

THE ALLIANCE FOR SOLAR CHOICE, and
RENEW WISCONSIN

Petitioners,
v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN

Case No. 15cv153

Hon. Peter Anderson

Respondent, and

WISCONSIN ELECTRIC POWER COMPANY,

Intervenor-Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners, The Alliance for Solar Choice and RENEW Wisconsin, respectfully submit this supplemental brief on the two issues identified by the Court during the hearing on August 31, 2015.

I. The Caselaw Defining and Applying The "Legislative Type" Decision Taxonomy To Agency Rate Setting Proceedings Do Not Change The Scope and Level of Review Applicable To The Issues In This Case.

The Court asked the parties to provide supplemental briefs on the contention by the Public Service Commission and Wisconsin Electric that ratemaking is a "legislative function." PSC Br. at 23; WEPCO Br. at 21. Both Respondents cite the Wisconsin Court of Appeals' decision in *Wisconsin Association of Manufacturers & Commerce, Inc. v. PSC*, 94 Wis. 2d 314 (Ct. App. 1979). That case, in turn, cites prior cases but does not explain

what a “legislative agency function” means. 94 Wis. 2d at 319, *citing Voight v. Washington Island Ferry Line, Inc.*, 79 Wis. 2d 333, 255 N.W.2d 545 (1977); *Friends of the Earth v. PSC*, 78 Wis. 2d 388, 254 N.W.2d 299 (1977). As the Court noted during the hearing on August 31st, the cases cited in *Wisconsin Association of Manufacturers* do not clearly establish why ratemaking is legislative, or what legal significance (if any) a “legislative” label on the standard of review in this case.

To answer the Court’s questions, Petitioners attempted to trace the origins of the “legislative” label in Wisconsin caselaw. That caselaw traces back to 1847, if not before. *Attorney Gen. v. Chicago and Nw. Ry. Co.*, 35 Wis. 425, 588-89 (1847) (discussing judicial authority and legislative function in setting rates). The evolution of the term is discussed further below. However, at bottom, labeling ratemaking as “legislative” agency action does not alter the statutory standards of review now codified in Wis. Stat. ch. 227 and 227.57 and does not advance respondents’ arguments in this case.

All agency decisions – whether “legislative” or otherwise – require support with substantial evidence¹ and cannot be arbitrary or discriminatory. Because Petitioners’ challenges to the self-generation fees imposed in this case are based on a lack of substantial evidence and as arbitrary and discriminatory, labeling ratemaking as “legislative” is irrelevant to the issues here. *See Madison Gas & Elec. Co. v. PSC*, 109 Wis.

¹ The standard for substantial evidence when reviewing a “legislative-type decision” is “whether reasonable minds could arrive at the same conclusion reached by the commission,” *Scharping v. Johnson*, 32 Wis. 2d 383, 391, 145 N.W.2d 691 (1966), which is the same as or indistinguishable from the standard applicable to all substantial evidence reviews: “that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion.” *Gehin v. Wis. Group Ins. Bd.*, 2005 WI 16, ¶ 48 and n.56 (collecting cases).

2d 127, 325 N.W.2d 339 (1982) (overturning PSC rate decision as not supported by substantial evidence); *Westring v. James*, 71 Wis. 2d 462, 475-76, 238 N.W.2d 695 (1976) (legislative type agency policy decisions still subject to substantial evidence requirement); *Kammes v. Wisconsin*, 115 Wis. 2d 144, 340 N.W.2d 206 (Ct. App. 1983) (remanding “legislative” agency decision as arbitrary and unexplained).

