



ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

MEMORANDUM

TO: Minnesota Energy Policymakers and Stakeholders

FROM: Bradley Klein and Rachel Granneman, Environmental Law & Policy Center

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

DATE: October 27, 2015

I. Introduction

This legal memorandum analyzes whether, under Minnesota law, third-party owners of on-site generation (TPO) should be regulated as “public utilities.” *We conclude that third-party financing of on-site generation should not trigger regulation of TPOs as “public utilities.”* To do so would be inconsistent with Minnesota and United States Supreme Court case law and would not serve the purposes and goals of public utility regulation.

Minnesota courts apply a case-by-case analysis to determine whether a particular service has a “public character.” In this case, TPOs share none of the key characteristics and traits of public utilities:

- 1) Solar developers and other TPOs are not “natural monopolies.”
- 2) Distributed generation is not a vital, necessary service.
- 3) On-site generation is not “dedicated to public use.”
- 4) TPOs do not “duplicate” public utility services.
- 5) TPOs must compete for business and do not exert undue influence or bargaining power.

The predominant purpose of public utility regulation is to protect consumers—the public—from monopoly utility market power. See James C. Bonbright, Principles of Public Utility Rates 4 (1961). As the neighboring Iowa Supreme Court recently held, public utility regulation should be extended “only as necessary to address the public interest implicated.” See SZ Enterprises, LLC v. Iowa Utilities Board, 850 N.W.2d 441, 455-456 (Iowa 2014). 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, freedom of contract, and customer choice.

II. Factual Background

Third-party power purchase agreements (PPAs) are innovative financing tools for renewable energy that have been expanding rapidly in various forms over the last few years. Under this mechanism, a developer builds and owns a solar photovoltaic (PV), biogas, or small wind system on a customer's property and sells all of the power to the customer under a long-term contract. This allows the property owner to avoid the upfront cost of purchasing the system, which is a barrier for many customers. PPAs are particularly important financing tools for governments, municipalities, schools, non-profits, churches and other entities that cannot utilize federal or state tax credits for renewable energy, because they allow the TPO to take advantage of the tax credits and pass those savings along to customers through lower PPA pricing.

Third-party financing is widely available in many states, including neighboring Iowa, Illinois, and Michigan. However, third-party PPAs have faced legal and regulatory uncertainty in Minnesota regarding the question of whether or not TPOs should be considered "public utilities" under state law. If an entity is determined to be a public utility, then it is subject to strict regulation by the Minnesota Public Utilities Commission (PUC) under Chapter 216B of the Minnesota Statutes. Among many other requirements, the law divides the state into distinct geographical regions and prohibits public utilities from furnishing electric service to a customer in the geographic service territory of another public utility. Minn. Stat. § 216B.37. This provision, along with the other requirements of Chapter 216B, would effectively prohibit third-party financing in Minnesota if third-party owners of distributed generation are deemed to be "public utilities" under state law. The current ambiguity about the legal status of third-party financing has chilled the market and is limiting the financing options available to Minnesota consumers.

III. Discussion

A. The Minnesota Supreme Court Has Rejected a Rigid Test For "Public Utility" in Favor of a Case-By-Case Inquiry of What the Entity "Actually Does."

There is no "bright-line" or "rigid" test for determining whether an entity is a public utility in Minnesota. Instead, the Minnesota Supreme Court looks to the particular facts of each case to determine whether the service at issue has a "public character."

Minnesota law provides:

"Public utility" means persons, corporations, or other legal entities, their lessees, trustees, and receivers, now or hereafter operating, maintaining, or controlling in this state equipment or facilities for furnishing at retail natural, manufactured, or mixed gas or electric service *to or for the public* or engaged in the production and retail sale thereof . . .

Minn. Stat. § 216B.02 subd. 4 (emphasis added).¹ The key legal question is whether TPOs deliver power “to or for the public” within the meaning of the statute. The following Minnesota Supreme Court cases illustrate that this turns largely on whether or not the particular facts of the case evince a “public character” that justifies state regulation.

