



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

**MEMORANDUM**

**TO:** Wisconsin 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 13, 2015

**I. Introduction**

This legal memorandum analyzes whether, under Wisconsin law, third-party owners of on-site generation (TPOs) 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 Wisconsin and U.S. Supreme Court case law and would not serve the purposes and goals of public utility regulation.

- (1) Wisconsin Supreme Court precedent is clear that service to a “limited class,” like the host of an on-site distributed generation system, is not service “to the public,” and does not trigger public utility regulation. See Cawker v. Meyer, 147 Wis. 320 (1911).
- (2) TPOs share none of the key characteristics and traits that justify public utility regulation under Wisconsin case law:
  - a. Solar developers and other TPOs are not “natural monopolies.”
  - b. TPOs have not devoted any property to a public use.
  - c. On-site generation involves no public infrastructure or investment.
  - d. TPOs do not “duplicate” any utility services.
  - e. TPOs operate in a competitive market and do not exert undue influence or bargaining power.

The Wisconsin Supreme Court has consistently held 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 Comm’n, 45 Wis. 2d 253, 259 (1969); see James C. Bonbright, Principles of Public Utility Rates 4 (1961). Thus, as the neighboring Iowa Supreme Court recently held, public utility regulation should be extended “only as necessary to address the public interest implicated.” 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 and better services, freedom of contract, public health, and customer choice.

## **II. Factual Background**

Third-party power purchase agreements (PPAs) are an innovative financing tool 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 property owners to avoid upfront costs and, often, lock in immediate savings on their electricity bills. 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 Wisconsin 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 regulation by the Public Service Commission of Wisconsin (PSCW) under Wisconsin Code Chapter 196. Among many other requirements, the law prohibits public utilities from furnishing electric service to a customer "already receiving electric service" from a different public utility or cooperative association. Wis. Stat. § 196.495(1m)(a). This provision, along with the other requirements of Chapter 196, would effectively prohibit third-party financing in Wisconsin if third-party owners of distributed generation are deemed to be "public utilities" under state law.

The Public Service Commission of Wisconsin has issued two informal letters expressing the opinion that TPOs should be regulated as public utilities because they are "providing heat, light, or power to customers in general and because their purpose is to produce heat, light, or power."<sup>1</sup> We disagree with the Staff's characterization of the relevant legal test for "public utilities" under Wisconsin law as well as Staff's conclusion that TPOs are providing heat, light, or power to "customers in general" under Wisconsin Supreme Court precedent.

## **III. Discussion**

### **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 the host of an on-site distributed generation system, 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:

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<sup>1</sup> Letter from Robert Norcross, Division Administrator, to Representative Gary Tauchen 2 (Feb. 8, 2012). See also Letter from Cynthia Smith, Chief Legal Counsel, to Gregory Bollom, Madison Gas and Electric Company (Apr. 3, 2014).

“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 key legal question is whether TPOs deliver power “to or for the public” within the meaning of the statute. The Wisconsin Supreme Court has explained that there is no simple, bright-line test for defining sales “to the public.” Instead, each case will depend upon its own particular facts and circumstances to determine whether regulation would serve the purposes and goals of public utility regulation. 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. This means that a third-party sale of electricity that is furnished solely to the site host from on-site generation will likely not be considered a sale “to or for the public” within the meaning of the statute.

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.

The Court focused heavily on legislative intent; the meaning of “public utility” “must receive a construction that will effectuate the evident intent of the legislature and not one that will lead to a manifest absurdity.” Id. at 324. Elaborating, the court explained, “[i]t was not the furnishing of heat, light, or power to tenants or, incidentally, to a few neighbors that the legislature sought to regulate, but the furnishing of those commodities to the public, that is, to whoever might require the same.” Id. The Court looked closely at the facility in question and determined that the steam generator did not provide a “public service,” and the owners were not a “public utility.”

Cawker supports a conclusion that third-party financing of on-site generation should not trigger public utility regulation in Wisconsin. Just like the steam generator in Cawker, on-site generation financed through a PPA 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.* Under *Cawker*, PPAs for on-site generation should be considered private contracts, not public utility services.

