

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 17

DANE COUNTY

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THE ALLIANCE FOR SOLAR CHOICE,  
and RENEW WISCONSIN,

Petitioner,

Case No. 15-CV-0153

v.

PUBLIC SERVICE COMMISSION  
OF WISCONSIN,

Respondent, and

WISCONSIN ELECTRIC POWER  
COMPANY,

Intervenor-Respondent.

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

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## INTRODUCTION

Respondent Public Service Commission of Wisconsin (the “Commission”) submits this Brief in opposition to Petitioners The Alliance for Solar Choice and RENEW Wisconsin’s (collectively, “TASC’s”) Petition for Judicial Review of the Commission’s Final Decision in *Joint App. of Wis. Elec. Power Co. and Wis. Gas LLC, both d/b/a We Energies, for Auth. to Adjust Elec., Natural Gas, and Steam Rates*, Docket No. 5-UR-107 (Pub. Serv. Comm’n of Wis. Dec. 23, 2014) (the “Final Decision”) and Initial Brief.

TASC challenges the Commission’s reasonable and well-informed exercise of its legislative and policy-making function in approving distributed generation demand charges. TASC asks this Court to not only reject basic principles of agency law, but also goes so far to suggest that Commissioners appointed by the Governor and charged by the Legislature with setting utility rates must have no general opinions or expertise in the field. TASC’s view of the law may be convenient for an interest group that disagrees with a particular agency decision, but ultimately, TASC’s understanding of the scope and purpose of judicial review contradicts decades of established legal precedent, is inconsistent with clear instruction found in Wis. Stats. ch. 227, and would deprive the public of any benefit of having expert administrative agencies.

Indeed, not only are regulatory agencies expected to understand and shape the industries that they regulate, law and sound public policy encourage Commissioners to share the knowledge base they develop in exercising their legal duties in order for the public to understand and provide input into the Commission’s policy decisions. Unsatisfied with the Commission’s preliminary decision in late November 2014 to approve the demand charges for Wisconsin Electric Power Company’s (“WEPCO’s”) distributed generation customers, TASC resorted to, at the eleventh-hour, a desperate attack on the integrity of one of the Commissioners participating in the Final

Decision. (R.39.) TASC disingenuously asserted that based on Commissioner Nowak's general statements at two conferences in March and June 2014 regarding problems associated with fixed cost recovery in an era of increasing distributed generation, Commissioner Nowak was unfit to decide WEPCO's rate case. *Id.* TASC reasserts this claim on judicial review notwithstanding Commissioner Nowak's well-reasoned refusal to disqualify herself and the remaining Commissioners' subsequent approval of Commissioner Nowak's thoughtful determination shortly before the Commission issued the Final Decision. (*See* Pet'r's Pet. for Judicial Review at 5-6; Pet'r's Br. at 29-39; R.358; R.48.)

Even a cursory review of controlling and persuasive authority forecloses TASC's claims. Commissioner Nowak had no pecuniary interest in the outcome of WEPCO's rate case, had not acted as counsel to a party in WEPCO's rate case, and had not prejudged the facts or law applicable in WEPCO's rate case. (R.39; R.358; R.48.) Indeed, no Wisconsin or federal constitutional or statutory law provides that general statements, without more, demonstrate that an administrative adjudicator prejudged a *particular* case. Simply publicly discussing a point of view regarding a question of law or policy is insufficient to warrant disqualification. In fact, quite the opposite is true. The law expects, encourages, and recognizes the benefit of public officials developing institutional knowledge and sharing it with the broader community in a manner that enables the public to understand and influence agency policy-making decisions. Wis. Stat. § 19.56(1). In any event, Commissioner Nowak's general statements merely reiterated the Commission's instruction in a formal November 2013 Order<sup>1</sup> for utilities to reexamine tariffs to ensure recovery of the costs associated with providing utility service to distributed generation customers.

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<sup>1</sup> "Current tariffs may need to be re-examined to ensure distributed generation buyback rates fairly reflect costs and benefits associated with distributed generation, and to ensure that utility rate structures appropriately recover the costs associated with providing utility service to customers with distributed generation." *Pet. to Open a Rulemaking Dkt. to Consider Amending Wis. Admin. Code ch. PSC 119 and Wis. Admin. Code § 113.10 Related to Distributed*

In rate cases, the Commission must design and impose charges on customers in order for the utility to recover the costs it has already incurred to build and maintain its infrastructure. *See, e.g.,* Wis. Stat. §§ 196.03, 196.20, 196.37. Historically, the fixed charges imposed on customers have not fully recovered the fixed costs the utility has already incurred. (R.254:4r.) Thus, utilities recover some of their fixed costs through the volume-based charges imposed on customers. *Id.* In turn, higher volume customers subsidize the fixed costs caused by lower volume customers, such as distributed generation customers, that still benefit equally from the utility's infrastructure. (*See, e.g.,* R.257:24r; R.256:4.) With the Commission's Final Decision that is before this Court, the Commission exercised its legislative and policy-making powers to begin to remedy this subsidy and craft a rate design that more closely aligns fixed costs with fixed charges. (R.49:82.)

The Final Decision limited this subsidy and redesigned rates to comport with the "cost causation" principle, which provides that customers' rates should reflect the costs they cause the utility to incur. (*Id.* at 56-79, 82; R.255:2r.) To fairly distribute the charges that recoup the fixed costs incurred by WEPCO, the Final Decision prudently increased fixed customer or facilities charges for all customers and imposed a demand charge on distributed generation customers. (R.49:56-79, 82.)

Under the guise of challenging the sufficiency of the record evidence, TASC challenges the Commission's thoughtful adherence to the cost-causation principle and the exercise of its policy-decision that customers who do not and cannot take advantage of distributed generation should not subsidize those who do. (Pet'r's Br. at 15-25.) Indeed, TASC comprises two groups that advocate for the solar rooftop industry and renewable energy resources among myriad

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*Generation*, Docket No. 5-GF-233, Order (PSC REF#: 193575), 2013 WL 7869153, at \*1 (Pub. Serv. Comm'n of Wis. Nov. 15, 2013.); (R.256:49.)

competing interests and policies. (R.341; R.349.) In establishing measures which equitably distribute WEPCO's fixed costs among those that cause them, the Commission rejected TASC's one-sided policy position. (R.49:77-86.) In turn, TASC invites this Court to require all of WEPCO's ratepayers to subsidize the development of distributed generation after having failed to convince the Commission to do so.

TASC's challenges to the distributed generation demand charges are premised on the glaring misconception that the Commission cannot impose a charge on a particular customer class unless it determines, with *exact precision*, the costs that class causes. (Pet'r's Br. at 16.) TASC essentially asserts that unless the Commission calculates the subsidy to TASC's satisfaction, no subsidy exists. *Id.* at 16-25. Contrary to TASC's assertions, however, the Commission is not bound to any precise method of allocating costs to customer classes or customers individually. The Commission's adherence to the "cost causation" principle does not involve a rigid scientific or mathematical formula.

TASC misapprehends rate making principles and the well-established legal standards applied to them in judicial review proceedings. Rate design is a zero sum game in which the Commission enjoys wide latitude in developing reasonable public policies. (R.257:8r.) The Commission may make pragmatic adjustments called for by particular circumstances. Thus, a court's role in reviewing a rate case is limited. Courts must affirm the Commission's findings of fact if, after taking into consideration the Commission's discretionary role, institutional knowledge, and expertise, they are supported by substantial evidence in the record.

The record in this case clearly demonstrates the subsidy from which distributed generation customers unfairly benefit. Even after increasing the fixed customer or facilities charge, WEPCO recovers approximately 61 percent of its fixed costs through volume-based charges. (R.256:36-

37.) Distributed generation customers with substantially reduced energy usage do not pay their fair share of these costs. *Id.* at 4. The Final Decision reasonably calculated the demand charges imposed on distributed generation customers using the average marginal costs caused by customers in the small residential customer class. (R.102:Schedule 8.) Evidence in the record demonstrates that the number of distributed generation customers is too small to perform a separate cost analysis specifically for this subset, the results of which would nevertheless be unreliable. (R.257:10r.) Instead, evidence in the record demonstrates that these average marginal costs, when applied to the nameplate capacity of a customer's distributed generation equipment, more than adequately serve as the basis for the demand charges. (*Id.*; R.254:24r; R.49:85.)

Despite TASC's fleeting suggestion, the two recent Dane County Circuit Court cases reversing, in whole or in part, prior Commission decisions involving distributed generation are plainly irrelevant to the case at bar. (Pet'r's Br. at 1-2.) Those cases, one of which the Commission has appealed, were based on distinct records and approaches to solving public policy problems. Those cases do not undermine: (1) the Commission's sound decision to promote the "cost causation" principle in this case; (2) the substantial evidence in this record that distributed generation customers benefit from a subsidy; or (3) the reasonably developed demand charges imposed to limit that subsidy.

