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BY THE COURT:

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Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

WISCONSIN UTILITIES ASSOCIATION, INC.,

Petitioner,

v. Case No. 2023-CV-1188

PUBLIC SERVICE COMMISSION
OF WISCONSIN,

Respondent.

DECISION AND ORDER

INTRODUCTION

North Wind Renewable Energy Cooperative ("North Wind") put solar panels on the roof of a family home as part of an agreement in which North Wind would continue to own the solar panels but sell the generated energy to the resident family. Vote Solar, despite having no direct connection to North Wind or the family, pointed to their arrangement and asked the Public Service Commission of Wisconsin ("PSC") to broadly declare that this sort of "third-party financing" should not be regulated under the rules that normally apply when a company sells electricity to the public. PSC issued a far narrower decision. It went no further except to declare that North Wind's set of solar panels on this specific family home would not furnish energy "to or for the public," so

North Wind—and North Wind alone—need not be regulated as a public utility.

This is a review under Wis. Stat. ch. 227 of PSC's decision. "The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action." *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984). The parties seeking to overturn PSC's decision, a series of utilities including the Wisconsin Utilities Association, Inc. (together, "WUA"),[1] satisfy that burden in at least two ways. First, PSC interpreted the phrase "public utility" to depend on the characteristics of an individual "project." This was error because Wis. Stat. § 196.01(5)(a) plainly defines a public utility as one of many possible entities—a "corporation, company, individual, [etc.]"—and a project for the generation of energy is not any of those entities. Second, PSC made the factual finding that North Wind did not sell electricity to "the public." This was also error because the record contains no evidence about what North Wind does or why it made an agreement to put solar panels on the home in question. No reasonable person could have considered that limited evidence of record and reached a conclusion about whether North Wind sold energy to the public. These errors require remanding the matter to PSC under Wis. Stat. § 227.57.

Accordingly, I set aside PSC's decision and remand this matter to PSC.

I. BACKGROUND

On October 28, 2022, Vote Solar petitioned PSC for a series of declaratory rulings on third-party financing agreements for the installation of solar panels. R. 160.[2] According to its petition, a

[1] WUA says that it represents seven other "Intervenors-Petitioners." WUA Br., dkt. 251:1. To be clear, no parties "have been permitted to intervene … by order of the reviewing court." Wis. Stat. § 227.53(2). The "intervenors" represented by WUA appear in this matter because, after being served with the petition for review, each filed a notice of appearance. *Id.*

[2] PSC's record consists of several hundred pages of documents filed across approximately 180 docket entries. Helpfully, PSC has also organized the record in an index of 435 hyperlinked documents. Dkt. 33. I join the parties in

third-party financing agreement describes the arrangement between a customer (for example, a homeowner) and a provider of a "distributed energy resource" (for example, solar panels plus batteries) to install electrical equipment (but perhaps not sell the equipment) for that customer's use. Here is how Vote Solar's original petition explained third-party financing agreements for solar panels:

(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 dedicated [sic] 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.

R. 160:3 (spacing added).

One of Vote Solar's members is a family in Stevens Point ("the Stevens Point Family"). R. 160:5. That family asked North Wind to install panels on its home. *Id.* The resulting third-party financing agreement ("the Family Project") required the family to lease space at their home for solar panels and related electrical equipment, all of which would remain owned by North Wind. R. 160:7. In return, North Wind agreed to sell the family electrical energy and "deliver[] all unconsumed power to the electric utility to which the system is interconnected." *Id.*

Vote Solar asked PSC to declare the Family Project would not require regulation of North Wind as a public utility because, in its view, a single family does not constitute "the public." R. 160:9. That declaration would be important because Wisconsin strictly regulates utilities that serve

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referring to the record by the numbered entries in PSC's index.

"the public." Wis. Stat. §§ 196.02(1) (granting PSC "jurisdiction to supervise and regulate every public utility in this state …") and 196.01(5) (defining "public utility."). Vote Solar's petition thus gave PSC the opportunity to declare whether or not third-party financing agreements subject a seller of electric energy to regulation.

On October 26 and November 2, 2022, PSC held hearings on Vote Solar's petition. R. 57:4. PSC then made a series of findings, including:

1. North Wind … intends to enter into a contract with a single customer, a family located in Stevens Point Wisconsin (the Stevens Point Family), to install an 8.64 kilowatt third-party financed DER system on the family's home (the Family Project). The contract contemplates that North Wind will own the equipment, and that the Stevens Point Family will pay for the energy and energy-related services provided through that system.

