STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

THE ALLIANCE FOR SOLAR CHOICE, and
RENEW WISCONSIN

Petitioners,
v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN

Case No. 15cv153

Hon. Peter Anderson

Respondent, and

WISCONSIN ELECTRIC POWER COMPANY,

Intervenor-Respondent.

PETITIONERS' REPLY BRIEF

Introduction

In this case, the Public Service Commission singled out a subclass of customers for arbitrary and unsupported fees. Wisconsin Electric Power Company ("WEPCO") customers who decrease their electricity purchases must now pay a fee based on the size of their generating equipment. (Pet'r Br. at 2.)[1] The purported basis for the new fee is that these self-generating customers cause WEPCO to incur costs to provide backup and other services that exceed the charges the customers already pay to WEPCO.[2] (R.49 at 84.) However--even granting deference to the Commission's choice of policy when setting rates and presuming the theoretical premise for the fee is legitimate—the record in this case lacks evidence that customers who self-generate some of their electricity impose costs for "standby generation and distribution" that exceed the charges these customers already pay, R.49 at 84, or that any such deficit is proportionate to the size of

[1] In classic doublespeak, WEPCO claims that the fees at issue are "voluntary" and only paid by those who "wish to receive a rate benefit." WEPCO Br. at 4. The fees are *mandatory* for any customer who actually wants to "receive a rate benefit" of using his own self-generated electricity instead of being forced to buy it from WEPCO--even if the customer has no intent to send any of the electricity to WEPCO's grid. See http://www.we-energies.com/pdfs/etariffs/wisconsin/ewi_sheet2014-2015.pdf. In fact, by the tariff's own terms, a customer with an emergency generator in the backyard would be required to pay the fee each month merely for having the generator, even if it never runs.

[2] Customers who supply some of their own electricity still pay a monthly "customer charge" or "facilities charge" as well as energy (and demand) rates for the electricity they use in excess of their own self-produced electricity. (Petr. Br. at 15 n.5, 27-28 n. 12.)

the customer's generating equipment.[3] In short, there is no evidence the fee is necessary, or if so, what the amount of the fee should be given actual costs.

Further, the fee is procedurally flawed because one of the two commissioners voting to impose the fee predetermined the need to tax self-generating customers. For all of these reasons, the PSC's decision to impose the self-generation fee should be vacated.

I. WEPCO Misreads The Law On Agency Deference.

Petitioners challenge the fee on customers' generating equipment because the proposed basis and amount of the fee is not supported by substantial record evidence. The applicable standard of review is whether the evidence that is in the record is sufficient so that a reasonable person could reach the necessary factual conclusions underlying the decision. (Pet'r. Br. at 13-15.) Petitioners do not dispute the Commission's interpretation of any statute. Yet, WEPCO incorrectly argues that the standard of review for agency interpretations and applications of statutory language apply to this case. (WEPCO at 20, 22.)

The cases WEPCO cites apply great weight deference to statutory interpretation, not to determining whether substantial evidence exists. *Wis. Bell, Inc. v. PSC* 2004 WI App 8 ¶¶ 14-22; *Wis. End-User Gas Ass'n v. PSC*, 218 Wis. 2d 558, 565 (Ct. App. 1998)

[3] WEPCO makes irrelevant arguments about whether customers with generation should pay for the distribution system costs that they cause. (WEPCO Br. at 12-13.) There is no dispute about that, and no challenge to the hortatory statements about "sending more appropriate price signals, better aligning rates with costs, and assigning costs more equitably to those who cause the costs." (*Id*. at 17.) The dispute is whether the record quantifies the costs actually caused by customers with their own generation and the rates they already pay, to determine whether an additional fee is necessary and if so, the amount at which it should be set.

(great weight applies for statutory interpretation but not in other matters such as interpreting a contract). While cases involving PSC rate orders have applied great weight deference, they did so to statutory interpretations and not to all questions or to substantial evidence review. WEPCO's attempts to apply statutory interpretation standards to this substantial evidence review case are without merit. (WEPCO Br. at 22 (arguing that great weight deference applies because this case involves rate setting).)

