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Circuit Court
Portage County
2021CV000041

For Official Use:

STATE OF WISCONSIN CIRCUIT COURT PORTAGE COUNTY

MIDWEST RENEWABLE ENERGY ASSOCIATION,
7558 Deer Road
Custer, WI 54423,

Petitioner-Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, and Commissioners REBECCA CAMERON VALCQ, ELLEN NOWAK, and TYLER HUEBNER,
Hill Farms State Office Building
North Tower, 6th Floor
4822 Madison Yards Way
Madison, WI 53705

Respondents-Defendants.

Case Code: 30701

Declaratory Judgment

PETITION AND COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

Plaintiff-Petitioner, Midwest Renewable Energy Association ("MREA"), on behalf of itself and its members, states as follows.

INTRODUCTION

1. This is an action for declaratory and injunctive relief pursuant to Wis. Stat. §§ 227.40, 806.04, and 813.01 to determine certain actions by the Public Service

Commission of Wisconsin ("Commission") to be invalid, unlawful, and beyond the limits of its statutory authority.

2. The Wisconsin Legislature delegated broad power to the Commission to regulate monopoly utilities. However, the Wisconsin Legislature never authorized the Commission to regulate private choices by Wisconsin families and businesses about whether and when to consume power or any aspect of competitive enterprise by non-utility businesses. Such a delegation would be constitutionally as well as politically suspect.

3. However well intentioned, the Commission occasionally oversteps its authority. When it does so, it violates Wisconsin law and infringes on Wisconsinites' freedom to run their businesses, control their own energy use, and utilize non-utility alternative clean energy. This case involves two such oversteps.

4. First, the Commission, through its staff, issued guidance documents that incorrectly assert broad jurisdiction over privately owned solar panels located on customers' roofs and connected behind the utility meter to provide a partial alternative to buying electricity from the utility. Those guidance documents incorrectly assert that private solar generation financed through a mechanism called "third-party financing" constitutes a "public utility" subject to regulation (and effective prohibition). However, Wisconsin law is clear that solar equipment serving a single host customer through an individual contract between a solar panel provider

and the host customer is not the type of monopoly public utility service that the Commission is authorized to regulate.

5. As a direct result of the guidance documents, many solar companies deem the risk that the Commission will attempt to interfere with their business too high. As a result, private clean energy generation in Wisconsin lags other states that do not threaten to extinguish third party financed solar by regulating private solar as if it were a monopoly public utility.

6. Second, the Commission is unlawfully prohibiting households and private businesses from reducing their electricity consumption during peak hours in exchange for compensation through wholesale power markets. While federal law allows states to preclude participation in wholesale power markets through state law, the Wisconsin Legislature has never done so and never authorized the Commission to do so. In fact, the Commission has no authority to prohibit electricity consumers from reducing their usage; it cannot prohibit them from doing so through a federal wholesale market.

7. The Commission's order prohibiting customers from reducing their power consumption as part of a federal wholesale power market exceeded the Commission's authority. Moreover, even if the agency had statutory authority to issue such an order, it failed to undergo the required formal rulemaking process required for such decisions.

8. This Court should invalidate these unlawful actions, reestablish the limits of the Commission's authority, and enjoin the agency from interfering with

choices that the Legislature left to individual families and businesses and to free market competition.

PARTIES

9. Petitioner-Plaintiff Midwest Renewable Energy Association is a non-stock corporation and a registered 501(c)(3) non-profit organization that promotes renewable energy, energy efficiency and sustainable living through education and demonstration. MREA works with its partners around the Midwest to expand renewable energy adoption through innovative programs, renewable energy training, and educational events.

10. MREA supports a number of programs, including its Solar Corps and Solar on Schools programs. The Solar Corps is a workforce development program that connects aspiring solar professionals with real work experience and opportunity and that connects technical and community colleges with solar contractors to establish career pathways for students. The Solar on Schools program provides assistance and incentives to K-12 schools to install solar photovoltaics ("PV") to offset their utility bills and provide clean energy for their educational programs.

11. As part of a pilot program funded by the Wisconsin-based Couillard Solar Foundation, MREA intends to install at least three separate 20 kilowatt ("kW") solar PV systems on Milwaukee-area public schools and related institutions and to enter into power purchase agreements ("PPA") for the electricity generated by those systems. MREA will provide the upfront cost and labor to install solar PV generation, maintain the systems, and bill the host customer monthly for the amount of electricity the system produced that month. The solar PV will offset some, but not all of the host

school or institution's electricity usage, and the school or institution will continue to purchase the balance of its electricity from the local public utility.

12. MREA is currently working with Walnut Way Conservation Corps to provide solar training to residents in and around the Lindsay Heights neighborhood where North Division High School is located. The pilot project will provide real-world training experience as part of this partnership. MREA fundraising is supporting 20 full scholarships for training that will qualify participants to earn entry level certificates and credentials in the solar industry, at least 5 of which will be in Milwaukee.

13. The Milwaukee-area pilot projects are an initial step towards offering more PPAs as part of MREA's Solar on Schools and Solar Corps program to provide clean, lower cost, solar power as well as workforce development training for clean energy jobs. The revenues from PPAs will repay MREA's cost of installing the solar PV systems at the host schools and institutions which will be recycled into a revolving revenue stream to continue and expand the Solar Corps scholarships by directly funding scholarships and solar projects for other not-for-profit entities otherwise unable to access the credit and tax incentives to own solar generating systems.

