

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Request of Vivo Living Madison for a Determination of
Compliance or, Alternatively, Waiver of Wis. Admin.
Code § PSC 113.0803(1) Regarding Individual Electric
Meters

Docket No. _____

**REQUEST FOR DETERMINATION OF COMPLIANCE OR,
ALTERNATIVELY, PERMANENT WAIVER**

Wisconsin Admin. Code § PSC 113.0803(3) requires that certain existing buildings which undergo alterations involving a change in type of occupancy or substantial remodeling shall have installed a separate electric meter for each separate tenant space. However, “for reasonable cause shown,” the Public Service Commission of Wisconsin (“Commission”) may grant waivers of this rule on a case-by-case basis. Wis. Admin. Code § PSC 113.0803(5).

Applicant Vivo Living Madison (“Vivo”) requests a decision by the Commission stating that Vivo’s use of private meters in units at its hotel-to-housing project in Madison Gas & Electric’s (“MG&E’s”) service territory complies with the individual meter rule in Wis. Admin. Code § PSC 113.0803, or that the project is exempt from the rule. Alternatively, Vivo requests a permanent waiver from this requirement for its project as the “electric equipment under tenant control is substantially more efficient than required by applicable codes and that the overall electric usage under tenant control is minimal,” *id.* § PSC 113.0803(5), or because this is an “exceptional or unusual

situation,” *id.* § PSC 113.0803(5), 113.01(2). For the reasons further stated below, the Commission should grant one or both of Vivo’s requests.¹

BACKGROUND

The Housing Crisis in Dane County

Dane County, Wisconsin is in the midst of a severe housing crisis. As recently reported by the Dane County Regional Housing Strategy: Strategic Action Plan 2024-2028 (“Strategic Action Plan”), Dane County added 42,000 households from 2010-2020, but only 34,000 new housing units were permitted in this same period, leading to a serious undersupply of housing.² This undersupply has significantly increased housing prices, whether in the form of home prices or rents, the latter of which increased 28% from 2010-2022.³ The housing shortage has affected lower-income households the most, who find themselves locked out of home ownership, commuting longer distances,

¹ Vivo recognizes that there have been revisions proposed to Wis. Admin. Code ch. PSC 113.0803 which would, among other things, modify the requirements for a waiver. *Proposed Revisions for Wisconsin Administrative Code Chapter PSC 113, for Individual Metering*, 1-AC-256, PSC REF# 511971. Vivo is confident that, while it should be granted a waiver under the current rule, if the revisions are approved, it would clearly be granted a waiver. Considering the present circumstances, it would be inequitable to deny a waiver when there is an imminent rule change that would lower the barriers to obtaining a waiver.

² Dane County Regional Housing Strategy: Strategic Action Plan 2024-2028 at 8 (April 2024) (“Strategic Action Plan”), available at <https://rhs.danecounty.gov/documents/pdf/DCRHS-SAPReport-FNL-web.pdf>; see also Wisconsin Policy Forum, *Housing Permitting Slows, Adding to Affordability Concerns*, Focus July 2024, available at https://wispolicyforum.org/wp-content/uploads/2024/07/Focus_24_15_Housing_Permits_Update.pdf

³ Strategic Action Plan, *supra* note 2, at 8. From 2021 to October 2024, rents in the city of Madison have increased “about 36% with the median one-bedroom unit priced at nearly \$1,600.” The rent in Madison continues to climb, contrary to 80 of the 100 largest cities that are seeing rents decline. Lucas Robinson, *How will Madison property tax referendums affect renters? It’s complicated*, Wisconsin State Journal (Oct. 22, 2024), https://madison.com/news/local/government-politics/madison-property-tax-referendums-renters-housing/article_af8ed556-880d-11ef-962f-fb8e04f856b2.html.

making tough decisions about paying rent or other expenses, “doubling up” in housing with other families and living in less sanitary conditions, or even facing eviction and homelessness.⁴ In these ways, Madison’s housing shortage is much worse than shortages seen nationally.⁵

Madison’s housing crisis is compounded by a significant increase in both undergraduate and graduate enrollment at the University of Wisconsin-Madison, with no additional on-campus housing.⁶ UW-Madison students are in need of off-campus housing in Madison; however, the average market price for an apartment in Madison is well above the average student budget for rent, particularly for new or renovated properties.⁷

Vivo’s Project would provide 153 reasonably-priced and affordable housing units

Vivo’s mission is to help solve the housing crisis through adaptive reuse and community building. Vivo is the leader in adapting low-demand hotels into multifamily housing. To date, Vivo has created 32 living communities in 13 states, totaling 4,500 apartment units. Vivo thus fulfills the twin needs of cleaning up

⁴ Strategic Action Plan, *supra* note 2, at 9; see also Allison Garfield, *Unhoused: Madison’s housing shortage is driving homelessness, and the city’s shelters are overwhelmed*, Cap Times, Mar. 6, 2024, available at https://captimes.com/news/government/madison-homeless-shelters-are-overflowing-linked-to-housing-shortage/article_a6fcc924-db16-11ee-b6f2-338a3ec6f173.html.

⁵ Strategic Action Plan, *supra* note 2, at 8; see also Lucas Robinson, *Madison’s housing crisis is a national extreme*, Wis. State. J., May 15, 2024, https://madison.com/news/local/business/real-estate/madison-affordable-housing-crisis/article_60d9d56a-d029-11ee-99f7-1f891db1746e.html.

⁶ JLL, *Madison, Wisconsin: Student Housing Market and Affordability Analysis*, Aug. 26, 2024. Since 2010, undergraduate and graduate enrollment has increased by 23% and 9%, respectively.

⁷ *Id.* at 17.

underutilized hotels and providing reasonably priced rental housing, typically in walkable areas of cities and by transit. This has the added benefit of reducing traffic, waste, and sprawl.

The Vivo Living Madison Project (“Project”) converts a non-performing hotel located at 517 Grand Canyon Drive on Madison’s middle/west side (the former Radisson hotel) into 153 studio and one-bedroom apartments.⁸ The building’s common areas are heated with gas, while individual units are cooled and heated with packaged terminal air conditioners (“PTAC”) with heat pumps. Vivo owns the property and is the utility customer; units are not individually metered by MG&E. Existing electric service in the building is already efficient, with few upgrades needed. Substantial remodeling is not required, allowing beneficial re-use of materials on-site and reducing project impacts. Because this is not new construction, costs can be kept lower and, therefore, rental rates are lower. As noted above, there is an urgent need for additional housing at reasonable rental rates, and Vivo’s Project will fill an important gap in Dane County.

