BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Verified Petition of Vote Solar to Determine Applicability of Wis. Stat. § 196.01(5)(a) to Third-Party Financing of Distributed Energy Resource Systems in Wisconsin	9300-DR-106

REPLY BRIEF OF WISCONSIN UTILITIES ASSOCIATION

There is a remarkable tension in this docket between the "narrow question" Vote Solar claims it wants resolved and (a) the generic "state of facts" forming the basis of the petition, as well as (b) the legal significance everyone—including the Commission itself—has accorded to this docket. In short, despite Vote Solar's reassurances to the contrary, everyone knows the Commission is poised to decide *something* significant about third-party ownership of utility facilities in Wisconsin that will impact all electricity customers in the state.

An intellectually honest approach to this petition would acknowledge that granting it would fundamentally change Wisconsin's regulatory compact. There is simply no credible way to argue, as Vote Solar and its supporters variously do, that Wisconsin law *already* authorizes third-party ownership of utility facilities, or that to deny the petition would be to regulate such facilities for the first time, or that no change in the law is needed to do what Vote Solar requests. The fact is that Vote Solar is seeking a fundamental change in the status quo because without it, at a minimum, the legality of its proposed arrangements is far from clear.

Indeed, granting the petition would reinterpret Wisconsin's definition of "public utility" in a way that requires rulemaking, if not legislation. As explained below, that was the path chosen by virtually every one of the 29 states to have legalized the practice. It simply is not plausible, as Vote Solar argues, that—unbeknownst to everyone—such arrangements have been deregulated since 1907. If that were true, where are all the third party-owned facilities Vote Solar claims are already clearly authorized by a century of Wisconsin case law? And why were legislators trying to change the statute as recently as the last session?

Given Vote Solar's admission that its members want to sell power to members of the public, this ought to be an easy case for the Commission to resolve. The distinctions and caveats Vote Solar proposes may be intellectually interesting, but they ultimately fail to engage with the core question: Does selling power to current customers of regulated public utilities make the seller a public utility, too? Of course it does. The rest is motivated thinking and sleight of hand.

I. Vote Solar's petition is about ownership, not financing, and is not limited to the Family Project.

At the outset, some clarification of terminology is needed. Vote Solar's arguments are framed almost exclusively in terms of whether one "Family Project" can use a "lease" to "finance" a residential solar installation. But the key aspect of this arrangement is *ownership* of the facilities that would *sell power* to Wisconsin customers, and Vote Solar admits its petition is broader than the Family Project.[1] Both the nature and scope of the petition are critical to the arguments that follow.

[1] WUA Initial Br. at 6–7; VS Br. at 1 ("The Petition also seeks a broader determination…").

II. Vote Solar is dead wrong on the public utility question.

Because selling power to current customers of regulated public utilities would so clearly constitute public utility activity, Vote Solar reframes the legal question as whether the *equipment* owned by a third party to sell power to a given customer will generate power for anyone else. This framing of the question is flatly incompatible with Wisconsin law. The key point is that power sales via an unlimited number of DERs to an unlimited number of customers would make the seller a public utility.

A. Vote Solar begins from a false premise: "public utility" refers to an enterprise, not an individual piece of equipment.

Conceding WUA's argument in its initial brief, Vote Solar confirms its requested ruling would apply to "sellers" of "power" to current utility customers. VS Br. at 22. So just as WUA argued, the only remaining question is whether those power sales would be, directly or indirectly, to or for the public. The answer to that question is clearly yes, because Vote Solar's members would offer to sell power to any member of the public meeting the stated criteria. But Vote Solar attempts to evade that straightforward conclusion by reframing the underlying test.

Specifically, Vote Solar says the question is "whether the individual *plant or equipment* in question is intended to serve the public at large or merely a subset of the public." (VS Br. at 8, emphasis added). That is not the test.