14. MREA has not yet advanced its pilot program due to Commission guidance documents asserting that third-party financing arrangements, such as the PPAs that MREA hopes to pursue through the Milwaukee-area pilot projects, constitute prohibited public utility service.

15. Additionally, the utility serving the Milwaukee region often denies necessary interconnections for solar generation based on the Commission guidance documents at issue. For example, the utility refused to interconnect solar generation intended for the City of Milwaukee, based, at least in part, on the illegal guidance documents at issue in this case, which forced the solar developer and City to spend years litigating their right to interconnect solar at significant financial cost. In fact, the same utility recently told the press that if Wisconsinites want solar panels, they are required to lease them directly from the monopoly utility company. MREA seeks to avoid threat of regulation by the Commission and intransigence from the utility through an order from this Court invalidating the Commission's erroneous guidance documents, declaring that third party solar financing is not public utility service, and enjoining the agency from attempting to regulate MREA as a public utility.

16. MREA also challenges an unlawful 2009 order from the Commission that precludes MREA from participating in another promising clean energy opportunity called "demand response aggregation."

17. Demand response aggregation allows energy users to reduce their consumption during peak periods. Doing so lowers wholesale energy prices for all customers and rewards participating customers for that shared benefit by providing incentives through wholesale markets.

18. MREA owns and operates a number of distributed energy resources at its demonstration site, educational facility and headquarters in Custer, Wisconsin. Those resources include solar and wind generation, electric vehicle charging, and

battery energy storage. MREA seeks to utilize its distributed resources, and further control its energy use, either alone or with other customers, through a third-party demand response aggregation service. Doing so would not only provide revenue to MREA, but also provide a public service by reducing energy costs for all customers across the region.

19. However, an illegal 2009 Commission order prevents MREA from participating in federal wholesale markets through demand response aggregation.

20. MREA also brings this case on behalf of its members who are individuals, businesses, and non-profits. The Commission's illegal guidance documents and 2009 order either preclude or make it more expensive for MREA members to buy and sell renewable energy generating systems and to receive incentives for reducing energy use through demand response aggregation. The illegal 2009 order also results in higher electricity prices for MREA and its members.

21. Respondent-Defendant Public Service Commission is an agency of the State of Wisconsin, established by Wis. Stat. § 15.79, and is authorized to regulate various activities of public utilities in Wisconsin.

22. Defendants-Respondents Rebecca Cameron Valcq, Ellen Nowak, and Tyler Huebner are the current Commissioners. The Commissioners are named in their official capacity, except to the extent that they are exercising or threatening to

exercise authority not provided by law, in which case they are acting *ultra vires* and therefore in their individual capacity.

Jurisdiction and Venue

23. This Court has jurisdiction over the claims in this case pursuant to Wis. Stat. §§ 227.40, 806.04, and 813.01.

24. Venue is appropriate in Portage County Circuit Court for each of MREA's claims pursuant to Wis. Stat. §§ 227.40(1) and 801.50(3)(a) and (b) because MREA is a resident of and has a principal place of business in Portage County and because it designates Portage County.

Background and History of Utility Regulation in Wisconsin

25. Electricity was historically provided by vertical monopolies that generated electricity with increasingly large power plants and sent it in one direction down a series of wires ultimately to consumers whose usage was largely inflexible.

26. The high cost of entry–building large plants power plants and transmission lines–and the reality that only one set of power lines could feasibly be located along or under public streets, inevitably led to utility service defaulting to "natural monopolies." Of course, electricity also became essential to a modern economy and society.

27. Because electric utility companies were natural monopolies and provided a necessary service, governments compelled universal service and controlled rates. At first, regulation was through common law. Courts imposed and

enforced duties of universal service and limited prices for a specific category of quasi-public businesses that courts deemed "affected with a public interest" or "impressed with a public interest." *City of Madison v. Madison Gas and Electric Company*, 129 Wis. 249, 108 N.W. 65, 68 (1906) (*quoting Munn v. Illinois*, 94 U.S. 113); *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 526, 539 (1857); *see also N. States Power Co. v. National Gas Co.*, 2000 WI App 30 ¶ 13, 232 Wis.2d 541, 548, 606 N.W.2d 613; *Commonwealth Tel. Co. v. Carley*, 192 Wis. 464, 213 N.W. 469, 471 (1927) ("The right to regulate and control a public utility exists because such utility affects the public interests."); *Schumacher v. Railroad Commission*, 185 Wis. 303, 201 N.W. 241 (1924).

28. Ultimately, most states created statewide administrative agencies to regulate quasi-public businesses like railroads and public utilities. In 1907, the Wisconsin Legislature authorized the Railroad Commission to grant exclusive monopoly status, impose uniform accounting and service standards, and set rates for every "public utility." Laws of 1907, ch. 449 §§ 1797m-1–1797m-108; *see also Weyauwega Tel. Co. v. Pub. Serv. Comm'n*, 14 Wis.2d 536, 545, 111 N.W.2d 559 (1961); *Wis. Traction, Light, Heat and Power v. Menasha*, 157 Wis. 1, 8, 145 N.W. 231 (1914); Crow, *Legislative control of Public Utilities in Wisconsin*, 18 Marq. L. Rev. 80, 81–85 (1933). The Railroad Commission later became the Public Service Commission. Laws of 1931, ch. 183.

