

For Official Use:

**FILED**  
**01-27-2021**  
**CIRCUIT COURT**  
**DANE COUNTY, WI**  
**2021CV000206**  
**Honorable Jacob Frost**  
**Branch 9**

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

SIERRA CLUB  
John Muir Chapter  
754 Williamson St.,  
Madison, WI 53703

VOTE SOLAR  
360 22<sup>nd</sup> Street, Ste. 730  
Oakland, CA 94612

Petitioners,

Case Code: 30607

v.

Review of Administrative Agency  
Action

PUBLIC SERVICE COMMISSION OF  
WISCONSIN  
Hill Farms State Office Building  
North Tower, 6<sup>th</sup> Floor  
4822 Madison Yards Way  
Madison, WI 53705

Respondent.

**PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION**

Petitioners Sierra Club and Vote Solar, for and on behalf of their respective members, and by the undersigned attorneys, petition the Court and allege against Respondent as follows:

**Introduction**

1. This action is filed pursuant to Wis. Stat. § 227.52, *et seq.* for judicial review of the December 29, 2020, Public Service Commission “Final Decision” in docket number 3270-UR-123. The Final Decision approved a non-unanimous

settlement that set new utility rates for gas and electric customers of Madison Gas and Electric Company, approved certain accounting changes, and allowed the utility to appropriate more than \$20 million in funds owed to ratepayers as additional utility revenue. A copy of the Final Decision is attached as Exhibit A to this Petition.

2. Electric and gas utilities in Wisconsin are monopolies whose rates are approved by the Public Service Commission, rather than through competition and market forces.

3. In theory, public utility rates are set through a public hearing process in which parties representing the interests of customers and the affected public are able to test the utility's evidence to ensure that the utility's rates cover only necessary and reasonable investments and expenses of providing service and that utility service pricing complies with the law and incentivizes efficient use. That process has been displaced by an increasing trend towards utility rate increases imposed through settlements between the utility and some, although not necessarily all, interested parties. The final decision at issue in this case was the result of one such non-unanimous settlement agreement.

4. Pursuant to Wis. Stat. § 196.026, the Public Service Commission may only approve a settlement if certain conditions are met, including that the settlement agreement "complies with applicable law, including that any rates resulting from the settlement agreement are just and reasonable." Wis. Stat. § 196.026(7)(c). The Final Decision fails that standard for three reasons. First, the Public Service Commission did not hold a hearing required by Wis. Stat. § 196.20 based on the Commission's

erroneous conclusion that converting more than \$20 million dollars owed to customers into additional utility revenue does not constitute “an increase in rates” or a “rate adjustment” necessitating a hearing. Second, the Public Service Commission approved the utility’s regressive pricing structure (also called a “rate design”) based on a policy and statutory interpretation that conflicts with the agency’s historic interpretation and was not adopted through rulemaking as required by Wis. Stat. § 227.10(1). Third, the regressive high fixed charge pricing produces less customer conservation, energy efficiency and renewable generation like rooftop solar compared to alternative pricing options and, therefore, violates the mandate in Wisconsin’s Energy Priorities Law to maximize customer conservation, efficiency and renewable generation when setting utility rates. Wis. Stat. §§ 1.12(4) and 196.025(1)(ar).

**The Public Service Commission Did Not Hold a Hearing On Electric Rates Based On The Commission’s Erroneous Interpretation of Wis. Stat. § 196.20.**

5. The settlement purports to result in an “overall” rate change of \$0 and 0% for electricity customers. However, what the settlement actually does is increase the cost of utility service to customers by converting over \$20 million in funds owed to customers into additional revenue to the utility during 2021. At the time the Public Service Commission issued the Final Decision in docket 3270-UR-123, it had already found that the utility collected too much money from customers and ordered the utility to return those funds to customers. In docket 3270-FR-2019, the Commission determined that Madison Gas and Electric Company had collected at least \$1.87 million too much for fuel costs from ratepayers during 2019 and owed that money back to customers. Additionally in docket 5-AF-101, the Public Service Commission

determined that the utility over-collected for income tax expenses following a change in federal corporate tax rates and owed customers a refund of savings resulting from the change in tax rates. The Final Decision allowed the utility to “amortize and include in 2021 revenue requirements” those funds, and to “use 100 percent of the remaining” balance of the tax rate reduction money still owed to customers. The result of those accounting maneuvers constitutes a rate increase to the same extent, and costs ratepayers the same amount, than if the utility had refunded the \$20 million it owed to ratepayers and then increased tariffed charges to recoup it during 2021.