The Commission therefore respectfully requests that this Court uphold the Final Decision in its entirety. TASC's attempt to undermine the presumption of integrity Commissioner Nowak enjoys fails as a matter of law and should be flatly rejected. Commissioner Nowak's general policy statements regarding distributed generation simply cannot be characterized as prejudgments of the facts and law applicable to WEPCO's rate case. Further, relying on a well-developed record demonstrating the disparity in WEPCO's rate structure, the Commission reasonably exercised its

legislative function to ensure that distributed generation customers who cause fixed costs pay for them. Notwithstanding TASC's insistence on an unwarranted level of precision, the Commission's method of calculating these demand charges more than satisfies Wisconsin law.

## STATEMENT OF FACTS<sup>2</sup>

### **I. GENERAL OVERVIEW OF RATEMAKING PRINCIPLES AND PROCESSES.**

An overview of ratemaking principles and processes is warranted because, at its core, this case challenges the Commission's fundamental discretionary role in rate cases. As TASC notes, ratemaking consists of three basic processes: (1) developing the utility's revenue requirement; (2) developing and analyzing cost-of-service models; and (3) developing a rate design.

First, the Commission estimates the utility's operating expenses for a future "test year." *Wis. Pub. Serv. Corp. v. Pub Serv. Comm'n of Wis.*, 109 Wis. 2d 256, 259 n.2, 325 N.W.2d 867 (1982). The Commission then adds to these operating expenses an amount necessary to pay the cost of capital required to build the utility system that includes interest on debt and return on equity. *Id.* The utility's operating expenses plus the cost of capital is known as the utility's "revenue requirement." *Id.*

Second, the Commission evaluates cost-of-service analyses, which assist in determining the proper rates for each class of service by starting with the costs that those classes impose on the system. (R.256:7.) The cost-of-service analysis involves three steps: (1) functionalizing costs; (2) classifying costs; and (3) allocating costs. *Id.*

"Functionalizing is the process of categorizing costs based on their function within the utility. Generally, costs are functionalized as production, transmission, or distribution. Classification is the process of categorizing costs based on whether they are related to demand,

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<sup>2</sup> The Commission will develop additional facts in the Argument Section as necessary.

energy or customers.” *Id.* Costs are also classified based on whether they are fixed or variable. (R.254:3r.) Fixed costs are costs that do not change in response to the amount of output the utility purchases. *Id.* Unit variable costs are incremental costs that do change in response to the amount of output the utility purchases. *Id.* “Allocation is the process of assigning costs to certain groups of customers based on how these costs are functionalized and classified.” (R.256:7.)

Third, the Commission “devises a rate structure which, based on projected sales, will enable the utility to collect from the various classes of customers sufficient income to meet the revenue requirement.” *Wis. Pub. Serv. Corp.*, 109 Wis. 2d at 259 n.2. “Rate design is a zero-sum game.” (R.257:8r.) Accordingly, “[a] fundamental concept in utility ratemaking is that customers’ rates should reflect the costs they cause the utility to incur – this is the principle of ‘cost causation.’” (R.255:2r.) Theoretically, unit variable costs are therefore most efficiently recovered through a “volumetric component in rates, e.g., by a charge per kWh sold,” and fixed costs are most efficiently recovered through a “non-volumetric component in rates, e.g., by a charge assessed per customer or specific account.” (R.254:3r.) “However, rates have evolved historically with some portion of the fixed cost being recovered via volumetric charges.” *Id.*

Traditionally, utilities have recovered their fixed costs through a mixture of fixed customer charges, energy charges, and capacity-related charges often referred to as demand charges, which vary with a customer’s maximum peak usage.<sup>3</sup> *Id.* at 4r. Most mass market customers, such as residential customers, only receive usage charges and fixed customer or facilities charges on their

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<sup>3</sup> Demand costs a utility incurs are dependent upon peak usage required by a customer over a given period. (R.255:7r.) They are considered more fixed in nature than energy costs. *Id.* More infrastructure is required to provide electric service to customers who place greater peak demand on the system than is required to serve customers with lower peak demand. *Id.* at 7r-8r. For rates that include a demand charge, fixed demand costs are placed in the demand charge and variable demand costs are placed in the energy charge. *Id.* at 8r. This allows the price components to match their cost components. *Id.* However, as will be discussed, simplified rates, such as residential rates, do not contain a demand charge, and fixed demand costs are usually incorporated into the energy charge. *Id.*

bill, but not demand charges. *Id.* Utilities simply lack the necessary infrastructure to measure peak demand. (R.257:23r.) Thus, for these mass market customers, some of the utility's fixed costs are frequently recovered in volume-based energy charges instead of being recovered through a fixed customer or facilities charge. (R.254:4r.) It is unusual for a utility to offer a facilities or customer charge that contains all customer-related costs. *Id.* Including fixed costs in volume-based energy charges provides lower fixed customer or facilities charges. *Id.* For low-usage customers, this provides lower bills than would otherwise occur. *Id.*

Finally, “[r]ate design considers many factors in addition to the cost-of-service.” (R.256:32.) “The results of the cost-of-service model are used as guidelines for the rate design.” *Id.* at 31. If all the assumptions used were accurate, the cost-of-service model would produce a rate design that “provides the most proper price signals to [WEPCO’s] customers.”<sup>4</sup> *Id.* “It would not be the optimal rate design, however.” *Id.* For several reasons, “[i]t is impossible to develop an optimal rate design[.]” *Id.* For instance, the billing components WEPCO uses to bill its customers are different than the components WEPCO used in its cost-of-service model. *Id.* “Another major difference between the cost-of-service analysis and the rate design is the fact that cost-of-service is an analysis of the average embedded costs but marginal costs are used in rate design to send customers forward-looking price signals.” *Id.*

## **II. CHANGES TO WEPCO’S DISTRIBUTED GENERATION TARIFFS.**

In order to more fairly align rates with cost causation and to send proper price signals, WEPCO’s proposed rate structure, in addition to increasing fixed customer or facilities charges, revised WEPCO’s distributed generation tariffs. (R.257:24r.) WEPCO’s previous distributed

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<sup>4</sup> A price signal is information conveyed to a customer, based on the price of service, which informs customer decision-making. For instance, a variable energy charge that recovers fixed costs improperly tells customers that a unit of energy is more expensive than it actually is. (R.254:5r.) This may inefficiently impact a customer’s decisions regarding conservation. *Id.*

generation tariffs were a “patchwork of rates developed over many years as customer-generation technologies were developing, ideas on how to price customer generation were being tested, and various levels of subsidies were desired by regulators to help the market [and were] confusing to customers and burdensome for [WEPCO] to bill.” (R.256:50.) WEPCO previously maintained ten different distributed generation tariffs that varied based on size of generation equipment, type of generation equipment, type of customer, and billing method. *Id.* at 50-53.

WEPCO proposed to consolidate many of these tariffs into four options for customers: (1) non-purchase; (2) net-metering;<sup>5</sup> (3) direct-sales; and (4) stand-by service. *Id.* at 55. WEPCO proposed demand charges for the non-purchase and net-metering tariffs. (R.256:56-57.) These demand charges recover the portion of distribution costs that are not recovered by the facilities charge of the underlying rate and costs of stand-by generation. *Id.* For customers with intermittent renewable generation (*i.e.*, solar or wind), the distributed generation demand charge is reduced for customers who do not pay a demand charge in their underlying rate and waived for customers who pay a demand charge in their underlying rate. *Id.* at 57. For customers who pay a demand charge in their underlying rate, the customer-demand charge will be set at a time when the customer’s distributed generation is not operating.<sup>6</sup> *Id.* Therefore, the distribution cost to serve the customer will be recovered through the customer-demand charge in the underlying rate. *Id.* The distributed

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<sup>5</sup> “Net metering” is a “service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period.” 16 U.S.C. § 2621(d)(11).

<sup>6</sup> Unlike with intermittent generation, the customer-demand charge for customers with constant distributed generation who pay a demand charge in their underlying rate is set at a time when the customer’s distributed generation is operating. Accordingly, WEPCO has not waived the distributed generation demand charge for these customers, where WEPCO needs to provide reserve capacity to fulfill its service obligations in the event the customer distributed generation fails. (R.257:42r; R.102:Schedule 8.)

generation demand charges are based on the nameplate capacity of the installed distributed generation. *See id.* at 56-57.

### III. THE FINAL DECISION.

The Final Decision approved WEPCO's proposal to increase the fixed customer or facilities charge for all customers, to close certain distributed generation tariffs, and, with some modifications, to establish the non-purchase and net-metering tariffs. (R.49:13-15, 69, 82-84, 94, 98-99.) A brief discussion of the Commission's rationale for increasing the fixed customer or facilities charge is warranted, where the same rationale served as the Commission's basis for imposing the distributed generation demand charge. Indeed, these decisions are interrelated and equally supported by the evidence in the record.

