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' REPLY TO SUPPLEMENTAL BRIEFS

Petitioners, The Alliance for Solar Choice and RENEW Wisconsin, respectfully submit this reply to the supplemental briefs submitted by the Public Service Commission ("PSC") and Wisconsin Electric Power Company ("WEPCO") on September 15, 2015.

I. Discrimination Based On Factors Other Than Differences In Amount and Type of Service Is Unjust and Prohibited.

As Respondents acknowledge, unjust discrimination is prohibited. (PSC Suppl. Br. at 2; WEPCO Suppl. Br. at 9.) While applying different rates to different customers is not necessarily unjust discrimination, imposing different rates for customers in the same class and for *the same services* is prohibited. In this case, there are fees imposed on customer generators, based on the size of their generating equipment, without any evidence that they receive different electricity service from other customers with similar electric loads, or that the service they receive is related

in any way to the size of their generating equipment. In short, the discrimination against self-generating customers in this case is unjust.

In *Wisconsin Manufacturers & Commerce, Inc. v. PSC*, the court of appeals upheld differing natural gas rates between Eau Claire and La Crosse because two separate natural gas distribution systems served those areas at different costs. 94 Wis. 2d 314, 325-26, 287 N.W.2d 844 (Ct. App. 1979). The differing rates were not discriminatory because they were based on different groups of customers receiving different services at different costs. *Id.* at 325. That difference in service was explicitly based on the record evidence. *Id.* The supreme court later upheld this decision, noting again that the different rates were based on "[t]he critical issue" that there were two different systems providing two different groups with different service, and the rates represented "the cost of gas utility service.... for each system." *Wis. Assoc. Mfr. & Commerce, Inc. v. PSC*, 100 Wis. 2d 300, 310, 301 N.W.2d 247 (1981).

Likewise, in *Fox Point v. PSC*, the supreme court upheld different rates charged in Milwaukee than in suburban municipalities specifically because of cost differences in providing service to the two customer groups. 242 Wis. 97, 101-102, 7 N.W.2d 571 (1943). The court noted the controlling fact was that "the rates fixed by [the PSC] are based upon cost factors of service" and held that applying different rates to customers "is warranted only if the services are in fact different." *Id.* Thus, a record showing an actual difference in services provided to two different customer groups is required if different rates are to be charged. *Id.* at 102-03.[1] In this

[1] Tellingly, WEPCO now backs away from the cost-causation basis for the challenged self-generation fee that both it and the PSC formerly claimed as the basis for the fee. (Ptr. Open. Br. at 4-5.) Instead, WEPCO now contends that the PSC may set any rate it wants for whatever (unannounced) policy preference it sees fit, as long as WEPCO is taken care of and can recover all of its costs. (WEPCO Suppl. Br. at 5-6.) But cost-causation, not vague anti self-generation policy, was the PSC's purported basis—counsel for the utility cannot substitute a new basis in supplemental briefing. *Stas v. Milwaukee County Civil Serv. Comm'n*, 75 Wis. 2d 465, 473, 249 N.W.2d 764 (1977); *GTE N., Inc. v. PSC*, 169 Wis. 2d

case, the record shows **no** difference in the cost or type of service received by a customer reducing electricity purchases by self-generation compared to a customer who reduces through other means. Self-generation customers are in the same class of customers and receive the same services as any other residential or small commercial ratepayer. The only difference is the self-generation fee imposed on self-generators, but not on any other customer, lower-use or otherwise.

The PSC's supplemental brief claims that "standby or backup" service is provided to customers with self-generation capabilities, but not other lower-use customers. (PSC Suppl. Br. at 3.) However, there is no evidence that the actual service rendered differs in any way by calling it "backup": WEPCO provides all of the electricity needed, when needed, to all customers in the residential and small commercial classes. Customers with self-generation are no different. Customers with small generating systems rely on the WEPCO grid if and when their use exceeds their generation and therefore need grid electricity. Customers without generation rely on the WEPCO grid if and when they need grid electricity. There is no evidence in the record that the use by self-generating customers is a different service.

