

SERVICE DATE
Jul 25, 2022

PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of Midwest Renewable Energy Association to Determine
Applicability of a Third-Party Financed Distributed Energy Resource
Systems

9300-DR-105

ORDER OPENING DOCKET AND RELATED ADMINISTRATIVE MATTERS

This is the Order to open a proceeding in response to Midwest Renewable Energy Association's request to open a declaratory ruling proceeding relating to whether third-party financed distributed energy resources are public utilities as defined in Wis. Stat. § 196.01(5)(a).

On May 26, 2022 the Midwest Renewable Energy Association (MREA) filed a petition for a declaratory ruling "that third-party financed distributed energy resources (DERs) 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)." (PSC REF#: 438969 at 1.) MREA requested that the Commission should conduct a declaratory ruling proceeding that includes a paper-only hearing.

MREA is a non-profit entity that seeks to develop clean, affordable, renewable energy in Wisconsin, and represents that it is an "interested party" within the meaning of Wis. Stat. § 227.41(1) because it intends to develop its own third-party financed resources but has refrained from doing so because of uncertainty and apprehension that the Commission might attempt to assert its jurisdiction over MREA as a "public utility." (*Id.* at n. 2.) MREA further claims that its members intend to pursue third-party financed resources but have refrained for similar reasons, and MREA claims to have standing on behalf of those members. (*Id.*)

The Commission discussed MREA’s request to open a docket at its open meeting of July 21, 2022. The Commission has discretion to determine whether a docket should be opened in response to MREA’s petition. *See* Wis. Stat. § 227.41(1); *Wis. Fertilizers Ass’n v. Karns*, 39 Wis. 2d 95, 107, 158 N.W.2d 294 (1968). Given the issues presented by the petition, the likes of which have been brought to the Commission with increasing frequency, the Commission finds that there is good cause for opening a docket.

While the Commission has previously chosen not to exercise its discretion to open a docket raising similar questions,¹ it has also chosen to exercise its discretion to do so in at least one prior instance.² In each of those cases, the particular facts and circumstances presented the petition at issue were relevant to the Commission’s decision. Here, the Commission finds that the particular facts and circumstances presented merit the opening of a docket to consider whether to grant all or part of the requested declaratory ruling. MREA has identified eleven specific attributes of distributed energy resources (DERs) which it contends constitute a “state of facts”, upon which the Commission may wish to exercise its discretionary authority to issue a declaratory ruling “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. Notably, the only decision made by the Commission today is the decision to open the docket itself. Whether and to what extent a

¹ *See Applicability of Wis. Stat. § 196.01(5)(a) to Third-Party Financing of Distributed Energy Resource Systems in Wisconsin*, Docket No. 9300-DR-102 and *Petition of Sunrun Inc. for a Declaratory Ruling Regarding the Applicability of Wis. Stat. § 196.01(5)(a) to Leasing of Solar Equipment in Wisconsin* ([PSC REF#: 335245](#) and [PSC REF#: 358934](#).)

² *Petition of Hackett Solar 1 for Declaratory Ruling Regarding PgS-3 Tariff of Wisconsin Power and Light Company* (6680-DR-112) in 2014. ([PSC REF#: 205585](#).) The applicant in docket 6680-DR-112 withdrew its request for a declaratory ruling before the Commission made any substantive findings. ([PSC REF#: 231458](#).)

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declaratory ruling may ultimately be issued in this docket will be determined later in the proceeding.

Pursuant to its authority under Wis. Stat. chs. 196 and 227, and Wis. Admin. Code ch. 2, the Commission thus opens this docket to consider all or part of the declaratory ruling request, and directs the Administrative Law Judge (ALJ) to work with the parties to establish the process and schedule for this docket, and, if necessary, to convene a prehearing conference. The Commission declines to limit the proceeding to a paper-only process at this time, and acknowledges that the parties should be permitted to develop an appropriate record. The Commission cautions, however, that the parties should not engage in unnecessary discovery battles or interlocutory motions. The Commission directs the ALJ that the scheduled developed for this docket should return the matter to the Commission for decision no later than December 1, 2022.

ADMINISTRATIVE MATTERS

Documents

All documents in this docket are filed on the Commission's Electronic Records Filing (ERF) system. To view these documents: (1) go to the Commission's E-Services Portal at <http://apps.psc.wi.gov>, (2) enter "9300-DR-105" in the box labeled "Quick Single Docket Search," and (3) select "Documents." To receive electronic notifications when new documents are filed in this docket, go to ERF - EZ Subscriptions and follow the instructions to subscribe to this docket.