In Northern Natural Gas Co. v. Minnesota Public Service Commission, 292 N.W.2d 759 (Minn. 1980), the Court determined that the Minnesota Public Service Commission (MPSC), now the MPUC, had jurisdiction to regulate as a public utility a company that sold natural gas directly from an interstate pipeline (“direct tap service”) to 34 large industries and about 2,100 farms. Northern served thousands of customers from a large, interstate pipeline network. The company maintained telemetry and other equipment to serve, meter, and bill these customers. In all respects the company looked and felt like a utility, and the Court determined it would be “unrealistic,” *id.* at 763, to exempt the company from regulation even though not all members of the public could access Northern’s direct tap pipeline.

Interestingly, Northern Natural Gas has played a prominent role in both Minnesota and Iowa courts. The Minnesota Supreme Court cited and followed an earlier Iowa case involving the same company and very similar facts. *See id.* at 763 (citing Iowa State Commerce Commission v. Northern Natural Gas Co., 161 N.W.2d 111 (Iowa 1968)). The Iowa Supreme Court discussed and relied on the very same case in its recent opinion concluding that TPOs are not public utilities. *See* SZ Enterprises, LLC v. Iowa Utilities Board, 850 N.W.2d 441, 466 (Iowa 2014).

In Dairyland Power Cooperative v. Brennan, 82 N.W.2d 56 (Minn. 1957), the Court determined that a member-owned electric cooperative was a “public utility” even though it provided only generation and transmission services and did not sell or furnish electricity at retail to the general public. Again, the Court applied a flexible, case-by-case analysis to assess the “public character” of the service in question. In this case, Dairyland owned and operated a “large, modern, and integrated generation and transmission system.” *Id.* at 59. It had a service territory and provided services to all distribution co-ops within that territory that required it. It had a “right of eminent domain,” which is not provided to entities that do not provide a public service. *Id.* at 62. In short, Dairyland looked and felt like a public utility, “both in the fabric of its organization and in the functions it perform[ed].” *Id.*

In contrast, TPOs do not “look and feel” like public utilities, and there are no compelling reasons to regulate them as public utilities. TPOs provide electricity from facilities that are located entirely behind the meter of a single customer, that involve no public utility infrastructure, and that are not intended to supply electricity to or for the public at large. Just as in Iowa, the Minnesota Supreme Court takes a practical look at “what the organization *actually does*” to determine if it is a public utility. Dairyland Power Cooperative, 82 N.W.2d 62 (emphasis added).

¹ The statutory definition includes a number of exceptions, including an exception for persons that produce or furnish service “to less than 25 persons.” Minn. Stat. § 216B.02 subd. 4. The exceptions are not discussed here because, as explained further below, TPOs share none of the underlying characteristics of “public utilities” as applied in Minnesota case law. Thus, the exceptions are not relevant.

Under this “practical analysis,” courts in Minnesota would likely conclude that electricity sales under a PPA are merely incidental to the system design, construction, operations, maintenance, and financing services provided by TPOs in a competitive market.

The Minnesota Supreme Court’s decision in Minnesota Microwave, Inc. v. Public Service Commission, 190 N.W.2d 661 (Minn. 1971), is a useful guidepost to illustrate how the Court would likely apply its functional, case-by-case analysis to a case involving TPOs. In Minnesota Microwave, the Court was asked to determine whether the University of Minnesota’s closed-circuit educational television system was a “telephone service” requiring regulation by the Public Service Commission. The analysis for the Commission’s jurisdiction over telephone utilities is nearly identical to the applicable determination for electric utilities. The “critical question,” according to the Court, “is whether the proposed closed-circuit educational television system would be ‘furnishing any telephone service *to the public*’...such that the supplier of such service is deemed a ‘telephone company’” under Minnesota law. Id. at 665 (emphasis added).

