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

Date: August 20, 2009

OPINION #09-002

TO: Ald. Judy Compton

FROM: Michael P. May, City Attorney

RE: The City of Madison 24/7 Taxi Service Policy

You requested my opinion on the legality of the City of Madison's policy, codified in Sec. 11.06, Madison General Ordinance (MGO), that licensed taxicab companies must provide service 24 hours per day, 7 days per week ("24/7 Service") and must serve all areas of the city.

The issue of the 24/7 Service rule has a long history within the City, which will be recounted in detail later. One of my predecessors, City Attorney Eunice Gibson, stated her opinion in a Report to the Common Council dated October 5, 2000, that the 24/7 Service rule was a legally appropriate policy choice for the Common Council. City Attorney Gibson reaffirmed that opinion in a letter dated July 30, 2001. Thus, the real question is whether I disagree with the opinion of former City Attorney Gibson or if I believe that circumstances have changed such that her opinion is no longer viable.

QUESTION PRESENTED:

Is the existing City policy codified in Sec. 11.06(7)(a), MGO, that all taxi operators must provide service 24 hours a day, 7 days a week, beyond the authority of the City or contrary to state or federal antitrust law?

BRIEF ANSWER:

No. I agree with the prior opinions issued by former City Attorney Gibson that the choice to require 24/7 Service is legally within the range of policy choices available to the Common Council under existing law.

However, I recommend that the City from time to time revisit this and other policies related to taxicab licensing within the City, given the frequency of litigation over taxi regulation. The City may find that, over time, the factual situation has changed such that other policy choices may better serve the public.

DISCUSSION:

A. History of the 24/7 Service Requirement.

The relevant history of this requirement goes back over a decade. In November, 1999, the Common Council passed a resolution to set up a subcommittee of the Transit and Parking Commission to explore the merits of taxicab regulation. The subcommittee concluded its work in September, 2000, with a report to the Transit and Parking Commission. It recommended some changes, but recommended retaining the requirement of 24/7 Service rule and service throughout the City. The subcommittee included representatives of the Transit and Parking Commission, other citizens, and representatives of the existing cab companies.

Another member of the subcommittee was Madison citizen Mike Roach, who has been an open critic of the 24/7 rule and argued that there should be greater ability to operate taxicabs in the city. Mr. Roach has expressed an interest in operating a one person taxi company. Information on the subcommittee and its report are attached in Appendix A.

Following completion of the report, City Attorney Gibson issued a Report to the Common Council, giving her legal opinion that the 24/7 Service requirement was a proper policy choice for the City to make under antitrust law. A copy of that report, together with the report of the subcommittee, and City Attorney Gibson's 2001 letter to Mr. Roach indicating that her opinion remained the same as stated in her report, are all attached to this Opinion as Appendix A.

Based upon the report of the subcommittee, the Common Council made some changes in the City's taxicab ordinance, but retained the 24/7 Service requirement. The subcommittee report concluded that it was necessary to have 24/7 service so that those who were dependent on Metro transit could obtain transportation service when Metro was not running.

There followed some spirited discussion in legal magazines, as City Attorney Gibson wrote an article about the process and issues involved which was published in the *Municipal Lawyer* magazine in the May/June, 2001 issue. Her article prompted a reply from Professor Carstensen, which I believe is also published in the *Municipal Lawyer*. Copies of those documents are attached to this legal opinion as Appendix B.

Within the last year, Mr. Roach has renewed his push for operation of a single person taxi cab company. This City Attorney and City staff (Bill Knobeloch and Keith Pollock) met with Mr. Roach, along with Professor Carstensen and Professor Rodney Stevenson of the UW Business School.

B. Legal Developments Since the Prior Opinion.

I will not repeat the basic analysis provided by City Attorney Gibson in her Report. The authority of the City to regulate in this area is clear; I agree with her conclusion that, while the 24/7 Service requirement and city-wide service requirement pose some barriers to entry, they are not unreasonable barriers, given the policy the City wishes to pursue.

The question then becomes if there has been some legal or factual change since 2001 that suggest the prior Opinion should be changed. I am not aware of any significant factual changes that would impact the policy choice made by the City.

The most significant legal decision since the opinion issued by City Attorney Gibson is the decision of the Supreme Court of Wisconsin in *County of Milwaukee v. Williams*, 2007 WI 69, 301 Wis. 2d 134, 732 N.W.2d 770 (2007). In the *Williams* case, taxi cab drivers appealed from a decision finding that they had violated a county ordinance for picking up passengers at Mitchell airport without a permit. In this decision, the Supreme Court found that the ordinance adopted by Milwaukee was contrary to a state statute, Sec. 114.14, Wis. Stats., which regulated the operation of airports. Although the statute gave the county authority to regulate airports, it also required that the "public may in no case be deprived of equal and uniform use of the airport." *Williams*, ¶23. The Court found that the county ordinance was contrary to this provision of the statute, and overturned the fines imposed on the cab drivers.

The petitioner also argued that the County ordinance – indeed, all regulatory actions by governmental bodies – must be interpreted in light of Wisconsin's antitrust provisions, set out in Chapter 133. Petitioner argued that all regulations must be as pro-competition as possible. The State Supreme Court summarized and rejected the petitioner's argument (*Id.* at ¶ 46-47):

> Thus, they argue, any regulation must "employ the least anti-competitive means to achieve any legislative mandated goal."
>
> The petitioners' view is supported by neither the language of Sec. 133.01, nor the cases cited. Further, the petitioners' view would subject the enforcement of any regulation affecting competition to litigation regarding the regulation's affect on competition. We therefore decline to adopt it here.

The Court went on to reiterate that it rejected this view of the law, later in the opinion. *Id.* at ¶ 53-55.[1]

1 Professor Carstensen was one of the attorneys for the petitioners who presented this argument which was rejected by the Court.

Subsequently, in *Eichenseer v. Madison*, *Dane County Tavern League*, 2008 WI 38, 308 Wis. 2d 684, 784 N.W.2d 154 (2008), the State Supreme Court rejected an antitrust challenge to a decision by a number of Madison taverns to restrict drink specials on certain nights of the week. The issue in this case was an implied exclusion from the antitrust laws for the taverns' conduct, which was in accord with regulations imposed by the City on other taverns and was done pursuant to pressure from City of Madison elected officials. In ruling that the taverns conduct did not violate the antitrust laws, the Court recognized the important public policy involved in the regulation of alcohol. *Eichenseer*, ¶ 65-66.

While *Eichenseer* is not directly on point, the Court's recognition of the roles municipalities play in regulating economic conduct is significant.

One of the key Wisconsin cases on antitrust liability of municipalities, discussed in both the *Eichenseer* ruling and in City Attorney Gibson's opinion is *American Medical Transport v. Curtis Universal, Inc.*, 154 Wis. 2d 135, 452 N.W.2d 575 (1990). In that case, the Supreme Court found that the dividing up of ambulance services into various portions of the city was anti-competitive, and that, unlike the situation in the *Eichenseer* case, there was no state law that authorized that action.

I raise the *American Medical Transport* case only to note that the legislature's swift response to that decision was the enactment of Sec. 62.133, Wis. Stats., which expressly authorizes the type of authority condemned in the *American Medical Transport* case.

In *Flying J., Inc. v. J. B. Van Hollen*, 597 F.Supp.2d 848, (E. D. Wis., 2009), the Federal District Court in Milwaukee found that Wisconsin's minimum gasoline price markup law violated the Sherman Antitrust Act and was therefore unconstitutional. In so doing, the court found that there was no state action immunity under the antitrust laws because the price fixing scheme established by Wisconsin was not actually monitored by any state entities. The *Flying J* decision does not appear to have significant application to the Madison taxicab regulation, which is not price fixing at all. The City of Madison does not set prices for taxi services.

