Mr. Walter L. Thomas, Jr.
Executive Secretary
Alabama Public Service Commission
100 North Union Street
P.O. Box 304260
Montgomery, AL 36130

RE: Docket U-4226 and Docket 32767 – RATE RIDER RGB (SUPPLEMENTARY, BACK-UP, OR MAINTENANCE POWER)

Dear Mr. Thomas,

Please find enclosed Energy Alabama’s Reply to the Supplemental Data Request Responses filed by Alabama Power Company in the above referenced dockets. This filing will be followed up with an original and the requisite amount of physical copies to the above address.

Thank you for your attention to this matter.

Sincerely,

Daniel Tait
Chief Operating Officer
Energy Alabama
27246 Crazy Horse Way
Toney, AL 35773
PO Box 1381
Huntsville, AL 35807
(256) 812-1431
dtait@alcse.org

Encl. Energy Alabama’s Reply to the Supplemental Data Request Responses
cc: Official Service List, via electronic mail only
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF ALABAMA

DOCKET NO. U-4226
DOCKET NO. 32767

RATE RIDER RGB (SUPPLEMENTARY, BACK-UP, OR MAINTENANCE POWER)

ALABAMA PUBLIC
SERVICE COMMISSION

ENERGY ALABAMA REPLY TO
SUPPLEMENTAL DATA REQUEST RESPONSES
FILED BY ALABAMA POWER COMPANY

1. Issue: Alabama Power is unable to demonstrate an industry-approved factual basis by which to create its Rate Rider RGB Section I.B and used internally derived and opaque methods for determining its fees.

Reply: In Alabama Power’s response to staff question 2, the Company admits it relies on a 2015 EPRI study that was not made public until the Company’s reply in ND-Reply 7. This admission undercuts the Company’s argument that the fees on customer generators is just and reasonable because the Company continues to lack transparency during this proceeding. The reference to the 2015 EPRI study is dated, even by the time of its original publication, and is a post hoc attempt to justify the Company’s fees. The Company further admits that a true data-driven study and analysis would take up to 36 months and the Company no longer has the equipment in place to replicate the study.

In Alabama Power’s response to staff question 3, the Company admits it, “did not perform any independent assessment of the benefits or costs of interconnected, on-site generation in developing the capacity reservation charge and Rate RTA charge under Part I.B of Rate Rider
RGB”. The Company further claims it assessed benefits that are “consistently associated with the output of the generation” but only gives customer-sited generation credit for “energy costs associated with the output of the generation, and the diversity effect that affords the Company [...]”.

The Company’s approach belies the practice of many utilities and Commissions across the country. For instance, the Tennessee Valley Authority in its 2015 Distributed Generation Integrated Value study identified at least 6 and as many as 15 potential benefits of distributed generation, as depicted below in figures 1 and 2.¹ TVA’s analysis is notable and relevant for 3 reasons: First, the study was dated in 2015, the same year as the EPRI study belatedly referenced by Alabama Power. TVA is also a member of EPRI. Second, TVA’s service territory is directly adjacent to Alabama Power. Third, TVA used a stakeholder process by which to determine the benefits and illustrative values in contrast to Alabama Power’s internal opacity.

<table>
<thead>
<tr>
<th>Categories</th>
<th>Components</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Included in DG-IV Methodology</td>
<td>Generation Deferral (Capital &amp; Fixed Operations &amp; Maintenance)</td>
<td>The marginal system capacity and fixed operations and maintenance value of deferred generation additions (including reserves) due to DG</td>
</tr>
<tr>
<td></td>
<td>Avoided Energy (Fuel, Variable Operations &amp; Maintenance, Start-up)</td>
<td>The marginal system energy, fuel, variable operations and maintenance, and start-up value of generation displaced by DG</td>
</tr>
<tr>
<td></td>
<td>Environmental (Compliance &amp; Market)</td>
<td>Compliance - addresses regulatory compliance components that are incorporated as part of TVA's system portfolio analysis (e.g., CO₂, coal ash, cooling water)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Market - the individual market value a DG resource adds to the valuation methodology in addition to regulatory compliance value (e.g., renewable energy credits)</td>
</tr>
<tr>
<td></td>
<td>Transmission System Impact</td>
<td>Net change in transmission system infrastructure due to presence of DG (i.e., transmission required, deferred, or eliminated)</td>
</tr>
<tr>
<td></td>
<td>Distribution System Impact</td>
<td>Net change in distribution system infrastructure due to presence of DG (i.e., distribution required, deferred, or eliminated)</td>
</tr>
<tr>
<td></td>
<td>Losses (Trans. &amp; Distr.)</td>
<td>Net change in transmission and distribution system losses due to presence of DG</td>
</tr>
<tr>
<td>Program Design Considerations</td>
<td>Local Power Company (LPC) Costs &amp; Benefits</td>
<td>Associated costs of implementing renewable energy programs (e.g., administrative, operational, engineering), and potential LPC-specific distribution system benefits</td>
</tr>
<tr>
<td></td>
<td>Economic Development</td>
<td>Regional job and economic growth caused by DG growth</td>
</tr>
<tr>
<td></td>
<td>Customer Satisfaction</td>
<td>Enhanced customer value due to preference, optionality, or flexibility</td>
</tr>
<tr>
<td></td>
<td>Local Differentiation</td>
<td>Site-specific benefits and optimization (e.g., geographic location, placement &amp; optimization of distribution grid, load demand reduction)</td>
</tr>
<tr>
<td>Placeholder Topics</td>
<td>System Integration/Ancillary Services</td>
<td>The symbiotic value of smart grid resources and high levels of DG penetration, and cost of integration of non-dispatchable resources - further study and data required</td>
</tr>
<tr>
<td></td>
<td>Additional Environmental Considerations</td>
<td>Additional environmental factors that are not specifically addressed as part of the environmental compliance or market values</td>
</tr>
<tr>
<td></td>
<td>Security Enhancement</td>
<td>Increased system resiliency to reduce power outages and rolling blackouts due to presence of DG</td>
</tr>
<tr>
<td></td>
<td>Disaster Recovery</td>
<td>The ability and pace of DG assets to assist with system restoration after significant damages caused by natural disasters</td>
</tr>
<tr>
<td></td>
<td>Technology Innovation</td>
<td>Impact value associated with technology-driven investment in DG</td>
</tr>
</tbody>
</table>

Figure 1. TVA Distributed Generation Integrated Value Components, Oct. 2015
### Values Provided are for Illustrative Purposes Only

<table>
<thead>
<tr>
<th>DG-IV Methodology Components</th>
<th>20-Year Average Example Values (¢/kWh)</th>
<th>Boundary Conditions &amp; Additional Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generation Deferral (G)</td>
<td></td>
<td>Total Solar Penetration = 2000 MW AC solar; Solar Penetration Rate = All loaded into model in 1st year; Solar NDC = 50%</td>
</tr>
<tr>
<td>Capital</td>
<td>1.3</td>
<td></td>
</tr>
<tr>
<td>Fixed O&amp;M</td>
<td>0.2</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>1.5</td>
<td></td>
</tr>
<tr>
<td><strong>Avoided Energy (E)</strong></td>
<td></td>
<td>NOTE: Values for Generation Deferral and Avoided Energy are derived from base condition input ranges at a defined point in time. These values will change across various planning horizons and can range between +/- 15% or more of the values listed</td>
</tr>
<tr>
<td>Fuel</td>
<td>4.4</td>
<td></td>
</tr>
<tr>
<td>Variable O&amp;M</td>
<td>0.1</td>
<td></td>
</tr>
<tr>
<td>Start-Up</td>
<td>0.1</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>4.6</td>
<td></td>
</tr>
<tr>
<td><strong>Environmental</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compliance (ENVC)</td>
<td>0.2</td>
<td>Compliance – CO2 proxy cost curve beginning in 2022</td>
</tr>
<tr>
<td>Market (ENVM)</td>
<td>0.1</td>
<td>Market – Voluntary REC value ($/MWh) applied from 2015-2021 at an 1.9% escalation rate</td>
</tr>
<tr>
<td>Transmission Impact (T)&lt;sup&gt;6&lt;/sup&gt;</td>
<td>0.4</td>
<td>Point-to-Point Transmission Service Rate = $1.73 per kw-month Solar NDC = 50% Escalation rate = 2% per year</td>
</tr>
<tr>
<td>Distribution Impact (D)&lt;sup&gt;6&lt;/sup&gt;</td>
<td>0</td>
<td>Total Solar Penetration = 0.5 MW AC on feeder Solar Penetration Rate = All loaded in 1st year</td>
</tr>
<tr>
<td><strong>Losses</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transmission Losses (TL)</td>
<td>2.6%</td>
<td>Transmission – Average marginal loss savings at 1 MW AC</td>
</tr>
<tr>
<td>Distribution Losses (DL)</td>
<td>1.6%</td>
<td>Distribution – Average net marginal loss savings at 0.5 MW AC</td>
</tr>
<tr>
<td><strong>DG-IV Calculation</strong></td>
<td>(G + E + ENVC + T + D)&lt;sup&gt;6&lt;/sup&gt; * (1 + TL + DL) + ENVM</td>
<td></td>
</tr>
<tr>
<td><strong>DG-IV Example Value</strong></td>
<td>7.2</td>
<td>20 Year Average Value&lt;sup&gt;6&lt;/sup&gt; - approximate value that is subject to change (from base condition input ranges at a defined point in time)</td>
</tr>
<tr>
<td></td>
<td>5.7</td>
<td>1st Year Value&lt;sup&gt;6&lt;/sup&gt; - approximate value that is subject to change (from base condition input ranges at a defined point in time)</td>
</tr>
<tr>
<td><strong>Values Provided are for Illustrative Purposes Only</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carbon Impacts&lt;sup&gt;7&lt;/sup&gt;</td>
<td>0-2.4</td>
<td>Based on the social cost of carbon and the projected carbon intensity of the TVA generation fleet.</td>
</tr>
<tr>
<td>Common Pollutant Impacts&lt;sup&gt;7&lt;/sup&gt;</td>
<td>0-3.5</td>
<td>Estimated societal cost associated with common pollutants of SO2, VOCs, NOx, PM2.5, PM10 and NH3</td>
</tr>
<tr>
<td>Water Impacts&lt;sup&gt;7&lt;/sup&gt;</td>
<td>0-0.01</td>
<td>The value that distributed solar provides as a buffer from the marginal or system impacts of decreased thermoelectric generation in times of drought or heat waves. Based on the replacement cost of power related to thermal derates (fossil and nuclear).</td>
</tr>
</tbody>
</table>

---

Figure 2. TVA Distributed Generation Integrated Value Illustrative Values, Oct. 2015
**Recommendation:** The Commission should order the Company to undertake a study of the costs and benefits of customer-sited generation, inclusive of diverse stakeholders. The Commission should require the Company to collect, analyze, and publicly publish data of customer-sited generation in the Company’s service territory in order to better inform any potential rate action affecting customer-sited generators.

