

**BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN**

<b>Verified Petition of Vote Solar to</b>	)	
<b>Determine Applicability of Wis. Stat.</b>	)	<b>Docket No.</b> _____
<b>§ 196.01(5)(a) to Third-Party Financing</b>	)	
<b>of Distributed Energy Resource Systems</b>	)	
<b>in Wisconsin</b>	)	

**Verified Petition for Declaratory Ruling of Vote Solar**

Pursuant to Wis. Stat. § 227.41, Vote Solar brings this verified petition (“Petition”) to request the Public Service Commission of Wisconsin (“Commission”) issue a declaratory ruling concluding the owner of a third-party financed photovoltaic (“PV”) system, and/or PV system coupled with an energy storage device (collectively, distributed energy resource or “DER”), will not be deemed to be, or regulated as, a “public utility” under Wis. Stat. § 196.01(5)(a), when the system is the subject of a lease or power purchase agreement (“PPA”) between the owner of the third-party financed system (referred to herein as a “DER Provider”) and a host customer.

A Vote Solar member seeks to utilize financing for a DER system in Stevens Point by signing a lease with a DER Provider. Other Vote Solar members seek to install third-party financed systems on their homes, businesses, farms, places of worship, and other locations via a lease or PPA. Vote Solar seeks certainty from the Commission on these members’ behalf that the DER Providers are not at risk of regulation as public utilities because such regulation would undermine the value of those systems.

Vote Solar’s members share the same interests as many other families, schools, dairies, churches and other organizations that seek to control their energy costs over the long-term by installing a DER in Wisconsin, but may not be able to do so due to the upfront payments needed

for such systems and other barriers. Clarity on Vote Solar’s positions would benefit these non-member Wisconsinites, as well as the individual, non-member businesses like solar installers that seek to enter into leases or PPAs for projects similar to the project described in this Petition throughout Wisconsin.

Granting Vote Solar’s request comports with State law, avoids the unreasonable situation where each and every third-party financed system must apply for a declaratory ruling from the Commission, and resolves a decade of uncertainty on an issue for which stakeholders—utility and non-utility alike—have long sought clarity from the Commission.

**I. About Vote Solar**

1. Vote Solar is an independent 501(c)(3) non-profit organization working to repower the U.S. with clean energy by making solar power more affordable and accessible through effective policy advocacy. Vote Solar seeks to promote the development of solar at every scale, from distributed rooftop solar to large utility-scale plants. Vote Solar has over 90,000 members nationally, including over 500 in Wisconsin. Vote Solar’s members include individual Wisconsin residents interested in providing financing for DER systems and those seeking to install third-party financed systems.

**II. Statement of Facts**

2. DERs provide families, businesses, schools, and other customers with cost-effective solutions to manage the size and ensure the stability of their electricity bills. In addition to relying on utility service over the course of the day, a customer meets a portion of their electricity needs with onsite generation, reducing the amount of electricity the customer needs to purchase from the utility. In this way, a DER functions similarly to energy efficiency investments, such as home insulation or high-efficiency appliances, by reducing the customer’s need for electricity generated

far from home. Once installed, a DER creates savings on electricity bills, offers long-term stability regarding energy costs, and greatly increases customers' freedom to become more energy independent and self-sufficient.

3. One of the largest barriers to the deployment of DER systems is the up-front cost. Third-party financing<sup>1</sup> is widely used throughout the United States, including in neighboring Illinois, Iowa, Michigan and Minnesota, to help customers overcome this barrier. Third-party financing can take the form of either a PPA or a lease. Under a PPA, the host customer agrees to purchase DER services from a DER Provider through a charge that is proportional to the electricity produced by the DER system installed on the customer's property.<sup>2</sup> Under a lease, the host customer agrees to lease the DER system installed on the customer's property,<sup>3</sup> similar to an automobile lease.

4. Under both a PPA and a lease between a DER Provider and the host customer: (a) the contract is individual to each customer; (b) no electricity is provided to the host customer until a contractual relationship exists; (c) the individual DER is dedicated to that specific customer; (d) each DER is designed based on attributes of the individual host customer; (e) no equipment is used to provide electricity to more than one customer; and (f) a third-party DER Provider owns the DER system. Most PPAs and leases include an option for customers to purchase the system outright at the end of the term.<sup>4</sup>

---

<sup>1</sup> Third-party financing is sometimes also referred to as "third-party ownership financing" or "third-party ownership."

<sup>2</sup> See Ex.–VS–2, Model PPA from the Solar Energy Industries Association ("SEIA Model PPA").

<sup>3</sup> See Ex.–VS–3, Model Residential Lease from the Solar Energy Industries Association ("SEIA Model Lease").

<sup>4</sup> See Ex.–VS–2, *SEIA Model PPA*; Ex.–VS–3, *SEIA Model Lease*.

5. Third-party financing provides significant advantages for customers. A DER provider is able to monetize various values, the savings from which can then be passed on through a lease or PPA to organizations and families with limited tax liability—such as non-profit organizations, low- and moderate-income families, government entities, schools, and places of worship—greatly reducing the cost of DERs. PPAs are particularly important for schools, non-profits, houses of worship, and other similar organizations because they provide an ability to monetize tax benefits, such as the federal Investment Tax Credit (“ITC”). The transfer of the up-front costs to an entity or person with greater access to capital, a lower cost of capital (not unlike a bank, credit union or other lending institution), and a greater ability to utilize tax-specific incentives paves a path forward for customers to install DERs to control and manage their electricity costs.<sup>5</sup> Indeed, third-party financing has been a primary driver of expanded access to DERs across the country.<sup>6</sup>

6. Companies providing third-party financed systems individually determine a potential customer’s eligibility for installing a DER based on site-specific characteristics such as roof conditions, roof orientation, available roof space, current electricity usage, solar irradiance, and building safety criteria. DER Providers, which may be solar installers, individuals with passive income tax liability, or other entities, assess customer-specific financial criteria such as the customer’s credit rating and other factors related to financing the DER system. Thus, there is a

---

<sup>5</sup> Ex.–VS–4, Wisconsin Academy of Arts, Sciences & Letters, *The City of Monona: Solar Panels on City Buildings* (2014) (noting that third-party financing of solar PV systems could reduce the installed cost by up to 50% and highlighting the importance of third-party financing as a cost-effective solution for implementing resolutions passed by Wisconsin communities) (“The City of Monona, Solar Panels on City Buildings”).

<sup>6</sup> *See, e.g.*, Ex.–VS–5, Lawrence Berkeley National Laboratory, *Residential Solar-Adopter Income and Demographic Trends: 2022 Update*, Slide 21 (March 2022); Ex.–VS–6, Lawrence Berkeley National Laboratory, *Performance of solar leasing for low- and middle-income customers in Connecticut*, p. 27 (May 2021).

natural cap on the number of customers that can host onsite DER systems that is far less than the total number of customers in a particular utility's service territory.

7. The DER Providers provide upfront financing for the projects, contract with local companies to build the systems on the host customers' facilities, and, if a PPA is utilized, use the federal ITC to reduce the sponsors' tax liabilities. As part of these arrangements, the tax sponsors may be solar installers or they may form limited liability companies to act as the DER Providers, which, in turn, own the systems when they begin operation. These arrangements allow the DER Provider, and ultimately the tax sponsor, to monetize the ITC and pass those savings on to the organization and family described below.

