

**BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Appeal of Denial of Application for	)	
Interconnection, Request for Contested Case	)	9300-DR-104
Hearing, and Petition for Declaratory Ruling of	)	
Eagle Point Solar, LLC and Eagle Point Energy	)	
6, LLC	)	

**INITIAL BRIEF OF NONPROFIT SOLAR ADVOCATES**

This proceeding provides an opportunity for the Public Service Commission of Wisconsin to clarify the scope and appropriately apply the laws that it enforces. It is an opportunity for the Commission to hold, consistent with over a century of Wisconsin case law, that third-party owners and financiers of customer-sited distributed generation are not public utilities. This clarification will protect consumer interests, increase equitable access to affordable self-generation, improve grid resiliency, reduce harmful pollution from fossil fuels, protect public health, and spur solar development to help meet Governor Evers’ goal of reaching carbon neutrality by 2050.

The Wisconsin Electric Power Company’s (WEPCO) refusal to interconnect third-party owned customer-sited solar is anticompetitive and violates the state’s Chapter 119 interconnection standards. The Chapter 119 standards are designed to protect the integrity of the grid, not to protect the monopoly utility shareholders from competition. In this case, the City of Milwaukee’s choice of a third-party financing arrangement for its rooftop solar projects is irrelevant to the engineering standards in Wisconsin’s Chapter 119 interconnection rules.

The Environmental Law & Policy Center, RENEW Wisconsin, and Vote Solar (collectively, Nonprofit Solar Advocates) urge the Commission to order WEPCO to interconnect the City of Milwaukee solar projects, regardless of how those projects are financed. Further, the

Commission should clarify that (1) a utility may not deny interconnection based on project ownership, and that (2) third-party owners of customer-sited distributed generation are not “public utilities” under Wisconsin law.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Third-party ownership is a financing model for customer-sited distributed generation, like rooftop solar. Under this model, the solar developer or another third party partially or completely owns the solar energy project, and the customer pays for a variety of solar services based on the amount of electricity generated or based on a set monthly fee. This reduces upfront capital costs for the customer, meaning more people can choose solar. It also allows customers to take advantage of solar tax credits, even if the customer does not pay taxes (like nonprofits, units of government, schools, and houses of worship), or does not pay enough taxes to fully utilize tax credits (as with lower-income people). The third-party owner can access the tax credits and pass the savings through to the customer, which helps to level the playing field for all customers regardless of their tax status.

In 2009, the City of Milwaukee adopted the goal of using 25% renewable electricity by 2025. Direct-COM-Shambarger-2. But directly building and owning all of the solar projects necessary to meet this goal presented a challenge due to upfront costs and the City’s inability to take advantage of tax credits. *Id.* at 2-3. The City put out a request for proposals (RFP) for co-owned solar projects on six City-owned properties. *Id.* at 3. The City selected Eagle Point Solar’s proposal, under which the City and Eagle Point would be co-owners of the solar projects, which would be sited behind the meter on the City’s property. *Id.* at 3-4. But when Eagle Point Solar submitted the interconnection applications with the City listed as the applicant, WEPCO denied the applications. *Id.* at 4. WEPCO complained that the City was not the proper applicant and that

Eagle Point would be illegally operating as a public utility. *Id.* Eagle Point and the City adjusted their contract and Eagle Point then re-submitted the applications listing itself as the applicant. Again, WEPCO denied the application, reasserting its position that Eagle Point would be operating as a public utility. *Id.* at 5. WEPCO did not allege that any of the requirements of Section 119 were not met. *Id.* WEPCO did encourage the City to instead participate in WEPCO's "Solar Now" program, which involves the customer agreeing to host *utility-owned* solar projects on the customer's property. Direct-COM-Shambarger-4-5.