The building has been undergoing renovations to convert it from a hotel to an apartment building since January 2024, including installing kitchenettes. If this request is granted, renovation will be completed within the following three months and new tenants will be able to move in shortly thereafter.

Tenants will have a variety of programming available to them, including community events such as game nights and breakfast on-the-go. Tenants will have

⁸ See project overview documents attached as **Exhibit A**.

access to credit-building support through Esusu and a flexible rent program through FLEX. Other building amenities will include a restaurant, pool, and indoor bicycle parking. The average tenancies will be thirteen months. Based on experience with other projects, Vivo anticipates the tenants will predominantly be students, young adults, recent college graduates, and young couples, with a median income between \$20,000 and \$60,000. In other words, the Project will predominantly provide workforce housing.

Building electric metering

The building used for the Project was originally constructed in 1985 as a hotel, and, as such, did not require individual metering. As discussed further below, Vivo is willing to install private meters to allow occupants of individual units to monitor and understand their energy use. These meters would be located in separate rooms or in corridors. Vivo will also install solar panels to offset energy usage for the building's common areas.

If Vivo is required to install individual, utility-owned meters, the cost of the Project will increase significantly, which in turn would require higher rents once the Project is completed. Installing individual meters would require concrete floor cuts, drywall damage, new flooring, and new finishes, which would increase project costs and result in less affordable units. It is estimated that, including construction and labor, it would cost approximately \$3.0 million to install utility meters including property carrying costs during construction. Additionally, it would add over a year to the estimated completion date, as there is an approximately 72-week lead time to procure all of the meter bases.

In addition to the increase in price, installing individual meters will cause a number of safety and practical problems. For example, installing individual meters and associating wiring would require drilling and cutting into the existing fire protection that separates the units. Currently, the walls have a 1-hour fire rating. If required to cut into the walls, the fire rating will be compromised, and the units will be less safe.

The building is spread out and is not set up for multiple points of electrical distribution with fire separations. Adding multiple points of entry, as required for individual meters, would also complicate fire department efforts to disconnect power to the building in an emergency. In the case of a fire in one of the units, individual metering will again make the entire building less safe.

Individual electric metering also makes it difficult to reap the benefits of renewable energy sources, such as rooftop solar. It is technologically complicated and impractical to connect solar panels to 153 separate meters, as opposed to a simple connection to a master meter. None of Vivo's hotel-to-apartment projects in other states have required individual, utility-owned meters for each unit.

In sum, individual electric metering has not been proposed or planned because, in addition to adding significant cost, individual metering will decrease the safety of the building and limit the ability to use alternative renewable energy sources. Installing private meters, while still incurring some cost, would allow Vivo to maintain lower rents and avoid the safety and technical consequences of installing individual meters.

The Project is in MG&E's service territory and MG&E currently provides utility service to the building. In April 2024, Vivo contacted MG&E about private meters as a

means to comply with Wis. Admin. Code § PSC 113.0308. MG&E did not agree on this solution and instead proposed that Vivo obtain a temporary waiver as recently occurred in a different docket, with the objective to install utility-owned meters in each unit over a longer timeline.⁹ However, this would not avoid the higher cost of individual meters, or the technical and safety issues identified above, and would not facilitate renewable energy use.

While the Commission considers this request, the building is being used as an extended-stay hotel. Vivo’s financing requires that the building be used for apartments, and Vivo has already obtained a conditional use permit (“CUP”) from the City of Madison for apartment use. That CUP will expire in November 2024, though it is eligible for an extension of one year. Of course, the community will have the fullest benefit of the Project if it can be used as apartments rather than as a hotel, to provide much-needed affordable housing amid the current housing crisis. In fact, Vivo is further willing to help fight the housing crisis in the capital city by holding twenty percent of units as affordable housing if the Commission so desires.

Other details of the project are discussed further below.

REGULATORY BACKGROUND

To understand how Vivo’s project complies with Wis. Admin. Code § PSC 113.0803 or is entitled to a waiver, it is important to understand the rule’s history and how it has been applied to date.

⁹ *Request of Republik Madison Apartments LLC, for a Temporary Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Meters, Docket 3270-EI-106.*

A. *History and Purpose of Wisconsin Admin. Code § PSC 113.0803.*

Now codified as Wis. Admin. Code § PSC 113.0803, the rule at issue was first introduced and promulgated in 1979. The rule was intended to comply with the federal Public Utility Regulatory Policies Act of 1978 (“PURPA”). The overall purposes of PURPA were:

- 1) [to] “encourage...conservation of energy supplied by electric utilities;”
- 2) “the optimization of the efficiency of use of facilities and resources by electric utilities;” and
- 3) “equitable rates to electric consumers.”

16 U.S.C. § 2611.

To meet these goals, PURPA required that state regulatory authorities adopt certain standards, 16 U.S.C. § 2623, and provided “[s]pecial rules” for each standard, *see* 16 U.S.C. § 2625. One such standard included prohibiting or restricting master metering of electric service in new buildings – to the extent necessary to carry out the purposes of PURPA. 16 U.S.C. § 2623(b)(1). For this specific standard, the “special rules” read:

(d) Master metering

Separate metering shall be determined appropriate for any new building for purposes of section 2623(b)(1) of this title if--

- (1) there is more than one unit in such building,
- (2) the occupant of each such unit has control over a portion of the electric energy used in such unit, and
- (3) with respect to such portion of electric energy used in such unit, the long-run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building.

16 U.S.C. § 2625.

The theory behind this standard was that tenants would be incentivized to decrease their electricity usage and conserve energy if they are financially responsible for that energy. At the time, several studies demonstrated that there was a difference of

almost 30% more electricity usage in master-metered apartments.¹⁰ Other studies showed that the difference was not as high.¹¹ Thus, even at the time PURPA was passed, there was not unanimity for the idea that individual metering would lead to energy conservation.