In determining whether the supplier of the closed-circuit television service should be regulated, the Minnesota Microwave court examined the purpose and goals of Minnesota’s telephone service laws, quoting from an early case describing the public interest concerns that motivated the state to regulate telephone companies as public utilities:

History. -- In 1904, a time when the art of telephony had attained the dignity of a commercial venture and the industry was in the midst of a period of growth, the company entered the field. The era was one of unfettered competition. The strong attempted to expel from contested territory those less fortified financially by increasing rate wars. Having destroyed opposition, the usual monopolistic evils -- discriminatory and excessive rates, under-capitalization, and indifferent service -- prevailed. This in turn caused exploited communities to invite invasion by new competing companies to furnish a check upon the victor, and the cycle was repeated.

Id. at 667 (quoting State v. Tri-State Tel. & Tel. Co., 284 N.W. 294, 305 (Minn. 1939)). On its face, the Court found that the University of Minnesota’s proposed closed-circuit transmission system “simply does not look like what the legislature must have considered as telephone service” at the time it adopted Minnesota’s telephone utility statute in 1915. Id. at 666. Rather than “dealing with the public generally,” the appellants market only to subscribers “who presumably are in a good position to bargain.” Id. at 667. Furthermore, the microwave system at issue in the case did not resemble other “ordinary” telephone systems; it was “not designed to operate in conjunction with ordinary telephone service and involves no two-way communication.” Id. at 666-67. In short, the Court felt that it was just too much of a stretch to regulate this new technology as a “utility.” The “nexus” justifying commission regulation was “not apparent” and the “usual monopolistic evils” that justified public utility regulation in earlier cases were “not threatened.” Id. at 667.

The Minnesota Microwave court also concluded that the consequences of regulating the University’s new microwave communication technology as a “telephone service” simply did not

make sense. “[I]f appellant is characterized as a ‘telephone company,’ it may thereby fall under a large number of specialized statutes designed to deal with the specialized problems of public-utility telephone companies.” Id. The “operative considerations” for closed-circuit television are “quite different.” Id. The Court was clearly concerned about stifling innovation in this “rapidly developing field” and declined to stretch Minnesota’s utility laws beyond their original intent, explaining that development of a new “regulatory scheme” for closed-circuit television (if one is needed) “should be left to the legislature and not merely assumed by the Public Service Commission on its own behalf.” Id.

All of the same conditions at play in Minnesota Microwave apply with equal or even greater force to third-party financing of distributed generation. Solar PV and other on-site generation services represent new and rapidly evolving technologies that do not resemble the electric utility businesses that Minnesota’s public utility laws were designed for. If classified as public utilities, TPOs would “fall under a large number of specialized statutes” designed for an entirely different purpose and without any clear relevance for the distributed generation market. The Commission and reviewing courts would likely hesitate to stretch the statutory definition of “public utility” to extend state jurisdiction over this new and growing industry. As in Minnesota Microwave, this decision should be left to the legislature and should not merely be assumed by the Commission.

Finally, it is important to highlight the inherent arbitrary nature of extending public utility regulation to TPOs. Customers have many options for financing distributed generation. They could pay for a system in cash, secure a traditional bank loan, sign an equipment lease with a project developer, or pursue a third-party deal using a PPA, among other options. There is no principled reason why the PPA deal should trigger public utility regulation while other financing choices do not. “Public utility” status should not turn on such arbitrary distinctions, particularly in light of the Minnesota Supreme Court’s practical look at “what the organization *actually does*” to determine if it is a public utility. Dairyland Power Cooperative, 82 N.W.2d. at 62 (emphasis added).

B. Third Party Financing of Distributed Generation Raises None of the Public Interest Concerns That Justify Public Utility Regulation.

