



## **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” Under Minnesota Law**

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, biogas and small wind systems be considered public utilities under existing Minnesota law? ELPC's legal conclusion is clear: They should not.

ELPC's legal memorandum considers more than 100 years of Minnesota case law and relies on principles long-established by the Minnesota and United States Supreme Courts and decisions from Minnesota and other state regulatory commissions. The memo also compares and contrasts Minnesota 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/mn.tpo.analysis](http://www.ELPC.org/mn.tpo.analysis).

#### **Key Points of ELPC's Legal Analysis:**

- Third-party financing is widely available in many states, including Iowa, Illinois, and Michigan. Minnesota case law closely tracks cases relied on by the Iowa Supreme Court in its July 2014 order affirming the legality of third-party financing.
- The Minnesota Supreme Court has consistently rejected a rigid test when defining a “public utility,” and has relied on a case-by-case look at what the entity “actually does.” None of the key factors for regulating public utilities in Minnesota apply to third-party owners of distributed-generation systems (TPOs), which have inherently different characteristics:
  - Solar developers and other TPOs are not “natural monopolies.”
  - Distributed generation is not a vital, necessary service.
  - On-site generation is not “dedicated to public use.”
  - TPOs do not “duplicate” public utility services.
  - TPOs must compete for business and do not exert undue influence or bargaining power.
- 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.
- Defining TPOs as “public utilities” would require the state to override private business contracts for competitive services on the private property of Minnesota homes and businesses without a clear public interest purpose.

35 East Wacker Drive, Suite 1600 • Chicago, Illinois 60601  
(312) 673-6500 • [www.ELPC.org](http://www.ELPC.org)

David C. Wilhelm, Chairperson • Howard A. Learner, Executive Director

Columbus, OH • Des Moines, IA • Duluth, MN • Jamestown, ND • Madison, WI • Sioux Falls, SD • Washington, D.C.

## **Background on Third-Party Financing of Distributed Generation**

Distributed generation (DG), such as rooftop 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 upfront 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 Minnesota, 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 utility. These restrictions effectively prohibit third-party financing of DG and therefore place extreme limitations on solar market growth.

\* \* \*

ELPC's legal conclusion that third-party owners are not public utilities under existing Minnesota 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 Minnesota, 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 Minnesota communities.

*This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.*