

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

9300-DR-105

INITIAL BRIEF OF WISCONSIN UTILITIES ASSOCIATION

When Wisconsin enacted its Public Utility Law in 1907, it made a choice. “[T]here was a legislative decision that as a general proposition the theory of public utility competition was wrong and that regulated monopoly was right. Referring to the law of 1907, the supreme court of Wisconsin stated: ‘One of the main purposes of the law was to avoid duplication and it was thought that by efficiently controlling the rates to be charged by a single utility the consumer would derive the benefits resulting from economy in production.’”¹ Early on the Supreme Court recognized the benefits of this system, including the “elimination of excessive investments and excessive expenses caused by two or more public utilities, each with its separate property and fixed charges, where the need of the consumers only required one, and elimination of risk to investors by encroachments, or threatened encroachments, upon an occupied field of public service without any public necessity therefor.”²

¹ William L. Crow, *Legislative Control of Public Utilities in Wisconsin*, 18 Marq. L. Rev. 80, 81 (1934) (Ex.-CFC-Rude-7), quoting *Wisconsin Traction, L. H. & P. Co. v. Menasha*, 157 Wis. 1, 8, 145 N.W. 231 (1914).

² *Calumet Service Co. v. Clinton*, 148 Wis. 334, 365, 135 N.W. 131 (1912).

Accordingly, Wisconsin established a “regulatory compact,” which persists to this day under Chapter 196 of the statutes. Electric service is provided by regulated monopolies, public utilities with defined service territories and the exclusive right to serve in their territories. In exchange for the franchise, a public utility is obligated to serve all customers within its service territory and is subject to pervasive regulation of its prices and other terms of service, including the rate of return it may earn on its investment in providing safe and reliable electric service.

This may not be the only model possible; indeed, there are many potential ways to structure the regulatory environment for the production, delivery, and sale of electricity. But this is the model the legislature chose as a matter of public policy, and if it is to be changed, that change must come from the legislature.

Now financiers and developers of distributed solar generation equipment (and their allies) argue that the system that has served Wisconsin so well over the last 100-plus years is outdated and electric service can and should be provided competitively, to give customers “choice” and the ability to obtain electric service at less cost. There are ample reasons to question these claims, as small-scale rooftop solar is a far more expensive way to supply electricity even after the massive subsidies provided by federal and state government. But even if these parties were right and, as the result of technological changes, it was now economically efficient to provide electric service on a competitive basis (a decision some states have indeed made, with largely negative results for consumers), allowing such competition would require a fundamental change in Wisconsin’s century-old Public Utility Law.

The Commission has no authority to dispense with the regulatory compact and the regulated monopoly model that governs the provision of electric service in this state. And it should not be lured unwittingly far down the path to doing so in this case, which would be the result if MREA's requested declaratory ruling is granted.

Nonetheless, MREA urges the Commission to accomplish indirectly what it cannot do directly, proposing a creative interpretation of the Public Utility Law that would endorse the very thing Wisconsin rejected in 1907: the provision of electric service to any number of customers of any type or size via individual generating systems under individual contracts. Consider the possibility of a Tesla or similar behemoth serving hundreds of thousands of Wisconsin residents and businesses in this fashion, with no limits as to technology type, the size of their generating and storage portfolios, the prices they charge, or the quality of the service they provide. If those would not be "public utilities" under the Public Utility Law, then the statute would not be worth the parchment on which it was first printed. MREA's proposed approach is precisely the model that the law was intended to prohibit.

MREA is asking the Commission to do what it and the legislature have so far refused to do: declare that MREA and its members can *sell power* to the customers of regulated public utilities. Regardless of how the transaction is labeled, this would recognize a form of retail competition for electric service in Wisconsin. As MREA notes, bills were introduced in the legislature just last year to authorize exactly that. They went nowhere. One might ask how it can be that such retail competition is already legal, as MREA claims, if such legislative "clarity" is needed.

In any event, if the Commission intends to legislate for itself, the policy and socioeconomic consequences of its decision must be considered, as they would be if the legislature did act. This sparse record provides no basis for such fundamental change. All it makes clear is that Wisconsin is not ready for retail competition.

I. *The issue: Petitioners request leave to sell power to utility customers free of PSCW jurisdiction.*

MREA is just the latest in a parade of parties that have come before the Commission seeking a ruling that would enable third-party providers to sell power to the customers of Wisconsin's regulated public utilities. Since at least 2014, the Commission has made clear that "clarification of Wisconsin statutes regarding the status of third-party ownership of DG is more appropriately within the purview of the Wisconsin Legislature."³ Instead of tampering with the statutes, the Commission announced a policy of evaluating whether "third-party owned DG systems" comply with *current* law on a case-by-case basis.⁴

Initially, the Commission recognized such "case-by-case" petitions for what they were: just so many attempts to get the Commission to do exactly what it said it would *not* do in the 2014 Order. It helped that previous petitioners were more explicit about what they wanted. For example, in 2017, the Wisconsin Solar Energy Industries Association (WiSEIA) requested a declaratory ruling that by its terms would have applied to "each and every" third party-owned system in Wisconsin;

³ Final Decision, *Joint Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas, and Steam Rates*, Dkt. 5-UR-107 (PSC REF#: 226564) (Dec. 23, 2014) (the "2014 Order"), at 89.

⁴ *Id.* (emphasis added).

recognizing that “any such determination on a potentially significant change in energy policy in Wisconsin should come from the Legislature rather than from the Commission,” the Commission wisely declined to open a docket.⁵

The following year, Sunrun Inc. came forward with a similar petition. Unlike WiSEIA, Sunrun purported to “request[] a declaratory ruling only for Sunrun and only as to its use of the [proposed] Equipment Lease.”⁶ The Commission had no trouble seeing through this and denying the petition: “The implications to the solar DG systems industry as a whole are evident. Despite a Commission decision in this matter being only applicable to Sunrun, other industry participants are likely to conform their behavior accordingly based on the outcome of such a decision.”⁷

Most recently, Eagle Point Solar modified the approach again. Like Sunrun, it purported to seek a declaratory ruling limited to its facts, but it made those facts even more specific (basing its petition on an *actual* contract with the City of Milwaukee), and it added an appeal of an interconnection denial by Wisconsin Electric.⁸ Consistent with its approach since the 2014 Order, the Commission declined to open a declaratory ruling docket, recognizing that “a ruling on this Petition . . . would likely generate additional requests for declaratory rulings from

⁵ Order, *Applicability of Wis. Stat. § 196.01(5)(a) to Third-Party Financing of Distributed Energy Resource Systems in Wisconsin*, Dkt. 9300-DR-102 (PSC REF#: 335245) (Dec. 22, 2017), at 6.

⁶ Order, *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*, Dkt. 9300-DR-103 (PSC REF#: 358934) (Feb. 4, 2019), at 6.