2. The Family Project DER will be dedicated to that single specific customer, the Stevens Point Family, and no equipment will be used to provide electricity to more than one customer.

3. The Stevens Point Family currently takes service from Wisconsin Public Service Corporation (WPSC), a public utility as defined in Wis. Stat. § 196.01(5)(a), and has submitted an application to interconnect to that utility system consistent with the utility's interconnection tariff and Schedule PG-1M.

4. The Stevens Point Family will continue to take service from WPSC under a residential rate schedule.

   …

7. Any excess energy that may be produced by the Family Project will be delivered to WPSC.

R. 57:4-5.

Based on these findings, PSC concluded the family served by the Family Project "is not, by itself, 'the public'" and that the Family Project "does not produce, transmit, deliver, or furnish

power either directly or indirectly 'to or for the public.'" R. 57:5.[3] Accordingly, PSC concluded that North Wind was not "subject to regulation as a public utility pursuant to Wis. Stat. § 196.01(5)(a)." R. 57:6.[4]

On May 11, 2023, WUA petitioned for judicial review of that decision. Dkt. 2. On June 12, 2023, PSC filed the record of its decision. Dkt. 33. Two weeks later, on June 27, 2023, a vaguely-described "non-profit entity" petitioned to intervene. Dkt. 230. Both WUA and PSC opposed intervention and, on August 16, 2023, I denied the motion to intervene. Dkt. 250. The parties have since fully briefed the matter.

II. LEGAL STANDARD

WUA seeks judicial review of PSC's decision under Wis. Stat. ch. 227. Judicial review of an agency decision "shall be confined to the record …." Wis. Stat. § 227.57(1). A court shall affirm an agency's action unless it finds grounds to set aside, modify, remand, or order agency action. Wis. Stat. § 227.57(2). In doing so, "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved …." Wis. Stat. § 227.57(10). However, "the court shall accord no deference to the agency's interpretation of law." Wis. Stat. § 227.57(11); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶3 n. 1, 382 Wis. 2d 496, 914 N.W.2d 21.

"The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency

[3] In its original decision, PSC labeled its legal conclusion about the identity of "the public" as a finding of fact. R. 57:5. In briefs submitted to this Court, nobody attempts to defend this label. Vote Solar Resp. Br., dkt. 256:12 (describing PSC's conclusion about the public as "the key legal question …."); PSC Resp. Br., dkt. 255:23 (same). Distinction between legal and factual questions is important because courts review legal conclusions de novo. *Tetra Tech,* 2018 WI 75, ¶3 n.1. However, the label does not matter here because, as I explain in Part III.B.2, there is no substantial evidence to support PSC's purported finding.

[4] All three PSC Commissioners authored an opinion. Concurring in PSC's judgment, Commissioner Tyler Huebner criticized the lead opinion for erroneously defining utility but concurred based on his belief, absent citation to any authority, that a solar power project cannot be a public utility "because the public does not require solar-panel electricity …." R. 57:33. Meanwhile, Commissioner Ellen Nowak would have dismissed the petition because, in her view, it sought "free reign for entities to enter into an unlimited number of contracts to sell electricity to current customers of Wisconsin utilities." R. 57:35.

action, not on the agency to justify its action." *City of La Crosse,* 120 Wis. 2d at 178. A plaintiff may satisfy this burden in several ways. *See* Wis. Stat. §§ 227.57(4)-(8). Here, WUA contends PSC's decision should be set aside for three different reasons:

- because "the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action …." Wis. Stat. § 227.57(5);
- because "the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." Wis. Stat. § 227.57(6); and
- because "the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure ...." Wis. Stat. § 227.57(4).

III. DISCUSSION

A. WUA has standing.

Before turning to whether PSC's final decision should be set aside under Wis. Stat. § 227.57, I must first address WUA's standing to seek relief from that decision. PSC says that WUA does not have standing because it identifies no concrete injury from a single lease involving a few solar panels. In PSC's words, WUA "relies on argument about the hypothetical impact" of the Family Project. PSC Resp. Br., dkt. 255:16. To determine whether PSC is right, I first set forth Wisconsin's two prong test for standing, then examine whether WUA can satisfy that test to demonstrate its standing.

