STATE OF WISCONSIN CIRCUIT COURT BRANCH 17 DANE COUNTY

THE ALLIANCE FOR SOLAR CHOICE, and RENEW WISCONSIN

Petitioners,
v.

PUBLIC SERVICE COMMISSION OF WISCONSIN

Respondent, and

WISCONSIN ELECTRIC POWER COMPANY,

Intervenor-Respondent.

Case No. 15cv153

Hon. Peter Anderson

PETITIONERS' OPENING BRIEF

INTRODUCTION

This is the third case seeking judicial review of a Public Service Commission of Wisconsin (the "PSC" or "Commission") decision discriminating against owners of small renewable energy generating systems. The Dane County Circuit Court previously remanded all or part of prior PSC decisions changing rates for small renewal energy system owners. *See RENEW Wisconsin v. Pub. Serv. Comm'n of Wis., et al.*, Case No. 13-cv-851, Decision and Order (Dane Co. Cir. Ct. Br. 16, May 1, 2014); *RENEW Wisconsin v. Pub. Serv. Comm'n of Wis., et al.*, Case No. 14-cv-169, Decision and Order

(Dane Co. Cir. Ct. Br. 16, Feb. 5, 2015).[1] This time, the Commission approved Wisconsin Electric Power Company's ("WEPCo") rate tariff charging customers for the right to generate some of their own electricity needs, rather than buying all their electricity from WEPCo. The new charge is mislabeled a "demand charge," implying that it is based on the amount of electricity a customer uses, but is actually based solely on the size of the customers' generating equipment. That is, utility customers are forced to pay the fee simply for having their own generating equipment, even if their demands on the WEPCo system are no different than other customers who are not forced to pay the charge.

The Public Service Commission tried to justify the new charge by stating that it covers WEPCo's additional costs to supply the "standby generation and distribution" costs caused by customers owning their own electric generation equipment. R.49, Decision and Order at 84, *Joint Application of Wis. Elec. Power Co. and Wis. Gas LLC, both d/b/a We Energies, for Authority to Adjust Elec., Nat'l Ga and Steam Rates*, Docket No. 5-UR-107 (Wis.Pub.Serv.Comm'n Dec. 23, 2014) (hereinafter "Order").[2]

However, the Commission's decision is fatally flawed for three reasons:

(1) The administrative record lacks substantial evidence that WEPCo actually incurs additional costs to supply backup power or distribution service to customers who have generation equipment.

(2) The costs purportedly recovered though the "demand charge" are also recovered through other charges that customers pay, resulting in double

[1] Copies of these decisions are attached to this brief.

[2] The electronic version of this brief contains live links to the PSC's record as kept on the PSC's online "ERF" docket system.

collection of some or all of those costs from customers who self-generate some of their electricity needs.

(3) One of two commissioners voting to approve the "demand charge" announced her intent and desire to fundamentally change electricity rates to make those with small electricity generation systems pay more prior to considering the evidence in the contested case hearing and then refused to recuse herself.

Each of these constitutes a separate basis for vacating the Commission's decision under Wis. Stat. § 227.57. Petitioners respectfully request that the Court vacate and remand the Commission's "demand charge" penalty on those who reduce their reliance on WEPCo by self-supplying some of their own electricity with clean generation.

LEGAL AND FACTUAL BACKGROUND

A. Utility Rate Making.

Electric utilities like WEPCo are the opposite of free market businesses. WEPCo is a monopoly which receives government protection from competition. WEPCo charges its captive customers rates set by the Commission that are essentially guaranteed to cover not only WEPCo's costs but also a hefty profit of over 10%. R.49, Order at 1. No other business in Wisconsin gets that kind of special protection and guaranteed profit by the government.

WEPCo sells electricity service to customers, which is conceptually divided into three categories:

(1) Energy: supplying all of the electrical energy used by the customer, generally metered and billed based on charges per kilowatt-hour of energy consumed by the customer. Residential customers (Rg1) of WEPCo pay $0.13 per kilowatt hour of electricity they use each month.

(2) Demand: supplying enough capacity in the system to meet customers' peak electrical use, generally metered and billed based on the maximum electrical demand during the peak period (e.g., 15 minutes) each month. To charge for demand separately from energy, WEPCo must install more sophisticated metering equipment at the customer's property that is capable of recording the customer's peak demand. WEPCo chooses not to do that for smaller customers (residential and small commercial customers) so those customers are provided a blended service of both demand and energy, and billed based on the kilowatt hours consumed each month. Medium commercial customers (the "Cg2" class) do have electric meters capable of measuring peak demand and pay a demand charge of $6.86 per kilowatt based on the peak 15 minutes of use each month. Larger commercial and industrial customers also pay demand rates specific to their customer class.

(3) Connection: supplying the infrastructure necessary for the customer to have access to the electrical grid and to be able to purchase and make use of other electrical services from the company. This is often charged through a monthly "customer charge." Residential customers pay $0.526 per day (about $16.00 per month) in customer charges.

The rate-setting process involves two basic steps: (1) determining the costs that WEPCo incurs; then (2) setting rates to recover those costs plus profit from the customers who cause WEPCo to incur the costs.

> In setting rates the PSC first projects the utility's operating expenses (costs) for a "test year" and then adds to that the amount necessary to pay a reasonable rate of return [to the utility's shareholders on their equity investment]. The total figure is the "revenue requirement." The PSC then 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. v. Pub. Serv. Comm'n of Wis., 109 Wis. 2d 256, 259 n.2, 325 N.W.2d 867 (Wis. 1982). The specific rates that customers pay are intended to allocate WEPCo's incurred costs based on the customer's usage and therefore contribution to the costs incurred to provide service to the customer. The underlying principle is that rates

should collect costs from the customers who cause them. R.324, Hr'g Tr. Vol. III 41:7-17 (O'Sheasy), 109:10-19 (Rogers); R.308, Direct-TASC-Hornby-14r; *see also Pub. Serv. Comm'n v. Midcontinent Independent System Operator Inc.*, 148 FERC ¶61,071 p.8 at ¶ 15 (2014) (PSCW applying this standard in arguments to the Federal Energy Regulatory Commission).

B. Small Scale Customer Solar Electric Generating Systems.

While electricity customers in Wisconsin are not free to choose to buy electricity from another utility company, customers have some control over their bills by reducing electricity purchases from WEPCo through conservation, installing and using more efficient appliances, purchasing through "time of use" rates that charge different amounts based on when electricity is used, and installing their own generation equipment on site. R.304, Direct-RENEW-Vickerman-17; R.305, Surrebuttal-RENEW-Vickerman-7r, 11r. State and federal law provide any electricity customer the right to install and connect their own generation, as well as to be free from unreasonable "backup" rates that would undermine the right to self-generation by making it impractical. Wis. Stat. § 196.496; Wis. Admin. Code ch. PSC 119; 18 C.F.R. §§ 292.303-.305.

Because of its compatibility with most types of land use, ease of operation, fuel-free and virtually maintenance-free operation, and dropping price, most new customer-sited generation is solar photovoltaic ("solar PV") that converts the sun's energy directly into electricity. R.304, Direct-RENEW-Vickerman-7. Although customer-sited solar PV has seen significant growth nationally, *id.* at 5, very few of WEPCo's residential

and small commercial customers have actually installed small generation systems. In total, the number of customers is less than 1/10 of 1% (467 of 1.1 million). R.308, Direct-TASC-Hornby-5r.