*Cawker* remains good law in Wisconsin, having been followed by the Wisconsin Supreme Court in subsequent cases and regularly cited by the Public Service Commission in its orders and decisions. For example, 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). Similarly, “any responsible person” may sign a PPA contract with a TPO. However, cases like *Cawker* and *City of Sun Prairie* make clear that the appropriate focus is on the *individual facility in question* and not the fact that any member of the public may decide to sign a PPA. If the purpose of the facility is to serve a “limited class” and not the public at large, then *Cawker* is “determinative.” *Id.*

Other Wisconsin cases reaffirm the same principle that service to a limited class is not service “to or for the public.” 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.* The court explained:

The character of the act is not changed because two or three join in it. It is where there is a monopoly or a service is offered to the public that that which was before private property becomes impressed with a public use and is brought within the field of regulation as a public utility.

*Id.* at 306. Once again, there was no bright-line rule about the number of customers, but rather, the court looked at the purpose of the arrangement and whether service was offered beyond a restricted class to anyone who might want the service.

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. Neither the hydropower company’s assertion that it was a public utility, nor the corporation’s statement of purpose or by-laws, was determinative. Instead, the court focused on what the company “actually does,” explaining that “[t]he question is whether the plant is built and operated to furnish power to the public generally.” *Id.* at 495-97. The Court found that the sole purpose of the plant was to sell to one customer and that it was “not built or operated for furnishing to the public generally.” *Id.* at 497. Thus, the hydropower company was not a public utility.

A few years later, the Wisconsin Supreme Court found that a power company that furnished electricity to a city was not providing service to or for the public. 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.

The Cawker line of cases compel a conclusion that third-party owners of behind-the-meter generation are not “public utilities.” Just as in Cawker, Ford Hydro-Electric, Union Falls Power, and City of Sun Prairie, the electricity generated by an on-site generator under a PPA contract is not “intended for and open to the use of all the members of the public who may require it.” See Cawker, 147 Wis. at 325. The PPA contracts are intended for one customer only and vary widely depending on site-specific roof conditions, climate, individual customer needs, and many other factors. Third-party developers do not make offers that “could be accepted by any member of the public.” See Union Falls Power Co., 221 at 461. In fact, according to the National Renewable Energy Laboratory, only about one-quarter of residential rooftops are suitable for solar PV systems. Just as in Cawker, a reviewing Wisconsin court would very likely find that the Public Utilities Act was never intended to “abridge the right to contract” for on-site power from a TPO that is not “intended for” nor “open to” all members of the public. See Cawker, 147 Wis. at 325-26.

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

While Cawker and its progeny should settle the issue standing alone, there are many other reasons why regulating TPOs as public utilities would stretch Wisconsin’s public utility law well beyond its purposes and goals. In particular, TPOs share none of the characteristics of “public utilities” that the legislature had in mind when adopting the Wisconsin Public Utilities Act.

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 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).

### 1. Public Interest Purpose

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). In a very early case, Shepard v. Milwaukee Gas Light Company, 6 Wis. 539 (1858), the Wisconsin Supreme Court discussed the underlying purposes for granting special privileges to gas companies, and for requiring certain duties be performed by gas companies. The court expressed reservations about monopolies and explained that they should be “tolerated” only where necessary to serve the public interest:

Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity; and they always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence.

Id. at 547.

In 1907, Wisconsin passed one of the first public utility laws in the country.<sup>2</sup> The court in City of La Crosse v. La Crosse Gas & Electric Co., 145 Wis. 408, 421 (1911), explained that a purpose of the public utility law was to ensure “the best service practicable at reasonable cost to consumers.” The court echoed this statement the following year in Calumet Service Co. v. Chilton, 148 Wis. 334, 363 (1912).

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 which 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).

As the Wisconsin Supreme Court has stated, “[t]he law should receive a construction that will effectuate its true purpose.” Cawker, 147 Wis. at 326. The “predominant purpose” of the Act “is the protection of the consuming public.” Wisconsin Power & Light Co., 45 Wis. 2d at 259. While ratemaking is designed to allow utilities 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.

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<sup>2</sup> Public Service Commission of Wisconsin, Shaping Utility Regulation in Wisconsin, <http://psc.wi.gov/aboutus/anniversary/timeline.htm> (last visited Oct. 12, 2015).

Indeed, prohibiting PPA financing in Wisconsin 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 justifies 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 in a 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. The Wisconsin Supreme Court similarly 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, 6 Wis. at 545. The same natural monopoly justification was used to explain regulation of electricity service, as that industry developed. Wyman, supra, at 171.

