STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY	
THE ALLIANCE FOR SOLAR CHOICE *et al.*, Petitioners, v. PUBLIC SERVICE COMMISSION OF WI, Respondent, and WISCONSIN ELECTRIC POWER COMPANY, Intervenor-Respondent.	Case No. 15-CV-0153 Case Code: 30607 Administrative Agency Review Hon. Peter Anderson

RESPONSE BRIEF OF WISCONSIN ELECTRIC POWER COMPANY

This is a case in which Petitioners, The Alliance for Solar Choice ("TASC") and RENEW Wisconsin ("RENEW"), challenge the technical expertise of the Public Service Commission ("Commission") in setting electric utility rates. Specifically, Petitioners take issue with a demand charge (the "Demand Charge") that is one component of two electricity tariffs among a complex set of tariffs approved by the Commission on a biannual basis. The Commission adopted the Demand Charge as one of several interrelated rate mechanisms to better align customers' charges with the utility's cost of providing service to those customers and to improve fairness in Wisconsin Electric's rates.

Petitioners' claim is not ripe and can be decided without ever reaching the merits because the Demand Charge they attack was authorized subject to true-up and refund. Even if the Court reaches the merits of Petitioners' claim, Petitioners ignore the highly deferential standard of review that applies to the Commission's technical rate-setting decisions, mischaracterize the nature and intent of the Commission's decision, and ultimately oppose the Demand Charge because, notwithstanding the record evidence supporting it, they simply disagree with it. Substituting a party's preference for an agency's considered conclusion is not the purpose of judicial administrative review under Wis. Stat. Ch. 227. The Court should deny the Petition.

LEGAL AND FACTUAL BACKGROUND

I. The Commission is the independent expert agency charged with establishing electric rates for public utilities in Wisconsin.

The Public Service Commission of Wisconsin is an independent regulatory agency dedicated to serving the public interest. Since 1907, the Commission has been solely responsible for the regulation of Wisconsin public utilities, including electric utilities like Wisconsin Electric. Wis. Stat. § 196.02. The Commission's review and approval is required before a utility like Wisconsin Electric can set new rates. Wis. Stat. § 196.20.[1]

II. The Commissioners are assisted by technical staff who spend months developing data, seeking additional information, and modeling rates before issues are presented to the Commission for decision.

The Commission is composed of three full-time Commissioners who have oversight over all Commission activities. The three Commissioners are supported by more than 100 staff members, including auditors, accountants, engineers, rate analysts, attorneys, planners, research analysts, economists, consumer analysts, and consumer specialists. These experts are divided into four divisions and work in an advisory role to the Commissioners.[2]

In a major rate case like the one under review, staff members evaluate every aspect of a utility's rate proposals and offer independent positions on each of the many issues facing the Commission in a single rate case. Reviewing staff members independently audit the utility's financial records, examine the utility's forecasts and proposals, and issue discovery requests to develop additional information.[3] Of course, the Commissioners retain decisional authority and may disagree with positions taken by staff.

The scope of staff's involvement in a major rate case is revealed in the docket entries in

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[1] The summary information in this paragraph is taken from the informational page of the Commission's website, http://psc.wi.gov/aboutUs/organization/PSCoverview.htm, and is provided for orientation purposes only.

[2] See fn. 1, *supra*.

[3] *See* "Typical Steps in a Major Rate Case," at http://psc.wi.gov/thelibrary/publications/general/general04.pdf.

the record before the Court. In this case, for example, Commission staff alone issued nearly 400 separate data requests, with Wisconsin Electric's responses totaling thousands of pages.

In addition, interested parties (including special interest groups like TASC and RENEW) have the opportunity to intervene in a rate case proceeding and take their own discovery. Wis. Admin. Code § PSC 2.21. In this case, a total of 19 intervenors formally participated in the proceeding, submitting an additional 207 data requests -- including a combined total of 117 from TASC and RENEW alone. (R.49, App. A). As parties, the intervenors may file testimony favoring or opposing any aspect of the utility's rate proposals. The parties then participate in a technical hearing, during which all witnesses are available for cross examination concerning their pre-filed testimony. The technical hearing in this case was held on September 24, 2014, and included extensive cross examination of the witnesses who supported the changes to the tariffs at issue in this appeal. (R.324). This high degree of intervenor participation means that issues of importance to the parties are not overlooked, and ensures that any proposal of interest is thoroughly vetted from all angles before it reaches the Commission for decision.

Finally, a contested rate case like this one is open to the public. As the Commission noted in its Final Decision, public hearings were held in Madison and Milwaukee in the autumn of 2014. (R.49 at 3). The public hearing process involves the opportunity to submit written comments through the Commission's website or at the public hearings, and in this case, the Commission received approximately 2,000 comments from members of the public. (*Id.*).

Once all of the discovery has been answered, all of the party and intervenor testimony has been filed, the technical hearing has been held, and all of the public comments have been submitted, Commission staff develops a "Decision Matrix" which assimilates all of the issues presented to the Commissioners for decision and notes each party's position on each issue, with

citations to relevant portions of the record. (R.51). Issues 26a and 26b on the matrix addressed the Demand Charge at issue here. (*Id.* at 68-71).

III. Wisconsin Electric uses a variety of mechanisms to recover its costs through rates; the Demand Charge is one of those tools.

Utilities are given the opportunity to recover, through rates, the cost of providing service to customers. One principle governing this relationship is "cost causation," which means that the rate that a class of customers pays should reflect the costs the utility incurs to provide service to that class of customers. A "tariff" is a set of electricity rates and rules applicable to a particular group of customers taking a particular type of electric service. Wisconsin Electric offers a total of 37 tariffs for its customers, including industrial, commercial, agricultural, and residential tariffs, as well as special tariffs for customer-owned generation. (R.49, App. B). Each of Wisconsin Electric's tariffs is designed to honor the principle of cost causation.

In the utility industry and in the Commission's Final Order, customers' on-site production of electricity is referred to as "distributed generation," or "DG," and self-generating customers as "DG customers." Wisconsin Electric offers a total of four tariffs for DG customers. Each of these tariffs begins with the prefix "COGS," which derives from Customer Owned Generation. Only COGS-NM and COGS-NP are at issue in this case.

A. Wisconsin Electric's COGS-NM and COGS-NP tariffs permit customers to produce some of their own electricity and receive credit for what they produce.

Wisconsin Electric proposed the Demand Charge at issue in this proceeding as a component of two tariffs: COGS-NM and COGS-NP. Both of these tariffs are designed for customers who generate some of their own electricity. Participation in these tariffs is voluntary: if DG customers wish to receive a rate benefit for the electricity they generate, they can opt into COGS-NM, COGS-NP, or one of Wisconsin Electric's other COGS tariffs.

Both COGS-NM and COGS-NP are options for customers who wish to offset their energy needs with their own generation. COGS-NM is an optional tariff for customers who anticipate generating more energy than they need for themselves and wish to sell the surplus back into the grid; "NM" stands for "net metering," the energy metering mechanism that allows customers to do this. (R.256 at 56). COGS-NM is available to anyone who owns generation located on their premises (such as a gasoline generator); it is not limited to renewable generation. (*Id.*). COGS-NP is an optional tariff for customers who wish to provide for their own energy needs but do not anticipate generating surplus energy or selling surplus energy back to the grid; "NP" stands for "non-purchase," meaning the utility will not purchase surplus energy from customers on that tariff. (*Id.* at 57-58).

While both tariffs contemplate that on-site generation will fulfill at least some of the customer's energy needs, they also recognize the reality that at least some of the time, the customer will still need to obtain energy from the utility. Often, customers' generation systems will not be large enough to supply 100% of their energy needs at any given moment. Even something as simple as turning on a central air conditioner could overwhelm the customer's ability to generate all of the electricity they need without assistance from the utility. And no matter the size of the customer's system, there will be times when it is not working. For example, solar panels generate less electricity whenever it is cloudy, and no electricity at night. This means the utility, with its generating assets (power plants), transmission system (long-distance power lines), distribution system (local power lines), maintenance fleet, and personnel, must be operational and available around the clock for these customers. (R. 246 at 29; R.254 at 25r; R.257 at 9r). The law requires no less. Wis. Stat. § 196.03(1). In this regard, DG customers are just like all other customers -- they rely on the utility's service to be available on demand.

B. Utilities recover many of their fixed costs through variable energy charges; demand charges reduce the risk of unrecovered fixed costs.

To understand how the Demand Charge functions as a component of the COGS-NM and -NP tariffs, it is necessary to explain some aspects of traditional utility billing.