A main reason for Wisconsin's clean energy lag is the Public Service Commission. The Commission's decision at issue in this case is the most recent in a string of monopoly utility company proposals, accepted by the Commission, seeking to slow or stop customers from installing clean solar PV generation. This is part of an overall effort by Wisconsin utilities to strangle a perceived competitor that would reduce the amount of utility-generated electricity sold to customers. *See e.g.*, Joby Warrick, *Utilities wage campaign against rooftop solar*, Wash. Post, March 3, 2015.[3]

> If demand for residential solar continued to soar, traditional utilities could soon face serious problems, from "declining retail sales" and a "loss of customers" to "potential obsolescence," according to a presentation prepared for [a utility industry group]. "Industry must prepare an action plan to address the challenges," it said.
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> …
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> The campaign's first phase—an industry push for state laws raising prices for solar customers—failed spectacularly in legislatures around the country, due in part to surprisingly strong support for solar energy from conservatives and evangelicals in traditionally "red states." But more recently, the battle has shifted to public utility commissions, where industry backers have mounted a more successful push for fee hikes that could put solar panels out of reach for many potential customers.
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> … A Wisconsin utilities commission approved a similar surcharge for solar users last year…

Id.

[3] Available at http://www.washingtonpost.com/national/health-science/utilities-sensing-threat-put-squeeze-on-booming-solar-roof-industry/2015/03/07/2d916f88-c1c9-11e4-ad5c-3b8ce89f1b89_story.html.

C. The 2015/2016 WEPCo Rate Case Proceeding.

On January 31, 2014, WEPCo asked the Commission to open a docket for WEPCo's request to implement new rates, tariffs, and other charges. Req. to Open Docket, PSC ERF#197922. WEPCo filed its formal application on May 30, 2014. R.49, Order at 2. However, WEPCo did not file its proposal to impose extra charges on customers who control their own generating systems until June 27, 2014. Filing Cvr, PSC Ref. # 208195; R. 256. While the rate case was pending, but before WEPCo submitted its proposal to penalize customer generation, one of the Commissioners announced to a utility industry audience that she had already determined that Wisconsin utilities should revise their traditional rate structures for customer-controlled distributed generation (or "DG"), a category which includes rooftop solar generation.

On March 6, 2014, Commissioner Nowak spoke to a utility industry conference in Washington, D.C. R.39 at 2. At the conference, Commissioner Nowak stated that she believes distributed generation (i.e., customer owned, small scale generation) shifts utility costs to customers who do not own generation and specifically instructed utilities in the audience to "please come in" and propose new rates to address this perceived problem. *Id*. The moderator of the panel, apparently recognizing that these statements were problematic, warned "that was on the record, by the way." *Id*. at 10.

Three months later—but still before WEPCo filed its proposal to penalize self-generating systems— Commissioner Nowak and WEPCo's Chief Executive Officer, Gale Klappa, jointly presented at another utility industry convention on June 10, 2014, this time in Las Vegas. *Id*. Commissioner Nowak told the utility industry audience that

utilities should revise their rate structures so that customers making their own power with rooftop solar systems pay more. *Id*. at 3. Commissioner Nowak was specific that she had already determined that "the traditional rate design will no longer work" because of the growth in customer-owned generation. *Id.* at 3.

Shortly after the Las Vegas conference, WEPCo filed its proposed penalty for customer generation. R.39 at 3; *see also* R.256 at 4:5-8. On November 14, 2014, the PSCW preliminarily voted to approve WEPCo's proposed changes to the traditional rate designs, including the charges on customer owned generation. R.39 at 4. The vote was 2-1, with Commissioner Nowak voting in favor. *Id*.

Following a Bloomberg News report of Commissioner Nowak's statements, TASC filed a motion on December 1, 2014, seeking Commissioner Nowak's recusal. R.39 (citing Christopher Martin, *Wisconsin Utility Sought Solar Fees After Regulator Advised CEO*, Bloomberg, Nov. 24, 2014).[4] TASC's motion cited both the actual bias revealed by her statements and the obvious appearance of bias, each of which compromises the fairness and integrity of the proceedings. *Id*.

TASC's motion was referred to Commission Nowak, who issued a December 15, 2014, memorandum refusing to recuse. R.358. Commissioner Nowak's memorandum conceded that "TASC's summary of the statements I made at these presentations are [sic] accurate," but claimed that the statements were her "underlying philosophy about rate design" and that she did not prejudge WEPCo's application specifically. (*Id*. at 2-4.)

[4] *Available at* http://www.bloomberg.com/news/2014-11-24/wisconsin-utility-sought-solar-fees-after-regulator-advised-ceo.html (last checked Apr. 6, 2015).

D. The Final Order And The Customer Generation Penalty.

The Commission issued its final written order on December 23, 2014. R.49, Order. The final order—consistent with the 2-1 vote in November—approved WEPCo charging customers more for self-supplying some of their electricity requirements. The new charge is mistitled the "demand charge" because it is applied to the size of the customers' generating equipment, not on the customers' actual electricity demand on the WEPCo system. The purpose of the charge is purportedly to cover WEPCo's additional costs to acquire generating plants and transmission infrastructure in order to supply "backup" or "standby" for customers with generation and to provide distribution system service to customers with their own generation. R.49, Order p. 84.

The only "finding of fact" the Commission made related to the new charge was a perfunctory statement about the tariffs containing the charge that "WEPCO's proposed COGS-DS-FP, COGS-DS-VP, COGS-NM, and COGS-DS tariffs are reasonable." R.49, Order at 15 ¶ 92. In the "Opinion" section of the order, the Commission provided only slightly more description of its basis for the fee:

> With regard to the proposed demand charges based on the installed capacity of generation for customers on the new COGS-NM and COGS-NP, the Commission finds that the demand changes 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 (Applicant's Initial Brief, p 19-20; Direct-WEPCO/WG-Rogers-56-57). Based upon the information currently available, it is reasonable to establish the demand charge based on the name-plate capacity of the generating equipment. However, the Commission notes that there are some questions regarding how closely the name-plate capacity reflects actual demand…

Id. at 84-85.

The Order also requires WEPCo to install meters "capable of measuring the actual output capacity of generating systems," but not meters that actually measure the customers' electrical demand. R.49, Order at 15 ¶ 93, 85.

The actual monthly charge imposed on residential and small commercial customers who control their own electrical generating equipment is $8.60 per kilowatt of generation capacity that the customer owns, or $3.79 per kilowatt if the customer owns an "intermittent" generator (such as solar generation, which only produces power during daylight). *Id*. at Appx B p 6 of 9. Other than the undefined difference between "intermittent" and non-intermittent generation, the amount of the charge does not depend on how much electric energy the generating system produces, how much electricity the customer buys from WEPCo, or the customer's actual demand. The charge is based, entirely, on the size of the generating equipment.

The $8.60 and $3.79 per kilowatt values that were calculated by WEPCo, and implicitly accepted by the Commission, consist of two components:

(1) **Backup Generation and Transmission**. $2.044 per kilowatt of generation, purportedly representing 14.5% multiplied by WEPCo's costs of $78.71 per kilowatt per year for "backup" transmission; (b) $81.76 per kilowatt per year to build new combustion turbine power plants as "backup" generation; (c) an additional 5.392% for assumed "losses" along the system between generation and customer. R.102, Rogers Ex. 11r, Schedule 1, Schedule 8 page 1 lines 1-7.