⁷ *Id.*

⁸ Order, *Appeal of Denial of Application for Interconnection, Request for Contested Case Hearing, and Petition for Declaratory Ruling of Eagle Point Solar, LLC and Eagle Point Energy 6, LLC*, Dkt. 9300-DR-104 (PSC REF#: 365974) (May 3, 2019).

other business in the same industry wishing to have the Commission consider their agreements for solar service. The Commission acknowledges that this issue is unlikely to go away; however, determinations with such broad statewide policy consequences are better addressed through the legislative process.”

At the same time, the Commission agreed to investigate Eagle Point’s denial of interconnection—an actual dispute between Eagle Point and the utility grounded in concrete facts centering on an executed contract for “solar services.” Because Eagle Point insisted it was *not* selling power to the City, the focus of that case shifted to whether that was true, with the utility asserting that as structured, Eagle Point’s transaction with the City could not be anything other than a power sale.⁹

MREA has changed the playbook yet again, with a petition that is both more and less transparent than Eagle Point’s. In one sense, MREA’s petition resembles the earlier, failed effort by WiSEIA: 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’ . . . are not public utilities.”¹⁰ But unlike WiSEIA, MREA pretends otherwise, insisting its petition is limited to the “state of facts” (just eleven!) specified in its petition and assuring the Commission that granting the petition would *not* be “making a discretionary policy choice whether to allow third party financed DERs to do business in Wisconsin.”¹¹

⁹ Commission Staff Memorandum, *Appeal of Denial of Application for Interconnection, Request for Contested Case Hearing, and Petition for Declaratory Ruling of Eagle Point Solar, LLC and Eagle Point Energy 6, LLC*, Dkt. 9300-DR-104 (PSC REF#: 429914) (Jan. 27, 2022).

¹⁰ Order Opening Docket and Related Administrative Matters (PSC REF#: 443840) (July 25, 2022) (Dissent at 2).

¹¹ MREA Resp. in Opp. to Joint Interlocutory Appeal (PSC REF#: 447552) (Sept. 16, 2022), at 10.

Even as it attempts to conceal the obvious reach of its requested relief (why else bring the petition?), MREA has finally said out loud what earlier petitioners tried to keep quiet: MREA and its members want to *sell power* to the customers of existing utilities. Its petition unabashedly admits this: “The PSC should declare that third-party financing, consisting of . . . **a power purchase agreement** . . . 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).”¹²

This outright request to sell power clarifies the stakes and lets the Commission cut right to the chase, making finer distinctions largely irrelevant. If MREA and its members are granted leave to sell power to the customers of WUA’s member utilities subject to no oversight by the Commission and none of the burdens and obligations imposed upon Wisconsin’s public utilities, then any distinction between leases and power purchase agreements (PPAs) falls by the wayside. Instead, MREA’s petition puts the question to the Commission in the starkest possible terms: should anyone meeting MREA’s eleven-point description be free to sell power to utility customers with zero regulatory oversight? The Commission must resolve the petition on these terms.¹³

¹² Ex.-MREA-Petition at 19; *see also* Hr’g Tr. at 131:12–25 (MREA’s Mr. Hylla confirming MREA “does not intend to pursue the lease option”—“Just a PPA.”); *id.* at 136:9–12 (same). Mr. Hylla later clarified that MREA may offer leases in the future if “circumstances change.” (150:6–13).

¹³ MREA has not explained *why*, exactly, it and its members are so set on obtaining unregulated freedom to make power sales when they and their potential customers already have other, legal options (like the sale of systems and capital leasing) at their disposal to market their wares. WUA and its members have never objected to those transactions, and have encouraged the development of customer-owned distributed generation through their own programs. It is only the unregulated *sale of power* requested by MREA and its members to which WUA and its members object.

II. *The public utility question: Selling power to customers would make Petitioners public utilities under Wisconsin law.*

Because MREA and its members openly ask the Commission to cede jurisdiction over their power sales to current utility customers, the Commission’s task is relatively easy. The distributed generation systems owned by MREA (or its members, or *their* third-party financiers) are clearly “plant or equipment, within the state, for the production, transmission, delivery or furnishing of . . . power.”¹⁴ So the only question is whether this would be “either directly or indirectly to or for the public.”¹⁵ Under over a century of Wisconsin case law, the answer is definitively yes.

A. Wisconsin’s definition of “public utility” is broad and certainly encompasses power sales to current utility customers.

This Commission’s regulation of Wisconsin public utilities dates back to 1907, when the Legislature authorized it to grant exclusive monopoly status, impose uniform accounting and service standards, and set rates for every “public utility.”¹⁶

Wisconsin’s original definition of “public utility” was as follows:

The term “public utility” as used in this act shall mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every town, village or city that now or hereafter may *own, operate, manage, or control* any plant or *equipment* within the state, for the conveyance of telephone messages or *for the production, transmission, delivery or furnishing of* heat, light, water or *power either directly or indirectly* to or for the public.¹⁷

¹⁴ Wis. Stat. § 196.01(5)(a) (defining “public utility”).

¹⁵ *Id.*

¹⁶ Laws of 1907, ch. 499 §§ 1797m-1–1797m-108 (the “1907 Act”).

¹⁷ 1907 Act, § 1797m-1.1 (emphasis added).

While this definition has undergone several changes over the intervening decades, the core aspects of the definition remain the same:

“Public utility” means, except as provided in par. (b), 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.¹⁸

Under this plain language, the so-called “public utility question” is in fact two questions: (1) whether MREA will “own, operate, manage or control . . . all or any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of . . . power,” and (2) whether MREA will produce, transmit, deliver or furnish such power “*either directly or indirectly* to or for the public.” Again, only the second question is really disputed in this case.

The last century of Wisconsin case law makes clear that “to or for the public” effectively means **any member of the public requiring power and not already standing in a special relationship with the power provider**. This is evident from *Wisconsin River Improvement Co. v. Pier*, 137 Wis. 325, 118 N.W. 857 (1908), the first Wisconsin decision to construe the statutory definition of public utility.

There, the Supreme Court stated:

By the ‘public’ is meant, not the whole population of the state, but all persons who require power and are willing to pay reasonable rates therefor *to the full extent of the capacity of the enterprise in question*.¹⁹

¹⁸ Wis. Stat. § 196.01(5)(a) (2019-20 ed.) (emphasis added).

¹⁹ 118 N.W. at 862 (emphasis added).

In other words, an entity is a public utility if it holds itself out to furnish power to those who require it and are willing to pay for it, up to its capacity to serve.