A utility like Wisconsin Electric incurs many costs to ensure that it can supply electricity to customers whenever they need it. These costs can be broken into three main categories:

> **Energy Costs (Variable):** This category includes the variable costs the utility incurs to actually produce energy as needed, and consists primarily of the cost of fuel burned to produce electricity.
>
> **Customer-Related Costs (Fixed):** This category includes fixed costs associated with the "customer service" side of the utility -- metering costs, service drop costs, customer accounting costs, customer service costs, and uncollectibles. These costs do not fluctuate with usage.
>
> **Demand Costs (Fixed):** This category includes all of the utility's other fixed costs of building and maintaining a safe and reliable infrastructure (power plants, wires, poles, transformers, etc.) for delivering electricity to its customers on demand. These costs do not fluctuate with usage.

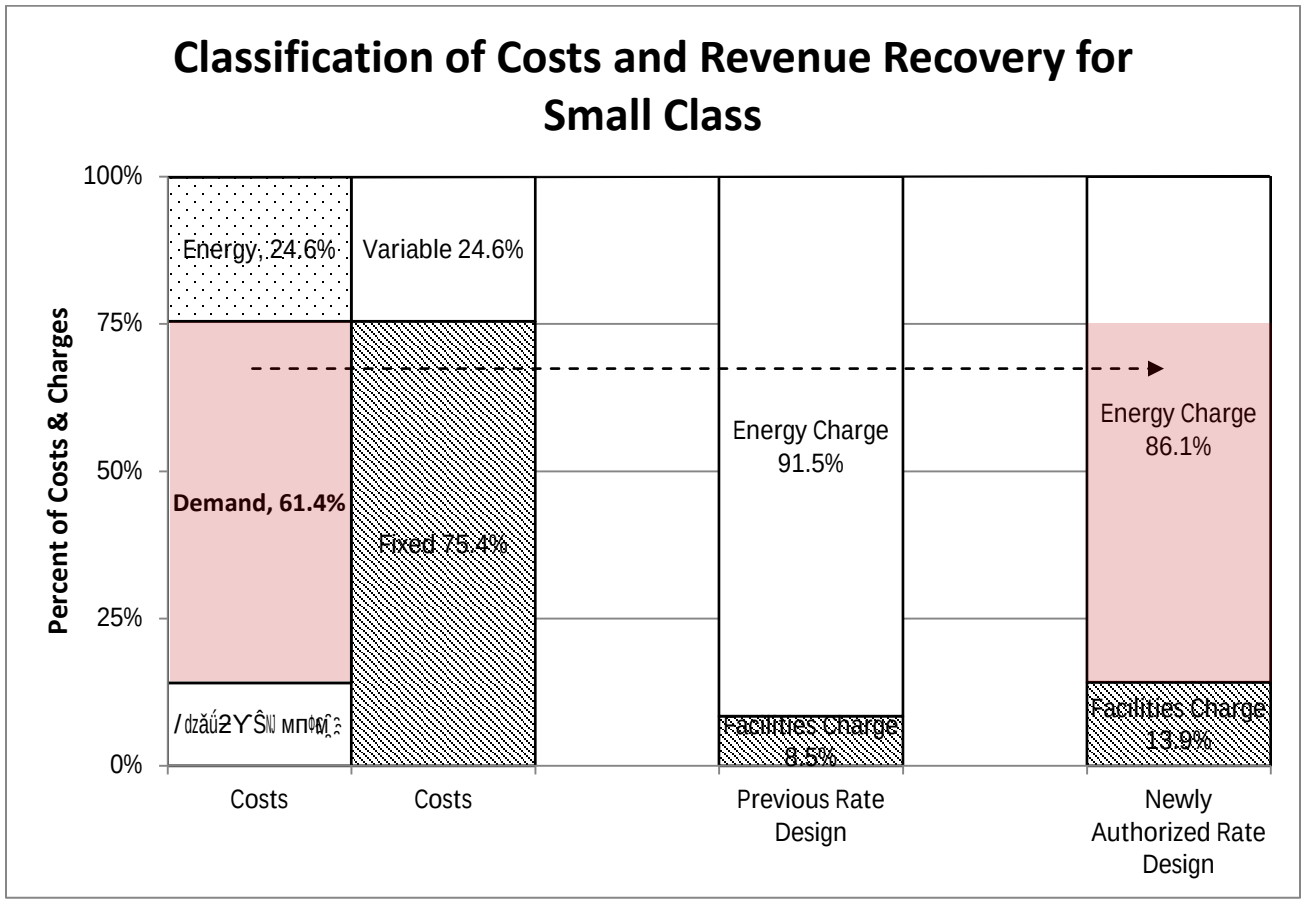
(R.254 at 3r-4r; R.255 at 5r-6r; R.256 at 34-36). In the small residential class, demand costs represent 61.4% of Wisconsin Electric's cost of serving customers. (R.256 at 37).

Just like Wisconsin Electric has fixed and variable costs, its customers have fixed and variable components to their bills. The majority of Wisconsin Electric's residential customers purchase energy on a retail tariff called Rg-1, which has two components:

> **Energy Charge (Variable):** In this component, customers pay for units of energy actually consumed -- the more electricity a customer uses, the higher her bill. This energy charge is expressed in terms of cents per kilowatt hour (currently $0.13111 per kWh).
>
> **Facilities Charge (Fixed):** In this component, customers pay a fixed daily amount for service. The facilities charge for a residential customer is currently $0.52602 per day.

(R.49 at App. B, p.2; R.254 at 3r-4r; R.255 at 8r; R.256 at 34-36). So an ordinary residential customer's bill will show a monthly facilities charge of $15.78 (assuming a 30-day month), plus an energy charge for the energy actually consumed that month.

Importantly, Wisconsin Electric does not recover all of its fixed costs to serve small customers through fixed charges. As a result of changes adopted in its last rate case, its **facilities charge** roughly corresponds to its **customer-related costs**; that is, when all of Wisconsin Electric's customers pay their monthly facilities charge, the utility recoups all but a small fraction of its fixed "customer service" costs associated with serving those customers. (R.256 at 37; R.106, Schedule 3 at 2). Together with its **energy costs**, the rest of Wisconsin Electric's small customer fixed costs -- including all of its **demand costs** -- are recovered via the **energy charge**, as shown on this graph:



(R.256 at 37). As this graph shows, under the newly authorized rate design, the **energy charge** is doing almost all of the work: it represents 86.1% of the customer's bill, and is responsible for recouping all of the **demand costs**, in addition to the energy costs.

The issue in this case concerns **demand costs**, shown in red on the graph. Demand costs represent the utility's single largest cost component in serving residential customers, and are driven by the peak amount of electricity that a customer uses in a given period. (R.255 at 7r-8r; R.256 at 36). The electrical system, from the wires leading to the customer's house all the way back to power plants, must be sized to deliver this peak demand, not merely the customer's average demand on the system. (R.255 at 7r-8r). The demand cost is the relatively fixed cost of building and maintaining the equipment necessary to meet this peak on a system-wide basis. (*Id.*).

As the graph above shows, however, Wisconsin Electric recovers all of its small customer demand costs -- which are *fixed* -- through the energy charge -- which is *variable*, in that the amount collected depends on how much energy customers actually take from the utility.

In the case of ordinary residential customers, this presents a small but manageable problem. Wisconsin Electric's variable energy charge is *designed* to recover a significant portion of the utility's demand costs, and will do so provided customers end up actually using as much electricity as was anticipated when rates were set. (R.256 at 36). While including these demand costs in the variable energy charge is not ideal from the standpoint of economic efficiency (because it inflates the price of energy above the variable cost of producing it), the alternative -- a fixed charge that recovers *all* of the utility's fixed costs -- would result in a customer charge of $2.92 per day, or $87.60 per month.[4] (R.254 at 3r-4r; R.255 at 8r). Historically, recovering demand costs through the variable energy charge has been deemed preferable to higher fixed charges. (*Id.*).

However, there is a trade-off. Because a larger share of fixed costs must be recovered through the variable charge, the utility risks significantly under-recovering its costs if there is a

[4] Based on $1,167,098,748 in fixed costs (R.106, Schedule 3 at 2: customer costs of $217,683,437 plus demand costs of $949,415,311), 1,096,047 customers (R.103, Schedule 32 at 1), 365 days per year, and a 30-day month.

gap between anticipated and actual energy usage. (R.254 at 5r-6r). Theoretically, the utility could reduce this risk by implementing a demand charge for all of its customers. (R.256 at 36). Indeed, Wisconsin Electric incorporates demand charges into customer rates under many of its tariffs, particularly the tariffs under which heavy energy users take service. (*See* R.49, App. B). Again, the philosophy behind demand charges is that they approximate the fixed cost of the total capacity the utility must have *available* to serve a given customer, even if the customer does not "max out" that capacity all of the time or even often. (R.255 at 7r-8r). Demand charges offer the utility a cost recovery mechanism that is more stable than variable energy charges, while at the same time maintaining a rational connection between billing and the customer's energy usage.

