BEFORE THE
PUBLIC SERVICE COMMISSION OF
WISCONSIN

Verified Petition of Vote Solar Of Distributed Energy Resource Systems in Wisconsin	)))	Docket No. 9300-DR-106

INITIAL BRIEF OF WISCONSIN ELECTRIC COOPERATIVE ASSOCIATION

INTRODUCTION

Petitioner (Vote Solar) seeks a declaratory ruling that an owner and operator of generation that sells electricity generated by its facilities to customers is not a utility. In doing so, Petitioner seeks Commission approval for the sale of electricity directly to Wisconsin utility customers without the regulation and obligations that apply to public utilities and cooperatives throughout the state. The interpretation of law that Petitioner advocates for would allow companies to effectively compete at retail with investor-owned and municipal public utilities as well as rural electric cooperatives, while bypassing most of Chapter 196 and associated administrative code provisions. Petitioner seeks this dramatic exemption from the Public Service Commission of Wisconsin's ("PSCW" or "Commission") regulatory authority not through a wholistic legislative process, but through a rushed declaratory ruling that if successful is likely to upend more than a century of statutory and common law, fundamentally change the retail electric market, leave a gap in critical consumer protection, and exacerbate issues surrounding cost-shifts and subsidization.

BACKGROUND

In existence since 1936, Wisconsin Electric Cooperative Association ("WECA") is the state's trade association for electric cooperatives. WECA specializes in government advocacy on behalf of Wisconsin electric cooperatives, safety and regulatory services, and education in cooperative governance for its cooperative leaders and their employees.

WECA's members are rural electric cooperatives organized under chapter 185 of the Wisconsin Statutes. They are member-owned nonprofit entities with an obligation to provide those member-owners with safe, reliable electric service on a non-discriminatory cooperative basis. (Direct-WECA-Buros-3) The Wisconsin legislature specifically excluded these cooperatives from the definition of "public utility." Wis. Stat.§ 196.01(5)(b)1. That is not to say that electric cooperatives are unregulated. Far from it. Wisconsin's electric cooperatives are primarily regulated by their democratically elected boards of directors. (Direct-WECA-Buros-3) They regularly adopt Commission rules as formal Cooperative policies. (Direct-WECA-Buros-3) Cooperatives are also subject to the provisions of chapter 185, as well as portions of chapter 196 which make them subject to certain Commission regulation. (Direct-WECA-Buros-3; *see e.g.,* Wis. Stat. §§ 196.374 & 196.495) This organizational structure provides consumer protections like those in place for Wisconsin's public utilities. (Direct-WECA-Buros-7)

ARGUMENT

I. Petitioner's proposal to allow third-party owners to sell electricity to customers fits the definition of a public utility under Wisconsin law.

As proposed in the Petition, third-parties would own distributed energy resources ("DER"), including solar PV, and sell the power generated by that equipment to a premises (i.e., customer) already receiving service from an electric utility. (Petition 5) The power generated by the system would be sold to the host customer pursuant to the terms of a purchase power

agreement (PPA) or lease. Despite this relatively straightforward concept of owning facilities that generate electricity and then selling that electricity directly to customers, Petitioner asks the Commission to declare that these third-party ownership arrangements fall outside the definition of a public utility under Wis. Stat. § 196.01(5)(a). (Petition 28) The Commission should deny the requested relief because the Petitioner's proposal squarely falls within the definition of "public utility."

A. The sale of power to Wisconsin consumers through third-party ownership arrangements fits the plain language of Wis. Stat. § 196.01(5)(a).

Under Petitioner's proposal, third-party developers will own and operate DERs and sell power generated by those systems to customers pursuant to a contract. In short, developers will own equipment and sell electricity generated by that equipment to its customers. Wisconsin law plainly defines a public utility as follows:

> "Public utility" means, except as provided in par. (b), every corporation, company, individual, association, their lessees, trustees or 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.
>
> Wis. Stat. § 196.01(5)(a).

The legislature created exceptions to the above definition at § 196.01(5)(b); however, none of those exceptions apply to third-party owners. Third-party DER owners are entities "that may own, operate, manage or control … all or any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of … power either directly or indirectly to or for the public," and the Commission should conclude that they are a public utility under the statute's plain language.

Petitioner's claim that these arrangements do not meet the definition of a public utility because they do not involve the sale of power to the broader public, but rather to each host customer on an individual basis, is unpersuasive. Petitioner argues that under *Cawker* and subsequent caselaw an owner of plant and equipment is a statutory public utility only where that equipment is intended to serve the broad public. (Petition 13-16) Petitioner argues its proposal is different in that the "plant or equipment" owned by third-parties will only serve the host customer not the broader public. (Petitioner 18) However, it is that very relationship between a third-party owner and a host customer – a relationship that exists solely for the purpose of generating electricity and selling that electricity to the customer– that satisfies the statutory definition, whether a third-party owner has one customer or 100,000 customers.

