

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 16

DANE COUNTY  
**FILED**

RENEW WISCONSIN,

Petitioner,

v.

PUBLIC SERVICE COMMISSION  
OF WISCONSIN,

Respondent,

and

WISCONSIN PUBLIC SERVICE  
CORPORATION,

Intervenor-Respondent.

FEB - 5 2015

DANE COUNTY CIRCUIT COURT

Case No.: 14-CV-0169

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**DECISION AND ORDER**

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This is a Wis. Stat. Ch. 227 review of a December 18, 2013, Decision of the Public Service Commission of Wisconsin ("Commission") in Docket No. 6690-UR-122, Final Decision, *Application of Wisconsin Public Service Corporation for Authority to Adjust Electric and Natural Gas Rates*, No. 6690-UR-122 (Wis. Pub. Serv. Comm'n Dec. 18, 2013) (hereinafter "Final Decision"). Petitioner RENEW Wisconsin ("RENEW") seeks review of two components of the Commission's Final Decision that were part of Wisconsin Public Service Corporation's ("WPSC") 2013 rate case. The two components are the imposition of a cap on the size of customers' generation systems under WPSC's Pg-4 tariff and the method used to calculate the customers' net energy usage. For the reasons in this Decision, the court remands back to the Commission regarding both the size limitation and netting structure issues.

## **I. FACTS**

RENEW is a not-for-profit entity that represents members who install renewable energy equipment, e.g., solar photovoltaic systems, as well as businesses and individuals who own and operate renewable energy equipment. The Commission is a state agency established by Wis. Stat. § 15.79 and responsible for regulating Wisconsin public utilities under Wis. Stat. ch. 196. The Commission's role, among other tasks, is to establish electricity rates, natural gas rates, and service rules for WPSC and its customers. WPSC is a Wisconsin public utility as defined by Wis. Stat. § 196.01(5) that provides retail electric and natural gas service to customers in central and northeast Wisconsin.

### **A. Net Metering**

Net metering is a "service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period." 16 U.S.C.A. § 2621(d)(11). Net metering allows an individual or business with renewable energy equipment to receive credits for the excess energy that goes back onto the utility's grid. The "net" of what the customers use and what they produce during the utility company's billing cycle determines how much electricity the customer actually produces.

### **B. Netting Structure**

Energy companies implement net metering in one of two ways: monthly or annually. Customers with renewable resource generation are able to offset their electric consumption by producing energy to decrease the net amount used or by producing an excess amount and "pushing" the excess back into the system. The power company compares the amount of energy

produced to the amount of energy used and the net of the two numbers becomes the customer's bill. The power company does a comparison of usage to production on a monthly or annual basis. The structure used by the power company has an effect on the size of system the customer elects to install because the customer receives a lower compensation rate for the excess energy produced. This decreased compensation may lead customers to size their system accordingly to produce only that amount of energy for which the higher retail rate is a guarantee.

### C. PURPA

Congress enacted the Federal Public Utilities Regulatory Policies Act ("PURPA") in 1978. Generally, PURPA requires that utilities purchase energy and capacity from "qualifying facilities" with renewable energy generating systems. 16 U.S.C. § 824a-3; 18 C.F.R. § 292.303(a). In 1983, the Commission issued an order establishing the methods and standards for implementing PURPA in Wisconsin. Findings of Fact and Order, *In re Investigation on the Implementation of Cogeneration and Small Power Prod. Rates and Rules, Pursuant to the Fed. Energy Regulatory Comm'n's Rules Regarding Sec. 201 and 210 of the Pub. Util. Regulatory Policies Act of 1978*, Nos. 05-ER-11, 12, and 13 (Wis. Pub. Serv. Comm'n June 21, 1983).

### D. 2013 WPSC Rate Case and Commission Final Decision

A portion of the Commission's Final Decision involves WPSC's Pg-4 tariff for customer-owned generation, i.e., net metering customers. The Pg-4 tariff is a distributed generation tariff that applies to customers who self-generate energy and compensates them for energy injected into the grid. In its Final Decision, the Commission made findings and orders regarding net metering. First, it found that WPSC net metering customers are limited to renewable generating systems of 20kW or the maximum size needed to meet the customer's electricity usage, *whichever is smaller. Final Decision at 54. Second, the Commission determined that the monthly*

net metering structure that WPSC utilized should remain in effect and not transition to an annual structure. *Id* at 52-53.