Meanwhile, a report prepared for the U.S. Department of Energy after PURPA was signed into law indicated that “[e]xisting federal and state metering policies currently may not fully address the energy conservation implications of various metering alternatives in the multifamily housing sector.”¹² One such implication: converting master meters to individual meters decreases a building owner’s motivation to invest in other conservation measures, such as improvements to the insulation that would decrease energy usage during hot or cold weather.¹³ This implication is particularly concerning as climate change intensifies, and as studies show that extreme heat impacts low-income and communities of color at a higher rate than other customer groups.¹⁴ Another concerning implication is that the required use of individual meters

¹⁰ See Gordon Gross, *The Energy Conservation Implications of Master Metering of Electric Service in Apartments*, UMR-MEC Conference on Energy, 58 (1975).

¹¹ See Samuel H. Nelson, *Energy Savings Attributable to Switching from Master Metering to Individual Metering of Electricity*, Argonne National Laboratory, 2 <https://www.osti.gov/servlets/purl/6594804> (1981); Booz, Allen and Hamilton, *Alternative Metering Practices: Implications for Conservation in Multifamily Residences*, 3 <https://www.osti.gov/servlets/purl/5899605> (1979).

¹² Booz, Allen, *supra* note 11, at 2.

¹³ *Id.* at 23.

¹⁴ Deepa Shivaram, *Extreme Heat is Worse for Low-Income, Nonwhite Americans, A New Study Shows*, NPR (July 14, 2021) <https://www.npr.org/2021/07/14/1015983700/extreme-heat-is-getting-worse-for-low-income-non-white-americans-a-new-study-sho>

would result in higher costs for building owners, who then would increase rental rates for tenants.¹⁵ At the time of the report provided to the Department of Energy, it was not clear if that increased cost would be outweighed by future savings from conserving energy.¹⁶ As the authors of the report indicated, there are other methods to combat potential increased costs while continuing to conserve energy, such as offering submetering as an option.¹⁷

The Commission, in considering its rule, noted that “studies concerning reduction in energy consumption by individually-metered commercial customers yielded inconclusive results.”¹⁸ Class A investor-owned electric utilities were asked to weigh in on the rule and all accepted it in part, but some had concerns about applying the rule to both commercial and residential buildings. For example, Northern States Power Company opposed the individual metering requirement for new commercial establishments because “the same percentage of energy conservation improvement attributable to individual metering of commercial establishments can be achieved through other means.”¹⁹ Wisconsin Power & Light Company opposed the commercial requirement as well because the cost to equip new commercial establishments with individual metering would be expensive and not cost-justified.

¹⁵ Booz, Allen, *supra* note 11, at 23.

¹⁶ *Id.*

¹⁷ *Id.* Submetering is discussed more below as “private metering.”

¹⁸ Public Service Commission, *Order of the Public Service Commission Adopting Rules, 1-AC-26*, Nov. 20, 1979, https://docs.legis.wisconsin.gov/code/register/1980/292b/rules/psc_113.pdf.

¹⁹ *Id.* at 5.

No environmental impact statement was performed for the rule. The Commission also determined that the proposed rule would have no fiscal impact on local or state units of government. The Commission found that individual metering in new residential buildings is “cost-justified and will promote the three purposes of PURPA.” Citing Wis. Stat. §§ 1.12, 196.02, 196.03, 196.16, 196.26, 196.37, 227.014 as authority, the Commission adopted the rule.²⁰

In 2000, the entirety of ch. 113 was repealed and replaced with regulations that sought to update the code. Section 113.315 became Section 113.0803 and expanded the explanation of exemptions and waivers.²¹ In 2003, residential care apartment complexes

²⁰ The text of the rule as adopted read:

PSC 113.315 Individual electric meters required for non-transient multi-dwelling unit residential buildings, mobile home parks, and for commercial establishments.

(1) Each dwelling and commercial unit in a multi-dwelling unit residential building, mobile home park and commercial building constructed after March 1, 1980, shall have installed a separate electric meter for each such dwelling unit or commercial unit. Dwelling unit means a structure or that part of a structure which is used or intended to be used as a home, residence or a sleeping place by one or more persons maintaining a common household, and shall exclude transient multi-dwelling buildings and mobile home parks: for example, hotels, motels, campgrounds, hospitals, nursing homes, convalescent homes, college dormitories, fraternities, and sororities.

(2) For the purpose of carrying out the provisions of subsection (1), Individual unit metering will not be required:

(a) where commercial unit space requirements are subject to alteration with change in tenants as evidenced by temporary versus permanent type of wall construction separating the commercial unit spaces.

(b) for electricity used in central heating, ventilating and air conditioning systems.

(c) for electric back-up service to storage heating and cooling systems or when alternative renewable energy resources are utilized in connection with central heating ventilating and air conditioning systems.

Cr. Register. April 1980, No. 292, eff. May 1, 1980.

²¹ The text of the rule as revised in 2000 reads as follows:

PSC 113.0803 Individual electric meters required for non-transient multi-dwelling unit residential buildings, mobile home parks, and for commercial establishments.

(1) Each dwelling in a multi-dwelling unit residential building and mobile home

or similar facilities were added to the excluded building types for the individual meter requirement.²²

The current rule reads:

Individual electric meters required for non-transient multi-dwelling unit residential buildings, mobile home parks and for commercial establishments.

(1) Each dwelling in a multi-dwelling unit residential building and mobile home park constructed after March 1, 1980, shall have installed a separate electric meter for each such dwelling unit. Dwelling unit means a structure or that part of a structure which is used or intended to be used as a home, residence or a sleeping place by one or more persons maintaining a common household and shall exclude transient multi-dwelling buildings and mobile home parks: for example, hotels, motels, campgrounds,

park constructed after March 1, 1980 shall have installed a separate electric meter for each such dwelling unit. Dwelling unit means a structure or that part of a structure which is used to or intended to be used as a home, residence or a sleeping place by one or more persons maintaining a common household, and shall exclude transient multi-dwelling buildings and mobile home parks : for example, hotels, motels, campgrounds, hospitals, community-based residential facility, nursing homes, college dormitories, fraternities, and sororities.

