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 REPLY BRIEF OPPOSING PETITION FOR JUDICIAL REVIEW

I. THE LEGISLATIVE FUNCTION THE COMMISSION PERFORMS IN SETTING UTILITY RATES CRITICALLY DEFINES THIS COURT'S REVIEW OF THE FINAL DECISION.

Petitioners incorrectly assert that because they challenge the Final Decision under Wis. Stat. ch. 227 as arbitrary, discriminatory, and lacking in substantial evidence, the fact that the Commission performs a legislative function in setting utility rates is somehow rendered irrelevant. (Pet'r's Supp. Br. at 2.) This assertion is incorrect. The deference due the Commission's extremely discretionary, legislative function of setting utility rates is explicitly reflected throughout Wis. Stat. ch. 227, including the provisions under which Petitioners challenge the Final Decision.[1] Further, the deference this Court must afford the Commission controls this Court's

[1] *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 . . . ." (emphasis added)); 227.57(8) (precluding the court from substituting its judgment for that of the

application of the substantial evidence test under Wis. Stat. § 227.57(6). *See, e.g.*, *Madison Gas & Elec. Co. v. Pub. Serv. Comm'n of Wis.*, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982) ("*In applying the substantial evidence to this case*," this Court must accord due weight deference to the Commission pursuant to Wis. Stat. § 227.57(10) (emphasis added)). For instance:

> Since the function performed by the [Commission] in processing this permit application was legislative, the ultimate test for the judicial review of its findings was stated by this court in the first Ashwaubenon Case, as follows: "when the 'substantial evidence' rule of sec. 227.20(1)(d), Stats., is applied to a legislative-type decision, the test is whether reasonable minds could arrive at the same conclusion reached by the [C]ommission." Or as stated in Weyauwega Telephone Co. v. Public Service Comm.: "The weighing of these various factors is a policy function which lies peculiarly within the province of the [Commission]. If there exists any reasonable basis in the evidence for the determination made by the [C]ommission, a reviewing court should not disturb it." Ch. 227 "does not contemplate that the reviewing court make an independent determination of facts." As stated in Gateway City Transfer Co. v. Public Service Comm.: "The court on review is required by statute to give effect to the legislative command that 'Upon such review due weight shall be accorded to the experience, technical competency and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.' " Sec. 227.20(2), Stats. "Whether the granting of the franchise or amendment sought is in the public interest presents a matter for the exercise of legislative discretion by the [C]ommission. It cannot be answered by the application of a proposition of law. It is clear therefore that a trial court must have compelling reasons for reversal where the final conclusion of the agency is based upon a determination which is not only highly discretionary but rests upon the agency's finding as to what is necessary and convenient in the public interest, two terms of indefinite and varying content. We concur in the conclusion of the trial court that such reasons are not present in this case."

Hixon v. Pub. Serv. Comm'n of Wis., 32 Wis. 2d 608, 629-30, 146 N.W.2d 577 (1966).

Thus, contrary to the plain language of Wis. Stat. ch. 227, Petitioners incorrectly argue that the substantial evidence test supplants the deference afforded to the legislative function the Commission performs in setting utility rates. Indeed, no case Petitioners cite actually stands for

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Commission on an issue of discretion and only permitting reversal where, among other inapplicable grounds, the Commission's exercise of discretion is *outside* the range of discretion delegated by law); 227.57(10) (requiring the court to accord due weight to the Commission's experience technical competence, specialized knowledge, and *discretionary authority*).

this proposition. (Pet'r's Br. at 2-3.) Rather, Wis. Stat. ch. 227 recognizes and preserves the discretion afforded to this legislative function. The court in *Wis. Ass'n of Mfrs. & Commerce, Inc. v. Pub. Serv. Comm'n of Wis.*, 94 Wis. 2d 314, 319, 287 N.W.2d 844 (Ct. App. 1979), duly noted this, stating, in reliance on what is now Wis. Stat. § 227.57(8), that "judicial review of legislative-type decisions is extremely limited. It is well settled that rate setting is a legislative agency function. The court may not substitute its judgment for that of the agency in a matter of discretion."

II. THE UNIQUE SERVICE PROVIDED TO AND USAGE OF STANDBY DISTRIBUTED GENERATION CUSTOMERS WARRANT A CHARGE THAT RECOVERS THE DEMAND COSTS THEY HAVE CAUSED BUT NOT PAID.

Petitioners' claim that distributed generation customers and energy efficiency customers "have identical deficits between their rates and their pro-rata share of 'fixed' costs" is simply untrue.[2] (Pet'r's Br. at 9 n.5.) All small class customers cause the utility to incur demand related costs. (R.259:2.) Where demand related costs are recovered through the variable energy charge, however, distributed generation customers who supplant their purchases from the grid do not fairly contribute towards the demand costs they cause Wisconsin Electric to incur in providing *standby* or *backup* service. (R.256:54.) Customers employing energy efficiency measures, however, do