8. A Vote Solar member in Stevens Point has worked with North Wind Renewable Energy Cooperative ("North Wind") regarding the installation of a 8.64-kW third-party financed DER system on their home via a lease agreement with North Wind ("Family Project").<sup>7</sup> This member has a family of four, with children aged 14 and 17. The family takes service from Wisconsin Public Service Corporation ("WPS") and would interconnect to the WPS electric system consistent with the utility's interconnection tariff and Schedule PG-1M. The family has already applied for interconnection for the Family Project with WPS.<sup>8</sup> The family will continue to take service from WPS under a residential rate schedule. The Vote Solar member seeks clarity on the regulatory status of the Family Project before the project moves forward with installation.

9. The family would like to install a third-party financed system to avoid some of the upfront costs of installing a DER on their home. The Family Project will reduce their electricity bills, help

---

<sup>7</sup> Ex.-VS-1, Family Project Lease Agreement. All personal and proprietary information has been redacted.

<sup>8</sup> Ex.-VS-7, Family Project Interconnection Application; Ex.-VS-8, E-Mail Conveying Project Interconnection Application. All personal and proprietary information has been redacted.

with the household budget, and provide increased financial freedom for the family. In particular, the family's two children will soon be attending college, and avoiding the upfront cost of investing in the system will allow the family to put those funds toward their children's college education while providing immediate savings on their electric bill.

10. The entirety of the Family Project's equipment, including the solar PV array, inverter, wiring, and other components, will be located "behind" the customer's point of interconnection with the utility, typically the meter on the customer's property. The Family Project will be capable of providing electric service only to the family, upon whose property the system is installed, due to the individual DER system size, configurations, interconnection requirements, and numerous other factors. The Family Project will meet local permitting requirements. Any excess energy that may be produced by the system will be delivered to WPS.

11. In sum, the Family Project has the following characteristics:

1. The third-party financed system is located on the customer's property.
2. The third-party financed system is installed behind the customer's point of common coupling with the electric grid, typically the customer's electric utility meter.
3. The third-party financed system is sized to offset all or a portion of the individual customer's annual load.
4. The customer enters into a private, individualized contract with the DER Provider for energy-related services.
5. The third-party financed system is interconnected in parallel to the local electric utility's system.
6. The third-party financed system provides power to the host customer upon whose property the system is located.
7. If the third-party financed system's generation exceeds the host customer's load, the system delivers all unconsumed power to the electric utility to which the system is interconnected.

### III. Argument in Support of the Requested Ruling

12. Wisconsin law sets a clear standard for treatment as a “public utility” under Wis. Stat. § 196.01(5)(a). This section demonstrates how, under that standard, a DER Provider using third-party financing should not be subject to regulation as a public utility. Despite the strong legal precedent against such regulation, third-party financed projects are at risk of being unable to move forward with interconnection and system installations, and being able to remain financially viable after operation, due to uncertainty regarding whether the Commission will choose to step in and assert jurisdiction to regulate these private contracts and services as those of a public utility.

13. This regulatory uncertainty stems from Commission and utility documents suggesting third-party financed systems will not be subject to regulation;<sup>9</sup> Commission staff’s informal letters opining financiers of third-party financed systems may be subject to regulation;<sup>10</sup> Commission precedent suggesting that it will review each individual third-party financed DER system lease or PPA on a case-by-case basis to determine if it is subject to regulation;<sup>11</sup> prior Commission decisions declining to rule on the issue even for projects brought on a case-by-case basis;<sup>12</sup> the

---

<sup>9</sup> See, e.g., Ex.–VS–9, Wis. Pub. Serv. Comm’n, Standard Distributed Generation Application Form (Generation 20 kW or less), Section 4 (requesting applicants indicate their ownership interest in the system as either “owner” “co-owner” “lease” or “other”).

<sup>10</sup> See, e.g., Ex.–VS–10, Letter from Robert Norcross, Administrator, Gas and Energy Division to Honorable Gary Tauchen, Re: Renewable Energy Development in Wisconsin (Feb 8, 2012) (“Norcross Letter”); see also Ex.–VS–11, Letter from Cynthia Smith, Chief Legal Counsel to Gregory Bollum Asst. Vice President Energy Planning, Madison Gas and Electric, Re: Third Party Ownership of Distributed Generation (Apr. 3, 2014) (“Smith Letter”).

<sup>11</sup> Application of Wis. Electric Power Co. for Authority to Transfer Milwaukee County Power Plant and Related Steam Distribution Assets, Docket No. 6630-BS-101, Final Decision at 9-10 (Jan. 15, 2016) (PSC REF# 280476) (“MRMC”).

<sup>12</sup> Appeal of Denial of Application for Interconnection, Request for Contested Case Hearing, and Petition for Declaratory Ruling of Eagle Point Solar, LLC and Eagle Point Energy 6, Docket No. 9300-DR-104, , LLC, Commission Order (May 3, 2019) (PSC REF#: 365974); Petition of Sunrun Inc. for a Declaratory Ruling Regarding the Applicability of Wis. Stat. § 196.01(5)(a) to Leasing of Solar Equipment in Wisconsin, Docket No. 9300-DR-103, Final Order (Feb. 4, 2019) (PSC REF#: 358934)

Commission’s pleadings asserting jurisdiction over the question in an on-going court case questioning whether the Commission has such jurisdiction;<sup>13</sup> and the on-going lack of the type of legislative action the Commission has previously stated it would prefer to clarify the issue prior to taking action.<sup>14</sup>

14. There are additional factors that contribute to this uncertainty in Wisconsin, including but not limited to: the existence of third-party financed projects that are not part of this Petition;<sup>15</sup> state government and non-profit reports detailing the benefits of third-party financing for government entities;<sup>16</sup> and reports offering guidance for customers on how to utilize third parties as a financing option for DERs in the State.<sup>17</sup>

15. This uncertainty puts Vote Solar’s members at financial and legal risk in Wisconsin. It also denies customers across Wisconsin the benefits of financing solutions offered by third-party

---

(“Sunrun Final Order”); Applicability of Wis. Stat. § 196.01(5)(a) to Third-Party Financing of Distributed Energy Resource Systems in Wisconsin, Docket No. 9300-DR-102, Final Order (Dec. 22, 2017) (PSC REF#: 335245) (“WiSEIA Final Order”).

<sup>13</sup> See e.g., *Midwest Renewable Energy Ass’n v. Publ. Service Comm’n of Wisconsin, Brief of Defendants Public Service Commission of Wisconsin, Rebecca Cameron Valcq, Ellen Nowak and Tyler Huebner in Support of Motion to Dismiss, or Alternatively, to Stay*, at p. 19, Case No. 21-CV-41 (Doc. 20) (April 16, 2021) (stating that “the Commission could start an enforcement action” if MREA developed a DER described in that case pursuant to a PPA); *id.* at 20 (arguing that “an exemption to the public utility definition. . . does not exist in the law” because “where the Legislature wanted to carve out categories or arrangements that would not qualify as a public utility, as a matter of law, it legislatively wrote an exemption” in Wis. Stat. § 196.01(5)(b)).

