

**BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN**

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Petition of Midwest Renewable Energy Association  
To Determine Applicability of a Third-Party Financed  
Distributed Energy Resource System

Docket No. 9300-DR-105

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**REPLY BRIEF OF MUNICIPAL ELECTRIC UTILITIES OF WISCONSIN,  
GREAT LAKES UTILITIES AND WPPI ENERGY**

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**INTRODUCTION**

In this proceeding, Petitioner and its allies<sup>1</sup> seek a declaratory judgment from the Commission that would modify the regulatory compact embodied in Chapter 196 of the Wisconsin Statutes by giving third-parties the right to sell electricity directly to public utility customers. The Petitioner's request should be denied because it is not supported by existing Wisconsin law and because it would harm public utility customers.

The "regulatory compact" grants public utilities an exclusive right to provide electric service to customers in defined service territories in exchange for the obligation to serve customers within these territories and submit to regulation of the terms of service, including price. The regulatory compact has worked well in Wisconsin for more than a century -- not just for the regulated public utility monopolies, but for their customers, as well, all of whom get the benefit of rules and regulations designed to ensure that rates are fair and non-discriminatory; that electric facilities are well-designed and properly operated to ensure safety and reliability; and that consumer interests are protected.

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<sup>1</sup> Capitalized terms have the same meaning as in the Initial Brief submitted by MEUW, GLU and WPPI Energy (the "Municipal Group"). Petitioner's allies include Citizens Utilities Board ("CUB"), Clean Wisconsin and City of Milwaukee ("Milwaukee").

The Petitioner seeks the right to serve whatever customers it chooses without the obligations to serve or submit to regulation. While that may be good for some customers in certain circumstances, the record in this Proceeding shows that it will not be true for many customers in numerous other circumstances. Petitioner has not demonstrated why the Commission should be willing to abandon its own precedent and cede its regulatory authority by granting the relief Petitioner seeks.

## ARGUMENT

### I. Third-Party Owned DERs are “Public Utilities” Under Current Law

Petitioner frames its request as a narrow legal issue – whether a third-party owner of a distributed energy resource (“DER”) should be regulated as a “public utility” under Wis. Stat. §196.01(5)(a) – and claims that the Wisconsin Supreme Court, as well as the Commission itself, has provided a clear and consistent answer to this question.<sup>2</sup> Petitioner acknowledges on the record that it intends to sell electric power directly to public utility customers.<sup>3</sup> However, Petitioner mischaracterizes Wisconsin law by misconstruing the concept of what it means to provide utility service “directly or indirectly to or for the public” in order to create what is, in essence, a novel exception to the statute.

In Petitioner’s view, the phrase “service . . . to or for the public” should be understood to apply to the equipment that furnishes electric power, rather than to the entity that intends to furnish the service.<sup>4</sup> This construction of the statute allows Petitioner to characterize third-party owned systems as one-off customized systems designed to serve single customers one at a time rather than electric service intended for a broader “public”.<sup>5</sup> But such a construction is not

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<sup>2</sup> “Midwest Renewable Energy Association’s Initial Brief” (“MREA Initial Brief”) at 1-2.

<sup>3</sup> MREA Initial Brief at 5-6; Direct-MREA-Hylla-1.

<sup>4</sup> MREA Initial Brief at 8.

<sup>5</sup> *Id.*

supported by Wisconsin cases that address the issue, all of which stand for the proposition that public utility status is conferred upon entities that intend to provide utility service to any customer who requires such service and is willing to pay for it.<sup>6</sup>

In contrast to the public utility exceptions created by *Cawker* and its progeny, the Petitioner here is seeking to provide utility service to an open class of potential customers with whom no special relationship exists *except* by means of the contract or lease that is executed with such customers by the provider to provide for the sale of electric power.<sup>7</sup> This is precisely contrary to the public utility exceptions carved out by the *Cawker* line of cases and the Commission orders referenced by the Petitioner.<sup>8</sup> The purpose and meaning of the statute simply cannot support the reading Petitioner advocates in order to exempt third-party DER owners from regulation.

## **II. The Record of this Proceeding does not Support Granting the Declaratory Relief Petitioner Seeks**

Petitioner upbraids the Wisconsin Utilities Association and the “monopoly utility front-groups” that intervened against the Petition in this proceeding for distracting the Commission with “irrelevant discovery, unfounded motions, and irrelevant policy testimony.”<sup>9</sup> This admonition ignores the Commission’s directive in its Hearing Order for the parties to produce an

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<sup>6</sup> See, e.g., *Wisconsin River Improvement Co. v. Pier*, 137 Wis. 325, 118 N.W. 857 (1908); *Cawker v. Meyer*, 147 Wis. 320, 133 N.W. 157 (1911) (“*Cawker*”); Initial Post-Hearing Brief of Municipal Electric Utilities of Wisconsin, Great Lakes Utilities and WPPI Energy (“Municipal Initial Brief”) at 5-6; Initial Brief of Wisconsin Electric Cooperative Association at 4-5 (“WECA Initial Brief”); Initial Brief of Fair Rates for Wisconsin’s Dairyland at 3-6 (“FRWD Initial Brief”); Initial Brief of Wisconsin Utilities Association at 9-15 (“WUA Initial Brief”).