II. WEPCO's Ripeness Argument Is Without Merit.

WEPCO urges the Court to apply federal cases to find that the challenged fee on customer owned generation is not ripe for review at this time because the Commission ordered a possible, limited, opportunity for a surcharge or refund (to retroactively increase or decrease the fee). (WEPCO Br. at 25-26.) WEPCO's argument misses the point.

Petitioners' challenge in this case is whether the evidence is sufficient to impose *any* fee and to impose it on generation *output capacity*—regardless of whether measured or nameplate[4]—rather than on actual electricity drawn from the WEPCO system. The "true-up" provision only allows the fee to be increased or decreased based on the customer's actual maximum generation compared to the name-plate capacity of his or her generating equipment. (R.49 at 85.) As long as the customer's equipment has some

[4] The nameplate rating is the amount of electricity that a solar panel, or system, will produce when brand new, under "Standard Test Conditions" (irradiance of 1,000 W/m², solar spectrum at 1.5 times sea level air mass (AM) and module temperature at 25 °C). The actual output can be lower, depending on various factors, including the strength of the sunlight, ambient temperature, shading, losses across wires and other system components, and panel degradation over time.

amount of output during the year, there is no possibility that the fee will be refunded entirely. And, there is no possibility that the charge will be assessed based on the customer's actual demand on the WEPCO system rather than on the generating system output. The order has an immediate impact on customer generators by imposing a fee and imposing it on generation system size. It therefore "finally disposes of matters having an immediate impact upon the rights of a party" and is reviewable now. *Friends of the Earth v. PSC*, 78 Wis. 2d 388, 406-07, 254 N.W.2d 299 (1977) (even a PSC rate subject to later refund is reviewable if it has immediate impact on rights of a party). WEPCO's ripeness argument lacks merit as a matter of fact and law.

III. Respondents Fail To Identify Record Evidence To Support The Purported Basis for the New Fee on Customers' Generation.

A. There is No Evidence That Customer-Generators Cause Costs Greater Than The Charges They Already Pay.

There is no evidence in the record about the costs that the sub-class of customers who own generation cause, except that they cost *less* to serve than otherwise similar customers because they *reduce* the amount of transmission, generation, and other infrastructure WEPCO would otherwise require. (Petr. Br. at 17-18; R.191 at ES-8, 61 through 6-3; R.308 at 12r-13r.)[5]

[5] The Commission's response also attempts to dismiss the only affirmative evidence of the impact on WEPCO's costs by customers with self-generation (i.e., reducing, not increasing costs) by attacking items other than the transmission, generation and distribution system costs at issue. (PSC Br. at 34-35.) The Commission quotes a WEPCO witness's comments about a particular comment specific to distribution system line loads, R.257:15r, and not the specific items of transmission, generation, and distribution system equipment other than the line. It also points to a law student comment from outside the administrative record in this case, which analyzes two studies done in another state (largely involving carbon emission prices and water use costs not at issue in this case), as an attempted substitute for the lack of record evidence in

Rather than pointing to any affirmative evidence to support its view, the PSC's brief points to a *lack* of evidence: that there were no data to demonstrate that customer-generators cost more to serve than they pay in rates (because WEPCO performed no study) and a statement by a WEPCO witness that there is no evidence that costs are different than for other customers. (PSC Br. at 28 (data do not exist to determine costs caused by customer-generators).)[6] An assertion that there is *no* evidence that a proffered fact is *not true*, is not substantial evidence of an affirmative fact. That is especially so in this case, where there is evidence in the record that small scale generation located on WEPCO's system *relieves* costs to the company—meaning customer-generators' costs to WEPCO are not the same as other customers'. (*E.g.*, Petr's Br. at 17-18 (distributed small solar relieves WEPCO's transmission costs).)

The PSC's response does not even acknowledge the lack of record evidence on whether self-generating customers already cover the costs they impose on the system through the substantial monthly bills they continue to pay after on-site generation is installed, *i.e.*, whether customer-generators' costs exceed the existing rates that those

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this case that customer-owned solar generation decreases WEPCO's costs. (PSC Br. at 35, citing 86 U.Colo.L.Rev. 1095, 1118-34.) *See also* White, 86 U.Colo.L.Rev. at 1119 (the discussion cited by the PSC is the law student's analysis of parties' contentions and studies in a *Colorado* proceeding). This attempt to use a law student note, analyzing studies done in another proceeding, in another state, as evidence in this case highlights the lack of affirmative evidence in the actual record in this case. The Court cannot rely on this extra-record "evidence" to sustain the Commission's order.