The Commission found that "[t]he increase to fixed facilities charges proposed by WEPCO is reasonable." *Id.* at 13. The Commission's discussion of the public policy rationale and evidence supporting this decision spanned 13 pages. *Id.* at 57-69. The Final Decision states that "WEPCO's intent with these changes is to send more accurate price signals, reduce intra-class subsidies, and to more fairly set rates by better aligning customer charges with the costs customers cause." *Id.* at 57. The Final Decision cited the testimony of WEPCO's witnesses to establish the fixed costs WEPCO incurs and the corresponding disconnect with the fixed charges it imposes on customers that resulted in under-recovery. *Id.* at 65-67. The Final Decision lastly discussed record evidence to dismiss intervenor allegations regarding the impact the proposed facilities charge would have on energy conservation and low-income customers. *Id.* at 68-69. The Commission approved the \$16.00 facilities charge. *Id.* at 69.

The Final Decision then accepted WEPCO's proposal to close and replace its distributed generation tariffs. *Id.* at 81, 14-15 ¶¶ 90-95, 98-99 ¶¶ 31-33. As the Final Decision notes, "[t]he

same policies articulated by this Commission in approving WEPCO's facilities charges – namely sending more appropriate price signals, better aligning rates with costs, and assigning costs more equitably to those who cause the costs – support the Commission's decision to accept, with some modifications, WEPCO's proposed new [distributed generation] tariffs." *Id.* at 82. The Commission found that "the demand charges are reasonable and will allow WEPCO a reasonable opportunity [to] recover standby generation and distribution costs that are not recovered by the facilities charge of the underlying rate[.]" *Id.* at 84. While the Commission approved WEPCO's request to base the demand charge on the nameplate capacity of the customer's distributed generation equipment, the Commission nevertheless modified it. *Id.* at 84-85. The Commission required WEPCO to install meters capable of measuring actual output capacity and conduct a true-up at the end of 2016 in which WEPCO must compare and settle the difference between customers' metered data and the nameplate capacity of their distributed generation equipment. *Id.*

#### **IV. TASC'S MOTION TO DISQUALIFY COMMISSIONER NOWAK.**

At the eleventh-hour, after TASC realized its attempts to persuade the Commission had failed, TASC moved to disqualify Commissioner Nowak. (*See* R.39.) TASC based its motion on a Bloomberg News Agency article and a video from the Edison Foundation, neither of which TASC made part of the record. *Id.* at 1. Rather, TASC simply included hyperlinks to Internet versions of these two sources in its motion. *Id.*

In support of its motion, TASC alleged the following facts. On January 31, 2014, WEPCO initiated the underlying proceeding by requesting the Commission to open a docket for its 2015 rate case. *Id.* at 2. On March 6, 2014, prior to WEPCO's filing of its proposal and testimony in this proceeding, Commissioner Nowak participated as a panelist in a conference where she expressed her opinion that distributed generation customers were causing cost shifts to non-

participants and encouraged utilities regulated by the Commission to “please come in” with rate design proposals to address this perceived issue. *Id.* On May 30, 2014, WEPCO filed its application and supporting testimony but did not include specific rate design proposals. *Id.* On June 10, 2014, Commissioner Nowak and WEPCO’s Chief Executive Officer Gale Klappa sat on a panel together at the Edison Electric Institute Annual Convention where Commissioner Nowak stated that “the traditional rate design will no longer work with the growth in the [distributed generation] environment[.] We need to make more of the fixed costs more in line with fixed charges, particularly so those customers who don’t participate in [distributed generation] are not paying for those who do.” *Id.* at 2-3. On June 27, 2014, WEPCO submitted its rate design testimony in this proceeding to modify its tariffs for distributed generation. *Id.* at 3. At the Commission’s meeting on November 14, 2014, the Commission preliminarily approved these tariffs. *Id.* at 4.

On December 1, 2014, almost 6 to 9 months after Commissioner Nowak’s statements, and weeks after it became apparent to TASC that its arguments in the proceeding were unavailing, it filed the motion for disqualification. (R.39.) At its December 12, 2014 open meeting, the Commission referred TASC’s motion to Commissioner Nowak. (R.48:1.) On December 16, 2014, Commissioner Nowak issued her determination that she would not disqualify herself from WEPCO’s rate case because she concluded she did and could continue to act in a fair and impartial manner. (R.358:1.)<sup>7</sup> At its December 18, 2014 open meeting, the Commission again considered TASC’s motion and Commissioner’s Nowak’s determination. (R.48:1.) The Commission “accept[ed] Commissioner Nowak’s determination and agree[d] that TASC ha[d] not made the

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<sup>7</sup> At no point did Commissioner Nowak ever discuss WEPCO’s rate case with WEPCO’s Chief Executive Officer Gale Klappa. (R.358:2.) Indeed, TASC does not, and could not, assert a violation of laws governing *ex parte* communications. Wis. Stat. § 227.50.

strong showing necessary to rebut the presumption of honesty and integrity.” *Id.* at 2. Accordingly, the Commission denied TASC’s motion to disqualify Commissioner Nowak. *Id.*<sup>8</sup>

## ARGUMENT

### **I. TASC’S DUE PROCESS CHALLENGE IS BASELESS AS A MATTER OF LAW AND PUBLIC POLICY.**

No due process violation resulted from Commissioner Nowak’s participation in WEPCO’s rate case because her general policy statements that did not mention any particular facts, law, proceeding, or party fail to demonstrate that she was biased in fact or otherwise create an impermissibly high risk of bias. In fact, Commissioner Nowak’s statements predated WEPCO’s application and the filing of its rate design. Commissioner Nowak had no pecuniary interest in the outcome of the rate case, had not acted as counsel to a party in the rate case, and most importantly, had not prejudged the facts or law applicable in WEPCO’s rate case. Commissioner Nowak could not have prejudged the applicable facts or law without having any conception of what to prejudge. The law and public policy considerations unequivocally confirm that Commissioner Nowak’s comments were appropriate and in fact encouraged.

#### **A. TASC has failed to rebut the strong presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings.**

The law governing adjudicator impartiality in administrative hearings consists of two components. First, the Due Process Clause of the Wisconsin and United States Constitutions require that an adjudicator in an administrative hearing be fair and impartial. *See State ex rel. DeLuca v. Common Council of the City of Franklin*, 72 Wis. 2d 672, 682, 242 N.W.2d 689 (1976).

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<sup>8</sup> The manner in which the Commission processed TASC’s motion is consistent with Commission practice. In *In re Minn. Power Co.*, Docket No. 5-CE-113, 2000 WL 33174979 (Pub. Serv. Comm’n of Wis. Sept. 28, 2000), a party moved for recusal of all three Commissioners and for appointment of an independent panel as the final decisionmaker. The Commissioners independently reviewed the allegations and individually determined that they would not recuse themselves. *Id.* The Commission then issued an Order affirming each of the Commissioners’ decisions. *Id.*

The Legislature supplemented these constitutional requirements with Wis. Stat. § 227.46(6), which provides that “[t]he functions of persons presiding at a hearing or participant in proposed or final decisions shall be performed in an impartial manner.” Given the broad language of Wis. Stat. § 227.46(6) and similar statutes and their resemblance to the language courts use in applying constitutional due process requirements, it is difficult to determine whether a court’s conclusion regarding impermissible bias is based on constitutional due process or statutory interpretation and application. However, most Wisconsin cases, as discussed below, address impermissible bias challenges in the administrative setting under constitutional due process frameworks.

There is a presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings. *DeLuca*, 72 Wis. 2d at 684. An administrative decision violates due process rights either by the decisionmaker’s bias in fact or when the risk of bias is impermissibly high. *Guthrie v. Wis. Employment Relations Comm’n*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983). Courts may vacate administrative decisions violating due process rights. *Id.* at 336.

