[Service Date July 30, 2014]

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Amending and Repealing Rules in	)	DOCKET UE-112133
	)	
WAC 480-108	)	INTERPRETIVE STATEMENT
	)	CONCERNING COMMISSION
Relating to Electric Companies-Interconnection With Electric Generators	)	JURISDICTION AND REGULATION OF THIRD-PARTY OWNERS OF NET METERING FACILITIES
. . . . .	)	

Synopsis. *In this policy and interpretive statement, the Washington Utilities and Transportation Commission (Commission) discusses its jurisdiction to regulate third-party owners of net metering facilities as public service companies, and consumer protection issues surrounding such business relationships. The Commission's investigation into third-party ownership began with a study of distributed generation in early 2011, continued through the amendment of rules governing interconnection of electric generation facilities in 2013, and continued with discussions in the 2014 legislative session. In this interpretive statement, the Commission concludes that determination of whether or not a third party owner of net metering facilities is subject to Commission jurisdiction is substantially a fact-dependent determination. Weighing relevant factors articulated by Washington courts, it appears that in most cases third-party owners would be subject to Commission jurisdiction as a utility. However, in order to provide greater certainty, the Commission recommends that the Legislature clarify the Commission's jurisdiction to regulate third-party owners of net metering facilities.*

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I. HISTORY

1 In early 2011, at the request of the Washington State House Technology, Energy, and Communications Committee, the Commission conducted a study of distributed electric generation and offered recommendations for changes in statute and rules to encourage development of cost-effective distributed generation in areas served by electrical companies.[1] The study made a number of recommendations, including updating the Commission's rules on interconnecting with incumbent utilities and the need to address the third-party ownership of net metering systems. The Commission noted that "[t]o achieve a statewide policy on the question of third-party ownership, the Legislature could act to address this challenge for promoting distributed generation.[2]

2 As a result of the study's recommendations, the Commission initiated a rulemaking in this docket to determine if amending the agency's rules governing the interconnection of generation facilities was warranted. The Commission convened a workgroup of technical representatives to recommend changes to the rule. Representatives of the Washington Public Utility District Association (WPUDA), Puget Sound Energy, Inc. (PSE), Inland Power and Light Company and the Interstate Renewable Energy Council (IREC) jointly chaired the workgroup, and other stakeholders were invited to participate. The workgroup filed their recommendations with the Commission on July 13, 2012. The workgroup recommended many technical changes to the interconnection rule, however they did not address issues concerning the third-party ownership of net metering systems. The Commission received comments from stakeholders on the workgroup's recommendations on September 7, 2012.

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[1] *Study of the Potential for Distributed Energy in Washington State*, Docket UE-110667, Report on the Potential for Cost-Effective Distributed Generation in Areas Served by Investor-Owned Utilities in Washington State (October 7, 2011). This study and supporting documents are available on the Commission's website at http://www.utc.wa.gov/110667.

[2] *Id*. at 24.

3 In November 2012 and February 2013, the Commission issued draft rules that incorporated the substantive changes the workgroup suggested and proposed to clarify that customers with solar facilities owned by third parties could qualify for net metering under the relevant statute.[3]

4 The Commission filed the Notice of Proposed Rulemaking along with a small business economic impact statement with the Code Reviser on April 16, 2013, WSR 13-09-054, scheduled an adoption hearing, and provided interested persons the opportunity to submit written comments. On June 5, 2013, the Commission circulated a notice of revisions to the proposed rules and issued a notice of opportunity to respond to stakeholder comments regarding the Commission's jurisdiction to regulate third-party owners.

5 At the scheduled adoption hearing on June 13, 2013, the Commission heard argument on the issue of the agency's jurisdiction to regulate third-party owners, in addition to receiving comments on specific language in the proposed rules. The Commission heard argument on jurisdiction from: David Meyer, representing Avista Corporation; Thad Culley, IREC; Megan Decker, Renewable Northwest Project (RNP); Lynn Logen, PSE; and David Warren, WPUDA.