That said, demand charges do not make sense for all tariffs. Among other things, the utility cannot calculate demand charges without sophisticated -- and more costly -- meters. In Wisconsin Electric's service territory, most residential customers lack those meters, so the utility's metering infrastructure is not capable of supporting demand charges for the residential customer class as a whole. (R.254 at 4r; R.256 at 36). But demand metering is feasible on a small scale, and would be particularly useful in the context of distributed generation. So in the rate case under review, Wisconsin Electric proposed a demand charge -- the Demand Charge at issue -- for DG customers on the COGS-NM and COGS-NP tariffs.

C. The Demand Charge for DG customers captures the cost of providing the standby service they require, which otherwise would be borne by other customers.

The COGS-NM and COGS-NP rates are -- for the most part -- identical to the rates under the standard residential tariff, Rg-1. Customers on the COGS-NM and COGS-NP tariffs pay the same monthly facilities charge as ordinary residential customers, and they pay the same energy charge when they use electricity supplied by the utility. (R.49, App. B at 6-7). However,

because these customers' generating systems permit them to offset a significant portion of their load, they can partially or entirely avoid paying the energy charge. (R.246 at 12-13; R.256 at 53-54). This is a problem because, as described above, the energy charge includes not only the cost of fuel to produce a unit of electricity but also a significant share of the fixed costs incurred to pay for the power plants and other essential fixed assets. So when the DG customer purchases little or no energy, the utility is unable to recover that customer's pro rata share of fixed costs, forcing other customers to subsidize those costs.

The problem is not that DG customers cause the utility to incur "special" or "additional" costs over and above the average cost of serving a residential customer. Rather, the problem is that DG customers cause the utility to incur the *same* fixed costs as any other residential customer, but without a demand charge DG customers can avoid having to pay those costs in their rates. (R.246 at 12-13; R.256 at 53-54; R.259 at 1-2). Again, the utility must maintain the capacity to serve DG customers 24 hours a day, 7 days a week -- just like it must do for all of its other customers. And just like any other customers, DG customers rely on their connection to the power grid: whenever they want to sell power back to the grid; whenever their energy needs exceed their own production capacity; whenever the sun isn't shining or the wind isn't blowing, the grid must be there. In short, it is inaccurate to describe DG customers as "off the grid," as testimony from TASC's and RENEW's own experts confirmed. (R.307 at 6 [TASC]; R.324 at 133 [RENEW]).

For this reason, in the rate case under review, Wisconsin Electric proposed the Demand Charge to capture at least *some* of those costs which DG customers are equally causing but are not equally paying. Under both the COGS-NM and -NP tariffs, the Demand Charge is the same and consists of two monthly components:

1. Backup Generation and Transmission: $0.768 per kilowatt of installed generation for "intermittent generators" (including all solar and wind generators), otherwise $2.044 per kilowatt of installed generation for non-intermittent generators.

2. Distribution System Costs: $3.026 per kilowatt of installed generation for intermittent generators, otherwise $6.558 per kilowatt of installed generation for non-intermittent generators.

Both components are tied to the "nameplate capacity" of the customer's owned generation -- that is, the amount of energy (in kilowatts) the customer's solar panel, wind turbine, or other resource is able to produce. (R.255 at 3r; R.256 at 56-57). This is based on the idea that if, for instance, the customer relies on his own solar panels to produce 20 kilowatts, that is what the utility could be called on to provide if the customer's system is not functioning (say, at night). (*Id.*).

Both components of the demand charge are calculated based on the same interrelated series of calculations and formulas underlying Wisconsin Electric's rate model as a whole.[5] (R.102, Schedule 8). That is, they reflect Wisconsin Electric's fixed costs to generate, transmit, and distribute a generic kilowatt of electricity based on the same set of operations driving its entire rate model. These are costs that Wisconsin Electric recovers from ordinary residential customers through the energy charge whenever those customers consume electricity. For DG customers, who often purchase less electricity from the utility but still rely on the utility's power plants and other assets to be available when called upon, Wisconsin Electric merely recovers a portion of the same costs through a different mechanism: the Demand Charge, which is based on

[5] For example, the $2.044/kW charge in the first component (R.102, Schedule 8, page 2, line 1) is calculated on the previous page of the same schedule. One sub-component of that component (R.102, Schedule 8, page 1, line 1) is a "marginal transmission cost" of $78.71/kW-year, which in turn is calculated on Schedule 3 of the same exhibit -- based on still other calculations of total transmission costs (R.99) and system kilowatts (R.95). The Petitioners present no challenge to Wisconsin Electric's calculations as such; they merely identify three "assumptions" which they describe as "necessary" to the calculations, then argue that these assumptions are false. In other words, Petitioners do not challenge *how* Wisconsin Electric calculated particular components of the Demand Charge, or the particular dollar amount of each component; they simply argue that each component of the Demand Charge is unnecessary and therefore should be $0. As Wisconsin Electric explains below, the Demand Charge does not rely on the Petitioners' assumptions, so it does not matter whether those assumptions are true or false.

the size of the energy vacuum the utility will need to fill whenever the customer's own generation is not up to the task.

IV. In this case, the Demand Charge was hotly contested by Petitioners and others, leading to the development of a detailed factual record on this specific point.

A. Wisconsin Electric offered testimony supporting the Demand Charge.

Wisconsin Electric made its case for the Demand Charge through the pre-filed testimony of Mr. Eric Rogers, a team leader in Wisconsin Electric's Regulatory Affairs and Policy Department who has been involved in the rate-making process for more than thirty years. (R.256 at 2). Mr. Rogers explained the problem noted above: while the utility incurs fixed costs to serve DG customers just like any other customers, DG customers do not pay their fair share of those costs because the utility typically recovers those costs through the energy charge and DG customers use less energy than other residential customers. (*Id.* at 53-54). Accordingly, Mr. Rogers noted that Wisconsin Electric was requesting that a Demand Charge be included in the optional COGS-NM and COGS-NP tariffs "to compensate [Wisconsin Electric] for standby generation and distribution services." (*Id.* at 56). Mr. Rogers also explained that the Demand Charge (1) would recover costs not currently recovered by the underlying rates; (2) would be reduced for customers with intermittent renewable generation, such as wind or solar; (3) would be waived entirely for customers already paying a demand charge; and (4) would *not* recover any additional costs that the utility may incur due to the variable and intermittent nature of customer generation. (*Id.* at 56-57).[6]

Wisconsin Electric also made its case for the Demand Charge through an expert witness, Mr. Michael O'Sheasy. Mr. O'Sheasy testified that under Wisconsin Electric's rate structure, "the self-generation customer can avoid paying for the distribution costs to serve the customer's

[6] This fourth point is critical because, as further discussed below, it clearly shows Wisconsin Electric was *not* seeking to recover any "special" or "additional" costs which may be caused by DG customers.

self-generation even though the customer relies upon the utility's distribution system for the backup power provided by the utility." (R.254 at 19r). Mr. O'Sheasy further testified that the Demand Charge would be a reasonable solution to this problem:

> Q. How have some other utilities tried to address these concerns you have raised?
>
> A. Some have employed demand charges based upon the nameplate capacity of the customer-owned resource. This can be effective in mitigating the possible cost recovery impacts of net metering because it recognizes the size of the self-generation that the utility must back up and because it measures a part of the customer's use of distribution service. Demand charges for self-generation based upon nameplate capacity have been proposed by utilities including Progress Energy Company, Alabama Power Company, and Georgia Power Company. The criticism of such demand charges is that they make it difficult for customers to economically justify self-generation. *That is not a valid criticism, however, because self-generation should only be viewed as economically efficient when it pays its appropriate share of the costs of service.*

(*Id.* at 24r) (emphasis added). Finally, Mr. O'Sheasy testified that he believed the Demand Charge was necessary to compensate the utility for standing by to serve any DG customer whose own generator is not operating. (*Id.* at 25r).

B. Staff proposed an alternative demand charge based on the same principles.

In evaluating the proposed Demand Charge, Commission staff witness Mr. Corey Singletary agreed with Wisconsin Electric that "the loss of energy billing units, whether due to DG or customer conservation, does present long term challenges for utility cost recovery of distribution fixed costs," and that "the exploration of rate design alternatives that might ameliorate this problem is not unreasonable." (R.318 at 27). Then, as an alternative to the proposed Demand Charge, Mr. Singletary proposed a demand charge that he had designed himself. (*Id.* at 28). Mr. Singletary also testified that in his view, the Demand Charge would not be appropriate if it would result in double recovery -- i.e., if rate components were not adjusted to ensure that a single customer did not pay the same demand costs more than once. (*Id.* at 32). As explained below, the Commission adjusted the tariff to prevent such a result.

C. TASC and RENEW vociferously opposed the Demand Charge.

In the proceeding before the Commission, TASC and RENEW made no secret of their opposition to the proposed Demand Charge, explaining the reasons for their opposition at length.