2. **Issue:** Public Service Commissions across the country have rejected similar attempts by utilities and most utilities do not levy similar charges on customer generators.

**Reply:** Most utilities do not charge fees similar to Alabama Power’s Rate RGB Part I.B. In fact, most attempts, including Georgia Power’s, have been rejected by public service commissions or the courts. Some utilities, such as TVA, have instituted grid access charges. While grid access charges also discourage the use of customer-sited generation, TVA’s charges apply to all customer classes. In contrast, Alabama Power’s fees are discriminatory and apply only to customers with on-site grid-connected generation.

Dominion Energy is currently the only investor owned utility in the Southeast that levies a standby charge remotely similar to Alabama Power.\(^2\) Unlike Alabama Power however, Dominion credits customers for their distribution related kWh charge, in essence recognizing some benefit to customer-sited generation. Further, Dominion’s standby charge only applies to residential customers with systems larger than 10 kW.

The Southern Environmental Law Center noted a similar attempt by DTE Energy of Michigan to levy a customer-sited generation fee, in its May 20, 2019 filing with this Commission. DTE attempted to charge of $2.31 per kW of nameplate capacity per month for residential customers and $2.28 per kW of nameplate capacity per month for commercial customers. DTE’s proposed charge was approximately half of Alabama Power’s current fee.

The Michigan Public Service Commission found that DTE’s charge, “relied on the distribution revenue deficiency and not on any cost to serve”. The Commission believed this was evidenced by the fact that DTE “based the charge on the size of the customer’s system rather than customer’s actual usage”. The Commission rejected DTE’s proposed charge stating, “The Commission find that this does not comport with the statutory requirements and is unreasonable from a COS [cost of service] ratemaking perspective”.

We Energies of Wisconsin proposed a $3.79 per kW charge on grid-connected solar in 2014. The Wisconsin Public Service Commission approved the fee but a Dane County Circuit Court judge overturned the Commission saying, “I do not think a reasonable person would reach the decision they [Wisconsin Public Service Commission] reached based on this record. I don’t think a reasonable person could reach it because there’s just a dearth of data to support the conclusions that are being relied on regarding subsidies and the like, subsidies and price distortions both.” The oral ruling is attached as Appendix A.

Alabama Power has erred as did DTE Energy and We Energies. Alabama Power, by its own admission, has not complied with the principles of cost of service ratemaking when it did not consider reasonable benefits to customer-sited generation even in light of evidence from neighboring utilities.

**Recommendation:** The Commission should overturn its approval of Rate Rider RGB Part I.B and reject the Company’s request to raise the charge in question. The Commission should further order the Company to refund all Rate Rider RGB Part I.B fees collected since the filing of the complaint.

---

RESPECTFULLY SUBMITTED, this 20th day of August 2019.

[Signature]

Daniel Tait
Chief Operating Officer
Energy Alabama
27246 Crazy Horse Way
Toney, AL 35773
PO Box 1381
Huntsville, AL 35807
Tel: (256) 812-1431
Email: dtait@alcse.org
CERTIFICATE OF SERVICE

I, Daniel L Tait, hereby certify that I have on this day filed with the Alabama Public Service Commission the original of the Energy Alabama’s Reply to Supplemental Data Request Responses Filed by Alabama Power Company and that in compliance with the Alabama Public Service Commission’s Rules of Practice and Procedure, I have served a copy via electronic mail or via United States Postal Service, to all parties of Docket No. U-4226 and Docket No. 32767.

Robin G. Laurie
Riley W. Roby
Balch and Bingham, LLP
105 Tallapoosa Street, Ste. 200
Montgomery, AL 36104
rlaurie@balch.com
rroby@balch.com

Dan H. McCrary
Scott B. Grover
Balch & Bingham LLP
P.O. Box 306
Birmingham, AL 35201
Tele. (205) 251-8100
dmccrary@balch.com
sgrover@balch.com

Christina Andreen
Kurt Ebersbach
Keith Johnston
Southern Environmental Law Center
2829 2nd Avenue South, Suite 282
Birmingham, Alabama 35205
Tel: (205) 745-3060
Fax: (205) 745-3064
candreen@selcal.org
kebersbach@selEGA.org
kjohnston@selcal.org

Clay Ragsdale
Allison Riley
Ragsdale LLC.
517 Beacon Parkway W.
Birmingham, AL 35209
Tel: (888) 727-1087
clay@ragsdalellc.com
allison@ragsdalellc.com

This day the 20th of August 2019,

[Signature]
Daniel L Tait
Appendix A

The Alliance for Solar Choice and Renew Wisconsin v. Public Service Commission of Wisconsin,
Case No. 15cv153, Dane County Circuit Court, Branch 17, transcript of bench order issued October 30, 2015.
STATE OF WISCONSIN  CIRCUIT COURT  DANE COUNTY
BRANCH 17

THE ALLIANCE FOR SOLAR CHOICE,
and RENEW WISCONSIN,

Petitioners,

-vs-

PUBLIC SERVICE COMMISSION
OF WISCONSIN,

Respondent.

DATE: October 30, 2015

TIME: 9:05 a.m.

BEFORE: HONORABLE PETER C. ANDERSON
Circuit Court Judge

APPEARANCES: THE ALLIANCE FOR SOLAR CHOICE and RENEW
WISCONSIN, Petitioners, appeared by
DAVID C. BENDER, Attorney at Law, Madison, Wisconsin.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
Respondent, appeared by CYNTHIA SMITH and
ALEX MAHFOOD, Attorneys at Law, Madison, Wisconsin.

WISCONSIN ELECTRIC POWER COMPANY, appeared
by JAMES E. GOLDSCHMIDT and JOE WILSON,
Attorneys at Law, Madison, Wisconsin.

PROCEEDINGS: Oral Ruling

REPORTED BY: Theresa L. Groves, RPR
Official Court Reporter
THE COURT: This is 15CV153, The Alliance for Solar Choice, et al., versus Public Service Commission of Wisconsin Department of. That doesn't make sense, but the Public Service Commission of Wisconsin is not a department, it's a commission, so I don't know why our caption reads that way. Could I have the appearances, please, beginning with the petitioner.

MR. BENDER: Good morning, your Honor. David Bender on behalf of both petitioners.

THE COURT: For the power company.

MR. WILSON: Joe Wilson of Quarles & Brady on behalf of Wisconsin Electric Power Company. I'm joined by James Goldschmidt also of Quarles & Brady.

MR. MAHFOOD: Good morning, your Honor. For the Public Service Commission of Wisconsin, Alex Mahfood. With me today is Cynthia Smith, chief legal counsel.

THE COURT: You guys are all soft spoken so move the mics closer and try to speak up a little bit. I have a tendency to do that, too, where your voice kind of drops. I guess everybody does.

So we had some follow-up briefing and I have some more questions for you guys, and then I feel I'm prepared to make a decision today, but it's always
possible, after we talk more, I realize I'm not, but
I think I'm ready. One of the things on the briefing
was I asked what the meaning of legislative was with
respect to the PSC. Too bad my intern didn't show
up. In my view, these responses were not "A"
responses. They were like "B" responses but they
weren't "A" responses because I think "A" responses
would have thought a little more about the
institutional character of legislation versus the
agency action, which is how I kind of see it.

But let me just ask you this: To be honest, I
found myself holding a view I thought that was fairly
similar to the PSC's view on this, which may not be
surprising since I used to represent the state,
including in administrative proceedings, and also
they're pretty expert on this kind of stuff. They're
not coming to this the first time. But for those of
you that claim that legislative meant they're
essentially like a little legislature, anybody think
that? They're essentially just doing a legislative
function? Anybody? Nobody thinks that. Mr. Wilson?

MR. WILSON: I believe the legislative
function in respect to ratemaking has been delegated
to them, and there's also an overlay, as you
mentioned, of their particular expertise in that
area. In that way, I think they're a bit different than a legislature which can be a bit generalist.

THE COURT: That's true. Here's some other differences: Would you agree with me on this? First of all, they decide these cases on a pretty formal record; right?

MR. WILSON: Yes.

THE COURT: Does everybody agree with that?

MR. WILSON: Your Honor, I don't mean to interrupt you. I wear hearing aids and I need to turn them up a bit, and they're controlled by my phone so I'm not meaning to break any court rules.

THE COURT: No problem.

THE BAILIFF: I have a device that will hook into your hearing aid.

MR. WILSON: I'll be fine.

THE COURT: You're listening to Lil' Wayne. I only say that because we had a case where the name Lil' Wayne came up, but the Judge never heard of Lil' Wayne, but now I know who Lil' Wayne is.

So we got a pretty formal record. I don't really know all the restrictions on legislation, other than like substantive constitutional restrictions. Aside from that, and the fact that you're not permitted to bribe legislators, it seems like pretty much anything
goes in the legislature. They're called the
political branches. We call the legislature and the
governor the executive political branches, and we
generally assume they operate on a political level.
That's why they call it the political branches.
They're not required to create any kind of particular
record. They can have all sorts of, as far as I
know, ex parte meetings. I don't know.

Can't lobbyists come in and meet with legislators?
Maybe they have to keep a record who they met with
and what they discussed. For example, I assume the
governor could call up the speaker of the assembly
and say, "look, I want this law passed" or "I support
this law" or "don't pass it" or whatever. The
governor can have influence on it. I'm sure that
that happens with the PSC; right? Right?

MR. MAHFOOD: No, your Honor. The
commissioners are bound by ex parte rules.

THE COURT: So like Jim Doyle couldn't have
called up Eric Callisto and said, "look, Eric, this
is going the wrong way. You need to do this." That
would be completely improper; right?