## II. STANDARD OF REVIEW

The parties do not agree what standard of review the Court should apply to the Commission's decision. The Commission argues that their decisions are discretionary in nature and thus the court should afford great weight deference when reviewing the decision. However, RENEW and WPSC do not agree and argue that great weight deference does not apply, as the Commission's findings do not involve statutory interpretation.

Chapter 227, Stats., governs administrative agency decisions when reviewed by the Court. Judicial review under Chapter 227 is confined to the record created before the agency and returned to the court. Wis. Stat. § 227.57(1); *Winch v. Pub. Serv. Comm'n of Wisconsin*, 96 Wis. 2d 362, 366, 291 N.W.2d 448, 450 (1980); *Milwaukee & Suburban Transp. Corp. v. Pub. Serv. Comm'n*, 13 Wis. 2d 384, 388, 108 N.W.2d 729, 731 (1961). The court is without power to go beyond the record made before the agency; therefore evidence alluded to, and arguments made in briefs are not binding on this court. *Wisconsin Employment Relations Bd. v. J.P. Cullen & Son*, 253 Wis. 105, 107, 33 N.W.2d 182, 183 (1948).

The court will set aside the agency's action, or remand the case to the agency, if it finds that the action depends on any finding of fact not supported by substantial evidence in the record. Wis. Stat. § 227.57(6); *Madison Gas & Elec. Co. v. Pub. Serv. Comm'n of Wisconsin*, 109 Wis. 2d 127, 325 N.W.2d 339 (1982). The substantial evidence standard is satisfied when reasonable minds could arrive at the same conclusion as the agency when taking into account all the evidence in the record. *Wisconsin Prof'l Police Ass'n v. Pub. Serv. Comm'n of Wisconsin*, 205 Wis. 2d 60, 67, 555 N.W.2d 179, 183 (Ct. App. 1996). Substantial evidence is evidence that is

relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion. *Cornwell Pers. Associates, Ltd. v. Labor & Indus. Review Comm'n*, 175 Wis. 2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993). It is the agency's function to determine the credibility of the evidence as well as the weight given to the evidence, not the Court upon review. *Wisconsin Cent. Ltd. v. Pub. Serv. Comm'n of Wisconsin*, 170 Wis. 2d 558, 573, 490 N.W.2d 27, 33 (Ct. App. 1992). However, credible evidence does not include speculation and conjecture. *Bretl v. Labor & Indus. Review Comm'n*, 204 Wis. 2d 93, 100, 553 N.W.2d 550, 552 (Ct. App. 1996).

### III. DISCUSSION

RENEW disputes two issues arising from the following Findings of Fact determined by the Commission in its Final Decision:

53. It is reasonable to retain WPSC's existing monthly netting structure for the Pg-4 tariff.

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56. It is reasonable to modify the Pg-4 tariff so as [to] reduce the capacity limit from 100 kW to 20 kW per customer premises, and to limit Pg-4 customer's generation so that the installed capacity does not exceed what is necessary to serve the customer's expected load at the same location.

Final Decision at 9-10.

#### A. Size Limitations on Net Metering Systems

RENEW argues that the Commission's finding to reduce the net metering system limit for customers receiving service under WPSC's Pg-4 tariff from 100kW to 20kW or the customer's load, whichever is smaller, lacks support by substantial evidence in the record and is arbitrary and capricious. The Commission argues that there are two justifications for the 20kW cap. First, they argue that the decision to lower the cap to 20kW was a discretionary decision and

the court should hold that decision to a reasonableness standard. The Commission advocates that while “substantial evidence can be helpful, [it] is not required for the affirmation of a discretionary decision.” Commission Reply Brief at 8. Second, the Commission argues that the 20kW cap will prevent “subsidies.” WPSC witness, Mr. Russell T. Laursen testified that “[n]et energy billing impairs the ability of WPSC to collect fixed distribution, transmission, and generation system costs that are currently included in the energy rate[]” causing cost shifting and “thereby creating inequity” among customers. R.141, Direct-WPSC-Laursen-24. He further explained that even though “the current monetary value of un-recovered fixed costs is small, WPSC’s rates should not be a mechanism for even a small number of customers to receive subsidies from the company or its other customers.” R.141, Rebuttal-WPSC-Laursen-2.