To be sure, neither the statutory definition nor the case law interpreting it is a model of clarity. Within Wis. Stat. § 196.01(5)(a), the phrase "either directly or indirectly to or for the public" most proximately modifies "heat, light, water or power," which would support a power-based formulation. But that entire phrase is

connected to the first part of the definition by "for," which may modify "plant or equipment" (favoring an equipment-based test) or may modify "own, operate, manage or control" (favoring an owner/operator-focused test). Picking up on this textual ambiguity, various judicial decisions over the intervening decades have included phrases that appear to support one formulation of the test or another.[2]

There are some obvious problems with the equipment-focused test favored by Vote Solar. For starters, plant or equipment cannot be a public utility; only entities can.[3] So at the most basic level, the definition makes clear that an entity is a public utility (or not) based on what *it does*. And this leads to the second problem with an equipment-focused test: it yields inconsistent results when two entities pursue the same activity using different equipment. Assume two entities each sell power to 100 customers in Wisconsin. Entity A does so by building, owning, and operating one power plant to serve all 100 customers. Entity B does so by installing, owning, and operating 100 rooftop solar arrays, one for each customer. Both clearly own and operate equipment to produce power for the public. But in Vote Solar's formulation, Entity A would be a public utility whereas Entity B would not—because each piece of Entity B's equipment (the argument goes) is not serving any *other* customer.

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[2] Compare Vote Solar's equipment-focused quotes from *Cawker* and *Ford* (VS Br. at 8–10) with more owner-focused quotes *from the same cases*: *Cawker* construed 'public' in "relation to *the owner* of the plant" (Initial Br. at 10), and *Ford* ultimately considered whether, "[u]pon the whole record," there was any "intention on the part of the plaintiff to operate its plant for the furnishing of power to the public generally," distinguishing other cases "involv[ing] companies which undoubtedly had the purpose to become public utilities." 240 N.W. at 421.

[3] *Cf.* Wis. Stat. § 196.01(5)(a) ("public utility" means a "corporation, company, individual, association," etc.).

This elevates form over substance, and conflicts with the teachings of early Wisconsin decisions interpreting the term "to or for the public."[4] Those cases recognized that entities cannot avoid public utility status by slicing and dicing their customer base, whether through individual contracts or otherwise.[5] Vote Solar's argument amounts to an assertion that it can avoid regulation because the Commission cannot aggregate an entity's operations or equipment to determine whether it is a public utility.[6] On its face, that assertion is absurd: if true, it would mean that no matter how many members of the public it served, an entity could evade public utility regulation by breaking its facilities into small enough pieces of distributed generation. And the supposed counterexamples Vote Solar offers do not support its argument.

Vote Solar discusses five cases decided between 1924 and 1967: *Schumacher v. Railroad Comm'n*, 185 Wis. 303 (1924); *Ford Hydro-Electric Co. v. Town of Aurora*, 206 Wis. 489 (1931); *Union Falls Power Co. v. Oconto Falls*, 221 Wis. 457 (1936); *City of Milwaukee v. Pub. Serv. Comm'n*, 241 Wis. 249 (1942); and *City of Sun Prairie v. Pub. Serv. Comm'n*, 37 Wis. 2d 96 (1967).[7] As WUA and other parties have already explained, and as recapped in greater detail below, *Schumacher*

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[4] To the extent Vote Solar tries to sidestep this line of cases and proceed directly from dictionary definitions of "public" (VS Br. at 7–8), the Commission should reject that attempt. After more than a century of judicial interpretation the term "public" as used in the definition of "public utility" has acquired a specialized meaning that the Commission is not entitled to disregard. That said, Vote Solar would be holding itself out to the public even by its own preferred definition.

[5] *See* WUA Initial Br. at 10–12, 16.

[6] *See*, *e.g.*, VS Br. at 14 (arguing that its members' "special contracts" with individual customers are "precisely what is necessary to avoid treatment as a public utility").

[7] VS Br. at 9–11.

involved neighbors,[8] *Ford* involved self-service,[9] *Union Falls* involved a wholesale arrangement,[10] and *City of Sun Prairie* was another landlord case that effectively limited the *Cawker* exception to those facts.[11] These cases don't help Vote Solar.

