to coincide with utility-side LSLR. Exhibit 6 of the application includes the utility's communication materials. ([PSC REF#: 374284.](#)) The utility developed and modified its communication materials over the last two years of its participation in its DNR-funded LSLR program. The materials included in the exhibit reflect the current program, and FWU intends to continue to use the above components of its current communication plan.

In addition, FWU proposes to use disconnection of water service to the property if the property owner fails to comply with any of the provisions set forth in the ordinance provided in Exhibit 1. ([PSC REF#: 374263.](#)) In response to Commission staff's data request, FWU explained its process for disconnecting a customer and included a copy of the disconnection notice letter. Prior to disconnection, FWU explained it plans to issue a 45 day notice, followed by open conversations with the property owner. The City's decision to issue a citation or the utility's decision to disconnect service would be based on the responsiveness of the owner and in consultation with the city attorney. ([PSC REF#: 382783.](#))

Estimated Program Costs

Based on 2019 program costs, the average replacement cost of a customer-side LSLR completed in conjunction with a utility water main replacement project was \$3,400. The average cost for customer-side LSLR done outside of a utility project was \$3,650. The cost estimates are based on an average service length of 25 - 35 feet. The utility estimates costs will increase 2 percent annually. The budget for 2020 - 2025 includes money for 100 private lead or galvanized water service replacements. FWU used these estimates to develop the detailed 30 year financial projection found in Exhibit 4 of its application. ([PSC REF#: 374266.](#)) Based on this

information, FWU estimates the total cost of the grant program over 30 years will be \$5,908,024 and will result in the replacement of 3,000 lead service lines. Because the exact number of customer-side LSLs is unknown at present, and the number of LSLs replaced each year will vary based on capital improvement project priorities, the actual program costs in any given year may be higher or lower than those projected in Exhibit 4. FWU estimates each customer-side LSLR will require 2-3 hours of utility staff time for verification, on-site activity, and administration. FWU estimates labor costs for each LSLR will be approximately \$264.04. ([PSC REF#: 382783](#).) FWU anticipates the work can be handled by existing utility staff.

FWU's application states the rate impact of administrative costs will be zero, since existing staff will handle the work, and labor is already included in rates. The estimated impact of the loan program will be zero, as the City will not forgive the loans.

FWU plans to track costs and expenditures in its work order system to easily identify costs associated with the LSL replacement program. When a work order is closed following replacement of a customer-side LSL, the utility will book the following:

1. Account 664: Utility grant portion. Utility staff time spent on verification, replacement and administration will also be recorded in this account. This is anticipated to require 2-3 hours of staff time for each service line.
2. Account 124: Utility loan portion. The amount in this account will decrease monthly as loan repayments are received from the City.

Rate Recovery – Method for Funding

FWU estimates the total cost of grants provided to customers to replace 3,000 customer-side LSLs over a 30 year period is \$5,908,024, or an average of \$196,934 per year. The estimated administrative costs of \$264.04 per LSL replacement would add \$26,404 to the total

annual program cost and would result in an average annual total program cost of \$223,338. Compared with FWU's current annual revenue (based on the rate increase effective December, 18, 2015) from total metered water sales of \$10,683,663, the estimated impact of the grant program, including administrative costs, is an increase in rates of approximately 2.1 percent. FWU does not anticipate the need for a rate increase due to the loan portion of the program. The actual amount of any rate increase would be determined at the time the utility submits an application for a rate adjustment.

FWU indicated it will use cash reserves to fund its financial assistance program but did not indicate when it anticipates filing a rate application that would include program costs in the requested revenue requirement.