For example, a customer who installs solar electric generating equipment to power his electric water heater must pay the challenged fee based on the size of his solar panels, but a customer who installs a solar panel to heat water directly (sometimes called solar thermal) to supplement his electric water heater does not. Yet, both require electricity from WEPCO's system to heat water when the sun is not shining. Their demand on the WEPCO system, and the service they receive from WEPCO, is indistinguishable. While the PSC's supplemental brief would arbitrarily label the power drawn by the customer with solar-electric equipment "backup,"

649, 662-63, (Ct. App. 1992) (court looks to agency's order for reasoning, not appellate counsel's arguments), *rev'd on other grounds* 176 Wis. 2d 559 (1993).

but not the power drawn by the solar thermal owner, the actual service they acquire is the same. Arbitrarily labeling grid use as "standby" or "backup" for some customers, but not others, does not change the actual electricity service provided by WEPCO.

Moreover, the PSC's supplemental brief incorrectly implies that WEPCO reserves additional system capacity to provide a "backup" service for customer-generators. (PSC Suppl. Br. at 5, *citing State ex rel. Fed. Reserve Bank of Kan. City v. Pub. Serv. Comm'n*, 239 Mo. App. 531, 543-44, 191 S.W.2d 307 (1945)). But, as Petitioners already explained, WEPCO's generation and transmission needs are determined based on utility-wide peaks--so a customer-generator only would require additional capacity on the system if three events occur simultaneously: (1) the customer uses electricity; (2) the customer's generation is simultaneously offline, and (3) these events occur at WEPCO's system-wide peak use.[2] To find that this actually occurs and the degree and consequent cost requires a probability analysis that WEPCO declined to do. (*See e.g.*, R.49, Dissent at 16, quoting PSC staff witness.)

The PSC further relies on two straw men arguments and cites inapposite cases, but avoids the actual issue in this case. The PSC's supplemental brief cites *Antioch Milling Co. v. PSC of Northern Illinois*, 4 Ill.2d 200, 203-07, 123 N.E.2d 302 (1954), for the proposition that a customer can be charged based on his peak demand, even if that demand it infrequent. (PSC Suppl. Br. at 5.) But that point is not disputed and is not relevant to the issues here. In this case, the fee imposed on self-generation is based on customers' peak generation system *output*, not on their peak *demand from* WEPCO's system.[3] Moreover, the fee is charged in addition to the per-

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[2] As noted in Petitioners' prior briefs, capacity on the system is obtained for *system* peaks, not for each customer's *individual* peak. (Petrs' Open. Br. at 17-20.) Customer use increases WEPCO's costs to serve peak loads *only* to the extent it occurs during those specific system peaks. *Id.*

[3] The PSC offers only the *ipse dixit* that the size of a customer's generation "allows WEPCO to adequately measure demand." (PSC Suppl. Br. at 4.) There is absolutely no basis provided for this remarkable assertion.

kilowatt-hour rate that the self-generating customer already pays, like every other residential or small commercial customer, without any evidence that the self-generating customer is receiving additional or different services than other customers in exchange for the additional fee.

Second, the PSC cites *State ex rel. Federal Reserve Bank*, 239 Mo. App. at 543-44, for the proposition that a ratepayer should pay for reserve capacity actually used. (PSC Suppl. Br. at 5.) However, the issues in *Federal Reserve Bank* are inapposite and, in any event, the fee at issue in this case is imposed based on the size of customer generation and not on the amount of reserve capacity actually used by the customer. In *Federal Reserve*, the challenged rates charged to a self-generating customer (the bank) were the same demand charge as any other customer—based on the amount of grid power actually used over twelve months— but the bank wanted a rate allowing it to pay less for that use compared to other customers. *Id.* at 544. The holding in *Federal Reserve* that a self-generating customer should pay *the same* as other customers for the same grid energy use is inapposite to the issue here: whether self-generation customers should pay an additional fee in order to pay *more* than other customers for the same level of use.

The requirement to base different rate charges on differences in services actually received further undercuts Respondents' arguments that *City of West Allis* authorizes the PSC to impose arbitrary charges against some customer groups (in this case, those it finds politically objectionable), where the record lacks proof that the charge recovers the cost of a different service actually received by those groups. Indeed, the PSC has repeatedly said that rates should be structured to allocate costs to those who cause them. (Ptrs. Suppl. Br at 7, collecting prior PSC decisions.) This longstanding policy properly puts sideboards around what could otherwise be indiscriminate and unlimited discretion to set any rate at any level for any reason. *Ala. Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (finding that FERC had the same

longstanding policy to set rates based on close approximations of the costs to serve the class or customer); *see also Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368-69 (7th Cir. 2004) (applying the agency's longstanding policy to allocate costs based on burdens imposed and benefits received to determine whether rate order was arbitrary).