The Supreme Court reiterated this point in *Cawker v. Meyer*, 147 Wis. 320, 133 N.W. 157 (1911), distinguishing special relationships from broader offers to serve the public:

It was not the furnishing of heat, light, or power to tenants, or, incidentally, to a few neighbors, that the Legislature sought to regulate, but the furnishing of those commodities to the public; that is, to whoever might require the same.²⁰

The court's discussion in *Cawker* makes clear that it was attempting to avoid an absurd construction of the statute: it rejected a claim that "the furnishing of such commodities *to any one else than to one's self* is furnishing it to the public," because in that case even a landlord providing a heated or lighted room would be deemed a public utility under the law.²¹ At the same time, the court stressed that "whether or not the use is for the public does not necessarily depend upon the number of consumers; for there may be only one, and yet the use be for the public . . ." ²² Instead, "[t]he word 'public' must be construed to mean . . . more than a few who, by reason of any *peculiar relation* to the owner of the plant, can be served by him."²³

It's true that in *Cawker*, the Supreme Court found that "the purpose of the plant was to serve the tenants of the owners, a restricted class, standing in a certain contract relation with them, and not the public." *Id.* at 158. But this was not

²⁰ 133 N.W. at 158.

²¹ *Id.* (emphasis added).

²² *Id.* at 159.

²³ *Id.* (emphasis added).

some blanket pronouncement that an entity can avoid public utility status merely by entering into one-off contracts with customers. The point is that the landlord providing power *already stood in* a “certain contract relation” with his customers: he was their landlord. So his tenants were not “the public”; they were a “restricted class.” And the court cautioned that notwithstanding this special relationship, even a landlord could become a public utility if it expanded its offerings beyond its tenants: “Should plaintiffs, however, *enlarge their field of service*, it is by no means certain that they would remain exempt from the operation of the law.”²⁴

Here, in contrast to *Cawker*, MREA has no “peculiar relationship” with its would-be customers *other than* its proposed PPA for the sale of solar energy. That contract is not “incidental to” some other, pre-existing relationship, nor is it merely furnishing power to a few neighbors. The transaction *is* MREA’s relationship with the customer, and MREA holds itself out to serve an unrestricted number of them.

Cases after *Cawker* continued to interpret “public utility” quite broadly, and the “special relationship” exception narrowly. In 1912, the court explained:

The comprehensive language . . . was plainly designed to cover *every conceivable situation* of the existence of an industry of the nature mentioned. No room was left for controversies over technical ownership or capacity to own. *The purpose was to encompass the physical situation,—to deal with the condition whatever it might be*, and the person, natural or artificial, whatever might be the particular relation of the person, or persons, natural or artificial, to the physical situation or condition, whether that of owner, operator, manager or controller, and give thereto the status of a public utility.²⁵

²⁴ *Id.* at 159 (emphasis added).

²⁵ *Calumet Service Co. v. City of Chilton*, 148 Wis. 334, 135 N.W. 131, 137 (1912) (emphasis added).

To paraphrase, the definition is not concerned with labels and technicalities; it is concerned with practical realities.²⁶

In other early decisions, the Supreme Court rejected the notion that entities providing power could use individual contracts with customers to remove themselves from the definition of public utility. In *President and Trustees of Village of Kilbourn City v. Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N.W. 499 (1912), the court presciently noted: “Any new telephone or electric light or water company could make all kinds of discriminating contracts before they actually began to serve the public.”²⁷ But that would not spare it from regulation as a public utility.²⁸

Wisconsin courts have also emphasized that in adding “indirectly” to the definition of public utility, the Legislature “aimed at including all corporations . . . which, under the guise of a private utility, nevertheless in fact were functioning as a public utility.”²⁹ And more recent decisions have not narrowed the definition of public utility through judicial interpretation. If anything, they have narrowed the *exception*.

²⁶ See also *id.* at 143 (“Note the significance of the term ‘either directly or indirectly to or for the public.’ In this, we repeat, nothing is left out, service to the public in the aggregate *as well as in individual capacities*, was unmistakably included.”) (emphasis added).

²⁷ 135 N.W. at 504.

²⁸ *Id.*; see also *Wis. Traction, Light, Heat & Power Co. v. Green Bay & Mississippi Canal Co.*, 188 Wis. 54, 205 N.W. 551, 554 (1925) (“it is not necessary that service by such corporation shall actually begin before its duties and liabilities as such arise or are imposed, otherwise . . . it might contract prior to actual service to evade the law as to uniformity of rates”) (citing *Kilbourn City*).

²⁹ *Chippewa Power Co. v. Railroad Comm’n of Wisconsin*, 188 Wis. 246, 205 N.W. 900, 901–02 (1925).

For instance, in *City of Sun Prairie v. Public Service Comm'n*, 37 Wis. 2d 96, 154 N.W.2d 360 (1967), the Supreme Court effectively reduced *Cawker's* holding to a landlord-tenant exception, describing it as a decision in line with holdings in other states “that a landlord who furnishes utility service to his tenants is not a public utility within the definition thereof contained in the applicable state law.”³⁰ WUA is not aware of any other court decisions applying *Cawker's* exception to other facts.

Still more recently, the Commission applied the lessons of *Cawker* and *City of Sun Prairie*, and its decisions support WUA's position. In consolidated dockets in 2006 and 2007, the Commission heard challenges to continued regulation of one of Wisconsin's smallest investor-owned public utilities, Consolidated Water Power Company (“CWP”).³¹ The Commission found the “determinative issue” was “not the number of customers CWP would serve, but whether CWP would be holding itself out to serve the public[.]”³² Initially, the Commission thought CWP would *not* be a public utility, because its proposed service territory was “carefully designed to ensure [it] would not have an obligation to provide service to new customers.”³³ But after additional evidence that “CWP [would] be holding itself out to serve the public,” including new customers, the Commission concluded CWP would remain a public utility.³⁴ Like CWP, MREA will serve the public, including new customers.

³⁰ *Id.* at 101.

³¹ Dockets 5-DR-105 and 5-BS-126, PSC REF#: 56487, 250 P.U.R.4th 156, 2006 WL 2042329 (Wis. P.S.C. June 29, 2006); Dockets 5-BS-162, 5-DR-108, 1330-ER-101, 2007 WL 3347352 (Wis. P.S.C. Nov. 8, 2007).

³² PSC REF#: 56478, at 7; 2007 WL 3347352, Opinion § 4.

³³ *Id.* at 8.

³⁴ 2007 WL 3347352, Opinion § 4.

In 2016, the Commission again applied the lessons of *Cawker* and *City of Sun Prairie* in Docket 6630-BS-101.³⁵ In that case, Wisconsin Electric Power Company sought permission to sell existing steam production and distribution facilities to the Milwaukee Regional Medical Center (“MRMC”), and the Commission needed to decide whether MRMC would become a public utility.³⁶ The Commission found it “highly relevant” that the MRMC had “only agreed to provide service to the MRMC members and ‘ha[d] no intention of ever holding itself out to the public to provide steam service.’”³⁷ Additionally, the geography and “physical limitations of the distribution system, support[ed] a finding that the service territory is designed to ensure there would be no obligations to provide service to new customers.”³⁸ Based on these findings, the Commission concluded MRMC would not be a public utility, but that determination could change if MRMC “were to enlarge its field of service, for example by offering services to additional entities or expanding its geographic boundaries.”³⁹ Here, MREA has announced its intention to offer its services to new customers throughout Wisconsin, and seeks to directly connect to existing utilities’ unrestricted distribution systems. Both facts support the conclusion that MREA would be a public utility under Wisconsin law.

