BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Wisconsin Power and Light Company's Request For Approval of an Experimental Economic Development Rider, and the Associated Approval of Deferral Treatment of Revenue Discounts

6680-GF-126

DISSENT OF COMMISSIONER LAUREN AZAR

The Public Service Commission of Wisconsin is charged with regulating Wisconsin's public utilities. The Commission's action in this "docket" diverts dramatically from this clear mission and charts a new course for this agency, one of economic development. I believe the approval of *this* economic development rate (EDR) is inconsistent with the Commission's statutory authority and the Commission's past practice. Stated bluntly, the EDR approved in this *Final Decision* is effectively an economic development grant for companies in the Wisconsin Power and Light (WP&L) service territory. The Commission takes this action without holding a contested case hearing, without issuing a notice of proceeding, and without opening a docket. The result is significant in its policy, and striking in its haste.

I dissent from the Commission's *Final Decision* in its entirety. This dissent addresses three separate topics: the EDR adopted within the *Final Decision*, the Commission's failure to open a docket or a proceeding, and the dismissal of Citizen Utility Board's (CUB's) request for a contested case hearing.

I. Economic Development Rates

The EDR adopted by the *Final Decision* is discriminatory, unjust and unreasonable. However, these infirmities could be remedied by adding a few additional requirements to the rate design.

A. Discriminatory Rates, Without Sufficient Rationale, are Prohibited in Wisconsin

Wisconsin statutes prohibit the Commission from approving discriminatory rates for contemporaneous services. Wis. Stat. § 196.60(1)(a). This is not an absolute prohibition on price discrimination, and the Commission has often approved rate structures that differentiate between various types of customers. *See City of West Allis v. PSC*, 42 Wis. 2d 569, 581 (1969) (identifying that differential pricing is lawful and even economically desirable within the public utility context). However, the Commission's approval of differential rates must be based on some rationale. The *Final Decision* claims discrimination can be rational if customers within the same class have "different [utility-service] usage characteristics."[1] (*Final Decision*, p. 18.) Simply using utility service differently is insufficient to justify price discrimination. For instance, there would be no justification for giving a price discount to a customer whose differing "usage characteristics" actually increased the costs for the utility and, therefore, the other ratepayers.

The correlation between "different usage characteristics" and the price discount must result in a benefit to the utility and its ratepayers as a collective whole. In *Wisconsin Environmental Decade v. PSC*, 98 Wis. 2d 682, 687-88 (Ct. App. 1980), this correlation was manifest in a rate that would "encourage some customers to shift their electric power demands to

[1] The *Final Decision* does not define the term "usage characteristics." I am assuming it means how a customer uses its utility service, such as the quantity of utility service, patterns in use, time of use, etc.

different times when the cost of producing electric power is less." Shifting demand to lower cost periods benefits all the consumers by lowering the overall cost structure for the utility. Similarly, in *Wisconsin Ass'n of Manufactures & Commerce v. PSC*, 94 Wis. 2d 314, 325 (Ct. App. 1979), the Court recognized the different costs of serving interruptible and non-interruptible gas customers as a basis for differential pricing.

1. The Discriminatory Rate Approved by the *Final Decision*

The rate approved in this *Final Decision* is discriminatory. Certain CP-1 and CP-2 customers are eligible to receive a discount on their energy bills even though they are receiving *precisely* the same utility service as other CP-1 and CP-2 customers.[2] This rate discount can only withstand judicial scrutiny if there is a rational justification for that discount. Specifically, to justify rate discrimination, the rate must satisfy a two prong test: (1) the CP-1 and CP-2 customers receiving the price discount must exhibit a utility-related characteristic that differentiates them from the other CP-1 and CP-2 customers who are ineligible for the discount; and (2) the utility-related characteristic must cause a benefit to the utility, that is, the discount must be correlated to some benefit for the utility. Hereafter, I refer to this as the "Rational Justification Test." Establishing both prongs of the Rational Justification Test is necessary to justify a discriminatory rate and to avoid violating the discrimination statutes of Wis. Stat. §§ 196.37 and 196.60. The EDR adopted by the *Final Decision* contains two fatal flaws: it does

[2] With respect to WP&L, CP-1 customers are large industrial or commercial customers that are served at normal or elevated voltage levels and which have monthly demand requirements of 200 kilowatts (kW) or more. CP-1 customers can be either interruptible or non-interruptible, though this election will change the rates for service. CP-2 customers are very large industrial customers that are served at high (transmission level) voltages, with monthly demand requirements of 5,000 kW or more. CP-2 customers can be either interruptible or non-interruptible, though this election will change the rates for service.

not require sufficient evidence to demonstrate prong one, and it does not include a requirement for establishing prong two.

