

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Verified Petition of Midwest Renewable Energy Association to Determine Applicability of Wis. Stat. §§ 196.01(5)(a), 196.02, 196.03, 196.49, 196.491(5), 196.495(1m) and (5) to Third-Party Financed Distributed Energy Resource Systems

Docket No. _____

Verified Petition for Declaratory Ruling

Pursuant to Wis. Stat. § 227.41, the Midwest Renewable Energy Association (“MREA”) brings this verified petition for a declaratory ruling that third-party financed distributed energy resources (“DERs”)¹ are not “public utilities” as defined in Wis. Stat. § 196.01(5)(a)² and, therefore, are not subject to the PSC’s jurisdiction under any statute or rule regulating public utilities, including Wis. Stat. §§ 196.02, 196.03, 196.49, 196.491(5), 196.495(1m) and (5).

¹ DERs may include any combination of energy storage, distributed generation, demand response, energy efficiency, thermal storage, and electric vehicles and their supply equipment. *See e.g.*, FERC Order 2222 n.1.

² MREA is an “interested person” within the meaning of Wis. Stat. § 227.41(1). MREA intends to develop its own third-party financed resources but has refrained because of uncertainty and reasonable apprehension that the PSC will attempt to assert jurisdiction over MREA as a “public utility.” Moreover, MREA members intend to pursue third-party financed resources but have refrained for the same reasons. MREA has standing on behalf of those members. *Wisconsin’s Envtl. Decade, Inc. v. PSC*, 69 Wis. 2d 1, 20, 230 N.W.2d 243 (1975) (association has standing to sue in its own name if a member of the organization would have standing); *see also Milwaukee Dist. Council 48 v. Milwaukee County*, 244 Wis. 2d 333, 355, 627 N.W.2d 866 (2001) (same).

The “State of Facts” For Which a Declaratory Ruling Is Requested

The PSC may issue a declaratory ruling binding the PSC and all parties to this action “with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it.” Wis. Stat. § 227.41(1). To be effective, the PSC’s decision in this case must apply to a “state of facts” that is common to many DER providers and sufficiently distinguishes third-party financed DERs from public utilities. It is impractical and infeasible for each third-party financed project, or each third-party provider, to individually litigate and receive a PSC a declaratory ruling. Unlike monopoly utilities, who pass through their regulatory costs to captive ratepayers, third-party DER providers have to absorb their costs. The tens of thousands of dollars to bring individual declaratory ruling proceedings would exceed the profit margin of most DER projects. Therefore, requiring a separate declaratory ruling for each project or provider creates an effective prohibition through regulatory cost, even though no third-party prohibition exists in substantive law.

The specific attributes of DERs subject to this petition, which constitutes the “state of facts” to which the PSC’s declaratory ruling will apply, Wis. Stat. § 227.41(1), include the following:

1. One or more entities, other than the host customer, owns DERs located at the site of a host customer.
2. The distributed energy resource(s) consists of one or more of the following: solar photovoltaic (“PV”) panels, direct current to alternating current inverter, battery energy storage, thermal energy storage, smart thermostat, smart appliance, and demand management system (e.g., demand controller or smart panel).
3. The DERs are located on the host customer’s property and electrically connected behind the host customer’s utility meter (point of common coupling).
4. Each DER is sized specifically for the host customer’s loads.

5. Each DER is dedicated solely to the host customer's use. No DER plant or equipment provides power to anyone other than to the host customer.
6. The DER provider and the host customer enter an individualized contract specific to the customer, the customer's property, the DER design and size, the customer's credit or other financial attributes, risk calculations specific to the host customer, the DER provider's availability, and other factors. The contract specifies the size, location, cost, and attributes of the DERs dedicated to the host customer as well as any related individualized servicing, insurance, financing, and management services.
7. The host customer and the third-party financing entities enter into a private, individualized, contract that specifies the size, location, cost, and attributes of the DERs dedicated to the host customer as well as any related individualized servicing, insurance, financing, and management services. No DER is installed at a host customer's property and no power is sold to a host customer unless an individualized contract already exists between the DER provider and the host customer.
8. The DERs are designed, installed, and interconnected pursuant to the applicable electrical code and Wis. Admin. Code ch. PSC 119.
9. The third-party financing entity and DER installer complies with applicable consumer protection requirements, which may include 15 U.S.C. § 45, Wis. Stat. §§ 100.195, 100.20, 100.21, 100.305, 100.315, 100.46, 100.54 100.65, chs. 421-428 and Wis. Admin. Code chs. ATCP 110, 127.
10. The host customer utilizes the DERs to serve its energy requirements and may, or may not, utilize the DERs to transact with the local public utility through net metering or in the Midcontinent Independent System Operator Markets.
11. The host customer remains a customer of the local public utility for utility service.