29. From the beginning, the Legislature limited the Commission's jurisdiction and authority to regulating only "public utilities," which it defined to

include only those quasi-public entities that "have always been under a legal duty to furnish reasonably adequate service at reasonable rates and without discrimination" under common law. *N. States Power Co.*, 2000 WI App 30 ¶ 13 (the public utility law codifies common law obligations of those entities that "have always been under a legal duty to furnish reasonably adequate service at reasonable rates and without discrimination to all who are entitled to apply for service.") (*quoting Krom v. Antigo Gas Co.*, 154 Wis. 528, 533, 140 N.W. 41, 44 (1913)); *Chippewa Power Co. v. Railroad Comm'n*, 188 Wis. 246, 251–53, 205 N.W. 900 (1925) (holding that the legislature only had authority to regulate businesses that the courts recognized to be "clothed with a public interest" in common law) (quoting *Charles Wolff Packing Co. v. Ct. of Indust. Rel.* of Kansas, 262 U.S. 522); *Schumacher*, 185 Wis. 303 (the definition of a "public utility" only includes entities "impressed with a public use" under common law).

30. Thus, consistent with the scope of common law regulation of quasi-public entities, Wisconsin courts have always narrowly interpreted the statutory definition of "public utility" to cover only businesses operating under exclusive franchises, with virtual monopolies, and exercising the right of eminent domain. *Chippewa Power Co.*, 188 Wis. at 251–53. In fact, the Wisconsin Supreme Court held that any broader interpretation of "public utility"–and, therefore, of the Commission's authority–would be "revolutionary" and unconstitutional. *Id.*; *see also U.S. Steel Corp. v. No. Ind. Pub. Serv. Co.*, 486 N.E.2d 1082, 1084–85 (Ind. Ct. App. 1985) (a business that does not dedicate its property to public use and not

under a common law duty to serve all who apply is not impressed with a public interest and not a public utility; an attempt to define it as a public utility would violate the Fourteenth Amendment).

31. Accordingly, Wisconsin caselaw going back at least 110 years rejects attempts to assert authority over private businesses that provide service to a "defined, privileged and limited group" through private contracts, rather than broadly and indiscriminately to the community at large, even when the services at issue are typically provided by public utilities. *City of Sun Prairie v. Pub. Serv. Comm'n*, 37 Wis. 96, 101, 154 N.W.2d 360 (1967) ("to the public" does not include a "defined, privileged and limited group" even when more than 1000 tenants across a more than 15 apartment buildings); *City of Milwaukee v. Pub. Serv. Comm'n*, 241 Wis. 249, 5 N.W.2d 800 (1942) (providing service to defined customers through exclusive contracts is "precisely what it was necessary for it to do to prevent it from becoming a public utility"); *Union Power Co. v. City of Oconto Falls*, 221 Wis. 457, 460–61 (1936) (a company providing power only pursuant to a contract and unwilling or unable to sell to "any member of the public" who shows up and demands power is not a public utility); *Ford Hydro-Electric Co. v. Town of Aurora*, 206 Wis. 489, 240 N.W. 418, 420–21 (1932) ("The question is whether the plant is built and operated to furnish power to the public *generally*." (emphasis added)); *Cawker v. Meyer*, 147 Wis. 320, 133 N.W.2d 157 (1911) (merely providing light, heat or power to others is insufficient to constitute a "public utility"); *see also Wis. Gas & Elec. Co. v. Railroad Comm'n of Wis.*, 198 Wis. 13, 222 N.W. 783 (1929)

(providing electricity to only a discrete set of persons who constructed their own lines to the city is not public utility service).

Third Party Financing of Distributed Renewable Generation

32. Electricity consumers no longer have to rely on large monopoly utilities for all of their electricity. Solar PV is a technology that turns free sunlight into electricity in modular increments of three-foot by five-foot panels installed at individual homes and businesses. Installing solar PV allows families and businesses to offset what they might have otherwise purchased from the utility. In addition, customers are increasingly installing batteries to use more of their solar generated electricity as well as to ride through increasingly prevalent utility power outages.

33. However, while the sunlight used by solar panels is free and reduced utility charges eventually offset the cost of solar generating equipment, the initial upfront cost of installing solar PV equipment still deters some families, businesses, churches, and schools from utilizing free sunlight with solar panels. Additionally, certain incentives for solar are provided only through income tax credits and deductions. People and entities that do not have federal income tax liability– including some low-income families and most schools, churches, and municipalities– cannot take advantage of those incentives.

34. Fortunately, there are solutions that allow many more customers to afford customer-sited solar. Leases and PPAs utilize capital from a third-party

financier to fund the up-front cost of solar PV at the host customer's property and to utilize the tax incentives.

35. Under a lease, the customer pays off the cost of the equipment at a fixed monthly price. Under a PPA, the customer pays off the cost of the system proportionate to the electricity received from the solar equipment. Under either option, a unique set of solar panels and associated equipment is designed specifically for the host customer's roof and usage patterns. The customer and third-party financing entity sign a contract specifying the size, capacity, and other attributes of the particular solar equipment, where the equipment will be located on the customer's property, pricing, insurance, and other terms. The solar equipment is then installed at the host customer's property and dedicated exclusively to the host customer who utilizes all of the electricity generated.