In a case arising in Pennsylvania, *Capital City Cab Service, Inc. v. Susquehanna Area Regional Airport Authority*, 470 F.Supp.2d 462 (M. D. Penn, 2006), the Susquehanna Airport entered into an exclusive agreement with one taxi company to pick up outgoing passengers, following a bidding process. The airport authority was sued for violation of Sherman Antitrust Act, with the cab companies excluded from the deal seeking damages from the airport authority.

In dismissing the complaint against the airport authority, the court found that there was not adequate state authorization to enter into such exclusive contracts. However, the court dismissed the complaint because the plaintiffs sought damages from the

municipal entity. Under both federal and state law, municipalities may be sued for injunctive relief under antitrust laws, but are not liable for damages or attorneys fees.[2]

Several other cases involving cab companies bringing antitrust actions were discussed either in the legal opinion rendered by City Attorney Gibson, or in her accompanying article in the *Municipal Lawyer* magazine.[3]

None of these cases cast significant doubt upon the ultimate conclusion previously reached by City Attorney Gibson, namely, that despite the fact that the 24/7 Service and city-wide service requirements do impose some barriers to entry, they appear to be a reasonable policy response to a stated need in the city to provide service to all areas of the city and at all hours of the day. The rationale behind the prior report to the Common Council and as noted by City Attorney Gibson still seems valid.

This is not to say that there might not be other public policy choices that the City could make which might serve those same ends, and perhaps might serve those ends more efficiently or effectively. That is a decision for the Common Council to make. I note, for example, that the City's ordinance allows the provision of certain accessible taxi service through entry into contracts. Sec. 11.06(7)(a), MGO.[4] There likely exists a range of policies that the Common Council could consider, if it so desired.

Those, however, are public policy issues, not legal requirements. The State Supreme Court has firmly rejected that the proposition that all regulation in any area must be done in a manner which most effectuates competition. Under that standard, the City's current policy is enforceable.

I recommend, however, that the City review its policies in this area from time to time. As can be noted from the cases cited above, litigation over competitive aspects of the taxicab industry is common. The City should be willing to review its existing policies and requirements at regular intervals to be certain that it meets the City's goals, and that there is not some other alternative that the City finds to be a better way for licensed taxis to provide efficient service to the City's residents and visitors.

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2 Wis. Stat. § 133.18(1)(b) and the Local Government Antitrust Act of 1984 P.L. 98-544, 15 U.S.C. Secs. 34-36.

3 See, e.g., *Yellow Cab Company v. City of Chicago*, 919 F.Supp. 1133 (N.D. Ill, 1996) (lease rates established by city do not violate due process or equal protection, but could be examined for whether they constituted an unlawful taking); *Santos v. City of Houston*, 852 F.Supp. 601 (S.D. Tex, 1994) (1924 ordinance that barred operation of jitney service to protect no longer existent city street car companies violated Sherman Act); Campbell v. City of Chicago, 823 F.Supp 1182 (7th Cir., 1987) (city is immune from antitrust claim for passing ordinance limiting the number of taxicabs within the city.)

4 The ordinance does not expressly authorize providing 24/7 Service by contract, and it is not likely that the City could approve such an arrangement without modification of the ordinance. Any such contractual arrangements must be mutual; a licensee could not meet a number of service requirements by simply forwarding calls to another licensed taxicab company.

CONCLUSION:

The City's requirement in Sec. 11.06, MGO, that taxicab companies provide service 24 hours a day, 7 days a week, throughout the City, is not an unreasonable restraint of trade, but is a policy choice within the legal range of choices available to the City. The City should review these policies on a regular basis to be certain they still meet existing conditions.

Michael P. May
City Attorney

cc: Mayor Dave Cieslewicz
All Alderpersons
City Clerk Maribeth Witzel-Behl
Dave Dryer
Bill Knobeloch
Keith Pollock

SYNOPSIS:

The City's ordinance requiring taxicabs to provide service 24 hours per day, 7 days per week, throughout the City, is legally within the range of policy choices available to the City under state and federal antitrust laws, consistent with a prior informal opinion by City Attorney Gibson.

APPENDIX A

Office of the City Attorney

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July 30, 2001

Mike Roach
2019 Sherman Avenue
Madison, WI 53704

RE: Taxicab Regulation

Dear Mr. Roach:

I have your letter of July 28, related to the application of Sec. 133.01 et seq, Wis. Stats. to the City of Madison ordinance regulating taxicab licensing. Last year I furnished a report to the Common Council when it was asked to consider that issue. I am enclosing a copy. This report still expresses my legal opinion on this subject.

Very truly yours,

Eunice Gibson

Eunice Gibson
City Attorney

EG:ssv

Enclosure

cc: Mayor Bauman
Ald. Gary Poulson, President, Common Council
Ald. Jean MacCubbin
Ald. Brenda K. Konkel
ACA Lara Mainella

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City of Madison, Wisconsin

AGENDA ITEM NO. _____

REPORT OF _____

Presented _____
Referred to _____
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Rereferred to _____
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Reported Back _____
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Adopted _____
Rules Suspended _____
Placed on File _____

ID No. _____

The City Attorney

Date: October 5, 2000

_____

RE: Report of the Ad Hoc Committee on Taxi Deregulation

The decision as to whether or not to adopt the report with its recommendations is a policy decision for the Council to make. A number of comments have indicated that adoption of the Committee's recommendations, or leaving the present regulatory ordinance unchanged, would violate state or federal antitrust law. In my opinion, those comments are unsupported in the law.

Professor Peter Carstensen of the University of Wisconsin Law School has furnished a paper in which he gives his opinion that the City's present ordinance, Sec. 11.06, Madison General Ordinances, violates antitrust law. In February, 2000, I furnished him with research materials produced in my office. In September, 2000, I requested that, in return, he furnish me with research information, identifying by name and citation the cases to which he referred in general terms. He has not responded. Therefore, this report will comment only on the written materials he has furnished to the Ad Hoc Committee on Taxi Deregulation and to the Transportation and Parking Commission up to this date, including his memo dated October 4, 2000.

Most of the material provided by Professor Carstensen is of a policy, rather than a legal nature. Some of the factual assertions are incorrect. City Transportation staff can furnish information on those points. He suggests (October 4 report, page 2) that a person needing late-night transportation to a hospital ought to call an ambulance instead of calling a taxicab. The Council may conclude that that option would impose an unreasonable financial burden, both on the individual and on the City, and that the City ought not to encourage it.

This report will respond only to legal arguments. The Mayor and Council are best able to assess the facts and the various policies being proposed.

Professor Carstensen has suggested that the City's ordinance ought not to require a determination of "public convenience and necessity" for taxicab licenses. The Ad Hoc Subcommittee agreed and has recommended that that requirement be repealed.

Cities are permitted by Wisconsin Statutes to regulate taxicabs and taxicab operators in the interest of public safety. Sec. 349.24, Wis. Stats. In addition, the "home rule" statute, Sec. 62.11(5), Wis. Stats. grants city councils broad powers to "act for the government and good order of the city." At the same time, such regulations are not exempt from the Wisconsin antitrust law, Sec. 133.01, et seq., Wis. Stats. However, "Only unreasonable restraints of trade are prohibited." Independent Milk Producers Coop v. Stoffel, 102 Wis. 2d 1, 298 N.W. 2d 102 (Ct. App. 1980). Only one case in Wisconsin has found a city's regulation to violate Wisconsin antitrust law, and that was a case where the City of Milwaukee had divided its area into four sectors and allocated only one sector to each of four ambulance companies. Three other companies were only allowed to furnish ambulance service on a "back-up" basis. American Medical Transport v Curtis-Universal, 154 Wis. 2d 135, 452 N.W.2d 575 (1990). In that case, it was undisputed that the Milwaukee regulation was anti-competitive. Milwaukee argued that the statutes permit an anti-competitive regulation. The Supreme Court said no.