(2) **Distribution System Costs**. $6.558/kW/month, purporting to represent WEPCo's costs to supply distribution system service based on the total of 15 categories of costs (substations, conductors, transformers, taxes, etc.) divided by the cumulative total of non-coincident peak demands of each small customer. R.102, Rogers Ex. 11r, Schedule 8 page 2 line 2, Ex. 12r, Schedule 33.

STANDARD AND SCOPE OF REVIEW

The Court's review of the Commission's decision is pursuant to Wis. Stat. ch. 227. Wis. Stat. § 196.41. When undertaking judicial review of an agency decision pursuant to ch. 227, the Court applies the standards in Wis. Stat. § 227.57, which require reversal if (among other reasons): "the agency's action depends on any finding of fact that is not supported by substantial evidence in the record," Wis. Stat. § 227.57(6), or "the agency's exercise of discretion is outside the range of discretion delegated to the agency by law… or is otherwise in violation of a constitutional or statutory provision." Wis. Stat. § 227.57(8).

A. Review Is Limited to the Basis Provided By the Commission In Its Order And the Evidence In the Record.

The Court's review is confined to the record developed before the agency. *Lake Beulah Mgmt. Dist. v. Dep't of Natural Res.*, 2011 WI 54, ¶ 7, 335 Wis. 2d 47, 799 N.W.2d 73. Further, the Court is limited to the reasons provided by the agency for its decision; the court does not search out and provide an adequate or proper basis not provided in the agency's order. *Stas v. Milwaukee County Civil Serv. Comm'n*, 75 Wis. 2d 465, 473 249 N.W.2d 764 (Wis. 1977) (holding that a reviewing court will not identify evidence and reasoning to support findings where administrative body failed to do so); *see also State* ex rel. *Momon v. Milwaukee County Civil Serv. Comm'n*, 61 Wis. 2d 313, 320 and n.6, 212 N.W.2d 158 (1973) (court does not uphold decision by identifying potentially valid facts to support decision that were not actually identified as the basis for the agency's decision); *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 141 Wis. 2d 10, 17-18, 414

N.W.2d 308, 311 (Ct. App. 1987) (it is the agency's obligation—not the Court's—to make findings that are "specific enough to inform the parties and the court . . . of the basis for [its] decision."). If the agency's decision is not supported by the facts found and reasons provided in the order, a court must remand rather than "grope around in the dark to ascertain if there is evidence which will support any of the [conclusions by the agency]." *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 203; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

The Commission must also go beyond identifying facts and conclusions supporting its decision--it must "articulate [a] rational connection between the facts found and the choice made," and a failure to do so compels remand. *B. D. C. Corp. v. Public Serv. Comm'n*, 23 Wis. 2d 260, 287 (Wis. 1964) (quoting *Burlington Truck Lines, Inc., v. U.S.*, 371 U.S. 156, 167 (1962)). Therefore, the Court need not defer to the Commission's ultimate decision where it contains "no findings and no analysis . . . to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion." *Wis. Ass'n. Mfrs. & Commerce, Inc. v. Public Service Com.*, 100 Wis. 2d 300, 310 (1981). Thus, Wisconsin courts have refused to defer to "findings" consisting of nothing more than a statement that a specific conclusion is "reasonable." *Wis. Elec. Power Co. v. DNR,* 93 Wis. 2d 222, 249-50 (1980); *Commonwealth Tel. Co. v. PSC*, 252 Wis. 481, 485 (1948).

The Court may not rely on fact, reasoning, or explanations given in briefs of the agency's attorneys; rather, review must be based solely on the reasons given in the

order and on the evidentiary record compiled by the agency. *GTE North*, 169 Wis. 2d at 663. Whether reasoning or findings proffered by attorneys for the agency is sound is irrelevant—it cannot substitute for the requirement for the reasoning and findings to be contained in the agency's order because "it should not take a petition for judicial review to elicit some indication that the agency's interpretation is based on reasoned application of its expertise." *Id.*

B. Each Fact Necessary to Support Each of the Commission's Conclusions Must Be Supported By Substantial Evidence In The Record.

The statutes require the Court to "set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." Wis. Stat. § 227.57(6). Specifically, the Commission's decision must be based on substantial evidence in view of the record *as a whole*. Wis. Stat. § 227.57(6); *Daly v. Nat'l Resources Bd.*, 60 Wis. 2d 208, 219, 208 N.W.2d 839 (1973). This requires the Court to view not only the evidence that tends to support the agency's findings, but also "the evidence which controverts, explains, or impeaches" the agency's findings. *Id.* at 220. Put another way, "[i]solated bits of evidence, taken out of context and overwhelmed by other evidence, will not support an affirmance of agency action." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1578 (10th Cir. 1994). The Court also may not substitute the agency's alleged expertise or knowledge for the evidence in the record. *Gilbert v. Med. Examining Bd.*, 119 Wis. 2d 168, 205, 349 N.W.2d 68 (1984).

The substantial evidence requirement applies separately to each specific factual finding necessary to support an agency's decision. A voluminous record, and a large amount of general evidence, is not sufficient to satisfy the requirement of substantial evidence to support each separate fact. *E.g., Wis. Hosp. Assoc.,* 156 Wis. 2d at 725 (fact of a voluminous agency record and lengthy review process does not support specific findings at issue); *Gilbert*, 119 Wis. 2d at 197-204 (general testimony that fails to support the specific legal conclusions required by substantive standard insufficient); *Copland v. Dept. of Taxation*, 16 Wis. 2d 543, 557-61, 114 N.W. 2d 858 (1962) (finding that despite evidence, generally, there was a lack of substantial evidence that would support the specific findings made by the agency based on a reasonable calculation methodology).

"Substantial evidence has been defined in the case law as 'that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion.' Cases state that substantial evidence is more than 'a mere scintilla' of evidence and more than 'conjecture and speculation.'" *Gehin v. Wis. Group Ins. Bd.*, 2005 WI 16 ¶ 48, 278 Wis. 2d 111, 692 N.W.2d 572; *see also Cornwell Personnel Assocs. Ltd. v. Labor & Indus. Review Comm'n*, 175 Wis. 2d 537, 449 N.W.2d 705 (Ct. App. 1993); *Crystal Lake Cheese v. LIRC*, 2003 WI 106 ¶ 27, 264 Wis. 2d 200, 664 N.W.2d 651.

While courts will defer to an agency's findings when two conflicting views are each supported by substantial evidence and a determination depends on the credibility of witnesses, courts do not defer when the quality and quantity of evidence is such that "a reasonable man, acting reasonable, *could not* have reached the decision from the evidence and its inferences…." *Daly*, 60 Wis. 2d at 220 (emphasis original). Thus,

courts must reverse agency decisions based on unreasonable factual inferences, *Martinsen*, 163 Wis. 2d at 814, or which contradict consistent and detailed testimony by a party. *Erickson v. ILHR*, 49 Wis. 2d 114, 119, 181 N.W.2d 495 (1970); *see also Bumpas v. Dept. of Indus., Labor & Human Relations*, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (Wis. 1980); *Richardson v. Indus. Comm.*, 1 Wis. 2d 393, 396-97, 84 N.W.2d 98 (1957).

ARGUMENT

I. THE RECORD LACKS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S APPROVAL OF THE "DEMAND CHARGE" FOR CUSTOMER GENERATION.