6. The Final Decision erroneously contends that no hearing was required because applying money owed to customers as additional payment for electric service in 2021 does not constitute an “increase in rates to customers” or a “rate adjustment for... refund of over-collected fuel costs...” Wis. Stat. § 196.20(2m), (4)(c)3. Final Decision p. 23. Charging customers more for future service by applying “credits” is a rate increase and a rate adjustment within the meaning of Wis. Stat. § 196.20 and the Public Service Commission was required to conduct a hearing.

**The Final Decision Approved Rate Schedules with High Fixed Charges Based On an Unlawful Policy and Statutory Interpretation**

7. Part of setting “reasonable” rates under Wis. Stat. § 196.37(1) is to determine the pricing structure through which the utility can earn its authorized revenue.

8. Typically, and historically, rates for residential and small business customers consist of two components: the “fixed” or “customer” charge that does not

vary between customers in a class and is unrelated to usage, and a usage-based or “volumetric” charge that increases proportionate to energy use. Because the total amount collected under both charges must equal the authorized revenue, setting the price for each rate component is a “zero sum game.” Any increase in the fixed customer charge results in a decrease to the usage-based charges and vice versa.

9. Monopoly utilities like Madison Gas and Electric benefit from higher fixed charges and often seek to increase them for two reasons. First, the more revenue the utility receives through the fixed charge rather than usage-based charge insulates the utility from revenue changes due to weather, recession, or customer efficiency. This reduces the downside business risk to the utility without any commensurate reduction in the authorized return allowed in its rates, producing a windfall for the utility. Second, because the fixed charge provides no price signal to customers to conserve, pricing energy by collecting more revenue through the fixed charge and less through the use-based charges causes customers to use more energy, which in turn increases utility profits.

10. Historically, the Public Service Commission priced energy to incentivize conservation and efficiency, and thereby kept utility costs and rates low over time. The Public Service Commission’s policy dates back to its August 8, 1974, decision in Madison Gas and Electric Company’s rate case. Prior to that decision, the Public Service Commission’s focus in rate cases was exclusively (or almost exclusively) on the total utility costs and return on investment and not on how the pricing should be

structured to recoup those costs from individual customers. *In re Madison Gas and Elec.*, 5 P.U.R.4<sup>th</sup> 28, 50, 1974 WL 393610 (Cudahy, concurring).

11. In its August 8, 1974, order the Public Service Commission interpreted its statutory rate setting authority to require that “fixed monthly charges reflect customer-related costs” that are generally limited to “meter reading, billing, connection costs, and that part of distribution costs that has been designated as varying only with number of customers.” *Id.* at 35, 39, 46.

12. Then for almost forty years following its 1974 order, the Public Service Commission limited utility fixed charges to covering only the cost of the meter and meter reading, billing, and the short section of wires or pipes connecting a single customer to the utility’s system. *See e.g., In re Wisconsin Gas Co.*, 138 P.U.R.4<sup>th</sup> 294 (Oct. 29, 1992) (“The Commission has regarded costs related to meter installations, service drops, meter reading, billing and customer accounting expenses as appropriate costs to recover at least a portion of in a customer charge.”); *Application of the City of Manitowoc, Manitowoc Cty., As an Elec. Pub. Util., for Auth. to Increase Elec. Rates*, No. 3320-ER-100, 1986 WL 1301249, at \*1 (Sept. 2, 1986) (“A customer charge should be developed for costs associated with the meter, meter reading and billing”). Limiting fixed charges to cover those minimum customer related costs is still the typical rate structure for regulated utilities around the country and for some municipal utilities in Wisconsin.

13. In the last decade, however, Wisconsin has become an outlier by allowing Wisconsin’s investor-owned utilities to collect costs beyond basic customer

costs in the fixed charge. In 2011 and 2012, the Public Service Commission abruptly changed its interpretation and significantly increased fixed charges to cover additional “fixed costs” beyond basic customer costs. The Commission never defined the extent of those additional “fixed costs” but they clearly extend beyond the costs allowed under the Commission’s historic interpretation.

14. Not only do the high fixed charges approved by the Commission incentivize energy waste, but they are also regressive by charging lower-use customers who tend to be lower and fixed income customers, more than higher-use customers. Because of existing societal inequities, communities of color are disproportionately low and fixed income utility customers. Thus, while unintended, by approving rates with high fixed charges the Public Service Commission disproportionately burdens lower and fixed income customers, people of color, and older customers.

15. The Public Service Commission never undertook the rulemaking process to revise its 1974 interpretation of its ratemaking authority in Wis. Stat. § 196.37(1) regarding the maximum fixed charge in utility rates. Instead, it changed its interpretation through an ad hoc series of orders in 2011 through 2018.