B. Individual contracts with host customers will not create the type of relationship that is as an exception to the definition of public utility.

In *Wisconsin River Improvement Co. v. Pier*, 137 Wis. 325, 118 N.W. 857 (1908), the Supreme Court of Wisconsin addressed the statutory definition of public utility. The Court stated that "public" does not refer to the population of the state as a whole, "but all persons who require power and are willing to pay reasonable rates therefor to the full extent of the capacity of the enterprise in question." 118 N.W. 862. This interpretation would apply again in the *Cawker* case.

In *Cawker v. Meyer*, 147 Wis. 320, 133 N.W. 157 (1911), the Supreme Court of Wisconsin considered whether plaintiffs were a public utility pursuant to the Wisconsin statute. Plaintiffs built a plant for the purpose of furnishing the tenants of their own building with heat, light, and power, and sold surplus of those commodities to some adjoining neighbors. 133 N.W. 158. The State alleged that "furnishing of such commodities to any one" other than one's self is furnishing to the public. *Id.* The Court rejected that definition reasoning that it would make every building furnishing heat or light to tenants, and every homeowner renting a heated or lighted

room, a public utility. *Id.* The Court stated such a construction was never contemplated by the legislature and would result in "manifest absurdity." *Id.*

According to the Court, it was not the furnishing of heat or electricity "to tenants, or, incidentally, to a few neighbors that the legislature sought to regulate, but the furnishing of those commodities to the public; that is, to whoever might require the same." 133 N.W. 158. While the use to which the plant or equipment is put must be for the public, "whether or not the use is for the public does not necessarily depend upon the number of consumers; for there may be only one, and yet the use be for the public …". *Id.* at 159. However, the Court concluded that the landlord's tenants and a few neighbors are not the public, and "'public' must be construed to mean more than a limited class defined by the relation of landlord and tenant, or by nearness of location, as neighbors, or more than a few who, by reason of any peculiar relation to the owner of the plant, can be served by him." *Id.* The facts before the Commission are distinguishable from the landlord-tenant relationship in *Cawker*.

Unlike *Cawker*, the Petition does not contemplate a "peculiar relation" between third-party owners and prospective customers such that the furnishing of electricity is merely incidental or convenient to an existing relationship. Rather, it contemplates a contractual relationship that will exist for the sole purpose of selling electricity generated by facilities owned and operated by the Petitioner. Petitioner claims third-party owners will not own or operate equipment intended for the broader public since each system will be intended to serve the host customer. However, *Cawker* makes clear that a single customer *can* constitute the public. Even viewing the Petition on an individual customer basis and accepting that each individual solar PV system will be sized to serve only the individual customer's electricity needs, that single customer can still satisfy the definition of "public" under *Wisconsin River Improvement Co.*, as

each customer constitutes a person who requires power and is willing to pay for that power up to the provider's capacity.

C. Cases cited by Petitioner affirm the *Cawker* exception and are factually distinct from the matter before the Commission.

Petitioner contends that individual contracts with each host customer will differentiate those customers from "the public" under Wisconsin law. (Petition 16) In support of this theory, Petitioner cites to various cases as though as a matter of law the existence of a contract with a customer definitively precludes a finding that third-party ownership arrangements satisfy the definition of a public utility. These cases, individually and in their totality, are factually distinct from the Petition and do not establish a broad, sweeping exception to the definition of public utility for the existence of a contract.

For example, Petitioner cites *City of Sun Prairie v. PSC* for the proposition that the public does not include "a defined, privileged and limited group," the inference being that by doing business with only customers who sign PPA's or leases, third-party owners will be serving a limited group that does not constitute the public. However, *City of Sun Prairie* examined a fact pattern involving a landlord furnishing heat, light, water and power to its tenants, just like in *Cawker*. 37 Wis. 2d 96, 154 N.W.2d 360 (Wis. 1967). The Court found that *Cawker* controlled and agreed with the courts of four other states that a landlord who furnishes utility service to tenants is not a public utility. 37 Wis. 2d at 100-01. However, third-party owners do not stand in a landlord-tenant relationship with its prospective customers. The exception for the landlord-tenant relationship first identified in *Cawker* and affirmed in *City of Sun Prairie* simply does not apply to the Petition.