TASC devoted a significant portion of its pre-filed testimony to opposing the demand charge. TASC argued that Wisconsin Electric had not submitted sufficient evidence to justify the Demand Charge, and claimed that in any event, DG customers do pay their fair share of Wisconsin Electric's fixed costs through rates. (R.308 at 8r-9r). In this regard, TASC argued that Wisconsin Electric should have conducted a separate cost-of-service study limited to DG customers only, which TASC claimed would support its own view of the issue. (*Id.* at 14r-15r, 17r-18r). TASC also claimed Wisconsin Electric does not actually incur the costs recovered via the Demand Charge (*Id.* at 16r-17r), and that the Demand Charge unfairly singles out DG customers because Wisconsin Electric failed to address other potential cost recovery misalignments (or "cross-subsidies") elsewhere in its rate structure. (*Id.* at 22r-27r). According to TASC, Wisconsin Electric should have imposed the Demand Charge on *all* of its residential customers or none of them. (*Id.* at 28r). TASC made similar arguments in its post-hearing briefs. (R.4 at 5-17; R.17 at 2-8).

RENEW took a policy-based approach to the issue, arguing that customers' ability to control their energy use is "a basic right of self-determination," and that DG customers are no different from other customers who reduce their energy use through conservation. (R.300 at 4r-5r; R.304 at 17-18). RENEW echoed TASC in claiming that Wisconsin Electric had not submitted sufficient evidence to justify the Demand Charge, while simultaneously arguing that the Demand Charge was unnecessary because Wisconsin Electric had identified a revenue shortfall of "only" $116,567. (R. 302 at 50r). RENEW also argued that the Demand Charge

would negatively affect the "value proposition" of solar generators, discouraging customers from installing them. (R.304 at 12-15). Like TASC, RENEW reiterated these arguments in its briefs. (R.15 at 25-26; R.25 at 6-7).

D. Wisconsin Electric responded to issues raised by intervenors and staff.

In rebuttal testimony, Mr. Rogers re-emphasized that the only purpose of the proposed Demand Charge was to "partially offset the cost the utility incurs for the generation and related resources that the utility must keep in place to provide service to the [DG] customer whenever the [DG] customer needs that service . . . Once again, its just seems to us that fairness requires that customers who want the benefit of this service should pay their fair share of the cost of providing it." (R. 257 at 3r). Mr. Rogers also pointed out that one of TASC's own expert witnesses had agreed with the basic premise of the Demand Charge:

> Installing solar panels on one's roof does not replace essential utility services. Without onsite energy storage, a solar customer cannot rely on their system to provide energy when the sun is not shining at night or when it is cloudy. The utility's grid is still important to providing consistent reliable service.

(*Id.* at 9r, quoting R.307 at 6).

Responding to the argument that Wisconsin Electric had failed to conduct a cost-of-service study specific to DG customers, Mr. Rogers reiterated that there is no reason to believe that the utility's fixed costs to serve DG customers would be any different than its fixed costs to serve non-DG customers. (R.257 at 10r, 20r). Mr. Rogers also responded to the argument that DG customers are no different from customers who conserve energy in other ways (i.e., by installing more efficient appliances), noting that this comparison fails to explain why the utility should not be permitted to charge customers for their use of the distribution system. (*Id.* at 17r). Mr. Rogers agreed that it might be preferable to add a demand charge to *all* residential customers' rates -- in other words, to move demand costs out of the variable energy charge component of

customers' bills and make them fixed -- but reiterated that the utility lacks the metering infrastructure to bill more than one million small customers on a demand basis, and that a goal of the Demand Charge was to address the problem while it was still relatively small. (*Id.* at 23r).

Next, Mr. Rogers responded to the issues raised by Commission staff. He acknowledged it was theoretically possible that a DG customer could be billed the Demand Charge even in a month when its generator was not running at all, but emphasized that the Demand Charge was designed "for the many months when the generator is operating normally, and the [utility] must provide distribution service and reserve capacity" for that customer. (R. 257 at 41r). Mr. Rogers also stated his view that Mr. Singletary's proposed alternative to the Demand Charge had some merit, was similar to a demand charge used on other Wisconsin Electric tariffs, and would be acceptable to Wisconsin Electric subject to certain modifications. (*Id.* at 42r). Mr. Rogers further clarified that the Demand Charge would *not* be imposed on customers already paying a demand charge, and would be reduced for intermittent generators like the wind and solar generators TASC and RENEW represent. (*Id.*).

Finally, Mr. Rogers submitted additional rebuttal testimony specifically addressing the mistaken notion that the Demand Charge was somehow intended to recover "special" or "additional" costs caused by DG customers. He said:

> I don't believe I've testified that customers with their own generation impose extra costs; rather, they impose the same costs on our distribution system as customers without their own generation. The difference is we recover those costs from customers without generation but we do not recover those costs from customers with generation.

(R.259 at 2). In short, by the time this issue reached the Commission for determination, the arguments for and against the Demand Charge were fully laid out, and it was quite clear that the Demand Charge was *not* for "unique" or "special" costs.

V. On the basis of the detailed evidence and arguments before it, the Commission approved the Demand Charge for customers on certain COGS tariffs, while conditioning its order to account for the uncertainties cited by Petitioners.

Following the submission of record evidence and briefing by the parties, the sole relevant issue before the Commission for determination was: Are the proposed COGS-NM and COGS-NP tariffs reasonable? (R.51 at 68-71). The Demand Charge was one component of these tariffs.

A. The Commission's general findings relied on fundamental cost-causation principles and rejected Petitioners' counterarguments.

The Commission began by summarizing the broader arguments regarding the utility's ability to recover its fixed costs from DG customers. (R.49 at 77-80). In doing so, the Commission specifically noted the argument -- raised by TASC, RENEW, and others -- that Wisconsin Electric "had neither performed a sufficient analysis to support its claims of cross-subsidization, nor provided sufficient evidence to support the charges proposed." (*Id.* at 80). The Commission rejected that argument, finding that the new tariffs proposed by Wisconsin Electric -- including COGS-NM and COGS-NP -- moved Wisconsin Electric "a step closer to more appropriately aligning costs and fairly compensating customers that generate a portion of their electricity needs without increasing costs to those who cannot or do not do so." (*Id.* at 81). Indeed, the Commission noted that as early as 2013, it had officially encouraged Wisconsin utilities to consider restructuring their rates along these lines. (*Id.* at 81 and fn. 15).

The Commission also found that the new tariffs proposed by Wisconsin Electric would advance policies articulated by the Commission earlier in the same decision -- namely, "sending more appropriate price signals, better aligning rates with costs, and assigning costs more equitably to those who cause the costs." (*Id.* at 82, referencing *id.* at 57-69). The Commission considered and rejected the argument that making these changes now is premature because DG only makes up a small fraction of Wisconsin Electric's current system. On the contrary, it said:

> [I]t is precisely for that reason that it is reasonable to restructure [Wisconsin Electric's] DG tariff offerings now. The Commission finds, based upon the facts and as a matter of public policy, that there are utility fixed costs that are not being borne by DG customers and a change should be made now before those costs grow with increased adoption of DG. The use of distributed generation is expected to continue to increase and it is important for those making such investments to understand the real costs and benefits of those investments and make informed choices.

(*Id.*, emphasis added). These general findings formed the backdrop of the Commission's more specific findings as to COGS-NM, COGS-NP, and the Demand Charge.

B. The Commission approved the Demand Charge subject to conditions.

Following this general discussion, the Commission determined that the COGS-NM and COGS-NP tariffs were reasonable and specifically discussed the Demand Charge. It said:

> With regard to the proposed demand charges based on the installed capacity of generation for customers on the new COGS-NM and COGS-NP [tariffs], the Commission finds that the demand charges are reasonable and will allow [Wisconsin Electric] a reasonable opportunity to recover standby generation and distribution costs that are not recovered by the facilities charge of the underlying rate. Based 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 at 84-85. However, the Commission also noted that there were "some questions regarding how closely the name-plate capacity reflects actual demand." *Id.* at 85. For this reason, it imposed three conditions on its approval of the Demand Charge:

- Wisconsin Electric was required to install meters capable of measuring the actual output capacity of generating systems newly enrolled under the COGS-NM and COGS-NP tariffs, with the cost of this installation to be borne by Wisconsin Electric. In the next rate case proceeding, the Commission committed to re-examining whether nameplate capacity is a reasonable proxy for actual demand, whether more widespread demand metering will be necessary, and whether the utility or customers should bear the cost of such metering.

- Using the newly installed meters, Wisconsin Electric was required to perform a true-up at the end of 2016. In this true-up, the metered data will be used to compare actual monthly maximum generation capacity with the rated nameplate capacity of the system. If there is any disparity between a customer's actual generation capacity and the rated nameplate capacity, the customer will receive a corresponding bill credit or surcharge.