(2) Each tenant space in a commercial building constructed after March 1, 1980 shall have installed a separate electric meter.

(3) Any existing building which undergoes alterations involving a change in type of occupancy or substantial remodeling shall have installed a separate electric meter for each separate tenant space.

(4) For the purpose of carrying out the provisions of sub. (1), individual unit metering will not be required:

- a. In commercial buildings where the commercial unit space requirements are subject to alteration, as evidenced by temporary versus permanent type of wall construction separating the 10 commercial unit spaces. Examples of temporary wall construction are partition walls which do not extend through the ceiling and walls which do not constitute a code-required fire separation.
- b. For electricity used in central heating, ventilating and air- conditioning systems.
- c. For electric back-up service to storage heating and cooling systems or when alternative renewable energy resources are utilized in connection with central heating ventilating and air conditioning systems

(5) For reasonable cause shown, the commission may grant waivers of this rule on a case-by-case basis. Applications for a waiver must be submitted to the commission in writing and set forth the facts or, reasons applicant believes justify a waiver. In cases involving multi-dwelling unit residential buildings, the applicant must show that the electric equipment under tenant control is substantially more efficient than required by applicable codes and that the overall electric usage under tenant control is minimal. Example cases which would not qualify for waiver are buildings which are electrically heated or- buildings which have individual unit electric water heaters.

Cr. Register, July, 2000, No. 535, eff. 8-1-00.

²² Wisconsin Clearinghouse Rule 02-027.

hospitals, community-based residential facilities, residential care apartment complexes or similar facilities, nursing homes, college dormitories, fraternities, and sororities.

(2) Each tenant space in a commercial building constructed after March 1, 1980 shall have installed a separate electric meter.

(3) Any existing building which undergoes alterations involving a change in type of occupancy or substantial remodeling shall have installed a separate electric meter for each separate tenant space.

(4) For the purpose of carrying out the provisions of sub. (1), individual unit metering will not be required:

(a) In commercial buildings where the commercial unit space requirements are subject to alteration, as evidenced by temporary versus permanent type of wall construction separating the commercial unit spaces. Examples of temporary wall construction are partition walls which do not extend through the ceiling and walls which do not constitute a code-required fire separation.

(b) For electricity used in central heating, ventilating and air conditioning systems.

(c) For electric back-up service to storage heating and cooling systems or when alternative renewable energy resources are utilized in connection with central heating ventilating and air conditioning systems.

(5) For reasonable cause shown, the commission may grant waivers of this rule on a case-by-case basis. Applications for a waiver must be submitted to the commission in writing and set forth the facts or reasons applicant believes justify a waiver. In cases involving multi-dwelling unit residential buildings, the applicant must show that the electric equipment under tenant control is substantially more efficient than required by applicable codes and that the overall electric usage under tenant control is minimal. Example cases which would not qualify for waiver are buildings which are electrically heated or buildings which have individual unit electric water heaters.

Wis. Admin. Code § PSC 113.0803.

Additionally, Wis. Admin. Code § PSC 113.01(2) states that:

Nothing in this chapter of the Wisconsin Administrative Code shall preclude special and individual consideration being given to exceptional or unusual situations and upon due investigation of the facts and circumstances therein involved, the adoption of requirements as to individual utilities or services which shall be lesser, greater, other, or different than those provided in said rules.

Id.

B. *Application of Wisconsin Admin. Code § PSC 113.0803.*

There has been an increase in requests for waivers from the rule in recent years, some of which tracks the national trend of developers converting hotels and motels to permanent and/or affordable housing.²³

Since 2017, the Commission has granted four permanent waivers for applications under Wis. Admin. Code § PSC 113.0803(1) or (3), but has denied six.²⁴ In each decision, the Commission states that the intent of the rule is to:

- 1) “promote energy conservation,”
- 2) “ensure that each customer is billed for his or her consumption only,” and

²³ See, e.g., Amy Scott, Old motels find new life as affordable housing, Marketplace (Aug. 22, 2024), available at <https://www.marketplace.org/2024/08/22/old-motels-find-new-life-as-affordable-housing/>

²⁴ **Granted:** Final Decision, *Request of Wisconsin Public Service Corporation for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Electric Metering for a Renovated Building*, docket 6690-EI-112 (Wis. PSC Oct. 17, 2017) (PSC REF#: 332355); Final Decision, *Request of Wisconsin Electric Power Company for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Metering for a Renovated Building*, docket 6630-EI-114 (Wis. PSC Nov. 1, 2019) (PSC REF#: 378692); Final Decision, *Request of Nicholas Balazs for a Waiver of Wis. Admin. Code § PSC 113.0803 Regarding Individual Electric Metering, for the Purpose of Installing a Photovoltaic Solar Array*, docket 3270-EI-102 (Wis. PSC Aug. 22, 2022) (PSC REF#: 445750); Final Decision, *Request of Compass Real Estate Management of Eau Claire for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Electric Metering for a Renovated Building*, docket 4220-EI-108 (Wis. PSC Nov 07, 2022) (PSC REF# 451904).

Denied: Final Decision, *Request of Wewerka Group, LLC for a Waiver of Wis. Admin. Code § PSC 113.0803(1) Regarding Individual Electric Meters*, docket 6690-EI-113 (Wis. PSC Jan. 18, 2023) (PSC REF#: 456765); Final Decision, *Request of Dominion Properties for a Waiver of Wis. Admin. Code § PSC 113.0803(2) Regarding Individual Electric Meters in a Commercial Building*, docket 6630-EI-117 (Wis. PSC August 3, 2023) (PSC REF#: 474493); Final Decision, *Request of Energy Concepts LLC, for a Temporary Waiver of Wis. Admin. Code § PSC 113.0803(1) Regarding Individual Electric Meters*, docket 4220-EI-109 (Wis. PSC Aug 24, 2023) (PSC REF#: 476258); Final Decision, *Request of Brightwater, LLC for a Waiver of Wis. Admin. Code § PSC 113.0803(1) Regarding Individual Electric Metering*, docket 4220-EI-110 (Wis. PSC Apr 16, 2024) (PSC REF#: 498117); Final Decision, *Request of Republik Madison Apartments LLC, for a Waiver of Wis. Admin. Code § PSC 113.0803(1) Regarding Individual Electric Meters*, docket 3270-EI-103 (Wis. PSC Mar 26, 2024) (PSC REF# 494902); Final Decision, *Request of Current Electrical Services, Inc., for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Electric Meters*, docket 6690-EI-119 (Wis. PSC Sep. 26, 2024) (PSC REF#:518191).