Petitioner also cites *City of Milwaukee v. PSC*, as support for its argument that individual contracts will differentiate its prospective customers from the public. However, the *City of Milwaukee* opinion is factually inapposite and actually recognized that a contract can lead to an obligation to serve which is a typical characteristic of a public utility. 241 Wis. 249, 5 N.W.2d 800 (Wis. 1942). There, the city of Milwaukee's water utility – a public utility – contracted with the town of Milwaukee to extend service to residents of the town residing on certain streets in a limited area, incident to the city's efforts to serve the village of Fox Point and in response to the necessities of getting an easement from the town. 5 N.W.2d 800, 801-02, 803. The city subsequently objected to a demand for it to extend its water mains to serve a new subdivision. *Id.* at 802. The Court concluded that the contract did not compel the city to provide water service to the town as a whole. *Id.* at 804. However, the Court noted, "Having by contracts agreed to serve those residents of the town of Milwaukee abutting the Port Washington Road and those included by the territory covered by the Green Bay Avenue extension, the Milwaukee utility under the doctrine of the West Allis Cases may find even if its contract be cancelled that it must continue to service contract customers upon a utility basis." *Id.* at 803. In other words, while the city did not contract its way into becoming a water utility for the town as a whole, the Court recognized that the utility would likely be held to the status of a public utility with respect to those it contracted to serve within the town.

Petitioner also cites *Union Falls Power Co. v. City of Oconto Falls*, 221 Wis. 457, 265 N.W.2d 722 (Wis. 1936). In that case, the plaintiff unsuccessfully sought to establish itself as a public utility. However, it was not the existence of a contract alone that proved determinative. Rather that case involved a wholesale relationship whereby the plaintiff company furnished electricity to its parent company, and to the city of Oconto Falls which in turn acted as a public

utility and distributed that electricity to the public. 265 N.W.2d 722, 723. The company did not deal with the public directly or indirectly, but with a utility. *Id.* However, in the matter before the Commission the Petitioner does not propose to contract with utilities at wholesale. It proposal is for the third-party owners to contract for the sale of energy to members of the public at retail. Unlike the *Union Falls* plaintiff, Petitioner will be making an offer to serve that can be accepted by any member of the public.

Finally, in *Schumacher v. Railroad Commission*, the Court approved of the trial court's conclusion that plaintiffs were not a public utility and quoted the trial court favorably: "They are only a group of neighbors who have cooperated to build a line to supply themselves with electric current, with no purpose of making a profit or of serving the public generally or any portion of the public outside of those who voluntarily band themselves together to aid in this purely neighborhood cooperative undertaking." 185 Wis. 303, 201 N.W.241-42 (Wis. 1924). What Petitioner proposes is nothing like a few neighbors banding together to connect to electric service that ended at city limits. Instead, Petitioner proposes to third-party ownership and operation of equipment that will generate electricity and then sell that electricity to each host customer pursuant to a contract. Petitioner has no plans to limit this arrangement to a single project or a couple neighbors, and it will seek to develop third-party ownership throughout the state.

II. Adopting the Petitioner's interpretation of public utility will have profound consequences for Wisconsin consumers and energy providers.

The provision of electricity is a critical service. For more than 100 years, Wisconsin consumers have received their electricity from regulated providers. With that comes rate transparency, safeguards for fairness, and forums for addressing disputes. If the consumer has a dispute with a public utility, she can bring it to the attention of Commission staff and even the full Commission. (Direct-CFC-Rude-8) If a member has a dispute with her cooperative, she can

bring it to the board of directors consisting of fellow cooperative members. (Direct-WECA-Buros-3) The Commission and cooperative boards regulate nearly every aspect of how the business of delivering electricity to consumers gets done. (Direct-WECA-Buros-3) These forms of regulation ensure that consumers are treated fairly, and that there are standards for billing, rates, and collections. (Direct-WECA-Buros-3) Yet this level of regulation will not apply to the sale of electricity by unregulated third-party owners.

A. The Petition fails to address risks to Wisconsin consumers and lacks guardrails necessary to protect consumers from unscrupulous tactics and unconscionable contracts.

