

THE ALLIANCE FOR SOLAR CHOICE *et al.*,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WI,

Respondent, and

WISCONSIN ELECTRIC POWER COMPANY,

Intervenor-Respondent.

Case No. 15-CV-0153

Case Code: 30607

Administrative Agency Review

Hon. Peter Anderson

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**SUPPLEMENTAL RESPONSE BRIEF OF  
WISCONSIN ELECTRIC POWER COMPANY**

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This brief responds to the supplemental brief filed by Petitioners on September 15, 2015. That brief once again seeks to avoid the application of great weight deference to the rate-setting decision at issue here and the implications of that standard for the Court's review. It also raises new and misleading arguments regarding the Petitioners' "discrimination" challenge to the Demand Charge at issue. As Wisconsin Electric explained in its supplemental brief, nothing in Wisconsin law requires the Commission to price tariffed services identically across all customer classes, so the Petitioners' "discrimination" challenge (like the others) should be rejected.

**I. Petitioners once again mistake statutory *requirements* for the applicable *standard of review*. That standard is great-weight deference.**

The Court asked the parties to explain what it means to say that the Commission acts in a "legislative capacity" in setting public utility rates. The Petitioners claim that it means nothing: "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. . . ." Pet. Supp. Br. at 2.

At the risk of over-repetition, the statutory requirements stated in Wis. Stat. § 227.57 are not standards of review. They are requirements for agency decisions. Under Wisconsin law,

there are only three standards of review for a court to choose from on Chapter 227 review:

“great weight” deference (tellingly, also known as “controlling weight” deference), “due weight” deference, and no deference. *See, e.g., Hillhaven Corp. v. DHFSS*, 2000 WI App 20, ¶ 12 fn. 6, 232 Wis. 2d 400, 606 N.W.2d 572. “Substantial evidence” is not a standard of review.

Wisconsin Electric agrees with Petitioners that Wis. Stat. § 227.57(7) applies here, and that its “substantial evidence” requirement is met by “that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion.”<sup>1</sup> *See* Pet. Supp. Br. at 2 fn. 1. But neither that statement of the substantial evidence requirement nor the requirement itself is a standard of review. In their supplemental brief, Petitioners continue to ignore this distinction.

This distinction matters because, while the requirements of Wis. Stat. § 227.57 still apply to the Commission’s decisions when it is acting in its “legislative,” rate-setting capacity, that legislative capacity dictates the standard of review -- the lens through which the Court is to assess the question of whether the statutory requirements are met. To be clear: Petitioners are correct in saying that Wis. Stat. § 227.57, with its “substantial evidence” requirement for agency findings of fact, applies to this agency decision like any other. But that does not resolve the crucial predicate question: which standard of review should the Court apply? The answer, which Petitioners gloss over because of its implications for their appeal, is great weight deference.

Whenever an agency decision is reviewed by a court, the legal requirements for that agency decision under Chapter 227 remain the same. But the standard of review controls how much leeway the court will afford the agency in assessing whether those requirements have been satisfied. The standard of review is dictated by the type of decision the agency made. Here, the Court is reviewing a ratemaking decision by the Commission, and Wisconsin law is clear that

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<sup>1</sup> Wisconsin Electric submits that the recent decision by Judge Colás in another rate-setting review, *Citizens Utility Board of Wisconsin, Inc. v. Public Service Commission of Wisconsin*, Dane County Case No. No. 14-CV-1137 (May 26, 2015) (Exhibit A), exemplifies how the Court should apply that requirement to this case.

such decisions receive great-weight deference. *See* WE Initial Br. at 20. As Wisconsin Electric pointed out in its recent brief, this level of deference in the rate-making context flows directly from the legislative nature of ratemaking. WE Supp. Br. at 2-6. Thus Petitioners are wrong when they state that “labeling ratemaking as ‘legislative’ is irrelevant” here. Pet. Supp. Br. at 2.

## **II. Petitioners continue to argue for a non-discrimination standard that does not exist.**

In response to the Court’s questions about “discrimination” in rates, Petitioners cite the general statutory prohibition on rates that are “unjustly discriminatory,” Wis. Stat. § 196.37(1), and also cite Wis. Stat. § 196.60. Pet. Supp. Br. at 6. Wisconsin Electric does not dispute the existence of this general prohibition, but nothing in Wisconsin law supports Petitioners’ view of what that prohibition means. Wis. Stat. § 196.60 closely resembles Wis. Stat. § 196.22, cited previously by Wisconsin Electric. WE Supp. Br. at 8. Again, both statutes simply codify the filed rate doctrine, which prohibits utilities from charging customers other than in accordance with their Commission-approved and published rates. Notably, per § 196.26, the Commission enforces these statutes through a consumer complaint process not utilized by Petitioners here.<sup>2</sup> Nothing in Ch. 196 requires the utility to achieve identical pricing across all of its tariffs, and nothing requires the Commission to mandate identical pricing across all tariffs, either. *Id.* at 7-9.