In March 2019, Eagle Point filed an appeal of the interconnection denial with the Commission, along with a request for a declaratory order that would clarify that Eagle Point was not operating as a public utility. The Commission denied the request for a declaratory order, stating that "direction on this issue [of third-party ownership] is best suited to come from the Legislature." Commission Order of May 3, 2019, PSC REF#: 365974. The Commission had used the same rationale to deny two earlier requests for declaratory orders on the legality of third-party ownership. *Applicability of Wis. Stat. § 196.01(5)(a) to Third-Party Financing of Distributed Energy Resource Systems in Wisconsin*, Docket No. 9300-DR-102 (Dec. 22, 2017), PSC REF#: 335245; *Petition of Sunrun Inc. for a Declaratory Ruling Regarding the Applicability of Wis. Stat. § 196.01(5)(a) to Leasing of Solar Equipment in Wisconsin*, Docket No. 9300-DR-103 (Feb. 4, 2019), PSC REF#: 358934.

The Commission opened a proceeding just on the interconnection appeal and stated that it "will not investigate or address the applicability of Wis. Stat. § 196.01(5) to Eagle Point in this proceeding." Notice of Proceeding, PSC REF#: 366083. But then on September 18, 2020, the Commission issued an order stating the scope of the interconnection appeal *would* include the issue of whether Eagle Point Solar was acting as a public utility. PSC REF#: 397001.

## **ARGUMENT**

### **I. WEPCO Has No Legal Basis for Denying Interconnection.**

WEPCO has presented no legal basis to support its denial of Eagle Point Solar's and the City of Milwaukee's interconnection requests. WEPCO has essentially provided two rationales for denying the interconnection. First was the reason given *at the time of the denial*: WEPCO's belief that third-party ownership is illegal. This is not a permissible reason to deny interconnection under Chapter 119. And as explained in Part II, over a century of Wisconsin case law shows that third-party ownership is legal and does not create a public utility.

WEPCO has also raised an additional post-hoc justification in its testimony: concern that third-party ownership or lack of "transparency" about ownership could somehow threaten grid integrity. This purported concern is entirely unconvincing; WEPCO fails to show any actual threat to grid integrity that turns on the financing method selected by the customer.

#### **A. WEPCO Cannot Deny Interconnection Based on Project Ownership.**

Chapter 119 of the PSC's rules govern interconnection of distributed generation facilities to the electric utility's distribution system. These rules cover engineering standards, insurance requirements, design requirements, fees, and certain other technical and procedural requirements. The rules are intended to be comprehensive and they do not allow electric utilities to deny interconnection requests based on the utility's own subjective view of other non-interconnection related legal issues as WEPCO did here. In fact, the Wisconsin law directing the PSC to establish interconnection rules states explicitly that the rules "shall be uniform" and that they "shall promote the development of distributed generation facilities." Wis. Stat. 196.496(2) (emphasis added).

PSC 119.04 states that "public utilities and applicants shall complete the following steps regarding interconnection applications for all classes of [distributed generation] facilities, in the

order listed ...” (emphasis added). Nowhere in the enumerated list does PSC 119.04 allow the utility to review the customer’s financing choice and decide, on its own, to deny an interconnection application on this basis. PSC 119.04(9) states that the “utility shall complete the distribution system upgrades and the applicant shall install the DG facility” within a specific time frame agreed upon by the parties so long as the applicant agrees to pay for any necessary upgrades (emphasis added). The word “shall” creates a mandatory duty and does not allow WEPCO to import unlisted subjective factors into the interconnection process that are not explicitly included in Chapter 119. One of the questions in WEPCO witness Eidukas’s testimony asks, “Ultimately, how does this dispute reflect the considerations Wisconsin Electric must balance in processing interconnection requests?” Rebuttal-WEPCo-Eidukas-15. The premise underlying this question is wrong—the utility does not have discretion to “balance” different “considerations”—if a distributed generation facility meets the requirements of Part 119, the utility must grant interconnection.