As for *City of Milwaukee v. Pub. Serv. Comm'n*, 241 Wis. 249, 5 N.W.2d 800 (1942), the question there was not whether Milwaukee was a municipal public utility (it was), but whether that status extended beyond the scope of its service territory (it didn't). As a result, Milwaukee's private contract to serve a section of Fox Point did not obligate it to serve all of Fox Point as a public utility.[12]

Notably, both Clean Wisconsin and the City of Milwaukee—both supporters of Vote Solar's petition—agree with WUA's framing of the test. They, too, say the test is focused at the enterprise level, not on a specific piece of plant or equipment.[13] And for good reason: if the test were really limited to whether a particular piece of plant or equipment serves more than one customer, none of the early cases would have needed to discuss the *relationship* between the customer and its power supplier; instead, the analysis would have begun and ended with the *equipment*.

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[8] WECA Initial Br. at 8; MEUW-GLU-WPPI Initial Br. at 5 n.5.

[9] FRWD Initial Br. at 5; MEUW-GLU-WPPI Initial Br. at 5 n.5; *id.* at 8.

[10] WECA Initial Br. at 7–8.

[11] WUA Initial Br. at 13; WECA Initial Br. at 6; MEUW-GLU-WPPI Initial Br. at 5 n.5; *id.* at 8.

[12] *See also* WECA Initial Br. at 7.

[13] *See* Clean Wisconsin Br. at 1 ("key factor" in determining whether a "provider" is a "public utility" is "whether its *customers* are confined to a 'limited' or 'restricted class,' or if *service* is available to the general public") (citing *Cawker*); *id.* at 2 ("key factor in defining a public utility" is whether "the *service it provides* is . . . available to the general public"); *id.* at 2 ("*Cawker* made clear, and subsequent cases confirmed, that they key determinant in the test is whether *service is provided* to a 'restricted class'" or more broadly); City of Milwaukee Br. at 3 ("For over 100 years, the Wisconsin Supreme Court has consistently ruled that the test is whether the *product or service* is intended for and open to all members of the public . . .") (all emphasis added).

And that returns this discussion to the far more fundamental point: "the public" as used in Wis. Stat. § 196.01(5)(a) ultimately describes the *relationship* between the power provider and the consumer. At its core, this is a *relational* test: does the producer approach the consumer as a member of the public, or do the two already stand in some special relationship to one another, making the provision of power merely incidental?

All of the cases addressing the public utility question—beginning with *Cawker*—can be harmonized on this basis.[14] Again, the landlord in *Cawker* already had a special relationship with his tenants: that of lessor and lessee. He did not offer power to anyone *other than* his tenants, except a few neighbors incidental to the service the landlord was already undertaking. That meant he was not a public utility—yet. But the court also warned that if he expanded operations beyond these special relationships, he would no longer enjoy the benefit of the exception.[15]

The same was true in *Schumacher v. Railroad Commission of Wisconsin*,[16] and *Ford Hydro-Electric Co.*[17] In both of those cases, regardless of whether the entity wanted to be a public utility (as in *Ford*) or not (as in *Schumacher*), the courts found no public utility because the provider and the consumer already stood in a special relationship to one another: they were providing power *to themselves*. In *Schumacher*, the plaintiffs were "a group of neighbors who have co-operated to build

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[14] So can the statutory prohibition on utility competition (absent a declaration that the public convenience and necessity require duplicative service) where a public utility is already serving, which applies to "persons," not "equipment." Wis. Stat. § 196.50(1)(a); *cf.* WUA Initial Br. at 24.

[15] *See* WUA Initial Br. at 10–11.

[16] *Schumacher v. Railroad Commission of Wisconsin*, 185 Wis. 303, 305, 201 N.W. 241 (1924).

[17] *Ford Hydro-Electric Co. v. Aurora*, 206 Wis. 489, 240 N.W. 418 (1932).

a line to *supply themselves* with electric current, with no purpose of making a profit or of serving the public generally or *any* portion of the public outside of those who voluntarily band themselves together to aid in this purely neighborhood cooperative undertaking."[18] And in *Ford*, Ford Motor Company *owned* the hydroelectric company providing power to Ford's factory, another example of self-supply.[19] In these cases, there was not just a special relationship between provider and customer; for all practical purposes, the provider *was* the customer.