36. These financing arrangements are collectively known as "third-party financing" and are used by more than forty percent of solar customers nationally. An important attribute of third-party financing is the ability for entities who do not pay federal income tax to utilize tax incentives that commonly constitute a third or more of the total cost of installing solar panels. Therefore, the ability to finance through third parties is often critical for non-profits, schools, churches, villages, sewer districts, and low-income families without sufficient tax liability to obtain cost-effective solar generation.

37. In fact, the State of Wisconsin, itself, has utilized third party financing to obtain solar energy through contracts between the State of Wisconsin

Department of Administration and third-party financing entities. Through such contracts, the State can benefit from federal tax credits passed through the third party that the State could not otherwise receive.

Public Service Commission Guidance Documents Incorrectly Assert that Third Party Financed Solar Constitutes A "Public Utility"

38. Guidance documents from the Commission assert that third party financed solar constitutes a "public utility" under Wis. Stat. § 196.01(5) and is therefore effectively prohibited by Wisconsin law.

39. On February 8, 2012, the Commission, through a Division Administrator, issued a letter addressed to Wisconsin Assembly Representative Gary Tauchen, discussing the scope of the Commission's authority and third-party solar financing. A copy of that Guidance Document is attached as Exhibit 1 ("Tauchen Letter").

40. The Tauchen Letter claims that every "entity that owns or operates electric equipment to provide electricity to consumers at retail" is a public utility and that a typical third-party solar financing arrangement "would meet Wisconsin's statutory definition of a public utility" because the financing entity "would own or operate equipment that produces heat, light, or power" and the financing entity's "business plan would be to deliver the heat, light, or power to retail customers."

41. On April 3, 2014, the Commission, through its Chief Legal Counsel, issued a letter to Gregory Bollom of Madison Gas and Electric Company. A copy of the letter is attached as Exhibit 2 ("Bollom Letter"). The Bollom Letter refers to the Tauchen Letter as reflecting "Commission staff's view" that third-party solar

financing would "generally" fall within the definition of a "public utility" in Wis. Stat. § 196.01(5) and therefore requires a certificate of authority from the Commission to conduct public utility business.

42. Wisconsin utilities rely on the Tauchen Letter and Bollom Letter in their advocacy and interactions with customers. In 2014, the Wisconsin Electric Power Company proposed to revise its service tariffs to exclude customers who participate in third party financed solar from utility service based, at least in part, on the letters. The same utility subsequently refused to connect third-party financed systems contracted by the City of Milwaukee in 2018, contending that third-party financing constitutes a "public utility" and "Wisconsin law prohibits a public utility from serving a customer already being served by another public utility." It also threatened to deny interconnection to at least one other customer since 2018 based on similar legal contentions.

43. The Commission has regularly rejected requests that they repudiate the letters and more formally interpret the definition of a "public utility" applied to third party financed solar through orders.

44. In a 2014 rate case order, the Commission refused to determine whether third-party financed solar constitutes a "public utility" under Wis. Stat. § 196.01(5) and insisted that such statutory interpretation "is more appropriately within the purview of the Wisconsin Legislature." Between 2017 and 2019, the Commission refused three additional requests for clarification about whether a

third-party financed solar arrangement constitutes a "public utility" under Wis. Stat. § 196.01(5).

45. The Commission's repeated refusal to interpret and apply existing law other than through the Tauchen and Bollom Letters leaves the letters as the only ostensible agency interpretations available to the public.

The Public Service Commission Prohibits Certain Private Energy Use Decisions By Individual Consumers

46. The Commission also undermined clean energy business opportunity in Wisconsin by unlawfully prohibiting electricity consumers from reducing their electricity usage as part of federal electricity market programs.

47. The Commission can only exercise authority expressly provided by the Legislature. While the Commission was once believed to exercise not only powers expressly provided, but also those "necessarily implied" by statute, *State v. Wis. Bell, Inc.*, 211 Wis. 2d 751, 754, 566 N.W.2d 496 (Ct. App. 1997) (citing *Wis. Power & Light Co. v. PSC*, 181 Wis. 2d 385, 392, 511 N.W.2d 291, 293 (1994)), the Legislature has since restricted all agencies to exercising only so much authority as the Legislature explicitly provides. Wis. Stat. §§ 227.10(2m) (prohibiting agencies from enforcing any standard or requirement not "explicitly required or explicitly permitted by statute or by a rule…"), 227.11(2) (limiting rulemaking authority to that "explicitly conferred on the agency by the legislature…"); *Wis. Legislature v. Palm*, 2020 WI 42 ¶ 51, 391 Wis. 2d 497, 942 N.W.2d 900 (recognizing that 2011 WI Act 21 prohibits finding implied power and, instead, requires "explicit authority").

48. The Commission has no statutory authority to regulate private energy use decisions by individual customers or to prohibit "aggregators of retail customers" from coordinating those choices.

49. The Commission issued an unlawful order in 2009 purporting to regulate—in fact, to outright prohibit—choices by individual customers and aggregators of retail customers about whether, when, and how much electricity to use.

50. Electricity sales and regulation generally consists of two levels: wholesale and retail. Wholesale consists of electricity that is subsequently resold before it is consumed. Retail is the sale of electricity to the ultimate consumer. Wholesale sales in interstate commerce (and practices that affect those sales) are regulated by the Federal Energy Regulatory Commission ("FERC"), while the sale of electricity at retail is generally left to states. 16 U.S.C. §§ 824(b), 824d(a), 824e(a).