1. Standing requires an injury to a protected interest.

"[S]tanding in Wisconsin is not a matter of jurisdiction, but of sound judicial policy." *Friends of the Black River Forest v. Kohler Co.,* 2022 WI 52, ¶17, 402 Wis. 2d 587, 977 N.W.2d 342 (quoted source omitted). "As a matter of sound judicial policy, typically our courts ask … (1) Does the challenged action cause the petitioner injury in fact? and (2) is the interest allegedly

injured arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question?" *Id.*, ¶18 (citations and quotations marks omitted). In answering these two questions, "[w]e construe the law of standing liberally, and even an injury to a trifling interest may suffice." *Id*., ¶19 (citation and quotation marks omitted).

2. WUA has suffered an injury because it points to unrebutted expert testimony that PSC's decision represents a monetary loss.

To determine whether WUA has standing, I must first determine whether it has suffered an injury in fact. An "injury in fact" refers to "injuries that are a direct result of the agency action." *Id*., ¶21. "[T]he injuries must be neither hypothetical nor conjectural." *Id*.

PSC says that WUA demonstrates no such injury. To show this, PSC begins by highlighting the fact that other interested parties have chosen to join WUA's briefing to this Court rather than independently file their own challenges to PSC's decision. PSC Resp. Br., dkt. 255:14. PSC labels these other parties intervenors, although it does not explain why it chooses that label or why the label matters, and then asserts that the intervenors "cannot 'breathe life into a "nonexistent" lawsuit.'" *Id.* (quoting *Fox v. DHSS*, 112 Wis. 2d 514, 537, 334 N.W.2d 532 (1983)). As best I can tell, PSC believes that WUA has suffered no injury (for reasons it will explain later) and so even if the other parties who joined WUA's brief did suffer an injury, I should nevertheless conclude all of the parties seeking review of PSC's decision lack standing.

I do not understand PSC's argument or its reliance on *Fox*. That case dealt with an entirely different situation: there, "a petition to *intervene*" was filed after the time for commencing a ch. 227 review had expired. *Fox*, 112 Wis. 2d at 535 (emphasis in original). *Fox* holds that untimely intervenors generally cannot, after dismissal of the original petitioner's claims, continue with their own untimely claims. *Id.* at 537-38. But *Fox* sheds no light on this case, in which none of the

parties joining WUA's brief have either petitioned to intervene or have done anything untimely.

PSC next tries to illustrate the absence of any injury by using a car dealership as an example. It says that when a car dealership leases a vehicle, "the dealership is not selling travel to the customer." PSC Resp. Br., dkt. 255:15. Similarly, it says that when a utility leases solar panels, it, too, "is not selling energy to the family." *Id.* These analogies appear inapt because PSC did find that North Wind is, in fact, selling energy to the family. R. 57:4 (PSC found that "North Wind will own the equipment [the solar panels], and that the Stevens Point Family will pay for the energy …."). Anyway, I do not understand why these analogies demonstrate the absence of an injury in fact to WUA.

As a third reason to conclude WUA lacks standing, PSC points to the fact that the same family subject to the lease in the Family Project has another contract for the sale of electricity from a public utility. PSC Br., dkt. 255:15. The public utility's contract allows the family to install its own solar panels. *Id.* Based on the presence of this contract, PSC says it "cannot discern how a single such arrangement would implicate any harm to WUA, must less the dire consequences it attempts to evoke in its pleadings." *Id.* This argument is not persuasive because the fact that PSC cannot discern an injury does not help determine whether an injury does, in fact, exist. If PSC thinks a contractual right to install one kind of solar panels means that a second kind of solar panels cannot harm an energy utility, then it should just point to testimony or other evidence that demonstrates this fact. PSC does not make this showing.

Although PSC does not point to facts or omissions in the record that illustrate a lack of injury, WUA nevertheless has the burden to prove its own standing. *Krier v. Vilione,* 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517; *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) ("each element must be supported in the same way as any other matter on which the plaintiff

bears the burden of proof …"). To demonstrate it has suffered an injury as a result of PSC's decision, WUA points to testimony that "the costs shifted by one residential customer participating in an energy sale like North Wind's [are] roughly $50 per month." WUA Reply Br., dkt. 259:21 (citing R. 85:16-17 (the testimony of Frank Graves)).

To repeat, "even an injury to a trifling interest may suffice." *Friends,* 2022 WI 52, ¶19. A monetary loss of $50 is one such injury, so WUA satisfies the first element of standing.[5]

3. WUA's injury is within the zone of interests protected by Wisconsin's energy regulations.

The second element of standing requires that the injury—here, WUA's loss of $50 per month in electricity sales—falls within the zone of interests protected by law. *Friends,* 2022 WI 52, ¶18. According to WUA, Wisconsin protects every public utility's right to sell energy as part of a broad regulatory scheme that restricts competition. WUA Reply Br., dkt. 259:20. To demonstrate the sweep of those regulations, WUA cites statutes which prohibit "duplication of facilities," Wis. Stat. § 196.495, and/or the ownership, operation, or control of utilities "if there is in operation … a public utility engaged in similar service in the municipality …." Wis. Stat. § 196.50(1)(a). Simply put, WUA thinks these regulations protect it from competition with an unregulated entity offering similar services.