- Wisconsin Electric was ordered to present its metering data in its next rate case so the Commission can evaluate "whether the COGS capacity demand charges, and the basis for determining the billing units for those charges, are appropriate or require modification."

Id. In other words, while the Commission accepted the Demand Charge and the basis for that charge on a trial or test basis, it recognized uncertainties associated with that decision, implemented a method for testing those uncertainties, and protected customers by establishing a true-up to mitigate the effects of those uncertainties. It did so after carefully considering all of the record evidence, arguments, and counterarguments discussed above, and after accurately summarizing and addressing those arguments in a reasoned, written decision. This is the decision that Petitioners now challenge as unreasonable, arbitrary, capricious, and discriminatory.

STANDARD AND SCOPE OF REVIEW

In this judicial review of an administrative decision by the Public Service Commission, the standard of review turns on the capacity in which the Commission was acting. The Commission expressly stated that capacity in the Final Decision under review:

> In this proceeding, [Wisconsin Electric] is asking the Commission to more closely align fixed charges with fixed costs, and to fundamentally engage in an exercise to enact reforms to restructure the rate design. Such an exercise goes to the core reason why Wisconsin created this Commission: to bring to bear this agency's expertise and knowledge about rates, how they are designed, and the kind of price signals to be sent to customers, and the type of behavior this Commission wants to incent as a matter of sound public policy. In designing rates, the Commission exercises a legislative function in setting policies that reflect the changing nature of the utility industry, which includes the emergence of increased customer interest in distributed generation. Each of the parties recognized this basic principle when they asked the Commission to consider various policy objectives in setting the facilities charges. Wisconsin courts have long held that the Commission has wide discretion in determining the factors upon which it may base its rate decisions. Further, the Commission is not bound to any single regulatory formula; it is permitted to make the pragmatic adjustments, which may be called for by particular circumstances, unless its statutory authority plainly precludes this. To the extent that setting rates requires the weighing of evidence, the Commission must use its special experience, technical competence and specialized knowledge to identify a reasonable result, bearing in mind the various public policies that may be impacted by various ratemaking decisions.

R.49 at 58-59, *citing* Wis. Stat. § 227.57 (6), (8), and (10). This statement by the Commission is fully in accord with Wisconsin law.

A. Because the Commission was acting in its expert rate-setting capacity, its decision is entitled to great weight deference, and can only be overturned if a reasonable person *could not* have reached the same decision.

There can be no dispute that in approving the Demand Charge for inclusion in certain electricity rates, the Commission was acting in its rate-setting capacity pursuant to Wis. Stat. § 196.20. "[R]ate setting is an area in which the Commission has special expertise." *Brookfield v. Milwaukee Metropolitan Sewerage District*, 141 Wis. 2d 10, 15, 414 N.W.2d 308 (Ct. App. 1987). As such, when the Commission acts in its rate-setting capacity, courts grant great weight deference to its decisions. *Wisconsin Bell, Inc. v. PSC*, 2004 WI App 8, ¶¶ 16-22 and n.8, 269 Wis. 2d 409, 675 N.W.2d 242 (the "complex determinations" required in the context of utility rate design -- where the Commission, "far better than a court, has the experience, expertise, and fact-finding opportunity that allow for fair and consistent decision making in areas of complex regulation" -- "have led courts . . . to accord great-weight deference in the area of utility rates") (collecting Wisconsin cases); *Wisconsin End-User Gas Ass'n v. PSC*, 216 Wis. 2d 558, 561, 581 N.W.2d 556 (Ct. App. 1998) ("we owe the PSC great deference in matters of statutory interpretation and rate setting").

Under the great weight deference standard, rate orders are *prima facie* valid, and the burden is on the challenger -- here, TASC and RENEW -- to demonstrate that the Commission's determination is unreasonable by clear and satisfactory evidence. *Madison Gas and Electric Co. v. PSC*, 150 Wis. 2d 186, 189, 441 N.W.2d 311 (Ct. App. 1989); *City of West Allis v. PSC*, 42 Wis. 2d 569, 579, 167 N.W.2d 401 (1969); *Madison Bus Co. v. PSC*, 264 Wis. 12, 14, 58 N.W.2d 463 (1953).

Great weight deference also requires the Court to affirm the Commission's decision if it was reasonable, even if in the Court's estimation an alternative decision would have been equally or even more reasonable. *Wis. Bell*, ¶ 23. "The agency's decision may be set aside by a reviewing court *only when*, upon an examination of the *entire record*, the evidence, *including the inferences therefrom*, is such that a reasonable person, acting reasonably, *could not have reached the decision* from the evidence and its inferences." *Id.* (emphasis added) (*quoting Sterlingworth Condo Ass'n v. DNR*, 205 Wis. 2d 710, 727, 556 N.W.2d 791 (Ct. App. 1996)).

Finally, as the Commission correctly noted, it exercises a legislative function in setting rates. *Wisconsin Ass'n of Mfrs. & Commerce, Inc. v. PSC*, 94 Wis. 2d 314, 319, 287 N.W.2d 844 (Ct. App. 1979). Indeed:

> It is well established that the PSC, in designing a rate structure that will enable a utility to recover the total revenue authorized, has wide discretion in determining the factors upon which it may base its precise rate schedule. […] Rate-making agencies are not bound to any single regulatory formula; they are permitted to make the pragmatic adjustments, which may be called for by particular circumstances, unless their statutory authority plainly precludes this.

Id. As such, it is not the function of a reviewing court to substitute its view as to public policy or to second guess the Commission by substituting the court's view as to what is reasonable. *Milwaukee & Suburban Transport Corp. v. PSC*, 268 Wis. 573, 586, 68 N.W.2d 552 (1955) ("The commission has a considerable latitude in matters of policy in regulating utilities . . . because such questions of policy are generally the function of the commission and not the courts"); *Milwaukee Elec. Ry. & Transport Co. v. PSC*, 261 Wis. 299, 302-03, 52 N.W.2d 876 (1952) ("The court must also recognize that the commission has expert knowledge, that such knowledge may be applied by it, and that even though we might differ with the commission, we are without power to substitute our views of what may be reasonable"); *Wisconsin Ass'n*, 94 Wis. 2d at 319 (same).

B. Petitioners entirely ignore the great weight deference standard, confuse statutory requirements with the standard of review, and overstate the "substantial evidence" requirement.

The Petitioners' statement of the standard and scope of review (Pet. Br. at 12-15) contains multiple misstatements or misunderstandings of Wisconsin law. On the whole, Petitioners' argument on this point is a fairly obvious attempt to avoid great weight deference, since that standard is generally fatal to a petition like theirs. *See Wisconsin End-User*, 218 Wis. 2d at 564 ("the scope of review underpins our analysis . . . and our ultimate decision is largely driven by the degree of deference owed").

First, Petitioners state that the Court is to apply the "standards" in Wis. Stat. § 227.57(6) and (8). Pet. Br. at 11. But those are *criteria* for agency decisions; the *standard of review* applicable to Chapter 227 actions generally is stated in subsection (10) ("due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as the discretionary authority conferred upon it"), and on review of the Commission's rate-setting decisions, that standard is further elevated to great weight deference. *Wis. Bell*, ¶ 22 n.8. In other words, while § 227.57 does require the Court to assess whether the Final Decision comports with certain statutory criteria, *great weight deference* is the lens through which the Court must view those questions.[7] Despite the clarity of Wisconsin law on this point, Petitioners make no mention whatsoever of the great weight deference standard.

Second, Petitioners argue that the "substantial evidence" requirement somehow alters the standard of review. *See* Pet. Br. at 12 (arguing that the Court "need not defer" where it is not satisfied with the evidence supporting the decision or the rational connection between the two).

[7] To draw an analogy to the criminal context, while a defendant must be convicted by proof of guilt "beyond a reasonable doubt," an appellate court reviews legal aspects of the conviction "de novo" (no deference to the trial court) and reviews factual aspects for "clear error" (substantial deference to the trial court). Petitioners' argument is like saying that a criminal conviction should be reviewed "beyond a reasonable doubt."

This turns the law on its head. If the standard of review depends on what the Court thinks of the evidence, then the inquiry is driving the standard instead of the other way around. Again, the standard of review -- here, great weight deference -- applies from the outset due to the nature of the Commission's decision -- here, a rate-setting order -- and guides the Court's inquiry into whether the statutory "substantial evidence" requirement is met.