³⁵ PSC REF#: 280476, 2016 WL 233574 (Wis. P.S.C. Jan. 15, 2016).

³⁶ *Id.* at 1.

³⁷ *Id.* at 11.

³⁸ *Id.*

³⁹ *Id.*

Beyond these precedents, there is the practical reality of MREA's business model. It has no preexisting relationship with customers in Wisconsin, and it is not offering them power incidental to some other, unrelated purpose. Instead, without regard to service territory, it would begin serving the Wisconsin market tomorrow if the Commission granted MREA's requested declaratory ruling. MREA does not suggest any limitation on the type or number of customers it could serve. It holds itself out to the public as an alternative energy supplier. MREA's model would be a public utility at scale, so it is a public utility now.

B. The “facts” cited by MREA, even if true, do not change the legal outcome.

The eleven “facts” cited in the petition are MREA's effort to isolate each one of its proposed power sales as a stand-alone transaction with an individual family or business, with no single transaction serving “the public.” They fail to do that.

Instead, MREA's proposed “facts”⁴⁰ make clear that:

- MREA's distributed energy resources (DERs) will supply customer load (#4), meaning “power is sold to a host customer” (#7).
- Not only will the host customer “utilize[] the DERs to serve its energy requirements,” but it may sell power back to the grid (#10).
- The customer will not own the DERs; MREA or some unidentified third party “other than the host customer” will (#1), and will also provide “servicing” and “management services” for the system (#7).

This is quintessential public utility service, and the remaining “facts” cited by MREA do not change the outcome of the public utility test under Wisconsin law.

⁴⁰ Ex.-MREA-Petition at 2–3.

The fact that each DER will be “located at the site of a host customer” (#1) or “located on the host customer’s property” (#3) makes no difference. The statutory definition encompasses “all or any part of a plant or equipment,” regardless of where it is located.⁴¹ The fact that each DER will be located “behind the customer’s utility meter (point of common coupling)” (#3) likewise makes no difference. That has never been a factor in the statutory analysis, and MREA admits that electricity from the DER will flow back to the grid regardless of the point of interconnection (#10). This admission, in turn, undermines MREA’s assertions that “[e]ach DER is dedicated solely to the host customer’s use,” and “[n]o DER plant or equipment provides power to anyone other than to the host customer” (#5). By definition, excess power returned to the grid *will* serve other members of the public, “either directly or indirectly.”⁴²

And even if not, case law makes clear that a power supplier cannot use individual contracts to evade public utility status and accompanying regulation.⁴³ Indeed, a public utility’s relationship with its customers is contractual in nature, with the utility’s filed tariffs providing the terms and conditions.⁴⁴ Thus all of MREA’s emphasis on “individualized contract[s] specific to the customer” (#6) and the “private, individualized, contract” with the third-party owner (#7) is irrelevant.

⁴¹ Wis. Stat. § 196.01(5)(a).

⁴² *Id.*

⁴³ *President and Trustees of Village of Kilbourn City, supra*, 135 N.W. at 504 (calling these “discriminating contracts”); *Wis. Traction, Light, Heat & Power Co., supra*, 205 N.W. at 554 (1925) (recognizing and rejecting attempt to “contract prior to actual service to evade the law as to uniformity of rates”).

⁴⁴ *Wis. End-User Gas Ass’n v. PSCW*, 218 Wis. 2d 558, 559 n.1, 581 N.W.2d 556 (Ct. App. 1998) (a tariff is “a contract between a utility company and some of its customers”).

So is MREA's related insistence that "no power is sold to a host customer unless an individualized contract *already exists* between the DER provider and the host customer" (#7) (emphasis added). Again, to meet the "special relationship" exception under *Cawker*, MREA cannot point to the power sale *itself* as the pre-existing relationship giving rise to the sale of power. That is entirely circular. What exempted the landlord in *Cawker*, and what MREA would need to show here, is some *other*, pre-existing contractual relationship as to which the sale of power is merely incidental. If MREA's *only* relationship with the customer is as a power provider, that plainly does not qualify.

Finally, the fact that the "individualized" contract is further tailored to specific attributes of the customer and their property (#6, #7) does not help answer the public utility question. If MREA *is* a public utility, then all of these aspects are prohibited discrimination based on individual customer attributes.⁴⁵ So MREA cannot point to the same discrimination as evidence that it is *not* a public utility. Indeed, if tailoring service and rates to "credit or other financial attributes" (#6) is a way to avoid public utility regulation, what is to stop Wisconsin's currently regulated public utilities from doing the same thing?

Try as it might to limit the Commission's focus to one individual contract at a time, MREA cannot escape the reality that, *at scale*, its proposed approach is indistinguishable from public utility service. To understand this, one need not imagine a scale as large as Wisconsin's investor-owned utilities. There are regulated

⁴⁵ See Wis. Stats. §§ 196.22, 196.60, 196.604.

public utilities in Wisconsin with as few as one hundred customers. It is not difficult to imagine MREA selling power to a few hundred customers, each with their own contract and DER. If the only aspects separating those two scenarios are things a public utility would be prohibited from doing (offering different terms to different customers, or altogether declining to serve customers deemed unworthy), then the only real difference between the two is *regulation*—not any attributes inherent in the transaction itself. There is no basis for the Commission to conclude that MREA should be unregulated if it proceeds as proposed—particularly based on the slim and almost entirely abstract “facts” presented in MREA’s petition.

III. *The stakes: Granting the petitions would upend the regulatory compact.*

Members of this Commission have already begun to discuss MREA’s application as a minor filing of little consequence. Most recently, an order of the Commission characterized “the dispute actually presented in this docket” as “a narrow one,” limited to “whether the Commission wishes to issue a declaratory ruling on whether the eleven identified attributes . . . presented by MREA in its petition could result in third-party financed DERs with such attributes being ‘public utilities . . .’”⁴⁶ The same order takes the position that granting the requested declaration “would not be setting policy,” but would merely “apply the law to a specific set of facts.”⁴⁷

⁴⁶ Order Denying Joint Interlocutory Appeal on Schedule (PSC REF#: 450205) (Oct. 24, 2022) at 5.

⁴⁷ *Id.* at 6.

Respectfully, it is difficult to understand how anyone involved in this case could believe that. Again, MREA asks this Commission to allow it to sell power to utility customers *unregulated*. The “facts” MREA enumerates do not “limit” or “narrow” that bold request in any meaningful sense. The precedent MREA seeks would have no limiting principle as to the type, size, or number of customers, or the technology used to serve them. If the Commission is to grant the petition, it can do so only by rewriting the law and the regulatory compact at its foundation.