**B. TASC’s belated assertion that Commissioner Nowak’s statements at the 2014 conferences warrant disqualification fail as a matter of law.**

TASC’s motion fails both procedurally and substantively. TASC waited 6 to 9 months *after* Commissioner Nowak’s statements and several weeks *after* the Commission’s open meeting at which it preliminarily approved the distributed generation demand charge. TASC therefore waited until just before the conclusion of the case: issuance of the Final Decision. The Supreme Court of Wisconsin has recognized that “it is contrary to general principles of court administration to permit a party to proceed in the face of full knowledge of a cause for objection and then to allow an initial objection only when the proceeding has produced an untoward result.” *Guthrie*,

111 Wis. 2d at 453;<sup>9</sup> *cf.* Wis. Stat. § 227.46(6) (in, at a minimum, class 2 and 3 contested case proceedings, motions for disqualification must be “timely”). TASC’s delay until December 2014 to move to disqualify Commissioner Nowak plainly contravenes the administration principles discussed in *Guthrie*. *Cf. State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992) (“A challenge to a judge’s right to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to the judge’s decision on a contested matter. We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge.” (citations omitted)). TASC’s motion was therefore untimely and procedurally deficient.<sup>10</sup>

Substantively, controlling constitutional and statutory law demonstrates that disqualification of an administrative adjudicator is only warranted in the most obvious and egregious circumstances, none of which even remotely apply here. Accordingly, Commissioner Nowak properly participated in the Final Decision. While nothing in the record besides hyperlinks to Internet sources and innuendos actually contains the evidence upon which TASC relies, Commissioner Nowak noted that TASC’s summary of the facts supporting its motion for disqualification was accurate. (R.358:2.) Commissioner Nowak, however, correctly noted that the conclusions TASC infers and asserts from those facts were far from accurate. *Id.*

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<sup>9</sup> In the context of judicial disqualification, the Supreme Court of Wisconsin also expressed concerns about the timing of a motion which was not made until after the decision was reached when the movant had the information at least two weeks prior to the court’s decision. *See Storms v. Action Wisconsin, Inc.*, 2008 WI 110, ¶¶ 29-30, 314 Wis. 2d 510, 754 N.W.2d 480 (“While we are appreciative of the fact that requesting the disqualification of a judge by law is a very serious matter, in fairness to the parties and the court, if a party has information while a case is pending that goes to the issue of a judge’s or justice’s participation in the matter, that party has an obligation to promptly bring the matter to the individual judge’s or justice’s attention before a decision has been rendered.”)

<sup>10</sup> The disingenuous nature of TASC’s December 1, 2014 motion is obvious where the November 24, 2014, Bloomberg News Agency article upon which TASC relies states “[a] solar industry group appealing a decision to impose the most expensive solar fees in the U.S. said a Wisconsin regulator violated rules barring communication about pending cases.” (R.39.) It is apparent then, that TASC knew about Commissioner Nowak’s participation in the March and June 2014 conferences *before* the Bloomberg News Agency article was even published, despite asserting that this Bloomberg News Agency article “recently revealed” Commissioner Nowak’s participation. *Id.* at 2.

**1. Clear disqualification standards plainly do not apply here.**

There are several clearly inapplicable circumstances under Wisconsin law that warrant disqualification: (1) cases in which the adjudicator has a pecuniary interest in the outcome of the proceeding; and (2) cases in which where the adjudicator has previously acted as counsel to any party in the same action or proceeding. *DeLuca*, 72 Wis. 2d at 684; *Guthrie*, 111 Wis. 2d at 460. Nothing in the record demonstrates, and TASC does not assert, that Commissioner Nowak had a pecuniary interest in the outcome of WEPCO's rate case, or has previously acted as counsel to any party in WEPCO's rate case.

**2. Commissioner Nowak most clearly did not prejudge the facts or law applicable in WEPCO's rate case.**

Instead, TASC asserts that Commissioner Nowak prejudged WEPCO's rate case. (*See, e.g.,* Pet'r's Br. at 32-34.) TASC, however, conveniently ignores controlling authority discussing circumstances in which administrative adjudicators who took *formal* preliminary action prosecuting civil cases in which they later served as administrative adjudicators were not disqualified and instead relies on or misconstrues cases requiring administrative and judicial disqualification that are readily distinguishable from Commissioner Nowak's general statements.

In *Withrow v. Larkin*, 421 U.S. 35, 55, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), the Supreme Court of the United States held that the Wisconsin Medical Board did not violate due process rights in bringing charges against a doctor and further deciding, after hearing, whether the doctor had committed the acts alleged in the charging document. Similarly, in *DeLuca*, members of the Common Council of the City of Franklin who had either investigated the alleged wrongdoing of the City Clerk or who had voted for a resolution commencing the removal process properly participated in the City Clerk's removal hearing. Last, in *Bracegirdle v. Bd. of Nursing*, 159 Wis. 2d 402, 412-15, 464 N.W.2d 111 (Ct. App. 1990), the Court of Appeals held that

Bracegirdle's right to an impartial decisionmaker was not violated where the Board of Nursing's Chairperson: (1) had acted as an advisor to the prosecuting attorney in preparing the charges against Bracegirdle; (2) participated in oral argument before the Board of Nursing; and (3) took part in the Board of Nursing's deliberations and decision to reprimand Bracegirdle.

Commissioner Nowak shared her *general* view that rate design may need to change in light of the growing interest in distributed generation and expressed that one such change could be to more closely align fixed costs with fixed charges to prevent a cross-subsidy and to send appropriate price signals. Of course, Commissioner Nowak's general statements cannot be reasonably characterized as formal preliminary actions on the merits of WEPCO's rate case where WEPCO had yet to even file its rate design. Therefore, *Larkin*, *DeLuca*, and *Bracegirdle* surely preclude Commissioner Nowak's disqualification, where administrative adjudicators in those case who *had* clearly taken formal preliminary actions on the merits of a matter pending before their administrative body were *not* disqualified.

TASC relies on *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 27, 498 N.W.2d 842 (1993), in which the Chairperson of the Cedarburg Board of Zoning Appeals, prior to hearing, stated that Marris's legal position was a "loophole" in need of "closing" and that the Board members and the Assistant City Attorney should "get [Marris] on the Leona Helmsley rule." The Supreme Court of Wisconsin held that these two statements regarding the facts and law applicable in the zoning appeal indicated that the Chairperson had prejudged "Marris's case" before hearing. *Id.* at 27-31.

This case is nothing like *Marris*, which involved the administrative adjudicator's prejudgment of *particular facts and law*. Commissioner Nowak mentioned no particular utility, proceeding, facts, law, or party whatsoever in her general policy-type statements. Indeed, TASC ignores *Marris's* caution that "[n]evertheless, a board member's opinions on land use and

preferences regarding land development should not necessarily disqualify the member from hearing a zoning matter.” *Id.* at 26. Since board members “are purposefully selected from the local area and reflect community values and preferences regarding land use, zoning board members will be familiar with local conditions and the people of the community and can be expected to have opinions about local zoning issues.” *Id.* Like the zoning board members in *Marris*, Commissioner Nowak has developed an understanding of rate design issues in an era of increasing distributed generation and can be expected to have opinions about them.<sup>11</sup>

TASC’s assertion that Commissioner Nowak’s general statements do pertain to the particular facts and law applicable in WEPCO’s rate case is plainly unavailing. In fact, Commissioner Nowak reiterated a general statement of policy the Commission itself previously explained in published, written Order. In its Order in *Pet. to Open a Rulemaking Dkt. to Consider Amending Wis. Admin. Code ch. PSC 119 and Wis. Admin. Code § PSC 113.10 Related to Distributed Resources Interconnection Rules*, Docket No. 5-GF-233, 2013 WL 7869153, at \*1 (Pub. Serv. Comm’n of Wis. Nov. 15, 2013), the Commission urged utilities to reexamine then current tariffs “to ensure distributed generation buyback rates fairly reflect costs and benefits associated with distributed generation, and to ensure that utility rate structures appropriately recover the costs associated with providing utility service to customers with distributed

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<sup>11</sup> TASC further relies on two cases similar to *Marris*. First, *State v. Gudgeon*, 2006 WI App 143, ¶ 26, 295 Wis. 2d 189, 720 N.W.2d 114, involved the disqualification of a judge who predetermined a criminal defendant’s sentence prior to hearing. While *Gudgeon* involves judicial disqualification and is therefore not controlling here, TASC’s reliance on *Gudgeon* fails for the same reason that TASC’s reliance on *Marris* fails: *Gudgeon* involved the prejudgment of the outcome of a *particular case*. Second, *Cinderella Career & Finishing Schools, Inc. v. Federal Trade Comm’n*, 425 F.2d 583, 591 (D.C. Cir. 1970), summarized the disqualification standard as follows: “[t]he test for disqualification has been succinctly stated as being whether ‘a disinterested observer may conclude that [the agency] has in some measure adjudged *the facts as well as the law of a particular case in advance of hearing.*” (emphasis added) (citations omitted). Like *Marris* and *Gudgeon*, *Cinderella* addressed prejudgment of the facts and law of a *particular case*. Further, as discussed on pp. 21-22, *Cinderella* has been subsequently limited. Nothing could lead a reasonable observer to believe Commissioner Nowak prejudged the facts or law applicable to WEPCO’s rate case.

generation.” (See also R.256:49.) Similarly, TASC’s insinuation that WEPCO proposed its distributed generation tariff changes in response to Commissioner Nowak’s statements cannot be taken seriously where: (1) the Commission’s prior Order recognized this same general principal; and (2) TASC itself submitted evidence that WEPCO previously contemplated changing its rate design. (*Id.*; R.221.)