I agree that a public utility's interest in not competing with other public utilities is within the zone of interests protected by Wis. Stat. ch. 196. Here, WUA points to evidence that it lost sales to a competitor that perhaps should have been regulated, but was not. Accordingly, WUA

[5] As an alternative injury in fact, WUA asserts that PSC's decision "erodes the regulatory compact …." WUA Reply Br., dkt. 259:20-21. WUA asserts this erosion confers standing because it has a "legally protected interest in Wisconsin's regulatory compact," but it does not explain why except to cite Wis. Stat. ch. 196, generally. *Id.* at 21 fn.99. Because I conclude Frank Graves' testimony that WUA has lost money is evidence of a concrete injury to one of WUA's protected interests, I need not decide how to measure the "erosion of a compact" or whether that erosion could satisfy either part of the test for standing.

satisfies the second element of the test for standing, too.

B. WUA satisfies its burden to show PSC's final decision must be remanded.

I turn, next, to the substance of PSC's final decision declaring North Wind was not a public utility. WUA seeks to set aside that decision for three reasons. First, it asserts the final decision erroneously interpreted the phrase "public utility" by examining an individual project, rather than the actions of an electricity-transmitting entity, in determining that North Wind was not a public utility. As a result of this erroneous legal interpretation, WUA concludes the final decision should be reversed under Wis. Stat. § 227.57(5). Second, WUA says the final decision made the finding that the Stevens Point Family was not "the public." WUA asserts that finding is not supported by substantial evidence because PSC heard much about the Family Project but nothing about North Wind's overall activities. *See* Wis. Stat. § 227.57(6). Third, WUA contends that the fairness of the final decision was impaired by what it labels a "bait and switch," mainly because WUA was denied the ability to take discovery on North Wind. *See* Wis. Stat. § 227.57(4).

I address WUA's three arguments, in turn.

1. PSC's decision erroneously interpreted the phrase "public utility."

WUA's first argument is that PSC erroneously interpreted the phrase "public utility." To determine whether PSC erred, I first define "public utility," then look to see how PSC's final decision interpreted the phrase.

a. The definition of "public utility."

"Public utility" is a statutorily-defined term. To determine what it means, "as always, we begin with the text of the statute." *Fleming v. AAU,* 2023 WI 40, ¶21, 407 Wis. 2d 273, 990 N.W.2d 244. Here is the relevant statutory text:

> "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. "Public utility" includes all of the following:
>
> 1. Any person engaged in the transmission or delivery of natural gas for compensation within this state by means of pipes or mains and any person, except a governmental unit, who furnishes services by means of a sewerage system either directly or indirectly to or for the public.
>
> 2. A telecommunications utility.

Wis. Stat. § 196.01(5)(a).[6] More plainly put, the definition of a public utility has four elements: it

[6] Although none of these exceptions apply here, "public utility" also excludes various entities:

> "Public utility" does not include any of the following:
>
> 1. A cooperative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water to its members only.
>
> 2. A holding company, as defined in s. 196.795 (1) (h), unless the holding company furnishes, directly to the public, telecommunications or sewer service, heat, light, water or power or, by means of pipes or mains, natural gas.
>
> 3. Any company, as defined in s. 196.795 (1) (f), which owns, operates, manages or controls a telecommunications utility unless the company furnishes, directly to the public, telecommunications or sewer service, heat, light, water or power or, by means of pipes or mains, natural gas.
>
> 4. A commercial mobile radio service provider.
>
> 5. A joint local water authority under s. 66.0823.
>
> 6. A person that owns an electric generating facility or improvement to an electric generating facility that is subject to a leased generation contract, as defined in s. 196.52 (9) (a) 3., unless the person furnishes, directly to the public, telecommunications or sewer service, heat, light, water or power or, by means of pipes or mains, natural gas.
>
> 7. A state agency, as defined in s. 20.001 (1), that may own, operate, manage, or control all or any part of a plant or equipment for the production, transmission, delivery, or furnishing of water either directly or indirectly for the public.
>
> 8. A person who satisfies all of the following:

refers to (1) an entity (2) that controls equipment (3) for transmitting power (4) to the public.