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[2] None of Petitioners' additional discrimination claims have merit either. First, the Final Decision explicitly states that fixed cost recovery was a basis for the distributed generation demand charge. (Pet'r's Supp. Br. at 9 n.5; R.49:82.) Second, Petitioners' claim that the distributed generation demand charge assumes that distributed generation will fail simultaneously with customer and system wide peaks misunderstands how it was developed. (Pet'r's Supp. Br. at 8.) The distributed generation demand charge is a function of the 14.5% *reserve margin* needed to supply backup or standby service and thus "do[es] not assume that all distributed generation will fail coincident with system peak." (R.259:2.) If Wisconsin Electric had made this assumption, it would have based the distributed generation demand charge on the *full cost* of a new combustion turbine. (R.257:11r.) Third, Petitioners' claim that Wisconsin Electric erroneously used the system size as a basis for the distributed generation demand charge ignores that: (1) system size estimates what Wisconsin Electric must backup; and (2) the Commission further required a *metering* and *true up* procedure. (Pet'r's Supp. Br. at 9; R.254:24r; R.49:85.) Last, Petitioners mischaracterize and misunderstand the record in claiming that, under Wisconsin Electric's purported rationale, Cg2 customers, who have demand meters, should not be required to pay the distributed generation demand charge. (Pet'r's Supp. Br. at 9-10.) Wisconsin Electric only waived the distributed generation demand charge for customers with intermittent distributed generation *who pay a demand charge* in their underlying rate. (R.256:57.) While Cg2 customers may have a demand meter, they *do not pay* a customer demand charge in their underlying rate. (R.256:39 ("[T]here is no customer demand charge under the current Cg2 tariff, so all demand-related distribution costs are recovered through the energy rates."); *id.* at 40 ("The [Cg2] customer demand charge in 2015 will be set to zero, so there would be no impact on customers' bills in 2015 or 2016."); R.49:App'x B at 7 (showing a $0.000 Cg2 customer demand charge)).

contribute, through the variable energy charges they pay, to the demand costs they cause Wisconsin Electric to incur in providing *standard* service. (R.259:2; R.51:68.) Further, the demand of these energy efficiency customers will not suddenly spike, thereby causing immediate strain on the grid, like the demand of a customer whose distributed generation fails. (R.257:17r.)

None of the cases Petitioners cite demonstrates how distributed generation customers obtaining a unique standby or backup service who have not previously paid for it are similar to energy efficiency customers in terms of customer usage, service, or characteristics. (Pet'r's Supp. Br. at 6-8.) Nor do they demonstrate that differences in rates "must be based on the cost" to serve.[3] *Id.* at 7. Rather, the cases Petitioners cite involve either: (1) a determination that, like in this case, different customer usage, service, and characteristics *support* different rates; or (2) a determination that, like in this case, customers should not receive a service *for which they have not paid.*

First, in *In re Milwaukee Water Works*, Docket No. 3720-WR-107, at *24 (Pub. Serv. Comm'n of Wis. Feb 3, 2011), the Commission approved an economic development rate (the "EDR") for a customer class maintaining distinct usage characteristics that precluded any finding of discrimination. Like the customer class taking service under the EDR, distributed generation customers obtain a unique standby or backup service under a set of circumstances that readily distinguishes them from energy efficiency customers. *Cf. In re App. of Wis. Power & Light Co.*, Docket No. 6680-UR-115, at *59-61 (Pub. Serv. Comm'n Jan 19, 2007) (rejecting a rate applicable "only to industrial customers that implement mercury control measures").

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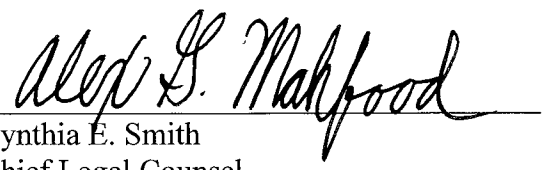
[3] Petitioners incorrectly claim that *City of West Allis v. Pub. Serv. Comm'n of Wis.*, 42 Wis. 2d 569, 167 N.W.2d 401 is distinguishable on the grounds that there, unlike here, a cost of service study (albeit 8 years old) served as a cost basis for the rates. (Pet'r's Supp. Br. at 7 n.3.) This claim is without merit. There was a comprehensive cost of service study here, too. Wisconsin Electric extrapolated from that study to develop the distributed generation demand charge, which recovers costs that distributed generation customers, just like all other small class customers, cause the utility to incur. The issue here is cost *recovery*: based on the nature of the standby or backup service distributed generation customers obtain, however, they do not contribute fairly towards those costs.

Second, in *President and Trs. of Vill. of Kilbourn City v. S. Wis. Power Co.*, 149 Wis. 168, 183, 135 N.W. 499 (1912), the court voided, as violating the filed rate doctrine, a contract between a utility and a municipality receiving free service. To the extent applicable, *Kilbourn City* supports the distributed generation demand charge imposed here, where distributed generation customers have not paid for the standby or backup service they have received. *Cf. In re Pet. of City of W. Allis for Decl. Ruling as to Legality of Discounted Employee Water Bills*, 68 Wis. P.S.C. 55, 56-57 (Jan. 29, 1985) (rejecting a discount on water utility bills to water utility employees). Similarly, in *In re Wis. Elec. Power Co.*, Docket No. 6630-UR-106, 1993 WL 509745, at *18-19 (Pub. Serv. Comm'n of Wis. Feb. 15, 1993), large industrial customers sought to remain indefinitely on a rate being phased out. The Commission rejected their request, expressing concern "with creating small groups of customers who are eligible for a lower rate simply because of historic circumstances." Like the large industrial customers, distributed generation customers should not be exempt, based on the historic circumstance of not having done so in the past, from contributing to their fair share of the demand costs they cause Wisconsin Electric to incur.

Dated this 25th day of September, 2015.

By: 

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