In any event, the Supreme Court of Wisconsin has drawn a distinction between prejudging policy issues in discharging important public duties and bias towards a particular utility. In *Wis. Tel. Co. v. Pub. Serv. Comm’n of Wis.*, 232 Wis. 274, 287 N.W. 122, 141-42 (1939), the Supreme Court of Wisconsin acknowledged that the Commission, in a particular rate case, may have prejudged the appropriateness of raising rates during the Great Depression but nevertheless held that “[b]ias and prejudice attributable to some feeling against the Company is an entirely different thing than zeal in the discharge of a highly important public duty.” To the extent Commissioner Nowak’s statements are construed as prejudging the appropriateness of approving WEPCO’s distributed generation tariffs, they most clearly represent zeal in the discharge of a highly important public duty, not bias towards any particular party.

**C. Commissioner Nowak’s general policy statements are appropriate under controlling law and encouraged as a matter of public policy.**

Under controlling due process law, Commissioner Nowak’s general policy statements do not disqualify her from WEPCO’s rate case. Rather, Commissioner Nowak’s general policy statements promote the desired public policy that specialized administrative adjudicators share their expertise in a manner that allows the public to understand and influence agency policy-making decisions. Disqualification of Commissioner Nowak would thwart that public policy.

Wisconsin Stat. § 19.56(1) provides that “[e]very state public official is encouraged to meet with clubs, conventions, special interest groups, political groups, school groups and other

gatherings to discuss and to interpret legislative, administrative, executive or judicial processes and proposals and issues initiated by or affecting a department or the judicial branch.” As one legal commentator observed, “[d]isqualification would be contrary to one of the main reasons for having agencies in the first place – namely to create a storehouse of information that can be brought to bear on regulatory decisions in a flexible manner.” Strauss, “Disqualifications of Decisional Officials in Rulemaking,” 80 Colum. L. Rev. 990, 1027 (1980). Further, “the possibility of disqualification will discourage [communications with the public] and thus injure the public’s ability to understand and influence agency policy-making decisions.” *Id.* at 1028. Therefore, in generally stating her views on the issues associated with distributed generation and potential solutions, Commissioner Nowak followed the Legislature’s guidance, disqualification for which would undermine the important public role she plays in the regulation of utilities.

The Supreme Court of the United States and the United States Court of Appeals for the District of Columbia Circuit have repeatedly held that a previously announced position on a disputed issue of law or policy simply does not disqualify an administrative decisionmaker from participating in adjudicative or quasi-legislative decisions.

In *United States v. Morgan*, 313 U.S. 409, 420-22, 61 S.Ct. 999, 85 L.Ed. 1429 (1941), the United States Secretary of Agriculture wrote a letter to the New York Times criticizing a recent decision of the Supreme Court of the United States involving the maximum rates to be charged by market agencies at the Kansas City Stockyards, then ruled in an administrative proceeding on the same subject matter. The Court held that the Secretary was not disqualified for merely holding and expressing strong views on matters he believed to be at issue. *Id.* at 421. Rather, it is acceptable for officials to have an underlying philosophy when approaching a case; the critical consideration is whether officials make decisions on the strength of individual facts. *Id.*

In *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683, 700, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), Commissioners of the Federal Trade Commission submitted a statutorily required report to Congress and the President regarding alleged price collusion among cement manufacturers and later decided an issue involving the same subject matter. In holding that the Commissioners were not impermissibly biased, the Court observed that having expressed opinions did not mean that the Commissioners' minds were irrevocably closed on the subject. *Id.* at 702.<sup>12</sup>

In *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976), the Court held that whether an official is engaged in adjudication or rulemaking, mere proof that he or she has taken a public position, expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome the presumption of honesty and integrity.

Last, in *Ass'n of Nat'l Advertisers v. Federal Trade Comm'n*, 627 F.2d 1151, 1155 (D.C. Cir. 1979), a Commissioner of the Federal Trade Commission expressed in a speech his unfavorable views on children's television advertisers, and the press widely quoted his statements. The Commission subsequently issued a Notice of Proposed Rulemaking that suggested restrictions regarding television advertising directed toward children. *Id.* at 1154. The court limited *Cinderella*, and held that "an agency member may be disqualified from [a rulemaking] proceeding only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking." *Id.*

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<sup>12</sup> Similarly, the court in *Ames v. Pub. Util. Comm'n of Cal.*, Case No. G043087, 2011 WL 2650967, at \*7 (Cal. Ct. App. July 6, 2011) refused to disqualify a commissioner who endorsed critical peak pricing in a prior ratemaking decision before ruling on the same issue in the challenged ratemaking decision. The court wisely noted that "[t]he commission is a policymaking body[.]" and that "[t]he commissioners are bound to endorse numerous policy statements, both in formal decisions and in less formal comments." *Id.* The court held "[t]he fact that critical peak pricing was relevant to the ratemaking decision here does not mean that [the commissioner's] favorable outlook toward the policy of critical peak pricing disqualifies him from continuing to serve as commissioner in this case." *Id.*

The case at bar is not even remotely similar to the federal and state cases cited by TASC. Rather, this case is similar to the federal cases finding no impermissibly high risk of bias and, therefore, no due process violation. In fact, Commissioner Nowak's general comments do not reach the level of the United States Secretary of Agriculture's belief *upheld* in *Morgan*, 313 U.S. at 421. Rather, Commissioner Nowak's decision in WEPCO was premised on the strength of the individual facts presented in that case. (*Id.*; R.358:3-4.) Like the Federal Trade Commissioners who commented on cement manufacturer price collusion and children's television advertisers, nothing suggests that Commissioner Nowak's mind was *irrevocably or unalterably closed* on the subject of distributed generation rate design. See *Cement Institute*, 333 U.S. at 700; *Ass'n of Nat'l Advertisers*, 627 F.2d at 1155.<sup>13</sup> Despite TASC's assertions, Commissioner Nowak merely identified a real problem associated with distributed generation and a potential solution. Indeed, the Commission found that WEPCO's proposed distributed generation tariffs required *modification*. The fact that Commissioner Nowak publicly discussed a matter of growing public importance in absolutely no way undermines the presumption of honesty and integrity she enjoys as an administrative adjudicator. See *Hortonville*, 426 U.S. at 493. As noted above, Commissioner Nowak's statements were instead encouraged as a matter of law and public policy.

## **II. TASC'S CHALLENGE TO THE DEMAND CHARGE PORTION OF THE COMMISSION'S FINAL DECISION IS WITHOUT MERIT.**

This Court should affirm the Final Decision because, in rate cases, the Commission exercises a discretionary, legislative function, review of which is extremely limited. The Commission is free to design rates according to numerous factors and is not strictly bound to any

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<sup>13</sup> Even if Commissioner Nowak's mind was irrevocably or unalterably closed, which it was not, secondary sources provide that "[a] prejudice or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not without more, a disqualification." Davis's Administrative Law Treatise, 3d ed. 1994, Vol. II at 68.

cost-of-service analysis. The record supports the Commission's public policy choice to realign fixed costs with fixed charges in the interest of fairness by approving WEPCO's distributed generation demand charges. These demand charges are based on customer class data that send the appropriate price signals to WEPCO's customers. The rate design TASC challenges here is far more precise than the rate designs Wisconsin courts have repeatedly and consistently upheld. Indeed, TASC's arguments are premised on a gross misunderstanding of rate design and the level of evidence that case law requires before the Commission can exercise its discretion.

**A. Applicable standards of review and legal principles require judicial deference to the Commission's fact-finding, discretion, and specialized knowledge.**

The Commission is generally authorized to set rates pursuant to Wis. Stat. §§ 196.20 and 196.37. For instance, under Wis. Stat. § 196.20, "no change in schedules which constitutes an increase in rates to consumers may be made except by order of the commission, after an investigation and opportunity for hearing." Similarly, under Wis. Stat. § 196.37, if the Commission finds rates to be "unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise unreasonable or unlawful, the [C]ommission shall determine and order reasonable rates . . . to be imposed, observed and followed in the future."