Are Madison's current taxicab regulations anti-competitive? They do not regulate rates charged, except that they require rates to be filed with the City Clerk and they require notice and a waiting period before rate changes. They do not limit territories and they do not limit the number of companies or the number of vehicles. They do impose safety, insurance, and service requirements. I maintain that the Mayor and Council have the right to impose these regulations if they reasonably believe such regulations benefit the citizens of Madison.

Prof. Carstensen claims that the requirement that taxis serve every part of the city and provide 24-hour service limits entry into the taxi business. That alone does not constitute a prohibited restraint of trade. Entry into any business is limited by start-up costs and start-up costs may be imposed by legitimate regulations. For example, restaurants are not permitted to open if they do not have the equipment required to serve food safely. No one can claim that such safety requirements are anti-competitive, even though they do require an investment that many people would not be able to afford. Such regulations may limit entry, but they are not the kind of regulations which constitute an antitrust or antimonopoly violation.

On page 7 of the October 4 document, Prof. Carstensen proposes that the City impose a tax on daytime cab fares. The City has no authority to impose such a tax.

Finally, his analysis of applicable statutes (October 4 report, pages 9-11) omits any reference to the "home rule" statute, Sec. 62.11(5), Wis. Stats. The most important decision of the Wisconsin Supreme Court relating to compliance by municipalities with the antitrust laws, points out that the "home rule" statute must be considered. Town of Hallie v. City of Chippewa Falls, 105 Wis. 2d 533, 539, 314 N.W. 2d 321 (1982).

The City Attorney and staff have the greatest respect for Prof. Carstensen and the assistance he has offered on this issue. His comments on the policy issues will be of help to the Mayor and Council. I must respectfully disagree with his legal conclusion. We can never promise that litigation will not take place, and we can never promise with certainty what its outcome will be. In this case, however, the threat is not of the kind that should impose the demanded limit on the Council's decision-making. I recommend that the Mayor and Council

decide this as they decide other policy issues, based on their considered judgment as to what is best for the citizens of Madison.

Respectfully submitted,

/s/
Eunice Gibson
City Attorney

eg:cam

City of Madison
INTER-DEPARTMENTAL
Correspondence

Date: Sept. 1, 2000

To: **Transit and Parking Commission**

From: **Ad-hoc Sub-committee on Taxicab Deregulation**

Subject: **Final Report**

SYNOPSIS OF RESULTS

For the seven months preceding these recommendations, members of the subcommittee exhaustively pursued input from presenters, published materials, reports, analyses and phone interviews with people involved in the industry from other cities regarding the options and effects of various deregulation scenarios. Though the subcommittee did not reach consensus on all issues discussed, it did concur unanimously that an ordinance regulating taxicabs does serve the public interest. Its task, therefore, was to consider modifications to the ordinance, not purging the ordinance in the strictest sense of deregulation.

The subcommittee found that Madison currently is a minimally regulated city vis-a-vis taxicabs compared to other cities. Other cities have regulations that cap the number of permits, or set the fares. Colorado, for instance, restricts the number of cab companies that can enter a market and requires an initial fleet size of at least 25 cabs. No new demand responsive general purpose cab company has been licensed in Madison since 1986. No applicant has been denied a general purpose taxicab operating license since at least 1991.

A difficult task for the subcommittee in its deliberations was to balance the interests of service providers with service consumers. Despite claims that potential entrants into the market would prefer elimination of Madison's minimum service requirements, i.e., the prohibition against refusal of service because of time of day or location of the origin of the call, the subcommittee reaffirmed the 24-hour requirement and the city wide service requirement.

On the other hand, the subcommittee recommends streamlining the application process for new licensees, eliminating the proof of public convenience and necessity requirement and a reduction in the application fee.

The subcommittee has also identified additional areas of taxicab regulation/oversight that the TPC may consider acting on separately in the future.

BACKGROUND

The Mayor's Task Force on Race Relations recommended that "The Mayor, Common Council and Transit and Parking Commission should study the merits of taxi deregulation." As further explanation, the Task Force notes "Madison's current taxi regulations are seen by some to create barriers to competition for low-income and for minority entrepreneurs who may have limited access to start-up capital. Deregulating Madison's taxicab industry could provide new business opportunities for low-income and minority entrepreneurs. The Task Force acknowledges that necessary regulations concerning vehicle safety, driver competence, insurance coverage, and other quality of service provisions of regulations need to be retained."

PROCESS

In November 1999, Resolution # 56755 was adopted by the Common Council to set up a subcommittee of the Transit and Parking Commission to explore the merits of taxicab deregulation. This was endorsed by the Transit and Parking Commission. The subcommittee was to be made up of:

- Two representatives of the Transit and Parking Commission,
- A taxicab user,
- Representatives of each of the three taxicab companies doing business in Madison,
- Two advocates of a more open taxicab market,
- A representative of people with disabilities,
- A representative from the visitor industry,
- A representative from the business community,
- A representative of the Madison Metropolitan School District,
- A representative of the Dane County Department of Human Services,
- A University of Wisconsin representative designated by the Chancellor's office and
- A University of Wisconsin student representative.

Five of these members were to have no voting rights – the two open market advocates and the three cab company representatives. Two of the original members later resigned. The membership was later amended to include two members with specific representation of racial/ethnic groups and voting rights were extended to all members of the committee. The subcommittee elected Carl Durocher as chair and Peter Quigley as Vice-Chair. The chair would only vote in the event of a tie. Two City staff members were assigned to assist the committee; a facilitator from the Comptroller's Office and a staff member from the Transportation Department familiar with taxicab issues. The subcommittee was asked to submit its findings to the Transit and Parking Commission and the Equal Employment Opportunities Commission by September 30, 2000.

The membership list is attached. The subcommittee met thirteen times on weekday evenings to discuss this issue and to develop recommendations to the Transit and Parking Commission. Numerous speakers, issue papers, phone interviews, e-mails, Faxes and phone calls were used to gather information about taxicab deregulation. Various persons appeared informally and gave their views to the subcommittee. The EOC presented a statement that favors deregulation. Partial deregulation in other cities such as Indianapolis and Denver were reviewed. Some members of the subcommittee conducted a taxicab driver survey. A summary of this taxicab driver survey follows:

"Most drivers responding report no interest in forming a cab company and believe the 24-hour service requirement should remain in force. Drivers were not given an explicit option of retaining the 24-hour

service requirement for some companies, but not all. Given the question as worded, drivers hold nine to one that the 24-hour service requirement should be retained. Several drivers have at least thought seriously about starting their own companies. They are among the most experienced drivers."

ISSUES IDENTIFIED

Early in the process, the subcommittee identified ordinance requirements that may limit the ability of low-income individuals from starting single-vehicle taxicab companies.

- Twenty-four hours, 7 days per week service requirement.
- Citywide service requirement.
- Required public hearings.
- City fees.
- Need to demonstrate Convenience and Necessity for an additional taxicab company.
- Driver hours limited to 12 continuous hours.
- Permanent markings on vehicles used as taxicabs

RECOMMENDATIONS

Retain the twenty-four hour, 7 days per week service requirement.
While the subcommittee realizes the impact on potential one-person taxicab operations, it voted by majority vote to retain this provision. The subcommittee feels that 24-hour service is a very important service priority for the community, especially for those that are transit dependent. Since there is no Metro bus service after 11:30 p.m., people that are transit dependent might have no means of public transportation after this time if the cab companies choose not to provide this service. The subcommittee does not recommend a two-tier regulatory system that treats small companies differently than large companies. This could lead to "cherry picking" where small companies concentrate on more lucrative peak-hour taxi times, leaving the slower less lucrative times to the larger companies. Staff pointed out that flat-rate specialized vehicles are not required to operate 24 hours a day and do not have service after 11 PM leaving passengers who cannot transfer from their wheelchair without service after this time. The subcommittee feels that all metered and zoned companies should be treated equally from a regulatory perspective on this issue.