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” 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 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, biogas, or small wind system. All members of the public remain connected to the electricity grid for their general electricity needs. A farmer does not dedicate his biogas facility to a public use, and the business of supplying solar panels to individual customers is not “clothed in 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 Ford Hydro-Electric Company, the Wisconsin Supreme Court determined that the physical nature of the plant in question indicated that it was intended for only one customer and not the “public generally”:

The company has not one foot of transmission line in this state; has made no effort to sell power in this state; has no facilities; has no franchises...Upon the whole record it must be concluded that there was no intention on the part of the plaintiff to operate its plant for the furnishing of power to the public generally.

206 Wis. at 496. 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 of rates, even if they are provided by a public telephone company that would otherwise be subject to rate regulation. This internal telephone service is “no more public in its nature than the speaking tubes or call bells in a building.” Id. at 247.

Like the generating plant in Ford Hydro-Electric and the private telephone service 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 and public utility regulation would be inappropriate.

#### 5. Avoiding Duplication of Service

The court in Wisconsin Traction Light, Heat & Power Co. v. Menasha, 157 Wis. 1 (1914), explained that the public utility law was “undoubtedly framed on the theory that certain kinds of business were of such a character that the duplication of plants for the purpose of carrying them on was undesirable because it resulted in an economic waste, the loss from which in the end usually fell upon the consumer.” Id. at 7. The court elaborated: “One of the main purposes of the law was to avoid duplication, and it was thought that by efficiently controlling the rates to be charged by a single utility the consumer would derive the benefit resulting from economy in production.” Id. at 8. With on-site generation, of course, there is no duplication and there is no need for uniform prices to protect the consuming public. Solar and other on-site renewable energy services are provided by many participants in a competitive market, and there would be



no benefit to limit customer choice to a single utility. In fact, at present there are no utilities in Wisconsin that offer their customers the choice of distributed generation.

#### 6. Protection against Unequal Bargaining Power

In Superior Water, Light & Power Co. v. Superior, 174 Wis. 257 (1921), the court explained how state regulation of utility businesses was intended to help address the inherent imbalance in power between monopoly utilities and municipalities:

The public utility law was enacted as a remedy for a well-recognized public evil. The relations existing between the respective municipalities and their public utilities were most unsatisfactory. The impotency of the municipalities to deal with them so as to secure adequate and satisfactory service for reasonable charges was abundantly demonstrated.

Id. at 285.

In contrast, TPOs do not have undue influence or unequal bargaining power over their customers. TPOs operate in competitive markets and negotiate arms-length contracts with customers. As the Iowa Supreme Court recently explained, “[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). Public utility regulation is not necessary to correct an imbalance in customer bargaining power for behind-the-meter energy systems.

#### 7. Respect for Private Property and Private Contract

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.

The Wisconsin Supreme Court’s approach in this and other cases reflects a fundamentally conservative approach to public regulation that 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 Wisconsin homes and businesses to protect the market share of state-sanctioned monopolies.*** This would not serve the purposes of the Public Utility Act and would cross the public/private line that has been “firmly and definitely fixed” by the Wisconsin Supreme Court. See Chippewa Power Co., 188 Wis. at 253.

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In summary, TPOs share none of the key factors or characteristics of “public utilities” that courts have considered when determining whether a public utility exists. First, 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 have not been granted monopolies. TPOs also do not have a “public character.” Utilities gained a public character because they had to utilize public rights of way to provide service and because, being natural monopolies, it made sense for one utility to serve all members of the public within its service area. This is not the case for TPOs. Nor have TPOs dedicated their property to a public use—each solar system is installed on a private roof, all infrastructure is on private property, and each system provides electricity to the customer on whose property it is installed.

TPOs also are not natural monopolies, such that they would need the buy-in of the public at large to support their business model. Instead, TPOs are like the providers of private telephone systems in Chesapeake & Potomac Telephone Co.—providing a service that may superficially look similar to service provided by a public utility, but in fact is of an entirely private nature.

