November 9th, 2022

Public Service Commission of Wisconsin
Attn: Tanner Blair
4822 Madison Yards Way
Madison, WI 53705-9100

Re: Comments on the Petition for Declaratory Ruling on Third-Party Financing in Wisconsin

Commissioners and Staff,

I’m writing today to express a strong level of support for action by the Public Service Commission of Wisconsin (PSC) to address the ambiguities surrounding the legality of third-party financing agreements for distributed energy resource purchase and installation by acting on Vote Solar’s petition (Docket ID: 9300-DR-106).

The question of whether third-party financing is allowed in Wisconsin has been left unresolved for about a decade, if not longer. Utilities, customers, and installers alike have sought clarity on this issue from the PSC dating back to at least 2012, but have failed to see a resolution despite multiple requests of the Commission and the courts system. One of the reasons for this failure is the proverbial game of ‘hot potato’ that the PSC, legislature, and courts have played with this issue as each believes that others are better suited legally and technically to address the issue. While not everyone may agree, I firmly believe this issue is before the right venue at the right time, and now it’s on the Commissioners to do the logical thing and support Vote Solar’s petition.

Some of the arguments I’d like to reiterate today were also mentioned in my letter submitted to the PSC on June 3rd, 2022 encouraging the acceptance of this petition, but I won’t be reiterating some of the other points as I respond with my opinions on some of the more frustrating contentions I’ve repeatedly seen made regarding third-party financing in Wisconsin from opponents of this important clarification to state law.

- This issue is firmly, legally, and rightly before the PSC, and there’s perhaps no other person in Wisconsin who can definitively dispute my argument given that I authored a bill on third-party financing last session (2021 Senate Bill 702 and Assembly Bill 731 with Rep. Rachael Cabral-Guevara). In the process, I heard from a myriad of bipartisan colleagues who felt this issue was best left to the PSC, not the Legislature. For my own comfort, I also spoke with Wisconsin’s nonpartisan Legislative Council who affirmed my belief that the PSC has the authority to decide this issue under law and under Commission precedent.

- Predictions of ruin by the utilities and their allies should not be considered, nor honestly taken seriously. Examples of the absurdity of these claims are easily identified. The commission can simply look across the border into Iowa, which after eight-years of third-party financing being legal, still only has around 2% of generation from distributed resources and has not marched towards retail choice and deregulation, nor...
have they seen reliability suffer. These easily and directly counteract the utilities’ versions of town criers that were falsely alerting about calamity from this court decision. In fact, to the contrary, the Iowa State Auditor showed that local public institutions like schools saw average cost savings of $26,000 per year because of the decision – fundamentally improving use of taxpayer funds. Meanwhile, statewide, Wisconsin’s energy rates have increased at a faster rate than Iowa’s since 2014.

- As more utility scale solar installations are being built, we’re seeing more and more resistance among locals to merchant generation plants and utility-built projects removing large swaths of prime farm land from production, often times with that land being necessary for permit compliance of land spreading manure. While property owners certainly have that right to lease their farm land for a different and stable income sources, the road towards implementation of more solar may be bumpy as counties like Columbia are considering serious restrictions on new installations. As utility-scale projects drag out for years, followed by additional time to get the power successfully on transmission lines, distributed energy sources can be installed and operating in a period of days, with minimal or no costs whatsoever being borne by the utility. If the goal is to increase renewable generation, both types of solar installations are necessary.

- Wisconsin citizens overwhelmingly support renewable energy sources, particularly those which drive economic development in Wisconsin. However, ratepayers have rightly begun to question whether the only option for renewable energy it through their utility. These questions are becoming louder as some residential customers are facing a near 15% rate increase, after being provided notice that it would only be around 5 to 6% and that costs necessitating an increase are partially attributable to the expansion of renewable resources. If utilities are unable to supply reasonably-priced renewable generation without merely stranding assets and pushing towards bigger profit margins, then Wisconsinites should have small-scale alternatives as a way out of this never-ending cycle of rubber stamped rate increases.

- Cross-subsidization has often been raised as a concern against distributed generation, particularly solar. While a simple and bold statement may be oversimplifying my thoughts on the argument, I think it’s fair to say that concern over this is absurd. Utilities have already largely seen their preference become PSC dicta in ongoing administrative rule changes and recently completed parallel generation tariffs. The impression that the utility is in some way providing the property owner a favor upon interconnection is just not an economic or technical reality supported by any reasonable and unbiased evidence. The lack of transmission reduction credits which are being provided to distributed energy generators during a rapidly increasing transmission rate base is evidence enough to discredit this claim. Furthermore, if cross-subsidization was occurring, why would consumer advocates such as the Citizens Utility Board be supporting this petition? If cross-subsidization was such a concern to the utility, why have each continued to promote and expand their own distributed solar energy programs? As each program has the utility’s return on equity built in to the financing cost, one could conceivably draw the conclusion that it is only for additional profit margins and not cross-subsidization concerns. Although, if the Commission accepts the premise that cross-subsidization is a concern, I believe that this is not a legal argument relating to the question at hand of whether agreements between private parties qualifies for the public utility definition, and therefore regulation, in Wisconsin (in case it wasn’t clear, I don’t believe it does). In other words, cross-subsidization concerns are not relevant, and therefore should not be considered.