Retain the citywide service requirement.

While the subcommittee realizes the impact on potential one-person taxicab operations, it voted by majority vote to retain this provision. The subcommittee feels that all cab companies should provide service to all sections of the city. Niche markets can and are being served by contractual transportation arrangements that are unregulated by the City. A local unregulated contractual van service for instance, uses seven vans to transport passengers to and from various institutions. Numerous specialized transportation companies provide contractual lift-equipped van service to people with disabilities without City licensing or regulation. In voting to retain this provision the subcommittee hopes to minimize the possibility of: redlining challenged neighborhoods and denial of service to periphery markets and short-haul taxicab rides. Since these markets can be unprofitable trips for taxicab companies, those passengers may be left without service. Refusal of service would be extremely difficult to detect and prosecute if cab companies were allowed to serve only certain segments of the community.

Eliminate the public hearing requirement for applicants of a taxicab operating license.

The subcommittee voted to eliminate the public hearing requirement for those seeking a taxicab license. This will lessen the cost/fees charged applicants and shorten the time span of the process. The subcommittee recommends that the applicant file with the Clerk's office and the City Traffic Engineer or designee review the application and make the necessary investigation. Public notice should be given when an application is filed for a new company license. The Traffic Engineering office will then make a recommendation to the Transit and Parking Commission, who, in turn, will make a recommendation to the Common Council. The Common Council will retain the authority and responsibility to issue or deny any taxicab license. The applicant will have an opportunity to present information to the Transit and Parking Commission and the Common Council in consideration of the license.

Lower the fee charged taxicab operating license applicants from the present $1500 to $1000.

City staff has advised the subcommittee that eliminating the public hearing may save the city as much as $500. City staff and the subcommittee recommends lowering the fee to $1000 to new applicants. This fee pays for the annual license (renewals cost $500) and the licensing process. City staff will review the costs to make sure the fees are appropriate after one year of operation (assuming a new applicant has gone through the system). The subcommittee does not feel the fees to new operating license applicants should be lowered and that the difference be made up with higher per-vehicle fees to all licensed operators.

Eliminate the need to prove public convenience and necessity to obtain a license.

City staff has advised the subcommittee that this provision has not been used to deny a taxicab operating license in the past ten years. The subcommittee does feel, however, that this could be used to deny a future license application and it could be used in a political fashion. It serves no useful purpose in today's marketplace and should be eliminated.

Retain the 12 hour continuous driving limit.

The subcommittee recommends the retention of the 12 hour continuous driving limit for taxicab drivers, however, recommends that the time allowed to be deducted for breaks be lowered to one-hour minimums versus the current two-hour minimum. This means, for instance, that a driver could drive for 13 hours if she/he has taken a one-hour continuous break or a driver could drive up to 16 hours if she/he has taken four hours of breaks. A driver must still take an eight hour continuous break in each 24-hour period. The subcommittee feels this is a safety item and increasing the allowable driving time could be dangerous for drivers and passengers.

The subcommittee did not vote on the following items, however, the committee feels that staff and the Transit and Parking Commission should review them

- Cost-based fee system
- Flat-rate cab requirements
- Service requirements
- Service refusal

- Insurance
- Vehicle markings
- Minimum vehicle requirement
- Specific language to allow associations of independent drivers
- Scheduled fixed route jitney service

MEMBERSHIP

AD HOC SUBCOMMITTEE ON TAXICAB DEREGULATION

NAME	POSITION	ADDRESS	PHONE	E-MAIL	FAX
Carl Durocher	T & P Member	1441 Williamson St Madison, Wi 53703-3726	251-8637 h 257-5917 w	Carld@GDInet.com	
Peter Quigley	T & P Member	925 Menomonie Ln Madison, Wi 53704-1031	244-4637 h	Pquigley@dainrauscher.com	
Franklin Monfort	Taxicab User	501 N Henry St. #404 Madison, Wi 53703-1813	256-8528 h	Montfort@compuserve.com	
Thomas Ziarnik Howard Johnson	Visitor Industry	525 W Johnson Madison, Wi 53703	251-5511(w)	Hjplaza@inxpress.net	
David Jensen	Business Community	5022 Odana Rd Madison, Wi 53711-1160	274-1392 h	David@dajensen-family.com	
Renee Bremer	Madison Metro School Dist.	545 W. Dayton St. Madison, Wi 53703	873-8769 h	Rbremer@madison.k12.wi.us	261-7309
Norah Cashin	Dane County Human Services	1202 Northport Dr Madison, Wi 53704	242-6486 w		
Jane Goemans	UW Chancellor	1508 Sundt Ln. Stoughton, Wi 53589	262-9798 w 877-4151 h	Jane.goemans@ccmail.adp.wisc.edu	
Erica Hawkinson **RESIGNED (MOVED)**	UW Student	502 N Frances St. 407E Madison, Wi 53703-1007	661-1749 h	Efhawkinson@students.wisc.edu	
Maureen Arcand	Disabled Community	2610 Myrtle St Madison, Wi 53704	244-1510 h		
Barry Heller	Cab Co. Rep Union Cab	Po bx 3513 Madison, Wi 53704	242-2015 w	Barry-heller@unioncab.com	
Kurt Schneider	Cab Co. Rep Badger Cab	2413 E Dayton St Madison, Wi 53704	256-1363 w 241-1821 h		
Rick Nesvacil	Cab Co. Rep Madison Taxi	1403 Gilson St. 53713	258-7454 w	Rtaxi81@aol.com	
Mike Roach	Open Market Advocate	2111 University Ave Madison, Wi 53705-2329	233-6592 h	Maroach@facstaff.wisc.edu	
David Velazquez Confirm 4/11/2000	Racial/Ethnic group rep	813 N Thompson Dr. P O Bx 8142 Madison, Wi 53708-8142	240-0516 h		
Dora Auniga Confirm 6/6/2000	Racial/Ethnic group rep	1821 Kropf Av. Madison, Wi 53704-3415	245-0061 h		
Kevin Houlihan	Facilitator	City of Madison	266-5965 w	Khoulihan@ci.madison.wi.us	267-8705
Bill Knobeloch	Staff	City of Madison	266-6537 w	Bknobeloch@ci.madison.wi.us	267-1158

Speakers at the Ad Hoc Subcommittee on Taxicab Deregulation

Warren Somerfeld, former director of City of Madison Transportation Department spoke about the history of taxicab regulation.

Peter Carstensen of the UW Law School spoke on anti-trust issues.

Eunice Gibson, City Attorney, spoke about the work of the committee and the City Ordinance regulating taxicabs.

Bill Knobeloch spoke at various meetings about the current regulation of taxicabs.

Barry Heller of Union Cab and Kurt Schneider of Badger Cab spoke about their companies including history and operation.

Mark Grendzinski of Gallant Knight Limousine, Inc. spoke about entry into the limo business in Madison.

Sergeant Emil Quast of Madison Police spoke about driver permitting.

Professor Rodney Stevenson of UW Public Utility Institute spoke about public utilities.

Nino Amato, Chair of the Task Force on Race Relation for the City of Madison spoke about its goals and a letter sent to the committee.

Steve Schmidt of Indianapolis spoke to the committee via phone about changes in the regulations in Indianapolis.

