

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP911

Cir. Ct. No. 2014CV169

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RENEW WISCONSIN,

PETITIONER-RESPONDENT,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

RESPONDENT-APPELLANT,

WISCONSIN PUBLIC SERVICE CORPORATION,

INTERVENOR-RESPONDENT-CO-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
RHONDA L. LANFORD, Judge. *Reversed.*

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Public Service Commission of Wisconsin (the Commission) and Wisconsin Public Service Corporation (WPSC) each appeal the

circuit court's order remanding the Commission's Final Decision for further consideration. This dispute arises from (1) WPSC's application to reduce the capacity limit for customer-owned energy generation systems (which we will call generation systems) eligible for the Pg-4 tariff rate from 100 kW to 20 kW, and (2) RENEW's proposal to change the energy netting period for Pg-4 customers from monthly to annually. The Commission granted WPSC's application to reduce the capacity limit and denied RENEW's proposal to change the netting period.

¶2 RENEW petitioned for judicial review of the Commission's Final Decision. The circuit court remanded to the Commission for further consideration. On appeal, the Commission argues that we should reverse the circuit court's order and affirm its Final Decision because that decision is "reasonable, articulates a rational[] basis for the conclusions made[,] and is based on substantial evidence in the record." WPSC also argues that we should affirm the Commission's Final Decision because it is supported by substantial evidence.

¶3 RENEW argues that we should affirm the circuit court order remanding to the Commission for further consideration because the Commission's decision "lacks sufficient explanation to be reviewable" and "is not supported by substantial evidence that generating systems larger than 20 kilowatts or annual netting cause the utility to under-collect fixed costs or provide a cross-subsidy." RENEW also argues that the Commission's decision is arbitrary and capricious because "it treats customer-generators served by [WPSC] differently than customer generators served by other large investor-owned utilities in Wisconsin" and because it targets generating systems larger than 20 kW as receiving a cross-subsidy while ignoring the half of customers who also receive the cross-subsidy because they buy less than the average amount of electricity. For the reasons set forth below, we agree with the Commission and reject RENEW's arguments.

Therefore, we reverse the circuit court's order and affirm the Commission's Final Decision.

BACKGROUND

¶4 We briefly summarize the undisputed facts and relate additional pertinent facts in the discussion.

¶5 The Commission is an independent state agency charged with jurisdiction to supervise and regulate every public utility in Wisconsin. *See* WIS. STAT. § 196.02(1) (2013-14).¹ WPSC is a public utility in Wisconsin that provides electricity and natural gas service to customers in Wisconsin. RENEW is a not-for-profit organization that represents approximately “115 renewable energy companies doing business in Wisconsin as well as approximately 300 individuals who are electric ratepayers in Wisconsin.”

¶6 WPSC offers a net energy billing program (Pg-4 tariff) that allows customers with renewable resource generation to offset their monthly electric consumption, also known as net metering, and, at times, “push” or sell excess electricity back to the WPSC system. Under the Pg-4 tariff, self-generating customers receive a credit at the applicable retail rate for self-generated electricity up to the customer's monthly usage, and a credit at the lower “wholesale” rate for self-generated electricity in excess of the customer's monthly usage.² In other words, if a customer uses more electricity than she generates during the course of

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² The parties sometimes refer to this lower “wholesale” rate as an “avoided cost rate.” We refer to it as the “wholesale” rate.

the month, the customer pays WPSC at the applicable retail rate for the “net” amount (total used minus total self-generated). If the customer generates more electricity than she uses during the month, her net amount purchased from WPSC is zero and she also sells the excess amount (total self-generated minus total used) to WPSC at the lower wholesale rate. The period over which this net energy use is calculated is called the netting period.

¶7 WPSC’s Pg-4 tariff is limited to customers with generation systems under a certain capacity limit. Prior to 2011, that capacity limit was 20 kW. In 2011, the Commission increased that capacity limit to 100 kW.

¶8 In March 2013, WPSC filed an application with the Commission to adjust its electric rates, which included a request to reduce the generation system capacity limit allowed under the Pg-4 tariff to “20 kW or less.” Public hearings were held in September and November 2013 to receive comments and testimony.