For the reasons set forth below, a third-party financed DERs with the foregoing attributes (“state of facts”) do not constitute a “public utility” within the meaning of Wis. Stat. § 196.05(5) and are therefore not subject to the PSC's jurisdiction.

Background on DERs and Third-Party Financing

DERs are individualized systems and equipment located at customer's homes and businesses and are more similar to appliances than to utility-scale power systems. DERs can generate, store, and manage power for the host customer's use.

DERs are increasingly cost-effective options for homes and businesses to reduce purchases from the local monopoly public utility. Solar PV was one of the first DERs to use third-party financing in other states. Most third-party financed DERs still include solar PV, but increasingly include additional equipment, such as battery storage and load controllers. As technology and business models continue to develop, it is likely that future third-party financed DERs will also include smart thermostats, smart appliances, and electric vehicle charging equipment.

Solar PV provided as a DER is interconnected to the host customer's load panel, behind the utility meter, and produces power that the customer uses instead of purchasing power from the utility grid. If the solar produces power beyond the customer's immediate needs, the power is either stored in batteries for later use, or exported to the local monopoly utility under a "net metering" or "net billing" tariff. Thus, whether used to offset usage in real time, stored in batteries, or used for "net" billing, the DER host is the only consumer of the power generated by the DER. DERs also produce value for the larger public by reducing energy and third-party tariffed transmission costs of the utility in the short-term as well as the cost of production and distribution capacity and wear on utility equipment over time. Most unbiased studies confirm that DERs save all customers—both those with and without solar—money because they reduce the amount of equipment that utilities must rate base over time. Cost-of-service regulated

utilities often oppose customer-sited distributed solar for this same reason.

The up-front cost of solar PV and other DERs can present an impediment to customer uptake. Many businesses and families have insufficient cash reserves to purchase DERs outright. Additionally, federal tax credits and favorable depreciation that could otherwise incentivize DERs are unavailable to non-taxed entities like schools, churches, hospitals, and local governments as well as to individuals and families without sufficient taxable income. Some estimates put the benefits of tax incentives, if fully captured, at up to half of the installed cost of solar PV.

Third-party financing provides a financing structure covering both the upfront cost of installing DERs and the ability to monetize tax benefits. One or more entities front the initial installation cost, utilize the tax benefits, and hold legal title to the solar generating equipment. The third-party financing entities then enter an individual contract with the host customer through which the host agrees to provide the physical space for the equipment and to make periodic payments (typically, monthly) in exchange for all of the energy from the DER equipment.

Third-party financing involves one of two types of agreements: a lease or a power purchase agreement. Under a lease, the host customer pays a set monthly charge each month, like a car lease. Under a power purchase agreement, the amount of payment each month depends on the amount of solar electricity produced. The benefits to the host customer from third-party financing include the ability to access solar generation for low (or no) upfront cost, the ability to shift the risk of ownership and equipment failure to the third-party provider, and often most importantly, the ability to utilize tax benefits that are otherwise unavailable to low-

income families, schools, hospitals, municipalities, churches, and non-profit service agencies who do not pay federal income tax.

Third-party financing is often temporary because customers may elect to make a small payment to buy out their agreement after tax benefits have been fully utilized by the third-party financing entity. Other customers prefer to continue to make monthly payments for the full term of their contracts.