Gorman Gilbert spoke to the committee via phone about studies in similar cities including San Diego, Indianapolis, and Seattle.

APPENDIX B

May/June 2001

Municipal Lawyer

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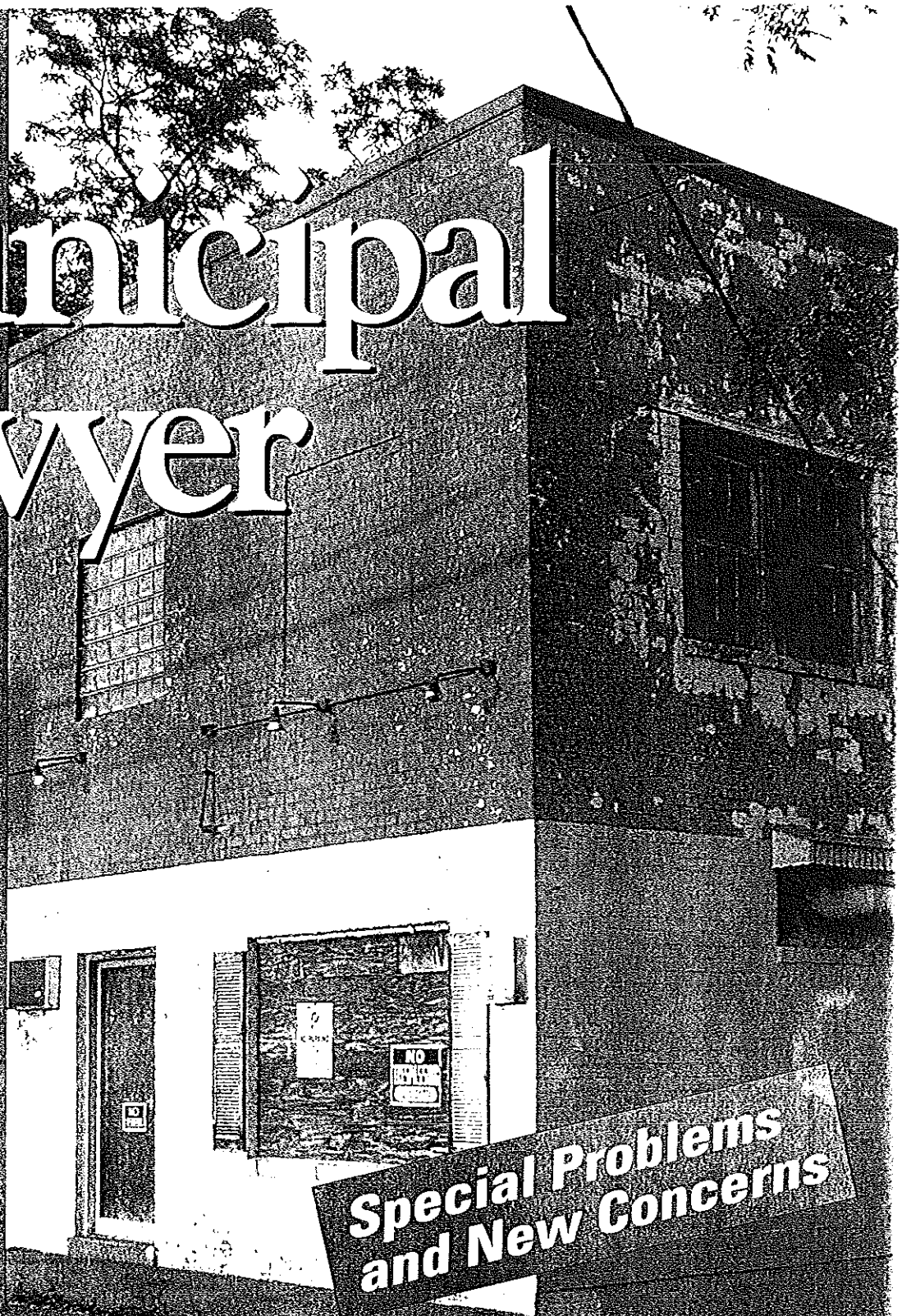
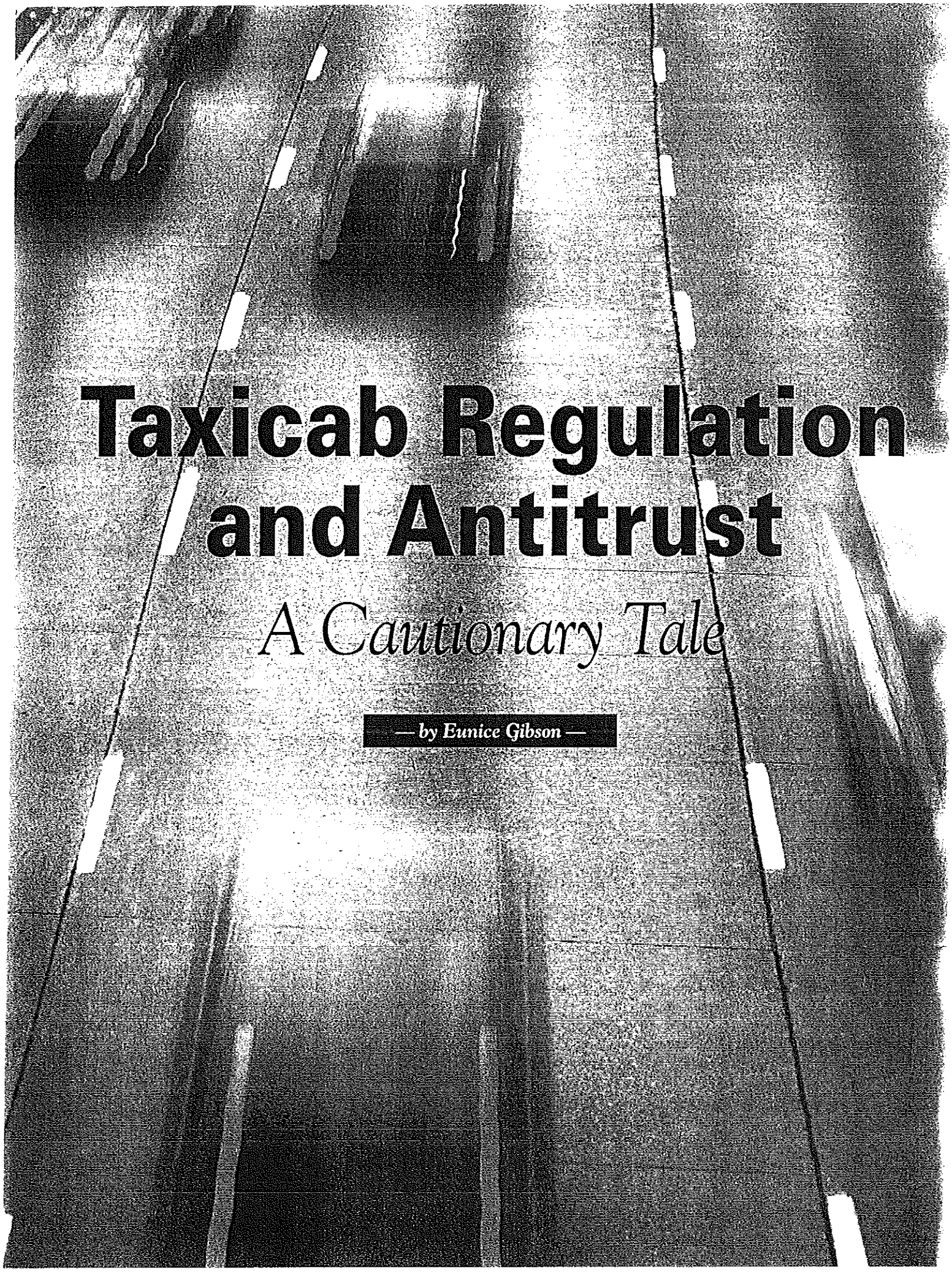


In this issue:

Special Problems and New Concerns

Code Enforcement Conundrums



Taxicab Regulation and Antitrust

A Cautionary Tale

— by Eunice Gibson —

Once upon a time, a young man in Madison, Wisconsin dreamed of starting his own taxicab company. He would use his personal automobile to drive people here and there—probably just between the airport and downtown hotels—when he felt like driving. He would be a small business owner. But his dreams were dashed when he learned that in order to be licensed in the City of Madison as a taxicab operator, he would have to offer taxi service to all locations within the city's corporate limits, and that he would have to offer service twenty-four hours a day, seven days a week. He was appalled. It was un-American. Such regulations are surely illegal and unconstitutional, he maintained. He demanded a hearing before the City's regulatory commission.