Schedule

For the official schedule in this docket, check the notices and orders filed in this docket on the ERF system. For public convenience only, the Commission will maintain the schedule in this docket on the PSC Docket Calendar. To view the calendar: (1) go to the Commission's E-Services Portal at <http://apps.psc.wi.gov>, and (2) select the button labeled "Docket Calendar." From there you may browse or search the calendar, and subscribe to a particular docket schedule.

Public Participation

A person may participate either as a member of the public, or as a party. The Commission will provide an opportunity for any member of the public to offer an opinion on this matter either in writing, or in person at a public hearing. A member of the public may participate without becoming a party to the proceeding. Parties participate by intervening (see below) and offering, at a trial-type hearing, expert witnesses and other technical evidence, prepared and filed in advance. A party may also conduct discovery and cross-examine witnesses. The Commission shall provide notice of when, where, and how members of the public and parties may participate in this proceeding at a future date.

Intervention

Any person desiring to become a party shall file a request for party status, known as a request to intervene, under Wis. Stat. § 227.44(2m) and Wis. Admin. Code § PSC 2.21 no later than 7 days from the date of service of this Order using the ERF system.

To file such a request, go to the Commission's E-Services Portal at <http://apps.psc.wi.gov>, click on the "ERF Upload Documents" link on the left side menu bar. On the next page, log on if you are a registered ERF user, create a new account if you do not have an

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existing account, or contact PSC Records Management staff at (608) 261-8521 or via e-mail at PSCRecordsMail@wisconsin.gov for assistance.

A person desiring to become a party who lacks access to the internet shall make a request to intervene by U.S. mail addressed to:

Docket 9300-DR-105 Intervention Request
Public Service Commission of Wisconsin
P.O. Box 7854
Madison, WI 53707-7854

At the time of filing, the person making the request to intervene shall serve a copy of the request on existing parties. An existing party may respond to the request within 3 days of service. A party wishing to request intervenor compensation should do so as soon as practicable.

Wisconsin Environmental Policy Act

This is a Type III action under Wis. Admin. Code § PSC 4.10(3). The Commission will review the potential environmental effects of the proposed action. Type III actions normally do not require the preparation of an environmental impact statement under Wis. Stat. § 1.11 or an environmental assessment.

Americans with Disabilities Act

The Commission does not discriminate on the basis of disability in the provision of programs, services, or employment. Any person with a disability who needs accommodations to participate in this docket or who needs to obtain this document in a different format should contact the docket coordinator listed below. Any hearing location is physically accessible to individuals with disabilities. The Public Service Commission is located in the Hill Farms State Office Building, which is also physically accessible to individuals with disabilities through the

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entrances on the first floor. Parking for people with disabilities is available on the ground floor of the parking garage. There is also limited, free handicap visitor parking at the front of the Hill Farms State Office Building.

Contact

Please direct questions about this docket or requests for additional accommodations for the individuals with disabilities to the Commission's case coordinator, Tanner Blair, at (608) 267-9859 or Tanner.Blair@wisconsin.gov.

This Order takes effect the same day as the date of service.

DISSENT

Commissioner Nowak dissents and writes separately (see attached).

Dated at Madison, Wisconsin, this 25th day of July, 2022.

For the Commission:

A handwritten signature in black ink, appearing to read "Cru Stublely", with a long horizontal flourish extending to the right.

Cru Stublely
Secretary to the Commission

CAW:DL: 01900184

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9300-DR-105

DISSENT OF COMMISSIONER ELLEN NOWAK

I write to dissent from the Commission's decision to grant the petition of Midwest Renewable Energy Association (MREA) for a declaratory ruling, 9300-DR-105, pursuant to Wis. Stat. § 227.41 regarding the public utility status, and the Commission's authority to regulate, third-party financed solar photovoltaic generation system providers. I am also dissenting from the Commission's decision to grant a similar petition filed by Vote Solar, 9300-DR-106, which we discussed on the same day. Because the two petitions involve the same legal analysis, I discuss both in this dissent.