A. Before 1907, utilities competed for and under municipal franchises, resulting in problems.

Wisconsin’s Public Utilities Law was enacted to solve a very specific problem. In the late nineteenth century, individual power providers began to spring up in and around municipalities throughout the State. Gas and electric utilities vied for municipal “franchises,” which were granted with varying terms and permitted varying degrees of competition. All of this gave rise to a great state of confusion:

The confusion created during the years preceding the public utilities law of 1907 by granting franchises in several different ways,—some directly by the state, some by cities as state agencies, some by the state in the main but with power to the various municipalities as state agencies to add supplementary features, fitting particular situations, some by the state without regard to local police regulations, and some likewise having such regard either expressly or by necessary implication, some having contractual features creating doubt in regard to constitutional status, and some having such features but without doubtful character, many of such matters being, in the ultimate, more or less detrimental to consumers whether public or private, and proprietors as well—in the whole, created a perplexing situation in respect to harmonious administration.⁴⁸

⁴⁸ Ex.-CFC-Rude-7, *supra* n.1, at 81.

This patchwork of municipal franchises and the lack of any centralized, expert oversight created openings for classical economic inefficiencies and resulting harm to customers, including duplication of facilities,⁴⁹ lack of regulatory expertise⁵⁰ or uniform accounting (with the attendant inability to identify the basis for customer pricing),⁵¹ utility insolvency,⁵² and various forms of customer abuses.⁵³ In short, the root problem was *competition*, and the response was “a legislative decision that . . . the theory of public utility competition was wrong and that regulated monopoly was right.”⁵⁴

⁴⁹ *Id.*, quoting *Wis. Traction, L. H. & P. Co. v. Menasha*, 157 Wis. 1, 8, 145 N.W. 231 (1914) (“One of the main purposes of the law was to avoid duplication . . .”); *id.* at 86, quoting *Calumet Service Co. v. Chilton*, *supra*, 148 Wis. at 365 (discussing “elimination of excessive investments and excessive expenses caused by two or more public utilities, each with its separate property and fixed charges, where the need of the consumers only required one”).

⁵⁰ Ex.-CFC-Rude-7, *supra* n.1, at 83 n.16, quoting *Pabst Corp. v. Milwaukee*, 190 Wis. 349, 356, 208 N.W. 493 (1926) (“The lack of . . . expert technical knowledge on the part of those who acted for municipalities in establishing rates before the passage of the utility law was one of the chief reasons which led the legislature to take the regulation of rates out of the hands of municipal authorities and to vest that power in the commission.”).

⁵¹ See Clyde London King, *Regulation of Municipal Utilities* (1912) (Ex.-WUA-3) at 308 n.1 (lamenting “entirely inadequate” accounting even after the 1907 Act was adopted); Wisconsin Legislature, *Brief Explanation of Public Utilities Bill* (Ex.-WUA-1) at 7 (“So long as each company keeps its own system of books any comparison of the cost of making and distributing any product will be impossible. The intricacies of a private system of accounting are such that it might be very difficult for the commission to determine the cost in detail. It is to be desired that a system be devised from which the commission or an individual consumer can determine accurately the exact cost of any product.”) (emphasis added).

⁵² Ex.-WUA-3, *supra* n.51, at 316 n.1 (one of the purposes of the law was “to prevent the projection of lines for speculative purposes and through which the innocent purchaser would be made to suffer losses,” and the effect of the law was “to eliminate speculative elements from the business of operating utilities of this kind and to increase the safety of investments therein”).

⁵³ *Id.* at 317 (noting the need to “protect the consumer against unjust and unreasonable rates and poor service”); *id.* at 315 (emphasizing that “the extent of the discriminations in the rates and service of utilities may be almost beyond comprehension. The whole state of Wisconsin was literally streaked and plastered with discrimination in the rates of utilities.”).

⁵⁴ Ex.-CFC-Rude-7, *supra* n.1, at 81. See also *id.* at 82 n.12 (“this law proceeds upon the theory that in the electric light and power field in every community . . . no competition should be permitted.”).

B. The Public Utilities Law of 1907 abolished competition among power providers in exchange for a specific set of obligations.

The 1907 Act attacked the ills of utility competition by offering existing utilities a tradeoff known today as the regulatory compact. It offered utilities a new, “indeterminate permit” in exchange for state regulation:

The device used to provide for a limited monopoly was called in the Wisconsin law an indeterminate permit. The monopoly granted was not the kind that of old had an evil repute, but the “one purchased by giving an equivalent to the public, as in the case of a patent allowed by the federal government.” The limitation consisted in regulation by the commission . . .⁵⁵

The basic forms of regulation imposed in exchange for the indeterminate permit⁵⁶ consisted of regulated rates,⁵⁷ financial accountability under a uniform system of utility property valuation and accounting,⁵⁸ customer protections,⁵⁹ a local presence requirement,⁶⁰ and general, centralized oversight at the state level—namely, by the Commission.⁶¹ In short, in exchange for the exclusive right to serve customers, “the [law’s] purpose [was] to *protect the public* in regulation of the quality of the product and the nature of the service as fully as in regulation of rates.”⁶²

⁵⁵ *Id.* at 86–87, quoting *Calumet Service Co.*, *supra*, 148 Wis. at 359.

⁵⁶ Ex.-WUA-1, *supra* n.51, at 11–12 (explaining Section 1797m-83 of 1907 Act).

⁵⁷ *Id.* at 5 (explaining Section 1797m-3 of 1907 Act).

⁵⁸ *Id.* at 6–8 (explaining Sections 1797m-6–24 of 1907 Act).

⁵⁹ *Id.* at 10, 12 (explaining Sections 1797m-48–56, 97–107, and 111 of 1907 Act).

⁶⁰ *Id.* at 11 (explaining Section 1797m-82 of 1907 Act).

⁶¹ *Id.* at 5, 10 (explaining Sections 1797m-2 and 46 of 1907 Act).

⁶² *Id.* at 3 (emphasis added) (also noting that for this “two fold purpose” to work, “the commission must be given opportunity for full knowledge of the affairs of the public utility and the public must in turn be given access to the knowledge obtained by the commission”).