16. The Wisconsin Legislature requires most administrative agencies, including the Public Service Commission, to “promulgate as a rule each statement of

general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.” Wis. Stat. § 227.10(1).

17. There is an exception to the definition of a rule in Wis. Stat. § 227.01(13) and from the requirement to undertake rulemaking for decisions made through contested case proceedings and proceedings that set rates. Wis. Stat. § 277.01(13)(b), (n).

18. Historically, some Wisconsin agencies believed that they could adopt new policies and interpretations of law through the proceedings exempted from rulemaking, such as contested case hearings or rate-setting proceedings. In fact, federal law generally allows federal agencies to do so.

19. However, the Wisconsin Supreme Court recently distinguished between *applying* policies or interpretation of statutes to the facts through a contested case and crafting *new* policies and statutory interpretations. According to the Supreme Court, the exceptions to rulemaking only allow application of an existing policy or statutory interpretation and do not allow agencies to craft new policies and interpretations or to revise existing policies and interpretations outside of rulemaking. *Lamar Central Outdoor v. Department of Transportation*, 2019 WI 109, ¶¶ 23-24.

20. As the Wisconsin Supreme Court held, interpreting the exceptions to rulemaking to allow new and revised policies and interpretations would “place Wis. Stat. § 227.10(1) in unresolvable conflict with itself” and allow agencies “to regulatory engage in *ad hoc* interpretation of ambiguous statutes.” *Id.* at ¶ 21. To avoid those

results, the Court interpreted Wis. Stat. § 227.10 as providing “only one pathway by which an agency can adopt a new interpretation of an ambiguous statute: The agency must adopt a rule.” *Id.* ¶ 23.

21. Thus, the Public Service Commission was required to undergo rulemaking before changing its 1974 policy and interpretation of Wis. Stat. § 196.37(1) to allow a fixed customer charge to include more than basic customer costs. It never did so.

22. By applying a revised policy and interpretation without undertaking rulemaking to approve rates, the Final Decision exceeds the Public Service Commission’s legal authority, constitutes legal error, and is arbitrary and capricious.

**The Final Decision Violates Wisconsin’s Energy Priorities Law By Approving High Fixed Charges Rather Than Alternatives That Would Have Incentivized More Conservation, Energy Efficiency and Rooftop Solar**

23. The Public Service Commission’s Final Decision incorrectly presumes that the agency may choose high fixed charges over a pricing option that sends a better price signal and results in more conservation, efficiency and rooftop solar. However, the Legislature has not delegated that choice to the agency. Instead, the Legislature directed the agency to favor pricing that maximizes conservation, efficiency and solar “to the extent cost-effective, technically feasible and environmentally sound... in making all energy-related decisions and orders, including... rate setting...” Wis. Stat. §§ 1.12(4) and 196.025(1)(ar).

24. There is no dispute in the record that setting rates that include a low fixed charge, rather than a high fixed charge, is cost-effective, technically feasible and

environmentally sound and would result in more conservation, energy efficiency and customer owned solar generation. Therefore, the Public Service Commission was required to select the low fixed charge option. Its decision to approve a high fixed charge instead exceeded its authority and violated Wisconsin law.

25. Tellingly, the Public Service Commission's Final Decision does not defend its choice of the high fixed charge option as lawful. Instead, it contends that Sierra Club's advocacy for the lower fixed charge option is procedurally barred as an "impermissible collateral attack" on the rates the Commission approved in 2012. Final Decision p. 27, *citing Zastro v. Am. Trans. Co. LLC*, 2019 WI App 51 ¶ 40, *in turn citing Sewerage Comm'n of City of Milwaukee v. DNR*, 102 Wis. 2d 613, 631 (1981).

26. That contention is baseless. The rates set in 2012 are not at issue. Nothing in this case will affect the prices charges in the past under prior rate orders. This case involves only the charges that will be in place for utility service during 2021 (and potentially beyond). The fact that prior Commission decisions contained faulty and unlawful interpretations of law and were not challenged does not immunize new faulty and unlawful interpretations of law from challenge.

### **Parties**

27. Petitioner Sierra Club is a national membership organization with its national headquarters at 2101 Webster St., Ste. 1300, Oakland, CA 94612, and its Wisconsin headquarters at 754 Williamson St., Madison, WI 53703. Sierra Club represents almost 20,000 members in the state of Wisconsin, and advocates on their

behalf for electric rate structures and utility spending that promotes energy efficiency and clean renewable energy at rates that are just and reasonable to consumers. Many of those members are customers of Madison Gas and Electric.