The Petition seeks Commission approval for third-party owners of distributed generation to sell power at an unregulated price of the owner's choosing without standard customer protections. (Direct-FRWD-Quackenbush-r-6) This is bad for consumers because in the absence of regulation and customer protections there is a potential for unfair marketing, deceptive business practices, market abuses, and bad actors that lack financial capability, technical competence, and compliance with safety and legal obligations. (Direct-FRWD-Quackenbush-r-6)

Wisconsin's cooperatives have firsthand experience with bad actors in the context of solar development. They do not want to see similar situations playout among individual Wisconsin consumers dealing with unregulated third-party developers. For example, in 2014 Vernon Electric Cooperative and some of its members entered into a 20-year PPA with a then reputable solar developer for the installation of a community solar facility. (Direct-WECA-Buros-4) The developer set up a limited liability company to own the facility. (Direct-WECA-Buros-4) Cooperative members made up-front payments for the rights to future bill credits based on the output from the facility. (Direct-WECA-Buros-4) The developer installed and maintained the facility for a few years, but shortly after the developer fully realized the tax credits from the

facility, and before the consumer recognized any financial benefit from the system, the solar array failed. (Direct-WECA-Buros-4) It stopped producing energy. (Direct-WECA-Buros-4) Rather than repair the array, the developer notified the cooperative that it planned to file for bankruptcy, and it would not repair. (Direct-WECA-Buros-4) The cooperative then undertook a lengthy legal process to acquire the facility, and then hired a contractor to perform significant repairs at the cooperative's expense. (Direct-WECA-Buros-4)

In Vernon Electric's situation the developer front-loaded the contract, collected its money, and left the customer in the lurch after the array failed. Luckily, that customer possessed the wherewithal and financial resources to resolve the situation. Unfortunately, this scenario could play out with individual consumers with far fewer resources who purchase electricity from unregulated third-party owners. (Direct-WECA-Buros-5) If the Commission disclaims jurisdiction over third-party owners there will be little if anything the Commission can do in such situations. If the Commission accepts the Petitioner's interpretation of the law, the Commission will have no visibility into the financial health of third-party owners, it will have no authority to monitor, interpret or in any way influence the terms of contracts or the rates paid by consumers, and it will have no means by which to compel third-party owners to comply with their end of a bargain. Petition supporters point out that the systems will still be subject to the interconnection rules, but those rules are not intended to address customer protection issues. (Rebuttal-FRWD-Quackenbush-r-3) Nor are they as far-reaching as the Commission's other regulatory tools available under Chapter 196. (Rebuttal-FRWD-Quackenbush-r-6) Of course those tools would not be available with respect to the third-party ownership arrangements under its interpretation of the law.

Vernon Electric's experience is just one example of bad behavior. There are other examples across the country including wildly varying prices offered by third-party providers in Virginia, high-pressure sales tactics prompting attorney general investigations in Connecticut, and even solar developers already in Wisconsin holding themselves out as working with utilities. (Direct-CFC-Rude-8-9) Consumers have been misled regarding the true cost of solar panels, been provided shoddy craftsmanship, incurred higher utility costs, and signed unconscionable contracts. (Direct-FRWD-Quackenbush-r-13, Ex.-FRWD-Quackenbush-2) These warnings signs from across the country show the need for a dedicated and knowledgeable regulator – like the Commission - to apply scrutiny to third-party ownership arrangements. (Direct-FRWD-Quackenbush-r-13, Rebuttal-FRWD-Quackenbush-r-5)

The National Association of State Utility Consumer Advocates ("NASUCA") recognized the role for utility regulators and state legislatures to protect consumers against the well-documented risks associated with third-party owners of distributed generation. (Direct-CFC-Rude-9-11, Ex.-CFC-Rude-6) NASUCA identified various steps for regulators and legislatures to take including legislation "to review and delineate the jurisdiction of state public utility commissions over third-party DG providers and conduct review of complaint resolution processes and legal remedies available to third-party DG contracts in order to determine whether such remedies are sufficient, reasonable and fair . . . ." (Direct-CFC-Rude-10-11) More broadly, there are numerous examples in the record of restructured states that have taken steps to protect customers against unfair marketing practices and other abuses posed by unregulated energy providers. (Direct-FRWD-Quackenbush-r-7-12)

Despite the countless negative experiences of consumers around the country, the customer protections adopted in restructured states, and the efforts of consumer groups like

NASUCA to encourage legislatures and regulators to get out ahead of third-party owners, the Petition before the Commission does nothing to enhance consumer protection. Instead, the Petitioner seeks to avoid Commission scrutiny for third-party owners and offers no new consumer protections. Interconnection rules that would still apply are not intended to address consumer protection, and other consumer protection rules established by the Commission including PSC 113 (which includes provisions for the testing and accuracy of metering equipment among other provisions) would not apply to third-party owned systems. More general consumer protection laws like the Wisconsin Consumer Act may not even apply to arrangements contemplated in the Petition due to the definitions and exceptions within those laws. (Rebuttal-FRWD-Quackenbush-r-4) With respect to consumer protection, Petitioner kicks the can down the road for the legislature and non-Commission regulators to address. This approach fails Wisconsin consumers and should be rejected by the Commission.

B. Approving the Petition will exacerbate cost-shifts which will be particularly difficult for small utilities and their customers.