¶9 RENEW intervened in the proceedings and, pertinent to this appeal, proposed that the Commission: (1) “[m]aintain the current 100 kW size cap”; and (2) “require that WPSC use an annual, as opposed to monthly, netting period.”

¶10 In December 2013, the Commission issued a Final Decision in which it reduced the capacity limit allowed under the Pg-4 tariff from 100 kW to 20 kW and maintained the current monthly netting period.

¶11 In January 2014, RENEW filed a petition for judicial review of the Commission’s Final Decision as to both the capacity limit and the netting period. RENEW argued in its petition that the Commission’s decision is arbitrary because it lacks a sufficient explanation and lacks a factual basis in the record, contrary to WIS. STAT. § 227.57(6).

¶12 The circuit court accepted RENEW’s arguments. Accordingly, the court remanded to the Commission for further fact-finding and to establish a sufficient record on the capacity limit and the netting period.

DISCUSSION

¶13 As already stated, the Commission argues that we should reverse the circuit court’s order and affirm the Commission’s Final Decision because that decision is “reasonable, articulates a rational[] basis for the conclusions made[,] and is based on substantial evidence in the record.” WPSC also argues that we should affirm the Commission’s Final Decision because it is supported by substantial evidence. RENEW argues that we should affirm the circuit court order remanding to the Commission for further consideration because the Commission’s decision “lacks sufficient explanation to be reviewable” and “is not supported by substantial evidence that generating systems larger than 20 kilowatts or annual netting cause the utility to under-collect fixed costs or provide a cross-subsidy.” RENEW also argues that the Commission’s decision is arbitrary and capricious because “it treats customer-generators served by [WPSC] differently than customer generators served by other large investor-owned utilities in Wisconsin” and because it targets generating systems larger than 20 kW as receiving a cross-subsidy while ignoring the half of customers who also receive the cross-subsidy because they buy less than the average amount of electricity. As we proceed to explain, we reject RENEW’s arguments, reverse the circuit court’s order, and affirm the Commission’s Final Decision.

A. *Standard of Review*

¶14 “We review the decision of the Commission, not that of the circuit court.” *Wisconsin Bell, Inc. v. Public Serv. Comm’n of Wisconsin*, 2004

WI App 8, ¶16, 269 Wis. 2d 409, 675 N.W.2d 242 (2003). The Commission’s orders are “prima facie valid, and to be upset [they] must be shown to be otherwise by clear and satisfactory evidence.” *Wisconsin Power & Light Co. v. Public Serv. Comm’n of Wisconsin*, 148 Wis. 2d 881, 888, 437 N.W.2d 888 (Ct. App. 1989) (quoted source omitted). Our review of the Commission’s decision is “confined to the record.” WIS. STAT. § 227.57(1). “[W]e review the commission’s order to determine whether it is arbitrary or capricious and whether the commission’s findings of fact are supported by substantial evidence.” *Wisconsin Cent. Ltd. v. Public Serv. Comm’n of Wisconsin*, 170 Wis. 2d 558, 568, 490 N.W.2d 27 (Ct. App. 1992). Nevertheless, “[w]e may not substitute our judgment for that of the commission on an issue of discretion.” *Id.*

B. Sufficient Explanation

¶15 RENEW concedes that the legislature granted the Commission discretion in setting electricity rates and tariffs. However, RENEW argues that the Commission’s decision to reduce the generation capacity limit allowed under the Pg-4 tariff and to maintain the monthly netting period “lacks sufficient explanation to be reviewable.” As we will explain, we reject RENEW’s argument because the Commission’s Final Decision provides sufficient and rational explanation.

¶16 “[A]dministrative agencies are to be given broad power within their respective jurisdictions and this court is hesitant to interfere with administrative determinations.” *Transport Oil, Inc. v. Cummings*, 54 Wis. 2d 256, 265, 195 N.W.2d 649 (1972). “In order for this balance between the administrative and judicial branches of government to be effective, however, it is essential that the agency exercise the power the legislature has given it.” *Id.* “Such power requires a clear articulation of the reasons for a particular determination.” *Id.* However, “a

detailed or explicit explanation of the [agency’s] reasoning is not necessary.” *Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶49, 362 Wis.2d 290, 865 N.W.2d 162. “The decision need only contain enough information for the reviewing court to discern the basis of the [agency’s] decision.” *Id.*