Early caselaw recognized the legislature’s authority to set rates for certain public service companies, as long as sufficient compensation was provided to the companies to avoid unconstitutional taking of the companies’ property. *Madison v. Madison Gas & Elec. Co.*, 129 Wis. 249, 265. However, prior to formal legislatively set rates, courts recognized an obligation arising expressly or implied from the company’s charter to furnish public services only at “reasonable” rates. *Attorney Gen.*, 35 Wis. at 588 (early railroad company charters allowed collection of reasonable rates”); *Madison*, 129 Wis. at 265 (implicit in right to collect rates is to collect reasonable rates). When the public service companies rates were challenged as unreasonable – in violation of the charter – courts would review the rates being charged, compared to current conditions and costs, and determine as a judicially-found fact whether rates were reasonable. *Attorney Gen.*, 35 Wis. at 588-89 (“The courts have authority to limit the right to reasonable tolls; to tolls reasonable, not in the arbitrary judgment of the corporation, but in fact.”); *Madison*, 129 Wis. at 265. Thus, determining whether specific rates complied with the implicit obligation of public service corporations to charge only reasonable rates, based on the then-existing facts and circumstances, was “a judicial question.” *Id.*; see also *Reagan v. Farmers’ Loan & Trust Co.*, 154 U.S. 362, 397-98 (1894). In effect, the courts were

interpreting and enforcing contractual obligations imposed through the corporate charters of the public service companies.

In contrast to judicial review of rates in contract enforcement type proceedings, courts recognized a separate authority to set prospective rates for future services distinct from the judicial authority to construe and apply corporate charters requiring reasonable rates. *Madison*, 129 Wis. at 266. The authority to set future rates arose from the police power authority of the legislature to make rules to protect “public welfare and public order, under the sovereign power of police...” *Attorney Gen.*, 35 Wis. at 590. Thus, the early distinction between the legislative function and judicial function in determining rates was the difference between setting future rates under legislative police powers of the state and judicial construction of charters as contracts to determine whether rates were reasonable under those agreements. *Reagan*, 154 U.S. at 398-99; *Attorney Gen.*, 35 Wis. at 588-90; *Madison*, 129 Wis. at 266; *Waukesha Gas & Elec. Co. v. R.R. Comm’n*, 181 Wis. 281, 287, 194 N.W. 846 (1923) (courts do not set rates based on policy decisions, but review rates set by the legislative or administrative branches).

The difference in these functions also dictated application of different standards. Legislative power to establish future rates could be based on various factors and policy choices, *id.* at 287, 289-91, while court review excluded policy and focused primarily on whether rates were sufficient to protect the utility from confiscation of its property in

violation of constitutional safeguards or unreasonable under then-existing conditions. *Id.* at 288; *see also Madison*, 129 Wis. at 265-66.²

Unsurprisingly, rate regulation by direct legislation proved to be “impractical” so the legislature abandoned direct rate setting through legislation and delegated the task to agencies. *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. R.R. Comm’n*, 136 Wis. 146, 159-61, 116 N.W.2d 905 (1908). But that delegation did not alter the basis of the authority to set prospective rates as legislative authority. *Id.* at 160. That authority was still exercised as a police power to establish future standards of conduct, and not as a judicial (or quasi-judicial) power to construe contracts and corporate charters.

This legal history, while interesting as general background, does not affect the issues in this case. In this case, Petitioners are not asking the Court to substitute its policy preferences for the PSC’s, nor to construe the term “reasonable” as a question of law, as if enforcing a contract. Rather, Petitioners challenge a specific rate – the one imposed on customers who self-generate some of their electricity – as unsupported by substantial evidence and as unlawfully arbitrary and discriminatory. Petr’s Opening Br. at 2-3. Those standards still apply to “legislative” agency ratemaking. *Madison Gas & Elec.*, 109 Wis. 2d at 133, 136-37; *Kammes v. Mining Inv. & Local Impact Fund Bd.*, 115 Wis. 2d 144, 340 N.W.2d 206 (Ct. App. 1983). Thus, even when the PSC acts in a

² One consequence of ratemaking based on legislative “police” powers to regulate conduct, as opposed to an adjudicative power, is that ratemaking must be prospective. *Kimberly-Clark Corp. v. PSC*, 110 Wis. 2d 455, 466-67, 329 N.W.2d 143 (1983). Presumably, if ratemaking was based on judicial power, rates could be retroactive similar to damages given as a remedy for past harm. *Id.* at 468 (distinguishing between PSC finding unreasonable or discriminatory rates to set future rates and a claim for remedy under Article I, section 9 of the Wisconsin Constitution).