51. Unlike the Commission in Wisconsin's practice of setting rates based on utilities' costs plus a "return" on deployed capital, FERC has generally moved to setting wholesale rates through competitive markets run and managed by independent non-profit entities called regional transmission operators ("RTOs") and independent system operators ("ISOs"). The RTO/ISO covering Wisconsin is the Midcontinent Independent System Operator ("MISO").

52. The price of the electricity sold in the wholesale market is a function of supply and demand. Simply stated, electricity generators bid to sell power into the

market and Load Serving Entities (retail utilities who then resell the power to end-use customers) submit requests to purchase power. The RTO/ISO stacks the offers to sell by price, plus adjustments for transmission constraints, and fills all of the Load Serving Entities' requests to purchase power. The point in the bid stack at which all requests for power are met is known as the "locational marginal price," which is paid by all buyers to all sellers in the market.

53. A decrease in usage has the same impact on price as a similarly sized increase in power generation. If consumers are willing to reduce electricity usage at a lower price than the next available power plant is willing to accept to produce more electricity, paying the consumer to reduce use lowers the marginal price paid by all wholesale customers. This concept is known as "demand response" or "DR." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) (demand response allows wholesale market operators to pay consumers for commitments not to use power at certain times, where electricity consumption reductions result in lower market prices and more reliability than paying for production of electricity).

54. Through the Energy Policy Act of 2005, Congress confirmed that it is the "policy of the United States" to encourage demand response. In 2008, FERC responded with Order 719, which allows electricity customers to bid demand response into the wholesale market. *Wholesale Competition in Regions with Organized Electric Markets*, Order 719, 125 FERC ¶ 61,071, P 1 (Oct. 17, 2008) ("Order 719"), 73 Fed. Reg. 64100. Specifically, FERC determined that permitting individual customers and businesses that aggregate of pools of customers

("aggregators of retail customers" or "ARCs") to participate in the wholesale market through demand response "increases competition, helps reduce prices to consumers and enhances reliability." Order 719 at P 154. It also encourages more renewable energy generation by making demand for electricity more flexible and therefore better able to adjust to and meet the variable output of resources like wind and solar.

55. FERC's Order 719 also provides an "opt in" requirement and a "state law exception" or "opt-out," depending on the size of the utility providing service to retail customers. Order 719 at P 155. An RTO/ISO must accept demand response bids from customers of utilities that sell more than 4 million megawatt-hours unless state law prohibits those bids (i.e., "opts out"). *Id.* at PP 51, 60; 18 C.F.R. § 35.28(g)(1)(iii).

56. Accordingly, MISO's tariff provides:

> Where the relevant utility distributed more than four million MWh in the prior fiscal year, an [aggregator of demand response] must certify that the laws, regulations, or order(s) of the [state regulatory authority] do not preclude the retail customer from participating directly in the Transmission Provider's Energy and Operating Reserve Markets… The [aggregator] may also state whether the [state authority] specifically permits such participation by the retail customer.

MISO Tariff Provision 38.6(iii)(1)(a), https://docs.misoenergy.org/legalcontent/Module_C_-_Energy_and_Operating_Reserve_Markets.pdf.

57. Notably, FERC's Order 719 did not expand the authority of state commissions beyond whatever authority exists in state law. Nor could it. State commissions are created by state law and derive their powers only from state law. Only state legislatures can expand the scope of state commission power.

58. As FERC explained, Order 719 does not make a determination of whether demand response participation in wholesale markets is either allowed or prohibited by existing state laws. Order 719 at *14. Instead, FERC merely avoided preempting any state laws prohibiting demand response participation in wholesale markets, to the extent such laws exist.

59. In 2011, FERC issued a new final rule, Order 745, which expands upon Order 719 and increases incentives for demand response in federally regulated wholesale markets. The Supreme Court upheld Order 745 in 2016. *Elec. Power Supply Ass'n*, 136 S. Ct. 760.

60. More recently, FERC's Order 2222 requires RTOs to allow distributed energy resources—which includes demand response as well as other resources like rooftop solar and batteries located at individual homes and businesses—to participate in wholesale markets. However, Order 2222 incorporates Order 719's "state law exception" and provides that if a state prohibits demand response through state law, that prohibition will continue to bar participation of demand response in federal wholesale markets. *Participation of Distributed Energy Resource Aggregations in Markets Operated by RTOs and ISOs*, Order 2222, 172 FERC ¶ 61,247, at PP 59, 145 (Sept. 17, 2020).

61. No Wisconsin statute or administrative rule prohibits utility customers from participating in wholesale markets through demand response. Therefore, Wisconsinites receiving electricity from utilities selling more than 4 million megawatt hours per year should be able to participate in federal electricity markets

through demand response. In contrast, for example, Arkansas statutes expressly prohibit demand response unless the Arkansas Public Service Commission makes an explicit determination that it is in the public interest. Arkansas Code §§ 23-18-1003, 1004.

62. Despite lacking any legal authority to do so, the Commission issued an order on October 14, 2009, purporting to ban electric utility customers from participating in demand response in wholesale markets except through regulated utilities ("Prohibition Order"). According to the Prohibition Order, the Commission "temporarily prohibits the operation of Aggregators of Retail Customers (ARCs) in Wisconsin..." and "prohibit[s] the transfer of demand response load reductions to MISO markets directly by retail customers or by third-party ARCs…" A copy of the Prohibition Order is attached as Exhibit 3.