6 On July 18, 2013, the Commission entered an order, filed at WSR 13-15-89, adopting revised rules for the interconnection of distributed generation facilities, including renewable energy facilities such as small solar and wind, to the electric delivery systems of electrical companies subject to Commission jurisdiction. The rules are designed to encourage distributed generation, simplify and streamline the application process, and address technological advancements. In the Order, the Commission indicated that it would address the jurisdictional issue in a separate document, stating:

> In written comments, RNP and [Northwest Sustainable Energy for Economic Development (NW SEED)], jointly, and NW Energy Coalition urged the Commission to signal in this Order that a third-

[3] These draft rules, and all comments submitted in this docket, are available on the Commission's website at http://www.utc.wa.gov/112133. A summary of the comments and the Commission's response to the issues raised in the comments are also available on the Commission's website.

> party owner, in factual circumstances described in the comments, would not be subject to regulation as a public service company . . .We are authorized and encouraged under RCW 34.05.230(1) to advise the public of our "current opinions, approaches and likely courses of action by means of interpretive or policy statements." We construe the joint request by RNP and NW SEED as one to issue an interpretive statement on this issue, and we grant this request. We will issue an interpretive statement on this issue in a separate order.[4]

Policy and interpretative statements are non-binding guidance of an agency's current thinking regarding a specific issue.[5] This statement provides our current opinion regarding the Commission's jurisdiction over third-party owners of net-metered systems.[6] It is our conclusion that while it appears that in many, if not most, cases third-party owners would be subject to Commission jurisdiction, such a jurisdictional determination likely would involve a substantial, time-consuming factual inquiry. Therefore, in order to provide more certainty the Commission recommends that the Legislature act to provide a more certain conclusion to this issue.

II. DISTRIBUTED GENERATION POLICIES AND BUSINESS MODELS

7 We begin by reviewing Washington state's renewable energy policies and then discuss the common net metering and third-party ownership models.

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[4] Order Amending and Repealing Rules Permanently, Docket UE-112133, General Order R-571, ¶¶ 43-44 (July 18, 2013) (hereinafter Rule Adoption Order) (footnotes omitted).

[5] RCW 34.05.230(1) ("Current interpretive and policy statements are advisory only.").

[6] This policy and interpretive statement is limited to the jurisdictional issues surrounding third-party owners of solar systems. In a separate proceeding we are addressing the costs and benefits of distributed generation to utilities and non-participating ratepayers. *Investigation of the Costs and Benefits of Distributed Generation and the Effect of Distributed Generation on Utility Provision of Electric Service*, Docket UE-131883.

A. Washington's state policy is to promote renewable energy and net metering.

8 This state has a long history of laws, enacted by both voters and the Legislature, that encourage the use of renewable energy and distributed generation. The net metering statute provides that:

> The legislature finds that it is in the public interest to:
>
> (1) Encourage private investment in renewable energy resources;
> (2) Stimulate the economic growth of this state; and
> (3) Enhance the continued diversification of the energy resources used in this state.[7]

9 In addition, voters passed the Energy Independence Act in November 2006 to require the state's electric utilities serving more than 25,000 customers to procure 15 percent of their energy from renewable resources by 2020. In determining compliance, the utility may count distributed generation resources at double its actual output.[8] Laws governing integrated resource planning create a level playing field for distributed generation by requiring electric utilities to determine the value of transmission and distribution costs in their evaluation of alternate resources.[9] In addition, the state set a greenhouse gas performance standard that prohibits the use of certain polluting power plants and provides tax incentives for certain types of distributed generation.[10] Further, legislative findings support the adoption of rules and practices to promote renewable energy.[11]

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[7] RCW 80.60.005.

[8] RCW 19.285.010 *et seq*.; RCW 19.285.040(2)(b). The Energy Independence Act's definition of distributed generation includes more than net metering systems, which are the focus of this statement. RCW 19.285.040(11).