<sup>14</sup> See Ex.–VS–13, SB 702 (Sen. Cowles); Ex.–VS–14, AB 731 (Rep. Cabral-Guevara). Neither bill has been given a hearing by either the 2021 Assembly Committee on Energy and Utilities or the 2021 Senate Committee on Utilities, Technology and Telecommunications.

<sup>15</sup> See, e.g., Ex.–VS–15, *Midwest Energy News, Third-Party Solar Financing Grows in Wisconsin, Despite Legal Uncertainty* (June 26, 2017); Ex.–VS–4, *The City of Monona, Solar Panels on City Buildings 2014*.

<sup>16</sup> See, e.g., Ex.–VS–4, *The City of Monona, Solar Panels on City Buildings 2014*.

<sup>17</sup> See, e.g., Ex.–VS–16, *Energy on Wisconsin, Environmental Resource Center, and University of Wisconsin Extension, Solar Energy Financing Guide, Empowering Wisconsin Local Governments* (May 2017).



financed systems. This uncertainty unnecessarily and unreasonably restricts the potential of Wisconsin-based investors, customers, and companies to deliver statewide economic benefits. Vote Solar brings this Petition to resolve these issues and respectfully requests the Commission issue a declaratory ruling establishing the following:

- 1) A singular host customer served by a DER is not “the public” within the meaning of Wis. Stat. § 196.01(5)(a).
- 2) Customers provided power pursuant to individualized contracts constitute a restricted class or special class, standing in a certain contract relationship with the sellers, and are not “the public” within the meaning of Wis. Stat. § 196.01(5)(a).
- 3) Owning, operating, managing, or controlling DER equipment used to supply only the host customer with electricity on the host customer’s real property also constitutes a specific (“peculiar”) relationship such that host customers are not “the public” within the meaning of Wis. Stat. § 196.01(5)(a).
- 5) Power from DERs sited on the host customers’ properties as a supplement and partial replacement of utility supplied power, similar to energy conservation and efficiency reducing power purchased from the utility, is not a natural monopoly and not “impressed with public use” and, therefore, is outside the legislative purpose of utility regulation in Wis. Stat. ch. 196.
- 6) For the foregoing reasons, each independently as well as taken together, the Family Project does not produce, transmit, deliver, or furnish power either directly or indirectly “to or for the public,” as that phrase is used in the Wisconsin Public Utilities Act and interpreted by the courts, and
- 7) As such, an owner of a project utilizing third-party financing for the installation of a DER system, with characteristics consistent with those described above in Paragraph 11, to customers in Wisconsin is not subject to regulation as a public utility pursuant to Wis. Stat. § 196.01(5)(a), and
- 8) Any other declaratory relief the Commission sees fit to provide in response to the Petition.

This requested relief is appropriate because it comports with State law, resolves nearly a decade of uncertainty on the question, and avoids the unreasonable and impractical situation where each

and every third-party financed system must apply for a declaratory ruling from the Commission, which, as described in more detail below, effectively constitutes an unsanctioned bar to third-party financing for Wisconsinites.

**A. Vote Solar Has Standing to Bring this Petition for Declaratory Ruling as an “Interested Person.”**

16. Under Wis. Stat. § 227.41(1), “... any agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it.” (Emphasis added). Neither the statutory section nor related Commission decisions and caselaw further define “interested person.” The term is thus left to its ordinary meaning: persons interested in the issue raised in the petition.

17. As discussed above, a Wisconsin-based Vote Solar member seeks to take advantage of third-party financing for the Family Project. This member is interested in the applicability of Commission “public utility” regulation to such third-party financing arrangements, which would impact the financial viability of the project significantly. Moreover, other Vote Solar members may seek to install and/or finance third-party financed systems in other scenarios in Wisconsin, and are likewise interested in the same question regarding the applicability of Commission regulation. As a membership-based organization, Vote Solar represents its members’ interests. Therefore, Vote Solar’s members and Vote Solar itself meet the broad “interested person” standard in Wis. Stat. § 227.41(1), and thus have standing to bring this Petition for Declaratory Ruling.

**B. Even if the Commission Were to Rely on the More Rigorous Standard for Judicial Standing, Vote Solar Would Have Standing to Bring this Petition for Declaratory Ruling.**

18. Wisconsin courts liberally construe the law of standing and “even an injury to a trifling interest” is sufficient to confer standing.<sup>18</sup> An individual has standing to bring an action on their own behalf if they suffer or will suffer direct injury to their interests.<sup>19</sup> A non-profit association has standing to bring an action in its own name to institute a proceeding if: (1) one or more members of the non-profit association have standing to assert a claim in their own right, (2) the interests that the non-profit association seeks to protect are germane to its purposes, and (3) neither the claim asserted nor the relief requested requires the participation of a member.<sup>20</sup>

---

<sup>18</sup> *McConkey v. Van Hollen*, 326 Wis. 2d 1, 11 (2010) (stating that the “law of standing in Wisconsin is construed liberally, and ‘even an injury to a trifling interest’ may suffice”) (citing *Fox v. Wisconsin Dep’t of Health & Social Services*, 112 Wis. 2d 514, 524 (1983)); *see also* *Wisconsin’s Envtl. Decade, Inc. v. Pub. Serv. Comm’n.*, 69 Wis. 2d 1, 13 (1975) (holding that “the law of standing in Wisconsin should not be construed narrowly or restrictively”).

<sup>19</sup> *Fox*, 112 Wis.2d at 524; *Wisconsin’s Envtl. Decade, Inc.*, 69 Wis. 2d at 9; *Madison v. Fitchburg*, 112 Wis. 2d 224, 228 (1983).

<sup>20</sup> Wis. Stat. § 184.07; *see also* *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (so long as the association alleges that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court’s jurisdiction); *Hunt v. Wash. State Apple Advert. Comm’n.*, 432 U.S. 333, 342 (1977) (negative treatment accorded to *Warth* and *Hunt* on other grounds); *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 552-54 (1996) (affirming the association standing doctrine articulated in *Warth* and *Hunt* and finding that association standing is proper, and individual participation of each injured party is not necessary, when the association seeks injunctive or declaratory relief on behalf of its members but that association standing is improper, and participation of the individual members is necessary, when the association seeks damages on behalf of its members) *citing* *Telecommunications Rsch. & Action Ctr. v. Allnet Commc’n Servs., Inc.*, 806 F.2d 1093, 1094-1095 (D.C. Cir. 1986) (“[l]ower federal courts have consistently rejected association assertions of standing to seek monetary, as distinguished from injunctive or declaratory, relief on behalf of the organization’s members.”); *Wisconsin’s Envtl. Decade, Inc.*, 69 Wis. 2d at 4; *Metro. Builders Ass’n v. Vill. Of Germantown*, 282 Wis. 2d 458, 466-69 (2005); *Milwaukee Dist. Council 48 v. Milwaukee County*, 244 Wis. 2d 333, 353-55 (2001).

19. The Vote Solar member seeking to install the Family Project is aggrieved, and their interests are directly and substantially affected, by the uncertainty of whether owners of third-party financed systems would be subject to regulation as public utilities under Wisconsin law. This uncertainty exposes this Vote Solar member to substantial legal and financial risk, as the project they wish to finance may not be viable if the owner is subject to regulation as a public utility. Other Vote Solar members attempting to finance or install third-party financed DER systems will face similar legal and financial risks. Vote Solar members therefore have standing to petition for a declaratory ruling on their own behalf under the more rigorous standard for judicial standing.