Here, nobody meaningfully disputes the first three elements. That is, nobody disputes that North Wind is an entity,[7] or that it controlled equipment, R. 57:4 ("North Wind will own the equipment …"), or that it transmitted power, R. 57:5 ("The Family Project will be capable of providing electric service …"). The parties dispute only whether North Wind's transmission of power was to "the public."

The Wisconsin Supreme Court defined "the public" in *Cawker v. Meyer,* 147 Wis. 320, 133 N.W. 157 (1911). There, the owner of a large commercial building "caused to be installed therein a steam plant for … furnishing electric light and power to such of the tenants and occupants of the said building as should desire the same." *Id*., 133 N.W. at 157. Wisconsin's then-existing enforcement agency threatened the building owners with prosecution for operating as an unregulated public utility, so the building owners sought injunctive relief. *Id*. at 158. In allowing the building owners' injunction to proceed, our supreme court explained that "the furnishing of … power, to tenants, or, incidentally, to a few neighbors," did not transform the building owners into

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> a. The person supplies electricity through the person's electric vehicle charging station to charge electric vehicles.
> b. The person charges a fee for using the electric vehicle charging station that is based on the amount of kilowatt-hours of electricity that the user consumes.
> c. The person is a retail customer of an electric utility, as defined in s. 16.957 (1) (g), or a retail electric cooperative, as defined in s. 16.957 (1) (t).
> d. All of the electricity supplied by the electric vehicle charging station is supplied to the person by the electric utility or electric cooperative that provides service to the person.
> e. Other than engaging in the activity described in this subdivision, the person does not directly or indirectly provide electricity to the public.

Wis. Stat. § 196.01(5)(b).

[7] PSC never actually explains what it thinks North Wind is, except to describe it as a "Cooperative." *See generally* R. 57. Some kinds of cooperatives are exempted from classification as a public utility. Wis. Stat. § 196.01(5)(b)1. This decision joins the parties' assumption that North Wind is not exempt and is instead one of the kinds of entities described in § 196.01(5)(a).

a public utility. *Id.* Instead, it explained, "[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." *Id.* at 158-59. Referencing several dictionaries, the court elaborated on the meaning of "public":

> It is very difficult, if not impossible, to frame a definition for the word "public" that is simpler or clearer than the word itself. The Century Dictionary defines it as: "Of or belonging to the people at large; relating to or affecting the whole people of a state, nation or community; not limited or restricted to any particular class of the community." The New International defines it as: "Of or pertaining to the people; relating to or affecting a nation, state or community at large." The tenants of a landlord are not the public; neither are a few of his neighbors, or a few isolated individuals with whom he may choose to deal, though they are a part of the public. The word "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. at 159.

In the century following *Cawker*, our supreme court has never changed this definition of "the public." *E.g., State v. Auto. Merchandisers of America, Inc.*, 64 Wis. 2d 659, 664, 221 N.W.2d 683 (1974) (citing *Cawker,* 133 N.W. at 159) ("A line of decisions of this court relating to what constitutes a 'public utility' is applicable to this situation."). The supreme court has held that, in a dispute about whether a party is a member of "the public," "[t]he important factor is whether there is some particular relationship between the parties." *Id*. And, "[w]hether such a relationship exists is a question of fact that depends on the peculiar facts and circumstances of the case." *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶62, 389 Wis. 2d 669, 937 N.W.2d 37 (citing *K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, 301 Wis. 2d 109, 732 N.W.2d 792 and *Cawker*, 133 N.W. at 159).

To help define "the public," WUA also invites me to consider several other PSC decisions. WUA Br., dkt. 251:16-17 fn. 25-33. However, WUA does not explain why old PSC decisions shed

light on the legal correctness of PSC's decision in this matter nor does WUA explain, if those past decisions somehow might help, how to square its citation to an agency's conclusion of law with our supreme court's admonishment to "no longer defer to administrative agencies' conclusions of law …." *Tetra Tech*, 2018 WI 75, ¶3 n.3.

To summarize, a public utility refers to (1) an entity (2) that controls equipment (3) for transmitting power (4) to the public. Whether the person receiving power is "the public" depends on the facts and circumstances of the power transmission which, in turn, "must be tested by the statute in the light of such facts and circumstances." *Cawker*, 133 N.W. at 159.

b. PSC erroneously interpreted the phrase "public utility."