PSC staff has acknowledged that “the ownership of a distributed generation resource is irrelevant to a utility’s obligations under Wis. Admin. Code ch.119.” Letter from Cynthia Smith, Chief Legal Counsel, to Gregory Bollom, Madison Gas and Electric Company, at 2 (Apr. 3, 2014), (PSC REF#: 362038, Exhibit A). Therefore, PSC rules “do not allow an incumbent utility to refuse to connect a distributed generation resource because the utility knows or has reason to believe the customer may not own the resource.” *Id.*

Indeed, the whole point of interconnection standards is to remedy the inherent bias that electric utilities exercise in favor of their own facilities, to the detriment of competition and just and reasonable rates. In its order adopting federal interconnection standards, the Federal Energy Regulatory Commission (FERC) explained that it is the Commission’s duty to “remedy undue discrimination” especially where the utility’s practices reflect “undue preference or advantage” to

the utility or its affiliates. FERC Order 2006, at p. 7 (May 12, 2005).<sup>1</sup> FERC concluded that interconnection standards will limit opportunities for utilities to “favor their own generation” and would “remove unfair impediments to market energy” for small generators. *Id.* at 8. The Commission concluded that interconnection standards can help “resolve most disputes, minimize opportunities for undue discrimination, foster increased development of economic Small Generating Facilities, and protect system reliability.” *Id.* In sum, fair competition and market access are the twin underlying purposes of interconnection standards, and it is exactly those purposes that WEPCO has undermined by its refusal to interconnect the City of Milwaukee’s solar facilities while simultaneously pointing the City towards WEPCO’s utility-owned “Solar Now” option.

**B. WEPCO’s Purported Concerns about Grid “Integrity” Are Unpersuasive.**

In an attempt to bolster its position, WEPCO has raised an additional post-hoc rationalization for its denial of the interconnection applications. In his testimony, WEPCO’s witness Theodore Eidukas (Vice President at WEC Energy Group) seems to argue that WEPCO needs to know who “owns” and is “legally responsible” for each distributed generation facility and that if it doesn’t have this information, some unspecified harm will result. Rebuttal-WEPCO-Eidukas-5. WEPCO argues that Chapter 119 supports this assertion because “Applicant” is defined as “the legally responsible person applying” for interconnection, and the standard application forms include a field titled, “Applicant’s Ownership Interest in the Generation System,” with Options including “Owner,” “Co-Owner,” “Lease,” and “Other,” “plus a space for

---

<sup>1</sup> While Order 2006 established interconnection standards for federally jurisdictional facilities, FERC explicitly intended the Small Generation Interconnection Procedures (SGIP) to serve as a model for states. *See* Order 2006 at 4 (indicating intent to “harmonize” state and federal practices).

additional details.” *Id.* at 5-6. Relatedly, Mr. Eidukas raises concerns about “unidentified” tax equity investors. *Id.* at 10.

These arguments are unconvincing. First, WEPCO repeatedly points to grid integrity, but identifies no actual potential harm. Indeed, Mr. Eidukas’ testimony presents the question, “Are you suggesting that Eagle Point’s interconnection request presents a genuine threat to the integrity of Wisconsin Electric’s distribution system?” He answers “No,” and then goes on to simply re-state that it would “not be prudent” for WEPCO to allow interconnection without knowing “who is legally responsible for ownership” of the system. *Id.* at 5. In other words, WEPCO says that it needs to know ownership for purposes of grid integrity, acknowledges that there is no actual threat to grid integrity, and then continues to state that it needs to know ownership information.

Second, Chapter 119 actually undermines WEPCO’s position. Chapter 119 defines Applicant to mean the “legally responsible” party. The City of Milwaukee initially submitted the interconnection application as the Applicant. That means that it was identifying itself as the “legally responsible” party. The application form promulgated by the Commission allows the Applicant to identify its interest as “Owner,” “Co-Owner,” “Lease,” or “Other.” This clearly indicates that the “legally responsible” party need not be the sole owner. WEPCO admits that the City of Milwaukee checked the appropriate “Co-Owner” box. *Id.* at 6. But even with this clear information about the “legally responsible” party and its ownership interest, WEPCO rejected these applications. Clearly, then, the issue was not about not knowing who was the “legally responsible” party.