Recognizing that the burden of regulation was substantial, the 1907 Act ensured that protection from competition was meaningful, not in name only:

To induce public utilities having franchises to make such an election, certain protection is given to the utility with an indeterminate franchise from competition either by the municipality or a second public utility . . . This arrangement secures to the company operating under an indeterminate permit, a practically exclusive indefinite franchise . . .⁶³

The accompanying restriction on competition was directly tied to the core purpose of the 1907 Act: “As it [was] the theory of the law as interpreted by the courts that competition is wasteful, competition [was] to be allowed only in extraordinary cases.”⁶⁴ Under the new law, utility competition was permitted in two (and only two) circumstances. First, a municipality could compete with a utility, “but only after securing from the commission a declaration, following a public hearing of all parties interested, that public convenience and necessity require such municipal public utility.”⁶⁵ Second, “Competition by another utility, other than municipal, is allowed, but only on the same terms that the municipality itself may compete.”⁶⁶ Both cases were viewed as termination of the utility’s indeterminate permit.⁶⁷

⁶³ Eugene A. Gilmore, “The Wisconsin Public Utilities Act,” GREEN BAG (1907) (Ex.WUA-2) at 520.

⁶⁴ Ex.-CFC-Rude-7, *supra* n.1, at 97.

⁶⁵ *Id.* at 91, citing Wis. Stat. § 196.50(4); *see also* Ex.-WUA-1, *supra* n.31, at 10 (explaining Section 1797m-81 of 1907 Act) (this section “is intended to prevent unwise and wasteful competition and provides that before a competing public utility shall be given a franchise, the commission shall determine that a necessity for the competing plant exists”).

⁶⁶ *Id.*, citing Wis. Stat. § 196.50(1).

⁶⁷ *Id.* at 90 (referring to this as “termination” for “abuse of monopoly”).

Contemporary commentators viewed such permissive competition as “highly improbable,” because, by definition, the public convenience and necessity could not require duplication of utility service unless the incumbent utility was failing to provide adequate service at just and reasonable rates—and regulation plus the risk of losing the franchise would always incentivize the utility to do better than that.⁶⁸

C. Despite their protests, Petitioners are asking for something big, new, and totally inconsistent with the regulatory compact.

Regulated utilities continue to rely on Wisconsin’s regulatory compact today to make billions of dollars of investments to serve customers the utilities assume they have the right and obligation to serve. As described by Mr. Graves of the Brattle Group, the “historical regulatory compact” still “rests on a finely balanced set of regulatory and economic tradeoffs,” summarized as a monopoly franchise in exchange for (1) an obligation to serve customers, (2) capital-intensive investment incurred to satisfy that obligation, and (3) regulated pricing.⁶⁹ And “despite more recent market innovations,” this “first-regime, traditional regulatory compact remains largely in place in Wisconsin.”⁷⁰

It also remains true that under Wisconsin law, there are only two ways for the Commission to authorize competition with public utilities holding an indeterminate permit under Wis. Stat. § 196.54. One (plainly inapplicable here) is to authorize a municipal public utility within a municipality where an incumbent

⁶⁸ Ex.-WUA-2, *supra* n.63, at 520–21.

⁶⁹ Direct-WUA-Graves-4–5.

⁷⁰ *Id.* at 11.

utility is already serving.⁷¹ The other, applicable to any others who wish to “own, operate, manage, or control any plant or equipment for the production, transmission, delivery, or furnishing of heat, light, water or power” where a public utility is already doing so, is a declaration from the Commission, “after a public hearing of any interested party, that public convenience and necessity require the delivery of service by the applicant.”⁷² Without such a declaration, duplication of utility facilities is prohibited.⁷³

MREA’s petition seeks to evade this regulatory regime by obtaining from the Commission a declaration that in performing as intended, MREA would *not* be a “public utility” within the meaning of Wis. Stat. § 196.01(5)(a). On one level, that question is a sideshow. True, the statutory bar on duplication of facilities applies to public utilities. But MREA does not need to be a public utility to be prohibited from competing with existing indeterminate permits under Wis. Stat. § 196.50(1)(a), which says nothing about the public-utility status of the would-be competitor.

MREA’s answer to this is that it is not seeking a “license, permit or franchise” from the Commission; it is simply asking the Commission to get out of the way. A declaration that MREA is *not* a public utility would ostensibly mean it can duplicate utility facilities and compete with existing indeterminate permits, both for the purpose of selling power to current utility customers, all without any oversight by the Commission.

⁷¹ Wis. Stat. § 196.50(4).

⁷² Wis. Stat. § 196.50(1)(a).

⁷³ Wis. Stat. § 196.495(1m)(a), (b).

MREA’s assertion that this would not erode the regulatory compact that has remained in place in Wisconsin by 1907 is simply not credible. Trite comparisons to auto loans or emergency generators do not capture the obvious magnitude of what MREA is requesting in this docket. MREA cannot be trusted when it claims it merely seeks to clarify the status quo, i.e., that its proposed activities are *already* unregulated.⁷⁴ Everything about its petition – and its “rocket docket” treatment by this Commission – says otherwise.

At a minimum, as its own petition demonstrates, MREA is not confident that current law authorizes its proposed approach.⁷⁵ Nor should it be: to date, the Commission has reviewed these arrangements with skepticism and insisted on case-by-case analysis. Now, however, MREA would have the Commission scrap that approach as “impractical and infeasible,” insisting that “the PSC’s decision in this case must apply to a ‘state of facts’ that is common to many DER providers”.⁷⁶ So MREA is expressly requesting a wide-reaching decision.

And the “facts” put forth by MREA are broad, not limiting. They broadly encompass both leases and PPAs.⁷⁷ They are not limited by technology or customer size. They are subject to no particular contract terms; indeed, MREA steadfastly refused to produce any terms whatsoever until cross-examination at the hearing

⁷⁴ See, e.g., Rebuttal-MREA-Hylla-3 (arguing that utilities’ testimony “starts from the false premise that third-party DERs are currently prohibited”); Ex.-MREA-Petition-2 (“no third-party prohibition exists in substantive law”).

⁷⁵ Ex.-MREA-Petition-8 (citing “uncertainty about whether the PSC will assert jurisdiction”).

⁷⁶ *Id.* at 2.

⁷⁷ *Id.* at 19 (seeking declaration that “Third-party financing, consisting of either a power purchase agreement or lease . . . is not a ‘public utility’ as defined in Wis. Stat. § 196.01(5).”).

revealed MREA had been withholding a draft PPA all along.⁷⁸ Even now, MREA has not committed to abiding by this or any other set of terms and conditions. And regardless of whether it views MREA’s “state of facts” as sufficiently narrow, there is no realistic way for the Commission to police MREA’s adherence to that “state of facts” going forward—particularly if it disclaims jurisdiction as requested.