DERs installed through third-party financing only provide power to the single host customer of the dedicated equipment. No equipment provides power to more than one customer. The physical equipment as well as the customer's relationship with the local utility are identical whether a host customer pays cash and owns solar equipment outright, or enters a third-party financing arrangement and pays for the output of the solar generating equipment over time. Both types of DER customer offset purchases they would have made from the utility while also continuing to purchase whatever supplemental power they require pursuant to PSC-authorized tariffs. There is no difference to the public, the utility company, or the grid between customers who own DERs outright and those who utilize third-party financing.

Third-party financing is never required. A potential solar customer can always decline DERs altogether and continue to receive all power and services through the local monopoly utility. Those customers who do choose to utilize DERs can purchase their equipment outright instead of utilizing third-party financing. However, third-party financing is often the *only* financially viable way to provide clean energy to those who cannot utilize tax benefits, do not have the capital or credit necessary to pay the up-front cost of DERs, or both. This means that without third-party financing as a financing option, DERs remain out of reach for many would-be

DER customers.

Background Facts About MREA

MREA is a non-profit entity that seeks to develop clean, affordable, renewable energy in Wisconsin and simultaneously train Wisconsinites for clean energy jobs. As part of its mission, MREA intends to provide third-party financing for multiple DER solutions to customers in Wisconsin. MREA will design and install a solar PV system for each host customer and charge that customer for the electricity produced.

Before MREA installs any equipment, MREA will sign a contract specific to the particular equipment and customer, which provides MREA access to the customer's property to install the solar panels and provides the customer with exclusive use of the solar PV equipment and all of its electrical output. Each customer will have a dedicated solar PV system. The DER output will reduce the amount of power the host customer buys from the local monopoly utility company and will decrease the customer's utility bills. The customer will host MREA's equipment on that customer's property and be responsible for providing physical security.

While MREA intends to enter multiple third-party financing arrangements with individual customers, it does not hold itself out as willing to serve the undifferentiated public. Customers must meet certain criteria: a sufficient ability to pay; electricity usage patterns and utility rates conducive to solar; agreeing to provide MREA access to the customer's premises for installation, inspection and maintenance; and adequate unshaded space on their roof or nearby for safe solar PV installation.

MREA has identified a customer for the first solar installation. Based on the experience gained through that first installation, MREA intends to enter contracts with several additional

customers, and potentially more. MREA has not yet advanced its program to install solar and provide third-party financing because of the overhanging threat that the PSC will assert jurisdiction and subject MREA to burdensome investigations, discovery, hearings, and enforcement proceedings, and may ultimately seek to prohibit or regulate third-party financing as “public utility” service.

MREA’s members are also interested in providing third-party financed DER solutions directly to customers in Wisconsin. However, because of the uncertainty about whether the PSC will assert jurisdiction over third-party financing as a “public utility,” few of MREA’s members have pursued those opportunities. At least one member recently experienced a project delay—which may ultimately result in the project being cancelled—when a utility representative told the would-be customer that third-party financing is prohibited by the PSC.

MREA is filing this petition, in part, based on the PSC’s statements in *Midwest Renewable Energy Association v. PSC*, Portage County Circuit Court 2021-cv-41. In that case, the PSC represented to the court that a declaratory ruling under Wis. Stat. § 227.41 is the appropriate process for a PSC determination on public utility status of third-party financing arrangements. While the PSC rejected at least three prior requests by other parties seeking declaratory rulings on the “public utility” status of third-party financing based on the PSC’s “discretion” not to issue rulings under Wis. Stat. § 227.41, MREA is relying on the PSC’s statements to the court that a declaratory ruling process is appropriate here. However, in filing this petition, MREA does not waive its rights to pursue clarity in any other venue, including an appeal of the Portage County action.

Third-Party Financing Does Not Constitute a “Public Utility”

The scope of the PSC’s jurisdiction to regulate third-party financed DERs turns on the definition of “public utility” in Wis. Stat. § 196.01(5). That statute defines “public utility” as:

Every corporation, company, individual, association, their lessees, trustees or receivers appointed by any court, and every sanitary district, town, village or city that may own, operate, manage or control any toll bridge or all or any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public.

Third-party financing meeting the “statement of facts” is not a “public utility” pursuant to Wis. Stat. §196.01(5) for at least four reasons.