As discussed above, the Minnesota Supreme Court looks to the purpose of Minnesota’s utility laws and the actual character of the industry in question to determine if and when a public utility exists. The following discussion explains how TPOs share none of the characteristics of “public utilities” that traditionally justify public utility regulation.

The traditional and best explanation for public utility regulation is that it is for the benefit and protection of the public, and that this protection is considered necessary due to the monopoly power of public utilities and the “indispensable” nature of the service. James C. Bonbright, Principles of Public Utility Rates 8 (1961) (“Necessity and monopoly are almost prerequisites of public utility status.”). 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 or “indispensable” 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 “enabl[ing] the company to live up to its obligations to serve the community.” Bonbright, supra, at 50.

1. Public Interest Purpose

The purpose of Minnesota’s Public Utilities Act, like the utility laws in other states, is explicitly to protect the public interest and to ensure “adequate and reliable services at reasonable rates.” See Minn. Stat. § 216B.01. While Minnesota did not begin to regulate the rates of electric and gas utilities until 1975, the state has regulated the rates of other public services such as railroads (1871) and telephone companies (1915) for many decades. As explained in a report by the Minnesota House Research Department, “certain industries provide goods and services that are so vital to the well-being of citizens that there must be some government intervention to ensure their safe, adequate, and nondiscriminatory delivery”:

The concern was that, in the absence of regulation, competitive market forces would be insufficient to provide adequate discipline to a market for a particular essential service, due to a number of factors including the difficulty of other competitors to enter the market. A provider of such a service may then be able to impose an exorbitant price for the service, pricing it out of reach for many consumers. Regulation of providers of these services was intended to substitute for a competitive market.²

Where an “essential service” is not involved or where market forces provide “adequate discipline” (or both, as in the case of distributed generation), then these concerns are not present.

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, 539 (1923). Rate regulation is appropriate where there is a threat of “exorbitant charges and arbitrary control.” 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).

The Minnesota Supreme Court has similarly explained that rate regulation by public bodies “is chiefly in the interest and protection of the public.” St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 153 N.W. 262, 265 (Minn. 1915). While ratemaking is designed to allow utilities

² Minnesota House Research Department, The Minnesota Public Utilities Commission and Related Agencies: Structure and Function 2 and 3, n.3 (Sept. 2002), available at <http://archive.leg.state.mn.us/docs/pre2003/other/020471.pdf>.

an opportunity to earn a fair return, it does so to preserve continued public access to essential goods and services on reasonable terms. On the other hand, there is no clear public interest rationale for regulating TPOs as public utilities. Indeed, as discussed further below, prohibiting PPA financing in Minnesota would invert the purpose of the statute by effectively protecting public utilities at the expense of their customers.

2. Natural Monopoly

The existence of a natural monopoly is one of the factors that traditionally justify public utility regulation. One important element in the “conditions which produce monopoly” is the “absence of a substitute.” Bruce Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 Harv. L. Rev. 156, 172 (1903). Early electric and gas industry customers were at the mercy of monopoly providers because they had no alternative way to provide themselves with these essential products in the market.

Thus, courts have historically distinguished between ordinary goods and services that can be bargained for in a competitive market and those that are “clothed with the public interest” because they present an “inevitable monopoly” in their supply. An early law journal article explains:

What, after all, is that element in the situation which differentiates the vending of candles from the purveying of gas? Is it not this,—that the box of candles may be sent from any factory into any market, a condition which preserves virtual competition in the sale of candles; while a thousand feet of gas can only be got by the consumer from the local gas company, a situation which presents an inevitable monopoly in the supplying of gas.

Wyman, supra, at 169. An early Wisconsin case explained that if natural gas were more like “an article of merchandise, [that] could be bottled or packed up, and imported or exported like ‘soap, candles or hats,’” then public utility regulation would not be necessary. Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 545 (1858). The same natural monopoly justification was used to explain regulation of electricity service, as that industry developed. Wyman, supra, at 172.