- 3) “ensure that the utility is able to disconnect the electric service to an individual unit without affecting the service of other units at the property.”²⁵

While the first intention cited supports the original policy rationales behind PURPA, the second intention does not necessarily support this goal, and it is unclear how the final intention supports the purposes of PURPA.

In evaluating waiver requests, the Commission considers whether the definitions in the rule apply to the applicant. In the past, the Commission has granted waivers for renovated buildings when individual metering would not be required for new construction under Wis. Admin. Code § PSC 113.0803(4). For example, in a 2019 decision, the Commission granted a permanent waiver for a renovated apartment building for homeless veterans and their families because it was a community-based residential facility excluded from the “dwelling” definition in Wis. Admin. Code § PSC 113.0803(1). Therefore, the Commission only needed to find “reasonable cause” to grant a waiver and did so.²⁶ The same is true in a 2022 decision, in which the Commission granted a waiver for a building, previously used as a motel, which was being converted to residential units for student housing.²⁷

²⁵ See, e.g., Final Decision at 2-3, *Request of Wisconsin Public Service Corporation for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Electric Metering for a Renovated Building*, docket 6690-EI-112 (Wis. PSC Oct. 17, 2017) (PSC REF#: 332355).

²⁶ See Final Decision, *Request of Wisconsin Electric Power Company for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Metering for a Renovated Building*, docket 6630-EI-114 (Wis. PSC Nov. 1, 2019) (PSC REF#: 378692).

²⁷ Final Decision, *Request of Compass Real Estate Management of Eau Claire for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Electric Metering for a Renovated Building*, docket 4220-EI-108 (Wis. PSC Nov. 7, 2022) (PSC REF#:451904).

The Commission has also looked to whether “the equipment under tenant control is substantially more efficient than applicable codes and the overall electric usage under tenant control is minimal,” as stated in Wis. Admin. Code § PSC 113.0803(5). In considering whether the equipment under tenant control is substantially more efficient than applicable codes, the Commission found in 2017 that use of light-emitting diode (LED) lighting through the building, Energy Star appliances in each apartment, and shared laundry was sufficient to meet this standard.²⁸ More recently, however, the Commission stated that “mere presence of Energy Star appliances is not sufficient to establish that the...electric equipment under the tenant’s control is substantially more efficient than is required by applicable codes.”²⁹ As for whether overall electric usage under tenant's control is minimal, the Commission has recently considered the number of electric appliances and equipment under the tenant’s control.³⁰

Alternatively, the Commission determines whether “exceptional or unusual” circumstances are present, through which “special and individual consideration” may be given. Wis. Admin. Code § PSC 113.01(2). In a 2022 decision, the Commission found such “unusual” circumstances were present when an applicant requested a waiver in

²⁸ Final Decision at 2-3, *Request of Wisconsin Public Service Corporation for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Electric Metering for a Renovated Building*, docket 6690-EI-112 (Wis. PSC Oct. 17, 2017) (PSC REF#: 332355).

²⁹ Final Decision at 10, *Request of Republik Madison Apartments LLC, for a Waiver of Wis. Admin. Code § PSC 113.0803(1) Regarding Individual Electric Meters*, docket 3270-EI-103 (Wis. PSC Mar 26, 2024) (PSC REF# 494902).

³⁰ *Id.*

order to install a rooftop photovoltaic (PV) system, “designed to substantially offset the energy consumption of the building at issue.”³¹ While MG&E argued in that docket that the tenant may lose the ability to measure and adjust their own energy usage, the Commission determined that the solar PV system’s ability to offset 70% of the building’s energy usage provided “benefits similar to the conservation benefits individual metering requirements are intended to promote.”³²

Lastly, the Commission has reviewed some waiver requests and determined that waivers are not needed at all because the project as proposed complies with applicable rules. For example, in a 2024 decision, the Commission determined that an upgrade to the electrical service of four multi-family residential buildings did not constitute “substantial remodeling.”³³ Therefore, as there was no change in the type of occupancy, the project did not require individual metering.³⁴

³¹ Final Decision, *Request of Nicholas Balazs for a Waiver of Wis. Admin. Code § PSC 113.0803 Regarding Individual Electric Metering, for the Purpose of Installing a Photovoltaic Solar Array*, docket 3270-EI-102 (Wis. PSC Aug. 22, 2022) (PSC REF#: 445750)

³² *Id.* at 5-6.

³³ Final Decision, *Request of Schoen Street Condo Rentals LLC, for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Electric Metering*, docket 6690-EI-116 (Wis. PSC Mar. 26, 2024) (PSC REF#: 494883).

³⁴ *Id.* More recently, the Commission determined that the individual metering requirements did not apply to a single apartment attached to an oversized storage garage. See *Request of Woodbury Rentals LLC, for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Electric Meters*, docket 6690-EI-118 (final decision pending).

Additionally, some hotel-to-apartment developments appear not to have sought a waiver from the Commission at all, including those in MG&E’s service territory. This includes the former Hotel Red on Monroe Street, which received approval from the Madison Plan Commission to convert to studio and one- and two-bedroom apartments in 2021. See Elisa Romas, *Plan Commission gives green light to repurpose Hotel Red into Apartments*, Channel 15 (Oct. 19, 2021), available at <https://www.wmtv15news.com/2021/10/19/plan-commission-gives-green-light-repurpose-hotel-red-into-apartments/>. The hotel, now known as Stadium Lofts, advertises apartment amenities that include PTAC heat and A/C and rents that include utilities, see

DISCUSSION

This request provides sufficient information to establish each of the following standards as set forth by the Commission:

- 1) Vivo's use of private meters, or submeters, demonstrates compliance with the intention of Wis. Admin. Code § PSC 113.0803, such that a waiver is not necessary;
- 2) The electric appliances and equipment under tenant control are substantially more efficient than applicable codes and the overall electric usage under tenant control is minimal.
- 3) This is an exceptional and unusual circumstance, deserving special and individual consideration.