1. The Definition Of “Public Utility” In Wis. Stat. § 196.01(5) Requires Use of Shared, Common, Equipment to Provide Service To The Public, Whereas Third-Party Solar Financing Dedicates Equipment Exclusively To Each Host Customer.

Pursuant to the text of Wis. Stat. § 196.01(5), a “public utility” only includes entities who own or operate “a plant or equipment” whose purpose is to provide power “to or for the public.” Wis. Stat. § 196.01(5)(a). That is, it turns on the purpose of the “plant or equipment,” not the business plan of the equipment owner. Only where “a plant or equipment” is intended to provide service broadly—to the public—is the owner a public utility. *Union Falls Power Co. v. City of Oconto Falls*, 221 Wis. 457, 265 N.W. 722 (1936) (“The use to which *the plant, equipment, or some portion thereof is put* must be for the public...” (quoting *Ford Hydro-Electric Co. v. Aurora*, 206 Wis. 489, 240 N.W. 418 (1932))); *Cawker*, 147 Wis. 2d 320, 133 N.W. 157, 158–59 (“The use to which the plant, equipment, or some portion thereof is put must be for the public, in order to constitute it a public utility.”). As the Wisconsin Supreme Court held in *Ford Hydro*, the question is whether “the plant is built and operated for furnishing power to the public generally,”

which necessarily excludes a plant intended to serve only one customer. *Ford Hydro*, 240 N.W. at 420–21.

Third-party financed DERs provide power exclusively to a single dedicated customer from each “plant or equipment.” Since there is no “plant or equipment” providing power to more than the single host customer, much less to “the public,” third-party financing cannot constitute a “public utility.” The fact that the same owner may intend to provide DERs to multiple customers does not make the owner a “public utility,” so long as a separate “plant or equipment” is dedicated to each customer.

2. Third-Party Solar Customers Are Also Not “The Public” Because Of Their Special Contract Relationship With The DER Provider.

Third-party financing also does not constitute a “public utility” under Wis. Stat. § 196.01(5)(a) because third-party financing involves individual bilateral relationships with customers that have distinguishing characteristics.

The definition of a “public utility” requires the utility to offer and provide service from its plant or equipment “which could be accepted by *any* member of the public.” *Union Falls Power Co. v. Oconto Falls*, 221 Wis. 457, 460-461 (1936) (emphasis added). Thus, whenever the scope of service from equipment is limited to a restricted class, it is not providing power to “the public.” *Camker*, 133 N.W. at 158–59 (service must be “intended for and open to the use of all the members of the public who may require it” as opposed to “a restricted class”). Wisconsin caselaw identifies as least two categories of restricted classes that do not constitute “the public”:
(1) those customers who have “a certain contract relation” with the seller, *Camker*, 133 N.W. at 159; and (2) customers with distinguishing characteristics, like physical proximity or landlord/tenant relationship. *Id.* Third-party financed DERs involve both.

Third-party financed DERs involve specific and individualized contracts between the provider and the host customer. That contract spells out details about the DERs, including the capacity, location, characteristics, price, insurance, and other details specifically negotiated and agreed to between the provider and customer. Those individualized contracts differentiate the DER host customers from “the public” under Wisconsin law. *City of Milwaukee v. PSC*, 241 Wis. 2d 249, 254, 5 N.W.2d 800 (1942) (providing service to defined customers through exclusive contracts does not constitute public utility service); *City of Sun Prairie v. PSC*, 37 Wis.2d 96, 101, 154 N.W.2d 360 (1967) (“to the public” does not include a “defined, privileged and limited group”); *Union Power Co.*, 265 N.W. at 724 (a company providing power only pursuant to a contract, rather than to “any member of the public” is not a public utility); *Cawker*, 133 N.W. at 158–59. Entering a contract voluntarily binds the DER provider and host customer together for the specific purpose of providing DERs dedicated to the host customer, as opposed to the purpose “of serving the public generally or any portion of the public outside of those who voluntarily band themselves together.” *Schumacher v. Railroad Commission*, 185 Wis. 303, 305, 201 N.W. 241 (1924).