The Commission made no findings of fact related to the "demand charge" for customer generation except to state that the charge is "reasonable." R.49, Order at 15 ¶ 92. To the extent that the "opinion" section of the Commission's order also constitutes findings of fact, the only potential finding relevant to the "demand charge" is that the charge is intended to cover WEPCo's costs to provide "standby generation and distribution costs that are not recovered by the facilities charge."[5] *Id*. at 84. That is, all the PSC purportedly found was that WEPCo's proposed charges would recover costs WEPCo incurs to provide standby or "backup" generation and transmission and to supply distribution system service to customers with their own generation.

[5] All residential and small commercial customers pay the same fixed monthly charges—which WEPCo calls the facilities charge-- to cover the company's costs to install and maintain electric meters, the service drop (i.e., the line from the pole to the home or business), customer service costs, and the company's uncollectible bills. R.49, Order pp. 66, 79.

Other findings of fact are required to support the Commission's decision to impose a specific per-month, per-kilowatt of generation system size charge on customer self-generation. The facts necessary to support the charge imposed in this case include:

(1) That WEPCo obtains additional transmission resources to provide "backup" power in case customers' own generation does not work and that such additional transmission backup capacity equals 14.5% of the nameplate generating capacity of each of WEPCo's customers.

(2) That WEPCo builds additional new combustion turbine generating plants equal to 14.5% of customers' generation system capacity in order to provide "backup" power to those customers.

(3) That WEPCo incurs incremental distribution costs to serve customers who control their own generation and that those incremental costs are directly proportional to each customer's peak demand, which is also directly proportionate to the customer's nameplate generation capacity.

None of these necessary facts is supported by substantial evidence in the record. The Commission's decision should therefore be reversed and vacated.

A. The Record Lacks Substantial Evidence That WEPCo Incurs Costs to Provide Extra Transmission System Capacity to "Backup" Customers With Generation.

The PSC's implicit finding that WEPCo obtains additional transmission capacity to provide "backup" to customers' generation systems lacks any factual basis in the record. As noted above, the PSC never made specific findings about the actual additional costs to WEPCo to provide service to customers with their own generation. However, because it adopted WEPCo's proposed charges entirely, without comment, it implicitly accepted the assumptions underlying those proposed charges.

WEPCo's proposed "demand charge" of $8.60/kW included $1.002/kW in "backup" transmission costs. R.102, Ex.-WEPCO/WG-Rogers-11r, Schedule 3 page 1 of

1, Schedule 8, page 1, line 1.[6] However, there is no evidence that WEPCo obtains any "backup" transmission, much less incurs the cost of such backup transmission, as a result of self-generation by its customers.

WEPCo does not build or own transmission system assets. Rather, transmission is provided by a separate utility, American Transmission Company (ATC), which bills WEPCo for the amount of transmission that WEPCo actually uses. R.256, Direct-WEPCO/WG-Rogers-15-16; R.191, Ex-RENEW-Rabago-25 at pp. ES-8, 6-1. Specifically, WEPCo is charged for WEPCo's share of ATC's peak usage period each month, not for additional "backup" transmission based on the size of its customers' generation. *Id*. There is simply no evidence in the record that ATC bills WEPCo for additional transmission capacity in order to provide an additional "backup" for customers who have their own generation. Thus, the backup transmission component of the "demand charge" calculation is without support by substantial evidence in the record.

In sharp contrast to the lack of evidence that WEPCo incurs additional transmission costs when customers own their own generation, the actual evidence is the opposite: customers who have their own generation—and specifically their own solar PV generation—actually *save* WEPCo money on transmission costs. By generating electricity during the peak hours on which WEPCo's charges from ATC are based, customers with generation *reduce* WEPCo's overall transmission costs. R.191, Ex.-

[6] WEPCo's calculation is to add a $78.71/kilowatt-year purported transmission cost to a generation cost (discussed below) plus an additional 5.392% assumed for losses, multiplied by 14.5% representing the "reserve margin", divided by 12 months. See R.102, Ex.-WEPCO/WG-Rogers-11r, Schedule 8 page 1, rows 5 and 7. The $78.71/kilowatt-year transmission component put into this calculation results in $1.002/kW of the total $8.60/kW charge.

RENEW-Rabago-25 at pp. ES-8, 6-1 through 6-3; R.308, Direct-TASC-Hornby-12r-13r. In fact, WEPCo commissioned a study that concluded that small-scale solar generation located on WEPCo's system can reduce WEPCo's overall transmission costs. *Id*. Thus, not only does the record lack evidence that WEPCo incurs costs for adding "backup" transmission because of customer-owned generation, the record contains evidence that WEPCo actually saves costs on transmission because of customer owned solar generation. The Court should vacate the "demand charge" as lacking substantial evidence in support of the "backup" transmission capacity cost component of the charge and remand the case to the Commission. Wis. Stat. § 227.57(6).

B. The Record Lacks Substantial Evidence That WEPCo Incurs the Cost of New Combustion Turbine Generating Facilities In Order to Provide "Backup" Reserve Generation for Customer Owned Generation.

The approved "demand charge" in this case was calculated assuming that WEPCo incurs the cost of building new combustion turbine power plants to provide "backup" generation for customer-owned generation. Specifically, the PSC approved WEPCo's proposed charge which was calculated based on the assumption that WEPCo incurs $81.76 per kilowatt-year to provide "backup" generation capacity, based on the cost of building a brand new combustion turbine power plant to provide the next margin of generation capacity. R.102, Ex.-WEPCO/WG-Rogers-11r, Schedule 1 and Schedule 8, page 1, row 2. This translates into $1.04/kW of the $8.60/kW monthly "demand charge" fee. *See* R.102, Ex.-WEPCO/WG-Rogers-11r, Schedule 8 p. 1.

Contrary to the assumptions underlying the calculated charges imposed by the PSC, there is no evidence in the record that: (1) WEPCo actually obtains additional

generation capacity in order to "backup" customer owned generation; or (2) that WEPCo must build additional combustion turbines for generation capacity rather than buying available capacity on the market at a fraction of the cost of building a new combustion turbine. *See* R.318, Direct-PSC-Singletary-30 (PSC's staff witness testifying that WEPCo "has not provided evidence that the utility in fact does or would incur additional generation capacity charges in order to meet the supply needs of customers with DG…"); R.302, Direct-RENEW-Rabago-35p-36p.

First, WEPCo does not obtain electrical generation capacity specific to any customers, whether the customer has generation or not. And, it does not obtain additional "backup" generation for each kilowatt of generation that customers own. R.318, Direct-PSC-Singletary-30. Rather, WEPCo's total required generating capacity depends on the level of WEPCo's system-wide peak use, plus an extra margin of 14.5%. *Id.*; R.182, Ex.-RENEW-Rabago-16, Response a, b. Thus, any particular customer impacts WEPCo's needed capacity only by drawing more electricity during WEPCo's system-wide peak. The only way for customer-owned generation to cause WEPCo to incur the cost of additional capacity is if the generation failed while the customer was drawing electricity and exactly at the time of WEPCo's peak. R.320, Surrebuttal-PSC-Singletary-9 ("The utility would only require additional capacity to serve [customer-owned generation] outages if the utility's load planning forecast could be shown to be affected by such outages. Even then, such an analysis would need to demonstrate a probabilistic consideration of DG outage frequency."); R.182, Ex.-RENEW-Rabago-16, Response c (no analysis done of cost to provide backup for small customer generators).