Having defined a "public utility," I turn next to PSC's decision to see how it defined the same term. PSC concluded that "[t]he Family Project does not … transmit … power either directly or indirectly to or for the public." R. 57:5. PSC reached this conclusion because it determined "[t]he Family Project will provide service only to the Stevens Point Family and is not intended or designed to provide service to anyone else; and therefore does not provide power to or for the public." R. 57:11 (quotation marks and citations omitted). As best I can tell, PSC must have interpreted an entity's status as a "public utility" to depend on the facts and circumstances of an individual "project." This is evident from PSC's reasoning that "North Wind, as owner of the Family Project … is not, by virtue of that arrangement alone, subject to regulation as a public utility …." R. 57:6. In other words, after considering only the individual project at issue here, PSC concluded North Wind was not a public utility because the Family Project would not involve transmission of power to the public.

To explain why a project-based definition of "public utility" was correct, PSC says that "all agree that *Cawker* provides the relevant legal test for evaluating the Family Project." PSC

Resp. Br., dkt. 255:23. Analogizing to *Cawker*, PSC argues that "[i]f *Cawker* determined it to be permissible to sell power to a group of neighbors, then certainly the leasing of solar panels to a single family, as North Wind has contracted to do, is legally allowed." PSC Resp. Br., dkt. 255:23.

Vote Solar also commits to the defense of PSC's project-based definition, but for a different reason. It says that "[t]he plain language of Section 196.01(5) … turns on the specific 'plant or equipment' in question …." Vote Solar Resp. Br., dkt. 256:32. To explain this emphasis on a specific piece of equipment, Vote Solar points to a part of the second clause of § 196.01(5) that refers to the things an entity—a corporation, company, etc.—must control to be a public utility. *Id.* at 32-33.Vote Solar appears to believe the rule of last antecedent somehow applies to § 196.01(5) but it does not explain beyond a citation to the general existence of the doctrine. *Id.* (citing *Vandervelde v. City of Green Lake*, 72 Wis. 2d 210, 215, 240 N.W.2d 300 (1976). I will not attempt to develop the argument further: "it is up to them to make their case." *SEIU v. Vos*, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35. Vote Solar further contends that interpreting § 196.01(5) to require consideration of an entity would lead to absurd results, but it does not explain why except to cite to another brief's unhelpful analogy to a coffee shop. Vote Solar Resp. Br., dkt. 256:37.[8]

Finally, WUA contends that PSC's definition of "public utility" was wrong because it "focused solely on a single transaction between North Wind and one family …." WUA Br., dkt.

[8] Here is the coffee shop analogy on which Vote Solar relies:

> In the hypothetical, one coffee shop paid for its DER system with cash, and the other coffee shop financed its DER system through a lease. Both DER transactions are private transactions, neither DER system meets the definition of a "public utility," and treating the customers differently would be undue discrimination.

R. 42:3. I do not understand why this analogy demonstrates that defining a public utility as an entity, rather than a vague project-based definition, will lead to absurd results.

251:33. WUA thinks that § 196.01(5) defines a public utility as an entity and, because North Wind is an entity, PSC should have looked to whether "North Wind's activities … subject it to regulation as a public utility." WUA Br., dkt. 251:32.

I agree. PSC's interpretation was erroneous because, in the words of the concurring commissioner's opinion, "[i]t is the entity that is or is not a public utility." R. 57:31. Put another way, the plain text of § 196.01(5) defines "public utility" by asking courts to consider the electrical transmission of a "corporation, company, individual, association, their lessees, trustees or receivers appointed by any court, and every sanitary district, town, village or city …." PSC's attempts to apply what it believed to be the "legal test for evaluating the Family Project," PSC Resp. Br., dkt. 255:22, missed the mark because "the Family Project" is not a corporation, company, individual, association, or any other entity.

Accordingly, WUA satisfies its burden under Wis. Stat. § 227.57(5) to show that PSC erroneously interpreted a provision of law.

2. Substantial evidence does not support PSC's finding that the Stevens Point Family was not a member of the public.

WUA next points to the PSC's finding that the Stevens Point Family—the primary purchasers of the electrical energy generated by the Family Project—was not a member of "the public." WUA says substantial evidence in the record does not support this finding, so PSC's decision should be remanded under Wis. Stat. § 227.57(6).[9]

[9] Although it challenges PSC's determination under the substantial evidence test, WUA Br., dkt. 251:37, WUA also characterizes PSC's definition of the Stevens Point Family as "the public" as though it were a legal error. *Id.* at 33 ("The Commission also committed legal error when it concluded that the family at issue is not 'the public.'"). WUA contends that, as a matter of law, an energy customer cannot have a particular relationship with an energy seller without a "relationship other than that of power provider and customer …." *Id.* at 35. I express no opinion about whether this position accurately states the law. I instead assume PSC applied the correct legal standard under § 196.01(5) and address PSC's findings about the Stevens Point Family as a matter of substantial evidence.

a. Legal standard for substantial evidence.