Ratemaking is a legislative function, and judicial review of legislative-type decisions is extremely limited. *See, e.g., Wis. Ass'n of Mfrs. & Commerce v. Pub. Serv. Comm'n of Wis.*, 94 Wis. 2d 314, 319, 287 N.W.2d 944 (Ct. App. 1979), *affirmed*, 100 Wis. 2d 300, 301 N.W.2d 247 (1981) ("*WAMC*"). "Moreover, rate setting is an area in which the [C]ommission has special expertise." *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 141 Wis. 2d 10, 15, 414 N.W.2d 308 (Ct. App. 1987). Under Wis. Stat. § 227.57(8), "the court shall not substitute its judgment for that of the agency on an issue of discretion." As such, courts grant great deference to the Commission in rate setting matters. *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 Commission's rate orders are *prima facie* valid, and TASC bears the burden of demonstrating invalidity by clear and satisfactory evidence. *City of West Allis v. Pub. Serv. Comm'n of Wis.*, 42 Wis. 2d 569, 579, 167 N.W.2d 401 (1969); *Madison Bus Co. v. Pub. Serv. Comm'n of Wis.*, 264 Wis. 12, 14, 58 N.W.2d 463 (1953).

In rate cases, the utility bears no duty to price the product for a class of customers or customers within a class. *City of West Allis*, 42 Wis. 2d at 574. "The function of absolute obeisance to the cost-of-service principle ends when the rate level of the utility as an entity is determined." *Id.* Given the extreme complexities of cost-of-service analysis, "the most that can be hoped for is the development of techniques of cost allocation that reflect only the major, more stable, and more predictable cost relationships." *Id.* at 576. "Rate design is not a mathematical application of an absolute cost theory." *WAMC*, 94 Wis. 2d at 319. Subjective factors "make a strict cost approach to rate making unrealistic both in attainment and in terms of operation." *City of West Allis*, 42 Wis. 2d at 577. Thus, "in designing a rate structure to recover the revenue to which [the utility] is entitled, as shown by a cost analysis, [the Commission] has wide discretion in determining the factors upon which it may base its precise rate schedule. It is not required to apply a cost-of-service formula to each class of customer or to each customer within a class." *Id.*

"[T]he legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-77, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968). "[R]ate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, to make the pragmatic adjustments which may be called for by particular circumstances." *Id.*

These principles inform judicial review of the Commission's findings of fact when sufficiency of the evidence is challenged under the substantial evidence test, which provides that an agency's findings of fact must be affirmed if they are supported by substantial evidence in the record. *See* Wis. Stat. § 227.57(6). Accordingly, “[i]n applying the substantial evidence test to this case, this [C]ourt is required by [Wis. Stat. § 227.57(10)] to accord due weight to the ‘experience, technical competence, and special knowledge of the agency involved, as well as the discretionary authority conferred upon it.’ ” *Madison Gas & Elec. Co. v. Pub. Serv. Comm’n of Wis.*, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982) (quoting Wis. Stat. § 227.57(10)).

Substantial evidence “means whether after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact.” *Volvo Trucks N.A. v. Wis. Dep’t of Transp.*, 2010 WI 15, ¶ 19, 323 Wis. 2d 294, 779 N.W.2d 423. Substantial evidence does not mean a preponderance of the evidence. *Id.* “The weight and credibility of the evidence are for the agency, not the reviewing court, to determine.” *Id.* Thus, a reviewing court may not substitute its judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. *See, e.g., Currie v. Wis. Dep’t of Labor, Indus. & Human Relations*, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997).

“An agency’s findings of fact may be set aside only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence.” *Volvo Trucks N.A.*, 2010 WI 15, ¶ 19; *see also Wis. Bell, Inc.*, 2004 WI App 8, ¶ 23. Conversely, the Commission’s “factual findings must be upheld on review if there is *any* credible and substantial evidence in the record upon which reasonable persons *could rely* to make the same findings.” *See Currie*, 210 Wis. 2d at 386-87 (emphasis added.) This Court “must examine the record for credible and substantial evidence which supports the agency’s determination. *Id.* “[A]

general finding by the [state agency] implies all facts necessary to support it. A finding not explicitly made may be inferred from other properly made findings and from findings which the [state agency] failed to make, if there is evidence (or inferences which can be drawn from the evidence) which would support such findings.” *Valadzie v. Briggs & Stratton Corp.*, 92 Wis. 2d 583, 591, 286 N.W.2d 540 (1979).

**B. The Commission reasonably exercised its discretion by approving WEPCO’s distributed generation demand charges.**

**1. Substantial evidence in the record supports the Commission’s public policy decision to adhere to the “cost causation” principle.**

In the case at bar, the Commission’s discretionary policy decision to approve the non-purchase and net-metering demand charges is an equitable measure to promote the “cost causation” principle and is supported by substantial evidence in the record. As noted above, WEPCO recovers much of its fixed costs through volumetric energy charges instead of through the fixed customer or facilities charge. (R.254:4r.) However, where volumetric charges recover significant fixed costs, lagging volumetric sales growth strains full fixed cost recovery. (*Id.* at 3r.) WEPCO, like all utilities, must nevertheless incur fixed costs to “furnish reasonably adequate service and facilities” to all customers irrespective of usage. *See, e.g.*, Wis. Stat. § 196.03(1). Further, where volumetric charges recover significant fixed costs, energy charges increase above energy unit variable costs, which may discourage energy use when it would otherwise benefit a customer or the utility and other customers. (R.254:5r.) Thus, in order to fairly align rates with cost causation and to send proper price signals to customers, the Commission increased WEPCO’s fixed customer or facilities charge and, with some modifications, approved WEPCO’s proposed distributed generation demand charges. (R.257:24r.)

Based on the results of WEPCO's cost-of-service analysis, about 14 percent of the costs to serve its small customer class were customer-related fixed costs, but only 8.5 percent of its costs were recovered through its facilities or customer charge. (R.256:36.) This sent "improper price signals because it [did] not include all customer-related costs." *Id.* at 35. The Commission increased WEPCO's fixed customer or facilities charge to \$0.52602 per day, or \$16.00 per month. (*Id.*; *see also* R.103:Schedule 32 (calculating average monthly cost per small class customer to be \$16.55)). Further, "[o]ver 61 [percent] of the costs to serve the small class are demand-related fixed costs[,] all of which will continue to be recovered through the variable energy charge. (R.256:36-37; *see also* R.106:Schedule 3.)

Similarly, for the 61 percent of demand-related fixed costs still recovered through variable energy charges, the Commission modified WEPCO's "tariffs for [distributed] generation to better accommodate such generation in a way that reduces cross-subsidization and lessens perverse incentives for customers to make economically inefficient investments in generation." (R.256:4.) "Even when a customer's generation completely offsets consumption, the customer is still receiving valuable benefits from the distribution system for stand-by power, voltage support and other ancillary services." *Id.* at 54. Notwithstanding displacement of load previously served by WEPCO, "there [were] two categories of utility costs that remain[ed]: (1) the distribution costs to deliver electricity to the self-generation customer when its self-generation is not available; and (2) backup generation and transmission that the utility maintains to serve the self-generation customer's load requirements when its self-generation is not available." (R.255:11r.)

"The magnitude of this problem has been relatively small, but as the number of these systems grow, so too will this problem." (R.256:54.) Indeed, legal commentators echo these cross-subsidy concerns. *See, e.g.,* White, "Compromise in Colorado: Solar Net Metering and the

Case for ‘Renewable Avoided Cost,’ ” 86 U. Colo. L. Rev. 1095, 1118-34 (2015) (identifying the cross-subsidy and criticizing a TASC study for over-estimating solar benefits from a rate perspective).

While TASC witnesses criticized WEPCO for not conducting a cost-of-service analysis for distributed generation customers, WEPCO’s witness Eric A. Rogers duly noted that “[t]he load data to support such a detailed cost-of-service study in our service territory does not exist. The customer-owned generator class is very small (currently) and the cost-of service results tend to be less robust and reliable for smaller customer classes.” (R.257:10r.<sup>14</sup>) Mr. Rogers further noted, “[h]owever, there is no reason to believe the customer-related distribution cost (upon which [WEPCO’s] proposed facilities charge [was] based) would be any different for the [distributed generation] customers than it is for [non-distributed generation] customers.” *Id.* TASC conceded that: (1) “[t]he utility’s grid is still important to providing consistent and reliable service[;]” and (2) “customers who own [distributed generation] cause the utility to incur those costs at the same extent as customers who do not own [distributed generation].” (R.307:6; R.324:148-49.)