Lacking actual data that customer-generators draw during their peak use from the WEPCO system, the PSC proffers only a speculative theory that customers who rely on efficiency measures do not increase demand on the grid, whereas customers who rely on self-generation so. (PSC Suppl. Br. at 4, citing R.257:17r.) However, as the dissent and PSC staff witnesses noted, there is no evidentiary basis for that speculation. (R.49, Dissent at 16, quoting PSC staff testimony.) Instead, WEPCO needed to produce evidence that customers with self-generation have use peaks that coincide with their generation not working, which also coincide with system-wide peaks for the utility to require additional "backup." (R.318 at 30.) The PSC cannot assume away this evidentiary burden. Unsubstantiated speculation is not substantial evidence in the record. *Gehin v. Wis. Group Ins. Bd.*, 2005 WI 16 ¶ 48, 278 Wis. 2d 111, 692 N.W.2d 572 (substantial evidence must be more than "conjecture and speculation.")

The PSC's decision in this case unjustly and impermissibly discriminates against self-generation customers and should be reversed.

II. Applying The "Legislative" Taxonomy To Rate Orders Does Not Change The Standard of Review.

Contrary to the PSC and WEPCO supplemental briefs, labeling a ratemaking order a "legislative" type agency action does not effectively immunize it from judicial intervention. Rather, as Petitioners' supplemental brief noted, the distinction between "legislative" and "judicial" in determining reasonable rates is a vestigial distinction from old case law. (Ptrs' Suppl. Br. at 3-6.) In short, the distinction determined whether an agency could establish

forward looking rates and compel a public service company to charge them or whether the agency was limited to after-the-fact quasi-judicial review of rates the companies set themselves. *See e.g., Interstate Commerce Comm'n v. Cincinnati, New Orleans and Tex. Pac. Ry. Co.*, 167 U.S. 479, 499-500, 508-09 (1897) (reviewing the Interstate Commerce Commission's statutory authority compared to various state agencies' authorities to determine whether the ICC is given only quasi-judicial power to review company-set rates, or legislative power to establish prospective rates).

Labeling ratemaking as "legislative" does not change the standard of review. Under Wisconsin's Administrative Procedure Act, this Court defers to the agency's policy preferences and interpretations, where consistent with the statutory delegation to the agency. Wis. Stat. § 227.57(8). But where the PSC's rates are discriminatory or without a basis in substantial evidence in the record, labeling them "legislative" does not save them from remand. (Ptrs' Suppl. Br. at 5-6.) The Court must vacate and remand even "legislative" decisions when the PSC fails to comply with applicable statutory standards, is arbitrary, or makes a decision based on facts that lack substantial evidentiary support in the record. *Madison Gas & Elec. Co. v. PSC*, 109 Wis. 2d 127, 325 N.W.2d 339 (1982) (remanding rate decision lacking substantial evidence); *see also Westring v. James*, 71 Wis. 2d 462, 475-76, 238 N.W.2d 695 (1976) (legislative type decision requires substantial evidence); *Kammes v. Wis.*, 115 2d 144, 340 N.W.2d 206 (Ct. App. 1983) (arbitrary legislative type decision remanded).

This Court must review the self-generation fee to determine whether the basis for it fails applicable judicial review standards. *City of Madison v. PSC*, 2002 WI App 102 ¶ 12 (PSC rate case reviewed under Wis. Stat. § 227.57(8) standard for arbitrary and capricious and substantial

evidence); *Minneapolis, St. Paul & Sault Ste Marie Ry Co.*, 136 Wis. at 164-65 (judicial review of rate orders for reasonableness). Applying a "legislative" label does not exclude that review.

Conclusion

For the foregoing reasons, and as set out in Petitioners' prior briefs and at argument before the Court, the PSC's decision to impose fees on customer generators is arbitrary, unjustly discriminatory, and lacking a basis in substantial evidence in the record. It should be reversed.

Respectfully submitted this 25th day of September, 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 September 25, 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 25th day of September, 2015.

David C. Bender