"Substantial evidence means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision." *Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶43, 362 Wis. 2d 290, 865 N.W.2d 162 (quoted source omitted). To determine whether a decision is supported by substantial evidence:

> The test is whether, taking into account all of the evidence in the record, reasonable minds could arrive at the same conclusion as the agency. The findings of an administrative agency do not even need to reflect a preponderance of the evidence as long as the agency's conclusions are reasonable.

Kitten v. DWD, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649 (internal citations omitted). Under this test, "[t]here may be cases where two conflicting views may each be sustained by substantial evidence." *Samens v. LIRC*, 117 Wis. 2d 646, 660, 345 N.W.2d 432 (1984) (quoted source omitted).

b. PSC's finding that the Stevens Point Family was not "the public" is not supported by substantial evidence.

To explain its finding that the Stevens Point Family was not "the public," PSC began with § 196.01(5)(a) and *Cawker's* definition of the phrase, then reasoned that a single family was not "the public" based on the individual facts and circumstances of this case. R. 57:11-13.[10] Although it did not articulate which facts and circumstances were especially important in making this determination, PSC appears to have relied primarily on evidence that North Wind would not sell

[10] PSC's decision suggests that its conclusion warrants some deference as the product its experience and specialized knowledge. R. 57:16. I agree that PSC's commissioners are "experts in the field of utility regulation or they employ experts …" *id.* (quoted source omitted), and I also agree that courts generally defer to the experience of an agency. Wis. Stat. § 227.57(10). However, deference does not mean blind adherence to an agency's conclusions. Here, PSC does not articulate what special knowledge it possesses that helped it to understand the Stevens Point Family's status as the public.

energy to others. R. 57:13. PSC now contends that suggesting North Wind sold, or intended to sell, energy to anyone else "is purely speculative"[11] and that, under a line of federal cases discussing a criminally accused's role in a conspiracy, "evidence of a single lease agreement alone was not enough to raise the specter that North Wind held itself out to the public …." PSC Br., dkt. 255:18.

PSC's reliance a federal criminal conspiracy case does not help explain why substantial evidence supported PSC's finding about the Stevens Point Family. To begin, PSC neither explains why a conviction for a federal criminal conspiracy is like an administrative agency's classification of a public utility nor, if there was some similarity, why PSC relies on *United States v. Aviles*, 274 F.2d 179 (2nd Cir. 1960) to make that point. *Aviles* dealt with an alleged criminal conspiracy in which approximately fifty conspirators imported and distributed heroin around the country. *Id.* at 181. The Second Circuit's opinion covers various parts of many of the conspirators' appeals, but the part of this opinion on which PSC focuses has to do with just one alleged conspirator, Rodriquez. At trial, the government introduced testimony that Rodriquez purchased heroin from the conspirators. *Id.* at 189. However, as the Second Circuit explained, the testimony inculpating Rodriquez contained "no suggestion of any conversation with Rodriquez or other manifestation to him by [a known conspirator] which might have given Rodriquez knowledge as to how [the conspirator] obtained the narcotics." *Id.* The *Avila* court thus held that the government failed to prove Rodriquez was part of the narcotics conspiracy because "conviction of conspiracy requires an intent to participate in the unlawful enterprise." *Id.* To summarize, *Avila* overturned a conviction for conspiracy to distribute heroin where trial evidence showed that an alleged conspirator

[11] North Wind's involvement in other energy sales is perhaps not speculative. The petition asking PSC for review itself discusses North Wind's other business activities. R. 160:168 ("The T.B. Scott Free Library in Merrill, Wisconsin recently installed a 27-kw solar array with a third-party arrangement with North Wind …."); *see also id.* at 184 (discussing North Wind's deal with the Portage County Solar Group); *id.* at 190 (discussing North Wind's deal with the Madeline Island Planned Microgrid.").

participated in only a single heroin sale.

As best I can tell, PSC's point here is that for the same reasons a single heroin sale could not have proved Rodriquez' involvement in a conspiracy to make other heroin sales, a single solar panel deal could not have proved North Wind's involvement in making other solar panel deals. The primary problem with this comparison is that it assumes administrative agencies are like criminal juries and solar energy sellers are like heroin distributors, but PSC does not explain those similarities. PSC Resp. Br., dkt. 255:18-20. I will not attempt to develop the argument for it: "it is up to them to make their case." *SEIU v. Vos*, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35.