MR. MAHFOOD: The rules as they relate to
contested-case proceedings provide that, whenever a
matter is before the commission, there is prohibited
ex parte communication with those involved with the proceeding.

THE COURT: But Jim Doyle could call up somebody, Peter Barca in the legislature and say, "hey, we'd like to see this law passed." Nobody would ever say that's improper. Or maybe they would. But it seems like the legislative process is so fundamentally different from the adjudicative process, even where the standards of adjudication are a little bit -- or maybe not a little bit. They're highly discretionary. It still is adjudication.

MR. MAHFOOD: It is a contested-case proceeding that is controlled by the judiciary provisions in Chapter 227.

THE COURT: And the legislature made that decision.

MR. MAHFOOD: Correct.

THE COURT: Even if it is legislative, the legislature decided we really don't want you to be like us. We don't want you making sausage. We want you to make these decisions on the record in formal proceedings; you have to issue a decision; it's going to be reviewable; there's going to be standards of review. It's not to say that discretion isn't going to be part of the standard of review, but it's to say
that it's not just like legislation. In fact, the 
historical fact that it was legislation to me is an 
example of the fact that the industrialized world, 
which we are a part, experienced great changes 
between 1848 and say 1948, and during those changes, 
the institutions weren't quite ready for it, and they 
did what they did. It seems crazy to have a 
legislature establishing rates.

Can you imagine having the legislature here 
establish rates? I think the fact that we even call 
it legislative seems to me a historical artifact, not 
so much like a thought-through process. Hey, how do 
we want to establish rates? Let's have the 
legislature do it. No, I don't think anybody would 
agree to that.

When I did the wolf case, which some of you may 
know about and doesn't matter if you do or not, but 
it had to do with hunting of wolves and had to do 
with regulations. I said, if Alexander Hamilton and 
James Madison and the other guy that wrote the 
federalist papers, whose name we can never remember, 
were to be transported in time to today, they would 
marvel at everything. They would marvel at 
electricity. I marvel at electricity, but they would 
truly marvel at electricity and everything else. But
One thing governmentally they would marvel at is the use of administrative agencies to resolve so much of what we need to do, and that just didn't exist when the Constitution was made. They would not marvel at the idea of judicial review because they did have judges and judges did review stuff.

The long and short of it is I found -- I'm with you, Mr. Mahfood, basically. It's a class-one contested-case proceeding that's subject to review as an adjudication. We do have a separate statute for review of rules which is 227.40. That's not here. This is a court review. It is adjudicative. What we're looking at is the adjudicative part of it. That's not to say policy isn't part of it, but that's part of the standard of review. So that was a little interesting.

I'm trying to think of what the other question I asked you was. What was the other question I asked you?

MR. WILSON: Discrimination, your Honor.

THE COURT: Discrimination, yeah. I've got to say I was taken by your response, Mr. Wilson, that all discrimination means is compliance with the filed tariffs. Seems like the agency doesn't agree with that.
MR. WILSON: Well, I think that the agency has entertained discrimination in other meanings of discrimination.

THE COURT: I apologize. I didn't hear what you just said.

MR. WILSON: I would agree that the commission has considered other meanings of discrimination.

THE COURT: In fact, the decision that we have here says, on page 63, "with respect to the setting of utility rates, the commission's fundamental obligation is to set just and reasonable rates that ensure the adequate provision of utility service." I agree that's not super-well defined, but it is more than just set rates that add up and then make sure they comply with the tariffs.

It seems like what the utility was arguing is all they need to do is come up with a rate where it gets enough money, produces enough money, and I don't buy it. It doesn't seem like the agency buys it. Seems like we're teeing that up for the Supreme Court, but I bet they don't buy it either. That's my guess. That just seems too much. That's to say what's the point of this process if it has no considerations? I was going to say that's part of adjudication, too.
What do you want in adjudication? You want something that's fair. Above all else, you want something that's fair. And the other part was you kind of like to have some critical thought applied. We like that, too, but it's not just do the numbers add up and then anything goes.

I do have a question for you, Mr. Wilson, on standard of review. On your supplemental response brief, you talk a lot about standard of review, and I've been talking with my intern about standard of review because one thing they don't teach you in law school is appeals. They don't ever teach you about appeals. You don't learn that till you've had a few appeals and you realize, oh, I get it, standard of review. It takes a while before the idea of standard of review sinks in, but once it does sink in, then you can't ever forget it. And, again, I used to do administrative cases with the Attorney General's Office and I used to do appeals. I used to do civil appeals, too.

But you say, at the bottom of page 1, top of page 2 of your supplemental response brief, "under Wisconsin law, there are only three standards of review for courts to choose from on Chapter 227 review: Great-weight deference, tellingly also known
as controlling-weight deference, due-weight deference and no deference." Then you write "substantial evidence is not a standard of review." I thought to myself either you've got this 100 percent wrong or I've got it 100 percent wrong because this is entirely opposite of my understanding of standard of review.

As to deference, again, if you look at the case you cite, which is *Hillhaven Court versus DHFS*, 232 Wis.2d 400, and then you cite page 409, footnote 6, this reveals fairly clearly that those great-weight, due-weight and no-weight deference standards have to do with agency interpretations of law. To me, that's gospel having done this for 25 years, and I'll read it to you, if you'd like, or you can concede this. Do you want me to read it to you or do you concede it?

MR. WILSON: The point, your Honor, that we're trying to make is that, when an agency makes a decision as rate-setting capacity, it's very well established in the law that that decision is entitled to great-weight deference.

THE COURT: The case you cite is not that case. The case you cite has to do with agency interpretation of its own rules and statutes, both of
which are interpretations of law. I don't think
that's the right standard on reviewing ratemaking.

The ratemaking standards are set out as standards of
review. It's in 227.57 I think is the scope of
review. It includes substantial evidence, among
other things.

For example, if they made an evidentiary finding
that was askew, which I think is the main argument
here, we don't accept that because they have
deference to ratemaking. If they tell us that
Beijing is the capital of Mongolia, we don't have to
buy that just because they said it, because they have
deference if they make some error of fact or don't
have a basis for it.

MR. WILSON: I would agree with that, your
Honor. Under the great-weight deference standard, if
there is not a basis that a reasonable person could
reach a conclusion that the agency reached, then I
would agree. You don't have to --

THE COURT: You're conflating standards of
review. The great-weight deference is specific to
rules, interpretations of law. Let's ask the agency.
You guys agree or disagree?

MR. MAHFOOD: When a court reviews a
discretionary determination of a rate-setting matter,
it is to apply a very limited scope of review, and I think that's comparable to what an agency charged with reviewing a particular statute, it might be comparable to that type of review.

THE COURT: It might be similar, but you don't even want the one we use for statutes. The statutes, great-weight deference is we uphold the interpretation unless there's a more reasonable interpretation. You don't want me to use that today, do you?

MR. MAHFOOD: No, your Honor.

THE COURT: I didn't think so. I'm just saying, Mr. Wilson, you're a little off on your administrative law. I say that in all sincerity. The great-weight deference is a standard for reviewing agencies' interpretations of law, and they don't get it all the time, but certainly their own statutes. And then Hillhaven had to do with a special case where they were interpreting their own regulation, but that's not our case here. Well, it's not our case with respect to the regulation, and even as to law, there's a little bit in here, but they're not challenging the legal determination here.

Substantial evidence, on the other hand, is the requirement; as you say, the quantity and quality of
evidence which a reasonable man could accept as adequate to support a conclusion. That's an evidentiary thing. If they say that Beijing is the capital of Mongolia, a reasonable man wouldn't accept that.

MR. WILSON: Right. Well, yes.

THE COURT: Even if an expert says it; right? Even if an expert comes up and says Beijing is the capital of Mongolia we wouldn't.

Here's a factual question I have for you that how do we even know -- one problem in this case, I would say from both the commission and the utility, they don't distinguish very well between the NP and the NM customers to me. They seem to blur their analysis there quite a bit. How do you know who an NP customer is? How do you even know who to charge these rates to? I understand an NM because they're selling it back to you, but how do you know that somebody's got a solar panel on their roof?

MR. WILSON: I believe, your Honor, they have to declare -- they tell the utility that.

THE COURT: They do? When you, like, put it in?

MR. WILSON: I believe that's true, your Honor. If you're still connected to the grid and
have generation at your home --

THE COURT: Maybe like a safety thing?

MR. WILSON: Yes.

THE COURT: Would you agree?

MR. BENDER: If you're selling to the utility, you certainly have to --

THE COURT: I understand if you're selling, but if you're just consuming your own.

MR. BENDER: I don't know that they would know actually, your Honor. I think many people will ask for an interconnection agreement so there's a process. I think it's Public Service Commission Administrative Code Chapter 119. And some generation has to declare, but it depends on some interpretation of terms in there. Without going deep into the weeds on it, your Honor --

THE COURT: I don't want to go deep. I was wondering how you even know who these folks were.

MR. BENDER: I think the utility only would know if there was a requirement for an interconnection agreement which is set up by Administrative Code. I don't think it's required for every self-generation.

THE COURT: How are they going to end up billing? How can they bill them if they don't know
who they are?

MR. BENDER: I don't know.

THE COURT: Okay. So if they do know who they are, though, Mr. Wilson, can't we measure actual usage for any person who is on your grid?

MR. WILSON: Yes.

THE COURT: But you didn't do that for these people that have the self-generation?

MR. WILSON: Yes, your Honor. Part of the tariff is that they install meters that are capable of doing that, and I understand --

THE COURT: No, no. Your measuring meter is how much they're producing. I'm saying you didn't bother to collect the data that would show us how much they're actually using off your grid; right?

MR. WILSON: As a practical matter, your Honor, yes. The meters that are installed do allow the company to measure demand.

THE COURT: Demand is like one of these new-speak kind of terms for me. I have like an economist view of what demand is. There's a demand curve and a supply curve and they intersect where the price is. Demand you mean the amount they're not using but they're producing themselves?

MR. WILSON: No. Demand would be the peak
THE COURT: The actual use, that's what you call demand.

MR. WILSON: Well, I guess there's two ways to think about use: Use over time, how much electricity you use in a month, so there's a charge per kilowatt-hour on that basis, and then there's also demand, and it's demand that's at issue here.

THE COURT: Can you pull the mic a little bit closer. Here's what I'm asking: I looked up on MG&E yesterday for my account, and you could see -- I guess I believe them. It shows my usage of electricity over this calendar year and the previous 12 months and maybe I can go beyond that but I wasn't that interested. They had that for me. I assume they have that for everybody.