With distributed generation, of course, this natural monopoly justification does not apply. Solar developers do not enjoy an “inevitable monopoly” and must compete vigorously in the market. Solar developers are much more like vendors of “merchandise . . . like ‘soap, candles or hats,’” id., than railroad barons or gas company monopolists.

3. Dedication to Public Use

Another factor that justifies public utility regulation is where goods or services are “clothed with 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.

The Minnesota Supreme Court explored the difference between public and private uses in Minnesota Canal & Power Co. v. Koochiching Co., 107 N.W. 405 (Minn. 1906). In this case, the appellant sought to condemn land to construct canals and a power plant that would generate both electricity and mechanical “water power” near West Duluth. The Court determined that a “use which, by physical conditions, is restricted to a very few persons who must use it within a very restricted area, is not a public use.” Id. at 414.

Distributed generation, like the energy generated by the water wheel in Minnesota Canal, is clearly not dedicated to a public use. Each system is designed to be used only by the site host and not the public at large. There is no vital need for the general public to have access to these private systems as all members of the public remain connected to the electricity grid for their general electricity needs. The business of installing solar panels on rooftops, for example, has an essential private character that is much different than the vital *public* services that courts have described as “clothed with the public interest.”

4. Public vs. Private Infrastructure

The use or reliance on public infrastructure is also an important factor in determining whether an entity is a “public utility.” In Dairyland Power Cooperative, the Minnesota Supreme Court noted the “large, modern, and integrated generation and transmission system” operated by Dairyland including “three steam generating stations...four hydroelectric generation stations” and a “network of 2,250 miles of transmission line with eleven transmission substations and six generating plant substations.” 82 N.W.2d at 58. Similarly, in Northern Natural Gas, the Court noted Northern’s “interstate pipeline” providing service to “34 large industries and approximately 2,100 farm taps.” 292 N.W.2d at 761. The extensive public infrastructure maintained by these entities supported the conclusion that they were public utilities.

In contrast, in City of St. Paul v. Tri-State Telephone and Telegraph Co., 258 N.W. 822, 823 (Minn. 1935), the Minnesota Supreme Court found that the City of St. Paul’s private police call and fire alarm system “are no part of the public telephone system which the company holds itself out as ready to furnish to the public.” Similarly, 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. These internal

telephone services are “no more public in nature than the speaking tubes or call bells in a building.” Id. at 247.³

Like the private police and fire alarm services in City of St. Paul and the private telephone services in Chesapeake & Potomac, a distributed generation system is located entirely on the private property of a single customer and is intended only to serve that customer. No public utility infrastructure is involved.

5. Avoiding Duplication of Services

One common rationale for public utility regulation is to avoid “unnecessary duplication of facilities.” See, e.g., Minn. Stat. 216B.01. Unlike the significant interstate network of transmission and pipeline facilities involved in cases like Northern Natural Gas and Dairyland Power Cooperative, solar and other on-site renewable energy services require no duplication of public utility infrastructure or services. In fact, at present there are no utilities in Minnesota that offer their customers a comparable option for distributed generation nor is there a clear rationale for allowing regulated monopoly utilities to provide this kind of distributed, private, competitive service.

6. Protection Against Unequal Bargaining Power

In St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 153 N.W. 262, 264 (Minn. 1915) the Minnesota Supreme Court explained how state regulation of utility businesses was intended in part to help address the inherent imbalance in power between monopoly utilities and municipalities due in part to the “dependency” of the public on continued access to the vital services provided by utility companies:

We are not strongly impressed with the proposition that, at the present time, the inhabitants of our large cities can dispense with the utilities supplied by the public service corporations, if the price seems too high. They are dependent upon these corporations for matters of daily need and comfort, such as light, water, power and the like.