In any event, I am skeptical that a reasonable person could believe that an entity that sells energy would do so only to a single family in Stevens Point, Wisconsin, but not to anyone else. I think it would take a great deal of evidence to convince a reasonable person that such an entity exists. To illustrate, imagine the only record evidence here was that a family purchased a 1963 Ford Ranchero and that, based only on this evidence, PSC declared that the Ford Motor Company did not make sales to "the public." Could reasonable minds arrive at the same conclusion? Of course not. The fact that PSC "constrain[ed] its ruling to what was known," PSC Resp. Br., dkt. 255:20, says almost nothing about whether reasonable minds could agree with the result of that constraint.

To determine whether North Wind's sale of energy was to "the public," any lawful determination had to "be tested by the statute in the light of such facts and circumstances." *Cawker*, 133 N.W. at 159. And, in making that determination, a reasonable person would understand that "[t]he law should receive a construction that will effectuate its true purpose, however difficult that may be." *Id.* Here, it is neither necessary to examine the evidence of record nor to pinpoint the "true purpose" of Wisconsin's energy regulation statutes because one part of PSC's final decision,

by itself, illustrates why any finding about the Stevens Point Family cannot supported by substantial evidence: PSC admitted "[t]here are no facts in this record establishing what, if any, additional projects North Wind might engage in …." R. 57:13.

This admission is critically important because PSC does not explain why a reasonable person could, having admitted to knowing almost nothing about North Wind, conclude North Wind does not transmit energy to the public. A reasonable person would instead try to understand "the public" to effectuate the true purpose of its statutory meaning. *Cawker*, 133 N.W. at 159. In doing so, that person would understand that (1) the legislature has chosen to regulate the transmission of energy by imposing costs on, or sometimes total barriers to, entities that sell energy to the public; (2) those regulations do not apply to an entity that forms a particular relationship with an energy customers; (3) so, assuming a sufficiently thoughtless interpretation of "the public," rational energy sellers will choose to bypass regulation whenever it becomes cheaper to form particular relationships than it is to comply with state law. As the dissenting commissioner pointed out, our legislature cannot have intended "free reign for entities to enter into an unlimited number of contracts to sell electricity to current customers of Wisconsin utilities." R. 57:35. On the contrary, our energy regulations are "intended to include those … who furnished the commodities therein named to or for the public." *Cawker*, 133 N.W. at 159.

In sum, the record tells us North Wind and the Stevens Point Family have a lease that involves the sale of energy, but as PSC concedes, the record tells us exactly nothing else about North Wind's other business or why North Wind would enter into such a lease. Reasonable minds could not agree with the finding that, based on that limited evidence, North Wind did not sell energy to the public.

Accordingly, I must conclude the record contains no credible, relevant, and probative

evidence upon which reasonable persons could rely to find that the Stevens Point Family was not a member of "the public." As a result, WUA satisfies its burden under Wis. Stat. § 227.57(6) to show PSC's action depended on a finding of fact that is not supported by substantial evidence in the record.

3. PSC's remaining alleged errors are moot.

WUA further contends that PSC committed a material error in procedure by not considering evidence of North Wind's business plans. WUA Br., dkt. 251:39-41. I do not consider this argument further because I have already concluded PSC's final decision erroneously interpreted the law and further concluded that PSC's final decision relies on a finding of fact that is not supported by substantial evidence. For either or both reasons, I must remand this matter for further proceedings. A third alleged error will have no practical effect, so the issue is moot. *In re Commitment of S.A.M.*, 2022 WI 46, ¶42, 402 Wis. 2d 379, 975 N.W.2d 162 ("An issue is moot when its resolution will have no practical effect on the underlying controversy.").

D. Conclusion.

On remand, PSC may again choose to declare whether North Wind is or is not a "public utility," but it must make that declaration consistent with the legislature's definition in Wis. Stat. § 196.01(5). That statute plainly says that any declaration about an entity's status as a public utility will require PSC to determine whether the entity, and not any of its individual projects, transmits energy to the public. PSC must support any such declaration by pointing to sufficient evidence of the individual facts and circumstances on which it has relied.

ORDER

For these reasons,

IT IS ORDERED that the Public Service Commission's final decision is remanded.

This is a final order for purpose of appeal. Wis. Stat. § 808.03(1).