[9] RCW 19.280.030(1)(d).

[10] RCW 80.80; RCW 82.16.110–130.

[11] *See, i.e.,* RCW 80.28.024.

10 Most recently, on April 29, 2014, Governor Inslee issued Executive Order 14-04 in which he asked the Commission "to actively assist and support the reduction in the use of coal-fired electricity, within the scope of its jurisdiction and authority," to work with other state agencies and various stakeholders to evaluate ways to expand the use of solar energy in Washington while ensuring consumer protection, as well as to evaluate "where we must change state statutes to clarify jurisdiction and establish necessary policies."[12]

11 We find that state laws and policy, especially those most recently enacted, support the promotion and adoption of renewable energy generally and specifically for net metering to "[e]ncourage private investment in renewable energy resources." We issue this interpretive statement with these policy goals in mind.

B. Net metering business model.

12 Net metering is a program that "encourage[s] private investment in renewable energy resources" by allowing electric utilities to provide a bill credit for certain types of power produced on a customer's property.[13] Power produced from a small fuel cell, cogeneration, or renewable energy system qualifies for the program, which is most commonly used by homeowners who install rooftop solar panels.[14] The homeowner is often called the "customer," "customer-generator," or "host customer" because she hosts the power generating system. We adopt this terminology for this statement.

13 The net-metering statute includes several significant size and production limitations. Individual systems must be 100 kilowatts or smaller and be located on the host customer's premises.[15] Net metering systems are designed to be no larger than necessary to offset the host customer's electricity use, because state and federal law

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[12] Executive Order 14-04 at 6, available at http://www.governor.wa.gov/office/execorders/documents/14-04.pdf.

[13] RCW 80.60.005; RCW 80.60.010(10)(a).

[14] RCW 80.60.010(10).

[15] *Id*. Systems located on a customer's premises are commonly described as "on the customer's side of the meter."

prevent a utility from providing bill credits for power produced beyond the host customer's annual use.[16] Under state law, the total amount of net-metered generation capacity for a utility is limited to 0.5 percent of that utility's retail peak demand in 1996.[17] The following table shows each company's position as of June 2014 relative to its statutory cap.[18]

Table 1: Net Metering: Installed Capacity (June 2014)

Utility	% of cap used	Installed capacity (MW)	Current statutory cap (MW)
Avista	13%	0.99	7.6
PSE	51%	11.4	22.4
PacifiCorp	33%	1.5	4.55

C. Third-party ownership business model.

14 Traditionally, a host customer purchases a solar system with her own money and has complete ownership of the net metering system on her property. Allowing a third party to own the equipment is, in essence, a financing arrangement allowing the host customer to use a system without purchasing it. In their joint filing, RNP and NW SEED describe two types of contractual arrangements commonly used, a lease agreement and a power purchase agreement (PPA).[19] Under a lease, the third party leases a net metering system to the host customer, and through a PPA, the third party

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[16] RCW 80.60.030(5); *MidAmerican Energy Co.*, 94 FERC ¶ 61,340, 62,262 - 62,263 (Mar. 28, 2001).

[17] RCW 80.60.020(1)(a).

[18] RCW 80.60.020(1)(a). *Investigation of the Costs and Benefits of Distributed Generation and the Effect of Distributed Generation on Utility Provision of Electric Service*, Docket UE-131883, Comments of Avista, at 3-4 (Nov. 6, 2013); Washington State University Extension Energy Program, *Solar Energy in Washington State*, 8 (Table 4) (June 25, 2014), available at http://www.utc.wa.gov/112133.

[19] May 17, 2013, letter from Megan W. Decker, Michael O'Brien, Jennifer Grove, and Linda Irvine, at 2.

sells the power produced by the system to the host customer.[20] Under both types of contracts, the host customer makes regular payments to the third party and owns the electrical output of the system.[21] At the end of the contract term, the property owner may renew the lease or PPA, have the system removed at no cost, or under some contracts purchase the system at its fair market value.[22] In this statement, we use the terms third-party ownership business model or arrangement to refer to both the lease and PPA.