One reasonable approach to addressing costs incurred between Commission approval of the financial assistance program and FWU's rate filing would be for FWU to seek deferral of its program costs. The Commission has the authority to direct deferral accounting pursuant to Wis. Stat. § 196.06. Under Commission Staff Accounting Policy Statement of Position 94-01 (SOP 94-01), which has been adopted by the Commission in several of its decisions, there are several criteria Commission staff uses to evaluate a request for deferral accounting treatment for a utility expenditure: (1) whether the cost is outside of the utility's control; (2) whether the cost is unusual and infrequently occurring; (3) whether the amount, if recognized in the year of expenditure, would cause the utility serious financial harm or significantly distort the current year's income; and (4) whether the immediate recognition of the expenditure would have a significant impact on ratepayers. Should the utility request this, or should the Commission want to address possible deferral treatment at this time, these criteria can be considered individually or together with other criteria. ([PSC REF#: 384719.](#)) Commission staff notes, under criterion

number 2, FWU has never used utility funds to replace customer-side LSLs in the past. In addition, once the customer-side LSLs are replaced, they will no longer contain lead; therefore, utility funds for their replacement will be expended only once. The Commission could decide the utility's proposed program costs are thus both "unusual" and "infrequently occurring." The Commission may want to address deferral treatment after making its other decisions in this docket.⁴

Commission Alternatives-Deferral

Alternative One: Wait to address possible deferral of costs until so requested by FWU.

Alternative Two: Require FWU to submit to the Commission more information for Commission staff to analyze the possibility of a deferral.

Alternative Three: Find that it is reasonable for the Commission to grant FWU a deferral after applying Commission Staff Accounting Policy Statement of Position 94-01 (SOP 94-01) with the recovery of such costs to be determined in a convention rate case.

Environmental Review

FWU submitted materials describing potential environmental impacts of the LSLRs. However, in this docket, the Commission is reviewing a utility financial assistance program only, not the LSLRs. As there are no potential environmental effects associated with the strictly financial action at issue in this docket, the docket will not require the preparation of an environmental impact statement under Wis. Stat. § 1.11 or an environmental assessment.

⁴ The Commission could also consider carrying costs if it decides to address the deferral issue *sua sponte*. Carrying costs on water deferrals are not typical. Absent further information as to the estimated amount for any such deferral, it may be premature to impose carrying costs.

ANALYSIS OF STATUTORY CRITERIA FOR APPROVAL

Wisconsin Stat. § 196.372(2)(c) requires a water public utility to obtain Commission approval prior to providing financial assistance. Pursuant to Wis. Stat. § 196.372(3)(a), a water public utility that seeks to provide financial assistance to private property owners must submit to the Commission an application that includes a description of the proposed financial assistance, a description of the method for funding the financial assistance, a description of the customers served by the water public utility that would be eligible for financial assistance, and any other information relevant to the action requested by the Commission.

Wisconsin Stat. § 196.372(3)(e)1. provides that the Commission shall grant its approval of a customer-side LSLR program if it finds the actions described in the utility's application are not unjust, unreasonable, or unfairly discriminatory. In addition, as described above, Wis. Stat. §§ 196.372(3)(e)2. and 3. include specific limitations on the provision of financial assistance by the utility, and provide that the Commission may not approve an application if those requirements are not met.

Accordingly, this memorandum first analyzes whether the Commission should deny the application due to the insufficiency of the application under Wis. Stat. § 196.372(3)(a) or is precluded from approving the application by the requirements under Wis. Stat. § 196.372(3)(e)2. or 3., and then analyzes whether the Commission should approve the application under Wis. Stat. § 196.372(3)(e)1.

Sufficiency of the Application under Wis. Stat. § 196.372(3)(a)

A water public utility that seeks Commission approval must provide the Commission with “an application that includes a description of the proposed financial assistance” and “a description of the method for funding the financial assistance” that the utility will provide and “a

description of the customers served by the water public utility that would be eligible for financial assistance,” along with any other relevant information that the Commission requests. Wis. Stat. § 196.372(3)(a). Once the Commission receives a complete application, it can conduct its investigation. Wis. Stat. § 196.372(3)(b).