The *Final Decision* claims the discrimination is justified because the EDR customers will "have different usage characteristics than existing customers on the CP rate schedules." (*Final Decision*, p. 3.) But, a closer look at the rate design does not bear this out. According to the *Final Decision,* the characteristics that differentiate these EDR customers are as follows: (1) maintain or expand electric load; (2) affirmatively declare that the customer would not maintain or expand load without the EDR; (3) implement economically viable energy efficiency and (4) receive other economic development funding. (*Final Decision*, pp. 18-19.) I address each of these characteristics individually.

Condition One -- the maintenance or expansion of electric load -- by itself does not help to differentiate between EDR customers and others in the CP-1 and CP-2 classes. (*Final Decision*, p. 18.) Because electric usage fluctuates for all customers, maintaining or increasing[3] electric usage provides no differentiation between those customers receiving a discount and those not. Many other CP-1 and CP-2 customers will be maintaining or increasing their usage (perhaps by the same amount), but will not be eligible for this discount. Therefore, by itself, Condition One fails to provide a "different usage characteristic" that would differentiate EDR from non-EDR customers. Moreover, by itself, Condition One also does not address whether the maintenance or expansion of load within the WP&L service territory would benefit the utility. Hence, Condition One, by itself, does not help to establish either the first or second prong of the Rational Justification Test.

[3] Because this rate sets no minimum requirement of additional usage, any amount of increased usage would qualify a customer for this rate discount.

Condition Two requires that, to receive a discount, the customer must sign an affidavit attesting that "but for" the discount, the customer would not have maintained or expanded operations in Wisconsin.[4] (*Final Decision*, p. 18.) The affidavit is intended to prove that the discount is causing the customer's behavior. Without proof of causation, the EDR customer could be like any number of CP-1 and CP-2 customers who are maintaining or expanding their usage, but not receiving a discount. Hence, proving the causal link between the discount and the benefit is critical to passing the Rational Justification Test. Though vital to the rate's legality, the *Final Decision* requires only minimal evidence of this causal link. Without requiring substantial evidence that the discount is causing the maintenance or expansion of load, Condition Two is essentially the same as Condition One because it does not meaningfully differentiate between customers who are receiving the discount and those who are not.

Condition Three -- customers must implement economically viable energy efficiency and conservation opportunities with a payback period of five years or less -- does not help to differentiate between EDR customers and non-EDR customers. (*Final Decision*, pp. 15, 19.) There are undoubtedly other CP-1 and CP-2 customers who will be implementing such energy efficiency and energy conservation efforts, but will not receive this discount. Indeed, the Focus on Energy Program provides technical assistance and grants for a variety of energy efficiency and conservation efforts. *See*, http://www.focusonenergy.com/Business/Industrial-Business/Default.aspx. But there are more significant problems with Condition Three. First, the

[4] The customer must sign a sworn affidavit that attests "but for" the EDR "the affiant would not have:
1. located operations or added electrical load with the state of Wisconsin, or
2. retained electrical load within the state of Wisconsin."
It is peculiar that the affidavit only requires that the customer maintain or expand load in the state of Wisconsin while the tariff specifies that the load must be located within the WP&L service territory. (Tariff, ¶ 6.) Hence, the customer may submit an affidavit in the form required, but still not qualify under the terms of the tariff.

EDR customer effectively gets to decide what is economically viable, thereby rendering this requirement hollow. (*Final Decision*, pp. 15-16.) Further, Condition Three is actually counterproductive to the overall goal of this EDR, which (according to WP&L) is to increase the electric load in WP&L's service territory. (*See* WP&L's Request for Approval of An Experimental Economic Development Program Rider, Attachment at 1 (November 13, 2009) (identifying availability of the proposed rate to incremental load added or retained).) While I am fully supportive of encouraging energy efficiency, if the goal of this EDR is to encourage additional energy consumption, this is an odd and inefficient means to that end. Because Condition Three actually undercuts the goal of this EDR, it cannot help to rationally justify this discriminatory rate.