[6] The PSCW's brief also spends significant time defending portions of the final order—specifically the separate "customer charge"—that the petitioners do not challenge. (PSCW Br. at 26-27 (discussing the PSCW's basis for the "fixed customer charge"). Petitioners noted that the customer charge is separate from the charge at issue in this case. (Pet'r Br. at 4 (describing the "connection" or "customer charge").)

customers already pay. (PSC Br. at 36 (summarily and incorrectly asserting that this point "is merely a reiteration of" a different argument).) Nor does the PSC rebut the fact that, unless the cost to provide service to the sub-class of customer-generators and the amount they already pay in rates to WEPCO are calculated, it is impossible to conclude that these customers pay less than the cost to serve them—which is the purported justification for the new fee.

Instead of pointing to evidence in the record quantifying the cost to serve customer-generators as a sub-class, WEPCO says only that customer-generators *rely* on the grid while omitting the critical quantitative value of how much and at what cost. (*Compare* WEPCO Br. at 27 ¶ 4 *with id*. at 28 ¶ 4.) WEPCO's brief tees up a set of "facts" purportedly proven by the record on one page, then attempts to identify the record evidence for each such "fact" on a subsequent page. (*Compare* WEPCO Br. at 27 ¶ 4 *with id*. at 28 ¶ 4.) Tellingly, while it claims on the first page that customers with their own generation cause WEPCO to incur costs *equal* to customers without generation, *id*. at 27 ¶ 4, when WEPCO actually attempts on the following page to identify evidence, it deceptively changes the statement to claim only that customers with generation rely to some unquantified extent on the grid—again omitting the critical detail of how much (and whether it is equal to or less than customers without generation). *Id.* at 28 ¶ 4. The fact that customers with generation rely on the grid to some extent is not the issue. The issue is how much they rely on it, what costs WEPCO incurs to provide for that quantity of use, and whether the fees and other charges that customer-generators already pay cover the costs they impose. There is no evidence in the record of *those*

facts. If there was, WEPCO would have cited it instead of relying on misdirection to the undisputed fact that there is some unquantified amount of use of the grid by self-generating customers.

Contrary to WEPCO's attempt to imply otherwise, the record does not actually show a quantitative value for the *amount* that customer-generators rely on WEPCO's grid. Determining the amount is necessary to determine the resulting costs to WEPCO, which in turn is a necessary step to justify the new fee on the premise that customer-generators cause costs in excess of the charges they already pay to WEPCO.

The PSC and WEPCO assert that the costs caused by the customer-generator subclass need not be quantified because those customers cause costs exactly equal to other customers, so they must pay a "pro rata" portion of WEPCO's costs. (WEPCO Br. at 10, 30-31; PSC Br. at 28, 34.) This is not only untrue[7] and inconsistent with the cost causation principle they claim to follow elsewhere, but it was not a finding set forth in the Commission's order.

Moreover, to the extent that Respondents assert that there was no study, or that the sub-class of customer-generators is too small to study—as a reason to assume that

[7] WEPCO's own calculation of the fee uses costs per kilowatt of peak use, not a pro rata division of all costs by number of customers. (R.102, Sched. 1, 8; Ex. 103, Sched. 33.) The testimony that WEPCO cites from its witness, R. 246:12-13, R.256 at 53-54, only says that *certain* costs do not vary by customer electricity usage (most of which are covered by the customer charge that is not at issue anyway)—not that *all* costs to serve each customer are equal. Similarly, R.259 page 2 says certain *types* of costs are incurred for customer-generators but does not say that the *amount* of costs caused by customers is equal. In fact, the same witness later admitted at hearing that the necessary analysis to make quantitative comparisons was not done, R.324 at 88:20-23, 90:25-91:17, and that customers cause costs based on when and how much electricity they draw (not that all cause equal costs). (*Id*. at 86-88, 112-13.)

customer-generators cost the same as those customers without generation, the argument assumes what it seeks to prove. The fundamental question is whether a new charge specifically applied to only one sub-class (customer-generators) is justified based on recovering costs caused by, but not paid for by, that sub-class. WEPCO and the Commission cannot assume away the factual predicate that the sub-class causes costs greater than the rates that they pay. *Cf. Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 917 (7th Cir. 1990) ("we cannot defer to agency interpretations that, as applied here, appear to assume what they seek to prove.")