The Commission did not supply reasoning for the size limitation in its Findings of Fact in the Final Decision, but it did provide this explanation in the attached Opinion section:

WPSC filed a proposal to roll back the capacity limit of its Pg-4 Net Energy Billing tariff from the 100 kW level authorized by the Commission in WPSC’s last full rate case, to 20 kW, citing concerns over reduced energy sales. [WPSC] also proposed to limit Pg-4 customer generation so that the installed capacity does not exceed what is necessary to serve a customer’s expected load. WPSC argued that allowing customer-owned generation with a capacity greater than 20 kW to take advantage of the Pg-4 tariff would impair WPSC’s ability to collect its fixed distribution, transmission, and generation system costs that are currently included in its variable energy rates, and would ultimately require customers that do not own generation to subsidize those that do. RENEW objected to WPSC’s proposal, suggesting that WPSC had not provided sufficient evidence to support a restriction in the availability of the Pg-4 tariff.

As previously noted, given the fixed-cost recovery issues raised by the utility, the identified uncertainties, and the potential for unreasonable cross-subsidies, the Commission believes that a conservative approach is warranted with respect to the Pg-4 tariff. Therefore, the Commission finds it reasonable to reduce the capacity limit for WPSC’s Pg-4 Net Energy Billing service from 100 kW to 20 kW, and to limit Pg-4 customer generation so that the installed capacity does not exceed what is necessary to serve a customer’s expected load at the same location. Lowering the

capacity limit of the Pg-4 tariff will limit the risk of possible cross-subsidization by non-participating customers.

Final Decision at 54.

First, the argument that substantial evidence may be helpful to the reviewing Court but is not required is not persuasive. Ample case law guides the Court to the conclusion that the record must contain substantial evidence to support the findings of the Commission. The Court will apply the substantial evidence standard. Thus, even if the actions of the Commission are discretionary, the exercise of that discretion must be reasonable and supported by substantial evidence.

Second, the Final Decision mentions cross-subsidies and a witness discusses the potential for creating inequity through cost shifting. However, the Commission and WPSC's specific cites to the record do not sufficiently describe the potential subsidy or how it would actually operate. The witness' discussion of the potential subsidy is cursory and does not provide any evidence above speculation. Additionally, since the court is limited to the record, it cannot consider explanations in briefs or oral arguments that do not have support in the record. Importantly, nothing in the record explains why a 20kW or actual usage cap would curtail the potential subsidy. Moreover, the fact that issues were raised, uncertainties were identified, and risks of possible cross-subsidies do not satisfy the substantial evidence standard. Mentioning subsidies, uncertainties, or risks, without further description or analysis, would not lead reasonable minds to conclude the WPSC's net metering customers required capping at the lesser of 20kW or their usage under the Pg-4 tariff.

There is no requirement that the administrative agency indulge in the elaborate opinion procedure of a court, but its findings of fact must be specific enough to inform the parties and the courts on appeal of the basis of the decision. *State ex rel. Harris v. Annuity & Pension Bd., Emp.*

*Ret. Sys. of City of Milwaukee*, 87 Wis. 2d 646, 661, 275 N.W.2d 668, 675 (1979). Again, substantial evidence in the record is required to support findings of fact. Wis. Stat. § 227.57(6). The record is lacking substantial evidence to support the Commission's finding that "[i]t is reasonable to modify the Pg-4 tariff so as [to] reduce the capacity limit from 100 kW to 20 kW per customer premises, and to limit Pg-4 customer's generation so that the installed capacity does not exceed what is necessary to serve the customer's expected load at the same location."

Chapter 227 reviews are limited to the record, so the court did not consider any purported facts mentioned in briefs not directly supported by the record as substantial evidence. Based on inadequacies of the finding and the record, it is impossible for the court to review whether the Commission acted arbitrarily or capriciously in light of the facts. *See Stas v. Milwaukee Cnty. Civil Serv. Comm'n*, 75 Wis. 2d 465, 475, 249 N.W.2d 764, 770 (1977). Therefore, the court remands to the Commission for further fact-finding and to establish a sufficient record on the issue of size limits for the Pg-4 tariff.