Condition Four -- the EDR customer must receive some other form of economic development grants or stimulus -- is an objective and discernable difference between EDR and non-EDR customers. However, it is unrelated to utility service and, therefore, cannot constitute a different "usage characteristic." Therefore, Condition Four is of no help in passing the Rational Justification Test.

In sum, while the rate discount approved in the *Final Decision* may make sense from an economic development standpoint, it fails to withstand scrutiny as a discriminatory rate. As currently crafted, this rate fails to demonstrate both prongs of the Rational Justification Test because it:

- contains no utility-related characteristic that meaningfully differentiates between CP-1 and CP-2 customers who are eligible for the discount from those who are not; and
- contains no requirement that the utility-related characteristic cause a benefit to the utility.

Conditions One and Two taken together could have established the first prong, but the weakness of the evidence required for establishing those conditions renders them meaningless. As to the second prong, Conditions One and Two could certainly be a component of establishing the causal link between the discount and a benefit, but these conditions do not go far enough. Therefore, even if the rate required stronger evidence for Conditions One and Two, as currently designed, it would still fail the second prong of the test. For this rate to be legal, more requirements are necessary to establish the second prong.[5]

2. Remedying the Problems in the Discriminatory Rate Approved by the *Final Decision*

While the EDR crafted and adopted by the majority is unlawfully discriminatory, it could be remedied by supplementing Conditions One and Two.

a. Affidavit

The first infirmity that must be addressed is the evidence required to demonstrate the "but for" test. The fundamental premise of this rate is: without the discount, the customer would not maintain or expand its load, *i.e.*, the customer would not be taking the actions that benefit the utility. Having confidence that the utility discount is necessary to achieve the goal is critical and, without such confidence, this discount could simply be a give-away of utility dollars.

I would, therefore, add to this EDR a requirement that the customer provide clear and convincing evidence to establish this fundamental premise. I would require a customer seeking the discount to submit corroborating evidence to support the assertions of the affidavit. Specifically, I would want the customer to establish, with specificity, why the financial benefits provided by the EDR are making the difference as to whether that customer maintains or

[5] Conditions Three and Four are irrelevant to establishing either the first or second prong of the Rational Justification Test and are not discussed further.

expands its load in the WP&L service territory. Such evidence could be submitted confidentially, if necessary.

With the addition of a clear-and-convincing standard, Conditions One and Two pass the first prong of the Rational Justification Test. Taken together, these conditions would demonstrate, with confidence, that the customer is maintaining or expanding its load because of the EDR discount.

However, this rate still does not pass the second prong of the test, demonstrating a correlation between the discount and a benefit to the utility. The *Final Decision* notes that "a successful EDR *could* protect WP&L's existing customers by spreading fixed costs over a somewhat larger base or by maintaining WP&L's existing base." (*Final Decision*, pp. 6-7 (emphasis added).) This EDR *could* also harm WP&L's existing customers through cost increases arising from the need to construct new generation prompted by this discounted rate. The majority cannot say whether its EDR will protect or harm the utility and its existing customers. Indeed, evidence from other dockets strongly suggests this EDR will harm, not protect, WP&L.[6] There must be an additional requirement proving that the sales of more

[6] WP&L's EDR is designed to increase electricity sales in the WP&L service territory. To accomplish this goal, WP&L will essentially pay customers to use more electricity than they would have without the EDR. Paying customers to use more electricity is only rational if increasing utility sales will benefit the utility. However, on May 7, 2010, WP&L submitted an application to the Commission requesting permission to purchase additional baseload capacity. *Application of Wisconsin Power and Light Company and Wisconsin Electric Power Company for Approval for Wisconsin Electric Power Company to Sell and Wisconsin Power and Light Company to Purchase a Partial Ownership Interest in Unit 5 at Edgewater Generating Station, Sheboygan County, Wisconsin*, Public Service Commission of Wisconsin Docket No. 5-BS-184, Application at 2 (May 7, 2010). In its application, WP&L stated that its "need for additional energy remains." *Id.* As recently as June 2, 2010, the Commission found that WP&L has "a long-term need for energy." *Application of Wisconsin Power and Light Company and Wisconsin Electric Power Company for a Certificate of Authority to Install a Selective Catalytic Reduction System for Nitrogen Oxide Removal on Unit 5 at the Edgewater Generating Station, Sheboygan County, Wisconsin*, Public Service Commission of Wisconsin Docket No. 5-CE-137, *Final Decision* at 15 (June 2, 2010). Incentivizing increased electric sales at a time when a utility believes it needs additional baseload capability is, at best, counterproductive.