TPOs are also not “clothed in the public interest” in the same sense as the grain elevators regulated in Munn. TPOs are not monopolists, nor is there any reason to think that there would be a market failure that would lead to unfair practices, or that there would be any other harm to the public. The service provided (renewable energy produced onsite) is not indispensable, and the public interest in universal access to electricity service is not implicated, as potential customers already have electricity service and stay connected to the grid. 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 Wisconsin law. TPOs are private businesses in a competitive market providing an entirely private service to individuals who choose to do business with them. Viewed in this historical context, it would be an extraordinary overreach for the State to essentially “reach across a customer’s meter” to restrict private business contracts for competitive energy services on the private property of Wisconsin home and business owners.

#### **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 of the public utility laws and precedent, it is likely that Wisconsin 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 Eagle Point Solar’s solar PPA contract with the City of Dubuque did not make it a public utility under Iowa law. The Court employed a multifactor test, as in Wisconsin, to “determine whether the transaction cries out for public regulation” and followed the “conservative principle” that “jurisdiction should be extended ‘only as necessary to address the public interest implicated.’” Id. at 456, 466.

Iowa’s analysis of public interest factors is very similar to Wisconsin’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.” Id. at 466. Echoing the Wisconsin Court’s approach in cases like Ford Hydro-Electric Company, the Iowa 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. As the Court observed:

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.” All of these factors cut against a finding that Eagle Point’s service was “clothed in 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 is directly contradicted by the many cases in Wisconsin holding that sales intended for a restricted class of customers are not sales “to the public.” See Cawker; City of Sun Prairie; Schumacher; Ford Hydro-Electric Company; and Union Falls Power Co. 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, Wisconsin 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. Order, SolarCity Corporation, 2010 Ariz. PUC LEXIS 286, at \*162-63 (July 12, 2010). The New Mexico Public Regulation Commission reached the same conclusion, explaining (in language remarkably similar to that used by the Wisconsin Supreme Court in Cawker) that “the public utility designation turns on whether its use is open to ‘all members of the public who may require it,’ including whether ‘the public generally has a right to such use.’” Declaratory Order, Third-Party Arrangements for Renewable Energy Generation, 2009 N.M. PUC LEXIS 85, at \*12 (Dec. 17, 2009) (emphasis in original). 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).

In May 2015, the Republican Governor of Georgia, Nathan Deal, signed the Solar Power Free Market Financing Act of 2015, which clarified the legality of leases and PPAs for on-site generation. The bill passed both the Republican-dominated Georgia House of Representatives and the Georgia Senate by unanimous votes and was supported by the state’s largest utility, Southern Company subsidiary Georgia Power, as well as the conservative grassroots group Georgians for Solar Freedom.<sup>3</sup>

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

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<sup>3</sup> See Greentech Media, *Georgia Legislature Unanimously Approves Third-Party-Owned Rooftop Solar* (March 27, 2015), available at <http://www.greentechmedia.com/articles/read/georgia-legislature-unanimously-approves-third-party-ownership-of-rooftop-s>.

considerations, and frequently employ a case-by-case, multifaceted analysis that is similar to the approach taken by Wisconsin courts. Decisions in other states have also considered public policy and the state's renewable energy policy. Wisconsin law reveals a strong statutory public policy in favor of encouraging renewable energy development. See Wis. Stat. § 1.12(3)(b) (“[i]t is the goal of the state that, to the extent that it is cost-effective and technically feasible, all new installed capacity for electric generation in the state be based on renewable energy resources”); Wis. Stat. § 16.85(5) (directing the Department of Administration “to implement and refine a statewide energy monitoring system and to develop and implement initiatives of replacing fossil fuels with renewable energy fuels”); Wis. Stat. § 196.378(2)(a)(1) (establishing a renewable energy standard); Wis. Stat. § 196.377 (directing the PSCW to “encourage public utilities to develop and demonstrate electric generating technologies that utilize renewable sources of energy”). The decisions of other states and supportive Wisconsin policies would be relevant, persuasive authority for reviewing courts in Wisconsin.

**V. The Informal Opinion Letters of Public Service Commission Staff Are Not Controlling.**

The Public Service Commission of Wisconsin has not taken a formal position on the legality of third-party financing in Wisconsin. In its Final Order in the recent We Energies rate case (Docket 5-UR-107), the Commission rejected We Energies' request for a “blanket prohibition” on third-party owned distributed generation and, instead, found it “reasonable to continue to evaluate whether third-party owned DG systems comply with Wisconsin statutes and administrative code on a case-by-case basis.” Public Service Commission of Wisconsin, *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, Final Order at 89 (Dec. 23, 2014).