³ The Minnesota PUC has on two occasions classified the resale of telephone services to building tenants as “service to the public,” requiring the companies in question to obtain a certificate of authority from the Commission before operating in Minnesota. See Order, Resale and Sharing of Local Telephone Service, 1989 Minn. PUC LEXIS 189; Order, Status of University Technologies with Respect to the Resale of CENTRON Service, 1995 Minn. PUC LEXIS 62. These orders indicate that it is not the size or number of customers that is relevant to whether a company furnishes service “to the public,” but rather it is the “actual character of the service.” 1989 Minn. PUC LEXIS 189 at *5. The Commission’s orders in these cases could have been motivated by concerns about the lack of customer options and bargaining power—a circumstance that is not present in the case of TPOs. See Northwestern Bell Telephone Co. v. Minnesota Public Utilities Comm’n, 420 N.W.2d 646, 649-50 (Minn. App. 1988) (citing concerns about the lack of customer bargaining power in an appellate case cited by the Commission in its 1989 and 1995 Orders).

Solar panels are not an “indispensable” product like “light, water, and power,” and customers remain connected to the grid for basic electricity service. There is no similar “imbalance” of power between TPOs and their customers that would justify public utility regulation. As the Iowa Supreme Court recently explained in the Eagle Point Solar case, “[t]here is simply nothing in the record to suggest that [solar developer] Eagle Point is a six hundred pound economic gorilla that has cornered defenseless city leaders in Dubuque.” SZ Enterprises, LLC v. Iowa Utilities Board, 850 N.W.2d 441, 467 (Iowa 2014). Members of the public can negotiate and enter into arms-lengths transactions for TPO services on an independent and equal footing without the need for state intervention.

7. Respect for Private Property and Private Contract

Courts have been generally unwilling to extend state regulatory power in ways that would infringe on private property and private contract without a clear public interest justification. The Minnesota Supreme Court has noted the exceptional character of circumstances that permit intrusion on private rights, Minnesota Canal, 106 N.W. 478, and the need for due care in the state’s exercise of its regulatory authority:

We are firm believers in the existence as well as the exercise of the police power on the part of the state over common carriers, but this power must be exercised reasonably. Every attempt to exercise it unreasonably only injures public interests, by bringing the police power of the state into disrepute.

State ex rel. Railroad & Warehouse Commission v. Minneapolis & St. Louis Railroad Co., 79 N.W. 510, 512-13 (Minn. 1899).

Other states are similarly cautious to avoid overextending state jurisdiction into areas where it is not clearly warranted to protect the public interest. The Iowa Supreme Court has expressed a “conservative principle” that state “jurisdiction should be extended ‘only as necessary to address the public interest implicated’ and no farther. SZ Enterprises, 850 N.W.2d at 455-56. The Wisconsin Supreme Court has been cautious to avoid crossing the line between public and private services lest “the constitutional provisions pertaining to the ownership, control, and management of private property [be] completely submerged.” Chippewa Power Co. v. Railroad Commission of Wisconsin, 205 N.W. 900, 902 (Wis. 1925).

This fundamentally conservative approach to public regulation is particularly relevant to third-party financing of distributed generation. ***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.*** This would not serve the purposes of the statute and would cross the public/private line that has been established in many prior cases.

* * *

In summary, the Minnesota Supreme Court strives to understand the original purposes of a statute and the “reasons which led to its enactment” when applying it in new and different circumstances:

A statute must be treated as a living thing ... Our duty is not to make an autopsy upon its remains, but sensibly to discover what it means.

Northwestern Tel. Exchange Co. v. Minneapolis, 86 N.W. 69, 72 (Minn. 1900).

As discussed above, public utility regulation was designed to protect the public from abuses by companies that had been given special privileges or wielded monopoly power over an indispensable product or service. TPOs have not been granted any of the special privileges historically granted to utilities. They do not have the power of eminent domain or the authority to use public streets. They are not “natural monopolies.” Nor have TPOs dedicated their property to a public use. On-site generation is not “indispensable,” and the public interest in universal access to electricity service is not implicated. Furthermore, having multiple players in the market would not lead to infrastructure duplication, and there is not a significant barrier to entry in the market. Potential customers of third-party developers will have a wide range of choices in the competitive marketplace and can therefore decide which price they deem most reasonable and which option provides the best service.