Further still, the idea floated by WEPCO that determining cost causation is not necessary because all customers should pay a "pro rata" portion of all of WEPCO's costs other than fuel (i.e., 86.1% of all costs to make and deliver electricity) *regardless* of the amount of electricity used is radical. It does not assign costs based on cost-causation, but only on the total number of customers and would require the retired widow living in an unairconditioned efficiency apartment to pay the same amount of WEPCO's costs as an energy-hog suburban mansion that uses 1,000 times as much electricity. The Commission has never adopted a policy imposing 86% of the utilities' costs on a pro-rata basis. Nor would such a policy conform to caselaw requiring cost-causation ratemaking. *See infra*, note 11.

The basis for the PSC's fees on customer-generators is unsupported in the record.

B. There Is No Evidence Connecting The Marginal Transmission, Generation, and Distribution Costs For Each Kilowatt of Customer Use With The Size of Customer Generation Equipment Capacity.

In addition to the lack of evidence justifying the need for the fee, there is also no evidence to lead a reasonable person to conclude that the amount of costs to provide a customer-generator with "standby and distribution" service (if any) is proportionate to the size of the customer's generation equipment instead of the amount of electricity that the customer draws from the WEPCO system. The disconnect is due to the fact that the fee was *calculated* from various itemized marginal[8] costs of providing transmission, generation[9] and distribution service per kilowatt of a customer's on-peak draw *from the WEPCO system*, whereas the fee is *imposed* on the size of the customer's generating equipment *regardless* of any on-peak electricity draw from the WEPCO system. (Petr. Br. at 23-25.) A customer with a 1 kilowatt solar array but who uses large amounts of electricity from WEPCO during peak periods pays less than a customer with a 10 kilowatt system who uses none even though the first customer is costing WEPCO more. It is equivalent to a grocery store charging customers based on the size of their home garden, instead of based on the amount of food they purchase.

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[8] The PSC's brief is incorrect that the fee imposed on customers-generators is based on the costs WEPCO already incurred. (PSC Br. at 33.) The cost calculations are marginal costs for future years. (R.102, Sched. 1, 8; Ex. 103, Sched. 33.) That is, they are based on the next margin of cost for the next margin of service, not on the average of costs WEPCO already incurred. For example, the fee is based on the cost of the next theoretical combustion turbine (power plant) WEPCO would build for additional generation capacity in 2015-2016. (R.102, Sched. 1.)

[9] WEPCO is incorrect that Petitioners do not dispute how WEPCO calculated the fee imposed on customer-generators. (WEPCO Br. at 11 n.5.) Petitioners noted that there was no basis for using the cost to build a brand new combustion turbine to provide generation capacity in 2015-2016 when WEPCO already owns excess capacity and when market purchased capacity is available during those years for a fraction of the cost to build a new power plant. (Petr. Br. at 18-20.)

The record lacks fundamental facts connecting the amount of electricity a customer-generator may draw from the WEPCO system if or when his generating equipment is not operating and the size of his generating equipment. The PSC responds only by asserting that customer generator size is a "reasonable proxy" for his electricity draw from the WEPCO system, and making the assertion that the record "demonstrates" this to be true. (PSC Br. at 29, 35.) Tellingly, no cite to the record is provided—because no such demonstration exists in the record, as the dissenting Commissioner accurately pointed out.

> I disagree with the capacity demand charge adopted by the Commission because it is largely arbitrary. While the stated purpose of the charge is "to recover standby generation and distribution costs that are not recovered by the facilities charge of the underlying rate," the Commission is unable to point to any record evidence demonstrating the amount or scope of additional distribution costs that are specific to distributed generation customers, and which would justify differential fixed, demand charge treatment. Yet the Commission concludes that "it is reasonable to establish the demand charge based on the name-plate capacity of the generating equipment," even though there is no showing that name-plate capacity of the various forms of distributed generation accurately reflects what either the actual output of the distributed generation facility will be or the customer's actual demand on the utility system.