The Commission should determine that Vivo's Project, as proposed, complies with or is exempt from Wis. Admin. Code § PSC 113.0803(3). Alternatively, the Commission should determine that Vivo is eligible for a permanent waiver under Wis. Admin. Code § PSC 113.0803(5) and/or § 113.01.

I. The Commission should determine that Vivo's Project, as proposed, complies with or is exempt from Wis. Admin. Code § PSC 113.0803.

A. The Project complies with Wis. Admin. Code § PSC 113.0803 because it will include private electric meters.

As explained above, Vivo will install private meters for each unit, i.e., sub-meters, connected to the master meter owned and operated by MG&E. This proposal,

<https://stadiumlofts.stevebrownaps.com/madison-wi-apartments/stadium-lofts/amenities/>. This at a minimum indicates the PSC rule is inconsistently applied by utilities and/or not fully understood by developers, and further creates inequities among those trying to create affordable housing in Madison.

which has not been advanced by other entities seeking waivers,³⁵ demonstrates compliance with Wis. Admin. Code § PSC 113.0803.

The plain language of the rule provides, “[a]ny existing building which undergoes alterations involving a change in type of occupancy or substantial remodeling *shall have installed a separate electric meter for each separate tenant space.*” *Id.* § 113.0803(3) (emphasis added). The rule does not state that the meter must be owned by the utility. Rather, it simply calls for a “separate electric meter.” Private meters comply with the plain language of the rule, and the Commission should determine that the Project as proposed with one utility-owned meter for the building and private meters for individual units complies with the rule.³⁶

Wisconsin statutes explicitly contemplate and allow submetering. *E.g.*, Wis. Stat. § 196.643(2) (recognizing that electric service from a utility can be “measured jointly for 2 or more rental dwelling units,” and provides that when that occurs, “the owner shall maintain the account for gas, electric or water service in the name of the owner or in the name of the agent responsible for the collection of rent and the management of the

³⁵ At most, two applicants proposed use of private meters, but also proposed using them for billing or reselling electricity, which is not part of Vivo’s proposal here. *See Request of Brightwater, LLC for a Waiver of Wis. Admin. Code § PSC 113.0803(1) Regarding Individual Electric Metering*, Docket 4220-EI-110; *Request of Current Electrical Services for a Waiver of Wis. Admin. Code § PSC 113.0803(1) Regarding Individual Electric Meters*, Docket 6690-EI-119.

³⁶ Wis. Admin. Code § PSC 113.0802(1) is not to the contrary, because it applies to meters where energy “is sold to customers.” Vivo does not propose using private or sub-meters to sell energy to tenants, but to allow them to understand their electric usage. “Electric meter” is also not defined in PSC § 113.0803(3) and there is nothing indicating that the term is intended to refer to meters discussed in § 113.0802.

rental dwelling units”). Similarly, MG&E’s tariffs recognize scenarios where apartment buildings will be served by one meter, as would be the case here:

[w]here service to an apartment building is measured through one meter, service will be billed at the residential rate when there are four or less residential units. **When the building contains five or more residential units, service will be at the appropriate commercial and industrial rate schedule.** If the building has separately metered residential units, service to the public areas and for other common usage will be billed on the appropriate commercial and industrial rate schedule.

MG&E Electric Rates and Rules, Volume 4, Sheet E-3.1.0 (emphasis added).³⁷

The private meter solution would allow the tenant to monitor and understand their energy usage. The installation of private meters also avoids compromising fire ratings in walls, as no drilling or cutting is needed to monitor existing branch circuits. This is accomplished with current transformers clipped onto the existing wiring that goes to each unit. Because the private meters rely on the existing wiring, this step avoids increased construction needs and costs as no new wiring would have to be installed other than the current transformers and related equipment.³⁸ Existing finishes would be preserved, and destructive work avoided.

The use of private meters thus complies with the purposes of Wis. Admin. Code § PSC 113.0803, as it allows tenants to monitor – and thereby conserve – their energy usage. It also promotes conservation and avoids waste by preserving the building’s existing efficient energy infrastructure and existing finishes. Vivo recognizes that the

³⁷ Available at <https://www.mge.com/MGE/media/MGE-Library/documents/rates-electric/electric-rates-20240327.pdf>.

³⁸ Spec sheets for the meter systems which include diagrams are attached hereto as **Exhibit B**. The final design package will include the one-line diagram for this project specifically

Commission has stated that one purpose of the rule is to only bill tenants for their own use.³⁹ However, Vivo also recognizes that the Commission has not allowed developers to re-sell electricity to tenants as a condition of receiving a temporary waiver.⁴⁰ Vivo thus does not currently plan to bill residents based on private meter readings, though it is willing to do so if that is the Commission's preference. Private meters would be located in a separate room or in corridors, easily accessible by Vivo, and power could still be disconnected to individual units as needed through circuit breakers even if power is not individually billed. No tenant's electricity service would be affected by another user's.

This solution as presented would comply with the purpose and intention of the rule without requiring additional construction and cost, which would be counterproductive to the rule's purpose. It also serves an additional consumer protection advantage because it preserves the building's existing fire rating and would make tenants safer.

For this reason, the Commission should determine that Vivo complies with the rule because every unit will have an electric meter, and no further action is needed.⁴¹

³⁹ Final Decision at 2-3, *Request of Wisconsin Public Service Corporation for a Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Electric Metering for a Renovated Building*, docket 6690-EI-112 (Wis. PSC Oct. 17, 2017) (PSC REF#: 332355).

⁴⁰ Final Decision at 3, *Request of Republik Madison Apartments LLC, for a Temporary Waiver of Wis. Admin. Code § PSC 113.0803(3) Regarding Individual Electric Meters*, docket 3270-EI-106 (Wis. PSC June 27, 2024) (PSC REF#: 506517).