MR. WILSON: Yeah.

THE COURT: You guys aren't MG&E, but I assume WE can do that, too.

MR. WILSON: Right.

THE COURT: So part of the issue here, as we'll get to momentarily, is really how much usage is there by these DG customers; right? Maybe you don't agree that's an issue, but to the extent it is an issue, that could be measured; right?
MR. WILSON: I believe, your Honor, usage in the sense that you're using the word as a number of kilowatt-hours consumed per month.

THE COURT: Let's use that, or even per day. I think they have it on a daily basis; right?

MR. WILSON: Sure.

THE COURT: So you have that available for the DG users; right?

MR. WILSON: Yes.

THE COURT: And did you compile that data to see what the actual usage was by DG users?

MR. WILSON: There was not a separate cost-of-service study done for DG users, no.

THE COURT: I don't know exactly what you mean by "cost-of-service study," but the answer to my question is no?

MR. WILSON: Correct.

THE COURT: You don't know the actual usage of any DG user?

MR. WILSON: No, that's not correct, your Honor.


MR. WILSON: We know the usage of the kilowatt-hour per-month or per-hour or per-day basis for all of our customers, and that's how they're
THE COURT: You know it, but you didn't compile it for the purpose of this case.

MR. WILSON: That's correct.

THE COURT: It wouldn't be that hard, right, to get it?

MR. WILSON: I don't know.

THE COURT: Okay. While I'm thinking about it, let me do this: We did talk last time and I had my little chart on the subsidy issue. I think, just for our record, we're going to call this Exhibit 1. It's not an evidentiary exhibit, but for document-control purposes, if anybody wants, we'll call it Exhibit 1. I don't think Mr. Bender necessarily agreed, but at least me and this table agreed that, in general, people who consume less than average were subsidized by people who consumed more than average because the great bulk of fixed costs were recovered through a variable energy charge. Did you agree, Mr. Wilson?

MR. WILSON: Yes.

THE COURT: For all those questions about fairness or discrimination and legislative versus adjudicative, still the main challenge is substantial evidence. So we did try to figure out what the
evidence was that supported these charges, tried to take a look at that. So on page 12 of your initial brief, under heading 4(a), in the middle, on the first part of this paragraph you write -- or rather it's more towards the top. "Mr. Rogers explained the problem noted above. While the utility incurs fixed costs to serve DG customers just like any other customers, DG customers do not pay their fair share of those costs because the utility typically recovers those costs through the energy charge, and DG customers use less energy than other residential customers." How do you know DG customers use less energy than other residential customers if you have not compiled any data on their usage?

MR. WILSON: Well, your Honor, your question about that makes me wonder whether -- I mean, the fact that a customer is offsetting some of the electricity that they would have otherwise purchased from the utility --

THE COURT: They're using less than they might use.

MR. WILSON: Yes.

THE COURT: But we're not comparing them to themselves. By the way, if they didn't have this thing on the roof, maybe they wouldn't use
electricity at all. Maybe they would turn off the
lights. Maybe they got this thing on their roof so
they can run television all day. I don't know.
We're not talking about them versus them, individual
versus that individual, but it says they use less
energy than other residential customers. How in the
world do you know that if you have not actually
measured usage?

MR. WILSON: Your Honor, I apologize. I --

THE COURT: Let me ask Mr. Bender. Would
you agree, Mr. Bender, they just didn't measure that?

MR. BENDER: That's not in the record. I
agree with that, your Honor.

THE COURT: You cite in your brief
Mr. Rogers' testimony at 53 to 54. If you have his
transcript, go ahead and find that for me because
I've looked at it and I can't figure out where he
says that. I don't see him saying that. Maybe he
said it and I just missed it.

MR. WILSON: I don't have his testimony in
front of me, your Honor.

THE COURT: I think Mr. Bender is giving
you something to help you. I don't know what it is.
Is it his testimony?

MR. BENDER: It is.
THE COURT: Maybe it's there. These aren't the easiest transcripts to read.

MR. WILSON: I believe, your Honor, what we were relying on is the language that, when a customer offsets --

THE COURT: Go ahead and give me the page. Is it page 53 or 54?

MR. WILSON: 53 beginning at line 20.

THE COURT: Make sure I'm in the right tab. Is that tab 256?

MR. BENDER: It is, your Honor.

THE COURT: So 53, line 20. "When customers offset their own loads with their generation, they reduce their payments to the company for their use of the distribution system which are embedded in energy charges or demand charges of their underlying retail rates." That's true. I agree with that. That doesn't say they're consuming less energy than other residential customers.

Here's the thought: This is like a major thought for this thing. I fully respect the PSC. They are very expert on this kind of stuff. I don't know how much I would enjoy doing this. I told you I did apply for the chief counsel job some years back but Eddy Marion got it, a former judge. I do like
economics, and I'm just awed by electricity. It just amazes me. We've amassed, in 150 years -- it used to be all electricity did for you is started forest fires or zapped you if you're hiding under a tree, but it's really a great thing now.

For all I know from this record, DG users use more than average electricity and are already subsidizing all the under users like me. It turned out I used 28 percent less. I have no idea why. I don't think we would but I guess we do. I have no reason to know that they use more or less or what. I have a mystery record on this. Do you have something that shows me otherwise?

I should say I understand, on the NM customers, they're using the grid to sell back electricity, but on the NP customers who aren't, for all we know, the reason these people are putting this up is because they're big energy hogs. The data is available. It seems like we kind of actually want to see what the usage is. Also, if we're going to make these kind of vague claims that they're the cause of our need for peak capacity or they use the grid when the air-conditioners go on or something or at night, I don't know when it is, these vague claims, we could actually look at their usage, compare it to peak
It seems like this is just pulled out of the air. I just have that reaction to it. It was afterwards. I didn't think of this before we talked before because I was kind of with you on the fixed costs spreading. I kind of liked the idea; although, there's an issue of what's fixed and what's not and what's variable certainly in the long-term. But then I thought about it. I have nothing in this record that tells me they actually do use more. Does anybody think there is? Do you think there is?

MR. BENDER: Not that we're aware of in the record, your Honor.

THE COURT: Mr. Mahfood, you got anything there?

MR. MAHFOOD: Well, I think, to the extent that a distributed-generation customer and let's say an energy-efficiency user, a customer using energy efficiency I think, assuming that they have the same exact consumption in a particular month, I think there is a couple of points that distinguish them. First --

THE COURT: I'm sorry, though. I'm not talking about let's assume their consumption. I'm saying is there any evidence what their consumption
is, the DG customers? We can make all sorts of assumptions and say, yeah, this guy is exactly like this guy. Those are like thought experiments that you do in economics, but they don't prove anything.

MR. MAHFOOD: I think, like you said earlier, to the extent that they're installing distributed generation, it's less than what they would have otherwise contributed.

THE COURT: Contributed? Contributed? They pay for it; right? That's not contributing. They're charged for this. They don't want to pay anything. When you're being charged something, you're not contributing; you're paying. But if they're already consuming more than average, we all agree -- at least you, me and Mr. Wilson all agree and I don't know what Mr. Bender's view on it is exactly -- that, if you're consuming more than average, you are paying a higher proportion of the fixed costs than somebody who is consuming less than average.

MR. MAHFOOD: I think that would affect the magnitude of the subsidy in terms of if their consumption -- assuming they're consuming more than average, if they're, nevertheless, still consuming more than average with respect to the -- after
they've installed their distributed generation, it
still impacts the subsidy that they're, I guess,

THE COURT: They're paying a subsidy so you
want them to pay a bigger subsidy even if it's unfair
that anybody is paying the subsidy at all; is that
what you want?

MR. MAHFOOD: It's a class-by-class
analysis, and I think, inherent in ratemaking, there
is, to some extent, subsidies, and this is one in
which the commission perceives a growing problem as
these distributed-generation systems proliferate.

THE COURT: Wouldn't it be nice to, like,
ask for some proof? It seems you pick out this
little minority of people who seem at least committed
to not producing greenhouse gasses, whether that's
good or bad, you can argue that I guess, but so you
say here's this little minority, and we're going to
make them pay a different rate. They're already
paying the same rate as everyone else, but we're
going to make them pay even more rates to get rid of
a subsidy that we don't even know that they're being
subsidized. Wouldn't we want to at least establish
that they're being subsidized and to what extent
they're being subsidized?
You produce these ginormous records, and I realize this wasn't the only issue of the case so I understand that, and you get this expert in, but they couldn't come up with any data whatsoever? I see there's some note being passed so I want to hear what it says.

MR. WILSON: What it says, your Honor, is that none of the parties in the case disputed the concept that folks with distributed generation use less electricity than your random customer without distributed generation.

THE COURT: So was that a question that was asked to comment on: Do distributed-generation customers use less electricity than your average customer?

MR. WILSON: I'm sorry. What was the question?

THE COURT: Was this a question that was posed to people: Do DG customers consume less electricity than your average customer? Was that posed to people as a question to answer?

MR. WILSON: Well, I think that it was based on the agency's experience in this area and its expertise. The agency clearly found that these customers did use less electricity.
THE COURT: Right. But if they clearly find it and there's no evidence for it, then the rule is you don't get to keep the ruling. What do you see on that? Was it the case that you guys all conceded you were using less than average?

MR. BENDER: Not to my knowledge, your Honor. In fact, I doubt that that's the case because distributed-generation customers vary from like Wal-Mart to the guy with a couple solar panels on his roof, and I can't imagine that it would be true that, as an entire class, they all consume less than average.

THE COURT: It seems unlikely they all would but maybe, on average, they do. I don't know. To me, it's not to say, if it's this or that, you should make this decision. The question is is it this or that. We don't know. This is really some weak evidence. So this is our evidence: Nobody disagreed with sort of an implicit understanding that somebody had that they consumed less, and your expert doesn't even say it. We tried to find your expert saying it. You cite it in your brief, and I don't see it in your expert's brief. I don't know that people are thinking through this problem as critically as warranted.
I had another one here. In fact, it was the next sentence on your brief. "Accordingly, Mr. Rogers noted that Wisconsin Electric was requesting that a demand charge be included in the optional COGS-NM and COGS-NP tariffs" -- quote -- "to compensate Wisconsin Electric for standby generation and distribution services." And he cites page 56, and when I looked at page 56, seemed like he said that pretty clearly as to NM but didn't say a word about NP. Again, if you want to look at 56, I don't think he quite says that.