electricity is actually beneficial to the utility, one that guarantees the selling of more electricity will drive down the costs for the utility.

b. Rate Escalation Spiral

The economy within a utility's service territory, if significantly distressed, can threaten the financial viability of that utility. When economic factors lead to losses in sales for the utility -- particularly those associated with industrial customers cutting back on operations -- the utility must raise its rates to pay for its fixed capital expenses. However, increased rates may, in turn, cause additional decreased sales as companies further cut production or move from the area entirely. Ultimately, the number of customers continues to spiral downward as the cost-per-customer spirals upward (a "rate escalation spiral"), thereby threatening the financial viability of the utility and hurting its customers.

Once the threat or existence of a rate escalation spiral has been recognized, the utility should take action to counteract that spiral. One counteracting mechanism is to try to stabilize and increase electricity sales.[7] A program designed to increase electric sales, such as an EDR, would benefit the utility and would, therefore, justify the expenditure of utility dollars in furtherance of those goals.

Requiring proof of a rate escalation spiral is one metric that would demonstrate a correlation between the discount provided by the EDR and a benefit to the utility. While there may be other methods of addressing prong two of the Rational Justification Test, this is the only metric I could identify.

[7] Another counteracting mechanism is to decrease fixed capital costs such as retiring plants that are inefficient and expensive. However, this may be difficult for utilities because they usually own very expensive assets with long depreciable lives.

Defining economic metrics to detect the threat or existence of a rate escalation spiral is not easy. I asked Commission staff what type of metric could be used and, though needing further development, the following two metrics seem appropriate for this purpose:

- "Escalation Metric" = measure the escalation of the revenue requirement and rate base per unit of sales, identified by a three-year trend. While this metric would need to be further developed, staff recommends it includes a calculation of the following:
    - o (revenue requirement – fuel costs)/MWH; and/or
    - o rate base/MWH
- "Sales Volume Metric" = Comparison of MWH sales volume for CP-1 and CP-2 customers relative to some historic time period. A rate escalation spiral would cause a significant, persistent and declining trend in sales. For instance, one could evaluate whether the sales over the three most recent years demonstrate a continued decline. Because this metric does not include a measurement of the utility's fixed costs, staff has advised me, and I agree, that this metric alone is insufficient to predict a rate escalation spiral. Therefore, I would use this metric in concert with the Escalation Metric.

A lawful EDR may also include metrics that would demonstrate the end of a rate escalation spiral. Staff identified the following two conditions that could be used to automatically close an ongoing EDR to new customers:

- Two consecutive years of non-residential sales growth; or
- The utility identifies a need for additional generation capacity,[8] unless:
    - o the capacity is needed to comply with public policy, such as a renewable portfolio standard, and is not needed to address capacity shortages;

[8] For example, the Kentucky Public Service Commission imposes a duty on EDRs that the utility provide an affirmative declaration and evidence that it has adequate capacity to meet anticipated load growth due to the incentive. *See, In the Matter of Application of Louisville Gas and Electric Company for an Adjustment of Electric and Gas Rates*, Kentucky Pub. Serv. Comm'n, Data Request to Department of Defense, 2010 WL 1848988, Appendix (May 6, 2010) (citing *In the Matter of An Investigation into the Implementation of Economic Development Rates by Electric and Gas Utilities*, Administrative Case No. 327, Order (Sept. 1990)). Additionally, the incentive is required to cease if the utility no longer has adequate reserves to meet anticipated load growth. *Id.*

- the utility is repowering or converting existing facilities to a cleaner fuel source; or
- the utility is retiring an amount of existing capacity that is roughly equivalent to the amount being added and the new capacity will produce cleaner or cheaper power.