As the dissenting commissioner correctly pointed out: "fundamentally WEPCO 'has not provided evidence that the utility in fact does or would incur additional generation capacity charge in order to meet the supply needs of customers with DG systems smaller than 300 kW in size.'" R.49, Order, Dissent at 16, quoting Direct-PSC-Singletary-30.[7] There is simply no evidence in the record that WEPCo's system-wide required generating capacity is increased in any way by customers owning their own generating capacity.

It is telling that WEPCo actually proposed two versions of the same "backup" generation fee for customers with generation, but the Commission only approved the "demand charge" at issue in this case. The Commission rejected WEPCo's proposed "standby" charge for larger customer-owned generation as "unreasonable" and lacking sufficient evidentiary support. R.49, Order at 88 (rejecting proposed Cg4 and Cp4 standby rates)[8]. The rejected "standby" charge was not only based on the same theory and same record as the "demand charge" the Commission did approve, the "demand charge" literally incorporated the rejected Cg4 and Cp4 transmission and generation charge calculation by reference. R.102, Ex.-WEPCO/WG-Rogers-11r, Schedule 8 page, row 1; R.324, Hr'g Tr. 73:15-19 (reserve demand charge calculation for Cp4 same as

[7] To the extent that there is any evidence in the record regarding the impact of small customer-owned generation on WEPCo's generation capacity needs, the evidence indicates that customer owned solar PV generation *decreases* rather than increasing the needed capacity. R.308, Direct-TASC-Hornby-18r; R.191, Ex.-RENEW-Rabago-25 p. ES-6 (study done on behalf of WEPCo shows that distributed (i.e., customer owned) generation enables WEPCo to avoid some unquantified amount of generating capacity needs).

[8] Cg4 and Cp4 are classes of larger customers who also have their own self-generation equipment.

generator demand charge for smaller customers).[9] In other words, the PSC rejected a "standby" generation charge for Cg4/Cp4 customers as unreasonable and without evidentiary support, but approved the "demand charge" at issue in this case, which adopts the rejected Cp4/Cg4 charge calculation by reference. The PSC had it right for the Cp4/Cg4 backup generation charge—it was baseless—but should have found the same when that charge was incorporated into the "demand charge" for smaller customers at issue in this case.

Second, even if the record did contain evidence that customer generation would likely fail at the exact moment of WEPCo's system-wide peak load, thus justifying some amount of backup generation charges, the record would still lack evidence that WEPCo actually constructs additional combustion turbine power plants to meet that need. The record shows that there is sufficient capacity already existing in WEPCo's generating plants, the cost of which are already recovered from customers, so no new capacity costs attributable to customer generation would be incurred. R.182, Ex.-RENEW-Rabago-16. Furthermore, even if additional capacity beyond WEPCo's current system was needed, there is no evidence that WEPCo would build new combustion turbines for the 2015 and 2016 period at issue in this case. Rather, sufficient additional capacity is available through market purchases for $5.00 per kilowatt-year, instead of the $81.76 per kilowatt-year cost of building a new combustion turbine. R.308, Direct-TASC-

[9] WEPCo's calculation states that the "Transmission & Power Supply Reserve Demand Charge $/kW/Month" is "From this Exhibit Page 1 Row 7," Ex.-WEPCO/WG-Rogers-11r, Schedule 8 page 2, Row 1, Note 1. This refers to the Cg4 and CP4 Standby Rates that the Commission rejected as lacking evidentiary support. See R.102, Ex.-WEPCO/WG-Rogers-11r, Schedule 8 Page 1.

Hornby-17r; R.102, Ex.-WEPCO/WG-Rogers-11r, Sched. 1 (MISO market purchase price of $5/kW-year). Thus, even if there had been evidence that WEPCo's system-wide capacity requirement was increased by likely outages of customers' generation, and that WEPCo had insufficient generation capacity on its system, there would still be no evidence that WEPCo must build new combustion turbines, instead of relying on much cheaper market purchases, during 2015 and 2016.

Combined with the unsupported transmission charge, above, the unsupported "backup" generation components of the "demand charge" comprise $2.044 of $8.602, or almost a quarter of the total "Demand Charge." *Id*. at p. 2. Because there is no substantial evidence in the record to support these cost components of the charge, the Court should vacate the charge and remand to the Commission. Wis. Stat. § 227.57(6).

C. The Record Lacks Substantial Evidence That WEPCo Incurs Incremental Distribution Costs Directly Proportionate to the Size of Its Customers' Generating Systems.

WEPCo's calculated "demand charge" costs included a "Distribution Demand Charge" of $6.558 per kilowatt of a customer's generation system size each month. R.102, Ex.-WEPCO/WG-Rogers-11r, Schedule 8 page 2, Row 2. That value was derived by adding 15 categories of costs and dividing by the total "Non-Coincident Peak KW" for a class of customers. R.103, Ex.-WEPCO/WG-Rogers-12r, Schedule 33. While this calculation and the values for the 15 categories of costs and the non-coincident peak use by the entire class of customers is provided in the record, the underlying premise that these values (the 15 different categories of cost and class-wide peak) are related in any way to each customer's peak electricity use is not. That is, there is nothing in the record

connecting the dollar figures identified as being caused by each incremental kilowatt of a customer's peak use. Thus, there is no evidentiary basis in the record for the Commission's implicit determination that WEPCo incurs $6.558 in distribution system costs to provide each kilowatt of each customer's peak electricity use. R.49, Order at 84.[10]

Moreover, even assuming that the $6.558 for each customer's non-coincident peak electric demand was justified by evidence in the record, the "demand charge" does not actually impose that cost on customers based on their non-coincident peak electric demand. Rather, the demand charge imposes it on the nameplate size of a customer's generating system. However, there is no evidence in the record connecting a customer's generating system size and the customer's peak electricity demand on the WEPCo system. Contrary to the Commission's statement that "[b]ased upon the information currently available, it is reasonable to establish the demand charge based on the name-plate capacity of the generating equipment," R.49, Order at 84, there is nothing in the record beyond pure speculation and conjecture that there is any connection between name-plate generating capacity and a customer's peak electric demand. R.308, Direct-TASC-Hornby-9r; R.215, Ex.-TASC-Hornby-6. Thus, $6.56 of the $8.60/kW monthly "demand charge" is based on two unsupported assumptions: (1)

[10] To the extent there is evidence in the record of the impact that customer-owned generation has on the distribution system costs it shows the opposite of the Commission's findings. A study commissioned by WEPCo shows that customers with solar generating equipment reduce peak demands on WEPCO's distribution system and therefore the costs to serve all customers. R.191, Ex-RENEW-Rabago-25 at ES-8, 2-7 through 2-22; R.303, Surrebuttal-RENEW-Rabago-8r.

that customers cause specific costs proportionate to their peak demand; and (2) that customers' generating system size is directly proportional to their peak demand.

Notably, not all of the commissioners missed the lack of evidence in the record. The dissenting commissioner correctly noted that the Commission failed to sufficiently explain its basis and failed to support its decision with record evidence. R.49, Order, Dissent at 15.

> While the stated purpose for 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. As Commission staff witness Mr. Singletary points out, the proposed demand charge is "speculative" and "theoretical"…

Id. at 15-16.