A Commission order disclaiming jurisdiction over power sales to customers of existing utilities on an individual contract basis would at least erode the regulatory compact and introduce retail access to Wisconsin.⁷⁹ To be clear, the issue is not that granting the requested declaration would usher in broad-scale retail access immediately. But the Commission would at least be holding open the door. And a decision need not instantly trigger full retail access to have serious implications for the regulatory compact. Diverting power sales to MREA’s customers would either erode existing utilities’ ability to serve their remaining customers or require raising those customers’ rates by a corresponding amount.⁸⁰ Mr. Graves quantified the costs shifted by *one* participating customer at roughly \$50 per month.⁸¹

⁷⁸ Compare MREA Resp. to 1-WUA-RFP-10 (PSC REF # 446335) (MREA has no contracts associated with potential customers described in Petition); 1-WUA-RFP-11 (MREA has no form contracts it intends to use with host customers); 1-WUA-RFP-12 (MREA has no form contracts its members intend to use with host customers) 2- WUA-INT-3 (PSC REF # 448610) (MREA unable to describe the range of options available to DER customers, including “options, contract terms, pricing, maintenance and conditions”); 2-WUA-INT-4 (“MREA is not aware of any specific contract for DERs” so cannot describe any consumer protection of privacy assurances included in DER contracts) *with* Hr’g Tr. at 121:4–123:12 (“we do have contract templates”).

⁷⁹ Direct-WUA-Graves-3; Rebuttal-WUA-Graves-2–3.

⁸⁰ Direct-WUA-Graves-3 (“the costs and benefits of DG PV will fall disproportionately on nonparticipants, with a regressive burden on lower income customers . . .”); *id.* at 11–15 (explaining fixed cost recovery problems introduced by expansions in distributed generation).

⁸¹ *Id.* at 16–17.

Nor can the stakes of this issue be minimized by pointing to the currently low rate of adoption in Wisconsin. If MREA is correct that legal uncertainty is chilling investment in this market,⁸² then current participation does not reliably indicate what would occur if the Commission suddenly declares this market open for business. What *is* clear is that “[e]xcept for scale, there is little to distinguish” MREA’s model “from utility-on-utility competition,”⁸³ and the Commission has not studied whether the public convenience and necessity require such competition.

IV. *The regulatory interest: The Commission has every reason to assert jurisdiction, not waive it.*

Not only has the Commission *not* studied what competitive effects would occur if it were to grant the petition, but it is far from clear why the Commission would wish to cede jurisdiction over this market given what this docket has shown.

First, whether MREA and its allies admit it or not, the petition reaches well beyond its purportedly narrow scope to implicate several of the Commission’s core functions. Some of these—anti-duplication of utility facilities, rate issues (including cross-subsidies), and public utilities’ long-term fiscal solvency—have already been discussed. In addition, the petition implicates system reliability issues.⁸⁴ And then there are the numerous consumer protection concerns raised by MREA’s approach.

Multiple witnesses expressed concern that MREA’s power sales would not be subject to many (if any) consumer protections, particularly if the Commission cedes

⁸² Ex.-MREA-Petition-8.

⁸³ Rebuttal-WUA-Graves-3.

⁸⁴ Direct-WECA-Buros-5–6.

the field. On behalf of the Customers First! Coalition, Mr. Rude introduced evidence of abuses in third-party contracting practices and recommendations from the National Association of State Utility Consumer Advocates (NASUCA) for addressing them.⁸⁵ On behalf of the Wisconsin Electric Cooperative Association, Mr. Buross raised similar concerns, with testimony relating how the Vernon Electric Cooperative suffered from the lack of regulatory oversight in its dealings with a now-bankrupt solar developer.⁸⁶ And two former public utility regulators—Mr. John Quackenbush, former chair of the Michigan Public Service Commission, and Mr. Timothy Simon, former member of the California Public Utilities Commission—offered extensive testimony explaining the necessity of regulating such transactions and offering examples of successful regulatory oversight in this area.⁸⁷

MREA’s response? “Look the other way.” MREA, joined (inexplicably) by CUB’s Mr. Singletary, reassures the Commission that there’s nothing to see here.⁸⁸ In fact, MREA went so far as to move to *strike* testimony by Mr. Ed Heiser, Wisconsin’s preeminent consumer protection advocate, to ensure that the Commission would not hear from him.⁸⁹ But CUB admits granting the petition

⁸⁵ Direct-CFC-Rude-8–12.

⁸⁶ Direct-WECA-Buross-2–5.

⁸⁷ Direct-FRWD-Quackenbush-r-5–21; Direct-WUA-Simon-3–18.

⁸⁸ Direct-CUB-Singletary-10 (consumer protection issues would “not really” be affected by the Commission’s decision in this proceeding); *id.* at 11 (consumer protection is “not germane to the question posed”); Rebuttal-MREA-Hylla-9 (consumer protection is “simply not relevant to this docket”); Rebuttal-CUB-Singletary-4 (“not germane” . . . “simply not relevant”).

⁸⁹ See MREA Objection and Motion to Strike (PSC REF# 449983) and WUA Response (PSC REF# 450185). WUA has appealed the ruling striking Mr. Heiser’s testimony (PSC REF# 450672).

would exacerbate consumer protection concerns,⁹⁰ and even encourages the Commission to “consider the issue of consumer protections related to DER and how it can take action”—just not in this docket.⁹¹ How it would so after ceding jurisdiction, CUB fails to explain.

Approving a new market practice now and worrying about the consequences later is not how this Commission typically does business—particularly when harm to customers is at stake. If even MREA and its allies admit that granting their requested ruling would exacerbate known problems in this area, then by definition consumer protection concerns are “germane” to this docket. The voice of experience cautions that it would be imprudent to rush into a decision without fully exploring these issues—particularly where *disclaiming jurisdiction* over MREA’s transactions would impair the Commission’s ability to revisit these issues later.

And this—not some advisory application of the statutory definition of “public utility” to a hypothetical set of facts—is ultimately what MREA is asking the Commission to do in this docket. If this were merely about the “public utility question,” the Commission could easily conclude that MREA’s proposed conduct satisfies that definition. But the public utility question is just a proxy for what MREA really wants: for the Commission to get out of the way entirely.

⁹⁰ Direct-CUB-Singletary-11 (“Increasing the number of players in the DER market may exacerbate the issue.”); Rebuttal-CUB-Singletary-4 (conceding that NARUCA “identifies DER as a factor that amplifies, or perhaps ‘exacerbates’ . . . the need for consumer protections”).

⁹¹ Direct-CUB-Singletary-11.

The unanswered question is: why should it? The Commission has not done the work necessary to determine that the public convenience and necessity require the kind of competition in power sales that MREA is seeking. But even if it had, why should such sales be unregulated? Expanding the regulated market is one thing; simultaneously opening and deregulating a market is quite another.

Given the experience of other commissions and the serious, wide-ranging implications of this decision, it is unfathomable why this Commission would not seek to *lead in*, rather than *cede*, this field. There are too many unanswered questions, and the Commission has allowed too little time to answer them. At a minimum, if it shares MREA's goal of opening Wisconsin to this market, the Commission should be intellectually honest about what it is doing, and take the time necessary to fully explore and appreciate the consequences of its decision.