These are but two examples; there may be other events that would unequivocally signal the end of a rate escalation spiral and, therefore, prompt the closure of enrollment into an EDR.

In sum, while the *Final Decision* approves a discriminatory rate that is unjustified, adding two requirements would remedy the problem, namely requiring clear and convincing evidence of the "but for" test and proof of a rate escalation spiral. These two new requirements would ensure that the EDR customer is only maintaining or expanding its load because of the discount and that the EDR customer's maintenance and expansion of load was benefitting the utility. With these additions, both prongs of the Rational Justification Test are met and, though the rate is discriminatory, it is justifiably discriminatory and in compliance with Wisconsin law.

B. Unjust and Unreasonable Rates are Prohibited in Wisconsin

In addition to avoiding unjust discrimination, the Commission may only approve rates that are "just and reasonable." Wis. Stat. § 196.03(1). While courts have generally given deference to the Commission's determination of what a just and reasonable rate is, that deference is not without bounds.[9] The rate approved here exceeds those bounds.

In Wisconsin, the Commission establishes utility rates through a three-step process:

- determine how much revenue the utility needs to pay for its costs as well as a reasonable return on its equity;

[9] Since this rate is about economic development, something that is *not* within the Commission's expertise, it is unclear whether such deference would be afforded to the Commission.

- determine how much it costs to provide service to the varying classes of customers; and

- allocate the revenue requirements to the varying classes of customers generally based on their cost of service.

The EDR approved in the *Final Decision* allows WP&L to charge certain customers less than the cost of serving that customer. Specifically, in the first year, EDR customers are only charged 5 percent of the fixed costs that would normally be allocated to that customer. With each passing year, the EDR customer pays a greater proportion of its fixed costs. By the sixth year, the EDR customer is paying the same as other similarly situated CP-1 and CP-2 customers. (Tariff, ¶ 5.)

Since the EDR customers are not paying their full share of the utility's fixed costs for five years, the utility is subsidizing the EDR customers. As explained in footnote 6, as currently crafted, this EDR could lead to an increase in the utility's fixed costs (in the form of additional generating capacity), which would require the utility to pay for both this discount as well as new fixed costs. Because this EDR may actually harm the utility, this rate cannot be just and reasonable. To be just and reasonable, the EDR must be structured to ensure that the EDR benefits, not harms, the utility. The remedy described above for unjust discrimination would also render the EDR just and reasonable.

In conclusion, while the EDR approved by the *Final Decision* is discriminatory, unjust and unreasonable, those infirmities could be remedied by adding two requirements to the tariff: bolstering the requirements of the affidavit and requiring proof of a rate escalation spiral. Because WP&L currently is in need of baseload capacity and increasing electricity usage will only accelerate that need, WP&L may not be able to establish proof of a rate escalation spiral.

While the Commission may want to assist the citizens of the WP&L service territory, creating an EDR, which is essentially a giveaway to businesses, will only harm those citizens in the long run, not help them.

II. The Commission is Making a Significant Policy Shift Without Opening a Docket, Initiating a Proceeding, or Holding a Contested Case Hearing

As identified in the introduction, the Commission is taking dramatic action without having held a hearing, and indeed, without officially opening a docket[10] or issuing a Notice of Proceeding.[11]

A. The *Final Decision* Based on "Informal" Action

According to the *Final Decision*, "The Commission is handling this matter informally." (*Final Decision,* p. 5.) I have a number of concerns about this approach, the first of which is: I have been a Commissioner for three years, and I do not know what it means for the Commission to handle a matter "informally" while at the same time issue a formal *Final Decision.* There is nothing informal about a *Final Decision* approving a rate that has never been used in Wisconsin. (WP&L's Request for Approval of An Experimental Economic Development Program Rider at 3 (November 13, 2009) ("WP&L does not currently have an economic development tariff, nor is WP&L aware of any similar program at any of the investor-owned utilities in Wisconsin.").)

Second, while I am considerate of the need for fast action, I believe this is an inappropriate decision-making process for such a major change in policy. Apparently, the last time the Commission was faced with an application for an EDR (in 1985), it opened a generic

[10] Though no docket was opened, "the Commission's Records Management Unit has assigned WP&L's proposal a docket number for tracking purposes . . ." (*Final Decision*, p. 5.)