Apparently recognizing that there was a disconnect somewhere in what they were ordering, the Commission included a condition that WEPCo install meters for measuring customers with generation. R.49, Order at 84-85. To the extent those meters are intended to patch the hole in the record connecting customer generating system size and customer peak electricity use, the Commission missed the ball completely. The meters the Commission ordered might be relevant if the meters actually measure the customer's peak electric use so a comparison between that peak use and the customer's

generating equipment size could be made. However, the meters required by the Commission measure the output of the customers' generating equipment to determine whether nameplate ratings represent actual peak generation output. *Id*. They provide no information relevant to the missing evidence in this record: whether there is any correlation (much less the direct 1-for-1 correlation the Commission assumed) between a customer's peak use and a generation system's peak output. See R.49, Order, Dissent at 16 (pointing out that the new meters do not capture the customer's actual demand on the system).

At bottom, there is no evidence in the record that (a) WEPCo actually incurs a specific incremental distribution system cost for each kilowatt of non-coincident peak demand by each customer; nor (b) that any such non-coincident peak demand by a customer is equal to the nameplate capacity of a customer's generating system. For these reasons the Court should vacate the "demand charge" and remand to the Commission. Wis. Stat. § 227.57(6).

II. THE DEMAND CHARGE IS ARBITRARY AND DISCRIMINATORY.

Like all agencies in Wisconsin, the Commission is prohibited from arbitrary decision-making. *Wis. Pub. Serv. Corp. v. PSC*, 109 Wis. 2d 256, 263, 325 N.W.2d 867 (Wis. 1982).[11] Additionally, the Commission is prohibited from setting rates that are unreasonable or discriminatory. Wis. Stat. § 196.03. The "demand charge" taxed to

[11] An arbitrary decision is "the result of an unconsidered, willful and irrational choice of conduct and not the result of the 'winnowing and sifting' process." *Olson v. Rothwell*, 28 Wis. 2d 233, 239 (Wis. 1965). A rational choice, conversely, is "made in a process which considers opinions and predictions based on experience." *Sterlingworth Condo. Ass'n v. Department of Natural Resources*, 205 Wis. 2d 710, 730 (Wis. Ct. App. 1996).

customer generators is arbitrary, unreasonable, and discriminatory. In addition to being arbitrary and unreasonable because it lacks evidentiary support, as noted above, the charge is also unreasonable, arbitrary, and discriminatory because it treats similarly situated self-generating customers differently depending on customer class and because it allows double collection of the same costs from customers with generation.

A. The "Demand Charge" Is Arbitrary and Discriminatory Because Customers With Generation In Cg4 and Cp4 Do Not Pay For "Backup" Generation and Transmission That Customers Subject To the "Demand Charge" Must Pay.

The Commission's decision treats customers in the Cg4 and Cp4 customer classes who own generating equipment differently than customers in other classes. As noted above, WEPCo proposed to charge Cg4 and Cp4 the same "backup" charges as the "demand charge" includes for customers in other classes. In fact, WEPCo incorporated the Cg4/Cp4 calculations for generation and transmission into the "demand charge" calculation. R.102, Ex.-WEPCO/WG-Rogers-11r, Schedule 8 page, row 1. However, the Commission rejected the standby generation and transmission charges for the Cg4 and Cp4 classes, R.49, Order at 88, but approved it as part of the "demand charge" for other customers. There is no basis in the record, and certainly none provided in the Commission's order, for why the exact same charges are unreasonable and unsupported by evidence for the Cg4/Cp4 classes but acceptable to charge other customers who control their own generation systems. This unexplained, unsupported, disparate treatment between customers is unreasonable, arbitrary and discriminatory. *See County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) ("A long line of precedent has established that an agency action is arbitrary when the agency offers

insufficient reasons for treating similar situations differently."); *Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) (holding that "an agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.").

The Court should vacate the "demand charge" and remand to the Commission.

B. The "Demand Charge" Is Arbitrary and Discriminatory Because It Collects The Same Distribution System Costs That Are Also Collected Through Other Rates, Resulting In Double Collection.

The "demand charge" was calculated from 15 different categories of distribution system costs. R.102, Ex.-WEPCO/WG-Rogers-11r, Schedule 8, page 2, Row 2; R.103, Ex.-WEPCO/WG-Rogers-12r, Schedule 33. However, those same costs are also included in other charges imposed on all customers, including energy rates for residential and small commercial customers and customer demand rates for mid-sized customers. *Id*., Sched. 26. This presumes, then, that customers pay one or the other so that each customer pays the 15 categories of "distribution" costs only once. However, since most customers with generation do not produce all of the electricity they consume[12], they will necessarily buy varying amounts of electricity from WEPCo under rates that incorporate the same distribution costs. In fact, WEPCo admits that "[e]nergy consumption from typical [residential and small commercial] customers during the time that the intermittent generation is not operating will at least partially offset the cost to

[12] R.324, Hr'g Tr. 78:18-19, 79:10-14 (customers with generation still purchase varying amounts of electricity from WEPCo); R.308, Direct-Hornby-8r, 16r and R.211, Ex.-TASC-Horby-2, page 2 (showing that customers with generation, "CGS" customers, still buy electricity and pay WEPCo), 16; R.304, Direct-RENEW-Vickerman-12 (based on other provisions in WEPCo rates, customers must likely to size their generation to provide up to 60% of their electricity use).

serve them." R.256, Direct-WEPCO/WG-Rogers-57. There is no connection in the record evidence between the size of a customer's generating system, thus the amount of their "demand charge," and the amount of electricity the customer buys under other rates[13], so there is no basis to conclude that customers with generation will not pay some of the 15 categories of "distribution" costs twice under both the "demand charge" and through other rates. Thus, a customer with a large generating system capacity compared with his or her peak demand, or a system with a high nameplate capacity but low output compared with how much energy he or she buys from WEPCo, can pay for most of his or her distribution system costs twice.

The "demand charge" is also arbitrary and discriminatory because it treats medium-sized commercial customers in the Cg2 class differently from those in other demand-metered classes with no apparent basis. Customers in the Cg2 class are charged a customer demand charge for the customer's peak electricity use in addition to energy charges for each kilowatt-hour of electricity he or she consumes. *See* R.49, Order, Appendix B page 2 (showing both a demand and energy charge for Cg2 customers). WEPCo admits that customers who have a demand meter should not pay for distribution system costs through a charge based on generation system size. R.256, Direct-WEPCO/WG-Rogers-57. Thus, WEPCo did not seek, and the Commission did not approve, a self-generation fee for customers in other classes which have demand

[13] While WEPCo's charge for customers owning "intermittent" generators is lower, based on an assumed capacity factor, there is no connection established in the record between the size of a customer's generating system, on which the "demand charge" is based, and the amount of electricity the customer purchases from WEPCo.

meters (Cg3 and primary voltage classes) because those customers pay for distribution system costs through their customer demand charge. R.256, Direct-WEPCO/WG-Rogers-57. But the Commission fails to explain why Cg2 class customers, who also have demand meters, must nevertheless pay the self-generation fee.

Collecting the same purported distribution costs twice from the same customer is arbitrary and discriminatory. Treating Cg2 demand-metered customers differently from Cg3 and primary voltage demand-metered customers when assessing a self-generation fee is also arbitrary and discriminatory. The Court should vacate the "demand charge" and remand to the Commission. Wis. Stat. § 227.57(5), (8).

