STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

THE ALLIANCE FOR SOLAR CHOICE, and RENEW WISCONSIN,

Petitioners,

v. Case No. 15-CV-0153

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent, and

WISCONSIN ELECTRIC POWER COMPANY,

Intervenor-Respondent.

RESPONDENT PUBLIC SERVICE COMMISSION OF WISCONSIN'S SUPPLEMENTAL BRIEF OPPOSING PETITION FOR JUDICIAL REVIEW

Respondent Public Service Commission of Wisconsin (the "Commission") submits this Supplemental Brief Opposing Petition for Judicial Review pursuant to the Court's request at oral argument on August 31, 2015. The Court requested that the parties submit supplemental briefs explaining the law on discrimination in ratemaking, clarifying what is meant by identifying rate setting as a "legislative function," and applying these concepts to this case.

ARGUMENT

I. THE LAW RECOGNIZES THAT DISCRIMINATION IN RATE SETTING IS PERMISSIBLE, PROVIDED THAT ANY SUCH DISCRIMINATION IS NOT UNJUST OR UNREASONABLE.

In relevant part, Wis. Stat. § 196.37(1) authorizes the Commission to remedy any "rates, tolls, charges, schedules or joint rates [it finds] to be unjust, unreasonable, insufficient or *unjustly* discriminatory or preferential or otherwise unreasonable or unlawful[.]" (emphasis added); *see*

also Wis. Stat. § 196.60(1)(a) (prohibiting utilities from charging different persons different levels of compensation "for a like contemporaneous service."). "Not every discrimination in the treatment by [utilities] of their customers is condemned by the common law. Only unjust discriminations are so condemned." *City of Superior v. Douglas Cnty. Tel Co.*, 141 Wis. 363, 122 N.W. 1023, 1025 (1909). Indeed, under Wis. Stat. § 196.02(2), the Commission *must* establish classifications of service that "may take into account the quantity used, the time when used, the purpose for which used, and any other reasonable consideration."

In accordance with the legislative directives noted above, Wisconsin case law provides that "[d]ifferential pricing, i.e., different schedules of rates for different classes of customers *and services*, is an entirely lawful and economically desirable form of price discrimination, insofar as regulated public utilities are concerned." *Wis. Ass'n of Mfrs. & Commerce, Inc. v. Pub. Serv. Comm'n of Wis.*, 194 Wis. 2d 314, 324, 287 N.W.2d 844 (Ct. App. 1979) ("*WAMC*") (citation omitted) (emphasis added). "Once it is established that the services are different, a difference in the rates for each is immaterial so far as lawfulness is concerned." *Vill. of Fox Point v. Pub. Serv. Comm'n of Wis.*, 242 Wis. 97, 102-03, 7 N.W.2d 571 (1943).

Utility law treatises echo these standards set forth in Wisconsin law. "To come within the prohibition, discrimination in rates must be unreasonable and without a factual basis. A mere difference in charges to different customers does not necessarily constitute unlawful or unjustifiable discrimination. Discrimination is not established by a showing that others are charged lower rates unless it is also shown that the conditions of service are comparable." 29 Corpus Juris Secundum Electricity § 72 (2015) (citations omitted).

"A utility may, without being guilty of unlawful discrimination, classify its customers or patrons on any reasonable basis, as according to the *purpose for which they receive its service* or

product, or the quantity or amount received, or the *different character of the service furnished*, and, subject to the general requirements of reasonableness, make separate rates for each class or group even though there is but one customer included therein." *Id.* § 78 (emphasis added).

II. THE DISTRIBUTED GENERATION DEMAND CHARGE IS NOT DISCRIMINATORY, LET ALONE UNJUSTLY DISCRIMINATORY.

As the complaining parties, "the petitioners bear the burden of proof; the [Commission] need not demonstrate the absence of a discriminatory effect." *Winch v. Pub. Serv. Comm'n of Wis.*, 96 Wis. 2d 362, 371, 291 N.W.2d 448 (1980). Whether a rate design is unjustly discriminatory is a question of fact for the Commission. *See, e.g.*, *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 141 Wis. 2d 10, 16, 414 N.W.2d 308 (1987). Further, "[w]here there is substantial evidence in the record to support [the Commission's] action, the act cannot be arbitrary or capricious." *WAMC*, 194 Wis. 2d at 569.

The distributed generation demand charge is not discriminatory, let alone unjustly discriminatory, because it is imposed on customers who: (1) obtain a *standby* or *backup* service that is categorically distinct from the service those who utilize energy efficiency measures obtain; and (2) present a set of circumstances, namely that their demand can be adequately measured, that distinguishes them from customers who utilize energy efficiency measures.

