



ENVIRONMENTAL LAW & POLICY CENTER

Protecting the Midwest's Environment and Natural Heritage

Summary of Legal Memo: Third-Party Financing of Distributed Generation Does Not Create a “Public Utility”

In October 2015, the Environmental Law & Policy Center (ELPC) published an in-depth legal analysis of the following question: Should third-party owners of distributed-generation systems such as rooftop solar be considered public utilities under Wisconsin law? ELPC’s legal conclusion is clear: They should not.

ELPC’s legal memorandum considers more than 100 years of Wisconsin case law and relies on principles long-established by the Wisconsin Supreme Court and decisions from Wisconsin and other state regulatory commissions. The memo also compares and contrasts Wisconsin case law with the “Eagle Point Solar” case decided recently by the Iowa Supreme Court. The entire text of ELPC’s legal memo can be found at www.ELPC.org/wi.tpo.analysis.

Key Points of ELPC’s Legal Analysis:

- Third-party financing is widely available in many states, including neighboring Iowa, Illinois, and Michigan. Wisconsin case law is even stronger than the cases relied on by the Iowa Supreme Court in its July 2014 order affirming the legality of third-party financing.
- The Wisconsin Supreme Court has consistently held that a company providing electricity to a limited class of customers, rather than to the general public, is not a public utility.
- None of the key factors for regulating public utilities in Wisconsin apply to third-party owners of distributed-generation systems (TPOs), which have inherently different characteristics:
 - Public utilities are regulated monopolies that provide a necessary public service, while TPOs compete in the marketplace and are not “natural monopolies.”
 - Public utilities are empowered to use public infrastructure, while TPOs do not use any public infrastructure.
 - Public utilities have unequal bargaining power because customers do not have an alternative way to get the services they provide, while TPOs do not provide a “necessary service” because customers can always get their power from the grid.
- Regulating TPOs as public utilities would not protect the consuming public, but instead would protect monopoly utilities’ market share at the expense of potentially lower prices and better services, freedom of contract, public health, and customer choice.
- The Public Service Commission of Wisconsin has not taken a formal position on the legality of third-party financing, but Commission staff have stated in two letters their informal opinion that TPOs generally would be public utilities. However, those letters acknowledged that they “are not formal statements of Commission policy” and “will not be considered precedential” should the Commission open a docket on this subject.

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Background on Third-Party Financing of Distributed Generation

Distributed generation (DG), such as roof-top solar, often requires large up-front costs even though the solar system often pays for itself through long-term savings. Many states are now adopting a third-party financing strategy that facilitates solar market growth – which has benefits for the entire state – while allowing access to solar for many individuals, businesses and communities that otherwise couldn't afford the up-front costs. Third party financing is also a growing way to develop farm-based manure digesters. Here's how it works:

- A third-party owner (TPO) installs the DG system on the customer's property, pays for the up-front costs, and receives any tax benefits associated with the project.
- The customer hosts the DG system on their property and pays the TPO only for the electricity they use.
- Through the financing agreement – called a third-party Power Purchase Agreement (PPA) – the owner passes along part of the tax benefit savings to the customer. That way, both the owner and the customer benefit.

Third-party financing is widely available in many states and has led to strong market growth. In Wisconsin, however, third-party arrangements face legal uncertainty regarding whether or not the owners should be regulated as “public utilities.”

If a TPO is a public utility, it would have to comply with numerous regulations designed for monopolies, including a law that would prohibit TPOs from supplying electricity to customers that already receive service from a different utility. These restrictions effectively prohibit third-party financing of DG and therefore place extreme limitations on solar market growth.

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ELPC's legal conclusion that third-party owners are not public utilities under Wisconsin law should help open up the market for “third-party” financing tools that lower customer costs while providing the public benefits of solar and other forms of distributed generation. State regulators have sent mixed signals on this issue, which has led to confusion among developers and customers in Wisconsin, but the law is clear. Project developers and customers should consider third-party financing as a viable option to help facilitate the development of distributed energy projects in Wisconsin communities.

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