In addition to the information that is expressly required by the statute, the Commission’s Application Checklist requested that FWU provide more details about its program. *See* Exhibit A, Application Checklist. The Application Checklist expressly requested information about how the program would comply with Wis. Stat. § 196.372(2)(a) and (b). It thus required FWU to file a copy of the municipal ordinance that permits the utility to provide financial assistance to private property owners and requires that customers replace their service lines containing lead pursuant to Wis. Stat. § 196.372(2)(a). FWU filed a copy of City of Fond du Lac Ordinances 3629 and 3689, as well as a copy of Chapter 65 of City of Fond du Lac Ordinances (hereafter, Ordinance). ([PSC REF#: 374263](#).) The Application Checklist also requested that FWU file information about how FWU will ensure that, pursuant to Wis. Stat. § 196.372(2)(b), either the utility-owned main or service line connected to the customer-owned service line does not contain lead or is replaced at the time the customer-owned service line is replaced.

FWU’s application materials demonstrate that FWU has a plan to ensure that either the utility-owned main or service line connected to the customer-owned service line does not contain lead or is replaced at the time the customer-owned service line is replaced. The Ordinance requires coordinated replacement of both the utility-side and customer-side LSLs when:

1. A utility-side LSL is being replaced on an emergency basis because of a leak or failure has been discovered on either the utility-side LSL or customer-side LSL;
and,

2. The utility-side LSL is being replaced as part of a planned utility main and/or service line replacement project.

However, FWU's application materials do not demonstrate that the City requires that all customers with service lines containing lead replace them. The Ordinance only requires replacement when either a leak or failure has been discovered on either the utility-owned or customer-owned service line or when the utility-owned service line is replaced either as planned or on an emergency basis.⁵

FWU submitted substantial information responding to the statutorily required information categories. While there are flaws with the proposed financial assistance program, as further discussed below, the Commission could find that FWU provided requested information on those items that were expressly required by the statute or requested in the Application Checklist.

In addition to problems with the Ordinance's failure to require all customers with service lines containing lead to replace them, the Ordinance, which has been adopted and has the force of law, appears to have an even larger problem with regard to the Application Checklist. The Ordinance refers to and reflects that the City, rather than FWU, will provide financial assistance to owners. Thus, the Commission could decide that the Ordinance demonstrates FWU has applied for a financial assistance program on behalf of City, which is a municipality and not a water public utility. Commission staff suggests this interpretation has merit because, in addition to explicitly using the word "City," the Ordinance evokes powers retained by the City of Fond du Lac under Wis. Stat. ch. 66.⁶

⁵ The Ordinance also provides for a further exception to the requirement to replace customer-owned LSLs at the determination of Director of Public Works or designee, which may be the Water Utility Manager.

⁶ For example, the Ordinance imposition of special assessments under Sub. Ch. VII, Ch. 66 of the Wisconsin Statutes and imposition of "penalty as provided in" the municipal code. Analysis into the equities surrounding these municipal powers is beyond the scope of this memorandum.

The Commission could also decide that, as further discussed above, FWU's application fails to satisfy the requirements in Wis. Stat. § 196.372(2)(a), and could therefore find that FWU did not provide an item of information required for a sufficient application—a compliant ordinance under Wis. Stat. § 196.372(3)(a).

Based on Commission staff's review of FWU's application, Commission staff has concluded that the Commission could find that the application does not include the contents required by Wis. Stat. § 196.372(3)(a), and the Commission could deny FWU's application based on the insufficiency of the application.

Alternatively, the Commission could find that FWU submitted information responsive to each category required by statute, and each item on the Application Checklist, and that the application is sufficient enough to proceed, subject to the requirement that approval is conditioned on FWU providing the Commission with a copy of an ordinance that does comply with the Wis. Stat. § 196.372(2)(a), which would require amending the current Ordinance to require all customers with service lines containing lead replace them, and to authorize the utility, rather than the municipality, to provide financial assistance.

Commission Alternatives-Sufficiency of Application

Alternative One: Find that FWU's application should be denied, pursuant to Wis. Stat. § 196.372(3)(a), based on the insufficiency of the application.

Alternative Two: Find that the Commission need not deny, pursuant to Wis. Stat. § 196.372(3)(a), FWU's application based on the insufficiency of the application.