Perhaps in many cities, the commission members would just have nodded sympathetically and passed on to the next item on their crowded agenda. But this wasn't many cities, it was Madison. The commission appointed a subcommittee to study the young man's complaint. Thus began a crusade that lasted more than a year, involving the subcommittee and, eventually, the Madison city council, in complex legal arguments. In the process, the young man's crusade revealed the connection between an extreme right-wing political agenda of eliminating all economic regulation, and the taxicab rules that most cities adopt under their police powers.

State and Local Laws

Wisconsin statutes authorize cities to regulate taxicabs,[1] and specifically empower cities to regulate and license taxicab drivers and taxicab businesses, and to prohibit unlicenced taxicab businesses and unlicenced taxicab drivers. The statute does not identify or limit any particular kind of taxicab regulation. Other states have similar statutes.[2]

Most cities regulate the operations of taxicabs. They have an interest in assuring neighborhood taxi service,[3] as well as an interest in providing for safe and adequate taxi service throughout the city.[4] Since every city is different, cities argue that these regulations, though authorized by state law, have to be local in nature. For example, congestion issues in Chicago are unique;[5] insurance requirements may need to be higher in New York. It follows that regulations vary considerably from city to city. Some cities regulate rates that taxis may charge.[6] Most cities regulate qualifications for cars and drivers, and impose insurance requirements.[7] Some of these regulations are closely related to passenger safety. For example, Madison and other cities limit the number of consecutive hours that a driver may work.[8] Other regulations are closely related to quality of service. Madison, Chicago, Honolulu, and other cities do not allow taxicab companies to deny service to certain neighborhoods.[9] Regulations may also attempt to reduce traffic congestion.[10] Some cities regu-late the number of licenses (medallions) that may be issued;[11] some require each company to have a minimum number of taxis.[12]

Wisconsin statutes authorize cities to regulate taxicabs, and specifically empower cities to regulate and license taxicab drivers and taxicab businesses, and to prohibit unlicensed taxicab business and unlicensed taxicab drivers. The statute does not identify or limit any particular kind of taxicab regulation. Other states have similiar statutes.

The regulation of taxicab service often extends to regulation of competition among taxicab companies. For instance, the regulation of taxicab lease payments in Chicago was approved on the basis of safety. It protected consumers from tired, overworked cab drivers.[13] However, such economic regulations are also sometimes approved on a more purely economic basis. In Chicago, the regulation of lease payments was also approved because it "provides drivers with the opportunity to earn a fair and reasonable income."[14] Atlanta's imposition of minimum fare rates was approved because it allowed dif-ferent modes of transportation "to find a niche," and it allowed operators to earn enough to meet the operational requirements set by the city, like insurance.[15]

The Situation in Madison

Madison's regulations are fairly typical. Madison imposes insurance requirements, and driver and automobile qualifications. It does not limit fares, but requires that fares be filed with the City Clerk and painted on the door of the cab. It does not limit the number of companies or the number of cars, but it does require that each company furnish service twenty-four hours a day, seven days a week ("24/7 service"), and serve every part of the city. It imposes strict limitations on the ability of a driver to refuse a fare.[16]

Enter the far right political agenda, calling for an end to all government regulation of economic activity, but disguised as the friend of minority business opportunity. An impoverished but ambitious member of a minority group would not be able to start his own taxi

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Eunice Gibson has been City Attorney of Madison for nine years, and was the Assistant City Attorney for 17 years. She graduated from the University of Wisconsin Law School. Eunice chairs IMLA's Personnel Section and is IMLA's State Chair for Wisconsin; she has also served as President of the Section on Individual Rights and Responsibilities of the State Bar of Wisconsin (she is currently the Secretary-Treasurer), as chair of the State of Wisconsin Personnel Board, on the Governor's Commission on the Status of Women, as Program Chair of the Dane County Legal Association for Women, and on the Board of Directors of the Government Lawyers Division of the State Bar of Wisconsin.

TAXICAB REGULATION

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company, argued our disappointed would-be entrepreneur (who was himself not a member of a minority group). Because of the 24/7 service and service to all parts of the city requirements, he would have to own at least three cars and need at least two employees or partners. How could he obtain financing for such an investment? This might not seem to be a particularly heart-tugging argument, but it was supported by some far-right heavy hitters. Madison's subcommittee was bombarded with literature from the Reason Public Policy Institute (RPPI), the Heritage Foundation, and the Institute for Justice (IJ).

The Institute for Justice bills itself as the nation's premier libertarian public interest law firm.[17] It brings lawsuits attacking affirmative action and supporting education vouchers for religious schools.[18] It is working for the reversal of the Slaughter-House cases, decided in 1873, because it claims that the "privileges or immunities" language in the Fourteenth Amendment guarantees to businesses the right to be free from state or local regulation of any kind.[19]

Dr. Sam Staley, deputy director of RPPI, besides furnishing numerous documents, visited Madison and gave a radio interview. By way of background, Dr. Staley was profiled in a May 2000 magazine article[20] which identified thirteen "free market think tanks" which argued for the elimination of land use regulations, and which were very much opposed to mass transit. In the article, Dr. Staley is described as an "ideologue," a "passionate critic of the Smart Growth planning idea," and a "free-market activist."[21] This view was confirmed by his argument opposing Madison's taxi regulations. He referred to Madison's fairly modest regulations as creating "an entrepreneurially hostile regulatory climate." The references he cited were his own article in "The Freeman," another article from The Buckeye Institute for Public Policy Solutions (one of the thirteen conservative think tanks identified in the May 2000 article referred to above), and a book by Walter Williams entitled *The State Against Blacks*. This book was also distributed to Madison's Equal Opportunities Commission, which was asked to consider the taxi regulation issue. It is a Manhattan Institute for Policy Research book, which states that Professor Williams' research was funded in part by the Heritage Foundation.[22]

There is nothing new and nothing wrong with furnishing political views to local government agencies. However, some of the legal arguments made against taxicab regulation require closer examination. Dr. Staley's statement advised Madison officials that "in Denver, Colorado...the cab industry was opened up to competition through a legal challenge...." In fact, the legal challenge brought by the Institute for Justice was unsuccessful.[23] After the federal district court had rejected the Institute's legal arguments, the Institute sought and obtained its solution from the legislature. Nevertheless, numerous articles boast of this "legal victory." It furnished Madison officials with videotapes of evening news reports where Tom Brokaw and Dan Rather, apparently accepting the Institute's version, report on this "legal victory," without relating that it was obtained in the legislature and not in the courts.