First, distributed generation customers obtain a unique standby or backup service. Energy efficiency customers, however, obtain standard service and thus contribute to some demand costs through the variable energy charge. (R.256:53-57.) For example, an energy efficiency customer purchasing 1000 kWh from WEPCO pays: (1) $16.00 per month in fixed charges, none of which contributes to demand costs; and (2) $131.11 in variable energy charges ($0.13111 per kWh), part of which contributes to demand costs. Unlike energy efficiency customers, distributed generation customers offset their energy consumption with distributed generation. *Id.* For example, a

customer using constant distributed generation that completely offsets energy purchases from WEPCO pays: (1) $16.00 per month in fixed charges, none of which contributes to demand costs; and (2) $0.00 in variable energy charges, none of which contributes to demand costs.[1] Thus, in this scenario, distributed generation eliminates contribution to demand costs recovered through the variable energy charge, despite requiring the utility to incur these demand costs to provide the full standby or backup service needed if the distributed generation fails. *Id.* Further, energy efficiency measures are "not likely to suddenly become less efficient, leading to an immediate demand upon the grid. The [distributed] generation owned by customers, on the other hand, is likely to have sudden fluctuations, to which the grid must respond immediately." (R.257:17r.)

Second, the nameplate capacity of a customer's distributed generation, when combined with the metering and true-up the Commission required in the Final Decision, allows WEPCO to adequately measure demand.[2] While a demand charge on all customers may be the most appropriate way of recovering demand costs, WEPCO simply lacks the necessary infrastructure to measure the demand of small customers. (R.256:36; R.257:23r.) Imposing a demand charge on distributed generation customers now is important to ensure demand costs are recovered as the use of distributed generation grows. (R.256:54); *see WAMC*, 94 Wis. 2d at 321-25 (upholding, over discrimination claim, a rate design sending price signals as a method of encouraging conservation).

In sum, under the Wisconsin authority cited above, the distributed generation demand charge is not discriminatory. To promote fixed cost recovery, the distributed generation demand charge is imposed on a *growing* number of customers obtaining a unique standby or backup service

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[1] As noted in the Commission's initial brief and at oral argument, customers owning intermittent distributed generation (i.e., solar and wind) purchase energy from the grid when their intermittent distributed generation is not operating and therefore contribute at least some amount towards the demand costs they cause. (R.256:57.) That is why the demand charge is *reduced* for these intermittent distributed generation customers. *Id.*

[2] Further, unlike energy efficiency customers, those customers who take service under the COGS-NM tariff utilize WEPCO's distribution system to *deliver* the energy they sell to WEPCO. (*See* R.256:49-57.)

who, unlike energy efficiency customers, do not contribute towards the demand costs they cause yet have in place a mechanism that allows WEPCO to accurately measure demand.

Courts across the country have upheld "demand charge[s] based on the maximum current a consumer may use . . . even though [they] bear[] most heavily on those whose use is irregular." 29 Corpus Juris Secundum Electricity § 72 (2015). For instance, in *Antioch Milling Co. v. Pub. Serv. Co. of N. Ill.*, 4 Ill. 2d 200, 203-07, 123 N.E.2d 302 (1954), an infrequent use customer previously exempt from a demand charge[3] opposed its reinstatement on the grounds that it was unlawfully discriminatory. The court rejected this claim, noting that "[a]ppellants' real complaint is that such a charge bears most heavily on those whose consumption is irregular. That is its purpose, and of course that is its effect. But the appellants cannot require a public utility to adjust its rates to compensate for economic disadvantages arising out of their method of doing business." *Id.* at 208. Similarly, in *State ex rel. Federal Reserve Bank of Kansas City v. Pub. Serv. Comm'n*, 239 Mo. App. 531, 543-44, 191 S.W.2d 307 (1945), a distributed generation customer seeking emergency backup service opposed a demand charge on the grounds that it was unlawfully discriminatory. The court rejected this claim, plainly stating that "[i]f the Bank desires the Light Company to reserve energy for it[,] it should pay for that service." *Id.* at 544. Otherwise, there would have been "discrimination in favor of the Bank against the other classes of customers." *Id.*

The case at bar is much like *Antioch Milling Co.* and *Federal Reserve Bank.* WEPCO's distributed generation customers obtain a standby or backup service that they have not paid for in the past. The remainder of WEPCO's ratepayers should not be required to subsidize the method

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[3] The court in *Antioch Milling Co.* succinctly described a demand charge: "[a] demand charge is designed to allocate to a utility's customers their fair portion of those fixed costs which must be incurred by the utility regardless of the amount of power which is actually supplied. It is the price which must be paid for the construction and maintenance of a plant with sufficient capacity to satisfy its customers' demands. Such a charge for the utility's readiness to serve is proper." 4 Ill. 2d at 207 (citations omitted).

through which distributed generation customers seek to reduce their purchases from the grid. Where the remainder of WEPCO's ratepayers contribute to demand costs, failing to impose the demand charge on distributed generation customers could be discrimination in their favor. If distributed generation customers want a standby or backup service that requires WEPCO to supply all their energy needs in the event their distributed generation fails, they should pay for it. Differentiating the mechanism through which they pay demand costs is not discriminatory.

III. RATE SETTING IS A "LEGISLATIVE FUNCTION" BECAUSE THE LEGISLATURE HAS LAWFULLY DELEGATED TO THE COMMISSION THE AUTHORITY TO SET UTILITY RATES.