While the Commission has not taken a definitive position on the specific issue of TPOs, it has previously followed Cawker to determine that sales to a limited class of the public do not trigger public utility status. For example, in a 2006 case, the Commission ruled that Consolidated Water Power Company (CWP) would no longer remain a public utility if it sold most of its distribution system to another company, even though it continued to provide retail electric service to a small area “encompassing four small commercial customers and a vacant parcel,” as well as to facilities owned by CWP's parent company. *Application of Consolidated Water Power Company and Wisconsin Public Service Corporation for All Approvals Required for Sale of Electric Distribution Facilities*, June 30, 2006, Final Decision, PSC Docket No. 5-BS-146 (PSC REF # 56489). Quoting Cawker, the Commission held that “The word ‘public’ must be construed to mean more than a limited class defined by the relationship of landlord tenant or the nearness of location, as neighbors, or more than a few who by reason of any particular relation to the owner of the plant may be served by him.” Id. at 8 (emphasis in original).

We Energies cited the CWP case in a recent filing with the PSCW, in which it argues that a non-profit company that would provide steam and chilled water to “a consortium of six health care and education institutions” should not be considered a public utility. Application of Wisconsin Electric Power Company, Application at 1, August 7, 2015, PSC Docket No. 6630-BS-101 (PSC REF # 273422). The filing states that the non-profit “will not be holding itself out generally to

the public to provide any public utility service,” “services will be provided by contract,” and the company “will not have a schedule of rates for these services.” Id. at 8.

The arguments advanced by the Commission and We Energies in the CWP case also hold true for TPOs of distributed generation. Despite this precedent, however, two recent letters from Commission staff have expressed the informal opinion that TPOs should be regulated by the Commission as public utilities. In a February 2012 letter to Representative Gary Tauchen, the PSCW’s Division Administrator for Gas and Energy opined that, in general, solar or biogas companies that offer to finance on-site renewable energy systems using third-party PPAs “could not do business in Wisconsin without first receiving a certificate of authority from the Commission to operate as public utilities.” Letter from Robert Norcross, Division Administrator, to Representative Gary Tauchen, at 2 (Feb. 8, 2012). In short, according to the letter, “[t]he business models of these companies make them public utilities.” Id. at 6. The letter then asserts that “[d]epending on the particular facts presented to the Commission, an individual third-party PPA may be permissible under Wisconsin law,” but that third-party owners would not be categorically exempt from regulation as public utilities. Id. The Division Administrator’s letter does not attempt to explain what particular facts would allow a third-party owner to escape public utility regulation, nor does it provide an in-depth analysis of Wisconsin case law or even mention the above PSCW case involving CWP’s utility status. In fact, the letter’s entire discussion of Wisconsin case law consists of the following four sentences:

The Wisconsin Supreme Court has held that providing heat, light, or power to only a few neighbors, as an incident to some other commercial operation, is not a public utility service. *See City of Sun Prairie v. PSC*, 37 Wis. 2d 96, 99-100 (1967) and *Cawker v. Meyer*, 147 Wis. 320, 324-25 (1911), where the Court explained what service “to or for the public” means under the statutory definition of a public utility. However, the business models of [TPOs] would not meet the exemption of *Sun Prairie* or *Cawker* because the Solar and Biogas Companies are providing heat, light, or power to customers in general and because their purpose is to produce heat, light, or power. As a result, state law would define them as regulated public utilities.

Id. at 2.

In April 2014, the Commission’s Chief Legal Counsel provided a follow-up letter to Madison Gas and Electric confirming that the 2012 letter to Representative Gary Tauchen “remains an accurate description of the Commission staff’s view of the law,” although it notes that the letters “are not formal statements of Commission policy.” Letter from Cynthia Smith, Chief Legal Counsel, to Gregory Bollom, Madison Gas and Electric Company, at 1 (Apr. 3, 2014). The 2014 letter reiterates the PSCW Staff’s position that the statutory definition of “public utility” “will generally include third parties who own distributed generation and sell electricity or a product or service directly related to the production of electricity to the hosting landowner/customer.” Id. Again, though, the letter acknowledges that “[w]hether any particular business arrangement will result in the third party meeting the definition of public utility depends on the facts of that particular arrangement.” Id. The 2014 letter provides no additional analysis or reference to Wisconsin case law to explain or support staff’s “view of the law” expressed in the letter.