The Antitrust Issue

In Madison, Dr. Staley and Institute supporters threatened the City Council with an antitrust lawsuit. Municipal attorneys who advise cities, counties, and airport authorities need to be aware that taxicab regulations can be attacked under antitrust laws and that, because libertarian think tanks have focused on taxicab regulation, those attacks will probably continue. When Congress passed the Sherman Antitrust Act in 1890, it was unclear whether the Act was intended to apply to anti-competitive activities of states. In *Parker v. Brown*,[24] the U.S. Supreme Court held that the Sherman Act did not apply to "activities of state officers." Municipalities are not state officers, and in 1982, the U.S. Supreme Court held that municipalities could be assessed damages for antitrust violations.[25]

In 1984, Congress passed the Local Government Antitrust Act.[26] The Act bars plaintiffs from recovering money damages from local governments in federal antitrust suits. Shortly thereafter, the U.S. Supreme Court substantially expanded the scope of municipal antitrust immunity.[27] A municipality can claim federal antitrust immunity if it demonstrates that it is engaging in the challenged activity pursuant to a clearly expressed state policy.[28] It is not necessary that the state legislature explicitly authorize the anti-competitive conduct, so long as the anti-competitive effects would logically result from the authority to regulate.[29]

As stated earlier, most states authorize cities to regulate taxicabs; therefore, cities will argue that the anti-competitive effects of such regulations are "foreseeable consequences" and are immune from federal antitrust liability.[30] Many states, however, have their own antitrust laws. Wisconsin's antitrust law is very strict.[31] The arguments against Madison's taxicab regulations were based primarily on Wisconsin's antitrust law. There is no case directly on point, but the Wisconsin Supreme Court has held, for example, that Milwaukee's plan to divide the city into four separate districts and to permit each of four private ambulance companies to have its own district, was a violation.[32] Very recently, a federal court held that the Waukesha airport's regulation requiring all users to buy gasoline from a single supplier also violated Wisconsin's antitrust law.[33]

Do these cases require Madison to rescind its taxicab regulations? To answer this question, it is necessary to dig deeper into antitrust concepts. All courts which analyze antitrust laws recognize two standards: "per se" violations, and violations of the "rule of reason."[34] Milwaukee's plan to divide the city into four ambulance districts was a "per se" violation of Wisconsin's antitrust law.[35] So was the Waukesha airport's gasoline purchase requirement.[36]

The distinction is that "per se" restraints of trade are practices which are so blatantly anti-competitive that they are illegal regardless of any possible justification. By contrast, a "rule of reason" approach requires the fact-finder to weigh all the circumstances in deciding whether a restrictive practice should be prohibited as an unreasonable restraint on competition. The court must balance the city's articulated justifica-

tions for establishing the anti-competitive regulation against the harm caused by the regulation. One case, *Giddens v. City of Shreveport*,[37] has held that the "per se" rule is almost never appropriate in antitrust cases involving local governments:

> Given the wide range of public responsibilities faced by municipal governments, and the traditional discretion afforded such governments in the exercise of their police powers, it seems likely that most challenged municipal regulations should be scrutinized under the rule of reason, rather than struck down as "per se" illegal without inquiry into the public interest involved.[38]

In *Hertz Corporation v. City of New York*,[39] the court took the same approach. The City of New York had prohibited rental car companies from basing their fees on the customer's place of residence. The car rental company sued New York City under the Sherman Antitrust Act. The city first claimed immunity under *Parker v. Brown*, but that claim was rejected. The State of New York has no statute granting cities power to regulate the rental car industry.[40] The city then argued that its restraint of trade was valid under the "rule of reason" and thus, did not violate the Sherman Act. The Second Circuit Court of Appeals noted that the U.S. Supreme Court, in *Community Communications Co. v. Boulder*, stated that, "per se treatment may not be well tailored to assessing municipal antitrust liability, because certain activities which might appear anti-competitive when engaged in by private parties take on a different complexion when adopted by a local government."[41] Urging the "rule of reason," New York City argued that rental car companies, by basing rates on place of residence within the city, were discriminating against customers because of their race. The court of appeals found the "rule of reason" appropriate, and remanded the case to the trial court to consider the facts offered in support of the regulation.[42]

Conclusion

In Madison, residents with disabilities and residents who work late hours and live in "poor" neighborhoods urged the city council to retain the ordinance requiring taxicab companies to provide service during all hours and to all parts of the city. The would-be entrepreneur, supported by Dr. Sam Staley, voluminous IJ and RPPI materials, and a list of prominent lawyers (not including the City Attorney) urged that the requirement be eliminated, because of the threat of an antitrust suit. The city council listened to the citizens and decided to retain the requirement. At this writing, no lawsuit has been filed. Nevertheless, municipal counsel may want to keep an eye on the litigation activities of the various "economic liberty" organizations. They claim to support small and minority-owned companies, but their real goal is to eliminate all regulations imposed on businesses by municipalities under their police powers.

Notes

1. WIS. STAT. § 349.24 (1999-2000).
2. TEX. LOCAL GOVERNMENT CODE ANN. § 215.004 (Vernon 1999); 65 ILL. COMP. STAT. 5/11-42-6 (2000); N.Y. GEN. CITY LAW § 20 (McKinney 2000); CAL. GOV. CODE § 53075.5 (West 2001); 53 PA. CONS. STAT. ANN. § 4511 (West 2000); N.J. STAT. ANN. § 40:48-2 (West 2000); FLA. STAT. ANN. § 166.021 (West 2000); MINN. STAT. ANN. § 412.221 (West 2000); OHIO REV. CODE ANN. CONST. ART. XVIII, §3 (West 2000); MO. ANN. STAT. § 94.110 (West 2000); MASS. GEN. LAWS ANN. ch. 40,§ 22 (West 2000); MICH. COMP. LAWS ANN. CONST. ART. 7, § 29 (West 2000).
3. *See* Minneapolis Taxi Federation v. City of Minneapolis, 1996 WL 722091 (Minn. App. 1996).
4. Yellow Cab Company v. City of Chicago, 919 F. Supp. 1133, 1139 (N.D. Ill. 1996).
5. *See* Pontarelli Limousine, Inc. v. City of Chicago, 929 F. 2d 339, 342 (7th Cir. 1991).
6. Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 562 F. Supp. 712, 723 (D. Haw. 1983).
7. *See* Huse v. Fulton, 678 F.2d 132 (5th Cir. 1982); *see also* Bryant v. Liberty Mutual Insurance Co., 407 F.2d 576 (4th Cir. 1969).
8. *See* Pavle-Marty v. City of New York, 399 N.E.2d 945 at 946 (N.Y. 1979).
9. *See Charley's Taxi*, 562 F.Supp. at 715.
10. *See Pontarelli*, 929 F. 2d 339.
11. *See* Campbell v. City of Chicago, 823 F.2d 1182 (7th Cir. 1987).
12. Jones v. Temmer, 47 F.3d 912 (10th Cir. 1995)).
13. *Yellow Cab*, 919 F. Supp. at 1138.
14. *Id.*
15. Executive Town & Country Services, Inc. v. City of Atlanta, 789 F.2d 1523, 1527 (11th Cir. 1986).
16. Madison, Wis. General Ordinances, Chap. 11, Sec. 11.06 (7)(e) (1997).
17. LIBERTY & LAW, Vol. 7, No. 2, May, 1998.
18. *Id.*
19. *Id.*
20. Christopher R. Conte, *The Boys of Sprawl*, GOVERNING, May, 2000, at 28.
21. *Id.* at 29.
22. WALTER WILLIAMS, STATE AGAINST BLACKS (New Press, 1982).
23. *See* Jones et al. v. Temmer et al., 829 F. Supp. 1226 (D. Colo. 1993) *dismissed as moot*, 57 F.3d 921 (10th Cir. 1995).
24. 317 U.S. 341, 63 S. Ct. 307 (1943).
25. Community Communications Co. v. City of Boulder, 455 U.S. 40, 57, n.20 (1982).
26. Local Government Antitrust Act of 1984, 15 U.S.C.A. §§ 34-36 (1984).
27. Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).
28. *Id.* at 40.
29. *Id.* at 42. *See also* Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985); Executive Town & Country Services, 789 F.2d at 1527.
30. *See Campbell*, 823 F. 2d at 1182; Independent Taxicab Drivers' Employees v. Greater Houston Trans., 760 F.2d 607 (5th Cir. 1985).
31. WIS. STATS. § 133.01, *et seq.*(1999-2000).
32. American Medical Transport of Wisconsin, Inc. v. Curtis-Universal, Inc., 452 N.W.2d 575 (1990).
33. *See* Cedarhurst Air Charter Corp. v. Waukesha County, 110 F. Supp. 2d 891, 893 (E.D. Wis. 2000).
34. State Oil Co. v. Khan, 522 U.S. 3, 9 (1977).
35. *American Medical Transport*, 452 N.W.2d 580 (1990)
36. *Cedarhurst*, 110 F. Supp. 2d at 893.
37. 901 F. Supp. 1170 (W.D. La. 1995).
38. *Id.* at 1180.
39. 1 F.3d 121 (2d Cir. 1993).
40. *Id.* at 128.
41. Community Communications Co. v. City of Boulder, 455 U.S. 40, 57, n. 20.
42. *Hertz*, 1 F.3d at 130 **ML**