In granting the petitions, the Commission ignored years of precedent, both from the Wisconsin Supreme Court and the Commission's holding that deciding public utility status is a fact specific determination and the general questions posed by the petitioners raise a significant policy issue that is properly left for the Legislature to decide. *See Applicability of Wis. Stat. § 196.01(5)(a) to Third-Party Financing of Distributed Energy Resource Systems in Wisconsin, Docket No. 9300-DR-102 and Petition of Sunrun Inc. for a Declaratory Ruling Regarding the Applicability of Wis. Stat. § 196.01(5)(a) to Leasing of Solar Equipment in Wisconsin.*

The petitions from Midwest Renewable Energy Association (MREA) and Vote Solar are nearly identical to the petitions the Commission has previously considered and rejected. First, in 9300-DR-102, Wisconsin Solar Energies Industry Association (WiSEIA) sought a declaratory

ruling that a WiSEIA member will not be deemed to be, or regulated as, a “public utility” under Wis. Stat. § 196.01(5) when it executed purchased power agreements or leases to provide energy to customers in Wisconsin from solar photovoltaic systems and/or PV systems coupled with an energy storage device. ([PSC REF#: 335245](#) at 2.)

Though WiSEIA identified two family projects and four school projects with a list of shared characteristics, the Commission declined to open a docket to consider the request for declaratory ruling, reasoning that:

the question presented in the petition for declaratory ruling raises significant public policy considerations that the Commission believes are better left for the Legislature’s determination rather than for the Commission’s determination through the declaratory ruling process.

Id. at 1.

The Commission’s decision noted that WiSEIA’s petition was not just to seek a declaratory ruling for the two families and four schools identified in the petition that its members sought to serve, but rather for “each and every” third-party financed PV system in Wisconsin. *Id.* at 6. The Commission reiterated its long-held position that considerations of whether an entity is a public utility is highly fact-specific and must be made on a case-by-case basis. *Id.* at 5-6.

Vote Solar’s petition mirrors the request of WiSEIA. While Vote Solar seeks clarity on behalf of the specific member family, just like WiSEIA, Vote Solar also seeks a broader ruling that would apply to arrangements that share certain “characteristics” to the one presented.

MREA’s Petition is even more problematic. It fails to present a specific situation of an MREA member and instead, seeks a broad, generalized ruling that any and all “third-party financed distributed energy resources,” which “may include any combination of energy storage,

distributed generation, demand response, energy efficiency, thermal storage, and electric vehicles and their supply equipment” are not public utilities. MREA Petition at 1. In other words, MREA asks us to improperly engage in rulemaking. *See Wisconsin Legislature v. Palm*, 391 Wis. 2d 497, ¶22 (2020) quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814 (1979). (“a rule for purposes of ch. 227 is (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency.”)

In order to depart from Commission precedent, the Commission must articulate a reasonable basis for doing so. It did not. Instead, the Commission cited the lack of action by the Legislature on the issue and the fact that other states have acted. Neither are reasonable or rational reasons. First, the fact that the Legislature has not acted on a matter which this Commission has repeatedly stated is a matter for it to determine does not open the door for us to act. Nothing in Ch. 196 gives us such authority. Also, imagine the precedent this sets. The Commission can, on a whim, decide that the Legislature is not moving fast enough on a policy matter and unilaterally enact policy changes. The Commission does not have such authority. To suggest that it does invites a costly legal challenge.

Second, the fact that other states have made determinations on the question of the public utility status of third-party leasing for solar systems is irrelevant. Wisconsin law is not dependent on when and how other states act, and the Commission must operate under the statutes enacted by the Wisconsin Legislature and the cases handed down by the Wisconsin Supreme Court, not the statutes or precedent from other states. This is a red herring.

MREA and Vote Solar also asked that the Commission decide the Petitions through a paper-only process. Not only is this request contrary to Wis. Stat. § 227.41(2), it is premature and presumptuous. MREA and Vote Solar boldly proclaim that no hearing is necessary, with Vote Solar further asserting that there are no disputed material facts, despite the fact that no docket has yet been opened and potentially interested parties have not yet had the opportunity to intervene, nor to request a contested case hearing. Not willing to go quite as far as MREA or Vote Solar, the Commission remarkably directed an expedited process for both proceedings, stating that it didn't want the proceedings to "languish" or parties to file "all sorts of motions for interlocutory review" or have "squabbles over evidence or discovery." While the majority may see motion practice as causing delay or being problematic, the fact is that parties should not be instructed to forgo motion practice or refrain from seeking more evidence. It is their right to do just that, and allowing such process creates a full record for this Commission's consideration. The Commission should not interfere with the development of the record without any basis other than expediency. There is no urgency here. Apparently the majority thinks this is urgent since it set a deadline of December 1, 2022 for the matters to be returned for a final decision. This, too, is remarkable and telling. Why the need to decide this before the end of the year? Why wouldn't January 4, 2023 or later serve as an acceptable time? The answer is obvious. The Commission made a purely political decision today.