20. Vote Solar is a member-based non-profit association and, as discussed above, its members have standing to bring this petition for declaratory ruling in their own right since their interests are directly and substantially affected by the regulatory uncertainty at issue. Furthermore, its members' interest in obtaining certainty with respect to the legal status of third-party financing is germane to Vote Solar's purpose of supporting the development of DERs. As explained in more detailed below, the ongoing ambiguity regarding the treatment of third-party financed systems has had significant, negative impacts on the development of DERs.<sup>21</sup> Finally, a Vote Solar member is not required to bring this Petition individually because Vote Solar's standing is proper, and Vote Solar does not seek damages on behalf of its members.<sup>22</sup> Therefore, Vote Solar has organizational standing to bring this Petition, even under the more rigorous requirements of judicial standing.

**C. Wisconsin Law Sets a Clear Standard for Determining an Entity's Status as a Public Utility.**

21. Wis. Stat. § 196.01(5)(a) defines "public utility" as:

Every corporation, company, individual, association, their lessees, trustees or

---

<sup>21</sup> See *infra* ¶¶ 46 - 49.

<sup>22</sup> See, e.g., *Warth*, 422 U.S. at 511.

receivers appointed by any court, and every sanitary district, town, village or city that may own, operate, manage or control any toll bridge or all or any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public.

The Wisconsin Supreme Court and Commission precedent interpreting the definition are clear that the financing structure behind any particular plant or equipment has no bearing on the question of whether that plant or equipment is being used to produce, deliver, or furnish power to or for the public.

22. The court established the test for determining whether an entity is subject to regulation as a public utility as follows: “[t]he use to which the *plant, equipment, or some portion thereof* is put must be for the public in order to constitute it a public utility.”<sup>23</sup> (Emphasis added).

23. Where electric service provided by a plant or equipment is to a “limited class” contracting with a producer of electricity, the producer is not putting the equipment into service “directly or indirectly to or for the public” and is therefore not a public utility. *Cawker v. Meyer* is the leading case and continues to be cited to this day. In *Cawker*, a company built a steam plant to serve the tenants in its building, and then contracted to sell surplus electrical power to three neighboring properties. The Court found that the company was not a public utility even though it was technically selling light and power to other members of the public, concluding that it was “obvious” that the legislature did not intend to sweep in sales to any individual member of the public as sales “to or for the public” for the purposes of public utility regulation.<sup>24</sup> The key factor, instead, is whether or not the product or service “is intended for and open to the use of all the

---

<sup>23</sup> *Cawker v. Meyer*, 147 Wis. 320, 324-25 (1911); *see also* *Sun Prairie v. Pub. Serv. Com.*, 37 Wis. 2d 96, 98 (1967); *Union Falls Power Co. v. Oconto Falls*, 221 Wis. 457, 460-61 (1936); *Ford Hydro-Electric Co. v. Town of Aurora*, 206 Wis. 489, 495-97 (1931).

<sup>24</sup> *Cawker*, 147 Wis. at 324.

members of the public who may require it.”<sup>25</sup> Because the purpose of the plant was primarily to serve a “restricted class”—the tenants of the owners and a few neighbors—the Court determined that the generator was not a public utility.<sup>26</sup>

24. Subsequent Wisconsin Supreme Court opinions affirm that the inquiry into whether a person or company is a public utility turns on whether the individual plant or equipment in question is intended to serve the public at large.<sup>27</sup>

25. In *Schumacher v. Railroad Commission*, the court considered whether “a group of neighbors who have co-operated to build a line to supply themselves with electric current” constituted a public utility.<sup>28</sup> The Wisconsin Supreme Court agreed with the district court that they were not a public utility, as they had no purpose “of serving the public generally or any portion of the public outside of those who voluntarily band themselves together.”<sup>29</sup>

26. In *Ford Hydro-Electric Company v. Town of Aurora*, a hydropower company owned mostly by the Ford Motor Company built a dam and provided power directly and solely to a Ford Motor Company factory.<sup>30</sup> The hydropower company asserted that it was a public utility, but the court focused on what the company “actually does.”<sup>31</sup> The court held that the hydropower plant was “not built or operated for furnishing to the public generally,” and therefore was not a public

---

<sup>25</sup> *Id.* at 325.

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., *Sun Prairie*, 37 Wis. 2d at 101-02; *Union Falls Power Co.*, 221 Wis. at 460-61; *Ford Hydro-Electric Company*, 206 Wis. at 495-97; *Schumacher v. Railroad Commission*, 185 Wis. 303, 305 (1924).

<sup>28</sup> *Schumacher*, 185 Wis. at 305.

<sup>29</sup> *Id.*

<sup>30</sup> *Ford Hydro-Electric Company*, 206 Wis. at 492 (1932).

<sup>31</sup> *Id.* at 495 (quoting *State ex rel. M. O. Danciger & Co. v. Pub. Serv. Comm’n*, 275 Mo. 483 (1918)).

utility.<sup>32</sup>

27. In *Union Falls Power Co. v. Oconto Falls*, the court examined a contract in which Union Falls agreed to furnish electricity to Oconto Falls under a PPA contract “at a specified price per electrical unit.”<sup>33</sup> The Court determined that Union Falls was not a public utility, even though Oconto Falls in turn distributed the power to its residents:

Under the facts in this case the plaintiff serves no one as a member of the public. It sells a part of the electrical energy produced by it to the city of Oconto Falls; the rest of the developed electrical energy, characterized as dump power, is absorbed by the parent company. It makes no offer to serve the public which could be accepted by any member of the public.<sup>34</sup>

28. In *City of Sun Prairie v. PSC*, the Wisconsin Supreme Court determined that a landlord company that provided heat, electricity, and water to the tenants of its apartment building was not a public utility even though the building owner “will house up to 1,000 people” and “will rent an apartment ‘to any responsible person’ who is able to pay the rent.”<sup>35</sup>

29. In *City of Milwaukee v. PSC*, the Wisconsin Supreme Court held that providing service to a defined set of customers through exclusive contracts did not constitute “public utility” service.<sup>36</sup> Instead, the court held, providing service to defined customers through exclusive contracts is “precisely what it was necessary for it to do to prevent it from becoming a public utility.”<sup>37</sup> That is consistent with Wisconsin case law interpreting a parallel statutory reference to advertisements to “the public” in Wis. Stat. 100.18 as excluding advertisements to those who

---

<sup>32</sup> *Id.* at 497.

<sup>33</sup> *Union Falls Power Co.*, 221 Wis. at 460-461.

<sup>34</sup> *Id.* at 461.

<sup>35</sup> *City of Sun Prairie*, 37 Wis. 2d at 98 (case syllabus).

<sup>36</sup> *City of Milwaukee v. PSC*, 241 Wis. 249, 254-57 (1942).

<sup>37</sup> *Id.*

enter into contracts with the seller.<sup>38</sup>

30. These cases make clear that (1) *Cawker* remains good law; (2) the key fact is whether service is provided to a “limited class” or “is intended for and open to the use of all the members of the public who may require it”; and (3) providing electricity exclusively to customers who enter individual contracts defining that service is not “to the public.” The cases also demonstrate that *Cawker* is not limited to the specific landlord-tenant relationship at issue in that case. The principles in *Cawker* have been applied by Courts and the Commission in a variety of factual circumstances over the years that go well beyond landlord-tenant relationships, making clear that such a relationship is but one of many examples of relationships that do not result in regulation as a public utility.