Each one of these factors cut against regulating TPOs as public utilities under Minnesota law. TPOs are private businesses in a competitive market providing a non-essential service to individuals who choose to do business with them. Viewed in this context, it would be an extraordinary overreach for the state to essentially “reach across a customer’s meter” to regulate one of many financing options for distributed generation in order to protect the market share of monopoly utilities.

IV. Recent Cases From Other States and Commissions Support the Conclusion that TPOs Are Not “Public Utilities.”

Courts often look to decisions made in other jurisdictions when considering a case of first impression. The Supreme Court of Iowa and several state commissions have recently held that third-party owners of solar energy systems are not public utilities. Given the similar structure and precedent, it is likely that Minnesota courts would find these decisions, particularly the Iowa decision, to be influential and persuasive.

A. The Eagle Point Solar Case

In SZ Enterprises, LLC v. Iowa Utilities Board, 850 N.W.2d 441 (Iowa 2014) (hereinafter “Eagle Point Solar”), the Iowa Supreme Court determined that SZ Enterprises, doing business as Eagle Point Solar, could construct and operate a solar energy system on City of Dubuque property and sell the resulting electricity to the city under a PPA without being regulated as a public utility or an electric utility. Just as in Minnesota, the Iowa Supreme Court determined that “the proper test” in deciding whether an entity was a public utility was “to examine the facts of a

particular transaction on a case-by-case basis to determine whether the transaction cries out for public regulation.” Id. at 466. The Iowa court applied a multi-factor “public interest test,” to help determine whether TPOs are “clothed with the public interest,” rejecting the state’s position that a sale of electricity on a “per-kWh” basis to any member of the public necessarily triggers regulation as a public utility. Id.

The Iowa Supreme Court first applied this “multi-factor analysis” in its 1968 decision in Iowa State Commerce Commission v. Northern Natural Gas, 161 N.W.2d 111, 115 (Iowa 1968). This case involves the same company (Northern Natural Gas), the same facts (sales to “direct-tap” customers) and the same operative statutory language (“to or for the public”) as the leading public utility case in Minnesota, Northern Natural Gas Co. v. Minnesota Public Service Commission, 292 N.W.2d 759 (Minn. 1980). In fact, Minnesota’s Northern Natural Gas opinion cites and follows the earlier Iowa case. See id. at 763. The similarities between the Iowa and Minnesota case law mean that the Iowa Supreme Court’s approach and analysis in the Eagle Point Solar case should be very persuasive in any future case involving the public utility status of TPOs in Minnesota.

Iowa’s analysis of public interest factors is very similar to Minnesota’s. For example, the Iowa court looked beyond the mere fact that Eagle Point’s PPA involved a sale of electricity and conducted a more “pragmatic assessment of what is actually happening in the transaction.” Eagle Point Solar, 850 N.W.2d at 466. The Court found that the solar panels on Dubuque city rooftops were “no more dedicated to public use than the thermal windows or extra layers of insulation in the building itself.” Id. at 467. Moreover, on-site solar energy is an optional service, “not an indispensable service that ordinarily cries out for public regulation.” Id.

All of Eagle Point’s customers remain connected to the public grid, so if for some reason the solar system fails, no one goes without electric service. Although some may wish it so, behind-the-meter solar equipment is not an essential commodity required by all members of the public.

Id. Similarly, the Iowa Court found that Eagle Point “is not producing a fungible commodity that everyone needs” like “water that everyone old or young will drink, or natural gas necessary to run the farms throughout the county.” Id. Instead, Eagle Point is providing a “customized service to individual customers.” Id. All of these factors cut against a finding that Eagle Point’s service was “clothed with the public interest.”