In an attempt to resolve WEPCO’s unlawful and unreasonable demands, Eagle Point then submitted the applications as the Applicant. This application therefore identified Eagle Point as

the “legally responsible” party. And again, WEPCO rejected the applications. WEPCO witness Eidukas claims that WEPCO was still concerned because it “knew very little about Eagle Point” and because of the City of Milwaukee’s “initial failure to disclose Eagle Point as the primary owner.” Rebuttal-WEPCo-Eidukas-7. These justifications lack any merit. WEPCO’s familiarity with an interconnection Applicant is entirely irrelevant to the proper considerations of Section 119, and the purpose of standardized interconnection rules is so that the utility *cannot* discriminate in this way. Further, the City of Milwaukee did nothing wrong in its initial application—it disclosed that it was a Co-owner. There is no requirement, and indeed no place on the form, to disclose other co-owners. WEPCO witness Eidukas implies that the City should have identified Eagle Point in “a space for additional details” in the form’s section on applicant’s ownership interest. Rebuttal-WEPCo-Eidukas-6 and -7. But the space in the form is clearly for an applicant who has checked the “Other” box to identify what that other interest is. *See, e.g.*, Ex.-Eagle Point-Shear-3. Witness Eidukas’ fabricated criticism of the City undermines his credibility.

Relatedly, WEPCO’s purported concerns about “unidentified financiers” are unfounded. Rebuttal-WEPCo-Eidukas-10. The identity of funders or financiers of a distributed generation project is simply irrelevant to Chapter 119 and quite frankly, no business of the utility. If a homeowner or business took out a loan to buy solar panels, they need not disclose that funding source to the utility. Similarly, there is no need for the City of Milwaukee or Eagle Point to disclose the identity of tax equity investors.

The issue has never been about a threat to the integrity of the system or lack of transparency about the “legally responsible” party. The issue is that WEPCO is trying to illegally



abuse its position as the monopoly electric utility to squelch competition and to protect its market share.

## **II. Wisconsin Law Is Clear that Third-Party Owners Are Not Public Utilities.**

As explained above, there is no legal basis for WEPCO to look outside the bounds of Chapter 119 for other reasons to deny interconnection. Yet, even if this were a valid consideration, it would not support WEPCO's denial of the City of Milwaukee's on-site solar projects. Over a century of case law in Wisconsin demonstrates that third-party owners of on-site generation are not public utilities because they are not offering services "to or for the public." This is true *even if* a third-party owner is technically selling electricity to an individual customer, *even if* they market similar services to other potential customers, and *even if* some electricity is pushed onto the grid through a net metering arrangement. Moreover, third-party owners do not raise any of the traditional justifications for public utility regulation.

### **A. Service to a "Limited Class" Is Not Service "To or For the Public."**

The Wisconsin Supreme Court has frequently and consistently held that service to a "limited class," like a customer using third-party financing, is not service "to the public," and therefore does not trigger public utility regulation. Under Wisconsin's Public Utilities Act, "public utility" is defined in relevant part as follows:

"Public utility" means, except as provided in par. (b), every corporation, company, individual, ... that may own, operate, manage or control ... any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of heat, light, water or power *either directly or indirectly to or for the public.*

Wis. Stat. § 196.01(5)(a) (emphasis added). The relevant legal question is what constitutes providing a service "to or for the public."

Beginning with the 1911 case of *Cawker v. Meyer*, which continues to be cited and relied on today, Wisconsin courts have determined that the legislature never intended to regulate sales

of electricity that serve a “limited” or “restricted” class of customers. The “public” in Wisconsin’s Public Utilities Act means the public at large, not a limited subset of the public that stands in a special contractual relationship with the facility owner.