I guess we waited long enough for people to read page 56. I'll ask Mr. Bender first. Is there a belief there's too much capacity?

MR. BENDER: There is too much capacity on the system, your Honor. That's in the record. They have more than their required amount of capacity. If they needed more, it's also in the record that they could buy it on a market purchase for a short period of time for --

THE COURT: Saying there's too much capacity, what does that mean?

MR. BENDER: They have too many power plants already.

THE COURT: So we want them to disinvest
then? I mean society, if they have too many power
plants, we'd like them to get rid of some power
plants, society would like that as a matter of
economic efficiency.

MR. BENDER: Ratepayers would like to pay
for fewer power plants than are necessary, I think
that's true.

THE COURT: Would you agree there's excess
capacity, Mr. Wilson?

MR. WILSON: At the moment, there is excess
capacity. That has now been the case and will not
always be the case.

THE COURT: I don't know. It's hard to say
what the future is going to entail. As a generalist,
I know my knowledge of everything is about a quarter
of inch deep of everything in the world. I know all
sorts of stuff, but it's not deep. One thing this
case suggested to me I had never thought of until I
had this case, and combined with just general
reading, is this may well be the wave of the future
is everybody gets a solar panel on their roof and a
little briefcase-size battery pack that stores it
because that's the big limitation right now is
batteries, but, in addition, you get more and more
efficient energy consumption or energy usage from the
sun. But if, at the moment, there's excess capacity, then it's really not a problem that somebody might utilize their air-conditioner in the middle of the summer; right? You don't have to go buy more turbines.

MR. WILSON: Well, your Honor, the issue of capacity is not limited to a utility-by-utility basis. The utilities in the Midwest or the middle of the country operate in the MISO system and essentially they're all connected, so it doesn't really answer the question to look at the capacity position of one utility.

THE COURT: I'm missing the end of the sentence there.

MR. WILSON: It doesn't answer the question to look at the capacity position of one utility.

THE COURT: Okay.

MR. BENDER: Your Honor, that's not exactly right.

THE COURT: I'm not going to resolve it. I just sort of had a general sense there was excess capacity. So society wants to get rid of the -- I'm just thinking in terms of economic efficiency. I am more advanced than economics 101. My own background is more advanced than economics 101. I'm just
thinking, economic efficiency, you want to get rid of the excess capacity. You've got wasted capital. The utility wants people to consume more so they can use it. I don't know. I don't know where I was going with it. It will probably come up in the decision, but I want to make sure I was right on that.

I think I've only got one more thing to grill you on, Mr. Wilson. Maybe not. There is a specific little testimony of Mr. Rogers I just wanted to grill you on. I want to see if I can find it here. I apologize. On page 9 of your supplemental brief, Mr. Wilson, you write, at the bottom, "again, Wisconsin Electric does not argue that these customers cause different costs." You emphasize "cause" and "costs." "The issue is that Wisconsin Electric needs a different mechanism to recover the same costs from these customers," and you underline "recover." "Demand charge is the mechanism, that mechanism, and recovers fixed costs that RG-1 customers pay through their variable energy charge." But these DG customers, they pay RG-1; right?

MR. WILSON: Yes, they do, but they pay less of it than --

THE COURT: They would have were they consuming more.
MR. WILSON: Yes.

THE COURT: But not less than somebody else. Okay. But the other thing is it seemed like I had some insistence by you, and it was a pretty strong statement that -- I'm having a little problem finding it -- that you are definitely not claiming they cause different costs. Is that right? You're not claiming they cause different costs?

MR. WILSON: The cost-of-service study that was done in this case shows the demand costs placed on the system by -- I'm sorry. The cost-of-service study done in this case shows the demand placed on the system by residential customers, and our contention is that is causing NP customers --

THE COURT: I'm just having a hard time hearing you.

MR. WILSON: They place those same costs on the system or cause the system to incur those same costs.

THE COURT: On page 3 of your supplemental reply brief, "all small-class customers cause the utility to incur demand-related costs." So everybody is incurring these. Then you say, "where demand-related costs are recovered through the variable energy charge, however,
distributed-generation customers who supplant their purchases from the grid do not fairly contribute towards the demand costs they cause Wisconsin Electric to incur in providing standby or backup service." So they supplanted their purchase because they owe you guys purchases; is that it?

They didn't develop these rates. The utility and the PSC developed these rates. And so if they aren't paying their share, it's not like they're violating their duty, are they? They don't owe you something if they're making rational decisions based on the rates. I found the word "supplant" kind of weird. It sounds like they owe you. They owe you consumption. They don't owe you consumption; right?

MR. WILSON: No.

THE COURT: You just think they owe you costs.

MR. WILSON: Yes.

THE COURT: If somebody else supplants their purchases by -- and we went over this before. If somebody else supplants their purchases from the grid by just consuming less or having energy-efficient appliances, they owe you as well?

MR. WILSON: The commission has made the determination in this case to address the cross
subsidization that it recognized that is inherent
with distributed-generation customers.

THE COURT: I'm sorry. You really are
speaking softly. Why don't you pull this up close.
If you move it real close, we sometimes tell people
you're too close.

MR. WILSON: Sorry. I think it's a
hearing-aid issue because I sound very loud to
myself. The commission made a discretionary decision
in this case, as it is allowed to do under the law,
to address the subsidization that it recognized with
distributed-generation customers. It did not make a
decision to address subsidization with customers who
may consume less electricity because of other
reasons.

THE COURT: And they did this without
evidence they actually consumed more, and they did
this in the name of fairness; right?

MR. WILSON: They did it in the name of
fairness, and they did it based on their expert
judgment that these customers consumed less.

THE COURT: So they didn't need evidence.
They just could pull that out of the air.

MR. WILSON: The commission is charged with
being the expert body to make decisions.
THE COURT: Do they need evidence to say that distributed-generation customers consume less than your average customer, or could they just pull it out of the air? I'm not saying pull it out of the air but do they need evidence. I don't know where they get it if they don't have evidence. Do they just believe it? Is that good enough?

MR. WILSON: I believe, your Honor, that there are several areas in which the commission, based on its past expertise, does make decisions like that.

THE COURT: So you're saying they didn't need evidence.

MR. MAHFOOD: Your Honor, I think in terms of how the commission's expertise flows into that, the application of the substantial-evidence test is best described on page 2 in our supplemental reply brief, and it's the quote from the Hixon case that I think is --

THE COURT: Give me a second here to find it.

MR. MAHFOOD: I need the same.

THE COURT: Supplemental reply brief?

Okay.

MR. MAHFOOD: On page 2, large-block quote
in the middle of page 2. It states, at the very bottom, "it is clear, therefore, the trial court must have compelling reasons for reversal where the final conclusion of the agency is based upon a determination which is not only highly discretionary but rests upon the agency's finding as to what is necessary and convenient in the public interest to terms of indefinite and varying content." And then in that case, the -- they weren't present in that case, but that is the standard that was -- they concur in the conclusion that those terms of indefinite and varying content, those are terms that are terms the Public Service Commission is charged with addressing and defining.

   MR. BENDER: Your Honor, may I?

   THE COURT: Could I just ask you this then, Mr. Mahfood, my same question to Mr. Wilson: Were they permitted to find that DG customers used less energy than the average customer without evidence?

   MR. MAHFOOD: They weren't permitted to do so, your Honor, but I think the inquiry is whether they were permitted to make the finding that distributed-generation customers consumed less than they otherwise would without distributed generation.

   THE COURT: Yeah. That's like duh. I
don't think that's expertise. Presumably that's what happens, but I guess there could be cases where it isn't. It depends on your elasticity of electricity, the band. But go ahead.

MR. MAHFOOD: I think that's the inquiry that was relevant in determining the subsidization that the commission was intending to address.

THE COURT: Does that make sense? Again, if the person is using 2,000 kilowatt-hours per month with distributed generation, he's paying the subsidy and then some. He's already paying that subsidy. So you want him to pay more of a subsidy? Does that make any sense that we don't care how much he's actually using? I don't even know, if you say on a class basis, we're going to stick you with your average, if that's fair or not, but at least if you had some data on it, it might be more plausible. At this point, you got nought. Go ahead.

MR. MAHFOOD: I think, theoretically, the distributed-generation demand charge could be imposed on a customer that runs constant generation and completely offsets their consumption and, therefore, pays zero dollars towards the energy charge, and that is a plausible and realistic situation.

THE COURT: Right, plausible, but why don't
we find out? This is my question: Why don't we just find out instead of let's assume this and guess this and think what's plausible and what might happen? They can get the data. You guys don't have to do it. Make the utility get the data. They've got it. Show a customer that's using no electricity. Wouldn't that be nice to see before we're going to start assuming there's customers out there doing it and, for that reason, we're going to stick everybody, which is the theory. The theory is we're going to stick everybody, and we're going to stick this tiny class of people who actually are preventing a negative externality, unlike -- well, I guess anybody now is using it to prevent a negative externality. What's your thought on that?

MR. BENDER: Your Honor, just to answer your question before about whether the agency can resort to its purported expertise in lieu of record evidence, and we say on page 13 of our opening brief citing Gilbert v. Medical Examining Board, 19 Wis.2d 168 at 205, that courts may not substitute their alleged expertise and knowledge instead of evidence in the record.

THE COURT: Not courts, agencies.

MR. BENDER: Sorry.
THE COURT: Read it one more time.

MR. BENDER: The court may not substitute the agency's alleged expertise or knowledge in lieu of the evidence in the record. The agency needs to have evidence in the record. It's not enough just to say we're an expert agency.

THE COURT: What I want to do is take a quick break and talk to my staff attorney privately because I'm having difficulty finding something I've been trying to look for and it's making for a kind of bad argument where I'm sort of talking to you and sort of reading at the same time, and multitasking is hard to do. So if that's okay with you, we'll recess for about 10 minutes and then we'll come back. You don't have to leave.