As proposed in the Petition, third-party owners will have no obligation to provide safe, reliable energy at a fair price to consumers 24 hours a day, 365 days a year. (Direct-WECA-Buros-5-6) Regulated utilities and cooperatives have that obligation. Despite having a PPA with a third-party provider, consumers will still rely upon the public utilities and cooperatives to provide electric service at times when the sun does not shine, temperatures plummet, or third-party owned equipment fails. (Direct-WECA-Buros-6) While public utilities and cooperatives will be obliged to purchase, build and maintain the infrastructure to be ready to meet this need, they will also face declining revenues and in-turn inadequate fixed cost recovery as some of their fixed and consumer costs are embedded in variable energy rates. (Direct-WECA-Buros-6) This will result in the recovery of costs being shifted to consumers who do not, or are unable, to

participate in third-party ownership arrangements, including low-income consumers. (Direct-WECA-Buros-6-7)

Utilities and cooperatives are already seeing this type of cost-shift play out to varying degrees. For example, an analysis commissioned by Vernon Electric Cooperative showed that on average its residential members with distributed generation participating in net metering were under-collected by approximately 15% while the average residential member without distributed generation was 2% over-recovered when compared to the cost of service. (Surrebuttal-WECA-Buros-2) While the problem of cost-shift already exists, granting the petition is likely to exacerbate the issue. (Direct-FRWD-Quackenbush-r-18) The magnitude of the cost-shift problem for any particular public utility or cooperative is likely to vary as distributed generation capacity and utility size is not uniform among providers. (Surrebuttal-WECA-Buros-2) For example, a community served by a relatively small utility with a substantial amount of its energy sales tied to a few large consumers will likely experience devastating cost-shifts to smaller customers if unregulated third-party owners target and are permitted to sell electricity to those large customers. (Surrebuttal-WECA-Buros-2) Granting the Petition will not solve problems with cost-shift and subsidization. It will make them worse. (Rebuttal-FRWD-Quackenbush-r-10) Ignoring rate impacts and cost-shifts as irrelevant to the Petition risks unintended financial consequences that are likely to hit small utilities and their consumers the hardest. (Surrebuttal-WECA-Buros-2-3)

C. Granting the Petition will introduce deregulation to Wisconsin's energy industry while bypassing the legislature on an issue of fundamental change to the state's utility regulatory system.

Granting the Petition will permit an unregulated sale of electricity to consumers. Thus, not only would the Commission cede its regulatory authority over third-party owners to the

detriment of consumers, but it would also introduce significant deregulation to Wisconsin's electric industry. (Direct-WECA-Buros-7) This is not a path the State should follow without clear legislative direction. Deregulation in other states has not produced promised savings. (Direct-WECA-Buros-8) Rather it created risks and left little incentive for the ownership of baseload generation capacity. (Direct-WECA-Buros-8) Wisconsin has thus far avoided these pitfalls. (Direct-CFC-Rude-5) If such a dramatic change is in store for Wisconsin's longstanding utility regulatory system it should come from the legislature, not a rushed declaratory ruling proceeding. (Direct-CFC-Rude-14, Direct-WECA-Buros-8)

As recently as the last legislative session the legislature considered and did not adopt the exception to the public utility law that the Petitioner seeks in this proceeding. (Direct-WECA-Buros-8, Direct-CFC-Rude-13-14) If approved, the Petition will result in a new class of unregulated energy provider operating largely outside of Wisconsin's utility regulatory system and avoiding that system's traditional consumer protections. The Commission simply should not approve such a consequential change without express direction from the legislature.

CONCLUSION

Petitioner proposes to allow third-parties to own electric generation facilities and sell the power generated by those facilities to the public. Its proposal describes a public utility under Wisconsin law. Furthermore, the Petition is incompatible with Wisconsin's longstanding utility regulatory framework. By seeking to allow third-party owners to sell electricity to Wisconsin consumers while avoiding the regulations and obligations that apply to public utilities and electric cooperatives, the Petition's requested relief will rip a hole in consumer protection, exacerbate cost-shifts, and introduce deregulation to Wisconsin's electric industry without

legislative approval. The Petition is contrary to Wisconsin law and Wisconsin energy policy, and it must be denied.

Dated November 4, 2022.

Fredrikson & Byron, P.A.

By: *Electronically signed by Justin W. Chasco*

Justin W. Chasco, Wis. State Bar No. 1062709
44 East Mifflin Street, Suite 1000
Madison, WI 53703-2800
(608) 441-3813
Email: JChasco@fredlaw.com

Counsel for Wisconsin Electric Cooperative Association