In *Cawker v. Meyer*, 147 Wis. 320 (1911), a company built a steam plant to serve the tenants in its building, and then contracted to sell surplus electrical power to three neighboring properties. The court found that the company was not a public utility even though it was technically selling light and power to other members of the public. The state argued that sales to “any one else than to one’s self” constitutes a sale “to the public.” *Id.* at 324. The Court rejected the state’s position, finding it “obvious” that the legislature did not intend to sweep in sales to any individual member of the public as sales “to or for the public” for the purposes of public utility regulation. *Id.* at 324. According to the Court, the key factor is whether or not the product or service “is intended for and open to the use of *all the members of the public who may require it.*” *Id.* at 325 (emphasis added). Because the purpose of the plant was primarily to serve a “restricted class”—the tenants of the owners and a few neighbors—the Court determined that the generator was not a public utility. *Id.*

Just like the steam generator in *Cawker*, customer-sited solar financed by a third-party owner is intended to serve a “restricted class”—indeed, a class of one. Just as in *Cawker*, the customer relationship is defined explicitly by the “contract relationship” and “nearness of location” to the system owner, and the energy is neither “intended for” nor “open to” all members of the public. *See id.* at 325-26. Instead, the “sale” of electricity under a PPA contract is “strictly incidental” to the primary purpose to provide private, behind-the-meter services via contracts with individual customers. *See id.*

*Cawker* teaches us that *even if* a third-party owner like Eagle Point Solar is technically selling electricity generated by a customer-sited system, this does not make it a public utility. Nor does marketing to a limited subset of customers, such as schools. WEPCO states that Eagle Point Solar had contacts for over 400 school districts in Wisconsin. Even if Eagle Point Solar constructed on-site solar projects for each one of those schools (which it certainly will not), the output of those on-site solar facilities would not be “open to” all members of the public. Each solar project would only supply power to the individual school on which it is sited. WEPCO’s argument misses the focus of the public utility statute. Public utility services are clothed in a public interest because they must be open to use by “*all the members of the public who may require it.*” *Id.* at 325 (emphasis added). Building on-site solar panels is not something that all members of the public require, nor does Eagle Point Solar make an offer that any member of the public could accept, regardless of how many customers Eagle Point Solar has. Indeed, the fact that Eagle Point’s marketing has been targeted specifically at schools, a specific limited set of customers, reinforces that it is not offering service generally to or for the public.

*Cawker*’s reasoning also demonstrates that a third-party owner does not become a public utility if some excess electricity ends up being pushed onto the grid instead of being consumed by the host customer. In that circumstance, the electrons would likely simply flow to one of the host customer’s nearby neighbors. This would certainly not mean that the solar panels were “intended for and open to the use of all the members of the public who may require it.” *Id.* at 325. Rather, this would be the “incidental” furnishing of power to neighbors that *Cawker* explicitly allows.

*Cawker* remains good law and over the years, the Wisconsin Supreme Court has consistently held that service to a limited class of customers does not trigger public utility

regulation. In *Schumacher v. Railroad Commission*, 185 Wis. 303 (1924), the court considered whether “a group of neighbors who have co-operated to build a line to supply themselves with electric current” constituted a public utility. *Id.* at 305. The Wisconsin Supreme Court agreed with the district court that they were not a public utility, as they had no purpose “of serving the public generally or any portion of the public outside of those who voluntarily band themselves together.” *Id.*

In *Ford Hydro-Electric Company v. Town of Aurora*, 206 Wis. 489 (1932), a hydropower company owned mostly by the Ford Motor Company built a dam and provided power directly and solely to a Ford Motor Company factory. The hydropower company asserted that it was a public utility, but the court focused on what the company “actually does.” The court held that the hydropower plant was “not built or operated for furnishing to the public generally,” *id.* at 497, and therefore was not a public utility.

In *Union Falls Power Co. v. Oconto Falls*, 221 Wis. 457 (1936), the court examined a contract in which Union Falls agreed to furnish electricity to Oconto Falls under a PPA contract “at a specified price per electrical unit.” *Id.* at 460-61. The Court determined that Union Falls was not a public utility, even though Oconto Falls in turn distributed the power to its residents:

Under the facts in this case the plaintiff serves no one as a member of the public. It sells a part of the electrical energy produced by it to the city of Oconto Falls; the rest of the developed electrical energy, characterized as dump power, is absorbed by the parent company. It makes no offer to serve the public which could be accepted by any member of the public.