From: Mike Roach <MAROACH@facstaff.wisc.edu>
To: <bknobeloch@ci.madison.wi.us>
Date: 3/3/02 10:49PM
Subject: Fwd: link to media coverage of taxicab regulations debate, law and policy 3-1-02

>>http://www.taxi-l.org/madison2.htm newspaper articles, petition and
>>part of Prof. Carstensen's work here
>>
>>http://www.taxi-l.org/madison.htm Prof. Carstensen's work can be found in
>>here also.
>>
>>Subject: Prof. Carstensen's response to Madison City Atty. article on
>>TAXI Regulations
>>Taxicab Regulation and Antitrust - Some Cautionary Comments on Gibson's
>>Madison Story
>>
>>Peter C. Carstensen
>>Young-Bascom Professor of Law
>>Associate Dean for Research and Faculty Development
>>University of Wisconsin Law School
>>
>>Eunice Gibson's article on taxi regulation and antitrust law in Madison,
>>Wisconsin, in the May/June issue of this journal (International Municipal
>>Lawyers Association Magazine) recently came to my attention. My reactions
>>include irritation, amusement, and concern.
>>
>>Her snide and disrespectful comments about the individual who raised and
>>pursued the issue of anti competitive, unnecessary regulation of the
>>local taxi business were uncalled for and demeaning. It is irritating, to
>>say the least, to read such ad hominem comments from a public employee.
>>They were irrelevant to her central thesis and reflect badly on her.
>>
>>I found Gibson's fear of an extreme right-wing political agenda to
>>destroy all government regulation of economic activity amusing. As a
>>long-time Wisconsin progressive, I am intrigued to find someone who
>>thinks I am advocating for the extreme right. In fact, contrary to
>>Gibson's claims, the public discussion of the anti competitive elements
>>of taxi regulation drew support from a broad range of people in the
>>Madison community.
>>
>>The real target of concern in Madison was a specific regulation requiring
>>every cab operator to provide service 7 days a week, 24 hours a day
>>(24/7"). This requirement makes it very costly and difficult to enter the
>>taxi business because of the problem start-up, multi-cab companies face
>>in attracting business at relatively low volume times of the day and the
>>impossibility of individual operators providing such service. The result
>>is that Madison's residents, including school children, are denied the
>>quality and quantity of service that the market would have produced.
>>Indeed, the only plausible explanation for 24/7 is to protect three
>>incumbent operators from the treat of competition.
>>
>>The stated theory of Gibson and the incumbent companies is that the
>>public interest requires 24/7 taxi service. However, they also claim that
>>there is little or no demand for taxis during some hours of the day.
>>Hence, not one company would provide such service absent the 24/7

>>requirement. Thus, Gibson concedes the anti competitive harms to
>>consumers from this regulation, but claims it is essential to provide
>>another public benefit.
>>
>>BUT, if it were true that late night or early morning demand is so low
>>that no company would provide such service, then it would be monumentally
>>stupid public policy to require ALL taxi companies to operate 24/7. All
>>would lose money and that loss in Madison would be roughly three times
>>more than the community and taxi owners should suffer in order to achieve
>>the necessary public service. Indeed, an across the board 24/7
>>requirement is the most costly way to address any actual need to provide
>>taxi service during periods of extremely low demand.
>>
>>In fact, there is no evidence in Madison, beyond the self-serving threats
>>to the incumbent companies, that any established, multi-car taxi operator
>>would fail to operate on a 24/7 basis. Such an operation maximizes the
>>return on invested capital. Moreover, the only data available support the
>>proposition that all three companies earn more, perhaps substantially
>>more, than their out of pocket expenses for such night and weekend
>>service. In addition, drivers, whose earnings are a direct function of
>>the fares they collect, are willing to work all hours!
>>
>>As an antitrust scholar and teacher with a very long standing interest in
>>the intersection of regulation and competition, I strongly concur in
>>Gibson's warning that such anti competitive local regulation can and does
>>raise antitrust concerns. For example, Stilwell, Oklahoma learned
>>recently that it could not use its monopoly power over water service to
>>coerce people into buying electricity from the city's power company.
>>United States v. City of Stilwell, Oklahoma, 1999-1Trade Cases para.
>>72,398 (E.D. Okla. 1998)(consent decree).
>>
>>On the other hand, Gibson's antitrust analysis concerns me. Her article
>>argues a brief for autonomy for local government, regardless of state law
>>and policy, to engage in anti competitive regulation. Basically, despite
>>Gibson's claim that the Rule of Reason applies, such restraints on
>>competition, favoring incumbents, are cartelistic in character, have
>>inherent anti competitive effect, and are per se illegal unless shielded
>>by some immunity such as state action. The current state of the law
>>governing state action immunity is much more complex and context specific
>>than Gibson acknowledges.
>>
>>The central issue for any anti-competitive local regulation is state
>>authorization. If the state has not authorized the regulation, then the
>>community faces serious antitrust risks. The state action doctrine itself
>>has gone through a number of variations. Some of the most recent
>>decisions, e.g., Columbia Steel Castings Co., Inc. v. Portland General
>>Electric, 111 F3d 1427 (9th Cir. 1996) cert. den. 522 U.S. 803 (1997);
>>and United States v. Rochester Gas and Electric, 4 F.Supp2d 172 (W.D.
>>N.Y. 1998), teach that in the context of deregulation, state
>>authorization for anti competitive conduct will be narrowly construed.
>>
>>In Wisconsin, both state antitrust law and the specific statutes
>>governing commercial transportation favor competition. Further, state law
>>limits regulation to that which is essential to the public interest as
>>defined by the legislature, and it must be the least anti competitive
>>necessary to achieve those goals. Other states have more permissive

>>authorization for local regulation. Even within Wisconsin, the scope of
>>authorization varies with the kind of regulation at issue. But in the
>>context of taxi regulation, my prediction is that the 24/7 requirement
>>for all operators will not withstand antitrust scrutiny.
>>
>>Despite its serious flaws, Gibson's antitrust analysis does accomplish
>>two things. First, it points up the risk to local governments that adopt
>>and enforce unauthorized restraints on competition. Second, the flaws in
>>her analysis demonstrate why municipal attorneys would be well advised to
>>obtain competent, experienced antitrust counsel early in the review of
>>any anti competitive regulation.