63. The Prohibition Order does not regulate the rates or charges imposed by public utilities, nor the conditions for service provided by public utilities. Nor does it prohibit public utilities from participating in wholesale markets through demand response. Instead, the Prohibition Order purports to directly prohibit individual electricity consumers (individually or through third-party aggregators) from reducing their energy consumption when participating in wholesale markets.[1]

[1] If the Commission had instead imposed the Prohibition Order as a condition of receiving utility service, rather than a direct regulation of non-utilities, it would have still exceeded the Commission's authority to regulate "a measurement, regulation, practice, act or service to be furnished, imposed, observed and followed," because that authority is limited to regulating the service provided by public utilities, not to regulate all aspects of private life and business by conditioning utility service on policies the Commission prefers. Moreover, imposing any limitations on receiving utility service– i.e., "which purports to curtail the

Notably, electricity consumers remain free to reduce their electricity usage just as much, at any time, and for any other reason. They just cannot transfer that load reduction to the MISO market other than through the incumbent monopoly utility.

64. While the Prohibition Order recognized that FERC's rule "requires a state commission to affirmatively 'opt-out' if it determines that ARCs are prohibited *under state law*," the order contained no analysis of Wisconsin law. As noted above, Wisconsin law does not contain such prohibition (emphasis added).

Count 1: Declaratory Judgment That The Tauchen and Bollom Letters Are Invalid Agency Guidance Pursuant to Wis. Stat. § 227.40.

65. The Tauchen and Bollom Letters purport to interpret and apply the definition of "public utility" in Wis. Stat. § 196.01(5) to include typical third-party financed renewable energy generation that is designed and installed at the home or building of a specific customer, provides electricity solely to that host customer, and is governed by a customer-specific contract.

66. Each of the letters is a "formal or official document or communication issued by an agency" that "[e]xplains the agency's implementation of a statute or rule enforced or administered by the agency" and/or "[p]rovides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency" that is "likely to apply to a class of persons similarly affected." Therefore, each letter constitutes a "guidance document" within the

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obligation or undertaking of service of the public utility"– required a class 1 contested case hearing, which was not conducted prior to the Prohibition Order. Wis. Stat. § 196.20(1).

meaning of Wis. Stat. § 227.01(3m). The letters are not exempt by any of the provisions of § 227.01(3m)(b)1.-9. Therefore, the validity of the letters is subject to this Court's determination pursuant to Wis. Stat. § 227.40(1), as amended by 2017 Wisconsin Act 369 ("Act 369").

67. The letters are guidance documents even through authored by agency employees, rather than the Commissioners, themselves. The Wisconsin Supreme Court's decision in *Serv. Employees Int'l Union, Local 1 v. Vos* invalidated Wis. Stat. § 227.112(6), as created by section 38 of Act 369, and upheld the lower court's injunction prohibiting enforcement of that provision, which would have required signature by the agency head or secretary attesting that a guidance document meets certain procedural and substantive requirements. 2020 WI 67 ¶¶ 88, 91, 107–108. Moreover, that provision would not have applied to the Tauchen and Bollom Letters anyway, since both preceded Act 369. *See* Wis. Stat. § 227.112(7). Therefore, no law requires an agency head to sign or issue a document to constitute an agency guidance document. In fact, most guidance documents issued by Wisconsin agencies are authored and issued by employees, rather than directly by the agency head. Nor is there any indication that the Commission employees who signed and issued the Tauchen and Bollom Letters were acting outside of their official capacity and the authority delegated to them by the Commission.

68. The Tauchen and Bollom Letters are invalid.

69. First, the letters misread Wis. Stat. § 196.01(5)(a) as turning on whether a particular entity's business purpose is to produce power to or for the

public. The statute does not turn on the owning entity's purpose. Instead, it turns on the purpose of a particular plant or equipment and whether that plant or equipment provides power to the public.

70. The statute strings together two prepositional phrases–"[1] for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly [2] to or for the public." The object of that compound preposition is the "plant or equipment," not the *owner* of that equipment. *Ford Hydro-Electric Co. v. Town of Aurora*, 206 Wis. 489, 240 N.W. 418 at 420–21 ("The question is whether *the plant* is built and operated to furnish power to the public generally." (emphasis added)); *Cawker*, 147 Wis. at 324–25 ("The use to which *the plant, equipment, or some portion thereof is put must be for the public*, in order to constitute it a public utility" (emphasis added)). Thus, a public utility is defined by the intended purpose of a plant or equipment, not the purpose of the plant's owner. As long as no "plant or equipment" provides power to "the public," there is no public utility.

71. Typical third party financed solar never involves a power plant or equipment that provides power to more than one customer. Each customer receives solar power from a discrete power plant and equipment used to provide electricity only to that customer. A third-party financing entity may own many individual solar power plants but each one is dedicated to an individual customer and installed at that individual customer's property. There is never a solar power plant or equipment providing power to more than one customer, so never "to or for the

public." Thus, third party financed solar never constitutes a "public utility" under Wis. Stat. § 196.01(5)(a).