31. The definition of a “public utility” also does not depend on the “business plan” of the DER installer or the DER Provider and does not aggregate all plants and equipment owned by a DER Provider. Instead, the definition turns on whether common equipment is used to provide service broadly. Each individual plant and equipment must be analyzed and only where a plant or individual equipment is used to provide power to the public is there a “public utility.”<sup>39</sup> That is why, for example, steam from the Domtar cogeneration plant is not regulated as a public utility service, even though the owner (We Energies) also owns and operates a steam public utility in

---

<sup>38</sup> *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 301 Wis. 2d. 109, 123-25 (2007) (“the public” exclude customers in a contract); *Kailin v. Armstrong*, 252 Wis. 2d 676, 709-10 (2002) (same); *Union Falls Power Co.*, 221 Wis. at 461-62 (providing power pursuant to a contract is not to “any member of the public” and therefore not a public utility); *Hackel v. Nat’l Feeds, Inc.*, 986 F.Supp.2d 963, 980 (W.D. Wis. 2013) (“If a particular relationship exists between the parties—*i.e.*, a contractual one—then that relationship distinguishes plaintiff from a member of the public more generally.”); *Uniek, Inc. v. Dollar General Corp.*, 474 F.Supp.2d 1034, 1039 (W.D. Wis. 2007) (“the public” does not includes those “with whom the defendant had a contract”).

<sup>39</sup> *Ford Hydro-Electric Co.*, 206 Wis. at 497 (“The question is whether the plant is built and operated to furnish power to the public generally.”).



Southeast Wisconsin.<sup>40</sup> The Domtar steam plant would be regulated as a “public utility” service if all of WEPCO’s plant and equipment was aggregated for purposes of determining whether it provides steam to the public. It is also why the fleet of electric generators owned by Home Depot, Sunbelt, and other retail tool rental companies are not aggregated and subjected to regulation as “public utilities.”

32. Additionally, the “public” in Wis. Stat. § 196.01(5)(a) refers to “the people at large,” and excludes any “special class” or “limited class” of people, or a “restricted class, standing in a certain contract relation” with a provider.<sup>41</sup> That is, to be a public utility, the plant or equipment must be “intended for and open to the use of all members of the public who may require it.”<sup>42</sup> That excludes customers who receive service through exclusive contracts.<sup>43</sup>

33. Finally, the Court has further explained that an entity that provides power to a utility is not providing power directly or indirectly to the public<sup>44</sup> and emphasized that “[t]he controlling consideration is not whether regulation is desirable, but whether appellant is subject to regulation

---

<sup>40</sup> *In re Application of Wis. Elec. Power Co. to Build and Operate a 50 MW, Biomass-fired Cogeneration Facility*, Docket 6630-CE-305, Final Decision at 18 (Pub.Serv.Comm’n Wis. May 12, 2011) (steam sales pursuant to Steam Supply Agreement not subject to PSC jurisdiction).

<sup>41</sup> *See Cawker*, 147 Wis. at 325-26 (“public,” as used in Wis. Stat. § 196.01(5)(a) refers to the “the people at large,” not to a “limited class” contracting for service).

<sup>42</sup> *See, e.g., id.* at 325.

<sup>43</sup> *City of Milwaukee*, 241 Wis. at 254-57 (holding that limiting service to customers who enter into exclusive contracts defining their service is “precisely what it was necessary for it to do to prevent it from becoming a public utility”); *K&S Tool & Die Corp.*, 301 Wis. 2d. at 123-25 (statute applies to advertising to “the public,” which exclude customers pursuant to a contract); *Kailin*, 252 Wis. 2d at 709-10 (“Once the contract was made, the Kailins were no longer ‘the public’ under the statute...”); *Union Falls Power Co.*, 221 Wis. at 460-461 (a company providing power only pursuant to a contract, rather than to “any member of the public” is not a public utility); ...); *Hackel*, 986 F.Supp.2d at 980 (W.D. Wis. 2013) (“If a particular relationship exists between the parties—*i.e.*, a contractual one—then that relationship distinguishes plaintiff from a member of the public more generally.”); *Uniek, Inc.*, 474 F.Supp.2d at 1039 (recognizing that *Kailin* created a categorical exemption from “the public” for those “with whom the defendant had a contract”).

<sup>44</sup> *Union Falls Power Co.*, 221 Wis. at 460-61.

under the Public Utility Law.”<sup>45</sup> The Commission’s inquiries into whether an entity is a public utility must follow this Wisconsin Supreme Court precedent.

**D. The Third-Party Financing Provider for the Family Project Is Not a Public Utility under Wisconsin Law.**

34. The Family Project would not provide, deliver or furnish power “either directly or indirectly to or for the public” from the equipment installed behind the customers’ meters.<sup>46</sup> It would serve only the qualified customer on whose property the system is located. The Family Project would produce energy to reduce the customer’s own electricity purchases in real time. To the extent that the system produces more energy than the customer demands in a given time period, that energy will be provided to WPS. Providing power to a utility is not providing power directly or indirectly to the public.<sup>47</sup>

35. Moreover, regulating third-party financed system owners as public utilities makes little sense in the context of the purpose of public utility regulation. The United States Supreme Court has stated that a state’s power to regulate rates and prices for a service ordinarily arises where there is a “fear of monopoly” because the service is an “indispensable” one that would subject the public to the risk of “exorbitant charges and arbitrary control” without regulation.<sup>48</sup> Likewise, the Wisconsin Supreme Court has determined that the “predominant purpose underlying the public

---

<sup>45</sup> *Sun Prairie*, 37 Wis. 2d 96 at 101.

<sup>46</sup> *See, e.g., Cawker*, 147 Wis. at 325; *Sun Prairie*, 37 Wis. 2d at 101-02; *Union Falls Power Co.*, 221 Wis. at 460-61 (an entity that provides power to a utility is not providing power directly or indirectly to the public).

<sup>47</sup> *Union Falls Power Co.*, 221 Wis. at 460-61.

<sup>48</sup> *Chas. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas*, 262 U.S. 522, 538 (1923).

utilities law is the protection of the consuming public rather than the competing utilities.”<sup>49</sup> More specifically, public utility regulation is intended to protect consumers against discriminatory practices and unreasonable rates charged for essential services provided by companies that wield monopoly power.<sup>50</sup>

36. The DER Provider associated with the Family Project, and DER Providers and installers, more generally, share none of the characteristics of “public utilities” that the legislature had in mind when adopting the Wisconsin Public Utilities Act. DER Providers and installers do not wield monopoly power. Instead, they compete to provide DERs to customers in free and competitive markets that exhibit none of the concerns that invoke the need for public utility regulation. This is evidenced by competitive markets in other states where numerous DER Providers and installers compete for the same customers.<sup>51</sup> Such competition ensures no one company or individual would exert undue influence or bargaining power. Public utility regulation is therefore not necessary to correct an imbalance in customer bargaining power.