(R.49, Dissent at 15-16.) It is not enough for the Commission to merely assert that using customer generation size as a proxy for customer electricity draw from WEPCO's system is "reasonable"—there must be some evidence in the record to support that conclusion. Wis. Stat. § 227.57(6).

WEPCO argues that it will "be called on to provide" 20 kilowatts to a customer if the customer's 20 kilowatt solar array is "not functioning (say, at night)," WEPCO Br. at

11, but WEPCO only fills the customer's electricity *use*[10], not the generator *size*. Unless the customer always uses 20 kilowatts, there is no requirement for WEPCO to provide backup capacity for that amount of electricity. A customer who uses 2 kilowatts only draws that amount from WEPCO and only causes proportionate costs—regardless of whether his solar array is 1 kilowatt or 100 kilowatts.

There is also no attempt to account for the fact that some amount of the same generation, transmission and distribution costs are paid for by customer-generators who are also required to pay them again through the new fee. As WEPCO admits, customers with generation still buy some electricity from WEPCO, and the same costs imposed in the fee on their generation equipment is also paid for through the charge on the electricity they buy. (WEPCO Br. at 9 (customer-generators pay the same energy charge as other customers when using electricity supplied by WEPCO), 11 (admitting that because customer-generators still buy power from WEPCO, the fee recovers a portion of the same costs twice).) There is no evidence that the amount of the fee imposed on customers' generating system size recovers the deficit (if any) between the costs they cause and the charges they already pay to WEPCO.

[10] In fact, elsewhere in its brief WEPCO admits that its costs are "driven by the peak amount of electricity a customer uses in a given period." (WEPCO Br. at 8.) Thus, these costs are recovered from customers without demand meters through the charge per kilowatt hour of use and from customers who have demand meters based on their maximum use because there is "a rational connection between billing and the customer's energy use." (*Id*. at 9.) But customers forced to pay the fee on self-generation are forced to pay the additional fee without any relationship to their actual usage (either kilowatt hours or peak demand). There is no evidence about how much electricity customers with self-generation draw from WEPCO's system during any given period so there can be no calculation of the costs incurred to serve that use and no conclusion that the rates they already pay are insufficient to cover the cost.

The PSC's decision is not supported by substantial, record evidence.

IV. The Cases The PSC Cites Are Inapposite.

The Commission's response cites *City of West Allis v. PSC*, 42 Wis. 2d 569, 167 N.W.2d 401 (1969), for the proposition that rates need not be set based on a "cost-of-service formula" for each class of customer. (PSC Br. at 35.) That argument is misplaced. First, there actually was a study of costs in the *West Allis* case, albeit an old one; the issue was whether the Commission could rely on an old study rather than conducting a new study for every rate case. 42 Wis. 2d at 578-79. Second, cost of service study or not, the case does *not* say that the Commission's rate design does not require substantial evidence. Here, the Commission chose to base the new fee on the theory that customer-generators cause WEPCO to incur costs of "standby generation and distribution… that are not recovered by the facilities charge of the underlying rate…" and that the charge should be "based on the name-plate capacity of the generating equipment." (R.49 at 84-85.) Having chosen that as the basis for the new fee, the Commission then had an obligation to ensure substantial evidence exists (1) that WEPCO incurs such costs, (2) that those costs are not already recovered through other charges, and (3) that the deficit between costs caused and charges already paid are proportionate to the size of the name-plate capacity of the customers' generation. As the *West Allis* court noted, whatever basis the Commission chooses to set rates, there must still be "substantial evidence in the record to support the rate as a whole." 42 Wis. 2d at 578; *see also Ill. Comm. Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) (the court cannot uphold a rate decision that is not supported by substantial evidence).