¶17 Although the Commission’s explanation could benefit from greater specificity, we conclude that it contains enough information for this court to discern the basis of the Commission’s decision. The Commission decided that it is “reasonable to modify the Pg-4 tariff so as to reduce the capacity limit from 100 kW to 20 kW per customer premises,” and that it is “reasonable to retain WPSC’s existing monthly netting structure for the Pg-4 tariff.” The Commission based its decision on its finding that “interest in customer-owned distributed generation will continue to increase” and that “the focus should be on getting the right policies in place before this becomes a more significant cost issue.”

¶18 As to its decision to reduce the capacity limit, the Commission explained that “given the fixed-cost recovery issues raised by the utility, the identified uncertainties, and the potential for unreasonable cross-subsidies, the Commission believes that a conservative approach is warranted with respect to the Pg-4 tariff.”³ The Commission found “it reasonable to reduce the capacity limit for WPSC’s Pg-4 Net Energy Billing service from 100 kW to 20 kW.” The

³ As we explain in greater detail below, the “fixed-cost recovery issues” and the “potential for unreasonable cross-subsidies” refer to the fact that WPSC does not recover all of its fixed costs from the fixed charge component of the monthly utility bill, but uses the variable charge component to recover some of its fixed costs, so that customers who use more electricity end up subsidizing customers who use less electricity. Here, the concern is with how the capacity limit and the netting period may affect the amount of that cross-subsidization by non-generating customers who are not eligible for the Pg-4 tariff.

Commission explained that “[l]owering the capacity limit of the Pg-4 tariff will limit the risk of possible cross-subsidization by non-participating customers.”

¶19 As to its decision to maintain the monthly netting period, the Commission found that there is “merit in the concerns raised by WPSC regarding possible fixed cost recovery issues associated with net metering, and possible cross-subsidization by non-participating customers [customers not eligible for the Pg-4 tariff].” The Commission found that “there is insufficient evidentiary support in the record to support modifying the netting structure of WPSC” as proposed by RENEW and, therefore, concluded that it is “reasonable to retain the existing monthly netting structure for WPSC’s Pg-4 Net Energy Billing Service.”

¶20 In other words, the Commission decided to act conservatively with respect to WPSC’s ability to recover fixed costs from net-metering customers and to limit subsidization by customers who do not participate in net-metering (cross-subsidization), and to focus on “getting the right policies in place before this becomes a more significant cost issue.” The Commission believed it could curb the magnitude of any potential cross-subsidization by limiting the availability of the Pg-4 tariff to small-generators and by maintaining the current monthly netting period. In sum, we conclude that the Commission’s Final Decision provides a sufficient and rational explanation.

C. Substantial Evidence Supporting the Commission’s Factual Finding

¶21 RENEW argues that there is a lack of substantial evidence in the record to support the Commission’s factual finding. We begin by examining the substantial evidence in the record supporting the Commission’s finding that there are fixed-cost recovery issues and a potential for unreasonable cross-subsidization

by non-generating customers. We then reject RENEW's arguments to the contrary.

¶22 “We review the agency’s factual findings pursuant to § 227.57(6), STATS., under which we will ‘set aside agency action or remand the case to the agency if [we find] that the agency’s action depends on any finding of fact that is not supported by substantial evidence in the record.’” *Wisconsin Prof'l Police Ass'n v. Public Serv. Comm'n of Wisconsin*, 205 Wis. 2d 60, 67, 555 N.W.2d 179 (Ct. App. 1996) (quoted source omitted) (WPPA). However, the “substantial evidence test is not weighing the evidence to determine whether a burden of proof is met or whether a view is supported by a preponderance of the evidence. Such tests are not applicable to administrative decisions.” *Wisconsin Ass'n of Mfrs. & Commerce, Inc. v. Public Serv. Comm'n*, 94 Wis. 2d 314, 321-22, 287 N.W.2d 844 (Ct. App. 1979) (WMC). “Rather, the substantial evidence test is satisfied when reasonable minds could arrive at the same conclusion as the commission when taking into account all evidence in the record.” *WPPA*, 205 Wis. 2d at 67. “We do not judge the credibility of witnesses or weigh the evidence.” *Id.* “We will set aside the commission’s findings only if a reasonable person could not have made the findings from the evidence.” *Id.* “[I]f two conflicting views may be sustained by the evidence, it is for the agency to determine which view of the evidence it wishes to accept.” *WMC*, 94 Wis. 2d at 324.