Wisconsin caselaw interprets “the public” in the definition of a “public utility” and in the false advertising statute, Wis. Stat. § 100.18, consistently. *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70 ¶¶ 24, 301 Wis. 2d 109, 732 N.W.2d 792. Cases interpreting Wis. Stat. § 100.18 also hold that customers with a contract relationship with the seller are not “the public.” *Id.* ¶¶ 23–26; *Kailin v. Armstrong*, 2002 WI App 70 ¶¶ 43–44, 252 Wis. 2d 676, 643 N.W.2d 132 (a “particular party with whom one has contracted is not... ‘the public.’”); *Hackel v. Nat’l Feeds, Inc.*, 986 F.Supp.2d 963, 980 (W.D. Wis. 2013) (“If a particular

relationship exists between the parties—*i.e.*, a contractual one—then that relationship distinguishes plaintiff from a member of the public more generally.”); *Uniek, Inc. v. Dollar General Corp.*, 474 F.Supp.2d 1034, 1039 (W.D. Wis. 2007) (recognizing that *Kailin* created a categorical exemption from “the public” for those “with whom the defendant had a contract”).

Other states interpreting the scope of their public utility statutes have distinguished third-party financing from public utility service based on the use of individualized contracts to define the relationship. *Cf. In re Vivant Solar*, Order No. 25,859, Docket No. DE 15-303, 2016 WL 224170 *12 (N.H. PUC Jan. 15, 2016) (distinguishing between public utilities providing service to the undifferentiated public and third-party financing providing specific service to discrete customers based on individualized factors); *In re Investigation and rulemaking to adopt, amend, or repeal regulations*, Docket Nos. 07-06024, 07-06027, 2008 WL 5159179 *6 (Nev. PUC, Nov. 26, 2008) (a third-party who installs a solar generating system on private property on a contractual basis “does not serve the public, but rather serves a single customer-generator pursuant to a private contract.”).

Third-party DER host customer are also distinguishable from “the public” because the physical location of dedicated DERs on the host customer’s property differentiates the host-customer from the undifferentiated “public.” *State v. Automatic Merchandisers of America, Inc.*, 64 Wis.2d 659, 664, 221 N.W.2d 683 (1974) (whether a customer is “the public” depends on whether there is a relationship that would “distinguish” it from any other party); *Uniek, Inc.*, 474 F.Supp.2d at 1039 (applying *Automatic Merchandisers* to find a relationship distinguishing the customer from “the ‘vast multitude’”). It constitutes a “peculiar relation[ship]” between the provider and the host customer, allowing the host to be served by the provider. *City of Sun*

Prairie, 37 Wis.2d 96, 99–100 (“the public” does not include those who “by reason of any peculiar relations to the owner of the plant, can be served by him.”).

Therefore, two separate distinguishing characteristics of third-party DER host customers differentiates them from “the public.” In fact, as the supreme court recognized 80 years ago, providing service to a defined set of customers through exclusive contracts not only does not constitute “public utility” service, but is “precisely what it was necessary” to avoid “becoming a public utility.” *City of Milwaukee*, 241 Wis. at 254.

3. Interpreting the PSC’s Jurisdiction Over “Public Utilities” to Cover Third-Party Financing Would Be An Absurd Interpretation.

The structure and legislative history of Wis. Stat. ch. 196 also limits the PSC’s jurisdiction to traditional monopoly utilities, not competitive alternatives to utility service. Interpreting “public utility” in Wis. Stat. § 195.01(5) to extend the PSC’s jurisdiction to DER providers who do not have natural monopolies and have to compete on price in the free market would greatly exceed the legislative intent and lead to absurd results. *Cawker*, 133 N.W. at 158 (the definition of “public utility” must be construed to “effectuate the evident intent of the Legislature, and not... lead to a manifest absurdity”); *see also State ex rel. Kalal v. Cir. Ct. for Dane Co.*, 2004 WI 58 ¶¶ 46, 48, 271 Wis. 2d 633, 681 N.W.2d 110 (plain language of a statute must be construed to avoid absurd results based on scope, context, and purpose of the statute).