<sup>7</sup> Worth noting in this regard is City of Milwaukee’s discussion of the Iowa Supreme Court decision in *SZ Enterprises, LLC v. Iowa Utilities Bd.*, 850 N.W.2d 441 (Iowa 2014), which appears to have applied many of the *Cawker* factors in reversing an Iowa Utilities Commission decision that conferred public utility status on a third-party owner (Initial Brief of City of Milwaukee at 9-10). Of course, it is folly to speculate on the extent to which the Wisconsin Supreme Court would regard the Iowa decision as persuasive authority if it gets the opportunity to review this or a similar third-party financing case. But in contrast to what Petitioner seeks in this proceeding, the Iowa case involved a specific provider with the express intent of serving a limited class of customers. No such limitation has been proposed by this Petition, which seeks declaratory relief to authorize any third-party financing provider to serve any customer meeting the eleven criteria enumerated in MREA’s Petition.

<sup>8</sup> MREA Initial Brief at 9 (citing Docket 6630-CE-305).

<sup>9</sup> MREA Initial Brief at 2.

appropriate record upon which the Commission could base its decision.<sup>10</sup> It also minimizes the value of the evidence brought by intervening parties, including the Municipal Group, that demonstrates the potential harm to customers that would be caused by a decision to grant the Petitioner the relief it seeks. That evidence is based on experience with third-party owned facilities here in Wisconsin, as well as in other states where DER penetration is far greater.<sup>11</sup>

As significant as the evidence produced by those who have opposed the Petition may be, the complete lack of evidence produced by the Petitioner is even more telling. Petitioner's "case" continues to rest on a series of alleged "facts" that may be true in theory, but that cannot be true in actuality since they are intended to apply to a wide range of DER projects unbounded by size, generation source, provider qualification or even customer type.<sup>12</sup>

Moreover, Petitioner has provided no evidence that explains why the projects it has proposed could not be built under existing tariff structures, obviating the need to modify the regulatory compact by granting an exception to providers of third-party financing.<sup>13</sup> Leaving aside the issue that what Petitioner seeks is not permitted by current Wisconsin law, Petitioner's primary justification for seeking unprecedented declaratory relief is its desire to minimize the cost of seeking administrative review on a project-by-project basis.<sup>14</sup> Petitioner's inability or unwillingness to furnish the Commission with evidence demonstrating customer need for this

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<sup>10</sup> Order Opening Docket and Related Administrative Matters (PSC Ref#: 443840) at 2.

<sup>11</sup> Municipal Initial Brief at 8-11. In this regard, MREA mischaracterizes the testimony of municipal witness Adams (MREA Initial Brief at 4, n.2). Mr Adams stated that he was aware of an existing third-party owned DER system where the customer, a public library, has been paying 45% more for energy costs than it would have paid had it been receiving all its service from the municipal utility, as well as a proposed third-party financed project that would have substantially increased costs for the public school for which the system was to be built. Municipal Initial Brief at 10. Notably, as discussed briefly by WUA witness Heiser in response to Commissioner Huebner's question during the Supplemental Party Hearing on November 22, 2022, these entities are not subject to even the basic consumer protections under the Wisconsin Consumer Act (Tr. 185 : 4-11).

<sup>12</sup> Municipal Initial Brief at 8-10.

<sup>13</sup> *Id.* at 14.

<sup>14</sup> MREA Initial Brief at 6-7.

particular financing alternative does not constitute a basis for the Commission abandoning long-standing precedent.<sup>15</sup>

### **III The Commission Should Deny the Petition and Wait for Legislative Action**

Petitioner insists that it seeks a mere clarification of existing law, which requires neither a Commission rulemaking, nor new legislation.<sup>16</sup> Multiple intervenors, including the Municipal Group, have belied that assertion.<sup>17</sup> For clarity on this question, however, the Commission need look no further than the Legislature itself. In public comments submitted in this docket jointly by Senator Julian Bradley, Chairman of the Senate Committee on Utilities, Technology and Telecommunications and Representative David Steffen, Acting Chairman of the Assembly Committee on Energy and Utilities, representatives of the Legislature specifically charged with the responsibility for public utility issues specifically state that the Commission should leave the matters raised by the Petition to the Legislature, or at a minimum, convene a rulemaking procedure under Chapter 227 of the Wisconsin Statutes.<sup>18</sup> Citing the Commission's own precedent for deferring the matters raised in similar, previous petitions, the two Legislators dispel the notion that the relief Petitioner seeks merely clarifies existing law.<sup>19</sup>

Given that the Commission has opted in other proceedings for a more cautious path in developing and potentially implementing new policies to address issues of paramount concern to customers and other stakeholders when it comes to evolving technologies and new models of utility regulation, similar caution is warranted here where arguably even more is at stake.<sup>20</sup>

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<sup>15</sup> WUA also notes the absence of any explanation from the Petitioner as to why it seeks a legally cumbersome end-around relation when other, legal options such as system sale and capital leasing exist to serve the same customers (WUA Initial Brief at 7, n.12).

<sup>16</sup> MREA Initial Brief at 22-23.

<sup>17</sup> Municipal Initial Brief at 13-15; Initial Brief of Customers First! Coalition at 6-10; Initial Brief of FRWD at 2-3; 9; Initial Brief of WECA at 13-14; Initial Brief of WUA at 3-4.

<sup>18</sup> Letter to Cru Stublely (PSC REF# : 451665).

<sup>19</sup> *Id.*

<sup>20</sup> Municipal Initial Brief at 15-16.

## CONCLUSION

For the reasons stated above, the Commission should deny the Petition and defer to the Legislature. If the Commission believes that third-party financing is a potentially worthwhile alternative for customers, it should convene a generic investigation so that issues concerning consumer protection and cross-subsidization that arise from deeper penetration of third-party financed DERs can be more thoroughly explored.

Dated this 30th day of November, 2022.

Boardman & Clark, LLP

By:

*/s/ Richard A. Heinemann*

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