Staff's informal opinion letters would overturn long-established precedent and expand the scope of the Commission's regulatory powers. As explained above, a long line of Wisconsin cases demonstrate that a more nuanced, case-by-case balancing of public interest factors is necessary to determine whether an entity is a public utility. These cases support the more conservative view of the law that government regulation should only extend as far as necessary to protect the public interest.

In any event, the 2012 and 2014 letters from Commission staff were intended to provide informal guidance and not authoritative positions. The letters did not, nor were they intended to, provide an in-depth analysis of Wisconsin case law or the underlying policy rationale for public utility regulation in Wisconsin. As noted in the April 2014 letter to Madison Gas and Electric, the letters "will not be considered precedential should the full Commission open a docket on these subjects," nor would a court likely give the letters any deference, as they do not constitute "formal statements of Commission policy." Id.

## **VI. Test Case Considerations**

As in Iowa, Wisconsin law provides citizens with a clear path to administrative and judicial determinations of whether a third-party distributed energy system owner is a public utility under Wisconsin law.

### **A. Petition for Declaratory Ruling**

Under Wisconsin law, a person may petition any state agency for a declaratory ruling on the application of laws or regulations. The relevant statute provides:

[A]ny agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the agency and all parties to the proceedings on the statement of facts alleged, unless it is altered or set aside by a court. A ruling shall be subject to review in the circuit court in the manner provided for the review of administrative decisions.

Wis. Stat. § 227.41. An unfavorable decision by the PSCW (either a ruling that third-party owners are public utilities or a refusal to issue a declaratory order) would be a reviewable agency action. See, e.g., Fond Du Lac v. Dep't of Natural Resources, 45 Wis. 2d 620 (Wis. 1970) (reviewing the decision of an agency to not issue a declaratory order). Wisconsin Statutes § 227.52 provides that "[a]dministrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter."

This procedural path to judicial review is similar to Eagle Point Solar's path to the Iowa Supreme Court. Eagle Point first petitioned the Iowa Utilities Board for a declaratory order under Iowa Code § 17A.9, which states that "[a]ny person may petition an agency for a declaratory order as

to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency,” and accompanying regulations. After an unfavorable order by the Iowa Utilities Board, Eagle Point then filed an action for administrative review of the decision, and the case ultimately reached the Iowa Supreme Court, which held that third-party owners are not public utilities under Iowa law.

## **B. Standard of Review**

While agency decisions often receive a high degree of deference from reviewing courts, a court would likely decide the legal status of third-party ownership on a *de novo* basis, without deference to the Commission’s opinion. As a general rule, no deference is applied to “an agency’s determination concerning its own statutory authority.” Wisconsin Power & Light Co. v. Public Serv. Comm’n, 181 Wis. 2d 385, 392 (1994). In Town of Beloit v. Public Service Commission, 180 Wis. 2d 610 (1993), for example, the court gave no deference to the Commission’s interpretation of whether a municipal sewerage system was a “public utility,” since the commission was interpreting the reach of its own statutory authority:

We often defer to administrative agencies’ interpretations of laws they are charged to administer. In this case, however, the commission was interpreting a statute relating to its own powers and responsibilities. In such a situation, the issue is one of law and “we give no deference to the decision of an agency regarding its own powers.”

Id. at 613 (quoting GTE North, Inc. v. Pub. Serv. Comm’n, 176 Wis.2d 559, 564 (1993)).

A decision on whether TPOs are public utilities would essentially be a determination of “the scope of the agency’s own power,” similar to the question in Town of Beloit. See Wisconsin’s Environmental Decade, Inc. v. Pub. Serv. Comm’n, 81 Wis. 2d 344, 351 (1978). Accordingly, a Wisconsin court would likely give no deference to the PSC’s opinion on the issue and would instead decide the issue *de novo*. See Id. (“[D]ecisions of an agency ... which deal with the scope of the agency’s own power, are not binding on this court.”); Wisconsin Bell, Inc. v. Pub. Serv. Comm’n, 2004 WI App 8, \*P38 (2003) (“[W]e give no deference to the Commission’s determination of its own authority.”); see also Eagle Point Solar, 850 N.W.2d at 450 (concluding that the Iowa Utilities Board’s interpretation of “public utility” was not entitled to deference by Iowa courts).

## **VII. Conclusion**

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



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