(A short recess was taken)

THE COURT: I was able to locate what I was looking for. This case produced a lot of paper even independent of the record. I think we've got about 200 pages of briefs, and then there have been parts of the record I've been looking at as well and the decision, of course. And I realized my problem was I was thinking it was only the supplemental briefs that I had been concerned with in the last couple weeks, but, in fact, it included the principal brief by
And on page 16 of that brief, it says, at the
bottom paragraph, "finally, Mr. Rogers submitted
additional rebuttal testimony specifically addressing
the mistaken notion that the demand charge was
somehow intended to recover special or additional
costs caused by DG customers." Much of that was
underlined. "He said" -- quote -- "I don't believe
I've testified that customers with their own
generation impose extra costs; rather, they impose
the same costs on our distribution systems as
customers without their own generation. The
difference is we recover those costs from customers
without generation, but we do not recover those costs
from customers with generation." So you're still in
concurrence with that, Mr. Wilson?

MR. WILSON: Let me look at the testimony,
your Honor.

THE COURT: I don't think "in concurrence"
is really a word, but you still agree with that?

MR. WILSON: Yes.

THE COURT: Because then parts of the
record seem to say otherwise. On page 17-R of his
rebuttal testimony, at the answer, he says "I agree
with Mr. Gilliam and Mr. Vickerman that utilities do
not charge higher rates to customers who install more efficient appliances." I guess they were asking the same question that I've been asking. "This has no bearing on the company's proposal to charge customers with generation for the use of the distribution system, however. The more efficient appliances are not likely to suddenly become less efficient leading to an immediate demand upon the grid. The generation owned by customers, on the other hand, is likely to have sudden fluctuations to which the grid must respond immediately." So it does seem like there is a difference in costs that you claim.

MR. WILSON: I don't agree with that, your Honor. I think the distinction that Mr. Rogers was drawing there was that customers who conserve electricity through the use of more efficient appliances -- for example, that efficient refrigerator -- will presumably be efficient at all times; whereas, a --

THE COURT: I got the idea. I understand that. Whereas, like if a cloud passes in front of your solar panel, I think that's what Mr. O'Sheasy talks about, I think he used the example of the cloud, but what is the difference? There is some difference that makes a difference?
MR. WILSON: Yes. The cloud passing over a solar panel can lead to a sudden spike in demand from that distributed-generation customer.

THE COURT: Why does that matter? Is that a difference between the distributed-generation customer and everybody else?

MR. WILSON: It is a difference.

THE COURT: Is it a difference in cost or what? Why does that justify a different charge to them?

MR. WILSON: There's a difference there because there are sudden spikes in demand with respect to the distributed-generation customers that don't necessarily exist with respect to customers who --

THE COURT: Let's say that's true. I'll come back to whether we have any evidence of whether that's true because that, of course, is again the $64,000 question. But let's say that is true. How does that impact the rate setting? Does the commission rely on these spikes, Mr. Mahfood?

MR. MAHFOOD: I think it helps illustrate the point that the type of service that distributed-generation customers receive resembles a standby or backup service as opposed to --
THE COURT: Is that why they're paying more because it resembles a standby or backup service?

MR. MAHFOOD: It's a distinct type of service that distinguishes them from energy-efficiency customers or customers --

THE COURT: Do we have any evidence as to these spikes, I mean actual empirical data on these spikes? I'm guessing not since we never bothered to get any usage data, period, for DG customers. If you're going to assert this, wouldn't it be a little bit reasonable to say, okay, you guys have the data; why don't you show it to us; let's see those spikes? They didn't do that. You didn't produce that, Mr. Wilson; right?

MR. WILSON: No. We have testimony making the point that, when the sun goes over a solar panel, it produces less electricity, and unless that customer simultaneously turns off his or her lights, there's going to be a spike in their demand.

THE COURT: And how does that impact the cost? What's your thought on that?

MR. BENDER: Your Honor, a couple things. It just means that the customer's use is the same as the guy next door without the solar panel, and when that cloud is going over, both of them are buying
their kilowatt-hours from the utility. It's not that
the guy with the solar panel uses a different type or
amount of electricity to run his light as the guy
next door without one. There is no data in the
record to answer that question.

Further, your Honor, this is one of the
frustrations for us in this case is that, the
justification for the charge, the respondents are
equivocating, your Honor. On one page they say it's
this special different service that people with solar
panels get as a backup, and then another few pages
they say no, no, there's no difference in service,
they're receiving the exact same service, and they're
just not paying for it. The respondents are
grappling for a justification, and it's changing
depending on what page of the brief you're looking
at.

    THE COURT: The other thing, when I did
talk to my staff attorney, she said I think you
should wrap this up. I was trying to find in the
record something that I couldn't find while I was
talking to you guys. I did go over all the points
that I had written in before.

    One thing I need to ask you, Mr. Bender: The NP
I'm sympathetic, but the NM, these guys are selling
electricity to the grid. They're using the very
grid. They are using these fixed charges. They've
become, as somebody said and I thought was a good
point, they're like mini utilities. So why shouldn't
they have to pay for the ability to use the grid to
sell their production?

MR. BENDER: Your Honor, the NM customer,
the net-metered customer -- first of all, the
definition of net metering is that their purchase,
their consumption is at the end of the billing
period. They may have flows out and flows in.
There's not two different distribution systems.

THE COURT: I understand that.

MR. BENDER: They're paying for the
distribution system for their consumption, and then
it's used again -- or the same system is used for
them to sell, but the evidence in the record is not
that there's an additional cost for the outflow from
the system. In fact, the evidence in the record, all
they're talking about is the single system and
dividing it by a number of customers. That's the
extent of the analysis in the record.

The customer with the outflow, first of all, is
paying but is paying a customer charge. They're also
paying for whatever kilowatt-hours they consume.
Customers also using the same system to sell, which is their right under federal law in addition to state law, and the charges that are imposed are nothing to do with it. Maybe that's the easiest way to put it. The charge we're talking about has nothing to do with what is the cost of the utility to maintain enough system for the sale.

THE COURT: Why is that the relevant measure? Is that a marginal-cost question? What's the marginal cost of providing enough system so you can sell it? Let's say you built a little solar energy factory. It's 300 kilowatts, so you can produce, depending on what your mechanism is -- maybe it's wind, maybe it's solar. It has to be clean; right? It has to be renewable.

MR. BENDER: Your Honor, under federal law, you can currently sell up to 20 megawatts.

THE COURT: 20 megawatts? That's a lot of watts. That's 20,000 --

MR. BENDER: Right. If you choose to do that, your Honor, you have to --

THE COURT: 20,000 kilowatts. A megawatt is a million watts.

MR. BENDER: Right.

THE COURT: That's a lot of power. So
Let's say you start up your little megawatt factory and you're generating 20,000 kilowatts or 20 megawatts, and all you have to pay is a marginal cost?

MR. BENDER: No, your Honor, because there's a step in the process that this hypothetical misses which is, before you connect, you have to go through that process of getting an interconnection agreement, and part of that is a study to decide whether the system can handle it, and if there's an additional cost to upgrade the system to allow you to do that, those are charged to you. There is a mechanism. To the extent that there are additional costs to hook up to the system in order to sell, that's a separate process.

THE COURT: You should definitely be paying that. Who would disagree you should pay that; right?

MR. BENDER: Right.

THE COURT: But the question is should you also be required to pay a portion of the system cost that you are now using to sell electricity? Here you are making 20 megawatts of electricity and getting money for this, shouldn't you pay for the existing system? Why should you get to do it for free; whereas, the utility has to cover it?
MR. BENDER: I don't think anybody is arguing that you should do it for free, but the question is are there additional costs for it; if so, what are they? And those aren't in the record, and the charge that was calculated here is not based on any of those types of costs.

THE COURT: What's it based on? You were pretty good last time and it was at the end of the hearing, but you were the one that in some way triggered me to go back and read the record.

MR. BENDER: What the costs are based on are marginal additional costs to We Energies, hypothetically, if they needed to draw more transmission, if they needed to build a brand-new combustion-turbine power plant, and then a series of other costs divided by peak use. It's not based on production by a facility. It's based on if We Energies was required to draw more power, how much would that additional increment cost, which is the other end of the spectrum from selling power onto the distribution system which actually reduces all of those costs. It reduces the need for additional combustion turbines, if it were even needed. It reduces the amount of transmission because it consumes below the transmission system.
THE COURT: What do you think is the right measure for somebody that's got his solar factory going?

MR. BENDER: One, it would require some data and analysis which we have none, and the data analysis would be is there additional costs to the system to connect that person. What I'm representing to the Court is that is part of just getting the permission to interconnect in the first place. If there are those additional costs --

THE COURT: But no other costs? I mean, the grid is there. They are going to use this grid to take the electricity, and then the electricity goes wherever electricity goes. Maybe you shouldn't be paying for the turbines because this is an alternative to turbines, but don't you think they should also pay for a share of the transmission lines and the distribution system?

MR. BENDER: No because it doesn't use the transmission lines. It's below the transmission system. So if you have a transmission line coming in, high voltage drops down to a substation and then from there kind of out in the neighborhoods, and we're talking about electricity that's produced on your house and used by your neighbor. It's below the
transmission system. None of it flows backwards onto
the transmission system.

THE COURT: So you could have a 20-megawatt
factory and it's just going to your neighbor. What
are they doing with it?

MR. BENDER: We are talking about the
300-kilowatt size in the rates we're talking about
here today, your Honor.

THE COURT: Even that, 300 kilowatts still
is a significant amount of electricity.

MR. BENDER: It's significant but not
compared to what it would take to back feed onto the
transmission.

THE COURT: So because there's no back
feeding, what's the right measure?

MR. BENDER: It would be what, if any, use
is there of the -- I mean, the fundamental point is
that the charges should be based on how much they're
using the system. That's not what the charges here
are. They're marginal costs if the utility were
required to go out and buy additional power and
additional transmission. But at the end of the day,
the charges that are imposed are not based on selling
electricity from the customer to the utility.

THE COURT: So it would be legitimate to do
that. You're just saying that wasn't how it was based.

MR. BENDER: That's not how it's based in this record, that's correct.

THE COURT: Mr. Wilson, do you want to respond at all?

MR. WILSON: No, your Honor.

THE COURT: Mr. Mahfood?

MR. MAHFOOD: Just a quick point, your Honor, that the demand charge was derived as a function of those costs that Mr. Bender described but a percentage of those -- 14.5 percent -- to recognize that the utility has to have a backup system in place. The distributed-generation customers are obtaining a backup service so the charge was based on the reserve margin that the utility must maintain. The distributed-generation demand charge was a function of those costs multiplied by 14.5 percent, so just to make that clear.