The Court also found that Eagle Point was not a natural monopoly nor did it exert unequal bargaining power over its customers. “There is simply nothing in the record to suggest that Eagle Point is a six hundred pound economic gorilla that has cornered defenseless city leaders in Dubuque.” Id. Indeed, the court characterized Dubuque’s PPA as a “low risk transaction”; Dubuque owes nothing unless the solar panels actually produce electricity. Id.

The Court found that rooftop solar is not an “essential public good.” Indeed, solar is not viable for customers with a shaded or obstructed roof. Id. Moreover, Dubuque would not be “left high

and dry” if its deal with Eagle Point falls through because it could “seek another vendor while continuing to be served by a regulated electric utility.” Id.

The Iowa utilities relied on a 27-year-old Florida case, PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988) to support their unsuccessful attempt to restrict third party financing. In that case, the Florida Public Service Commission determined that sales to an industrial complex from a behind-the-meter cogeneration facility triggered public utility status under Florida law. The Iowa Supreme Court did not follow PW Ventures, and the case fails to follow the pragmatic, multi-factor approach taken by Iowa and Minnesota courts. Aside from PW Ventures, there are no other appellate cases from any state that find that TPOs are public utilities.

B. Administrative Decisions

In addition to the Iowa case, Minnesota courts would likely look for guidance to recent public utility commission orders in Arizona, Oregon, New Mexico, and Nevada, which have all determined that third-party owners are not public utilities.

In a lengthy opinion, the Arizona Corporation Commission found that a third-party solar developer (SolarCity) “is not acting as a public service corporation when it provides electric service to schools, governmental entities or non-profits” under a PPA. Opinion and Order, SolarCity Corporation, 2010 Ariz. PUC LEXIS 286, at *162 (July 12, 2010). The New Mexico Public Regulation Commission reached the same conclusion, explaining that third-party developers “are offering a supplemental service,” and that “[t]here is no obvious public policy basis for the Commission to regulate these third-party developers as public utilities.” Declaratory Order, Third-Party Arrangements for Renewable Energy Generation, 2009 N.M. PUC LEXIS 85, at *17 (Dec. 17, 2009). The Public Utilities Commission of Nevada also concluded that “third party owners of net metered renewable energy systems are not public utilities” and “the contractual relationship between a third party system owner and a customer-generator is beyond the jurisdiction of the Commission.” Order, Investigation and Rulemaking, 2008 Nev. PUC LEXIS 283, at *4 (Nov. 26, 2008).

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In summary, the majority of the case law and regulatory decisions of other states support a conclusion that TPOs are not public utilities. These decisions have been based on many considerations, and frequently employ a case-by-case, multifaceted analysis that is similar to the approach historically taken by Minnesota courts. Decisions in other states have also considered public policy and the state’s renewable energy policy. Minnesota law reveals a strong statutory public policy in favor of encouraging renewable energy development. See Minn. Stat. § 216B.1691 (renewable portfolio standard calling for 25% renewable energy by 2025); Minn. Stat. § 216B.03 (the “commission shall set rates to encourage . . . renewable energy use”); Minn. Stat. § 216C.053 (the commissioner of commerce must “encourage deployment of cost-effective renewable energy developments”). The decisions of other states and supportive Minnesota policies would be relevant, persuasive authority for reviewing courts in Minnesota.

V. Conclusion

The legal status of third party financing has been clouded with uncertainty in Minnesota, which has limited financing options for Minnesota customers to the detriment of the public interest. This comprehensive memorandum describes how Minnesota case law, decisions from other states, and the historical bases for public utility regulation all support a conclusion that third-party owners of distributed energy systems should not be regulated as public utilities under Minnesota law. This is consistent with the “conservative principle” followed by courts in Minnesota and other states that the jurisdiction of the state should extend only so far as necessary to address the public interest implicated.

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