[11] "Because the Commission has not yet officially voted to issue a notice for this matter, the Commission's current review of WP&L's proposed EDR is neither a proceeding nor a docket." (*Final Decision*, p. 5.)

docket and prepared an Environmental Impact Statement (EIS).[12] (CUB Comments on WP&L's Proposed EDR at 3 (March 16, 2010) (citing Docket No. 05-EI-15).) At that time, the Commission ultimately rejected the proposed economic development rate. (*Id.*) In the 25 years between the two cases, the Commission has moved from the formality of performing an EIS (which are generally prepared in the Commission's most important and complex cases) to considering such a request "informally."[13] I find no justification for the Commission's move from preparing an EIS to handling this informally; *i.e.*, I can find no justification for the Commission's inconsistent approach in evaluating proposed EDRs.

Third, this "informal" decision-making is not described in Wis. Stat. chs. 227 or 196, or Wis. Admin. Code ch. PSC 2. Because this is neither a docket nor a proceeding, the *Final Decision* concludes that the rules of intervention do not apply. (*Final Decision*, p. 5.) But, without knowing the legal framework and authority for an informal process, I do not know what procedural rules apply and whether the Commission followed them.

B. The Commission Should Either Have Held a Contested Case or Should have Ordered that the WP&L Shareholders Would Pay for the Shortfall Caused by the EDR Discount

Wisconsin Statute § 196.20(2m) requires that the Commission hold a contested case hearing before approving any rate increases. Though the *Final Decision* claims that "WP&L's

[12] Environmental Impact Statements are required when the Commission may take a "major action . . . significantly affecting the quality of the human environment." Wis. Stat. § 1.11.

[13] In the application for this EDR, WP&L identified a number of changes that have occurred in the industry since the Commission's last consideration of an EDR. (WP&L's Request for Approval of An Experimental Economic Development Program Rider at 3 (November 13, 2009) (identifying, among other things, the advent of the Midwest ISO and the enactment of Renewable Portfolio Standards).) If anything, changes in the utility industry would render the record from the Commission's prior investigation moot and require a new in-depth re-examination of how an EDR would operate under today's conditions and laws.

proposed EDR is effectively a rate decrease," this conclusion is not persuasive. (*Final Decision*, p. 5.) As explained below, the adoption of this EDR could also constitute a rate increase.

It is likely that WP&L will pursue a full rate case next year, with new rates beginning on or around January 2012.[14] Until then, the provision of any discounts under the EDR will not increase customer's bills. But next year, when processing the WP&L rate case application, the Commission will decide whether the WP&L shareholders or ratepayers will be paying for the discount provided under the EDR. Though asked, the Commission refused to decide this issue now. Hence, depending on what the Commission decides, this EDR could result in a rate increase to WP&L's ratepayers at that time.

Though such an increase would not occur until 2012, with the issuance of the *Final Decision*, WP&L may begin to enroll customers into the EDR. When enrolled, a customer will sign a contract entitling the customer to receive the discount for up to five years. (Tariff, ¶ 5.) Hence, should the Commission decide that WP&L's ratepayers must pay for the discounts, contracts signed today would be binding the ratepayers to a rate increase beginning around January 2012. Given these facts, the majority has no basis upon which to conclude that this EDR is "effectively a rate decrease."[15] As identified by the Wisconsin Supreme Court, an "injury in fact" can begin with the initiation of a "series of events" that ultimately results in injury. *See*

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[14] While WP&L is currently seeking an increase in rates, it is a "limited reopener" of its rates, which means it will address only the issues identified and will not generically calculate the utility's revenue requirement. *Application of Wisconsin Power and Light Company for Authority to Adjust Electric and Natural Gas Rates*, Docket No. 6680-UR-117, Order to Reopen and Notice of Prehearing Conference (May 28, 2010). The revenue deficiency caused by the EDR is not one of the issues that will be considered in this limited reopener. Nonetheless, the *Final Decision* makes clear that a more comprehensive rate case filing is expected for 2012. (*Final Decision*, p. 10.)

[15] Given that WP&L is incentivizing load growth while also identifying a need for additional generation suggests this EDR will necessarily cause a rate increase since the EDR will accelerate the need to build new generation, thereby increasing rates further.