The one (and only) Wisconsin case cited by Petitioners makes this clear. In *Kilbourn City v. S. Wis. Power Co.*, 149 Wis. 168, 135 N.W. 499 (1912), the question was whether the respondent utility could privately contract with the municipality to provide electricity at an unfiled rate. The court held that it could not. Petitioners’ selective quotation from that decision (Pet. Supp. Br. at 6) suggests that the court was independently imposing some sort of equality principle upon utility rates. The full sentence makes clear that the court’s discussion of “like costs for like service” was situated within the broader context of the filed rate doctrine:

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<sup>2</sup> Wisconsin Electric notes that nothing in Wis. Stat. § 227.57(4)-(8) even references “discrimination.”

Some of the main purposes of this law were to compel public service corporations to file their rates, so that they would be open to public inspection, to make reasonable rates of charge, and to make one consumer pay the same as another, where the service was furnished under substantially similar conditions.

135 N.W. at 504 (emphasis added). A century later, Wisconsin courts still agree. *See Wis. Power & Light Co. v. PSC*, 2009 WI App 164, ¶ 22 fn. 9, 322 Wis. 2d 501, 777 N.W.2d 106 (same); *see also GTE North Inc. v. PSC*, 176 Wis. 2d 559, 562 fn. 1, 500 N.W.2d 284 (1993) (“Sections 196.22, 196.60, and 196.604, Stats., provide statutory authority mandating that utilities may obtain only compensation that is specified in its tariffs”) (emphasis added). These laws limit what utilities may do after rates are approved, not the Commission’s approval of rates.

Petitioners go on to cite Commission decisions and decisions by federal courts which they believe support their interpretation of discrimination. Pet. Supp. Br. at 7-8. They flatly mischaracterize the Commission decisions they cite; we join in the Commission’s discussion of those cases. The federal decisions simply confirm what no one disputes: matching charges with costs is a theoretical ideal in ratemaking. But as Wisconsin Electric has already explained (WE Supp. Br. at 3-5), nothing in Wisconsin law mandates perfect observance of that ideal beyond the relationship between total rates and the utility’s total costs. Once total cost of service is determined, “absolute obeisance to the cost-of-service principle ends.” 42 Wis. 2d at 574.

This brings us back to the *City of West Allis* decision, which -- again -- is the controlling Wisconsin authority on this point. Petitioners relegate this case to a footnote (Pet. Supp. Br. at 7 fn. 3), and once again mischaracterize it. The question in *West Allis* was not merely whether the Commission could rely on an old cost-of-service study. The court stated the question clearly:

[Petitioners] appeal on the very narrow question of whether the Commission, having found that the old rate as a whole was inadequate, properly applied an 8 percent increase applicable to all customers without making a determination of how much of the additional cost (since 1963) was allocable to ‘outside customers’ as a class and to each of them individually.

42 Wis. 2d at 573 (emphasis added). The court concluded that the Commission did not need to align rates with costs at such a granular level as long as the rate structure as a whole allowed the utility to recover its total costs, plus a reasonable rate of return. Far from being “dicta” or “not relevant to the holding,” the language dismissed by the Petitioners was the central rationale for this holding. The *Permian* decision cited by the *West Allis* court, 42 Wis. 2d at 577, did more than Petitioners admit in their footnote; it rejected the very rigidity which they advocate here.

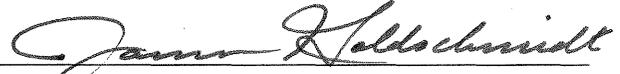
Petitioners double down on their argument, claiming the Commission cannot “base rates on considerations wholly separate from costs imposed by customers’ usage” (Pet. Supp. Br. at 8 fn. 3) or “factors other than cost of service or usage” (*id.* at 8). This is simply false. Wisconsin law clearly allows the Commission to weigh public policy factors and advance what it views as desirable policies through rates, separate and apart from cost causation. WE Supp. Br. at 5-6.

Finally, Petitioners return to granular criticisms of the Demand Charge, which reduce to two: (1) the Demand Charge is an imperfect proxy for strict, customer-by-customer adherence to the principle of cost causation, and (2) demand charges vary across tariffs. The first point is true, but is equally true of all tariffs -- that is the teaching of *West Allis*. The second is also true, but is only relevant if “discrimination” means what Petitioners claim it does. It does not.