*Id.* at 461

In *City of Sun Prairie v. PSCW*, 37 Wis. 2d 96 (1967), the Wisconsin Supreme Court determined that a landlord company that provided heat, electricity, and water to the tenants of its apartment building was not a public utility even though the building owner “will house up to

1,000 people” and “will rent an apartment ‘to any responsible person’ who is able to pay the rent.” *Id.* at 98 (case syllabus).

These cases reaffirm that a company that sells or provides electricity to a limited class of customers does not trigger public utility regulation, even if that limited class includes a large number of customers. The question is whether or not the company is really acting like a public utility—does it make an offer to the general public that any member of that public could accept? Or does the company work with a limited set of customers on a case-by-case basis? Eagle Point Solar, and the third-party ownership model generally, clearly is not a public utility under this test. Eagle Point Solar designs, develops, and helps finance solar facilities for individual customers. The details of the contract are based on the relevant circumstances for that individual customer. Indeed, third-party owners could not make an offer that any member of the public could accept because the majority of customers do not have property where solar facilities could even be sited.

**B. Third-Party Ownership Raises None of the Public Interest Concerns That Justify Public Utility Regulation.**

A brief discussion of the reasons why public utilities are regulated in the first place reaffirms that third-party owners are an entirely different type of business. Third-party owners share none of the characteristics of “public utilities” that the legislature had in mind when adopting the Wisconsin Public Utilities Act.

The Wisconsin Supreme Court has repeatedly announced in straightforward language that “the predominant purpose underlying the public utilities law is the protection of the consuming public rather than the competing utilities.” *Wisconsin Power & Light Co. v. Public Service Com.*, 45 Wis. 2d 253, 259 (1969). This protection is necessary due to the monopoly power of public utilities and other special powers granted to utility companies by the government. First common

carriers, and later, public utilities, were formed when the government granted a charter for a private corporation in a situation of natural monopoly—where infrastructure was costly enough to create a barrier to entry into the market, competition would lead to duplicative infrastructure, and there were significant economies of scale. Because these companies provided what was seen as a necessary service, the government granted them special privileges so that they could be practically and economically viable. The requirements of a “fair” rate of return and full recovery of “reasonable” operating expenses, for example, are designed to serve the public interest by “enable[ing] the company to live up to its obligations to serve the community.” James C. Bonbright, *Principles of Public Utility Rates* 50 (1961). On the other hand, the government regulates rates and other conditions, to ensure the protection of the public. *See City of La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 421 (1911) (explaining that Wisconsin’s original public utility law passed in 1907 was intended to ensure “the best service practicable at reasonable cost to consumers”).

The U.S. Supreme Court has explained that the need for public regulation “depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared.” *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 538 (1923). A state’s power to regulate rates and prices typically arises where there is an “indispensable” service that would subject the public to the risk of “exorbitant charges and arbitrary control” without regulation. *Id.* While the process of ratemaking “involves a balancing of the investor and the consumer interests,” the Court has been clear that the “primary aim” of utility regulation is the protection of the consuming public. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 610 (1944).

Third-party owners are an entirely different type of business than a public utility. For example, a primary factor that justifies public utility regulation is whether goods or services are “clothed in the public interest” due to their great public importance or dedication to public use. In the seminal case of *Munn v. Illinois*, 94 U.S. 113 (1877), the U.S. Supreme Court upheld an Illinois law setting prices for grain warehouses. The Court opined:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

*Id.* at 126. In finding that grain warehousing was “clothed with a public interest,” the Court focused on the importance of the grain trade, the practical necessity of using grain warehouses when participating in the grain trade, and the virtual monopoly on providing grain warehousing. In contrast, the general public does not have an interest in another person’s behind-the-meter solar project.