Economic regulation of monopoly utilities through a government agency is an exception to the free market system in Wisconsin and the United States. PSC regulation is a second-best option to market forces in setting supply and price and was intentionally limited to only those natural monopolies that the legislature perceived (120 years ago) as incapable of market constraint. *Chippewa Power Co. v. Railroad Comm’n*, 188 Wis. 246, 251, 205 N.W. 900 (1925);

City of Madison v. Madison Gas and Electric Company, 129 Wis. 249, 108 N.W. 65, 68 (1906) (quoting *Munn v. Illinois*, 94 U.S. 113); *In re Northern States Power Co.*, Docket 4220-UR-121, 2015 WL 9450252, *27 (Wis. Pub. Serv. Comm’n Dec. 23, 2015) (“At its most basic function, the regulated utility ratemaking process is intended to simulate a free market for monopoly utilities.”). Specifically, state regulation was limited to only those natural monopolies that were already regulated through common law. *Schumacher v. Railroad Comm’n of Wis.*, 185 Wis. 303, 201 N.W. 241, 242 (1924) (holding that the definition of “public utility” “must be read in connection with the subject-matter to which it refers” which is to regulate only “where there is a monopoly” or where common law triggered obligations because the entity is “impressed with a public use”); *N. States Power Co. v. Nat. Gas Co., Inc.*, 2000 WI App 30 ¶ 13, 232 Wis.2d 541, 606 N.W.2d 613 (summarizing caselaw as providing for regulation of those companies that provide service “under exclusive franchises, or otherwise had virtual monopolies”); *Chippewa Power Co. v. Railroad Comm’n of Wis.*, 188 Wis. 246, 205 N.W. 900, 902–03 (1925) (the definition of public utilities must be construed to convey only authority over monopolies and entities with the power of eminent domain) (quoting *Wolff Packaging Co. v. Ct. of Indus. Relations of Kan.*, 262 U.S. 522 (1923)). Competitive businesses without natural monopolies—such as “an article of merchandise, [that] could be bottled or packed up, and imported or exported like ‘soap, candles or hats’”—is inappropriate for government economic regulation. *Shepard v. Milwaukee Gas Light Company*, 6 Wis. 539, 545 (1858).

Third-party solar providers are not natural monopolies. They compete with each other and with the incumbent utility’s energy for customers who are free to choose among solar providers, not to install DERs at all, or to finance solar any another way. It would be absurd to extend the

PSC’s authority to regulate the supply and price (among other aspects) of competitive enterprises like third-party financed DERs. *Chippewa Power Co.*, 188 Wis. 2d at 251 (attempting to regulate “purely private contracts” involving power generation is inappropriate and likely unconstitutional action by the legislature). As the Iowa Supreme Court correctly put it: third-party financing of solar for individuals is an *alternative to* monopoly utility power and “should not draw an entity into the fly trap of public regulation.” *SZ Enterprises, LLC v. Iowa Utilities Bd.*, 850 N.W.2d 441, 467 (Iowa 2014) (interpreting an Iowa definition of public utilities as excluding third-party solar which is not the type of natural monopoly that public utility regulation is intended to cover); *see also U.S. Steel Corp. v. No. Ind. Pub. Serv. Co.*, 486 N.E.2d 1082, 1084–85 (Ind. Ct. App. 1985) (applying utility commission regulation to a business other than a historic monopoly would violate the Fourteenth Amendment); *In re Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation*, Declaratory Order Partially Adopting and Modifying Recommended Decision ¶ 26, Case No. 09-00217-UT (N.M. Pub. Reg. Comm’n Dec. 17, 2009) (“[t]here is no obvious public policy basis for the Commission to regulate these third-party developers as public utilities” where there is no monopoly and if “a potential customer doesn’t like what is being quoted, the customer may shop around or simply continue to rely exclusively on their rate-regulated public utility.”)

Third-party financed DERs are not natural monopolies and not the type of business regulated under 120 year old common law. They are competitive businesses whose supply and price are already controlled by the market. It would be absurd, and far beyond the legislature’s intent behind state regulation, to interpret the PSC’s jurisdiction to cover those private businesses.