72. Second, the letters appear to refer to "electric equipment" in the plural and aggregate, rather than singular tense as the statute provides. Based on the statute's text, a separate determination of whether a plant or equipment provides power to the public is made for each discrete plant or equipment, not for all plants and equipment collectively. That is why the Wisconsin Supreme in *City of Milwaukee* held that a city, while providing water through its aggregate plants and equipment to the public, was still not a "public utility" as to specific discrete customers served through private contracts. 241 Wis. 249; *see also Wis. Gas & Elec. Co.*, 198 Wis. 13. It is also why the Commission does not treat steam sales from a cogeneration plant in Rothschild owned by Wisconsin Electric Power Company as a public utility subject to rate regulation, despite the same company owning other plants and equipment providing public utility steam service in Milwaukee. *See Application of Wisconsin Electric Power Company for Authority to Build and Operate a 50 MW, Biomass-Fired, Cogeneration Facility in the Village of Rothschild, Marathon County, Wisconsin*, Final Decision, Docket No. 6630-CE-305, at 18 (WI PSC May 12, 2011) (unlike the utility's Valley Power Plant in Milwaukee, the steam output of the Rothschild plant is not subject to Commission jurisdiction). Because the statute does not aggregate separate individual plants and equipment for purposes of defining a public utility, the Commission correctly did not aggregate Wisconsin Electric Power Company's Rothschild plant and equipment with the

company's plants and equipment in Milwaukee and impose ongoing rate regulation for steam from the Rothschild plant.

73. Third, even if Wis. Stat. § 196.01(5) defined a public utility by intent of the owner, or aggregated all plants and equipment owned by the same business before determining whether it serves "the public," the guidance documents still err because the nature of third-party financing involves individualized contracts with specific customers, rather than indiscriminate and undifferentiated service to a whole community that characterizes service "to the public" under established caselaw.

74. For each of these reasons, the Tauchen and Bollom Letters are invalid. The Court should declare the letters invalid agency guidance.

Count 2: Declaration and Injunction Prohibiting the Public Service Commission From Exercising Jurisdiction Over or Attempting to Regulate Non-Utility, Third Party Financed Distributed Energy Resources.

75. The Commission lacks jurisdiction over third-party financed distributed energy resources located at individual customer's homes, schools, businesses, churches, and government buildings.

76. With a few explicit and narrow exceptions not applicable here, the Commission's jurisdiction is limited to regulating "public utilities" as defined in Wis. Stat. § 196.01(5).[2]

[2] Wis. Stat. §§ 196.02(1) ("The commission has jurisdiction to supervise and regulate every public utility in this state…"), .02(2)–(6) (additional authority over public utilities), .03. (authorizing the Commission to investigate and set rates for public utilities), 196.66 (providing liability for "any public utility," officer, or agent that violates a duty imposed by statute or order). The Commission has narrow and limited authority over anyone other than a "public utility" is explicitly provided. *See e.g.*, Wis. Stat. §§ 196.04 (requiring

77. The Commissioners cannot assert jurisdiction over, and cannot attempt to regulate, third party financed solar and other distributed energy resources that connect a discrete power plant or equipment to a single customer through an individualized contract with that customer because those entities are not "public utilities."

78. Regardless of whether the Tauchen and Bollom Letters are guidance documents and reviewable under Wis. Stat. § 227.40, the Court is authorized by Wis. Stat. §§ 806.04 and 813.01 to declare that a third-party financed distributed energy resource like rooftop solar panels and associated electronic equipment and wiring, located on the property of a single customer, and which provides power solely to that single host customer, does not constitute a public utility pursuant to Wis. Stat. § 196.01(5)(a), and to enjoin the Commission from attempting to exert jurisdiction over or regulate third-party financed solar and other distributed energy resources.

provision of access to facilities of any person owning transmission equipment, not limited to public utilities), 196.201 (requiring access to conduits owned by providers of private telecommunications), 196.491(3) (requiring every person to obtain a certificate to build a large generating facility), 196.495(1m) (prohibiting duplication of electric service by cooperative associations in addition to public utilities).

Count 3: Declaratory Judgement that the 2009 Prohibition Order is an Unlawful Rule that Exceeds The Commission's Authority and Was Adopted Without Compliance With Mandatory Rulemaking Procedures Pursuant to Wis. Stat. § 227.40.

79. The Commission may only exercise those powers expressly provided to it and, even then, it must exercise them "in the manner prescribed" by the Legislature. *Friends of the Earth v. Pub. Serv. Comm'n*, 78 Wis. 2d 388, 400, 254 N.W.2d 299, 303 (1977).

80. The Commission must promulgate each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administrative of that statute through rulemaking. Wis. Stat. § 227.10(1).

81. The Commission is also prohibited from implementing or enforcing any "standard, requirement, or threshold… unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with" chapter 227. Wis. Stat. § 227.10(2m).

82. The rulemaking requirement "exists precisely to ensure that… controlling, subjective judgment asserted by… unelected official[s], [are] not imposed in Wisconsin." *Palm*, 2020 WI 42 ¶ 28. In fact, the obligation to undertake rulemaking is necessary to ensure delegations of broad authority are constitutional. *Palm*, 2020 WI 42 ¶ 35.

83. An agency order or other decision constitutes a rule if it is "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or

make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency." *Palm*, 2020 WI 42 ¶ 22, *quoting Citizens for Sensible Zoning v. Dep't of Nat. Res., Columbia Cty.*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979).