- Unfortunately, while many Wisconsin stakeholders understand that third-party financing should be legal, the question of legality has been revolving around ongoing efforts for some stakeholders to convince contending branches of government that it’s another branch’s responsibility to clarify the legality of third party arrangements, keeping this crucial legal question in limbo. More directly, certain stakeholders
argued in meetings and communications after the introduction of 2021 Senate Bill 702 and Assembly Bill 731 that this question is best reserved for subject matter experts at the PSC, with those persons now arguing that the PSC doesn’t have the authority to address this question. Well, they were right the first time. I believe this matter is best reserved for the PSC for numerous reasons. Other groups, including interveners, have seen such dissent on these questions that it has fundamentally changed their membership.

- One intervening party claimed that electric vehicle (EV) charging and third-party financing of renewable energy resources are identical, and that the person best suited to identify this legal quandary is the state’s transportation secretary. This assertion shows the weakness of their underlying arguments given the fundamentally different nature of a publicly-accessible EV charging station which may see thousands of customers per year versus a solar panel which will likely only see one roof in its lifetime. Party to party agreements are fundamentally different than retail sale businesses, as I’m sure the Commission recognizes.

- Furthermore, I firmly do not believe that questions regarding consumer protection are legally relevant to the question at hand in the petition, nor do I believe that assertions regarding consumer protection concerns, raised by single instances overplayed by the media and presented as convenient evidence, are indicative of the reality in states where third-party financing is allowed. However, even if you accept that those questions are relevant in this discussion, they must be weighed against the myriad of consumer protection concerns against the existing utilities which routinely go unaddressed. Most recently, the stories presented in WEC Energy Group rate cases can highlight repeated instances of abysmal customer service and deceptive practices against Wisconsinites who may be down on their luck. If consumer protection is relevant in this discussion, it should be viewed against the status quo alternative.

- Reliability has been routinely raised as a major concern for some of Wisconsin’s biggest utilities and their allies, which is no surprise given its regularly used as a perceived necessity for an untold number of applications. However, in states where third-party financing is allowed, reliability, untied to extreme weather events, has not been an obstacle any more than in states without these financial agreements. Meanwhile, Wisconsin Public Service Corporation, for example, had one of the worst years on record for reliability last year. Given that energy reliability isn’t even guaranteed to customers under the current utility arrangements, the benefits, and therefore the payoff, realized by customers with distributed energy and battery storage include that they can be more resilient given the food they can keep from spoiling and the hardship they may otherwise face from existing utility outages that average hours, if not even days. However, all of this is arguably moot given that reliability, much like consumer protection, is a red herring in that the question is not legally relevant to the petition’s question, nor has the commission appropriately employed a method for considering the efficacy of improvements approved to enhance reliability.

- Finally, I want to respond to an argument agreed to by a Commissioner which is that the process is moving too fast. Simply put, if that was a legitimate argument, the PSC and WEC Energy Group utilities wouldn’t be trying to move a nearly 15% rate increase on the largest customer class through the Commission on roughly the same time frame. This is also despite the rate case records including twice as many filings and a much more in-depth financial analysis required to properly rule on the issue. The rate cases in question were submitted about one month prior to this petition, and the rate cases are on a schedule which would lead to a decision about one month prior to the schedule of this petition. Therefore, in my opinion, the arguments that we’re moving too fast on this petition, which has much simpler question of law than the question of necessity in the rate case, is only being used here as a means of last resort to delay a decision.
To again provide a quote which I’ve used in a filing for a different docket, Justice John M. Harlan wrote the majority opinion in the Northern Securities Co. v. United States case (193 U.S. 197, 1904) to say that “(i)t is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions.” Any moderately-engaged party can tell that this is exactly what is happening here. Furthermore, if the Commissioners were to decide that each situation needs to be resolved on an ongoing, case-by-case basis, this will continue to happen every time even an utterance of this issue rises before state government or in the media.

Much of the rest of the U.S., and certainly energy markets, are moving towards a world where distributed energy resources will play a much bigger role. Perhaps this is best illustrated with FERC Order No. 2222, which is actively being worked on in the MISO market to better implement new bulk power supply sales from distributed sources. Even very conservative states have been ahead of the curve to implement these virtual power plants. The decision on whether to clarify the legality of third-party financing will be a keystone for decades to come and will be seen as a turning point in whether we join other states and federal initiatives in this cleaner, cheaper, and more reliability energy future, or whether we let unfounded predictions of ruin continue to rule the day.

In closing, I believe the question that the Commissioners ought to be asking themselves is not whether we can or should allow third-party financing arrangements to exist in Wisconsin, but rather how can we reject them?

Sincerely,

Senator Robert L. Cowles
Serving Wisconsin’s 2nd Senate District