“legislative” type capacity does not give the PSC “arbitrary and unchallengeable power.” *Ashwaubenon v. Public Service Comm’n*, 22 Wis. 2d 38, 45, 125 N.W.2d 647 (Wis. 1963). Courts have always reviewed rate orders to determine whether they fail applicable judicial review standards. *See e.g., City of Madison v. PSC*, 2002 WI App 102 ¶ 12 (reviewing PSC rate case under Wis. Stat. § 227.57(8) standard of review for arbitrary and capricious and substantial evidence); *Minneapolis, St. Paul & Sault Ste Marie Ry Co.*, 136 Wis. at 164-65 (addressing statute allowing judicial review of rate orders for reasonableness). This case is no different.

II. The PSC Is Prohibited From Approving Unjustly Discriminatory Rates.

Wisconsin Statutes prohibit rates that are “unjust, unreasonable, insufficient or unjustly discriminatory or preferential...” Wis. Stat. § 196.37(1); *see also* Wis. Stat. § 196.03(1). Wisconsin Statutes also prohibit any public utility from charging any person less, or more, for utility service than it charges any other person “for a like contemporaneous utility service.” Wis. Stat. § 196.60(1)(a). Wisconsin courts have interpreted the public utility laws to require rates that “make one consumer pay the same as another where the service was furnished under substantially similar conditions.” *Kilbourn City v. S. Wis. Power Co.*, 149 Wis. 168, 180, 181 N.W. 298 (1921). Thus, rates have to be equal and, if they are not, the difference must be based on the difference between the customers’ use of the utility service.

The long established PSC practice is consistent with the statutes and caselaw. The PSC has long interpreted the prohibition on discriminatory rates as requiring

customers to pay the same rates unless there is something specific to their usage characteristics, and the costs imposed by those usage characteristics, justifying a different rate. *In re Pet. of City of W. Allis for Decl. Ruling as to Legality of Discounted Employee Water Bills*, Docket 6360-DR-100, 68 Wis. PSC 55, 58 (Wis.Pub.Serv.Comm'n Jan. 29, 1985); *see also In re Milwaukee Water Works*, Docket 3720-WR-107, Order at 24 (Wis.Pub.Serv.Comm'n., Feb. 3, 2011) (same). Thus, as the PSC has stated, "one of the basic purposes of public utility regulation... is to prevent rate discrimination between customers for which there is no difference in cost." *In re Wis. Elec. Power Co.'s Req. for Rate Increase for Test Year 1993*, Docket 6630-UR-106, 1993 WL 509745, *19 (Feb. 15, 1993.) In short, differences in rates charged to customers must be based on the cost to provide the services that the customers use. This is consistent with federal caselaw, which similarly requires that "electrical rates should be based on the costs of providing service to the utility's customers, plus a just and fair return on equity... 'Properly designed rates should produce revenues from each class of customers *which match, as closely as practicable, the costs to serve each class or individual customer.*'" *Ala. Elec. Coop. v. FERC*, 684 F.2d 20, 27 (D.C.Cir. 1982) (emphasis original) (citing *Carolina Power & Light Co.*, Docket No. ER76-495 (FERC Oct. 2, 1979)); *see also* *Petr's Reply* at 13 n.12.³

³ *City of West Allis v. PSC*, 42 Wis. 2d 569, 167 N.W.2d 401 (1969) is not to the contrary. In that case, there was a cost basis for the rates. The actual issue before the court was whether a new study of costs must be done specifically for each rate case, or whether the PSC could rely on a prior study and increase the rates for each class proportionately. *Id.* at 578-79. Any broad statements in the opinion about the need for cost studies are not relevant to the holding, and thus dicta. In fact, the U.S. Supreme Court case cited in *City of West Allis* confirms that the rule is not that costs causation should not be the agency's guidepost, but that the ratemaking agency is "not bound to the service of *any single regulatory formula...*" *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) (emphasis added). It is undisputed that the PSC has discretion to select the

For example, in Wisconsin Power & Light's 2007 rate case the PSC rejected a proposed special rate for an industrial customer that would have been 22.8% cheaper for energy and 9% cheaper for capacity compared to standard charges. *In re Application of Wis. Power and Light Co. for Auth. to Change Retail Elec. Rates and Natl. Gas Rates*, Docket 6680-UR-115, Order at 60 (Jan. 19, 2007). Consistent with the statute and prior PSC decision, the PSC reasoned that Wisconsin law, and specifically Wis. Stat. § 196.37, prohibits unjustly discriminatory rates for a select customer category defined based on "factors other than cost of service or usage." *Id.* at 61.