The Commission's reliance on *Wisconsin Association of Manufacturers and Commerce v. PSC*, 94 Wis. 2d 314, 287 N.W.2d 844 (Ct.App. 1979) is also misplaced. That decision recognizes the Commission's ability to base a rate design on a balance of factors (including the desire to encourage conservation and the recognition of two separate delivery systems in that case). 94 Wis. 2d at 320-21, 326. It does *not* recognize a right to impose rates that are unsupported by record evidence. To the contrary, the court found that there was record evidence—including testimony and concessions by the petitioner—to support the basis on which the rate was established (conservation and separation of delivery area systems). *Id*. at 322-23, 326; *see also id*. at 328-29 (dissent noting that under a different definition of "conservation" the court would have to reverse because no evidence exists).[11] In this case, Petitioners are not challenging the Commission's ability to choose the basis for setting rates. The parties agree that the new fee on self-generating customers is purportedly based on cost causation. (PSCW Br. at 26, 31; Pet'r Br. at 4-5; WEPCO Br. at 4.)[12] Petitioners challenge the lack of

[11] The Wisconsin Supreme Court also held that it would have reversed the Court of Appeals because the PSC's order failed to adequately set forth findings to allow review but for the fact that the case became moot through a subsequent rate decision. *Wis. Ass'n Mfr. & Commerce v. PSC*, 100 Wis. 2d 300, 309-311, 310 N.W.2d 247 (1981).

[12] To the extent the *West Allis* decision extends to allowing the Commission to establish rates on a basis other than cost causation, it may no longer be good law as courts have recognized that setting rates based on cost causation is essentially required. *See e.g., Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009) ("[A]ll approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them… Not surprisingly, we evaluate compliance with this unremarkable principle by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.") (internal quotes and citations omitted).

substantial evidence for findings supporting the particular rate set on the Commission's purported basis.

Unlike the cases cited by the PSC, the record here lacks that evidence.

V. Respondents Fail To Justify Commissioner Nowak's Prejudgment of a Disputed Factual Issue In This Case.

Petitioners also challenge the fee on customer-generation because Commissioner Nowak pre-determined that new charges on customer-generators were necessary prior to considering the evidence in this case. (Pet'r Br. at 29-39.) Respondents' attempts to refute this procedural flaw are without merit.

A. WEPCO Fails to Demonstrate That The Prejudgment Was Appropriate.

WEPCO protests Petitioners pointing out the problem with a quasi-judicial official prejudging an issue being litigated before the same official. (WEPCO Br. at 36.) But WEPCO attempts to minimize Commissioner Nowak's statements by suggesting that the issue of distributed generation rates had been raised by the Commission in 2013 and that the WEPCO rate decision was consistent with that earlier decision fail. (*Id.*) The earlier proceeding was a request by RENEW and others for a formal rulemaking process to address Wisconsin's outdated "distributed generation" ("DG") rules. *In re Petition to Open a Rulemaking Docket to Consider Amendeing Wis. Admin. Code ch. PSC 119 and Wis. Admin. Code § PSC 113.10 Related to Distributed Resources Interconnection Rules*, Case 5-GF-233 (11/15/13). That proceeding included a decision to defer addressing distributed generation because revisions to tariffs *might* be necessary in future proceedings—which was hardly surprising since considering whether changes to tariffs

are needed is always an issue in PSC rate proceedings. *Id*. at 2 ("Current tariffs *may* need to be re-examined…" (emphasis added)). The question of whether changes might be needed is categorically different, however, from Commissioner Nowak's determination that "we need" to make changes to rates for owners of distributed to generation. (R.39 at 3.)

WEPCO also claims the PSC's procedural handling of TASC's recusal request was consistent with prior practice. (WEPCO Br. at 36.) But the procedural handling is not Petitioners' dispute. Rather, the end result of the recusal process was wrong, based on the objective standard by which the risk of bias is assessed. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009) (finding objective risk of bias despite judge's "probing search" into subjective bias through four separate opinions). Commissioner Nowak should not have participated in the rate case because she had prejudged the issue of whether fixed costs should be imposed on customer-generators, or because the risk of her prejudgment was high.

B. The PSC's Brief Fails To Show That Commissioner Nowak's Statements Do Not Indicate Prejudgment or At Least Have The Appearance of Prejudging an Issue Being Litigated Before The Commission.

It is undisputed that prior to the final decision in this case, Commissioner Nowak made statements indicating she had prejudged an issue in this very case: that the "problem" of DG users should be solved by imposing fixed charges on customer-generators. Despite the PSC's attempts to spin Plaintiff's arguments as sour grapes or "interest group" politicking (*see* PSC Resp. at 1-3, 13-22), these statements—made with

the WEPCO's CEO by her side—created an objectively high risk of bias in this proceeding.