Third, Petitioners confuse the issue of whether the "substantial evidence" inquiry is limited to the face of the agency's decision. Pet. Br. at 11 ("the Court is limited to the reasons provided by the agency for its decision"). It is not. Under Wisconsin law, "a general finding by the [agency] implies all facts necessary to support it. A finding not explicitly made may be inferred from other properly made findings and from findings which the [agency] failed to make, if there is evidence (or inferences which can be drawn from the evidence) which would support such findings." *Valadzic v. Briggs & Stratton Corp.*, 92 Wis. 2d 583, 591, 286 N.W.2d 540 (1979) (findings by state agency); *Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶ 49, --- Wis. 2d ---, --- N.W.2d --- (same, findings by municipal board) ("a detailed or explicit explanation . . . is not necessary. The decision need only contain enough information for the reviewing court to discern the basis" of the decision).

Fourth, Petitioners overstate the "substantial evidence" requirement when they say that it "applies separately to each specific factual finding necessary to support an agency's decision." Pet. Br. at 14. As the Petitioners' own cases make clear, the substantial evidence inquiry merely asks whether the agency's decision is supported by evidence "which a reasonable man could accept as adequate to support a conclusion." *Id., citing Gehin v. Wis. Group. Ins. Bd.*, 2005 WI 16, ¶ 48, 278 Wis. 2d 111, 692 N.W.2d 572. *See also Clark v. Waupaca County Bd. Of Adjustment*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994) (" 'Substantial evidence' is

evidence of such convincing power that reasonable persons *could* reach the same decision") (emphasis added); *Smith v. City of Milwaukee*, 2014 WI App 95, ¶ 22, 356 Wis. 2d 779, 854 N.W.2d 857 ("substantial evidence" is even less than a preponderance of the evidence).

Fifth, the Petitioners appear to suggest that the Commission must weigh all evidence equally and rule in favor of the party that submits the most evidence. Pet. Br. at 13 (describing evidence "overwhelmed by other evidence"); *id.* at 14 (describing "two conflicting views"); *id.* at 15 (describing decisions "which contradict consistent and detailed testimony" by another party). Petitioners imply that the Court must review whether the Commission properly weighed the evidence before it, but Wisconsin case law is clearly to the contrary: "The substantial evidence test is not weighing the evidence to determine whether a burden of proof is met or whether a view is supported by a preponderance of the evidence. Such tests are not applicable to administrative decisions." *Wisconsin Ass'n*, 94 Wis. 2d at 321-22. On the contrary:

> Sec. 227.20, Stats., review standards do not allow a reviewing court to weigh the evidence or pass on the credibility of witnesses. Moreover, an agency determination reviewable under ch. 227 will not be overturned because it is against the great weight and clear preponderance of the evidence. Thus, when the issues basically involve a dispute over conflicting testimony and a reasonable man could be convinced by either side, it is within the administrative agency's province to weigh it and accept that which it finds more credible.

Id. (*quoting Sanitary Transfer & Landfill, Inc. v. DNR*, 85 Wis. 2d 1, 14, 270 N.W.2d 144 (1978).

In summary, the only question before the Court is: <u>On the basis of the record as a whole, including all reasonable inferences from the record, is the Commission's decision to include the Demand Charge in the COGS-NM and COGS-NP tariffs supported by enough evidence that a reasonable person *could* reach the same decision?</u> In answering that question, the Court is to apply great weight deference, setting aside reasonable alternatives and upholding the Commission's decision unless a reasonable person <u>could not have reached the same decision</u>.

ARGUMENT

I. Because the Demand Charge is subject to Commission review and refund in future proceedings, the Petition is not ripe and the Court need not reach the merits.

Before reaching the substantive question presented by the Petitioners -- whether the Commission's decision is supported by enough evidence that a reasonable person could reach the same conclusion -- the Court must consider whether the Petition is even ripe for a judicial determination. Because amounts collected via the Demand Charge are subject to a true-up and refund, the ripeness doctrine means that the Petitioners lack standing to challenge the Demand Charge at this time.

Under Wisconsin law, "the basic rationale of the ripeness doctrine is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative or . . . legislative policies." *Lister v. Board of Regents of University Wisconsin System*, 72 Wis.2d 282, 309, 240 N.W.2d 610 (1976) (*citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 18 L.Ed. 681 (1967)). The ripeness doctrine asks whether there is a "justiciable controversy" between the parties, which requires "the existence of present and fixed rights," not "hypothetical or future rights." *Tooley v. O'Connell*, 77 Wis.2d 422, 434, 253 N.W.2d 335 (1977). A justiciable controversy is "easily distinguishable from remote, contingent, and uncertain events that may never happen." *Loy v. Bunderson*, 107 Wis.2d 400, 415, 320 N.W.2d 175 (1982).

Wisconsin courts have applied the ripeness doctrine in the context of administrative agency action. *See, e.g., Helnore v. Department of Natural Resources*, 2005 WI App 46, ¶ 13, 280 Wis.2d 211, 694 N.W.2d 730 (plaintiff's challenge was not ripe where administrative agency had merely promulgated a new regulation: "It is not enough for a regulation to be *applicable*; it must have actually *been applied* by the relevant agency") (emphasis in original).

Here, the Demand Charge challenged by Petitioners is neither "present" nor "fixed" at this juncture. The Commission clearly stated that to the extent customers pay the Demand Charge, those payments are subject to true-up and adjustment -- including a potential refund -- at the end of 2016. (R.49 at 85). The Commission also stated that it will hold open the ultimate question of "whether the COGS capacity demand charges, and the basis for determining the billing units for those charges, are appropriate or require modification." (*Id.*). That question will be determined in WEPCO's next rate case, or annually beginning in 2017. (*Id.*).

While it appears that Wisconsin courts have not considered whether an administrative review proceeding is ripe where the challenged tariff is subject to refund,[8] other courts considering that very question have concluded that the ripeness doctrine bars such a challenge:

> One relatively stable line of demarcation the Commission and the courts have identified is that a Commission order accepting a tariff submission for filing and allowing it to go into effect subject to possible refund after further proceedings is generally not ripe for review.

Report of the Committee on Judicial Review, 11 *Energy L. J.* 111 (1990) (emphasis added). This consensus includes decisions by the D.C. Circuit Court of Appeals, which reviews decisions by the Federal Energy Regulatory Commission (FERC). *See, e.g., Transcon. Gas Pipe Line Corp. v. FERC*, 866 F.2d 477 (D.C. Cir. 1989) (because petitioner would obtain refund of any charges ultimately found to be excessive, review was not ripe); *Miss. Valley Gas Co. v. FERC*, 68 F.3d 503, 509 ("Mere delay in obtaining relief from . . . past rates does not suffice to establish that the FERC orders have an immediate impact on [petitioner]"). These cases rely on *Abbott Labs*, the same seminal U.S. Supreme Court decision that informs Wisconsin ripeness doctrine. *Compare Mississippi*, 68 F.3d at 509, *with Lister*, 72 Wis.2d at 309; *see also* Report, 11 *Energy L. J.* at 111

[8] *Cf. Friends of the Earth v. PSC*, 78 Wis. 2d 388, 406, 254 N.W.2d 299 (1977) (review was appropriate where rate order "contained *no provision* contemplating a *later reevaluation* of whether the authorized rate increases were just and reasonable or *whether a refund should be made*") (emphasis added).

(citing *Abbott*). Here, the Court should dismiss the Petition as unripe for the same reasons.

II. The Commission's decision is supported by substantial evidence in the record.

A. On the basis of the record evidence before it, the Commission decided that all customers—including DG customers—should pay equally for the system costs all customers cause.

The Commission's decision to include a Demand Charge in the new COGS tariffs was straightforward and well reasoned, and can be summarized as follows:

(1) Wisconsin Electric incurs fixed costs to maintain a safe, reliable energy system for all of its customers.

(2) The majority of those fixed costs are embedded in variable energy charges, which customers only pay when they purchase electricity from the utility.

(3) Distributed generation customers do not pay as much of those costs because they typically purchase less electricity from the utility than non-DG customers.

(4) However, distributed generation customers still rely on Wisconsin Electric's power grid to the same extent as all other customers.

(5) Therefore, distributed generation customers are not paying their fair share of the utility's fixed costs.

(6) The size (or "nameplate capacity") of a customer's generator is a reasonable proxy for the amount of electricity the utility must stand ready to supply whenever the generator fails.

(7) Therefore, a monthly Demand Charge based on that nameplate capacity is a reasonable way for the utility to recover at least *some* of the fair share of fixed costs that DG customers should be paying.

Each of these points was supported by "substantial evidence in the record" -- that is, enough evidence that a reasonable person could reach the same conclusion:

(1) Wisconsin Electric's total fixed costs were extensively documented, summarized at Ex.-WEPCO/WG-Rogers-15 (R.106), and not seriously disputed by any party.

(2) Wisconsin Electric's apportionment of fixed costs to energy rates was also summarized at Ex.-WEPCO/WG-Rogers-15 (R.106), and Mr. Rogers further explained that the vast majority of Wisconsin Electric's fixed costs are embedded in variable energy charges that are tied to energy purchases. (R.256 at 34-37).