Alternative Three: Find that the Commission need not deny, pursuant to Wis. Stat. § 196.372(3)(a), FWU's application if it conditions approval on the requirement that FWU provide the Commission with a copy of an ordinance that does comply with Wis. Stat. § 196.372(2)(a).

Compliance with Wis. Stat. §§ 196.372(3)(e)2. and subd. (3)(e)3.

Wisconsin Stat. § 196.372(3)(e)2. provides that the Commission may not approve an application unless all of the following conditions are met:

1. Grants provided as financial assistance to a property owner may not exceed 50 percent of the cost to replace the customer-side water service line. Wis. Stat. § 196.372(3)(e)2.a.
2. Any loan provided to a property owner may not be forgiven by the utility or the municipality. Wis. Stat. § 196.372(3)(e)2.b.

Additionally, the Commission may not approve an application unless the application satisfies one of the following conditions:

1. If the utility intends to provide financial assistance as a percentage of the cost of replacing the property owner's portion of the service line, the percentage must be the same for each owner in a class of customers. Wis. Stat. § 196.372(3)(e)3.a.
2. If the utility intends to provide financial assistance as a specified dollar amount, the amount must be the same for each owner in a class of customers. Wis. Stat. § 196.372(3)(e)3.b.

Commission staff's review of the application materials suggests that the Commission may find: (1) the application provides that grants will not exceed one-half of the owner's LSLR costs, and (2) neither the utility nor the municipality will forgive any program loan. Thus, the Commission could conclude that the application complies with Wis. Stat. §§ 196.372(3)(e)2.a. and b. because "[g]rants that are provided as financial assistance to an owner are limited to no more than one-half of the total cost to the owner of replacing the customer-side water service line

containing lead” and “[a]ny loan provided may not be forgiven by the water public utility or the municipality”.

FWU’s application as currently submitted, however, faces issues when the requirements of Wis. Stat. § 196.372(3)(e)3. are considered. First, as noted above in the discussion of application sufficiency, FWU’s application materials, and its Ordinance in particular, contemplate financial assistance provided by the City, rather than the utility. Absent a program change, the program could not comply with 196.372(3)(e)3.a. or b., which both relate to financial assistance provided by the utility. Indeed, the entire statute is related to financial assistance programs provided by a water public utility, not by a municipality. *See* Wis. Stat. § 196.372(2)(“A water public utility may provide financial assistance . . . “)

Even setting the municipality/utility issue aside, problems remain. FWU claims that the program will be providing the same percentage of financial assistance to all owners within a customer class, but the structure of FWU’s proposed program under the Ordinance makes the last claim inaccurate. The program proposes to offer 100 percent financial assistance to every participating customer. But while FWU would offer all owners up to 50 percent of the cost of private LSL replacement, it caps the grants at \$2000. The proposed program also contemplates loans for amounts not covered by the grants. This proposed financial assistance necessarily means that different customers will be offered different percentages. The availability of loans to cover the remainder might have remedied the problem by making all owners eligible for 100 percent financial assistance through a combination of grants and loans, if the entire remaining balance were covered by the loan for all owners. However, by providing loans only for amounts that exceed \$500,⁷ different owners could be receiving financial assistance in differing

⁷ \$500 matches the minimum amount for extended payment under the City’s Special Assessment provisions, included in the Ordinance.

percentages of reimbursement. A customer whose replacement cost \$3000 would receive \$1500 in a grant and then be offered a loan for the remaining \$1500, thus receiving 100 percent financial assistance. A customer whose replacement cost \$999 would receive a \$499.50 grant but no loan, thus receiving only 50 percent financial assistance.

While hypothetical, the above examples demonstrate that, without modification, the Commission could find that FWU's program as submitted could not meet the requirements under Wis. Stat. § 196.372(3)(e)3., and that the Commission is thus precluded from approving the application.

However, Commission staff alternatively suggests that the Commission could find that the statutes would not preclude Commission approval if FWU provides the Commission with a copy of an ordinance that, in addition to the changes discussed previously,⁸ modifies the program to eliminate the \$500 threshold for a loan.