The PSC Commissioners' role in rate cases is quasi-judicial. The cases are on-the-record class 1 contested case hearings pursuant to Wis. Stat. § 227.01(3)(a). (R.54.) Thus, while the PSC claims it was exercising its "legislative and policy-making powers" in the WEPCO rate case,[13] it recognizes the quasi-judicial nature of the hearing by claiming that Commissioner Nowak enjoys the "presumption of honesty and integrity in those serving as *adjudicators* in state administrative proceedings." (PSC Br. at 3, 14 (emphasis added).) The PSC cannot claim both legislative authority and judicial impartiality in the same proceeding, since legislators are biased by design. *Williams-Yulee v. The Florida Bar*, __ U.S. __, 135 S. Ct. 1656, 1667 (2015) ("the role of judges differs from the role of politicians. . . Politicians are expected to be appropriately responsive to the preferences of their supporters . . . . The same is not true of judges."). That the PSC claims the mantle of legislator reveals the bias present in this quasi-judicial case and why Commissioner Nowak should not have participated. "'Favoritism', i.e., partiality, if inevitable in the political arena, is disqualifying in the judiciary's domain." *Id*. at 1674 (Ginsburg, J., concurring).

[13] This statement is actually incorrect. While the PSC has some policy-making powers in other proceedings, rate cases are not legislative acts. The PSC has itself recognized that such cases must follow Wis. Stat. ch. 227, *see* Wis. Admin. Code § PSC 2.01, which in turn demands that "persons presiding at a hearing or participating in proposed or final decisions shall be performed in an impartial manner," Wis. Stat. § 227.46(6).

Here, Commissioner Nowak expressed partiality on a specific issue central to this case that precluded her participation. Her statements at the two utility conferences did not just "generally stat[e] her views on the issues associated with distributed generation and potential solutions." (PSC Br. at 20.) Rather, she identified customer generators (or "DG") as a threat to traditional rate design, even though it was highly debated in this case whether such customers are actually "causing [fixed] costs" to increase. (R.358 at 2.) She did not identify multiple solutions, but only one: more fixed fees imposed on customer-generators. (R.39 at 3.) Commissioner Nowak was an advocate for the fixed fee "solution," which is consistent with the legislative role she claims, but not the adjudicative role this rate case demanded. *Keen v. Dane County Bd. of Supervisors*, 2004 WI App 26, ¶15, 269 Wis. 2d 488, 676 N.W.2d 154 (decisionmaker "cannot be both an advocate and an impartial decisionmaker").

The PSC claims this is not enough for bias, because Commissioner Nowak did not mention any utility or proceeding by name. (PSC Br. at 17.) But the PSC cites no holding that an administrative adjudicator must "name names" in a particular proceeding before prejudgment exists. (*See id.*) Assuming that were the law, it was hardly necessary for Commissioner Nowak to specifically identify WEPCO, since she was sharing the podium with its CEO at one event, in conjunction with statements like, "*we need* to make more of the fixed costs more in line with fixed charges" (R.39 at 4 (emphasis added).) The facts of this case show Commissioner Nowak did not just express a general position on policy, but also created at the very least the appearance that she had pre-judged WEPCO's need to impose fixed costs on customer-generators

rather than "fairly on the basis of its own circumstances" based on evidence in the record. *Hortonville Jt. Sch. Dist. v. Hortonville Educ. Assoc.*, 436 U.S. 482, 493 (1976).