Wisconsin Environmental Decade v. PSC, 69 Wis. 2d 1, 14 (1975). Since the *Final Decision* approves the signing of contracts that could result in rate increases, I believe the Commission was legally required to do one of two things:

- decide in this *Final Decision* that the WP&L shareholders would be paying for the discount; or
- hold a contested case hearing recognizing that actions taken today are initiating a series of events that will result in a rate increase.

Even if the Commission had decided to do the former, a contested case would have created a proper record upon which to base an informed decision.

III. CUB's Right to a Contested Case Hearing Under Wis. Stat. § 227.42

The Citizens' Utility Board (CUB) requested a contested case hearing pursuant to Wis. Stat. § 227.42(1). This statute "creates an independent right to a contested case hearing, conditioned only on the satisfaction of the elements outlined in [the statute]." *Milwaukee Metropolitan Sewerage Dist. v. Wisconsin DNR*, 126 Wis. 2d 63, 72 (1985). Looking at the individual elements of the statute, despite a rather minimal filing, I believe CUB satisfies all the elements.

First, CUB has a substantial interest that is threatened with injury by the Commission's action. Wis. Stat. § 227.42(1)(a). CUB is an organization representing specific ratepayers, including residential, farm, and small business customers in the WP&L service territory. (CUB Intervention Request at 1-2.) The threat to CUB's members involves the possibility that discounted rates for a specific subset of customers may be subsidized by others, including CUB members, or that this rate may precipitate the need for additional capital expenditures. While any rate increase to CUB members would be subject to a subsequent proceeding, this *Final*

Decision is an event that may initiate a series of events that could cause harm to ratepayers, including CUB members. *See Wisconsin Environmental Decade v. PSC*, 69 Wis. 2d 1, 14 (1975). Without this rate, CUB would not be threatened with the potential rate increases or the need to defend themselves against it in later proceedings. I believe there is a threatened injury to CUB members sufficient to satisfy the first prong of Wis. Stat. § 227.42(1).

As for the second prong of the statute, I find no legislative intent that CUB's member interests are not to be protected. Wis. Stat. § 227.42(1)(b). To the contrary, the requirements of Wis. Stat. §§ 196.37 and 196.60 suggest interests relating to non-discriminatory utility rates should be protected.

The third prong is met due to the fact that there are a variety of different types of ratepayers. Wis. Stat. § 227.42(1)(c). Under the rate approved by the Commission here, some ratepayers would be subject to discounts, while others would have the potential risk of increased costs due to those discounts. This shows that CUB members are threatened by injuries of "different kinds or degrees" from other ratepayers. Therefore, the threat is different from that of the general public.

The final prong of the statute, whether there is a dispute of material fact, is also met. Wis. Stat. § 227.42(1)(d). While many issues in this docket are mixed law and fact, fundamental factual disputes remain. For example, there is a factual dispute about whether the rate proposed by WP&L will cause existing customers to subsidize customers receiving benefits from the EDR. WP&L argues there is no subsidization, and CUB argues there is a subsidy without commensurate benefit. This is a fundamental factual dispute that has not been fully developed pursuant to a contested case proceeding, or any proceeding for that matter.

Even assuming *arguendo* that the requirements of Wis. Stat. § 227.42 are inapplicable, the Commission should still have held a contested case hearing on its own motion. Implementing an EDR that provides a rate discount to promote economic development is a significant shift in agency policy; significant enough that it should be properly scrutinized to ensure it does not result in an unjust, unreasonable or unduly discriminatory rate. A contested case is the best tool the Commission has to ensure that all sides of an issue are presented for consideration and to ensure that our decisions are based on the best available information. Here, the Commission applied an *ad hoc*, informal process that is highly unlikely to lead to the best possible result.

IV. Conclusion

My dissent in this docket is not a dismissal of the poor economic climate experienced by many communities within WP&L's service territory. I am fully aware of the hard times that major plant closings and scaled-back manufacturing bring. However, the desire to have a positive impact on local economies cannot trump Wisconsin law and the Commission's core mission. Indeed, as identified above, I believe this agency could craft an EDR that complies with the law and furthers the Commission's mission, while simultaneously assisting economically challenged areas.

Dated at Madison, Wisconsin, June 25, 2010

Lauren Azar
Commissioner

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