37. As Wisconsin courts have recognized, regulation by this Commission is a second-best option to competitive markets—necessitated by the lack of competition for natural monopolies.<sup>52</sup>

---

<sup>49</sup> Wis. Power & Light Co. v. Pub. Serv. Comm’n, 45 Wis. 2d 253, 259 (1969); *see also* James C. Bonbright, *Principles of Public Utility Rates* 4 (1961).

<sup>50</sup> Chippewa Power Co. v. R.R. Com. of Wis., 188 Wis. 246, 255 (1925) (“ . . . the public is primarily and solely interested in a reasonable rate, which it is the duty of the *Commission* to ascertain and fix.”) (emphasis in original); *see also* *Munn v. Illinois*, 94 U.S. 113, 131-34 (1877); *Gay Law Students Ass’n v. Pac. Tel. & Tel.*, 24 Cal.3d 458, 476-77 (1979); Wis. Pub. Serv. Comm’n, *Energy Regulation*, <https://psc.wi.gov/Pages/ForUtilities/Energy.aspx> (“the PSC works to ensure that, in the absence of competition, adequate and reasonably priced service is provided to utility customers”).

<sup>51</sup> *See, e.g.*, *SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441, 467 (Iowa 2014) (“There is simply nothing in the record to suggest that [solar developer] Eagle Point is a six hundred pound economic gorilla that has cornered defenseless city leaders in Dubuque.”).

<sup>52</sup> *Chippewa Power Co.*, 188 Wis. at 251, 205; *City of Madison v. Madison Gas & Elec. Co.*, 129 Wis. 249, 264 (1906) (quoting *Munn*, 94 U.S. at 126).

That legislative purpose is inapposite to the competitive market for financing and installing DERs. There is no justification for regulating DER Providers as public utilities.<sup>53</sup>

38. DER Providers and installers also do not possess other characteristics of a natural monopoly. All of the equipment used to provide electricity via a third-party financed system for onsite generation and consumption by an eligible customer is located on the customer's property and is capable of serving only that customer. Using behind-the-meter equipment to power appliances or air conditioning does not require public infrastructure, does not require public investment, does not require the condemnation of any privately owned property, does not devote any property to public use, and does not duplicate any already existing infrastructure.<sup>54</sup> DERs can only serve certain customers that meet the site-specific and financial factors necessary to meet a customer's needs, and thus cannot, and have no obligation to, serve the public. DERs are partial, incomplete substitutes for utility-delivered energy; DER Providers are not, themselves, natural monopolies.

39. Wisconsin Courts have been generally unwilling to extend public utility jurisdiction into areas that would infringe on private property and private rights of contract without a clear public interest justification.<sup>55</sup> A contract between an eligible customer and a DER Provider for a third-

---

<sup>53</sup> See, e.g., *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539, 545 (1858) (explaining that if natural gas were more like "an article of merchandise, [that] could be bottled or packed up, and imported or exported like 'soap, candles or hats,'" then public utility regulation would not be necessary); Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156, 172 (1903) (demonstrating that one important element in the "conditions which produce monopoly" is the "absence of a substitute").

<sup>54</sup> See, e.g., *Ford Hydro-Electric Co.*, 206 Wis. at 496; *Chesapeake & Potomac Telephone Co. v. Manning*, 186 U.S. 238 (1902).

<sup>55</sup> See *Chippewa Power Co.*, 188 Wis. at 251 (determining that extending state jurisdiction over a private contract to lease land for a hydropower plant could inappropriately subject many other kinds of "purely private contracts" to regulation by the Commission). According to the Court, "[a] line or distinction must definitely be drawn somewhere, and, unless this be done, the constitutional provisions pertaining to the ownership, control, and management of private property will be completely submerged."

party financed system is a completely voluntary, private, arms-length transaction. Even if a customer's limiting site-specific and financial factors are met, both the DER Provider and the customer ultimately each have a choice whether or not to enter into an independent contractual relationship with each other for on-site electrical services. The installation and operation of the system on the customer's private property does not obligate the DER Provider to provide electricity from that system to any other customer other than the individual customer with whom the third-party financed system provider has privity of contract for that specific system. Asserting jurisdiction over such a third-party financed system would inappropriately insert the Commission into a "purely private contract."

40. DERs are not "indispensable" or "public" services that require state intervention in private markets. DER Providers are not natural or legal monopolies; they do not have undue influence or unequal bargaining power over their customers; they operate in competitive markets and negotiate arms-length contracts with customers. Regulating DER Providers as public utilities would not enhance protections of the consuming public and is contrary to the principles of free market competition. Such regulation would place unreasonable restrictions on individual liberties, including a customer's freedom to contract and freedom to choose how to power his or her home or business. The Wisconsin Supreme Court has warned that agencies of the state are to exercise their jurisdiction only so far as necessary to serve the public interest and no farther: "This thought is at the very foundation of public regulation and public control, and must serve as a perpetual warning that 'thus far shalt thou go, but no farther.' The line has thus been definitely drawn and the limitations firmly and definitely fixed."<sup>56</sup> Regulating the third-party owners of the Family Project or any other systems meeting the characteristics in Paragraph 11 as public utilities would

---

<sup>56</sup> *Id.* at 253.

cross that line.

**IV. The Commission Should Exercise Its Discretion to Issue a Declaratory Ruling Despite Past Inaction.**

**A. The Commission Recently Made Clear a Petition for Declaratory Ruling Is Appropriate.**

41. The Commission recently made clear before the Portage County Circuit Court both that it believes it has jurisdiction over this question and that a petition such as this one submitted pursuant to Wis. Stat. § 227.41 is the appropriate vehicle to obtain clarity regarding the potential for regulation as a public utility. The Midwest Renewable Energy Association (“MREA”) brought suit against the Commission averring the Commission has incorrectly asserted jurisdiction over third party-owned solar panels located on customers’ roofs and connected behind the utility meter.<sup>57</sup> MREA concluded: “Wisconsin law is clear that solar equipment serving a single host customer through an individual contract between a solar panel provider and the host customer is not the type of monopoly public utility service that the Commission is authorized to regulate.”<sup>58</sup>

42. The Commission responded that “If a party were to want a Commission view on the public utility status of a particular arrangement, there is a statutory process for requesting a declaratory judgment from the Commission. Wis. Stat. 227.41.”<sup>59</sup> The Commission stated further that “[i]t is without question that the Commission would have jurisdiction” over any ripe issues relating to the possible regulation of a solar provider (in that case, MREA) “as a public utility by the Commission,

---

<sup>57</sup> Midwest Renewable Energy Ass’n v. Publ. Service Comm’n of Wisconsin, *Petition and Complaint For Declaratory Judgment and Injunction*, p. 2, Portage County Circuit Court, Case No. 21-CV-41 (April 16, 2021).

<sup>58</sup> *Id.* at pp. 2-3.

<sup>59</sup> Midwest Renewable Energy Ass’n v. Publ. Service Comm’n of Wisconsin, *Brief of Defendants Public Service Commission of Wisconsin, Rebecca Cameron Valcq, Ellen Nowak and Tyler Huebner In Support Of Motion To Dismiss Or, Alternatively, To Stay*, p. 12, Portage County Circuit Court, Case No. 21-CV-41 (April 16, 2021).

or the possible denial of interconnection by a utility. There is a statute that establishes the definition of a public utility, and which also carves out the statutory exemptions the Legislature intended the Commission to apply. The statute also provides a specific process through which Plaintiff could go to the Commission to request a declaratory ruling on its own public utility status (Wis. Stat. § 227.41).<sup>60</sup> By this Petition Vote Solar seeks to follow the process the Commission has endorsed for addressing the regulatory status of third-party financed systems.