THE COURT: They're not paying 100 percent as it is. They're paying significantly less.

MR. MAHFOOD: Correct.

THE COURT: One in seven. One-seventh. Anything else you want to say, Mr. Bender? I am going to go ahead and finish up this case.
MR. BENDER: No, your Honor. Just that, as we've struggled to find the evidence in support of some of these assertions that we've just heard, that there's even disagreement among the respondents on whether there's additional services or whether it's the same service. The overall theme here is that this charge is still in search of a justification in the record. It seems like we're backing into or trying to back into a justification and scour the record to see if we can find some evidence in support of it.

THE COURT: Although, that's kind of what we do on appeals.

MR. BENDER: That's not what the commission is supposed to do. The commission is supposed to make a decision based on the record and not make a decision and see later, if someone appeals, whether they can come up with a justification on appeal and find some evidence to support it.

THE COURT: I don't know if that's a fair characterization of what the commission did. I think they called it the way they saw it. I don't really fault their work on this case. They've done a great job in this case I think. Whether it's persuasive or not is another question but at least in terms of
being a pretty polished product. Also, we often do
look for things in the record that support it even if
they're not exactly stated in the decision here.
Anything else you want to say, Mr. Wilson?

MR. WILSON: No, your Honor.

THE COURT: Mr. Mahfood?

MR. MAHFOOD: Your Honor, I think this case
involves an exercise in discretion of the
commission's function to set rates. They have been
delegated that function by the legislature. They
have a special expertise. They applied that
expertise in developing the distributed-generation
demand charge identifying the subsidy that it creates
-- that distributed-generation customers create, and,
respectfully, the trial court should apply the
deferential standards that are present throughout 227
and the case law describing it. Thank you.

THE COURT: Thanks. I've already addressed
the issue. I'll just reiterate it since this will be
my ruling. I did address the issue of what it means
when we talk about the PSC decisions being
legislative, and as I said before, I think that's not
-- that might be historically the case that the
legislature established rates and then the
legislature created the PSC. If we think about the
actual functions of rate setting, while they do
involve a great deal of discretion and expertise,
they are not on the order of legislation. You
actually would not want a legislature doing this, and
it's really, matter of fact, just I think
historically that we didn't have an institution in
place when rate setting became necessary and,
therefore, the legislature took over; although, the
courts were involved, too, apparently.

But by now, a hundred years later, that's plainly
not how we're going to do it, and I think it's wise
we don't do it that way. The process that's involved
here, at least as established by the very entity that
we're invoking, the legislature, that process creates
a class-one contested-case proceeding which is
subject to the provisions of Chapter 227 regarding
agency adjudication, and it's subject as well to
judicial review, the standards of review being those
set out in 227.57. I think that's what it is. It's
not 58. Some reason I want to say 57. There is a
whole list of them.

And I do, as I said, disagree in that regard as
well with Wisconsin Electric that the standard is
great deference. The actual standard depends on what
we're looking at, and that's what we do in any agency
case but recognizing in this case it really is pretty
general. It is a pretty broad delegation of
authority, and I don't think the commission would
disagree with this. The very breadth of the
delegation requires that the commission, as they said
themselves, establish fair rates I think was the
phrase. With respect to setting of utility rates,
the commission's fundamental obligation is to set
just and reasonable rates that ensure the adequate
provision of utility services. The greater your
discretion, in a way, the higher the calling of being
just and fair. Discretion is not an excuse to be
arbitrary. Discretion is the opportunity to take
into consideration all of the evidence in a
thoughtful, fair, unbiased way that really should
involve some critical thought as well because these
are pretty serious decisions.

Let me address the question of bias because we
haven't been talking about that. I kind of
vacillated on this one a little bit. I was initially
fairly sympathetic to Commissioner Nowak. When I
read her recusal decision, it did strike me as -- it
wasn't so much what she said before, but the recusal
decision itself seemed to disclose she had come up
with this conclusion regarding distributed generation
not paying its fair share, which really is a key question in the case, and she also said -- when you read it in context, it was okay, but when I first read it, it struck me as a funny statement. She said her mind was not irrevocably closed or something like that, and she didn't really mean that. She meant it, but she didn't mean this was her standard: My mind is not irrevocably closed. Imagine going to sentencing and the judge says my mind is not irrevocably closed on the issue of whether to send you to prison. You'd say "could I get a different judge?" But I don't think that's what she meant. She was just saying that wasn't the case, and then she says "I did consider all this."

The thing that made it a little close was that it really was the central issue of the case or this part of the case -- I understand this is only a fraction of what the PSC was doing in this case -- how distributed generation should be treated, but I took that to mean -- first of all, we presume the integrity of the agency. Whatever else you say about distributed generation, it does pose some interesting conceptual issues that I would be surprised that a utility regulator, at least who's been on the job for a few years, would not have at times thought about
it. This is part of what they do is think about these things, and as she said, you could have done this by a general policy development process, but sometimes it's done through the context of adjudicating cases.

So, all in all, in the last analysis, I just did not find sufficient bias to require this to be remanded and have her be recused. Again, what I said last time: Does this mean she couldn't decide any of these cases ever because she had thought about it two years ago and had some conclusions? We only have three commissioners, so if we start bumping them for preconceived ideas, we're not going to have a quorum. It's just a practical reality.

My overall assessment of Commissioner Nowak's decision is that she had -- as she said, this was something that comes up in the process of her job, and she had thought about it, she had certain leanings, and there is -- I was ready to go with the idea of people who consume less than average in some way are being subsidized by people who consume more than average. This is a matter of mathematical analysis. I don't think it's too weird. Anyway, I'm not finding that. Let me go back then to what I am finding.
Well, the petitioner was essentially framing this as a substantial-evidence case. There does relate to this, though, the issue of unjust discrimination, which is a legal standard and is mentioned even by the commission here. There were two grounds for the commission's decision factually, or I should say factually slash policy. One was the view that DG customers were receiving an unfair subsidy.

As our discussion today reveals, while I initially thought yeah, that makes some sense, and when we talked about that last time, I had my Exhibit 1, but when I went back and looked at the record, and it was prompted by Mr. Bender's criticism last time who said, hey, that's all well and good but there's no data on this, and then I asked Mr. Wilson let's see where they calculated it.

So we opened up the book, and it turned out all they did was calculate the average cost. There was nothing specific to this class of users. In fact, we've talked about this over and over this morning. There really is no evidence of any concrete kind that, in fact, DG users even consume more than other users let alone to what degree -- I'm sorry -- consume less than the other users. They use less than themselves most likely; although, that depends
on, if their thing were knocked out, maybe they would just say, okay, we're those kind of people, we don't want to use it, we don't want to use it unless it's coming from the sun so we're not going to use it at all, it's possible, but most likely, between themselves, they're using less electricity, but that's not the relevant consideration, and it's not stated as a relevant consideration.

The consideration is they're using less than other folks that are consuming electricity; there just isn't any evidence on that. There's no evidence that they use more at peak. There's no evidence that there is some spike in usage when the cloud passes in front of the sun or how that would correlate to costs. The strong impression this Court has when we look at the evidence that was presented is, when I looked at Mr. O'Sheasy and Mr. Rogers' testimony, is these are stories, but they're not empirical, and they happen to be stories spun by a company that is facing competition from the people who are now going to be paying these higher rates. So if these were our standards in most cases, let's hear the competitor tell us what his competitor is doing but without evidence, but without any empirical evidence, we would expect it to be skewed. I don't know if
it's skewed or not skewed. He doesn't even say the things that Wisconsin Electric says he says.

If you look at page 12 of the brief, there were two successive citations that were not in the record. They have also and I think he has also and I think the commission has also confused NP and NM. They make no distinction even though both rates are being challenged. But Wisconsin Electric is giving me -- they don't even have in the record that -- he might believe it, but I don't think they have in the record that he even believes that they're using less electricity than your average user.

Even if he did believe that, there is not empirical evidence to support that, and I do not see why this company couldn't come up with the empirical evidence to show us those things. Show us what the actual usage is. If you want to say there's spikes, give me somebody who is actually off the grid who is producing all their energy, any of those things, they're all discussed, but none of them are demonstrated. And then as Mr. Bender was saying, and I have the same frustration, it really seems like, depending on whether the cloud is in front of the sun or not determines whether these people are the same as everybody else or they're different from everybody
else. It seems to be a -- depending on whether it benefits Wisconsin Electric, they're just like everybody else or they're causing these spikes. That was the one ground for the decision was the unfair subsidy which was based on, without evidence, the idea that these DG users are actually consuming less. Now, it was somewhat ironic that the courts told Loehr you shouldn't be too concerned about fairness because, once we get the overall numbers added up, how they get distributed is for the commission to determine, but it's the commission that invokes fairness first. And I think it's fundamentally unfair to say the DG user is deriving a subsidy -- parentheses -- but we have no evidence of this -- close parentheses. The DG user is deriving an unfair subsidy but the person who is energy efficient isn't, and the argument on this seems to go back and forth. At times they seem to say, well, it would be desirable if we did that, if we charged everybody the demand charge, but we can't do that, so we're going to just charge this very small minority who just happen to be our competitors.

The other grounds for the decision were price distortions; that people are putting up too many solar panels because they think the marginal price of
electricity is about 13 cents per kilowatt-hour, maybe 14 cents.

Incidentally, on Exhibit 1 when we went over this last time, I said I knew I got those numbers somewhere. 13 was the energy charge, 13 cents per kilowatt-hour, but 3 cents per kilowatt-hour is the real short-term marginal costs, and I think it was maybe 14 cents, but it was in the commission's decision. I found that when I was looking through the commission's decision again. I think it was on page 67. Yes. "WEPCO witness Mr. Rogers also presented testimony that the variable cost of energy, as represented by the marginal cost of energy, has an approximate value of .0301 dollars per kilowatt-hour," we'll call it 3 cents, "which is significantly lower than the current energy charge of 0.13945 per kilowatt-hour." We'll call that 14 cents. So that's where I got those numbers for my Exhibit 1. It was done by memory but it was close.