Commission Alternatives-Compliance with Wis. Stat. § 196.372(3)(e)2 and subd. (3)(e)3

Alternative One: Find that the Commission is not precluded by Wis. Stat. § 196.372(3)(e)2. or subd. (3)(e)3. from approving FWU's application.

Alternative Two: Find that the Commission is precluded by Wis. Stat. § 196.372(3)(e)2. or subd. (3)(e)3. from approving FWU's application.

Alternative Three: Find that the Commission is not precluded by Wis. Stat. § 196.37(3)(e)2. or subd. (3)(e)3. from approving FWU's application, if the Commission conditions approval on the requirement that FWU provide the Commission with a copy of an ordinance that modifies the program so requires all customers with service lines containing lead replace them, requires that the proposed

⁸ Namely, that the Ordinance be modified to require all customers with service lines containing lead replace them, and requiring that the financial assistance come from the utility rather than the municipality.

financial assistance comes from the utility rather than the municipality and eliminates the \$500 loan threshold.

Compliance with Wis. Stat. § 196.372(3)(e)1.

In order to approve an application, the Commission must find that the overall program is not unjust, unreasonable, or unduly discriminatory.

If FWU does not modify its application, the Commission may find that the program is unreasonable, because Wis. Stat. § 196.372(2)(a)'s requirement that an ordinance be enacted permitting the utility to provide financial assistance and requiring all customers with service lines containing lead replace them has not been met. While the Commission is not tasked with ensuring that a city, town, or village comply with the requirements expressed in Wis. Stat. § 196.372(2)(a) and (b), the Commission may find it unreasonable to move forward without the proper ordinance in place and without assurance that it will be enacted. Alternatively, however, the Commission could find the ordinance failures to be outside of its jurisdiction, as it does not fall under the "Commission approval" portion of Act 137. It could then choose whether to condition approval, if granted, on enactment of a compliant ordinance.

The possibility that customers within a class could be treated differently under the proposed program, discussed above, also suggests that the Commission could find that the program, as currently contemplated, would be unjust, unreasonable and/or unduly discriminatory. If the Commission takes that view, denial under Wis. Stat. § 196.372(3)(e)1. could be appropriate. The Commission could, however, also find that the program would not be unreasonable or unduly discriminatory if the Commission required FWU to revise the program so the \$500 threshold for loans is eliminated. Thus, if it decides against denial, the Commission could condition its approval on the requirement that FWU modify its financial assistance

program to make it legally compliant and file information describing its revised program with the Commission as has been discussed previously.

Assuming the Commission does not deny the application and imposes upon FWU all of the above discussed conditions, the Commission must still determine whether “the actions described in the application are not unjust, unreasonable, or unfairly discriminatory” under Wis. Stat. § 196.372(3)(e)1., with those conditions in place. The Ordinance provides that financial assistance will be given to customers in line with an established priority, as discussed above.⁹ The Commission could find this priority is or is not unjust, unreasonable, or unduly discriminatory. However, if there is a lack of funding in a particular year, this priority potentially could also run afoul of Wis. Stat. § 196.372(3)(e)3., discussed above.¹⁰ In order to receive funding, a property owner must also agree to have a prequalified plumbing contractor complete the work, sign a hold harmless agreement to the benefit of (as currently in effect) the City of Fond du Lac, if necessary, grant (as currently in effect) the City of Fond du Lac a temporary limited easement, and otherwise qualifies for under applicable grant or funding rules when applicable. If the Commission finds the other conditions precedent to approval are met, and the actions described in the application are not unjust, unreasonable, or unduly discriminatory, the Commission shall approve the application.

Commission Alternatives – Compliance with Wis. Stat. § 196.372(3)(e)1.

Alternative One: Find FWU’s application has met requirements for Commission approval under Wis. Stat. § 196.372(3)(e)1.

⁹ Leaking or failing LSLs are given first priority, then customer-owned LSLs as part of a planned utility owned water service line replacement, properties with licensed child care facilities and schools, properties where children under the age of seven or pregnant women reside, and finally all remaining customer-owned LSLs receive priority in that order.