28. Petitioner Vote Solar is an independent 501(c)3 nonprofit working to repower the U.S. with clean energy by making solar power more accessible and affordable through effective policy advocacy. Vote Solar seeks to promote the development of solar at every scale, from distributed rooftop solar to large utility-scale plants. Vote Solar has over 80,000 members nationally, including over 200 members in Wisconsin, many of whom are also customers of Madison Gas and Electric Company. Vote Solar is not a trade group and does not have corporate members.

29. Respondent Public Service Commission of Wisconsin is an agency of the State of Wisconsin, established by Wis. Stat. § 15.79, and is authorized to set electricity rates charged by and prices paid by public utilities in Wisconsin.

### **Jurisdiction and Venue**

30. This Court has jurisdiction over this action pursuant to Wis. Stat. § 227.52, *et seq.*

31. Venue is proper in this Court pursuant to Wis. Stat. 227.53(1)(a)(3) because Petitioner Sierra Club resides in Dane County within the meaning of Wis. Stat. § 227.53(1)(a)(3), and, even if none of the Petitioners was a resident of Dane County, because the dispute arose from the activities of the Public Service Commission of Wisconsin in Dane County.

32. The relief requested is authorized by Wis. Stat. § 227.57.

33. Petitioners have standing to bring this action because their interests and the interests of their individual members in utility rates and charges that maximize conservation, energy efficiency, and customer owned renewable generation, avoid regressive structures that charge low income and fixed income customers more for their utility service, and provide maximum ability for customers to control their energy charges. Thousands of the Petitioners' members take service under the electric and gas rates and tariffs approved in the Final Decision. The organizations and their members are harmed by the failure of the Commission to hold a public hearing on the utility's electricity rates and by the high fixed charge pricing structures the Commission approved, which undermines energy conservation, efficiency and renewable energy. For all of these reasons, the Final Decision adversely affects the Petitioners' substantial interests and their members' substantial interests within the meaning of Wis. Stat. § 227.52.

#### **Basis for Review And Request for Relief**

34. The Public Service Commission's Final Decision, which erroneously interpreted Wis. Stat. § 196.20 as not requiring a hearing before approving Madison Gas and Electric's proposal to convert millions of dollars of ratepayer money, erroneously applied a new and revised policy and statutory interpretation adopted without undertaking rulemaking, and approved a rate design that fails to implement the energy priorities in Wis. Stat. § 1.12(4) as required by Wis. Stat. § 196.025(1)(ar).

35. This Court is authorized to review those erroneous legal interpretations and set aside, modify or order the appropriate agency action pursuant to Wis. Stat. § 227.57(5).

36. Moreover, because each of the Public Service Commission's legal errors set forth above also constitutes an exercise of discretion outside the range delegated by law and otherwise in violation of a constitutional or statutory provision the Court is authorized to reverse or remand pursuant to Wis. Stat. § 227.57(8).

37. The Court may also order additional relief that it finds appropriate, including interlocutory orders necessary to preserve the interests of the parties and the public pending further proceedings or agency action. Wis. Stat. § 227.57(9).

WHEREFORE, Petitioners respectfully request that the Court:

- (1) find pursuant to Wis. Stat. § 227.57(2), (5) and (8) that the Public Service Commission's Final Decision:
  - a. Erroneously interpreted the requirements for a hearing in Wis. Stat. § 196.20 and exceeded its discretion by approving Madison Gas and Electric's increase in rates through the conversion of millions of dollars of customer credits into utility revenue without a hearing;
  - b. Erroneously approved rates based on a policy and legal interpretation that was not adopted through rulemaking as required by Wis. Stat. § 227.10(1); and
  - c. Erroneously approved gas and electric pricing that violates Wis. Stat. §§ 1.12(4) and 196.025(1)(ar).

2. Set aside or modify the Public Service Commission's Final Decision and remand with instructions consistent with law.
3. Pursuant to Wis. Stat. § 227.57(9), enjoin the Public Service Commission from:
  - a. approving rate increases by converting customer credits into utility revenue without a hearing;
  - b. approving fixed charges that collect more than basic customer costs without first undergoing rulemaking to revise its policy and statutory interpretations to allow such rate design; or
  - c. approving utility pricing that fails to maximize conservation, energy efficiency and renewable generation to the maximum extent cost-effective, technically feasible and environmentally sound as required by Wis. Stat. §§ 1.12(4) and 196.02(1)(ar).

Dated this 27<sup>th</sup> day of January 2021.

Sierra Club and Vote Solar by:

EARTHJUSTICE

Electronically signed by David C. Bender

David C. Bender

State Bar No. 1046102

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