4. Regulating Third-party Financed DERs as Public Utilities Would Conflict With Federal Law.

Interpreting “public utility” in Wis. Stat. § 196.01(5)(a) to exclude third-party financed solar also avoids potential constitutional and preemption problems. *Wis. Legislature v. Palm*, 2020 WI 42 ¶ 31, 391 Wis.2d 497, 942 N.W.2d 900 (Wisconsin courts apply “the constitutional-doubt principle” that “disfavor[s] statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration.”).

First, defining “public utility” to include third-party solar would require a definition so broad and open-ended that it would necessarily invite *ad hoc*, subjective, determinations by the PSC, which would violate the Constitution. *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85 ¶ 54, 363 Wis. 2d 1, 866 N.W.2d 165; *State v. Popanz*, 112 Wis. 2d 166, 172–73, 176, 332 N.W.2d 750 (1983); *see also In re Commitment of Dennis H.*, 2002 WI 104 ¶ 16, 255 Wis.2d 359, 647 N.W.2d 851 (due process requires that the law “set forth fair notice of the conduct prohibited or required and proper standards for enforcement of the law and adjudication”). That is, if the definition turned on a DER provider’s intent to sell and an unspecified threshold number of customers, with unspecified characteristics—as some utilities and PSC letters have argued in the past—the “case-by-case,” *ad hoc*, judgment by the PSC would lack adequate notice. Third-party financing entities would have no bright lines by which to know whether, when, and how their activities cross into regulated “public utility” conduct. That would violate minimum due process rights. *Walworth County v. Tronshaw*, 165 Wis. 2d 521, 526, 478 N.W.2d 294 (Ct. App. 1991). On the other hand, interpreting “public utility” to exclude third-party financing, based on the bright line standards in existing law set forth above, avoids this constitutional infirmity.

Second, defining “public utility” in Wis. Stat. § 196.01(5)(a) to create two classes of solar customers—those who pay cash and those who utilize third-party financing—would violate both equal protection and due process. Treating different classes of citizens differently requires (among other things) that one class is actually different from the other in a way germane to the purpose of the law, and that treating them differently is for the public good as defined by the statute. *Mayo v. Wis. Injured Patients & Fam. Compensation Fund*, 2018 WI 78 ¶ 42, 383 Wis.2d 1, 914 N.W.2d 678; *Metropolitan Associates v. City of Milwaukee*, 2011 WI 20 ¶¶ 22, 61, 64, 72, 332 Wis. 2d 85, 796 N.W.2d 717; *see also Treiber v. Knoll*, 135 Wis. 2d 58, 65, 398 N.W.2d 756 (1987). The purpose of economic regulation of utilities is to protect the public from excessive prices extracted by natural monopolies—not protection of the utilities. *Wis. Power & Light Co. v. PSC*, 45 Wis. 2d 253, 259, 172 N.W. 639 (1969) (“the predominant purpose underlying the Public Utilities Law is the protection of the consuming public rather than the competing utilities”).³ This justifies treating natural monopoly utilities differently than customer-sited alternatives like DERs. But, it does not justify treating non-monopoly DERs differently from each other, based on whether they are paid for with cash or financed through third-party structures. Treating third-party financed DERs differently from DERs directly purchased by the customer lacks a distinction germane to the purpose of public utility regulation.

³ Economic protectionism is not a valid police power for the state to exercise. *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 209–10, 313 N.W.2d 805 (1982) (protection of liquor stores over grocery stores is illegitimate use of police power); *State ex rel. Week v. Wis. State Bd. of Exam’rs*, 252 Wis. 32, 36, 30 N.W.2d 187 (1947) (state action for benefit of private association is not within the legitimate exercise of police power); *John F. Jelke Co. v. Emergy*, 193 Wis. 311, 321–22, 214 N.W. 369 (1927) (the Legislature has no power to protect one type of business from another).

Third, subjecting third-party financed DERs to pervasive state regulation as “public utilities” would conflict with federal law exempting small renewable generation from state regulation.