V. *The process: The place to address MREA's broad request is in a rulemaking, and doing so in this docket would be an arbitrary and capricious departure from Commission practice.*

As the preceding discussion makes clear, MREA's broad, hypothetical request for a declaratory ruling is not the place for the Commission to change Wisconsin's Public Utilities Law. First, only the legislature can do that. But if the Commission is determined not to wait on the legislature, then at a minimum it cannot upend Wisconsin energy law outside the rulemaking process. To do so in this docket, based on an individual "state of facts," would not only violate state law but depart from the Commission's past practice of *declining* to do just that, rendering the decision arbitrary and capricious.

A. MREA seeks relief that exceeds the Commission’s authority to issue a declaratory ruling; such broad relief requires rulemaking.

Under Wis. Stat. § 227.41(1), the Commission has authority to issue a declaratory ruling on “the applicability to any person, property, or state of facts of any rule or statute enforced by it.” MREA asks the Commission to go far beyond the scope of that authorization, and instead issue an order of general application that would authorize a new class of public utilities to operate in Wisconsin subject to no regulation by the Commission.

First and foremost, the petition does not allege with any specificity a singular “state of facts” to which the Commission is asked to apply the statutes, or any active case or controversy in which any such entity is being prejudiced by action of the Commission or a utility.⁹² Rather, MREA seeks a broad ruling by the Commission that the owners of 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.⁹³ In other words, the petition asks the Commission to interpret certain provisions of Chapter 196 as they might apply to any number of unidentified owners of any number of electric generation facilities who sell power directly to any number of retail customers who would otherwise be served by existing regulated public utilities.

⁹² See Wis. Stat. § 227.41(1).

⁹³ Ex.-MREA-Petition-1.

This is far afield from a traditional ruling declaring rights as between two parties with an actual dispute. Moreover, the petition presents a variety of potential business models or contractual structures, devoid of particular facts as to the number and type of customers MREA (or its members, or both) would serve. These are not facts at all. Merriam-Webster defines “facts” as “something that has actual existence” or “an actual occurrence,”⁹⁴ whereas MREA asks the Commission to interpret the statute for application to hypothetical scenarios.

Issuing the requested interpretation of Chapter 196 to allow this new class of public utilities to operate without regulation would exceed the Commission’s authority under Wis. Stat. § 227.41(1) because it would constitute an order of general application. Indeed, what MREA seeks—a general interpretation of Chapter 196 that would recognize a new class of unregulated public utilities—is a “rule”: a “statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency.”⁹⁵ As the Supreme Court has held, “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.”⁹⁶ An

⁹⁴ <https://www.merriam-webster.com/dictionary/fact> (accessed November 2, 2022).

⁹⁵ Wis. Stat. § 227.01(13).

⁹⁶ *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 22, 391 Wis. 2d 497, quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814 (1979).

agency action is of general application and therefore a rule “if that class is described in general terms and new members can be added to the class.”⁹⁷ Importantly, the focus is on “the people regulated, not on the factual context in which the regulation arose.”⁹⁸ The Supreme Court has also made it clear that there is “only one pathway by which an agency can adopt a new interpretation of an ambiguous statute: The agency must adopt a rule.”⁹⁹

Here, MREA asks the Commission to interpret Chapter 196’s definition of “public utility” for general applicability: that entities who would own distributed electric generating facilities and sell electricity to any number of customers who could afford the service are not public utilities. There can be no question that new members could be added to the class of such unregulated entities. Indeed, the very point of the petition is to open Wisconsin to a new, unlimited class of unregulated public utilities—any entity matching the “state of facts” set forth in the petition.

MREA claims it is just too cumbersome to “individually litigate and receive a PSC a [sic] declaratory ruling,” and that “a separate declaratory ruling for each project or provider creates an effective prohibition through regulatory cost.”¹⁰⁰

MREA is entitled to its view of the matter, but this assertion is all the Commission needs to see to know that MREA is asking for more than a declaratory ruling. By

⁹⁷ *Citizens for Sensible Zoning*, 90 Wis. 2d at 816. See also *Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶ 30 (“An agency action is a general order of general application if the class to whom it applies is described in general terms and new members can be added to the class.”).

⁹⁸ *Wisconsin Legislature*, ¶ 23.

⁹⁹ *Lamar Central Outdoor, LLC v. Division of Hearings & Appeals*, 2019 WI 109 at ¶ 23.

¹⁰⁰ Ex.-MREA-Petition-2.

intentionally framing its petition as broad enough to encompass any parties falling within its stated scope, MREA has *asked for* an order of general applicability, which is to say a rule. That is not relief the Commission can grant in this proceeding.¹⁰¹

B. Given the breadth of MREA’s requested relief, it would also be arbitrary and capricious for the Commission to grant it.

As WUA explained (§ D), the Commission has an unwavering track record on third-party ownership in at least two respects. First, it has steadfastly declined to step out in front of the legislature and reinterpret the statutory definition of “public utility” when there has been no change in the law. Second, when parties have sought declaratory relief going well beyond the scope of an individual petition, the Commission has recognized the switch and declined to take the bait.

Granting the petition would depart from both of those longstanding practices, making the Commission’s decision arbitrary and capricious.¹⁰² At a minimum, the Commission would need to explain why, after so many official statements that this issue is best left for the legislature, it is suddenly suited for Commission resolution—and why, after years of scrupulously avoiding a decision with statewide implications, MREA’s petition is the right time and place to decide this question.

¹⁰¹ MREA may argue that the Commission may issue a statutory interpretation of general application in a contested case, but *Lamar* closed that asserted loophole. First, the exemption for such interpretations is from the definition of “guidance document,” not “rule.” See Wis. Stat. § 227.013(3m)(b)5. In *Lamar*, the Court explained that this exemption “merely recognizes that, in resolving specific matters, agency decisions will often contain—but not create—a statement of policy, or interpretation of a statute as applied to the matter at hand, and that they need not adopt a new rule for each specific matter they resolve. However, the second sentence does not say that an agency need not promulgate a rule embodying the new interpretation of an ambiguous statute before implementing it in a specific case.” *Lamar* at ¶ 23.

¹⁰² Cf. Wis. Stat. § 227.57(8) (“The court shall reverse and remand the case to the agency if it finds that the agency’s exercise of discretion . . . is inconsistent with . . . an officially stated agency policy or a prior agency practice”).

CONCLUSION

Nothing in Wisconsin's Public Utilities Law has changed since the last time the Commission addressed the issues raised in MREA's petition—or the last several times before that. And nothing in MREA's petition is consistent with that law. Selling power to utility customers would make MREA a public utility, and allowing it to do so would severely undermine Wisconsin's regulatory compact. Allowing it to do so *unregulated* would be even worse, and MREA has identified no basis for the Commission to depart from its prior decisions and practice in this regard.

There are ways for MREA to obtain the relief it seeks. The legislature is one; proper notice and comment rulemaking may be another. But in this docket, as presented, the Commission should deny the petition.

Dated this 4th day of November, 2022.

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