(3) Mr. Rogers and Mr. O'Sheasy each testified that to the extent DG customers do not purchase electricity from Wisconsin Electric, Wisconsin Electric does not recover its fixed demand costs from those customers. (R.254 at 19r; R.256 at 54).

(4) TASC's and RENEW's *own witnesses* admitted that DG customers still very much rely on Wisconsin Electric's power plants and other fixed assets, both to sell their own electricity and to receive electricity from the utility whenever their own generation is inadequate or fails. (R.307 at 6; R.324 at 133, 148-149).

(5) Mr. O'Sheasy testified that rates become misaligned when customers who incur costs do not pay those costs (thereby shifting them to others). (R.254 at 16r).

(6) Mr. O'Sheasy testified that the size (or "nameplate capacity") of a customer's generator is a reasonable proxy for the amount of energy the utility will have to supply whenever the generator fails, and further noted that several utilities around the country have adopted this pricing mechanism. (R.254 at 24r).

(7) Mr. Rogers testified that the Demand Charge would partially solve the "fair share" problem by providing a reasonable way to charge DG customers for their daily reliance on Wisconsin Electric's power grid. (R.256 at 57).

In addition to the record evidence supporting each of these points, the entire Demand Charge decision is supported by logic and fundamental principles of fairness:

- It is common sense that distributed generation customers still rely on the utility's power plants and other fixed assets on a daily basis. If they wanted to be *completely* disconnected, they could "unplug" and -- with a large enough system or small enough usage -- generate all the energy they need. But then they would have no backup power when their own system is inadequate or entirely fails, and they also would not be able to sell their surplus energy back to the utility. Customers who *want* backup electricity and/or *want* to sell their surplus electricity *choose* to enroll in one of the COGS tariffs and connect themselves to the grid.[9]

- It is fundamentally fair that customers who benefit from a service should pay for it, and it is logical that DG customers who purchase little or no energy will end up avoiding costs that are embedded in energy charges.

- It is common sense that the size of the customer's generator approximates that customer's energy needs, and it is logical that whenever that generator fails, the utility will need to supply as much energy as the generator normally does.

[9] Of course, all of the COGS tariffs are optional. Petitioners would prefer the benefits of the COGS option (compensation for surplus generation) without the cost (the Demand Charge). This amounts to asking other customers to pay those costs *without* the corresponding benefit. In short, Petitioners would have everyone else pay *something for nothing* so that their constituents can pay *nothing for something*. That's simply unreasonable.

TASC and RENEW obviously disagree with the record evidence and its common-sense implications, and make much of what they describe as contradictory evidence. But that is not the test for whether the Commission's decision is supported by substantial evidence in the record. Again, the question is whether the Commission's decision is supported by enough evidence that a reasonable person could reach the same conclusion -- even if another reasonable person (i.e., TASC or RENEW or the Court) could disagree.

The Commission's decision certainly satisfies that test. As discussed above, the Commission described the issue and the arguments, accepted certain arguments and rejected others, and explained its reasoning for doing so. It reached general conclusions regarding fixed cost recovery from distributed generation customers, and -- on that basis and the basis of record evidence -- reached more specific conclusions regarding the Demand Charge. It also expressly recognized areas in which its conclusions remained subject to uncertainty, and went out of its way to mitigate those uncertainties through a three-part mechanism consisting of (1) new metering, (2) data reporting, and (3) a true-up at the conclusion of the test period. This thoughtful approach to a complex question within the Commission's expert discretion does not become "unreasonable" or "unsupported" simply because Petitioners dislike the outcome.

B. The "necessary facts" Petitioners claim Wisconsin Electric failed to establish proceed from a misunderstanding of what the Commission decided, so are not necessary to support the Commission's decision.

Petitioners describe the Demand Charge as a "rate tariff charging customers for the right to generate some of their own electricity needs, rather than buying all their electricity from [Wisconsin Electric]." Pet. Br. at 2. They say customers "are forced to pay the fee simply for having their own generating equipment, even if their demands on [Wisconsin Electric's] system are no different than other customers who are not forced to pay the charge." *Id.* And they claim

that the Commission "tried to justify the new charge by stating that it covers [Wisconsin Electric's] *additional costs* to supply the 'standby generation and distribution' costs caused by customers owning their own electric generation equipment." *Id.* (emphasis added).

As should be clear by now, this is a complete mischaracterization of the Commission's decision. The Demand Charge does not "charg[e] customers for the right to generate some of their own electricity needs;" it charges customers for their connection to and continued reliance on the power plants and other infrastructure built and maintained by Wisconsin Electric. Customers are not charged the fee "simply for having their own generating equipment;" they are charged the fee for voluntarily enrolling in two optional tariffs that give them the *benefit* of bill credits for their own energy production. They are not charged "*even if* their demands on [the] system are no different than other customers;" they are charged *because* their demands on the system are no different than others'.

Most importantly, the Commission did not justify the Demand Charge in terms of "additional costs" caused by DG customers. The Commission very clearly stated that the Demand Charge was intended to recover costs that DG customers equally *cause* but do not equally *pay*. Wisconsin Electric's own testimony on this point permits no misunderstanding:

> I don't believe I've testified that customers with their own generation impose extra costs; rather, they impose the same costs on our distribution system as customers without their own generation. The difference is we recover those costs from customers without generation but we do not recover those costs from customers with generation. (R. 259 at 2).

The Commission's decision on the Demand Charge is prefaced by a lengthy discussion of the issues that arise when all customers rely equally on the grid but do not pay equally for its use. (R.49 at 57-61, 66-69). The Commission expressly incorporated that same reasoning into its decision approving the new COGs tariffs, including the Demand Charge. (*Id.* at 82).

Because the Commission's decision on the Demand Charge is premised on the notion of *equal* payments for *equal* benefits, the Petitioners' arguments -- all of which focus on "additional" or "special" or "unique" costs -- are beside the point. This is apparent from the three "facts" which Petitioners identify as "necessary to support the [Demand Charge] imposed in this case":

> (1) That [Wisconsin Electric] 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 [Wisconsin Electric's] customers.
>
> (2) That [Wisconsin Electric] 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 [Wisconsin Electric] 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.

Pet. Br. at 15 (emphasis added); *see also id.* at 17 ("lack of evidence" that Wisconsin Electric "incurs *additional* transmission costs when customers own their own generation"), 18-19 ("no evidence in the record" that Wisconsin Electric "actually obtains *additional* generation capacity" to serve DG customers), 22 ("nothing in the record" regarding "*incremental* distribution costs" caused by DG customers) (emphasis added).

None of these "facts" is "necessary to support the Demand Charge imposed in this case" because the Demand Charge had nothing to do with them. At the risk of redundancy, what is "special" about DG customers is not the *costs they cause*; in their equal reliance on the grid, they cause the *same* costs as everyone else. Instead, the issues before the Commission were whether DG customers have been paying their fair share of those costs (the Commission found that they have not), and whether the Demand Charge adopted here is a reasonable solution to the underpayment problem (the Commission found that it is).

C. The Petitioners' remaining arguments on "substantial evidence" do not meet their burden of showing unreasonableness by clear and satisfactory evidence.

All of Petitioners' arguments regarding the "substantial evidence" requirement are infected by their mischaracterization of the Demand Charge and the Commission's decision, so should be rejected for that reason alone. Their ancillary arguments on this point also lack merit.

First, Petitioners claim *their* evidence (including an outdated study obtained in discovery) shows DG customers actually *save* the utility money. Pet. Br. at 17, 20 n.7, 23 n.10. But in approving the Demand Charge, the Commission rejected that evidence, finding instead that DG customers should be required to pay an equal portion of fixed system costs. The Commission is entitled to reject inconsistent or conflicting evidence and the Court may not reweigh that evidence on review. *Wis. Ass'n*, 94 Wis. 2d at 321-22; *Sanitary Transfer*, 85 Wis. 2d at 14.

Next, Petitioners argue a portion of the Demand Charge should be rejected because the Commission rejected a similar charge in another context. Pet. Br. at 20-21. The "standby tariffs" at issue there ("Cg4" and "Cp4") would have applied to customers whose energy needs and generation capabilities vary significantly from the residential and small commercial customers to whom the Demand Charge applies. (For example, the primary customer on Cp4 is the Milwaukee Metropolitan Sewerage District.) That both charges happened to be based on the same underlying calculations says nothing about whether a tariff appropriate for one group of customers will be appropriate for another. The standby tariffs were the subject of separate testimony and briefing, and the Commission's primary reason for rejecting them was that participation in the new tariff (Cp4) would have been mandatory (R.49 at 87-88). By contrast, the COGS tariffs are optional, and in any event, "[r]ate-making agencies are not bound to any single regulatory formula; they are permitted to make the pragmatic adjustments, which may be called for by particular circumstances . . ." *Wis. Ass'n*, 94 Wis. 2d at 319.