The use or reliance on public infrastructure is also an important factor in determining whether an entity is a “public utility.” For example, in *Chesapeake & Potomac Telephone Co. v. Manning*, 186 U.S. 238 (1902), the U.S. Supreme Court explained that private telephone services located entirely within a private building are not subject to public regulation of rates, even if they are provided by a public telephone company that would otherwise be subject to rate regulation. Customer-sited solar projects are behind the meter, serve only the customer host, and involve no public infrastructure.

Another reason for public utility regulation was to avoid the wasteful duplication of infrastructure, such as multiple sets of powerlines serving the same areas, which would drive up costs for the consumers. *Wisconsin Traction Light, Heat & Power Co. v. Menasha*, 157 Wis. 1 (1914). With customer-sited generation, there is no wasteful duplication of service.

Finally, state regulation of utility businesses was intended to help address the inherent imbalance in power between monopoly utilities and their customers. *Superior Water, Light & Power Co. v. Superior*, 174 Wis. 257 (1921). Third-party owners are not natural or legal monopolies; they do not have undue influence or unequal bargaining power over their customers. Third-party owners operate in competitive markets and negotiate arms-length contracts with customers. Public utility regulation is not necessary to correct an imbalance in customer bargaining power.

Importantly, Courts have been generally unwilling to extend public utility jurisdiction into areas that would infringe on private property and private rights of contract without a clear public interest justification. In *Chippewa Power Co. v. Railroad Commission of Wisconsin*, 188 Wis. 246 (1925), the Court declined to extend state jurisdiction over a private contract to lease land and a hydropower plant to a public utility, claiming that extending regulation over this business contract could subject many other kinds of “purely private contracts” to regulation by the Commission. According to the Court, “[a] line or distinction must definitely be drawn somewhere, and, unless this be done, the constitutional provisions pertaining to the ownership, control, and management of private property will be completely submerged.” *Id.* at 251. The Court has warned that agencies of the state are to exercise their jurisdiction only so far as necessary to serve the public interest and no farther: “This thought is at the very foundation of public regulation and public control, and must serve as a perpetual warning that ‘thus far shalt thou go, but no farther.’ The line has thus been definitely drawn and the limitations firmly and definitely fixed.” *Id.* at 253. Regulating third-party owners as public utilities would cross that line.



### **III. Clarification of the Legality of Third-Party Ownership Would Serve the Public Interest.**

The Commission decided to broaden the scope of this proceeding to include the “public utility question” and should take this opportunity to clarify that third-party ownership is legal in Wisconsin and does not trigger public utility regulation. The solar industry has sought clarity on this issue for several years, and the Legislature has not resolved the issue. It is appropriate for the Commission to provide needed clarity.

Third-party financing has many public benefits. Of course, it allows more solar to be built, which helps to address climate change. But the public interest value goes far beyond this. Third-party financing allows for broader and more equitable access to solar and self-generation (and the financial benefits that can come with it). Public commenter Tom Rutkowski explained that he helped organize solar group buys for several years in the Racine and Kenosha areas. The large upfront costs led to an unfair “sorting of who can and cannot benefit from solar energy”—in his experience, only a “homogenous group in terms of income and race” could afford rooftop solar. Public Hearing Session, Tr. 62-64 (Feb. 17, 2021).

There are also significant and immediate public health benefits from reducing reliance on fossil fuel generation. Many health professionals submitted public comments supporting third-party financing for this reason. For example, Dr. Johnathan Patz is “the Director of the University of Wisconsin-Madison Global Health Institute and an elected member of the National Academy of Medicine.” Public Comment by Jonathan Patz, MD, MPH, PSC REF#: 405552. He has “dedicated [his] career to studying the health impacts of climate change and the numerous benefits to well-being that could result from climate action” and accordingly urges the Commission to support third-party ownership. *Id.* Dr. Patz also pointed out equity issues: “Third-

party solar allows lower-income individuals who are most harmed by fossil fuels and climate impacts, to protect their health and financial security.” *Id.*