As such, the non-intermittent \$8.602/kW/month and intermittent \$3.794/kW/month demand charges based on general small residential customer class data are calculated as follows. (R.102:Schedule 8.) For non-intermittent distributed generation customers, WEPCO summed: (1) the demand-related reserve marginal transmission and generation level capacity costs; and (2)

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<sup>14</sup> Mr. Rogers is currently a team leader in the Regulatory Affairs and Policy Department and has been employed with WEPCO since 1982. (R.256:2.) During his tenure with WEPCO, Mr. Rogers has developed residential sales forecasts, analyzed cost effectiveness of demand-side programs and evaluated the performance of actual demand-side programs, developed load profiling and settlement methodology in Michigan, and has recently assumed responsibility for cost-of-service analysis and rate design. *Id.* Mr. Rogers has previously testified before various state and federal regulatory agencies, including the Commission. *Id.* Mr. Rogers is a registered professional engineer in the State of Wisconsin and a member of the Association of Edison Illuminating Companies Load Research and Analytics Committee. *Id.* at 1. Last, Mr. Rogers earned a Bachelor of Science in Civil Engineering from the University of Wisconsin – Madison in 1975 and a Master of Science in Environmental Engineering from Stanford University in 1978. *Id.*

demand-related distribution costs, all of which are on per \$/KW/month basis. *Id.* The marginal transmission costs are based on payments made to American Transmission Company LLC and Midwest Independent System Operator. *Id.* at Schedule 3. The marginal generation level capacity costs are based on a combustion turbine cost, which WEPCO has used in the past and are less than average demand-related generation capacity level costs. (*Id.* at Schedule 1; R.256:31, 33.) The distribution costs are based on WEPCO's cost-of-service analysis. (R.103:Schedule 33.) For intermittent distributed generation customers, WEPCO applied a capacity factor adjustment for intermittent generation. (R.102:Schedule 8.)

Similarly, the Commission's use of the nameplate capacity as a basis for calculating a customers total distributed generation demand charge "recognizes the size of the self-generation that the utility must backup and . . . measures a part of the customer's use of distribution service. Demand charges for self-generation based upon nameplate capacity have been proposed by utilities including Progress Energy Company, Alabama Power Company, and Georgia Power Company." (R.254:24r.)

The Commission bolstered this use of the nameplate capacity by imposing conditions that provide for an accurate evaluation of demand and a reconciliation process between WEPCO and the distributed generation customer after a specified evaluation period. First, the Commission required WEPCO to install meters capable of "measuring the actual output capacity of generating systems newly enrolled under [net metering] and [non-purchase] on an interval basis." (R.49:85.) The Commission indicated that in the next rate case, it would re-evaluate whether the nameplate capacity serves as a reasonable proxy for actual demand and related questions. *Id.* Second, the Commission required WEPCO to perform a true-up at the end of 2016 where WEPCO would use the metered data to "compare the customer's actual monthly maximum generation capacity with

the rated nameplate capacity of the same system.” *Id.* If the customer’s generation is less than the nameplate capacity, WEPCO must issue a refund; if the customer’s generation is more than the nameplate capacity, WEPCO must issue a surcharge. *Id.* Last, WEPCO must present the data collected through this metering process in its next full rate case proceeding. *Id.* If WEPCO does not file for a 2017 test year rate case, WEPCO must perform the true-up described above annually until its next rate case. *Id.* These conditions therefore further improve the precision of WEPCO’s distributed generation demand charges beyond what is necessary under the law.

**2. Wisconsin case law upholding similar and even less precise rate designs under the substantial evidence test supports the Final Decision.**

Several binding Wisconsin cases demonstrate how reluctant courts are to overturn the Commission’s sound policy decisions and affirm the deference due the Commission’s institutional knowledge and legislatively delegated authority and function. Indeed, courts have upheld under the substantial evidence test: (1) an 8 percent rate increase applicable to all customers based on an outdated cost of service study to recover an increase in fixed costs; and (2) a general increase in rates that allocated costs equitably and promoted a natural gas conservation policy. These cases upheld rate designs far less precise than the distributed generation demand charges here.

In *City of West Allis*, suburban municipalities purchasing water from the City of Milwaukee sought review of a determination very similar to the case at bar that the court ultimately upheld under the substantial evidence test. *City of West Allis*, 42 Wis. 2d at 573-74. There, in an effort to promote fixed cost recovery, the Commission utilized a cost-of-service study from a previous rate case to apply an 8 percent across-the-board rate increase on all customers. *Id.* at 573. The suburban municipalities claimed that the Commission erred in using the previous cost-of-service study because nothing indicated costs were allocable in the same way. *Id.* at 574.

In applying the substantial evidence test, the Supreme Court of Wisconsin accorded deference to the Commission's discretionary ratemaking function and disagreed with the suburban municipalities. *Id.* at 575-79. The Supreme Court of Wisconsin held that the suburban municipalities offered no contention that the rates derived from the previous cost-of-service study were not fair and reasonable. *Id.* at 578. Rather, the 8 percent across-the-board rate increase produced adequate revenue and preserved the relative fairness among the parties. *Id.* at 578-79.

The case at bar is much like, if not more reasonable than, the rate design upheld in *City of West Allis*. The 8 percent across-the-board rate increase based on cost-of-service analysis from a prior rate case was far less precise and far more generic than the thoughtful allocation of demand-related fixed costs through the non-purchase and net-metering demand charges here. These forward looking measures are imposed on the small customer class that has already caused WEPCO to incur fixed costs. They are computed in a reasonable and rational manner given the available data and are supported by conditions the Commission imposed to further attain accuracy. The same fairness principles that compelled affirmance in *City of West Allis* apply with equal or greater force here, where the Commission has demonstrated its well-reasoned and principled commitment to the "cost causation" principle and distributing fixed costs equitably.

Similarly, in *WAMC*, the Court of Appeals dismissed two separate challenges to the Commission's rate design in an order increasing electric and natural gas rates. *WAMC*, 94 Wis. 2d at 325, 327. There, the Wisconsin Association of Manufacturers and Commerce ("WAMC") asserted that based on the Commission's departure from using a cost of service analysis, the rate design disproportionately affected one customer class in particular. *Id.* at 319. Similarly, the City of Eau Claire claimed that the Commission's maintenance of separate tariffs for the utility's two separate service areas was unlawful. *Id.* at 325.

With respect to WAMC's claims, the Court of Appeals held that: (1) the Commission adequately set forth in its Order the conservation factors necessitating departure from previous rate design; (2) the Commission properly relied on evidence that the rate design sought to provide price signals as a method of encouraging conservation; and (3) as far as regulated utilities are concerned, differential pricing is an entirely lawful and economically desirable form of price discrimination. *Id.* at 321-25.<sup>15</sup> With respect to the City of Eau Claire's claim, the Court of Appeals held that where the utility's service areas were not physically integrated, it would be inequitable to force one service area to pay for expensive Canadian natural gas they did not use. *Id.* at 327.

The case at bar is also very much like *WAMC*. Like the affirmed decision in *WAMC*, the Final Decision accomplished the following: (1) it set forth the Commission's subsidy concern and emphasized the need to redesign rates to fairly realign costs with charges; (2) it relied on evidence demonstrating the cross-subsidy, the current failure to and benefits of sending proper price signals, and the benefits of realigning the cross-subsidy; and (3) developed lawful and reasonable differential pricing based on cost-causation principles, not discriminatory bases. In relieving non-distributed generation customers from subsidizing the fixed costs that distributed generation customers cause, the Final Decision also resembles *WAMC* where the court would not place the burden of expensive Canadian natural gas on customers who did not use it.

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<sup>15</sup> On appeal, WAMC reasserted its claims that: (1) the Commission did not adequately explain its reasons for departing from its former rate-setting system; (2) the record does not support the pricing of natural gas to interruptible customers substantially above the cost of service; and (3) the Commission's order is unreasonable and unjustly discriminatory against interruptible customers. *WAMC*, 100 Wis. 2d at 303. In an advisory opinion dismissing the appeal as moot, the Supreme Court of Wisconsin "held" that "[t]he statement in the [Commission's] order 'The rates adopted herein will provide additional incentives to customers to perform further conservation measures' does not inform a court of how the record led to that conclusion." *Id.* at 311. The Supreme Court of Wisconsin did not indicate to which of WAMC's claims this "holding" related. Presumably, it related to WAMC's first claim concerning the adequacy of the Commission's order. Further, the Supreme Court of Wisconsin did not indicate that this "holding" would have reversed the Court of Appeals, where the Court of Appeals cited far more of the Commission's order than just this statement.

**C. All of TASC's interrelated and reiterative arguments rest on a fundamental misunderstanding of rate design.**

Without discussing, let alone citing, these binding authorities, TASC's first argument audaciously challenges the sufficiency of the record evidence. (Pet'r's Br. at 16.) TASC claims that the record lacks evidentiary facts necessary to impose the non-purchase and net-metering demand charges. *Id.* Generally, TASC erroneously asserts that the Final Decision assumed: (1) WEPCO obtains *additional* transmission resources to provide back-up power to distributed generation customers; (2) WEPCO builds *additional* new combustion turbine generating plants to provide back-up power to distributed generation customers; and (3) WEPCO incurs *incremental* distribution costs to serve distributed generation customers. *Id.*

None of these assertions is even remotely accurate. Rather, they demonstrate TASC's fundamental misunderstanding of the ratemaking process. The non-purchase and net-metering demand charges are based on costs that WEPCO has *already* incurred. The non-purchase and net-metering demand charges embody a policy aimed at equitably *assigning* those costs. In fact, WEPCO addressed TASC's claims in responsive testimony in the rate case. (R.259:1.)