¶23 WPSC presented evidence that its estimated “fixed costs” to service residential customers is \$52.18, and the Commission estimated that the fixed cost of service is \$41.24. Given either amount, however, even with the increase authorized in the Commission’s Final Decision, WPSC is only permitted to recover \$10.40 per residential customer per month as a fixed charge under the approved rate structure. This means that WPSC must recover the bulk of its fixed

costs through the variable energy charge to customers (retail rate). In other words, a portion of the fixed costs is built into the retail rate of \$0.11143 per kWh, which is greater than the estimated variable cost of \$0.0338 per kWh (WPSC’s estimate), or \$0.0415 per kWh (Commission’s estimate). This rate structure, in effect, creates a “subsidy” from customers who purchase a lot of electricity to customers who purchase less electricity.⁴

¶24 Because the Pg-4 tariff allows customers to offset their electricity use at the retail rate up to their monthly use, these customers are able to offset not only their variable cost but also the fixed cost that is built into the retail rate. Thus, for the same reason—that customers who purchase a lot of electricity subsidize customers who purchase less electricity—it can be reasonably concluded that non-generating customers “subsidize” self-generating customers who “purchase” less electricity from WSPC because they are able to offset their electricity use. Indeed, the record shows at least one self-generating customer who not only offset his entire electricity use—all of his variable costs plus the fixed

⁴ For additional clarity, we provide a simple mathematical example.

Assume that an empty nest couple lives in House A and consumes 100 kWh in one month. House A’s utility bill, assuming no other fees, is the \$10.40 fixed charge plus the total variable charge of \$11.14 (100 kWh multiplied by the variable charge of \$0.11143 per kWh), for a grand total of \$22.54. This total is much less than the estimated \$52.18 fixed cost to providing service to House A, not to mention the variable cost of the electricity (100 kWh multiplied by the variable cost of approximately \$0.0415 per kWh).

Now assume that a large family lives in House B and consumes 1,000 kWh. House B’s utility bill, again assuming no other fees, is the \$10.40 fixed charge plus the total variable charge of \$111.43 (1,000 kWh multiplied by the variable charge of \$0.11143 per kWh), for a grand total of \$121.83. However, the actual cost to providing this electricity to House B is at most \$93.68 (the fixed cost of \$52.18 added to the variable cost, which is 1000 kWh multiplied by the estimated variable cost of approximately \$0.0415 per kWh).

Thus, House B with the large family is, in effect, providing a “subsidy” to House A with the empty nest couple.

costs built into the retail rate—but also generated so much excess electricity as to offset much of the fixed charge, resulting in a monthly bill of fifty-three cents. Thus, we conclude that the record includes substantial evidence to support the Commission’s finding that there are fixed-cost recovery issues and a potential for cross-subsidization by non-generating customers that the Commission could believe is unfair.

¶25 RENEW makes three arguments to the contrary, which we reject as follows.

¶26 First, RENEW argues that the actual costs of providing service to “any particular customer—or to any subset of customers, like those that self-generate some of their electricity—is not in the record.” RENEW further argues that “to the extent there is any evidence specific to costs caused by customers who self-generate some of their electricity, that evidence actually shows that such customers *cost less to serve* than a typical customer because they reduce peak demands, reduce transmission, provide a fuel hedge, and decrease system losses.” While we recognize that there is evidence in the record showing the existence of benefits, albeit non-quantified, conferred upon society by generating systems, these benefits merely provide an alternative view that the Commission could have adopted. That is, this limited evidence could have led the Commission to conclude that there is less of an issue of cross-subsidization because the benefits offset, to some extent, any potential subsidy. As we stated above, “if two conflicting views may be sustained by the evidence, it is for the agency to determine which view of the evidence it wishes to accept.” *WMC*, 94 Wis. 2d at 324. Here, in finding that there are issues of cross-subsidization and fixed cost recovery, the Commission decided to accept the view unfavorable to RENEW.