**B. Recent Cases and Stalled Legislation Underscore the Need for Commission Action to Address this Urgent Issue.**

43. Statements and actions from a variety of stakeholders, from sitting Commissioners to Wisconsin’s utilities to solar developers to the Legislature, support the need for Commission action after a decade of ambiguity. Prior Commission decisions in response to a utility application and petitions similar to this one, which do not bind this Commission,<sup>61</sup> have declined to address the issue suggesting it is a question more appropriate for the Legislature to address.<sup>62</sup> However, the Commission’s own actions have significantly contributed to this ambiguity, originating from staff letters dating back to 2012.<sup>63</sup>

44. The Commission’s prior efforts to defer to the Legislature have not produced clarity. The

---

<sup>60</sup> *Id.* at p. 32.

<sup>61</sup> *Wis. Power & Light Co. v. Pub. Serv. Com.*, 148 Wis. 2d 881, 889 (Ct. App. 1989) (“quasijudicial agencies such as the Public Service Commission are not subject to the rule of *stare decisis*, ... and we agree with the commission that it should not be bound by prior decisions made in other situations and in other contexts”); *Union State Bank v. Galecki*, 142 Wis. 2d 118, 124 (Ct. App. 1987).

<sup>62</sup> Joint Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas, and Steam Rates, Docket 5-UR-107, Final Order, p. 89, (Dec. 23, 2014) (PSC REF#: 358934) (rejecting request by public utility to limit its customer-owned distributed generation tariffs to customers who owned their own generation systems, to the exclusion of customers with third party owned systems, and finding it “reasonable to continue to evaluate whether [third party owned] systems comply with Wisconsin statutes and administrative code on a case-by-case basis”); WiSEIA Final Order at 10-11; Sunrun Final Order at 9.

<sup>63</sup> *See, e.g., Ex.–VS–10, Norcross Letter.*

most recent example is the stalling of two Republican-backed bills in the most recent legislative session aimed at clarifying the status of these financing arrangements, which were unable to obtain even a committee hearing.<sup>64</sup> This inaction speaks volumes of the Legislature’s stance on the question. As Commissioner Valcq was quoted as stating recently, “Clearly to me the Legislature has not demonstrated an interest in taking this up. It has become a hot potato . . . We already have a statute in front of us that we have the expertise and experience interpreting.”<sup>65</sup> Vote Solar agrees. After a decade of uncertainty, the time has come for the Commission to act.

45. In their response to prior petitions, Wisconsin’s utilities have opposed the Commission opening a docket to provide clarification, arguing “that process is best left to the legislature.”<sup>66</sup> However, when the question was brought before the legislature in the form of bills clarifying the status of leased projects, the utilities changed their position, with the Wisconsin Utilities Association (“WUA”) arguing the Legislature need not act because leases are allowed. A news article regarding the legislation most recently before the Legislature cites the WUA as follows: “Bill Skewes, the WUA executive director, said there’s nothing under current law that prevents people from leasing solar panels.”<sup>67</sup> Thus, despite previously opposing the Commission consider

---

<sup>64</sup> See Ex.–VS–13, SB 702 (Sen. Cowles); Ex.–VS–14, AB 731 (Rep. Cabral-Guevara). Neither bill was given a hearing by either the 2021 Assembly Committee on Energy and Utilities or the 2021 Senate Committee on Utilities, Technology and Telecommunications; Ex.–VS–12, *Wisconsin regulators deadlock on solar financing; bill to legalize tool in limbo*, Wisconsin State Journal, Jan 28, 2022 (“*Wisconsin regulators deadlock on solar financing*”).

<sup>65</sup> Ex.–VS–12, *Wisconsin regulators deadlock on solar financing*; see also *id.* (quoting Commissioner Nowak as stating: “The Legislature has had the opportunity to modify it and they have chosen not to.”).

<sup>66</sup> *Response of the Wisconsin Utilities Association to the Sunrun Inc. Verified Petition for Declaratory Ruling Concerning Leasing of Solar Equipment in Wisconsin*, Docket 9300-DR-103, p. 2 (Dec. 26, 2018) (PSC REF# 356077).

<sup>67</sup> Ex.–VS–17, Wisconsin Public Radio, *Lawmakers propose bill that would allow leasing of solar panels in Wisconsin* (Oct 19, 2021).



a 2019 petition for declaratory ruling regarding solar leases,<sup>68</sup> WUA now appears to believe such leases are allowed. WUA’s about-face at the Legislature underscores the need for the Commission to act.

**C. The “Case-By-Case” Approach the Commission Has Followed for the Past Seven Years Has Acted as an Unsanctioned Bar on Third-Party Financed Systems.**

46. The facts laid out in this Petition clearly establish that the Family Project’s owners should not be subject to regulation as public utilities, and the Commission should find as much. However, ruling on the second question in this Petition, *i.e.*, that projects sharing the characteristics in Paragraph 11 also will not subject the owners of those projects to utility regulation, will provide sufficient guidance and clarity for Wisconsin ratepayers and DER providers to avoid an unreasonable and unnecessary situation where each customer needs to petition the Commission with regard to each DER to be installed, even one as small as 5 kW. Avoiding such a situation strongly favors the Commission granting the relief requested in this Petition.

47. Commission staff and the Office of General Counsel recognized in the informal opinion letters that failure to seek a declaratory ruling affirming that a third-party financed system provider is not a public utility would subject the provider to risk of future regulation as a public utility, and potentially monetary penalties.<sup>69</sup> Later Commission precedent indicates a preference to determine whether an entity is a public utility on a case-by-case basis.<sup>70</sup>

---

<sup>68</sup> *Response of the Wisconsin Utilities Association to the Sunrun Inc. Verified Petition for Declaratory Ruling Concerning Leasing of Solar Equipment in Wisconsin*, Docket 9300-DR-103, pp. 1-2 (Dec. 26, 2018) (PSC REF# 356077).

<sup>69</sup> *See, e.g.*, Ex.–VS–11, *Smith Letter* (stating that a public utility “would require a certificate of authority from the Commission to conduct public utility business”).

<sup>70</sup> MRMC at 9-10; WiSEIA Final Order at 10; Sunrun Final Order at 6.

48. On its face, this policy would appear to require a declaratory ruling from the Commission each and every time a DER Provider would seek to enter a private contract with a company for a third-party financed system. That is, a family seeking to install a 5 kW DER would need to spend tens of thousands of dollars to litigate the legality of their system before moving forward with installation. Developers with a large pipeline of residential projects would need to submit hundreds of petitions to the Commission each year, sapping both Commission and developer resources. From a practical standpoint, the application of this type of a case-by-case policy to determine whether third-party financed system providers are public utilities is unreasonable, unduly burdensome, and an inefficient use of Commission and petitioner resources. The practice acts as a *de facto*, unsanctioned bar on small projects utilizing third-party financing since the cost of clarifying the project's status before the Commission would undermine the projects' economics altogether.