III. COMMISSIONER NOWAK'S REFUSAL TO RECUSE REQUIRES REVERSAL.

The Commission's order also suffers a fatal procedural error that deprived Petitioners of their right to an impartial decision-maker in contested case hearings. Pursuant to Wis. Stat. § 227.57, this Court must remand a case to the agency for further action "if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure." Wis. Stat. § 227.57(4). A claim under Wis. Stat. § 227.57(4) is reviewed as a procedural due process claim, since the statute's requirement of fairness "insures that the procedure before the administrative agency will meet the requirements of due process." *Bracegirdle v. Dep't of Regulation & Licensing*, 159 Wis. 2d 402, 416, 464 N.W.2d 111 (Ct. App. 1990). Similarly, the Court must reverse or remand the agency decision if it is "in violation of a constitutional or statutory provision." *Id.* §

227.57(8). A court reviews "whether due process has been provided as a question of law." *Marder v. Bd. of Regents of the Univ. of Wis. Sys.*, 2005 WI 159, ¶ 19, 286 Wis. 2d 252, 706 N.W.2d 110.

A. Commissioner Nowak's Bias or Appearance of Bias on The Issue of Increasing Costs Imposed On Customer Generation Requires Reversal and Remand in the Case.

"It is . . . undisputable that a minimal rudiment of due process is a fair and impartial decisionmaker." *Guthrie v. WERC*, 111 Wis. 2d 447, 331 N.W.2d (1983) (*citing Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)). TASC and RENEW were denied their right to due process and fairness because Commissioner Nowak prejudged a critical issue of this case: whether to impose new charges on customers who use their own distributed generation equipment. At the very least, Commissioner Nowak's public statements on this issue prior to deciding this case created an appearance of partiality that violates due process and fair play principles applicable to contested case hearings before the Commission. Commissioner Nowak should have disqualified herself, and therefore, the Commission's decision should be reversed and remanded to the PSC for a determination on the merits without Commissioner Nowak's participation.

1. Statute and Case Law Require PSC Commissioners to be Impartial When Deciding Contested Issues.

Like most agencies, the Commission's procedures for hearing contested cases are set forth in Wis. Stat. ch. 227. Wis. Admin. Code § PSC 2.01. Chapter 227 makes clear that contested cases must be decided on the evidence presented to the agency, based upon the applicable law. *E.g.*, Wis. Stat. §§ 227.44, .45. Fundamental to deciding a case

based on the evidence is that "[t]he functions of persons presiding at a hearing or participating in proposed or final decisions shall be performed in an impartial manner." Wis. Stat. § 227.46(6). Where impartiality cannot be achieved, an agency official may disqualify himself or herself at any point in the proceeding. *Id*. When that does not occur, agency determinations issued by one or more biased decision-makers are subject to review under Wis. Stat. § 227.57(4) and (8), which both provide remedies for proceedings that are unfair or violate statutory and constitutional provisions. *Id*.; *see also Bracegirdle*, 159 Wis. 2d at 416.

The United States Supreme Court and Wisconsin Supreme Court have long held that "a fair hearing in a fair tribunal is a basic requirement of due process, and that this rule "'applies to administrative agencies which adjudicate as well as to courts'." *Guthrie*, 111 Wis. 2d at 454 (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). Importantly, due process is violated not just when there is actual bias or unfairness, but also "when the risk of bias is impermissibly high." *Id*. at 458 (holding automatic disqualification is required where decision-maker has previously acted as counsel "because it is a situation in which the risk of bias or partiality . . . is too high to be constitutionally tolerable").

Improper risk of bias is typically judged by an objective standard that measures the decision-maker's conduct or interest against "'a realistic appraisal of psychological tendencies and human weakness'." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009); *see also Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 483, 591 (D.C.Cir. 1970) (recognizing standard for agency disqualification as "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 it") (citation and internal quotation marks omitted). Thus, the standard is not whether the decision-maker has actual bias, or a subjective review of the decision-maker's thoughts, but an objective determination of whether the statements and actions of the decision-maker could be viewed by an observer as having prejudged an issue or facts.

Wisconsin law also recognizes "common law concepts of due process and fair play" in administrative and quasi-judicial proceedings, which includes an associated common law duty of disqualification. *Guthrie*, 111 Wis. 2d at 454, 456; *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 24 & n.5, 498 N.W.2d 842 (1993). An administrative decision-maker must disqualify if he or she harbors bias, a high risk of bias, or has prejudged either the facts or the application of the law. *Keen v. Dane County Bd. of Supervisors*, 2004 WI App 26, ¶ 14, 269 Wis. 2d 488, 676 N.W.2d 154; *see also Marris*, 176 Wis. 2d at 26; *Nova Servs. v. Village of Saukville*, 211 Wis. 2d 691, 697, 565 N.W.2d 382 (Ct. App. 1997) (invalidating decision where village's prosecuting attorney also advised decision-making board on potential ordinance violations). While this is a case-by-case inquiry, it is based on an objective review of the facts. "A clear statement suggesting that a decision has already been reached, or prejudged, should suffice to invalidate a decision." *Id*.

State and federal courts have reversed decisions when a decision-maker's own statements reveal bias or an impermissibly high risk of bias. The Wisconsin Supreme Court held a permit applicant's right to a fair hearing was denied where a zoning board

chairperson's statements indicated that he prejudged the application. *Marris*, 176 Wis. 2d at 20. During deliberations on the application, the chair referred to the applicant's legal position as a "loophole" in need of "closing," and commented that the committee should "get [the applicant] on the Leona Helmsley rule." *Id.* at 27. The court found the "loophole" comment was more than an "unfortunate choice of words," and that the phrase "get her" indicates prejudgment and a desire to prosecute, together creating an impermissibly high risk of bias. *Id*. at 30-31. In another case, a zoning committee member who submitted a personal letter generally vouching for an applicant who had requested a conditional use permit crossed the line from impartiality into advocacy. *Keen,* 269 Wis. 2d 488, ¶ 15 (concluding letter "evidences an impermissibly high risk of bias").

In the analogous judicial bias context, the Wisconsin court of appeals found a criminal defendant was denied due process when a judge's handwritten note prior to a probation extension hearing evidenced a prejudgment.

> The court here used strong language. "*I want* his probation extended." (Emphasis added.) "Want" signifies a personal desire on the court's part. Of additional significance, this expressed desire refers not to an extension hearing--at which to decide the merits of extension versus a civil judgment--but to the extension itself, an ultimate outcome. **Neutral and disinterested tribunals do not "want" any particular outcome.** Moreover, a reasonable person familiar with human nature knows that average individuals sitting as judges would probably follow their inclination to rule consistently with rather than against their personal desires. The ordinary reasonable person would discern a great risk that the trial court in this case had already made up its mind to extend probation long before the extension hearing took place.

State v. Gudgeon, 2006 WI App 143, ¶ 26, 295 Wis. 2d 189, 720 N.W.2d 114 (emphasis in bold added). Even a campaign promise to be "tough on crime" or "enforce the death penalty" may be evidence of bias that should disqualify a judicial candidate from sitting in criminal cases. *State v. Allen*, 2010 WI 10, ¶ 103 & n.71, 322 Wis. 2d 372, 778 N.W.2d 863 (Opinion of Abrahamson, C.J.).