¹⁰ Also, Wis. Admin. Code § PSC 185.15 provides: “No utility shall provide water service free or at a rate different than provided for in its rates. (See ss. 196.22 and 196.60, Stats.)” Therefore, the Commission would also need to make a determination allowing for this priority in the utility’s tariffs that are filed with the Commission.

Alternative Two: Find FWU’s application has not met requirements for Commission approval under Wis. Stat. § 196.372(3)(e)1.

Alternative Three: Find FWU’s application has met requirements for Commission approval under Wis. Stat. § 196.372(3)(e)1., if the Commission conditions approval on the requirement that FWU provide the Commission with a copy of an ordinance that describes a program that does comply with the criteria under Wis. Stat. § 196.372(3)(e)1.

Potential Conditions

Given the concerns raised above, should the Commission approve FWU’s application, Commission staff recommends the Commission consider the following docket-specific condition:

1. FWU shall not commence its program until it secures from the City of Fond du Lac a modified ordinance that allows the utility to provide financial assistance, provides that all financial assistance will come from the utility rather than the City of Fond du Lac, requires all customers with service lines containing lead replace them, eliminates the \$500 loan threshold, and makes the program legally compliant for approval under Wis. Stat. § 196.372(3). FWU shall file additional application materials as determined by Commission staff to document the changes.

Should the Commission approve FWU’s application, Commission staff further recommends the Commission consider the following general conditions that have been imposed on other approved programs:¹¹

¹¹ See, e.g., Final Decision, *Application of the City of Menasha, as a Water Public Utility, for Authority to Implement a Customer-Side Lead Service Line Replacement Program, in the City of Menasha, Winnebago County, Wisconsin*, docket 3560-LS-100 (Wis. PSC June 6, 2019)([PSC REF#: 368602](#), at 16-17).

1. FWU shall record its program expenses and revenues in subaccounts created in the following manner:

- a. Grant Program: Account 664 subaccount
- b. Loan program: Account 124 subaccount
- c. Administrative Costs: Account 664 subaccount.

Using a standardized accounting format will facilitate analysis of FWU's program and allow for appropriate allocation of LSL program costs at the time of FWU's next rate application. This condition will provide for tracking of program costs and will help ensure rates remain just and reasonable.

- 2. FWU shall submit an application for a conventional water rate case no later than two years from the effective date of this Final Decision. This condition will help ensure water rates remain just and reasonable.
- 3. FWU shall file with the Commission, as part of its annual report to the Commission, a report of the number of service lines replaced, as well as program expenses and revenues in a manner that is consistent with the prescribed subaccounts described in Item 4. This condition is intended to reconcile estimated program costs with actual program costs, which will help ensure water rates remain just and reasonable.
- 4. FWU shall receive approval from the Commission prior to making any significant changes to its financial assistance program.
- 5. FWU shall work with Commission staff to develop tariff provisions for the financial assistance program.
- 6. The Final Decision takes effect one day after the date of service.
- 7. Jurisdiction is retained.

Commission Alternatives-Approval and Conditions:

Alternative One: Approve the application without conditions.

Alternative Two: Approve the application with some or all of the docket-specific or the general conditions, and any others identified by the Commission.

Alternative Three: Do not approve the application.

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Key Background Documents

[Notice of Investigation Signed and Served 2-13-20 – PSC REF#: 383783](#)

[Private L&G SL Replacement Application – PSC REF#: 374262](#)

[Exhibit 1 – Ordinances – PSC REF#: 374263](#)

[Exhibit 2 – PSC Report and Maps – PSC REF#: 374264](#)

[Exhibit 3 – Reimbursement Forms, Application, RFO – PSC REF#: 374265](#)

[Exhibit 4 – Financial Projections – PSC REF#: 374266](#)

[Exhibit 5 – Proposed Tariff – PSC REF#: 374283](#)

[Exhibit 6 – Communication Material – PSC REF#: 374284](#)