In its entirety, Wis. Const. art IV § 1 states that "[t]he legislative power shall be vested in a senate and assembly." "Legislative power" is "a term more easily understood than defined." *State v. Lange Canning Co.*, 164 Wis. 228, 157 N.W. 777, 780 (1916). However, a simple definition is " the power to declare what rules and principles of conduct shall govern the citizens of this state and which shall be enforced and according to which the conduct of citizens of this state is to be regulated, limited, or protected." *Id.* "Taken literally, [Wis. Const. art IV § 1] would bar any delegation of legislative power to administrative agencies. However, [the Supreme Court of Wisconsin] has long recognized that the delegation of the power to make rules *and* effectively administer a given policy is a necessary ingredient of an efficiently functioning government." *Gilbert v. Wis. Med. Exam. Bd.*, 119 Wis. 2d 168, 184, 349 N.W.2d 68 (1984) (emphasis added).

Rate regulation by "direct action of the legislature has been tried and found impracticable, and its attempt generally abandoned." *Minneapolis, St. P. & S. S. M. Ry. Co. v. R.R. Comm'n of Wis.*, 136 Wis. 145, 115 N.W. 905, 910 (1908). Thus, statutes that establish that rates and services must be reasonable and empower the Commission to investigate, fix, and determine rates have been upheld as a valid exercise of the legislative power. *Id.* at 910-11. Indeed, the legislature may

empower an administrative agency to determine facts on which the provisions of a law are to operate provided that authority is surrounded with procedural safeguards. *See* 73 Corpus Juris Secundum Public Administrative Law and Procedure § 106 (2015). This is what it means to say that "rate setting is a legislative function." *WAMC*, 94 Wis. 2d at 319.

IV. BECAUSE RATEMAKING IS A LEGISLATIVE FUNCTION, THE COURT MUST DEFER TO THE COMMISSION'S DETERMINATIONS HERE.

In approaching the question whether the basis adopted by the Commission resulting in increased rates is illegal or unreasonable, the Court "should keep in mind the fact that the regulations of rates is exclusively a legislative function." *City of Eau Claire v. R.R. Comm'n of Wis.*, 178 Wis. 207, 189 N.W. 476 (1922). "[J]udicial review of legislative-type decisions is extremely limited." *WAMC*, 94 Wis. 2d at 319. In *City of Eau Claire*, the Supreme Court of Wisconsin made abundantly clear that courts generally should not interfere with rate orders:

> [A] court should proceed with great caution in setting aside the orders of the Commission fixing rates, for what may be considered detail errors of judgment. The fixing of rates is a complicated problem, calling for expert and scientific knowledge. The rate promulgated by the Commission is generally the result of mature consideration on the part of those having expert and technical knowledge which is essential in arriving at just and correct conclusions. The announcement of the Commission should be accorded the greatest deference by the courts, and its orders should be set aside because of presumed errors of judgment or technical computation, with great caution and reluctance.

189 N.W. at 478. In sum, "[t]he legislature has seen fit to endow the [C]ommission with extraordinary power." *City of St. Francis v. Pub. Serv. Comm'n of Wis.*, 270 Wis. 91, 98, 70 N.W.2d 221 (1955); *see also* Wis. Stat. § 196.02(1).

While Wis. Stat. § 227.57 further defines the scope of judicial review of the Commission's decisions in rate setting matters, these additional standards reflect and require judicial deference to the Commission's performance of its legislative function. For instance, under Wis. Stat. § 227.57(8), "the court shall not substitute its judgment for that of the agency on an issue of discretion." Where the legislative function of rate making unquestionably involves the exercise of

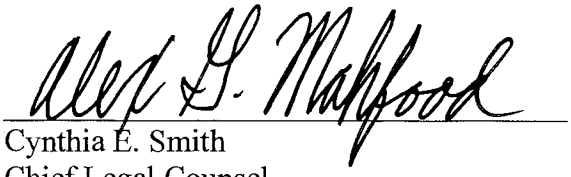
discretion as a matter of law, the Court must grant deference to the Commission's determinations. *See* Wis. Stat. § 227.01(3)(a) ("A 'class 1 proceeding' is a proceeding in which an agency acts under standards conferring substantial discretionary authority upon it. 'Class 1 proceedings include rate making, price setting . . . ."); *Wis. Bell, Inc. v. Pub. Serv. Comm'n of Wis.*, 2004 WI App 8, ¶¶ 16-22, n.8, 269 Wis. 2d 409, 675 N.W.2d 242.

The legislative nature of the Commission's rate setting function also controls this Court's application of the substantial evidence test to the Commission's factual findings. Wis. Stat. § 227.57(6); *Madison Gas & Elec. Co. v. Pub. Serv. Comm'n of Wis.*, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982). For instance, Wis. Stat. § 227.57(10) states that on judicial review "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it."

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court dismiss the Petition for Judicial Review and affirm the Final Decision in its entirety.

Dated this 15th day of September, 2015.

By: 

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