So the argument on price distortions is that we would like marginal-cost pricing, to the extent possible, and because there isn't people who are facing the choice do I put a solar panel up, we don't. We really deviate from marginal-cost pricing as those numbers indicate; although, these seem to be
short-term marginal costs rather than maybe
longer-term marginal costs. Somebody who's facing
the decision do I put a solar panel on my roof is
making that decision in the belief that he or she is
going to save 14 cents per kilowatt-hour rather than
the real social cost of 3 cents per kilowatt-hour.
So that's the theory there. And, again, I have
enough economic background to say I can see that. I
have a little bit of doubt as to using marginal
costs, if it's short-term marginal costs, because
many costs are not -- many costs are marginal if you
go long enough.

Certainly things like generating capacity is a big
one. Here we have a system that has too much
capacity. I'm just trying to think economically. I
think would we say it doesn't have a marginal cost?
The capacity is -- anyway, we'll skip that idea. The
thing is, though, that this problem with the price
structure, well, it's created by the very tariff that
Wisconsin Electric has proposed and the PSC has
endorsed, and it creates the same distortions for any
electricity user.

So, again, the same goes back to, oh, people are
going to put up too much insulation; although, that
would be for electric heat. People are going to buy
refrigerators that are too efficient or people are
going to turn off their lights too early when they
shouldn't be doing this. That distortion that exists
for DG exists for everybody and is created by the
tariffs that have been established, and if you
correct it as to only one class of a tiny class of
customers, you haven't fixed the distortion; you've
just sort of switched it so that people now, instead
of putting solar panels on their roof, are going to
buy too efficient of refrigerators. Because the one
class of people are facing true marginal costs,
according to this pricing theory -- namely, the DG
measures -- and everybody else is facing the highly
inflated marginal costs, so the DG customer is not
going to be saving 13, 14 cents per kilowatt-hour but
will only be saving 3 cents per kilowatt-hour, but
they can save 14 cents by putting in energy-efficient
light bulbs and energy-efficient refrigerators. The
distortion isn't in any way eliminated; it's just a
new distortion.

Of course, again, it's a distortion that exists as
to other customers using electricity. Basically the
idea is people are not using enough electricity.
They really should know that electricity is a lot
cheaper than we're telling them at the margin, the
marginal cost of electricity, and they also should be using more of it, but we're only going to do that as to one tiny class of customers, the DG customers. Even that analysis only treats the very short-term marginal costs as the relevant measure which seems particularly questionable given that there is excess capacity.

Another thing that wasn't really well addressed by the commission, although I don't know that this would be different for DG customers than anybody else that's being efficient in their energy use, there are positive externalities to not using -- or rather there is negative externalities to the creation of electricity through the use of carbon sources. I don't know if we use coal anymore, natural gas, whatever else they use. Somebody that has a solar panel on their roof is creating what we call clean energy, and there are these negative externalities that most people agree exist from using carbon-based power. The commission, when they address the EPL, don't seem to consider that, but they go back to the idea of unjust discrimination and unfair discrimination and price distortions.

At the same time, there probably is some potential benefit that also isn't addressed having people
produce their own electricity and that, in the long-term, it creates competition against what is a monopoly, and really monopolies are not an ideal way of providing for stuff in the economy. It's considered a necessary evil, but to the extent this monopoly power could be reduced, it solves a number of problems. But those are sort of just some side thoughts I had on the very issue of why we care about price distortions as to this tiny group of people but nobody else.

The main problem is that; is that we care about this tiny group of people. There's reasons to question the price distortions that are being claimed, and those were the thoughts I just had about competition and externalities, but the more important thing is it doesn't get rid of price distortions at all; it just distorts it in a different way because those people that aren't required to pay these charges face the energy charges, their relevant marginal costs, and end up under consuming or having too much efficiency.

But my overall assessment of this is, notwithstanding the great deal of deference that's given to this agency but actually maybe because so much deference is given to this agency and we really
need them to do it in a thoughtful critical and fair way, I do not think a reasonable person would reach
the decision they reached based on this record. I don't think a reasonable person could reach it
because there's just a dearth of data to support the conclusions that are being relied on regarding
subsidies and the like, subsidies and price distortions both. The language of the -- well, I don't know. That's my honest assessment of it. As I said, not only is there not any evidence and then the evidence that's been cited isn't what was said, the evidence is contradictory, but even without contradiction, it still has no empirical basis.

So I'm going to reverse the decision as to the tariffs as to those classes of customers that have been challenged today; namely, the NM and NP. I will say this about the NM: I am definitely more sympathetic to the commission's view on the NM -- or the utility's view on NM, and I thought Mr. O'Sheasy said it pretty well when he said this problem is even exacerbated when you got people who are essentially selling their electricity onto the grid, but it still lacks evidence, and I think maybe that one, that can be fixed. And the NP, that might be fixed, too, but I think, first and foremost, we need to get a handle
on what's actually being used and how does that actually compare to anybody else.

But even then keep in mind we do have a statutory standard that prohibits unjust discrimination, and I don't have to reach it today because, on this record, I don't think this decision stands even on the basis that the commission stated. But the idea that this class of customers is different from every other user who uses less than average has not yet been credibly asserted to me in this court or in this record or even mentioned in the commission's decision. So I think, if they are going to go back and do that, they should address that issue in good faith: Why is it we're thinking these folks are different from somebody that puts in an energy-efficient refrigerator?

But that's not the basis of my decision. NP, like on NM, there's something there, and that's probably where Commissioner Nowak and others start in their thought process, and then they start with this example. It's a good thought. We always call them thought experiments in social science: What about the DG customer that consumes no electricity but they're still on the grid and they want to be on the grid? Those are legitimate questions. But I don't
think they're answered by just asking the question. They have to be answered in the context of a realistic evaluation of what is really there, what's really going on, what the data really shows, and that's certainly available, to my mind, to this company.

So that will be my ruling. If you want to give me a proposed order, I'll hold it for -- you can just circulate it with them. Here's all the order needs to say: For the reasons stated on the record of the hearing held October 30, 2015 and the hearing held whatever the other date was, just in case there's some gem in there, but mostly it's what I just said -- you got to get the right word for me -- the tariff of the PSC as to the COGS-NM and COGS-NP is it vacated, reversed?

MR. BENDER: We'd like to clarify that it's vacated and not merely remanded which would allow it to go into effect in the interim. For petitioners, we prefer it vacated. To be clear that, by reversal, it means vacatur as well.

THE COURT: That's what I actually intend.

MR. WILSON: It seems to us that what you're asking is that the commission conduct additional fact finding to determine if the NM and NP
are warranted, and that seems to argue in favor of remand for further fact finding.

THE COURT: We didn't discuss this issue at all. I don't know what the law is on it. My inclination is just say it's done. I don't want to do this anymore. I don't want it to come back to me, to be honest. I'll do it if that's necessary, but I don't think these rates should go into effect. So that is my intent. Whether it's a remand or it's a non-remand, these rates shall not go into effect unless and until something else is done. I don't think I can preclude them from redoing it, can I?

MR. MAHFOOD: Can I just clarify one thing. You indicated that the tariffs themselves are vacated.

THE COURT: That's what I said. I said help me on this because I don't know what the technical word would be.

MR. MAHFOOD: You're just referring to the demand-charge aspect of those tariffs.

THE COURT: COGS-NM and NP charges.

MR. MAHFOOD: Demand charges.

THE COURT: Is there any other charge?

MR. BENDER: If I understand counsel's clarification, I think we would join. There's more
to the tariff than the pieces that were challenged,
and so we'd specify that it's the demand charges that
are vacated.

THE COURT: Okay. That's my intent. And I
don't mean to throw out what we call the baby with
the bath water.

MR. MAHFOOD: Thank you.

THE COURT: Why don't you do this, though:
If you have any issue on whether I should remand or
shouldn't remand, my vote, for what it's worth but
I'd certainly listen to you guys, I would like to --

MR. WILSON: It's worth something.

THE COURT: I can let the PSC do whatever
it does. I don't know. The PSC could say let's do
this next year or the PSC could say let's go back and
do it now. I don't really think I should be telling
them what to do on that. If they want to leave it,
it's a very small amount of revenue. So that would
be my vote is just to have them prohibiting these
rates, and the PSC can do whatever is lawful under
the circumstances. Is that okay?

MR. BENDER: Yes, your Honor. We didn't
want there to be ambiguity about whether the rates
could go into effect notwithstanding that the agency
is supposed to take this up some time in the
indefinite future. The rates will go into effect in two months and people will be paying them despite the problems with them, and that's what we're seeking to avoid.

THE COURT: Why don't you prepare a proposed order and discuss it with Mr. Wilson or Mr. Mahfood and preferably then you can give me something that's agreed upon as to the language just to effect what the Court intends but not to effect what I don't intend. I trust you guys on that more than I do myself since this is a little specialized.

If there's any issue on remand or not remand -- and, again, my preference is for me not to exercise further jurisdiction in this case, just to be done with it and send you guys back the record, assuming no appeal is taken but maybe one will be. I don't know what we do with the record then. You'll have to tell me. But, anyway, not to continue to exercise jurisdiction over this matter is my preference. But if you guys find that there's some reason I should, then let me know; that is, if there should be a remand. If there is a dispute on that issue, again, you should let me know there is a dispute on that issue, and we'll address it in due course. Is that okay?
MR. WILSON: Yes. We'll discuss it amongst counsel, and if we come to logger heads, we know who can resolve it.

THE COURT: Anyway, I found the case interesting. It takes a special breed of cat to be able to say that, but I guess we're all that special breed of cat, and that's why I did apply to be general counsel there because I thought I could find that interesting. But I will say this: I'm actually glad I did this job instead. Eddy Marion did the opposite. Of course, he was a circuit judge, and then he did a bunch of things. He was with the governors's office, with DHFS, and then he became PSC. I assume he's retired.

MS. SMITH: He's still doing some work in the area.

THE COURT: Okay. Thank you very much. It was a pleasure, and thanks a lot for the fine lawyering. Thank you, Lijana. We're adjourned.

(Adjourned at 11:12 a.m.)
STATE OF WISCONSIN   
COUNTY OF DANE

I, THERESA L. GROVES, Official Court Reporter, do hereby certify that I took in shorthand the above-entitled proceedings held on the 30th day of October 2015, I reduced the same to a written transcript, and that it is a true and correct transcript of my notes and the whole thereof.

Dated at Madison, Wisconsin this 20th day of November 2015.

Theresa L. Groves, RPR
Official Court Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.