The same relational test explains the outcome in *Union Falls Power Co.*[20] There, as in *Ford*, Union Falls Power Co. was originally created to supply power to its corporate affiliate, the Falls Manufacturing Company, and sold excess power to the City of Oconto Falls—first in marginal amounts, and eventually up to half of its output as the manufacturing facility's load declined.[21] The city itself was a municipal utility, and the power company did not seek to serve *anyone* outside of that special relationship, which today would be recognized as a wholesale agreement not subject to the Commission's jurisdiction.[22] The court emphasized that, just as if "a company chartered as a public utility were to erect a hydroelectric plant in the wilderness," Union Falls could not be a public utility where "there would be in existence no public which could be served."[23]

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[18] *Schumacher*, 201 N.W. at 241–42 (emphasis added).

[19] *Ford Hydro-Electric Co.*, 240 N.W. at 421.

[20] 221 Wis. 457, 265 N.W. 722 (1936).

[21] *Union Falls Power Co.*, 265 N.W. at 722.

[22] *Id.* at 723–24.

[23] *Id.* at 724.

In summary, regardless of their outcome or how they parsed Wisconsin's definition of "public utility," the key cases agree on one thing: where an energy provider serves an energy consumer, the provider is a public utility *unless* the two already have some *other* relationship setting the consumer apart from the general public.[24] Only this test unifies Wisconsin case law on the topic, and applying it to these facts makes clear that Vote Solar's only relationship with its would-be customers would be that of a power provider, *i.e.*, a public utility.

B. WUA has already explained why Vote Solar's power sales would be "to or for the public" and why Vote Solar's contrary arguments are wrong.

Vote Solar places almost all of its eggs in its "equipment-specific" basket, emphasizing that the particular solar arrays serving one customer will not serve anyone else, or alternatively that no other member of the public can become a party to another customer's contract. This dodges the question, which is whether Vote Solar[25] would serve customers in the context of some pre-existing relationship.

The record clearly shows the opposite. That Vote Solar and a new customer may enter into a site-specific agreement for particular "right-sized" facilities does

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[24] In this regard, the public utility cases align with a more recent line of Wisconsin decisions interpreting Wis. Stat. § 100.18, which prohibits false advertising "to the public." These cases recognize that even "a statement made to one person may constitute a statement made to 'the public' under this statute"; "the important factor in defining 'the public' is 'whether there is some particular relationship between the parties." *Kailin v. Armstrong*, 2002 WI App 70, ¶ 44, 252 Wis. 2d 676, 643 N.W.2d 132, citing *Bonn v. Haubrich*, 123 Wis. 2d 168, 366 N.W.2d 503 (Ct. App. 1985), and *State v. Automatic Merchandisers of Am., Inc.*, 64 Wis. 2d 659, 221 N.W.2d 683 (1974). In fact, *Automatic Merchandisers* expressly based the test for § 100.18 on the older public utility test. *See Hinrichs v. DOW Chemical Co.*, 2020 WI 2, ¶¶ 57–70, 389 Wis. 2d 669, 937 N.W.2d 37 (reaffirming this test).

[25] Here and below, WUA uses "Vote Solar" as inclusive of Vote Solar's (unidentified) members, who would be the ones actually making the power sales per Vote Solar's description.

not answer the public utility question one way or the other. The key is that Vote Solar and any given customer have no relationship *except* that of energy provider and energy consumer—and the same will be true of every member of the public Vote Solar approaches, as it indisputably intends to do.

If the Commission rejects the myopic, equipment-focused test proposed by Vote Solar, then the Commission is left with no basis to find Vote Solar is anything *other than* a public utility (or would be, if authorized to operate as intended). Vote Solar does not identify any restrictions (other than its own preferences) on the number of Wisconsin customers it would serve.

At times Vote Solar appears to argue that because it lacks capacity to serve the *entire* public, or because it intends to be selective as to which members of the public it serves, it cannot be deemed a public utility.[26] Both points are irrelevant. No public utility has the capacity to serve every customer in Wisconsin, and serving even one member of the public can make an entity a public utility.[27]

Beyond that, these arguments are circular: if Vote Solar *is* a public utility, then it cannot discriminate among customers, so it cannot invoke its preference for selective service as some kind of talisman against regulation as a public utility. That point has been clear since at least 1912, when Southern Wisconsin Power Company entered into a private contract with the Village of Kilbourn City under

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[26] *See*, *e.g.*, VS Br. at 7–8, 15.