In this case, the fee imposed on some customers who choose to reduce their purchases from WEPCO by self-generating some of their electricity is discriminatory for two reasons. First, the self-generation fee is purports to collect costs for standby generation and transmission and various distribution system costs without any basis that customers with their own generation are imposing these costs, while other customers who reduce purchases from WEPCO by other means (conservation, seasonal use, etc.) do not. Respondents' pure speculation that customer-generators *could* be unavailable simultaneous to system-wide peaks and simultaneous to huge demands by those customers, WEPCO Br. at 11-12, 28, PSC Br. at 35, is unsupported by the record.⁴ So is the apparent assumption that customers who reduce electricity purchases from

methods— or formulas— to determine costs, and is not bound to any one formula. But that is categorically different from the ability to base rates on considerations wholly separate from costs imposed by customers' usage.

⁴ As noted by Petitioners' prior briefs, the evidence suggests that because solar generation occurs during system peak periods, customers with solar generation cost less to serve than customers without solar generation. Petrs' Opening Br. at 17-18.

WEPCO through self-generation do not decrease their peak demand, which is the basis for allocating “distribution” costs, whereas customers who reduce purchases through other methods do.⁵ Moreover, even assuming a connection between customer’s peak demand and cost of service, as the self-generation fee calculation presumes, the fees actually imposed are on generation system size, and not customer demand. There is no evidence of a difference in cost of service based on self-generation system size.

Second, purporting to justify charging a self-generation fee on small customers without demand meters and not on large customers with demand meters, WEPCO claims that customers with demand meters should not pay distribution system costs through a charge on generation system size. R.256, p.57. Instead, customers with demand meters should pay distribution system costs based on their actual measured demand. *Id.* But that is not what WEPCO did. Instead, WEPCO’s tariff charges Cg2 customers – who do have demand meters – a self-generation fee including distribution system costs based on the size of the customer’s self-generation system instead of their

⁵ Counsel for respondents have suggested that the basis for the charge is not to recover backup generation and distribution service caused by but not paid by self-generators, as the Commission’s order says R. 49 p. 84, but because there are “fixed” costs that do not vary with usage and so should be recovered through a fee unrelated to electricity use. See e.g., WEPCO Br. pp. 6-9. The issue of fixed costs versus variable rates was a basis for the customer charge (or “facilities charge”) increase in the rate case, R. 49 pp. 57-61 , but not a reason given by the order for the self-generation charge at issue in this case. See R.49 p. 84 (basing self-generation charge on “standby generation and distribution costs that are not recovered by the facilities charge of the underlying rate” and not based on fixed versus variable). However, even if the fixed versus variable comparison were a basis (and ignoring the critical difference between variable costs and short term marginal costs) there is no basis for discriminating against one group of customers – self-generators – who pay less than their pro-rata share of so-called “fixed” costs but not similarly charging other customers with the same usage pattern – like those who conserve – who have identical deficits between their rates and their pro-rata share of “fixed” costs.

actual demand. *See* R.49, Appx B p.7 (imposing the same self-generation fee on Cg2 customers as Rg and Cg1 customers, despite Cg2 customers being demand metered). Neither WEPCO nor the PSC has explained why Cg2 customers – who are demand metered – should pay for distribution system costs through the self-generation fee, rather than through the demand charge like Cg3 and primary voltage customers who are also demand metered.

Customers with self-generation face unjustly discriminatory rates without a basis in the record showing that self-generation imposes different costs to provide service or customer usage than customers who buy less electricity through other means.

Conclusion

For the foregoing reasons, and for the reasons set forth in Petitioners' briefs and at hearing, the PSC's decision should be vacated and remanded.

Respectfully submitted this 15th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2015, I mailed a true and correct copy of the foregoing brief to the following attorneys via First Class U.S. Mail:

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Dated this 15th day of September, 2015.

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