Greater distributed generation and diverse generation sources also help with grid resiliency, as pointed out by numerous commenters. *See, e.g.*, Public Comment by Sally Leong, PSC REF#: 405425 (“Providing a flexible environment for decentralized energy production will foster more rapid development of renewable energy in Wisconsin and create more innovative and resilient solutions such as DERs and microgrids”); Public Comment by Michelle Citron, PSC REF#: 405390; Public Comment by Robert H. Owen, Jr., PSC REF#: 405478; Public Comment by Andrew Hanus, PSC REF#: 405459. This is an issue that will only grow in importance as we experience more and more extreme weather events due to climate change.

Wisconsin is also missing out on the economic development and jobs that would be spurred by clarity on the third-party financing issue. Greenpenny Bank is a bank headquartered in northeast Iowa that finances residential and commercial solar projects in Wisconsin. Public Comment by Greenpenny Bank, PSC REF#: 405030. In public comments, the bank explains that clarity about the legality of third-party financing in Iowa “has meaningfully contributed to the growth in the solar PV marketplace in Iowa,” with accompanying economic benefits to the state. *Id.* Kurt Reinhold, President and CEO of Legacy Solar Wisconsin Cooperative, explains in public comments that the co-op has “helped community institutions like municipalities, churches, libraries, schools, farmers, other cooperatives, and numerous business entities develop solar photovoltaic and energy efficiency projects using our own model of a 3rd-party financing arrangement.” Public Comment by Kurt Reinhold, PSC REF#: 405019. The co-op has “helped develop over 3,500 kilowatts of projects at nearly 30 locations all around the state bringing in over \$7 million in revenue for Wisconsin solar companies, with likely over \$4 million of that

amount of investment staying in our state of Wisconsin in the form of good paying skilled jobs.”  
*Id.* This is just a fraction of the solar development that would be spurred by clarity on the legality of third-party financing. Notably, WEPCO is blocking other projects besides the City of Milwaukee solar projects at issue here. For example, Mark Mueller explains in his comment that he is a member of the First Unitarian Society of Milwaukee. He planned to help finance a solar project on the roof of the church, but WEPCO denied the interconnection application. PSC REF#: 404974.

A Commission order clarifying that third-party ownership of customer-sited generation is legal and does not trigger public utility regulation would end WEPCO’s practice of unlawfully denying interconnection to other solar customers based solely on their choice of financing method.

### **CONCLUSION**

In conclusion, the Nonprofit Solar Advocates urge the Commission to (1) order WEPCO to interconnect the City of Milwaukee solar projects, regardless of how those projects are financed, (2) clarify that a utility may not deny interconnection based on project ownership, and (3) clarify third-party owners of customer-sited distributed generation are not “public utilities” under Wisconsin law.

Dated March 10, 2021.

Respectfully submitted,

s/ Rachel Granneman  
Rachel Granneman  
Bradley Klein  
Environmental Law & Policy Center  
35 E. Wacker Drive, Suite 1600  
Chicago, IL 60601

(312) 673-6500  
[RGranneman@elpc.org](mailto:RGranneman@elpc.org)  
[BKlein@elpc.org](mailto:BKlein@elpc.org)

*Counsel for Nonprofit Solar Advocates*

**BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Appeal of Denial of Application for	)	
Interconnection, Request for Contested Case	)	9300-DR-104
Hearing, and Petition for Declaratory Ruling of	)	
Eagle Point Solar, LLC and Eagle Point Energy	)	
6, LLC	)	

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the *Initial Brief of the Nonprofit Solar Advocates* has been served by electronic mail (e-mail) to all parties listed on the Service List.

s/ Rachel Granneman  
Rachel Granneman  
Environmental Law & Policy Center  
35 E. Wacker Drive, Suite 1600  
Chicago, IL 60601  
(312) 673-6500  
[RGranneman@elpc.org](mailto:RGranneman@elpc.org)