[27] *Cawker*, 133 N.W. at 159 ("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.") (emphasis added); *see also Ford Hydro-Electric*, 206 Wis. at 420 (fact that entity "serves a single customer is not determinative").

terms the circuit court called "subterfuge . . . for the purpose of avoiding the provisions of the public utilities law."[28] The Supreme Court affirmed, emphasizing that the whole point of public utility regulation is to require entities providing quintessentially public utility service to do so on equal terms. Far from protecting the power company, the contract was void because it discriminated in violation of Wisconsin's public utility law.[29] The result should be no different here.

C. Vote Solar's arguments on "legislative purpose" miss the mark.

Next, Vote Solar argues its model does not implicate the public policy concerns that led to public utility regulation over a century ago.[30] Contrary to Vote Solar's revisionist history, the Act was not designed to combat the evils of "natural monopoly." It was to *adopt* a monopoly-based approach to electric service in order to *protect customers from unregulated utility-on-utility competition.*[31] That historical fact goes to the heart of the problem with this petition. Even if one were to conclude that today, economic efficiencies favor the competitive approach to power supply Vote Solar advocates (as explained by Mr. Graves, they don't),[32] changing the approach enshrined in the Public Utilities Law would require amending the law.

Other key premises of this argument are also unfounded. Vote Solar emphasizes that its model "does not require public infrastructure," but in fact it

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[28] *President & Trustees of Village of Kilbourn City v. Southern Wis. Power Co.*, 149 Wis. 168, 135 N.W. 499, 502 (1912).

[29] *Id.* at 503–05.

[30] VS Br. at 14–16.

[31] WUA Initial Br. at 1, 19–23.

[32] Direct-WUA-Graves-11–13, 15–17.

commandeers public utility infrastructure in order to function. It may not "duplicate any already existing distribution and transmission infrastructure," but it certainly duplicates generation infrastructure funded by customers, contrary to the express purpose of the 1907 Act. And Vote Solar's argument that the project owner "does not have an obligation to serve all customers on an as-needed basis" is (again) circular: that obligation depends on public utility status, which is the core of this dispute.

In any event, one need not be a "six hundred pound economic gorilla" to be a public utility, and current monopoly status is not a requirement of Wisconsin's public utility test. First, the statutory definition says nothing about it, and the cases that reference this public policy consideration make clear that it is but one way to attain public utility status.[33] Second, again, Wisconsin's courts made clear early on that entities cannot evade regulation as a public utility merely by locking up customers one contract at a time.[34]

III. Rulemaking is required by Vote Solar's own broad framing.

Vote Solar's final argument is an exercise in obfuscation. It suggests not only that the Commission *can* grant the requested relief without considering any of the public policy implications of its decision, but that it *must* do so because the Commission's review is limited to the specific facts alleged in the petition.[35] The supreme irresponsibility of this argument is sufficient to reject it. But it also demonstrates the irreconcilable procedural problem with the petition.

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[33] *See*, *e.g.*, *Schumacher*, 201 N.W. at 242 (public utility regulation is triggered where there is a monopoly *or* a service is offered to the public . . .") (emphasis added).

[34] *See* WUA Initial Br. at 10–12, 16.

[35] VS Br. at 16–22.

If Vote Solar had filed a petition expressly limited to a single, actual transaction or dispute between two parties, it might be right that the Commission could adjudicate that petition via a declaratory ruling. Even then, the statewide implications of the ruling would be obvious, which is why the Commission has wisely rejected such advances in the past—and why suddenly doing otherwise now would be arbitrary and capricious.[36]

But that is not the petition Vote Solar filed. The requested declaration does not even mention the Family Project. Not only is its "state of facts" broad enough to encompass *any* transaction fitting the same basic description; they are not even facts. Vote Solar is asking the Commission to assume a set of conditions and issue an opinion stating how the law *would* apply *if* those conditions are true. That is the definition of an impermissible advisory opinion and places beyond all doubt that what Vote Solar seeks here is an order of general application—that is, a rule.[37]

In addition to following the law, both rulemaking and legislation would accomplish what this docket will not: a robust examination of the far-reaching consumer protection and other policy implications of the rule Vote Solar is really requesting. That would stand in stark contrast to this docket, where utilities' efforts to flag such issues have been met with empty assurances that *any* policy concern that might derail Vote Solar's petition simply is "not germane."[38]

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[36] *See* WUA Initial Br. at 4–6 (laying out Commission's past practice and statements of policy on this issue); *id.* at 34 (explaining why sudden departure would be arbitrary).