⁴¹ By making this request, Vivo does not waive, and explicitly reserves, the argument that Wis. Admin. Code § PSC 113.0803 exceeds the Commission's authority and is inconsistent with statute. The Commission's jurisdiction is to regulate public utilities, not private developers, building codes, and landlord-tenant relations. For example, Wis. Stat. § 196.175 provides that the Commission "may not

B. *The Project is exempt from the rule.*

Individual metering is not required for multi-dwelling unit residential buildings constructed after March 1, 1980 if “alternative renewable energy resources are utilized in connection with central heating ventilating and air conditioning systems.” Wis. Admin. Code § PSC 113.0803(4)(c). The Commission has, in the past, found it reasonable to delegate authority to grant waivers of Wis. Admin. Code § PSC 113.0803(3) in situations where individual metering would not be required under Wis. Admin. Code § PSC 113.0803(4) if the renovated building were new construction.⁴² Vivo’s Project is not new construction; thus subsection (4) does not apply. However, Vivo intends to use solar panels, an alternative renewable energy resource, in connection with central heating, ventilating and air conditioning systems of common

establish or enforce construction or occupancy standards applicable to any public building, as defined in s. 101.01 (12), dwelling, as defined in s. 101.71 (2) or any occupancy standard applicable to any place of employment as defined in s. 101.01 (11)”. Yet this is what § PSC 113.0803 purports to do. Moreover, administrative codes implemented by other agencies regulate such matters, such as the Department of Safety and Professional Services building and electrical codes, many of which are administered by the City of Madison. *See generally*, Wis. Admin. Code chs. SPS 316,362; Madison, Wis., Ordinances, chs. 19, 27, 29.

These other codes specifically allow submetering. The Department of Agriculture, Trade & Consumer Protection, for instance, allows landlords to purchase electricity from a utility and then distribute it to tenants provided “the rental agreement shall set forth either the specific rate or the method by which the charges are to be computed.” Wis. Admin. Code §§ ATCP 125.01(10)(a), 125.03(1)(b); *see also* Wis. Admin. Code §§ ATCP 134.04(3), 134.06(3)(a)3. (allowing landlords to resell electricity to tenants as long as specified conditions are met). Case law also recognizes that landlords can sell power to tenants without becoming a “public utility” subject to Commission jurisdiction. *See, e.g., Cawker v. Meyer*, 147 Wis. 320, 133 N.W. 157, 159 (1911). While the Commission’s rulings on other waiver requests to date have prohibited applicants from reselling electricity to tenants, these rulings are inconsistent with the authorities cited in this footnote. Regardless of Wis. Admin. Code § PSC 113.0803, Vivo is entitled to use private meters, individual meters, or no meters in the units for the Project.

⁴² Final Decision at 4, *Request of Wisconsin Public Service Corporation for a Waiver of Wis. Admin. Code § 113.0803(3) Regarding Individual Electric Metering for a Renovated Building*, docket 6690-EI-112 (Wis. PSC Oct. 17, 2017) (PSC REF#: 332355).

areas in the building. As such, if the Project were new construction, individual metering would not be required. Following the logic the Commission has applied in past decisions, it should determine that Vivo's Project is exempt from individual metering requirements.

II. Even if the rule applies, Vivo is entitled to a permanent waiver under Wis. Admin. Code § PSC 113.0803(5).

If the Commission determines that private meters are not sufficient to comply with Wis. Admin. Code § PSC 113.0803, Vivo requests a waiver from the individual metering requirement because "electric equipment under tenant control is substantially more efficient than required by applicable codes and that the overall electric usage under tenant control is minimal." Wis. Admin. Code § PSC 113.0803(5).

Upon a review of the history and purpose of Wis. Admin. Code. § PSC 113.0803, it is evident that waivers granted due to the efficiency of electric equipment and minimal tenant control of electric usage is rooted in the purposes of PURPA: encouraging energy conservation and optimizing the efficiency of electricity usage. Vivo's Project supports both purposes as the building is already energy efficient, as is the electrical equipment under tenant control. Moreover, electric usage under tenant control is minimal, as tenants have few electric appliances under their control. For example, each unit will have kitchenettes - not full kitchens -with a small refrigerator (10.1 cubic feet), microwave (1.6 cubic feet), and a two-burner induction cooktop.⁴³ Induction cooktops are up to three times more efficient than gas stoves, and up to 10%

⁴³ Additional information about appliances is attached as **Exhibit C**.

more efficient than conventional smooth top electric ranges.⁴⁴ All appliances in each unit are more energy efficient than required by codes and each unit will have LED lighting. The units will not have dishwashers, washers and dryers in units, ovens, or garbage disposals.

Temperature control for the unit is also energy efficient. Heat and air conditioning are controlled by energy-efficient packaged terminal air conditioner (PTAC) units, manufactured by Friedrich and suitable for small spaces like the units in the Project.⁴⁵ If requested by the Commission as a condition of this application, Vivo would consider locking thermostats so that the temperature cannot be increased or decreased by more than 5 degrees to further minimize energy usage under tenant control. The appliances under tenant control are minimal, compared to the average apartment. Each appliance is substantially more efficient than required by applicable codes.

Sources of major energy use are not within tenant control. Laundry facilities, which are also Energy Star appliances, are shared and not in-unit. There are also no individual water heaters. Common areas are heated separately with multi-zoned equipment powered by gas, not under tenant control. Moreover, energy use in common areas and throughout the building is planned to be offset by rooftop solar. Taken together, this is far more than the “mere presence” of Energy Star appliances.

⁴⁴ Vivien Bui, *Making the Switch to Induction Stoves or Cooktops*, Department of Energy (May 11, 2023), <https://www.energy.gov/articles/making-switch-induction-stoves-or-cooktops>.

⁴⁵ Additional information for the PTAC models is attached as **Exhibit D**. The model being used for this project specifically is the PVH12K

The energy usage in the Project is designed to be as efficient as possible, in accordance with the underlying purposes of Wis. Admin. Code § PSC 113.0803, further supporting that the Commission should grant Vivo's waiver. In so doing, the Commission would be complying with the goal set forth by the state of Wisconsin to reduce the ratio of energy consumption to economic activity in the state. Wis. Stat. § 1.12. Because Vivo's Project complies with Wis. Admin. Code § PSC 113.0803(5), the Commission should grant Vivo's waiver.

III. Even if the rule applies, Vivo is entitled to a waiver under Wis. Admin. Code § PSC 113.01 due to exceptional or unusual situations.