### **B. Netting Structure**

RENEW argues that the Commission's finding to allow the usage of a monthly netting structure as opposed to an annual structure for the Pg-4 tariff lacks support by substantial evidence in the record, is arbitrary and capricious, and deviates from past practice. The Commission argues that there are three justifications for the monthly netting structure. First, they contend that the Commission is not required to demonstrate uniformity between public utilities. Second, the Commission argues that the Final Decision adequately explained the reasoning for a monthly netting structure. Finally, the Commission alleges that there is substantial evidence in the record in the form of testimony by a WPSC witness that discussed customer "subsidies" in



the hypothetical, introduced materials from a well-regarded group, and directly addressed prior adverse testimony.

The Commission did not supply reasoning for the netting structure in its Findings of Fact in the Final Decision, but it did provide the following explanation in the attached Opinion section:

RENEW proposed that WPSC's Pg-4 Net Energy Billing tariff be modified to all Pg-4 customers to net their generation against their consumption on an annual basis to align the Pg-4 tariff with the net energy billing tariffs offered by other Wisconsin investor-owned utilities. RENEW suggested the net energy billing tariffs of Madison Gas and Electric Company (MGE), Northern States Power Company-Wisconsin (NSPW), and Wisconsin Electric Power Company (WEPCO) as possible models for the implementation of an annual netting structure for WPSC's Pg-4 service. WPSC objected to RENEW's proposal based on its cost of service analysis. WPSC argued that allowing customers to net on an annual basis would amount to a subsidy by customers who do not own generation and would compensate customers owning generation at a rate that is multiple times the average LMP. RENEW objected to WPSC's conclusions, arguing that the proposed change would have *de minimis* impact on WPSC revenues, and that WPSC's argument relies on unsupported and conclusory assertions that lack any evidentiary support in the record.

The Commission recognizes that distributed generation buyback rates are currently a heavily contested issue, not only in Wisconsin, but around the country. The Commission finds merit in the concerns raised by WPSC regarding possible fixed cost recovery issues associated with net metering, and possible cross-subsidization by non-participating customers. The Commission has every reason to believe that interest in customer-owned distributed generation will continue to increase as the cost of such generating systems become more cost competitive with retail electric service. As such, the focus should be on getting the right policies in place before this becomes a more significant cost issue.

Given the issues raised, the identified uncertainties, and the potential for unreasonable cross-subsidies, the Commission finds that there is insufficient evidentiary support in the record to support modifying the netting structure of WPSC. Therefore, the Commission finds it reasonable to retain the existing monthly netting structure for WPSC's Pg-4 Net Energy Billing Service.

Final Decision at 52-53.

The Court finds that resolution of the Commission's second and third arguments dispose of this matter; therefore its first argument will not be addressed. The Final Decision again references a subsidy and refers to prior testimony provided by a WPSC witness. Similarly, neither the Commission nor WPSC specifically cite to testimony or evidence in the record that sufficiently describes the potential subsidy or how it would actually operate. As referenced above, the witness's discussion of the potential subsidy is cursory and does not provide any more than speculation. The Commission cites concerns over "possible" fixed cost recovery issues and "possible" cross-subsidization. However, reciting each party's position and then describing the Commission's "concerns" is not reasoning and does not adequately satisfy the substantial evidence standard. Referring to subsidies, uncertainties, and potential risks, without some detailed analysis in either the Final Decision or the record, would not lead reasonable minds to conclude the WPSC's monthly net metering structure was more appropriate than an annual structure.

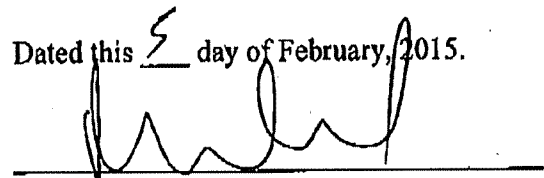
The record produced is devoid of substantial evidence to support the Commission's finding that "it is reasonable to retain WPSC's existing monthly netting structure for the Pg-4 tariff." Based on insufficiencies of the record and the finding, it is impossible for the court to review whether the Commission acted arbitrarily or capriciously in light of the facts. *Stas*, 75 Wis. 2d 465. Accordingly, the court remands to the Commission for further fact-finding and to establish a sufficient record on the issue of monthly versus annual netting structures.

**IV. CONCLUSION AND ORDER**

For the reasons state above, the December 18, 2013, Final Decision of the Public Service Commission is REMANDED for further consideration.

BY THE COURT:

Dated this 5 day of February, 2015.



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The Honorable Rhonda Lanford  
Dane County Circuit Court, Branch 16

cc: All counsel of record