49. Ruling on this Petition can avoid that result and end the Commission's *de facto* ban on third-party financed systems. Third-party financed systems installed in the State are likely to share the legally-relevant characteristics of the Family Project listed in Paragraph 11. Thus, ruling on this Petition can provide the necessary clarity and guidance about third-party financing that Wisconsin's schools, families, businesses and other entities require to install technologies that help them control the costs of their electricity.

**V. This Petition for Declaratory Ruling Does Not Warrant a Contested Case Process or Other Judicial-Type Hearing, and May Be Resolved Through Written Submissions.**

50. Under Wisconsin Stat. 227.42(1), a person requesting a hearing has a right to a contested-case hearing if they, among other requirements, demonstrate that “[t]here is a dispute of material fact.” To define “dispute of material fact,” courts have looked to cases involving summary judgment, which define “material fact” as “one that is ‘of consequence to the merits of the

litigation” and “a fact ‘that affects the resolution of the controversy.’”<sup>71</sup> As one court held, “it would make no sense to require... contested, evidentiary hearings on purely legal issues that do not require the presentation of evidence.”<sup>72</sup>

51. In addition, in addressing the requirement in Wisconsin Stat. § 227.41(1) that a “[f]ull opportunity for hearing shall be afforded to interested parties” in declaratory ruling proceedings, the Commission has stated that “[p]rocedural due process requires an opportunity to be heard at a reasonable time and in a meaningful manner.”<sup>73</sup> The Commission relied on established case law to determine that such an “opportunity to be heard” may be satisfied by written submissions and need not include a judicial-type hearing.<sup>74</sup>

52. This Petition for Declaratory Ruling presents a purely legal question: whether or not a third-party financed DER project as described herein would be considered a “public utility” under Wisconsin law and subject to regulation as such. There is no “dispute of material fact” involved. Rather, the Commission need only assess the applicability of public utility regulation on the facts as stipulated. Therefore, this Petition does not warrant a contested case and associated hearing. Moreover, written briefs and any other written submissions the Commission may deem necessary will satisfy procedural due process requirements. Not only does such an approach meet the

---

<sup>71</sup> Haase-Hardie v. Wisconsin Dept. of Natural Resources, 357 Wis.2d 442, 452 (2014) (holding that petitioner was not entitled to contested-case hearings on legal issues raised in her complaint related to air pollution control permits issued by the Department of Natural Resources, and quoting Schmidt v. Northern States Power Co., 305 Wis.2d 538, 556 (2007) and Clay v. Horton Mfg. Co., 172 Wis.2d 349, 354 (1992)).

<sup>72</sup> *Id.* at 461.

<sup>73</sup> Petition of Brett Healy for Declaratory Ruling to Determine Allocation of Costs for Relocation of Utility Structures for Milwaukee Streetcar Project, Docket No. 5-DR-109, Final Decision at p. 20 (Aug. 29, 2014) (PSC REF# 214833) (citing Bunker v. Labor & Indus. Review Comm’n, 257 Wis.2d 255, 267 (2002)).

<sup>74</sup> *Id.* at pp. 21-22 (referring to Waste Mgmt. of Wisconsin, Inc. v. State Dep’t of Natural Res., 128 Wis. 2d 59, 79 (1986) (the opportunity to present reasons, either in person or in writing, why proposed action should not be taken satisfies due process requirements)).

requirements of the law to allow for a “full opportunity for hearing,” as required by Wisconsin Stat. § 227.41(1), but it would also promote administrative efficiency and allow the Commission and participating parties to conserve resources.

## **VI. Conclusion**

WHEREFORE, Vote Solar respectfully requests that pursuant to Wis. Stat. § 227.41, the Commission issue a declaratory ruling that:

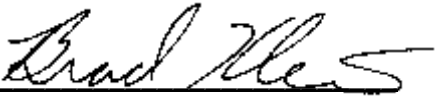
- 1) A singular host customer served by a DER is not “the public” within the meaning of Wis. Stat. § 196.01(5)(a).
- 2) Customers provided power pursuant to individualized contracts constitute a restricted class or special class, standing in a certain contract relationship with the sellers, and are not “the public” within the meaning of Wis. Stat. § 196.01(5)(a).
- 3) Owning, operating, managing, or controlling DER equipment used to supply only the host customer with electricity on the host customer’s real property also constitutes a specific (“peculiar”) relationship such that host customers are not “the public” within the meaning of Wis. Stat. § 196.01(5)(a).
- 5) Power from DERs sited on the host customers’ properties as a supplement and partial replacement of utility supplied power, similar to energy conservation and efficiency reducing power purchased from the utility, is not a natural monopoly and not “impressed with public use” and, therefore, is outside the legislative purpose of utility regulation in Wis. Stat. ch. 196.
- 6) For the foregoing reasons, each independently as well as taken together, the Family Project does not produce, transmit, deliver, or furnish power either directly or indirectly “to or for the public,” as that phrase is used in the Wisconsin Public Utilities Act and interpreted by the courts, and
- 7) As such, an owner of a project utilizing third-party financing for the installation of a DER system, with characteristics consistent with those described above in Paragraph 11, to customers in Wisconsin is not subject to regulation as a public utility pursuant to Wis. Stat. § 196.01(5)(a), and
- 8) Any other declaratory relief the Commission sees fit to provide in response to the Petition.

Dated this 26<sup>th</sup> day of May, 2022.



---

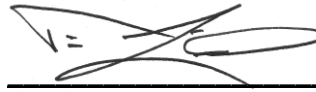
Will Kenworthy  
Regulatory Director, Midwest  
Vote Solar  
1 South Dearborn Street, Suite 2000  
Chicago, IL 60603  
E-mail: will@votesolar.com



---

Brad Klein (Wis. Bar No. 1063708)  
Erica McConnell  
Environmental Law & Policy Center  
222 S Hamilton St # 14  
Madison, WI 53703  
Telephone: (608) 334-1456  
E-mail: bklein@elpc.org  
emcconnell@elpc.org

Co-Counsel to Vote Solar



---

Tim Lindl (Wis. Bar No. 1122246)  
Nikhil Vijaykar  
Keyes & Fox LLP  
1012 Jenifer Street  
Madison, WI 53703  
Telephone: (510) 314-8385  
E-mail: tlindl@keyesfox.com  
nvijaykar@keyesfox.com

Co-Counsel to Vote Solar

VERIFICATION

NOW, BEFORE ME, the undersigned authority personally came and appeared,

William D. Kenworthy

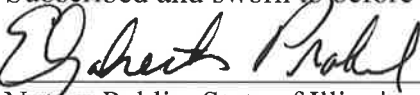
Who, after first being duly sworn by me, did depose and say:

That he is the Regulatory Director, Midwest of Vote Solar, the Petitioner in the foregoing Petition for Declaratory Ruling; that he has the authority to verify the Petition for Declaratory Ruling; that he has read the Petition for Declaratory Ruling and knows the contents thereof, and that the statements contained in said Petition for Declaratory Ruling are true and correct based on his own knowledge, except those matters stated on information and belief, which he believes to be true.

  
William D. Kenworthy  
Regulatory Director, Midwest  
Vote Solar  
1 South Dearborn Street, Suite 2000  
Chicago, IL 60603

State of Illinois                    )  
  )  
County of Cook                    )

Subscribed and sworn to before me this 25<sup>th</sup> day of May, 2022.

  
Notary Public, State of Illinois  
My Commission expires: 11/12/2025