DERs such as solar PV and storage constitute “qualified facilities” under federal law, including third-party financed DERs. 18 C.F.R. §§ 292.101(b)(1), .203, .601(a); *cf. Sun Edison LLC*, 129 FERC ¶ 61,146 at PP 18 (third-party financed solar PV is a qualified facility exempt from FERC regulation). Federal law broadly exempts qualified facilities from “State laws or regulations respecting: (i) the rates of electric utilities; and (ii) The financial and organizational regulation of electric utilities.” 18 C.F.R. § 292.602(c); see also 16 U.S.C. § 824a-3(e)(1) (requiring FERC to “prescribe rules under which” qualifying facilities “are exempted in whole or part from...State law and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities...”). While the state can regulate the interconnection and safety of qualifying facilities, it cannot regulate their business like utilities.

If third-party financed DERs constitute a “public utility” under Wis. Stat. § 196.01(5), those qualifying facilities would be subject to PSC regulation of their rates, finances, and organization. *See generally*, Wis. Stat. ch. 196. That directly conflicts with federal law exempting small scale solar from such regulation. 18 C.F.R. § 292.602(c); *see also In re Vivant Solar*, 2016 WL 224170 *12 (because third-party financed solar constitutes a qualifying facility under federal law, the exemption from state regulation of public utilities under 18 C.F.R. § 292.602(c) may be applicable).

The PSC should avoid the potential constitutional violations and federal preemption by interpreting “public utility” in Wis. Stat. § 196.01(5), and therefore the scope of the PSC’s

regulation and jurisdiction over public utilities in Wis. Stat. ch. 196, to exclude third-party financed DERs.

WHEREFORE, MREA respectfully requests that the PSC conduct a paper-only hearing⁴ and promptly issue a declaratory ruling pursuant to Wis. Stat. § 227.41, with respect to the “state of facts” set forth above, binding the PSC and all parties to this proceeding. The PSC should declare that:

- a. Third-party financing, consisting of either a power purchase agreement or lease, which meets the criteria set forth in the “State of Facts” above, is not a “public utility” as defined in Wis. Stat. § 196.01(5).
- b. Such third-party financed DERs are not subject to the PSC’s jurisdiction and regulation of public utilities under Wis. Stat. §§ 196.02, 196.03, 196.491(5), 196.495(1m) and (5), and 196.50(1) and (5).
- c. A dedicated DER system at an individual host customer’s property involves a singular “plant or equipment” for purposes of Wis. Stat. § 196.01(5)(a), which is not for the production, transmission, delivery or furnishing of power to the public.
- d. The relationship between a third-party provider and host customers, involving physical placement of dedicated equipment on the host customer’s property and an individualized contract prior to any power sales, constitute a specific or “peculiar” relationship that distinguishes the host customer from “the public” within the meaning of Wis. Stat. § 196.01(5)(a).
- e. DER providers are outside the legislative purpose and intent of regulating natural monopolies under Wis. Stat. ch. 196 because DER providers are competitive businesses, controlled by market forces, without the ability to

⁴ The “hearing” in Wis. Stat. § 227.41 requires interested parties to be heard, but does not require a full contested evidentiary process involving discovery and live witness testimony. *See* Final Decision at 20, 5-DR-109 (Aug. 29, 2014). The recent proceedings in the Eagle Point docket indicate that utilities will attempt to use abusive discovery process into matters unrelated to the definition of a “public utility” to chill lawful DER development. In fact, the entire point of this petition is to confirm that the PSC lacks jurisdiction over MREA and other third-party financing entities and cannot compel them to produce records and appear before PSC. It would be perverse if the only means to do so requires MREA to incur those same burdens as part of the declaratory ruling process itself.

extract monopoly prices.

- f. There is no meaningful distinction between third-party financed DERs and DERs owned directly by the host customer that is germane to the purpose of state regulation of public utilities under Wis. Stat. ch. 196.
- g. Third-party financed DERs are “qualifying facilities” subject to the exemption from state regulation of their rates, finances, and organization pursuant to 18 C.F.R. § 292.602(c).

Pursuant to Wis. Stat. § 227.41(2)(b) the declaratory ruling shall be binding upon the Public Service Commission of Wisconsin, Hill Farms State Office Building, North Tower, 6th Floor, 4822 Madison Yards Way, Madison WI 53705, Midwest Renewable Energy Association, 7558 Deer Road, Custer WI 54423, as well as any party to this proceeding.

Dated this 26th day of May, 2022.

EARTHJUSTICE

Electronically signed by David C. Bender
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