¶27 Second, RENEW argues that the substantial evidence standard requires “some actual data and some attempt to actually quantify” the cross-subsidy. Assuming without deciding that that is the standard, we disagree with RENEW’s contention that there is no significant evidence of actual data or quantification of the cross-subsidy here. One example of quantified data is from a policy analyst employed by the Commission who estimated possible “losses” of between \$93,000 and \$117,000 per year in fixed-cost recovery across the 299 Pg-4 customers when compared against averages of the entire Pg class. We recognize that the policy analyst also testified that this estimate does not include any analysis of possible system benefits or avoided costs that may be produced by the Pg-4 customers, and that “it would seem reasonable to consider both costs and benefits when evaluating cost responsibility.” However, that does not change the fact that a reasonable view from the evidence in the record is that customers entitled to the Pg-4 tariff cause some difficulty in fixed-cost recovery for WPSC.

¶28 Third, to the extent that RENEW may be arguing that the substantial evidence standard requires even more individualized or nuanced data analysis, we are not persuaded. In *WPPA*, 205 Wis.2d at 74-75, we held that “the commission’s discretionary decision did not need to be supported by statistical data showing the effectiveness of limited per-line blocking on reducing harassing calls, nor did it need to establish that limited per-call blocking was the most effective method of protecting certain groups and privacy interests.” Similarly here, we do not require that, in order to satisfy the substantial evidence standard, there be more nuanced data analysis quantifying either the cross-subsidy or the effectiveness of reducing the capacity limit and maintaining monthly netting periods in curbing this cross-subsidy.

D. Arbitrary and Capricious

¶29 We understand RENEW as making two additional arguments as to why the Commission’s decision is arbitrary and capricious. Those arguments are that the Commission does not explain why it is: (1) treating WPSC’s net-metering customers differently from the net-metering customers of other utilities, and (2) targeting only the small group of net-metering customers to solve concerns relating to fixed cost recovery and cross-subsidization rather than, more generally, the larger group of customers who purchase less than the average amount of electricity purchased. Assuming that both of RENEW’s arguments are timely, we address and reject both arguments.⁵

¶30 First, RENEW argues that the Commission does not provide sufficient explanation for its decision to treat WPSC’s customers differently. RENEW contends that the decision results in “[d]isparate treatment of similarly situated people without a rational explanation” because it “treats customer-generators served by [WPSC] differently than customer generators served by other large investor-owned utilities in Wisconsin.” For support, RENEW asserts that the net-metering tariffs for three other Wisconsin utilities allow systems larger than 20 kW and annual netting. Assuming without deciding that “similarly situated” net-metering customers should be treated the same, RENEW has not proven that WPSC’s net-metering customers are “similarly situated” to the net-metering customers of those three Wisconsin utilities. The three Wisconsin

⁵ It appears that in the circuit court, RENEW only presented the first argument. RENEW contends that its second argument is timely because it is in response to the rationale presented by WPSC on appeal. We need not decide whether RENEW’s arguments are timely because, as we explain in this opinion, RENEW’s arguments fail for other reasons.

utilities referenced by RENEW are not part of this rate setting case. RENEW fails to demonstrate that the evidence and facts pertinent to those other utilities are identical to the evidence and facts here.

¶31 Second, RENEW argues that the Commission did not sufficiently explain why it is only targeting net-metering customers to solve concerns with fixed costs recovery and cross-subsidization rather than, more generally, the larger group of customers who purchase less than the average amount of electricity purchased. We are not persuaded. RENEW's argument ignores the Commission's order to increase the authorized fixed charge for all customers. Although increasing the authorized fixed charge does not eliminate issues of fixed-cost recovery and cross-subsidization, it could reduce them. Moreover, "different schedules of rates for different classes of customers and services [for example residential versus commercial], is an entirely lawful and economically desirable form of price discrimination, insofar as regulated public utilities are concerned." *WMC*, 94 Wis. 2d at 325.

CONCLUSION

¶32 For the reasons set forth above, we conclude that the Commission's decision is sufficiently explained, supported by substantial evidence, and rational. Therefore, we reverse the circuit court's order and affirm the Commission's Final Decision.

By the Court.—Order reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