For instance, TASC testified that WEPCO "has not provided any analysis to support . . . that there are extra distribution-related costs associated with customer generation systems that are sized to supply all or virtually all of the customer's electricity use in real time." (R.305:8r.) Similarly, TASC testified that "WEPCO is proceeding on the untested assumption that the cost of serving a non-purchase customer in fact *is* different than the cost of serving a customer without any on-site generation, and it is this difference that justifies, in [WEPCO's] view, the application of a 30% capacity demand charge on the generating system." *Id.* at 11r (emphasis original). Last, Commission staff testified that WEPCO's non-purchase and net-metering proposals essentially

address a scenario in which all distributed generation customers fail, fail consistently, and fail at the system peak. (R.320:9.)

WEPCO, however, easily dismissed these red herrings. WEPCO's witness Mr. Rogers had not "testified that customers with [distributed generation] impose extra costs; rather they impose the same costs on [WEPCO's] distribution system as customers without [distributed generation]. The difference is [WEPCO] recovers those costs from customers without [distributed generation] but [WEPCO] do[es] not recover those costs from customers with [distributed generation]." (R.259:2; *see also* R.51:68 (WEPCO "agrees that [distributed generation] will not increase costs; rather costs will remain the same, but would otherwise need to be recovered from [non-distributed generation] customers.")). Further, WEPCO's Mr. Rogers testified that Commission staff misunderstood WEPCO's "proposed generator capacity demand charge. As indicated in [R.102:Schedule 8], the generation component of the proposed capacity demand charge *is a function of the reserve margin of 14.5%*, so [WEPCO] do[es] not assume that all the distributed generation will fail coincident with the system peak." (R.259:2 (emphasis added)).<sup>16</sup>

Within TASC's first argument, TASC further references a study performed for WEPCO that alleges numerous societal benefits of distributed generation. (R.191.) The purported benefits TASC alleges include reduced transmission costs, reduced needed capacity, and reduced peak demand on distribution systems. (Pet'r's Br. at 18, 20 n.7, 23 n.10.) In a similar fashion, TASC testified that excess energy produced by the solar "reduces the load on the distribution system at a time of generally higher utility costs in the middle of the day – a benefit for all." (R.300:10r.) WEPCO's Mr. Rogers duly corrected TASC's misconceptions, testifying that these are not

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<sup>16</sup> This reserve margin is what WEPCO must maintain to serve stand-by customers. (R.256:60-61.) If WEPCO based its distributed generation demand charges on the assumption that forced outage would occur at the time of system peak, WEPCO would have charged the *full* cost of new entry for the back-up service, not 14.5 percent of this cost. (R.257:11r.)

“benefits to all” where they do not “reduce the cost to the utility to install, operate and maintain that distribution line. All it does is reduce the revenue received from the customer with the solar generator.” (R.257:15r.) As noted above, legal commentators have taken specific issue with TASC’s overstatement of solar benefits. *See White*, 86 U. Colo. L. Rev. at 1118-34.

Also within TASC’s first argument, TASC criticizes the Commission’s adoption of WEPCO’s proposal to base the demand charge on the nameplate capacity of the distributed generation equipment. However, the record demonstrates that nameplate capacity is a reasonable proxy that recognizes the size of the self-generation that the utility must backup and measures a part of the customer’s use of distribution service. Further, the Commission imposed conditions that provide for a more accurate evaluation than what would otherwise occur. TASC thus invites this Court to require the Commission to evaluate a cost-of-service analysis for distributed generation customers, even though the law most clearly does not require such an infeasible and unreliable analysis. *See City of West Allis*, 42 Wis. 2d at 577.

TASC’s second argument essentially asserts that non-purchase and net-metering demand charges are arbitrary and discriminatory because: (1) the Commission refused to impose the stand-by service charges; and (2) the demand charges are duplicative.<sup>17</sup> (*See Pet’r’s Br.* at 26-29.) Notwithstanding TASC’s gross mischaracterization of the record and the Final Decision, the Commission rejected the stand-by service charge because the record did not demonstrate: (1) the need to change the stand-by service from a voluntary service to a mandatory service; and (2) WEPCO’s unidentified use of the expected \$1.0 to \$1.5 million in revenue. (R.49:88 (citing R.290:3-5; R.292:9r-10r; R.320:9-10)); *Pet’r’s Br.* at 20 (misconstruing the Final Decision by

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<sup>17</sup> TASC also asserts a third arbitrary and discriminatory argument based on alleged treatment of Cg2 class customers. However, it appears that this argument is premised on a misunderstanding of the non-purchase and net-metering demand charges as described in WEPCO’s testimony, which are waived for customers with demand charges in their underlying rate that also use *intermittent* distributed generation. (R.102:57.)

vaguely asserting that “[t]he Commission rejected WEPCO’s proposed ‘standby’ charge for larger customer-owned generation as “unreasonable” and lacking sufficient evidentiary support.”); *Id.* at 24 (same, asserting that “not all of the [C]ommissioners missed the lack of evidence in the record.”).

The Commission did not arbitrarily accept non-purchase and net-metering demand charges and reject the stand-by service based on the same data, as TASC suggests. Rather, the stand-by service includes two charges *in addition* to those that served as the basis for the non-purchase and net-metering demand charges. (R.102:Schedule 8; R.292:9r-10r.) The stand-by service charge consisted of: (1) a proposed billed demand charge based on the number of kW it purchased from WEPCO *and* for each kW it generated itself; (2) a reserve demand charge based on the nameplate generation capacity or expected actual demand; and (3) stand-by energy charges. *Id.* The stand-by service charge was categorically distinct, designed for a different customer class, and presented a different issue for the Commission’s consideration. Further, TASC’s second basis for claiming the non-purchase and net-metering demand charges are arbitrary and discriminatory, that customers subject to these tariffs may pay demand-related distribution costs twice, is merely a reiteration of its argument against basing the rate on the nameplate capacity dismissed above that also requires conjecture and speculation.<sup>18</sup>

### CONCLUSION

Overwhelming authority demonstrates that courts have been extremely reluctant to find that an administrative adjudicator should have been disqualified because of actual bias or an impermissibly high risk of bias. Disqualification is warranted only where the adjudicator has a

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<sup>18</sup> TASC’s claim that the non-purchase and net-metering demand charges are arbitrary and discriminatory also fails as a matter of law based on the holding in *WAMC* that where substantial evidence supports the Commission’s actions, the Commission’s action cannot be arbitrary and capricious. *WAMC*, 94 Wis. 2d at 324-35 (citing *Westring v. James*, 71 Wis. 2d 462, 477, 238 N.W.2d 695 (1976)).

pecuniary interest, has previously advocated for a party in the proceeding in which he or she also serves as an adjudicator, or has prejudged the facts and law of the *particular* case. Commissioner Nowak's general comments regarding the developing distributed generation landscape and potential solutions to problems this landscape poses neither rendered her biased in fact nor created an impermissibly high risk of bias. Publicly stating a policy position, without more, is simply insufficient. Indeed, such statements are appropriate under the law and encouraged as a matter of sound public policy. Neither Commissioner Nowak nor the rest of the Commission erred in declining to disqualify Commissioner Nowak.

Further, the Commission's policy choice to adhere to the "cost causation" principle is supported by substantial evidence in the record. Like all of WEPCO's customers, WEPCO's distributed generation customers cause WEPCO to incur fixed costs associated with providing reliable and needed service. However, where WEPCO has traditionally recovered its demand-related fixed costs through variable energy charges imposed on customers, WEPCO's distributed generation customers previously did not pay their fair share of the demand-related fixed costs they cause WEPCO to incur. Rather, the rest of WEPCO's customers satisfied the difference in order for WEPCO to recover the revenue necessary to provide reliable and needed service.

In addition to increased facilities charges, WEPCO's distributed generation demand charges correct this disparity. The non-purchase and net-metering demand charges are based on *reserve margin* demand-related generation, transmission, and distribution costs WEPCO has *already* incurred. Further, the Commission modified WEPCO's proposal to *mitigate* any potential inaccuracy in the event the nameplate capacity of the distributed generation equipment does not adequately represent the demand the customer causes. Where rate design is not a mathematical application of an absolute cost theory, the non-purchase and net-metering rate designs nevertheless

do far more than reflect the major, more stable, and more predictable cost relationships. See *WAMC*, 94 Wis. 2d at 319, *City of West Allis*, 42 Wis. 2d at 576.

For the foregoing reasons, the Commission respectfully requests that this Court affirm the Final Decision in its entirety.

Dated this 22nd day of June, 2015.

By: \_\_\_\_\_



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