[Exhibit 7 – Environmental Impact – PSC REF#: 374285](#)

[Exhibit 8 – Environmental Impacts \(Confidential\) – PSC REF#: 374289](#)

[Response to Data Request dated January 15, 2020 – PSC REF#: 382783](#)

Docket 2010-LS-100

Exhibit A

Application Checklist for PSC Approval of Customer-Side Lead Service Line (LSL) Replacement Programs

1. Utility contact information including: name, title, address, phone, and email.
2. A copy of the municipal ordinance required by Wis. Stat. §196.372(2)(a) that:
 - a. Permits the water public utility to provide financial assistance to property owners for LSL replacement; and,
 - b. Requires owners of premises served by a customer-side LSL to replace that water service line.
3. Information about how the Utility will ensure that, per Wis. Stat. §196.372(2)(b): either the Utility-owned main or service line connected to the customer-owned service line does not contain lead or is replaced at the time the customer-owned service line is replaced.
4. Information about how the Utility will ensure that, per Wis. Stat. §196.372(3)(d)(2):
 - a. Grants provided to a property owner are limited to no more than one half of the total cost to the owner of replacing an LSL;
 - b. Loans provided to customers are not forgiven by either the Utility or the municipality;
 - c. If the Utility provides financial assistance as a percentage of the cost to replace a customer-side LSL, that percentage is the same for each owner in a customer class; and,
 - d. If the Utility provides financial assistance as a specified dollar amount, the dollar amount is the same for each owner in a customer class.
5. Information about the Utility's proposed lead service line replacement program, including:
 - a. A current inventory of utility-owned lead service lines as reported on Page W-22 of the Utility's most recent annual report, a description of how the inventory was developed, and, if relevant, a description of any updates to Page W-22.
 - b. A current inventory of customer-owned lead service lines as reported on Page W-29 of the Utility's most recent annual report, a description of how the inventory was developed, and, if relevant, a description of any updates to Page W-29.
 - c. A map showing the location of lead service lines by Public Land Survey System (PLSS) quarter-quarter section or by another methodology acceptable to the Commission.
 - d. A description of program components, phases, schedule, and anticipated program duration.
 - e. A description of how the Utility will prioritize service line replacements, including how the program will be coordinated with other Utility infrastructure projects (main replacement, replacement of Utility-owned service lines, etc.).

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- f. An estimate of program costs, by year, itemized by major accounts as identified in the Commission's [Uniform System of Accounts \(USOA\)](#). Costs should include all administrative, overhead, engineering, legal, construction, and inspection costs.
 - g. Assumptions used to develop estimates of program costs (average cost per customer-owned service line, average length of service line, etc.)
6. A proposed tariff, to be added to the Utility's rates and rules on file with the Commission, that describes the Utility's LSL replacement program and is consistent with the municipality's adopted ordinance.
7. Information describing how the Utility plans to communicate with its customers about the proposed program.
8. Identification and estimated amount of funding sources, including Utility funds, grants, principal forgiveness, loans, and special assessments, and other municipal funding sources.
9. Identification of any permits or approvals required by other state agencies or local governmental units and a statement indicating whether the permits or approvals have been applied for or obtained.
10. Information to allow the Commission to document the environmental impacts of the program consistent with s. PSC 4.10 and coordinate with the WDNR pursuant to s. 30.025, Stats. Please note that in the environmental impact application filing requirements documents linked below, there are detailed instructions for the confidential filing of certain information related to rare species. Please consult these documents prior to filing this information.
 - a. For Type II water projects, which involve the construction of water main that is BOTH eight inches in diameter or greater and at least three miles in length or longer see environmental impact application filing requirements at: <https://psc.wi.gov/Documents/water/ENVAFRwaterTypeTwo.pdf>
 - b. All other water projects that DO NOT involve water main construction of the size and length described above are considered Type III water projects. The environmental impact application filing requirements for those projects can be accessed at: <https://psc.wi.gov/Documents/water/ENVAFRwaterTypeThree.pdf>
11. Estimated water rate impact.