[37] *See* WUA Initial Br. at 31–34.

[38] *Compare* WUA Initial Br. at 27–30 (summarizing policy concerns) *with* VS Br. at 19 (arguing that the Commission can somehow deregulate these transactions now and then regulate them later).

To be clear, WUA's argument is not that Vote Solar's status under the statutory definition of "public utility" rests on the policy concerns WUA and others have raised. The point is that whether to issue *any* declaratory ruling is within the Commission's discretion,[39] and it is patently absurd to suggest that the Commission must do so (a) because Vote Solar has asked for it and (b) without considering *anything* not alleged in Vote Solar's petition.

The law leaves Vote Solar with two clear alternatives: pursue a genuine declaratory ruling limited to a factual dispute between two parties, which would be binding on no one else, or seek a broader ruling that will apply beyond the Family Project that is the front for this petition. Vote Solar has clearly opted for the latter. Public policy issues are germane, and must be considered now, precisely because Vote Solar is unmistakably asking the Commission to issue a rule.

All the while, Vote Solar feigns compliance with the separation of powers. "Executive branch agencies like the Commission are creatures of statute—they do not exercise legislative power and cannot re-write the law."[40] "The Commission's role is to faithfully apply the law enacted by the legislature and interpreted by the Wisconsin Supreme Court . . ."[41] Exactly so. But the way to heed those admonitions is not to "interpret" a statutory definition in a way that the legislature declined to adopt just last term. The only way for this Commission to respect the separation of powers and a century of unbroken case law is to deny Vote Solar's petition.

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[39] Wis. Stat. § 227.41(1) ("An agency *may* . . . issue a declaratory ruling . . .") (emphasis added).

[40] VS Br. at 2.

[41] *Id.*; *see also id.* at 18 (same).

WUA is aware of only one other state utility commission (Arizona) that has followed Vote Solar's proposed approach and authorized third party power purchase agreements for solar PV *solely* by its own order, as opposed to via rulemaking, legislation, or (in a few cases) judicial intervention. In every other state to authorize the practice—28 in all—there has been legislation (23 states plus Puerto Rico), rulemaking (4 states, again plus Puerto Rico), a judicial decision (3 states), or some combination of these.[42] The overwhelming theme is political consensus among elected leaders in the state legislature—not a decision by two or three individuals that the time has come to redefine the regulatory compact for their entire state. Even if Wisconsin law did not require rulemaking or outright legislation here, prudence would caution the same approach.

CONCLUSION

Granting the petition would allow third parties to sell power to Wisconsin utilities' customers, unregulated. The technology may be new; the arguments are not. The legislature rejected Vote Solar's arguments a century ago, and courts have been rejecting them ever since. The Commission should reject them again.

Dated this 11th day of November, 2022.

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Electronically signed by
James E. Goldschmidt

[42] A graphic reflecting WUA's legal research on this topic is included as Appendix A to this brief. *Cf.* VS Br. at 3 n.11, citing Rebuttal-VS-Rábago-r-4–5 and Fig. 1 (identifying same 29 states, but without information about *how* they came to "allow PPAs").

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Appendix A

- LEGISLATION
- RULEMAKING
- PUC DECISION
- COURT DECISION
- APPARENTLY DISALLOWED SOLAR PPAS OR LEASES
- AUTHORIZED SOLAR PPAS OR LEASES (OR OTHERWISE CURRENTLY IN USE IN SOME JURISDICTIONS)
- LEGAL STATUS OF SOLAR PPAS OR LEASES IS UNKNOWN
- ENACTED SOME TYPE OF 3PO LIMITATION
- NO LEGAL AUTHORITY
- OTHER