If the Commission does not determine that Vivo has met the standard for a waiver under Wis. Admin. Code § PSC 113.0803(5), Vivo requests that the Commission give Vivo special and individual consideration due to the exceptional and unusual situation presented by the Project in the current housing environment. *See* Wis. Admin. Code § PSC 113.01 ("Nothing in this chapter of the Wisconsin Administrative Code shall preclude special and individual consideration being given to exceptional or unusual situations and upon due investigation of the facts and circumstances therein involved, the adoption of requirements as to individual utilities or services which shall be lesser, greater, other, or different than those provided in said rules.")

First, as explained above, Madison is in a housing crisis, as there is an urgent need of additional housing, particularly housing that is within rental rates that Madison residents can afford.⁴⁶ The lack of housing has, in turn, caused rents to increase 28%

⁴⁶ Strategic Action Plan, *supra* note 2, at 12.

from 2010 to 2022.⁴⁷ Madison residents are left in a difficult situation: there are limited housing units available and those that are available leave residents spending more than 30% of their gross income on housing. This is an unsustainable situation, and will continue to harm Madison’s marginalized communities hardest as the housing shortage has a disproportionate impact on residents of color, as well as on those in the LGBTQ+ community.⁴⁸ In order to keep up with growth and prevent further increases to housing costs, Dane County will need to produce 139,000 new housing units by 2040, or 7,000 per year.⁴⁹ According to the City of Madison’s Director of the Community Development Division, Madison is “nowhere near a point where we’ve satisfied the demand for housing at those more affordable price points.”⁵⁰

Vivo’s project not only provides 153 new housing units, but these units are affordable and avoid excess housing cost burdens.⁵¹ Moreover, converting an existing, underperforming hotel into housing prevents further environmental damage and construction costs, avoiding waste and further ensuring that rent can be kept at an

⁴⁷ *Id* at 8.

⁴⁸ *Id.* at 9.

⁴⁹ *Id* at 12.

⁵⁰ Nicholas Garton, *Madison official: ‘Nowhere near’ meeting demand for affordable housing*, Cap Times (Aug. 14, 2024), available at https://captimes.com/news/community/madison-official-nowhere-near-meeting-demand-for-affordable-housing/article_f943b88e-58c8-11ef-8c71-6f7982ca0387.html.

⁵¹ A household is considered “cost-burdened” if it spends more than 30% of its gross income on housing costs. Strategic Action Plan, *supra* note 2, at 12. More than half of renters in Dane County are cost-burdened, driven by the high cost of rent in the County. Wis. Policy Forum, *Home Prices Outpace Incomes* (March 2024) <https://wispolicyforum.org/research/home-prices-outpace-incomes/>.

affordable rate. As such, Vivo's Project directly supports Dane County's initiatives.⁵² It also significantly shortens the timeline in which much needed housing can be available.⁵³ Vivo's Project is an opportunity to help combat the housing crisis in Madison and in Dane County. This opportunity will be hindered if Vivo is required to further delay opening and expend more cost to install individual meters.⁵⁴

In meeting the urgent need for housing, the Project will not compromise safety or consumer protection. In fact, installing individual meters undermines both goals, as it would compromise the effectiveness of the building's firewalls. Private meters also address some of the consumer protection objectives of the rule the Commission has previously articulated.⁵⁵ Vivo has taken and will continue to take significant steps to ensure that the building is as safe as possible for tenants. But, if Vivo is required to install individual meters, potential residents will be less safe and less protected.

Similarly, individual meters will make it harder to capitalize on renewable energy for the building. Vivo is planning to add solar panels to the building. This

⁵² See Strategic Action Plan, *supra* note 2 at 12.

⁵³ As the cost of housing development has increased, many new housing construction projects have been delayed. See Garton, *supra* note 49.

⁵⁴ Vivo recognizes that the Commission has previously found that "an increased cost in a renovation project does not outweigh the consumer protections provided by the individual metering requirement under Wis. Admin. Code § PSC 113.0803(3)." Final Decision at 11, *Request of Republik Madison Apartments LLC, for a Waiver of Wis. Admin. Code § PSC 113.0803(1) Regarding Individual Electric Meters*, docket 3270-EI-103 (Wis. PSC Mar 26, 2024) (PSC REF# 494902). However, here the increased cost speaks to the unusual circumstances surrounding the need for affordable housing – not an excuse for noncompliance. Moreover, as demonstrated throughout this Request, Vivo strives to provide greater consumer protection and safety measures that could not be provided should individual meters be required.

⁵⁵ Final Decision at 11, *Request of Republik Madison Apartments LLC, for a Waiver of Wis. Admin. Code § PSC 113.0803(1) Regarding Individual Electric Meters*, docket 3270-EI-103 (Wis. PSC Mar 26, 2024) (PSC REF# 494902).

would offset the energy usage of the building. This directly supports one of the stated purposes of PURPA: to “encourage...conservation of energy supplied by electric utilities.” Vivo’s attempts to decrease the amount of non-renewable energy supplied by MG&E, and replace that electricity with solar power, comports with the policy reasons behind PURPA. However, as mentioned above, it is not feasible if Vivo is required to install individual meters.

Moreover, the existing electric service in the building is already efficient, with few upgrades needed. Substantial remodeling is not required, allowing beneficial re-use of materials on-site and reducing project impacts, further conserving energy. By conserving energy and protecting consumers, Vivo’s Project supports the purposes of PURPA and of Wis. Admin. Code § PSC 113.0803. Vivo recognizes the urgency of Madison’s housing needs, and is ready to help, if the Commission will let it. As noted above, Vivo is further willing to demonstrate this commitment by holding 20% of units for affordable housing if the Commission so desires.

Vivo recognizes that other applicants with similar projects have been denied. However, Vivo has taken considerable measures to ensure that the Project will meet the letter and purposes of the rule while going beyond typical standards for energy conservation. In the meantime, the need for housing has grown even more urgent in the Madison area. Based on this need and the measures Vivo will take to provide safe and affordable units, Vivo presents an exceptional situation.

The Commission should grant Vivo’s waiver as this is an “exceptional and unusual circumstance.”

CONCLUSION

For the reasons stated above, Vivo requests that the Commission grant its waiver request.

Respectfully submitted this 14th day of November, 2024.

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