That said, the Court should uphold the Commission’s decision even under the Petitioners’ reading of “discrimination.” Assuming (contrary to Wisconsin law) that the Commission may only approve utility rates if those rates charge all customers identically for “like contemporaneous service,” that is precisely what the Demand Charge is designed to do. The record shows that absent the Demand Charge, distributed generation customers are not paying the same price as other customers for like contemporaneous service. The Demand Charge closes the gap, and need not do so perfectly. The “discrimination” challenge, like the rest of the petition, should be denied.

Dated this 25th day of September, 2015.

Joe Wilson  
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# **EXHIBIT A**

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 10

DANE COUNTY

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CITIZENS UTILITY BOARD OF  
WISCONSIN, INC.,

v.

Case No. 14-CV-1137

PUBLIC SERVICE COMMISSION  
OF WISCONSIN.

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**PUBLIC SERVICE COMMISSION OF WISCONSIN'S  
NOTICE OF ENTRY OF DECISION AND ORDER**

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TO: Attorney Kira Loehr  
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16 North Carroll Street, Suite 640  
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PLEASE TAKE NOTICE that in the above-captioned proceeding, the Circuit Court for Dane County, Branch 10, the Honorable Juan B. Colás presiding, signed on May 25, 2015, and entered with the Dane County Clerk of Circuit Court on May 26, 2015, a "Decision and Order," which was therein declared to be a final disposition for purposes of Wis. Stat. § 808.03(1). This pleading constitutes a notice of entry of judgment pursuant to Wis. Stat. § 806.06(5). The Court's Decision and Order, a copy of which is attached, dismissed the petition for review with prejudice.

Dated this 17<sup>th</sup> day of June, 2015.

Respectfully submitted,

Cynthia E. Smith  
General Counsel

  
Michael S. Varda  
Assistant General Counsel  
State Bar No. 1016329

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STATE OF WISCONSIN

CIRCUIT COURT  
Branch 10

**FILED**

**MAY 26 2015**

DANE COUNTY

Citizens Utility Board of Wisconsin, Inc,  
Petitioner

DANE COUNTY CIRCUIT COURT

vs.

Case No. 14CV1137

Public Service Commission of Wisconsin,

Respondent

DECISION AND ORDER

The Citizen's Utility Board ("CUB") seeks review of a decision of the Public Service Commission ("PSC") dated March 17, 2014 ("Decision") concerning the allocation between electric and steam customers of the costs of conversion to natural gas of the Valley Power electricity and steam production plant in Milwaukee. The case is decided upon the briefs with no hearing.

The Valley Power Plant ("Valley") is a coal-burning plan constructed in 1969 with the primary purpose of generating electricity and a secondary purpose of generating steam for sale to customers in downtown Milwaukee. The plant's purpose is now primarily to produce steam and secondarily to produce electricity.

The PSC's grant of a certificate of authority to convert the plant to burn natural gas is not in dispute in this review. The issue in dispute is the allocation of the cost of the conversion and of the loss from selling excess electricity below cost (the latter is called "uneconomic dispatch."). In 1971 the PSC allocated 92% of capital costs at Valley to electric customers and 8% to steam customers. In approving the conversion the PSC decided not to alter that allocation. It also decided that 100% of the cost of uneconomic dispatch should be assigned to electric customers. CUB argued that at most 22% of the capital costs should be allocated to electric customers and none of the uneconomic

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dispatch costs.

For the reasons below, the court concludes the decision of the PSC was not arbitrary and capricious and satisfied the substantial evidence rule. Therefore, the petition is denied.

#### STANDARD OF REVIEW

CUB argues that the PSC's finding that "it is reasonable to maintain the existing capital and fuel cost allocations at Valley" (Decision at 17) is a factual finding subject to the substantial evidence test. Wisconsin Stat. §227.47(1) requires that "every final decision of an agency shall be in writing accompanied by findings of fact." Wisconsin Stat. §227.57(6) requires reversal if the court "finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." The substantial evidence test holds that a court may not reverse an agency's factual findings unless a reasonable person reviewing all of the evidence in the record could not reasonably have reached the decision the agency did. *Hamilton v. Dep't of Indus., Labor & Human Relations*, 94 Wis. 2d 611, 618, 288 N.W.2d 857, 860 (1980).