84. The Prohibition Order is a "regulation, standard, statement of policy or general order" that prohibits millions of Wisconsinites and any non-utility business doing business in, or who would otherwise do business in Wisconsin, from participating in federally run electricity markets through demand response.

85. The Prohibition Order is of general application because it applies to millions of customers of at least four large electric utilities, as well as all potential third party ARCs, which is a class described in general terms and new members can be added to the class. *Palm*, 2020 WI 42 ¶¶ 21–22, *citing Citizens for Sensible Zoning*, 90 Wis. 2d at 816.

86. The Prohibition Order also has the effect of law because it bars Wisconsin utility customers and third-party demand response aggregators from participating in markets otherwise open to them. In fact, the Prohibition Order was intended to meet the provision of 18 C.F.R. § 35.28(g)(1)(iii) precluding demand response aggregation "where the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets." Order 719 P 155. Thus, to serve its intended purpose of satisfying 18 C.F.R. § 35.28(g)'s criteria for precluding demand response in federal markets, the Prohibition Order must necessarily have the effect of law.

87. The Prohibition Order purports to implement, interpret or make specific legislation enforced or administered by the Commission. The order includes a string of statutes generally related to utility regulation that purportedly authorize the order. While none of those statutes actually provides lawful authority for the Order, the Commission intended to issue the Order pursuant to one or more of those statutes.

88. The Prohibition Order exceeds the Commission's authority. The Legislature has not delegated any authority to the Commission to regulate individual customers' choices of whether, when, and how much electricity to consume. The Commission had no authority to prohibit customers from reducing their electricity usage for any reason, including for purposes of participating in a federally regulated wholesale market. Nor did it have authority to prohibit third-party aggregators or ARCs from organizing and assisting electricity consumers in doing so.

89. Moreover, in order to explicitly require customers to participate in demand response markets only through regulated utilities, the Commission imposed a "standard, requirement, or threshold"–i.e., that an entity must constitute a Commission-regulated utility to participate in federal wholesale markets–that is not "explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with" Chapter 227. Wis. Stat. § 227.10(2m).

90. The Commission also did not promulgate the Prohibition Order according to statutory rulemaking procedures applicable at the time. For example,

it did not conduct the required impact analyses, publish the required statement of scope, provide the required notice and opportunity for public comment, submit the rule to the Department of Administration or Legislature for review and approval, or publish the rule in the Administrative Register. Wis. Stat. §§ 227.114–227.26 (2009).

91. The Prohibition Order does not meet any of the exceptions to rulemaking in Wis. Stat. § 227.01(13). It was neither issued following a contested case nor directed to specifically named parties. It also does not fix or approve rates, prices, or charges by a public utility.

92. This Court is authorized to declare the Prohibition Order "invalid if it finds that it… exceeds the statutory authority of the agency or was promulgated or adopted without compliance with statutory rule-making or adoption procedures." Wis. Stat. § 227.40(4)(a). The Prohibition Order is invalid for both reasons: it exceeds the Commission's authority and was not promulgated in compliance with the statutory rulemaking or adoption procedures.

Claim 4: Declaration That the Prohibition Order Exceeds The Commission's Authority and Injunction Prohibiting Enforcement and Requiring Notice to MISO.

93. No statute or duly promulgated rule provides the requirement that an entity constitute a regulated public utility to participate in federal wholesale markets through demand response. Despite the Prohibition Order citing to fifteen statute sections, none provides authority to "prohibit the transfer of demand response load reductions to MISO markets directly by retail customers or third-party ARCs" as the Prohibition Order purports to do. Nor does any rule

promulgated according to Wis. Stat. ch. 227 provide such authority. Therefore, the Prohibition Order exceeds the Commission's authority. Wis. Stat. § 227.10(2m).

94. Even if the Prohibition Order were not reviewable under Wis. Stat. § 227.40, the Court has authority pursuant to Wis. Stat. §§ 806.04 and 813.01 to declare that the Prohibition Order is unlawful and exceeds the Commission's authority and to enjoin the Commission from enforcing the Prohibition Order and requiring it to notify the public and MISO that Wisconsin law does not preclude participation of ARCs in the wholesale market within the meaning of MISO Tariff Provision 38.6.

Request for Relief

Plaintiff-Petitioner MREA therefore respectfully requests that the Court issue an Order:

1. Invalidating the Tauchen Letter and Bollom Letter as agency guidance that conflicts with applicable law.

2. Declaring that third-party financed distributed energy resources that provide power to a single customer from each discrete plant or equipment and pursuant to an individual contract does not constitute a "public utility" pursuant to Wis. Stat. § 196.01(5).

3. Enjoining the Commission from asserting or exercising authority over third party financed distributed energy resources.

4. Invalidating the Prohibition Order as an unlawful rule that exceeds the Commission's authority and that was adopted without compliance with statutory rulemaking procedures.

5. Declaring that the Commission has no authority to regulate customer participation in federally regulated wholesale markets through demand response and/or demand response aggregation.

6. Enjoining the Commission from asserting or exercising authority over electricity customers' and third-party aggregators' participation in wholesale markets through demand response activities and requiring the Commission to notify MISO accordingly.

7. Providing such other relief as authorized by law and which the Court determines to be just and appropriate.

Dated this 24th day of February 2021.

Midwest Renewable Energy Association by:

EARTHJUSTICE

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