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City of Wetumpka

FOR IMMEDIATE RELEASE

From the Office of General Counsel to the City of Wetumpka:

Letter to the Editor

The City of Wetumpka's leaders are regularly asked about the pending downtown renovation projects and ongoing litigation. The following is an update for the public regarding the legal actions and reasons for the delays on the downtown improvements.

The City of Wetumpka announces that its legal action with local utility companies – Alabama Power, Spectrum, AT&T – is proceeding and that the parties will meet in Elmore County Circuit Court in early 2018.

As part of its Downtown & Riverfront Revitalization Plan, the City of Wetumpka passed an Ordinance last spring directing the utilities to relocate their facilities either underground or elsewhere for the Historic portions of Downtown Wetumpka. The goal being to remove obstructions as part of a Streetscapes and Sidewalk improvement project.

The planned removal would improve traffic flow for vehicles and pedestrians – namely those patrons of downtown business that use strollers, ride bikes, or are handicapped and need unobstructed access to the sidewalks. This would also allow the City to construct the much-needed roundabout at the intersection of Company, Online, and Spring Streets, to eliminate traffic congestion through that area of downtown. The City Council unanimously found in the Ordinance that the relocation of overhead utility facilities in that area is desirable to promote the safety, comfort, and convenience of the public.

All three Utilities ignored the Ordinance and refused to sign the utility agreements required by ALDOT as part of the project. As a result, the entire project was placed on hold and the City was forced to pursue costly legal action.

The battle over the City's right of way didn't begin with the Ordinance. The Utility companies are known for their political influence. An oft heard quip in this state is that "Alabama Power isn't called the power company because they sell electricity." In June of 2016, the Wetumpka Planning

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Commission sought an Attorney General's Opinion from then-acting AG Luther Strange. To the City's consternation, Big Luther withheld judgment on the request until his appointment by Governor Bentley to the US Senate.

In the Spring of 2017 – nearly a year after the City's first request – Steven Marshall, appointed to the AG position after Strange went to Washington, issued an opinion. He held that a "municipality *may* require a public utility company to relocate its aboveground utility lines and reinstall them in underground conduits or elsewhere." He goes on to state that "a utility that provides power, cable, or telephone service *must generally pay* to relocate underground or otherwise its poles, lines, or systems that are in the right-of-way to meet a public need."

While clear that the City has the authority to control where utility lines are placed in their right of ways, AG Marshall left some room for the power company to argue that the Public Service Commission (PSC) would preempt the City's authority to regulate their streets and sidewalks. Although an expert in public utility accounting consulted by the city estimated that the costs of relocation should have little or no effect on rates charged by the Utilities given generally accepted accounting and rate setting practices, Alabama Power, AT&T, and Spectrum all seized on the AG's statement about the PSC to entrench their positions against the City and keep the project on hold pending a legal battle.

The PSC was created in 1915 to expand the States' regulations of railroads; it was expanded further to include telephone, telegraph, transportation, steam, and electricity companies. It was broadened again by the legislature in 1920 to regulate utility rates. The PSC is limited in its scope as a state agency and has previously recognized that it has no authority over reasonable police regulations and ordinances of local municipalities, but the Utility companies have argued otherwise.

After negotiations met a stalemate, the City filed a complaint in early Summer 2017 against the Public Utilities seeking a declaratory judgment as to the interpretation of the law of Alabama and injunctive relief.

It is the City's position that the Alabama Constitution clearly establishes municipal control over any public utility's use of its streets or public places wherein it states "No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village. Ala. Const. Art. XII, § 220.

Section 11-45-1 of the Alabama Code authorizes municipalities to adopt ordinances in furtherance of their powers and duties, including “to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of the inhabitants of the municipality.” Ala. Code § 11-45-1 (1975). Moreover, Section 11-43-62 of the Alabama Code specifically delegates to municipalities regulation of use of their streets for telephone, electric and cable systems and states; “The council shall regulate the use of the streets for the erection of telegraph, telephone, electric, and all other systems of wires and conduits and *may require the same to be placed underground if deemed necessary for the public convenience and safety* and generally to control and regulate the use of the streets for any and all purposes.”

The City enacted its Ordinance in reliance of the foregoing statutes and the Alabama Constitution and is therefore seeking a court order to confirm its authority, declare its Ordinance valid and enjoining the utilities from violating a lawful ordinance requiring them to relocate their utility infrastructure either underground or elsewhere.

In late August of 2017, Circuit Judge Bill Lewis ordered the parties to mediate prior to issuing a ruling on the case. After several months of attempting to settle the case – which delayed the construction phase of the project further– the court-appointed mediator advised Judge Lewis that the parties have been unable to reach a resolution. A long-awaited hearing has been set for February 2018. The parties are scheduled to meet in court for the Judge to determine whether Public Utilities may continue to ignore local municipal ordinances regarding the placement of infrastructure in city streets and sidewalks.

Loud and common are citizen complaints about the horrid condition of the roads downtown and patience is wearing thin for the City to act on improving the traffic flow. I assure you that the frustration of the citizens is completely shared by the City and its leaders. However, until a final decision is made in the litigation the Downtown Improvement Projects are on hold. The City of Wetumpka’s streets and sidewalks remain a burden on vehicle and pedestrian traffic flows and unfortunately it seems it will remain that way for now.

By Regina B. Edwards, the City Attorney for Wetumpka, Alabama.