The PSC argues that the decision to retain the existing cost allocation is not required to be predicated or dependent on a factual finding because it is an exercise of its ratemaking authority under Wis. Stat. §196.20(1) and (2m), a legislative function which it argues does not require factual findings. Therefore, in its view, the substantial evidence rule simply doesn't apply. In support it cites *Wisconsin Ass'n of Mfrs. & Commerce, Inc. v. Pub. Serv. Comm'n*, 94 Wis. 2d 314, 319, 287 N.W.2d 844, 846 (Ct. App. 1979) ("Although an agency must give reasons for its findings, judicial review of legislative-type decisions is extremely limited. It is well settled that rate setting is a legislative agency function.") However, in that case, the Court of Appeals nonetheless applied the substantial evidence test, albeit to a decision to depart from a past agency practice rather than to reject a proposed change. *Id.* at 321.

The court concludes that the substantial evidence test does apply to the commission's decision. The decision in this case explicitly makes a finding of fact that "It is reasonable and in the public interest to maintain for ratemaking purposes the current allocation." Decision at p. 6. The decision itself contains two pages reviewing the evidence in support of that finding. Decision at 16-18. The case law and the statutes do not support the position that the substantial evidence rule does not apply to the factual finding that maintaining the existing cost allocation is reasonable and in the public interest.

### DECISION

The PSC has "wide discretion in determining the factors upon which it may base its precise rate schedule" and it is not "bound to any single regulatory formula." *WMC v. PSC*, 94 Wis. 2d at 320. Here the PSC considered that Valley's electrical production, though minimal, is necessary for reliability of the system and that if it were retired additional transmission capacity would be needed to maintain reliability at a substantially higher cost to electric customers than the costs of conversion allocated to them according to existing percentages. It concluded the benefit to electric customers from maintaining reliability through conversion was enough to justify keeping the existing cost allocation. There is credible evidence in the record that would allow a reasonable person to reasonably reach that conclusion. Of course, a reasonable person might reasonably weigh the evidence differently, or assign different importance to the factors the PSC considered and arrive at a different allocation of cost, but that kind of re-weighting of evidence and factors is beyond the scope of judicial review.

In deciding how to allocate the uneconomic dispatch costs the PSC gave great weight to the reduction by 80% in the production of excess electricity subject to uneconomic dispatch costs,

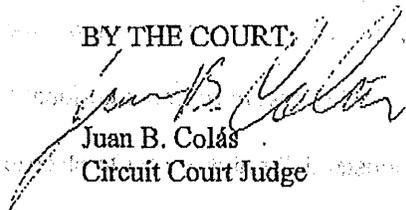
concluding that electric customers will see a rate reduction even if the allocation of those costs remains the same. As with the allocation of capital costs, a reasonable person could reasonably have arrived at a different allocation of uneconomic dispatch costs that shifted some of those costs to the steam customers. But the court cannot conclude that there is no evidence on which the PSC could reasonably have reached the conclusion that it did.

**CONCLUSION AND ORDER**

Because the court concludes that the substantial evidence test is satisfied it also finds that the PSC's decision was not arbitrary and capricious. The petition for review is dismissed with prejudice. This is a final order as defined by Wis. Stat. §808.03(1) for purposes of appeal.

Dated: May 25, 2015

BY THE COURT:



Juan B. Colás  
Circuit Court Judge

Copy: Counsel BY FAX ONLY

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 10

DANE COUNTY

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CITIZENS UTILITY BOARD OF  
WISCONSIN, INC.,

Petitioner,

v.

Case No. 14-CV-1137

PUBLIC SERVICE COMMISSION  
OF WISCONSIN,

Respondent.

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**CERTIFICATE OF SERVICE**

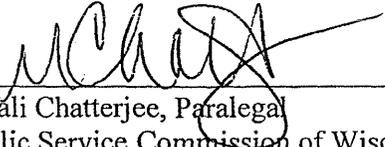
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I hereby certify that on the 11th day of June, 2015, I mailed a true and correct copy of Public Service Commission of Wisconsin's Notice of Entry of Decision and Order, via first-class mail, to the following:

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\_\_\_\_\_  
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Public Service Commission of Wisconsin  
Office of General Counsel

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY  
BRANCH 17

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THE ALLIANCE FOR SOLAR CHOICE

*and*

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Hon. Peter Anderson

WISCONSIN ELECTRIC POWER COMPANY,

Intervenor-Respondent.

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**CERTIFICATE OF SERVICE**

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I hereby certify that on September 25, 2015, I caused to be mailed a true and correct copy of the foregoing brief to the following parties via First Class U.S. Mail:

THE ALLIANCE FOR SOLAR CHOICE  
RENEW WISCONSIN

*By their attorneys:*

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Dated this 25th day of September, 2015.

  
James E. Goldschmidt