Federal courts have similarly found that a decision-maker's comments may violate due process and disqualify him or her from participating in a decision. *See Withrow*, 421 U.S. at 50 n.16 (citing cases). In the seminal case of *Cinderella Career & Finishing Schools, Inc. v. FTC*, the District of Columbia Court of Appeals held that the Federal Trade Commission ("FTC") chair should have disqualified himself from deciding a deceptive trade practices case involving issues and facts he previously spoke publicly about. 425 F.2d at 584 & n.1. Prior to deciding a case to determine whether a charm school advertising that its graduates are qualified to be flight attendants constitutes deceptive advertising, the chairman gave a speech including examples of ads that may not meet "advertising acceptance standards," including ads that suggest "becoming an airline's hostess by attending a charm school." *Id*. at 589-90. The court excoriated the chair's participation, characterizing his statements after the appeal to the full commission had been filed as "give[n] the appearance that he has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves." *Id*. at 590 (vacating and remanding for decision without the chair's participation).

In short, due process and common law concepts of fair play apply to this proceeding, including the right to an impartial decision-maker. A party is deprived of that right where a decision-maker is biased, or where the risk of bias is impermissibly high. A decision-maker's own statements, during or outside of case deliberations, may demonstrate bias or an unacceptable risk of bias or that the decision-maker has already reached a conclusion about the facts or the application of the law.

2. Commissioner Nowak Was Not Impartial and had Prejudged the Issues in this Case.

Commissioner Nowak's public statements at two utility industry conferences, plus her own decision denying the request for her disqualification, demonstrate either actual bias or an unacceptably high risk of bias in this proceeding. Not only did she advise utilities to "please come in" to the PSC to address rates surrounding distributed generation, but she revealed her preferred outcome of increasing costs charged to customers using their own generation, despite this very issue pending in the WEPCo rate case. Her actions violate both Wis. Stat. § 227.46(6) and constitutional and common law concepts of due process and fair play, and Commissioner Nowak should have disqualified herself.

The content of Commissioner Nowak's statements at two conferences in March and June, 2014, is not disputed. R.358 at 2. At both, she characterized customer owned generation, or DG, as a problem, and urged the utilities to "please come in" with rate design proposals to address perceived problems with customer-owned distributed generation. R.39 at 2. These statements are similar to the zoning board chairman in

Marris, who characterized the plaintiff's position as a "loophole" in need of "closing," 176 Wis. 2d at 17, but with the added advice that utilities should "come in" to fix the loophole.

At the June, 2014, presentation with WEPCo's CEO, Commissioner Nowak again advocated for rate changes to increase charges for customer-owned generation. R.39 at 3. She also expressed a desire to change from established rates to new, higher cost, rates for customer owned generation, saying "**[w]e need** to make more of the fixed costs more in line with fixed charges, particularly so those customers who don't participate in DG are not paying for those who do." R.39 at 3 (emphasis added). The "we need" is revealing, and is analogous to the phrases used by the chairman in *Marris*, "get her," and the court in *Gudgeon*, "I want," which revealed prejudgment and preferred outcome apart from a neutral review of the facts. 176 Wis. 2d at 18; 295 Wis. 2d 189, ¶ 26. As the court in *Gudgeon* put it, "neutral and disinterested tribunals do not [need] any particular outcome." *Id*.

Moreover, Commissioner Nowak's use of the phrase "we need," when presenting with WEPCo CEO Klappa and to a utilities company audience, also connotes that she and they are on one side and the customers with small, distributed generation, are on the other side. A reasonable person could assume she meant "we" to include Klappa, WEPCo, and the utilities in attendance—the same entities with an incentive to maximize their income and quash competition by increasing costs for small scale self-

generation.[14] WEPCo clearly got the message, revising its testimony to request these increased costs imposed on customers with generation just a few weeks later—increased costs Commission Nowak later voted to approve.

Commissioner Nowak's memorandum denying TASC's motion to disqualify her from this proceeding stokes, rather than mitigates, these concerns. R.358. She acknowledged her "general view" that rate design may need to change given the growth of customer owned distributed generation and that fixed costs in particular may need to change, that she "encouraged utilities" to "think[] outside the box on rate design," and implied that she publicly identified an issue she would "like to see addressed." R.358 at 3. Still, Commission Nowak denied prejudging the issues in this proceeding, because she did not "provide any comments as to *what any specific rate design* proposal should look like" or define the "kind or amount of fixed costs" that could be recovered as fixed charges. *Id.* This ignores the fact that the issue before the Commission was not merely *how* to implement increased costs for customers with their own generation, but *whether* to increase those costs. Whether to impose the fixed costs on customer generators at all was hotly contested in the hearing and a central issue in the proceeding below. R.39 at 8; R.4 at 7-8. Thus, Commissioner Nowak's memorandum confirms that she had already prejudged the question of whether, and was only looking at how, to increase costs for customer generators. This is like saying a

[14] A University of Wisconsin Law School professor, quoted in the *Bloomberg News* article, provided an outside opinion that Commissioner Nowak's very appearance with WEPCO's Gale Klappa while the application was pending approaches the edge of impropriety, "but giving advice goes beyond that." R.39 at 3.

court has not prejudged a defendant's guilt because the judge is keeping an open mind as to the total number of years in prison to impose. Commission Nowak's prejudgment of the threshold issue, as revealed in her comments, is not minimized because she did not also prejudge the amount of costs to impose on customer generators.

Here, a disinterested observer could easily conclude that Commissioner Nowak had in some measure prejudged the facts and the law in WEPCo's rate case, *Cinderella*, 425 F.2d at 591, or made a clear statement suggesting that a decision on the facts or application of law had already been reached, *Marris*, 176 Wis. 2d at 26. As explained above, Commissioner Nowak's own choice of words at the conferences ("please come in," "we need . .. ") and identification of greater charges for customer-owned generation as the desired outcome of rate proceedings strongly indicates prejudgment against Petitioners' position that such charges are unsupported by the facts or law and that customer generators decrease WEPCo's costs. The close temporal relationship and overlap between Commission Nowak's comments and the WEPCo application process also supports a serious, objective risk of actual bias. *Caperton*, 556 U.S. at 886 (finding temporal relationship between campaign contributions and justice's election "critical" in discussion of due process violation).

In sum, Commission Nowak's statements at the two conferences, and even her own memorandum on the disqualification motion, indicate her personal preference on WEPCo's rate redesign to impose new charges on customer generation. "A reasonable person familiar with human nature knows that the average individuals sitting as judges would probably follow their inclination to rule consistently with rather than against

their personal desires." *Gudgeon*, 295 Wis. 2d 189, ¶ 26. Accordingly, "[t]he ordinary reasonable person would discern a great risk" that Commissioner Nowak's decision in this matter would be to impose new charges customer-generators—which she did through her vote. The risk of bias in favor of this position was too high to be tolerable, and the Court should find her participation violated TASC's and other parties' right to an impartial decision-maker.

3. The Should Be Reversed and Remanded.

The proper remedy for the due process and fairness defects in Commissioner Nowak's consideration of this matter is to reverse and remand this case for decision without her participation. *See* Wis. Stat. § 227.57(4), (8); *Marris*, 176 Wis. 2d at 31 (vacating and remanding board decision for new hearing without chair's participation); *Cinderella*, 425 F.2d at 592 (vacating and remanding decision with instructions that remaining commissioners decide the matter without chairman's participation). The Court should accordingly grant TASC's petition, reverse the PSC's decision in this matter, and remand it to the PSC for decision without Commissioner Nowak's participation.

CONCLUSION

For the foregoing reasons, the Court should vacate the "Demand Charge," reverse and remand to the Commission.

Respectfully submitted this 14th day of May, 2015.

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CERTIFICATE OF SERVICE

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

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