Finally, Petitioners argue that nothing in the record supports a rational connection between the "nameplate generating capacity" of a customer's generator and the demand that customer places on the power grid. Pet. Br. at 23-25. Petitioners overlook the record evidence explaining this rational connection and citing other major utilities that rely on a similar proxy. (R.254 at 24r). Petitioners also overlook the common sense connection between nameplate capacity and demand. It is reasonable to assume that when a customer installs his own generation system (say, a rooftop solar generator), he will size the system according to his needs. When that generator goes offline, the utility will have to supply the same amount of power that the generator was supplying before. Certainly, in a monthly or even daily period, the customer's energy needs (and thus his reliance on the generator) will ebb and flow. But, as explained above, demand charges are based on *peak* usage within a period, and the generator's nameplate capacity represents the *maximum* demand that the utility could face if that generator goes offline.

Here, Petitioners seek to sow further doubt by criticizing the special conditions the Commission placed around the Demand Charge. The Commission expressed concern that a generator's nameplate capacity may not reflect its actual output, so implemented a metering mechanism for measuring that disparity and "truing up" bills at the end of a test period. R.49 at 85. Petitioners argue that this safeguard is really just a misguided attempt to "patch the hole in the record." Pet. Br. at 24. According to Petitioners, the question is not whether nameplate capacity matches actual output, but whether nameplate capacity matches peak demand.

On this point, the Petitioners, not the Commission, have "missed the ball completely." *Id.* The generator's *actual output* is what will suddenly go missing -- and what the power grid will suddenly have to supply -- if, for example, the customer's wind turbine stops when the wind dies. The customer's *peak demand* may be significantly higher -- and it will be whenever the

size of the generator is smaller than the customer's total energy needs. The Demand Charge should not (and does not) apply to the difference between the amount of energy the generator can supply and the greater amount of energy the customer needs. The customer is already paying the utility for that energy, at rates which incorporate demand costs. The Demand Charge is only intended to cover the gap between zero and the generator's maximum output -- so it is important to know whether that output actually matches the generator's nameplate capacity (the current basis for the Demand Charge). The Commission's metering and true-up plan will do exactly that.

III. The Commission's decision was neither arbitrary nor discriminatory.

Petitioners argue the Commission's decision was "unreasonable, arbitrary, and discriminatory" for two reasons: (1) "it treats similarly situated self-generating customers differently depending on customer class," and (2) "it allows double collection of the same costs from customers with generation." Pet. Br. at 26. Petitioners are wrong on both counts.

The Petitioners' first argument is oxymoronic. Customers are not "similarly situated" if they are in different customer classes. The whole point of defining customer classes in utility ratemaking is that based on their characteristics (location, peak energy needs, energy usage patterns, self-generating ability, etc.), certain types of customers are sufficiently distinct from other types of customers to merit a separate tariff or rate:

> The Supreme Court has long recognized that the groupings necessary to form a class of commodities or customers result from expert administrative judgments that are entitled to great weight by the courts. […] [While] different charges for the same service *within a class* are discriminatory and unlawful, [a] very different rule applies to *interclass* differentials. […] A difference in rates does not prove interclass relationships are unreasonable or discriminatory.

Leonard S. Goodman, *The Process of Ratemaking* (1st ed. 1998) at 1016-17 (emphasis added) (collecting cases); *see also Wisconsin Ass'n*, 94 Wis. 2d at 325 (rejecting "unjust discrimination" challenge to rates) ("Differential pricing, i.e., different schedules of rates for different classes of

customers and services, is an entirely lawful and economically desirable form of price discrimination, insofar as regulated public utilities are concerned"). Petitioners' argument amounts to the absurd conclusion that the Commission must offer identical rates *and rate structures* to the residential homeowner and the Milwaukee Metropolitan Sewerage District.[10]

The Petitioners' remaining argument relates to "double counting." Pet. Br. at 27-28. They claim that because many DG customers still supply part of their energy needs by purchasing energy from the grid, they will end up paying the utility's fixed costs twice: once in the monthly Demand Charge, and again when they purchase energy. *Id.* It is true that the utility's demand costs are embedded in the variable energy charge and that DG customers will pay those costs *if and when* they purchase energy. But because some or all of their monthly energy needs are supplied by their own generation, they will purchase energy -- and thus will pay these costs -- to a much lesser extent than their non-generating counterparts. The Demand Charge is intended to make up the difference. Moreover, Wisconsin Electric specifically addressed this criticism by *reducing* the Demand Charge by 56% (from $8.602 to $3.794 per kilowatt) for "intermittent" generators (like solar and wind generators), which will oscillate frequently between self-reliance and dependence on the grid. (R.256 at 56-57). Thus double counting is avoided in the structure of the rate.

In any event, Petitioners' argument here is no different from saying that the Demand Charge lacks evidentiary support. *Wis. Ass'n*, 94 Wis. 2d at 324-25 ("Where there is substantial evidence to support the PSC action, the act cannot be arbitrary or capricious"). Thus Petitioners' second set of arguments (Pet. Br. at 25-29) also fails for the reasons stated in Section II, above.

[10] The same is true of Petitioners' related argument, on pages 28-29 of their brief, that Cg2 customers should be treated the same as customers in the Cg3 and primary voltage classes. Again, customers in different classes are *by definition* meaningfully distinct, and apportioning different rates to different classes is not discriminatory. Moreover -- and more fundamentally -- Cg2 is a secondary demand/time of use rate and has nothing to do with either the Demand Charge or the two COGS tariffs at issue in this case.

IV. Commissioner Nowak's public comments merely reflected a prior public decision by the Commission, and the Commission properly rejected TASC's recusal request.

In a last ditch effort to undermine the reasonableness of the Commission's decision, Petitioners cast aspersions on the integrity of one of Wisconsin's Public Service Commissioners. Pet. Br. at 7-8, 29-39. This argument is unseemly and hardly merits a response.

In November of 2013, well before the events Petitioners complain of, the Commission publicly and officially invited utilities to consider their distributed generation rates in a rate case. Order, *Petition to Open a Rulemaking Docket to Consider Amending Wis. Admin. Code ch. PSC 119 and Wis. Admin. Code § PSC 113.10 Related to Distributed Resources Interconnection Rules*, Docket 5-GF-233 (Nov. 15, 2013) (PSC REF# 193575). Incidentally, that invitation came in a proceeding initiated by RENEW. *Id.* The Commission cited the same order in its Final Decision here (R.49 at 81 and n.15), and Commissioner Nowak's public comments in March and June of 2014 were consistent with the Commission's November 2013 order.

Moreover, the Commission considered the recusal issue at two open meetings, issued an independent order approving of Commissioner Nowak's continued participation in the case, and rejected TASC's motion to disqualify her. Order, *Joint Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas, and Steam Rates*, Docket 5-UR-107 (Dec. 18, 2014) (R.48). That order was approved by Chairperson Montgomery and Commissioner Callisto (who dissented from the portion of the Final Decision regarding the Demand Charge), with Commissioner Nowak abstaining. (*Id.*). This is consistent with Commission practice. *See, e.g.*, Order, *In re Minnesota Power Co.*, Dkt. 05-CR-113 (Sept. 28, 2000) (each of three Commissioners declined to self-recuse, and full Commission affirmed in public order). Petitioners' arguments on this point should be rejected for these reasons and for the reasons set forth in the Commission's brief.

CONCLUSION

The Court need not reach the merits of the Petition. Instead, the Petition should be rejected as unripe because the charges at issue remain contingent and subject to refund.

If the Court does reach the merits, then this administrative review asks of the Court one question, and one question only: On the basis of the record as a whole, including all reasonable inferences from the record, is the Commission's decision to include the Demand Charge in the COGS-NM and COGS-NP tariffs supported by enough evidence that a reasonable person *could* reach the same decision? In answering that question, the Court is to apply great weight deference, setting aside reasonable alternatives and upholding the Commission's decision unless a reasonable person *could not* have reached the same decision.

Wisconsin Electric respectfully submits that mere disagreement is no basis for overturning a reasoned agency decision, and that in light of the great weight deference due to the Commission's specialized rate-making expertise, the portion of the Final Decision relating to the Demand Charge should be affirmed in its entirety.

Dated this 22nd day of June, 2015.

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STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY
BRANCH 17

THE ALLIANCE FOR SOLAR CHOICE

and

RENEW WISCONSIN,

Petitioners,

v.

Case No. 15-CV-0153

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Case Code: 30607
Administrative Agency Review

Respondent, and

Hon. Peter Anderson

WISCONSIN ELECTRIC POWER COMPANY,

Intervenor-Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2015, I caused to be mailed a true and correct copy of the foregoing brief to the following parties via First Class U.S. Mail:

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