Respondent overstates Petitioners' position as claiming Commissioners "must have no general opinions or expertise in the field," or must stay cloistered and refrain from discussions with stakeholders. (*E.g.*, PSC Br. at 1.) There is a difference between having knowledge and general opinions about the field of one's expertise, on the one hand, and prejudging specific issues in cases that come before a quasi-judicial tribunal, on the other. While the PSC claims certain case law allows an "announced position on disputed issue[s] of law or policy" (PSC Br. at 20), more recent case law recognizes the dangers of such positions in individual cases. In our "'post-*Caperton*, political-realist world,'" even judges who promise to be "tough on crime" during election campaigns may be required to recuse themselves from all criminal cases. *State v. Allen*, 2010 WI 10, ¶ 102, 322 Wis. 2d 372, 778 N.W.2d 863 (Abrahamson, C.J.) (quoting Keith Swisher, Pro-Prosecution Judges: 'Tough on Crime,' Soft on Strategy, Ripe for Disqualification, 52 Ariz. L. Rev. 1 (2010)); *Caperton*, 556 U.S. at 892 (noting "there are a number of factors that could give rise to a 'probability' or 'appearance' of bias," including a decisionmaker's "prior speeches and writings") (Roberts, C.J., dissenting). Furthermore, the PSC cites cases and authorities in the rulemaking context (PSC Resp. at 20-21), which are wholly inapplicable and allow a more permissive bias standard than the adjudicative proceeding at issue here. *E.g.*, *Assoc. of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1168 (D.C.Cir. 1979) (discussing difference between legislative and

judicial facts, and different bias standard).[14] Again, the PSC claims the role of legislator and the freedom to discuss policy that role affords, when this is an adjudicative case still subject to the *Cinderella* rule for disqualification. *Id*.

Finally, TASC's initial motion for disqualification was not untimely or procedurally defective, as the PSC suggests. (PSC Br. at 14-15.) The PSC identifies no rule governing the timing of motions for disqualification, and the applicable statute actually provides that a hearing examiner or agency official may disqualify him or herself "at any time." Wis. Stat. § 227.46(6). The PSC defaults to case law suggesting that parties cannot sit on motions for disqualification, but it cites no facts that Petitioners knew of the basis for the motion here until the *Bloomberg News* article on November 24, 2014,[15] and the motion for disqualification was filed one week later. Meanwhile, the timing of Commissioner Nowak's comments—after WEPCO's initial testimony was filed and before a preliminary decision—raises serious due process issues, although the PSC ignores the "critical" importance of the close temporal relationship between these events. *Caperton*, 556 U.S. at 886.

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[14] In fact, the PSC expressly declined a request by RENEW and others to address DG through rulemaking, choosing instead to take up the issue through individual rate cases. Having made that choice, the PSC is also stuck with the standards that accompany adjudication. *In re Petition to Open a Rulemaking Docket to Consider Amendeing Wis. Admin. Code ch. PSC 119 and Wis. Admin. Code § PSC 113.10 Related to Distributed Resources Interconnection Rules*, Case 5-GF-233 (PSC Ref. #193575, Order, 11/15/13).

[15] At most, the PSC implies that Petitioners must have known about Commissioner Nowak's potential conflict prior to the November 24, 2014, article, since a "solar industry group appeal[]" is mentioned in the article. (PSC Br. at 15, n.10.) This still does not indicate when Petitioners learned about Commissioner Nowak's statements. In fact, TASC learned of the statements when the reporter called for TASC's comment on them for the story.

In sum, Respondents' feigned shock that the impartiality of the commissioners was questioned is not enough to overcome the facts in this case. Wisconsin law makes clear that even the risk of bias, as gauged under an objective standard, requires an agency judge to remove herself from cases where that risk is present. Commissioner Nowak should have done so here.

Conclusion

For the foregoing reasons, and the reasons set forth in Petitioners' opening brief, the decision of the Commission should be vacated and remanded.

Respectfully submitted this 14th day of July, 2015.

MCGILLIVRAY WESTERBERG & BENDER LLC

David C. Bender (SBN 1046102)
211 S. Paterson Street, Ste 320
Madison, WI 53703
Telephone: (608) 310-3560
Facsimile: (608) 310-3561
bender@mwbattorneys.com

Counsel for Petitioner RENEW Wisconsin

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2015, I mailed a true and correct copy of the foregoing brief to the following attorneys via First Class U.S. Mail:

Attorney Alex Mahfood
Assistant General Counsel
Public Service Commission of Wisconsin
610 North Whitney Way
P.O. Box 7854
Madison, WI 53707

Attorney Joe Wilson
Quarles and Brady
411 E. Wisconsin Ave., #2350
Milwaukee, WI 53202-4426

Dated this 14th day of July, 2015.

David C. Bender