15 The third-party ownership arrangement may not be not available to all customers of an electric utility. Third-party owners typically condition their offer to enter into contact negotiations with customers who meet specific criteria, including ownership of the host property, a sufficient credit score (*i.e.*, 680 or higher), engineering or structural criteria, and a property's location and solar potential (including shading).[23] Proponents stress that, even with these requirements, a third-party owner's offer to

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[20] Evergreen State Solar Partnership, *Third Party Ownership of PV Systems in Washington State* 4-5 (June 20, 2013). SolarCity, a third-party owner of net metering systems, published its standard contracts on February 5, 2013. Its SolarLease is available at http://www.solarcity.com/downloads/SolarCity_Residential%20Solar-Lease%20Contract_sample.pdf (hereinafter SolarLease); its SolarPPA is available at http://www.solarcity.com/downloads/SolarCity_Residential-Solar-PPA-Contract_sample.pdf (hereinafter SolarPPA). The National Renewable Energy Laboratory (NREL) published model residential lease contracts developed by the Solar Access to Public Capital Working Group, available at https://financere.nrel.gov/finance/solar_securitization_public_capital_finance (hereinafter NREL Model Contracts). This group represents over 200 organizations in the fields of solar development and finance. These contracts are also available on the Commission's website at http://www.utc.wa.gov/112133.

[21] May 17, 2013, letter from Megan W. Decker, Michael O'Brien, Jennifer Grove, and Linda Irvine, at 3.

[22] Evergreen State Solar Partnership, *Third Party Ownership of PV Systems in Washington State* 5 (June 20, 2013). For example, SolarCity's SolarPPA provides consumers an option to purchase the system, while its SolarLease does not. SolarLease, provision 10; SolarPPA, provision 10 and Schedule A.

[23] May 17, 2013, letter from Megan W. Decker, Michael O'Brien, Jennifer Grove, and Linda Irvine, at 3.

contract is limited to entering into contractual negotiations and is not an offer to provide service.[24]

16 RNP and NW SEED also point to several benefits of this arrangement for the host customer and third-party owner. The host customer pays little or no upfront cost to have a system installed on her property and pays lower monthly energy bills, even considering the contract payments.[25] This can enable middle and low-income property owners to lower their utility bills, and produce renewable energy, without making a large capital investment.[26]

17 The third-party owner, in return, benefits from access to significant federal subsidies for renewable energy including accelerated depreciation and the investment tax credit.[27] Residential homeowners do not qualify for accelerated depreciation, and only individuals with significant tax liability (*i.e.*, those with large incomes) are able to take full advantage of the residential investment tax credit. Systems owned by third parties do not qualify currently for Washington state's tax incentive program.[28]

18 The Commission's review of Washington's net metering statutes led us to conclude that RCW 80.60 allows third parties to own net metering systems. In the Rule Adoption Order, we noted that RCW 80.60.010(10)

> only specifies certain requirements, including the type, size, location, and use of a net metering system. The law requires that the system be located on the customer-generator's property, but does not require the system be owned by the customer-generator . . . [T]here is no

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[24] *Id.*

[25] See Evergreen State Solar Partnership, *Third Party Ownership of PV Systems in Washington State* 4-5 (June 20, 2013).

[26] *Id.*

[27] *Id.* at 5-6. State tax incentives for renewable energy systems are provided in RCW 82.16.110-130. WAC 458-20-273(402)-(403) specifies that systems owned by third parties do not qualify for state tax incentives.

[28] WAC 458-20-273(402)-(403); RCW 82.16.110-130.

> requirement in statute that a customer-generator own the net metering system.[29]

19 Accordingly, the rule clarified in the definition of "interconnection customer" that "A net metered interconnection customer may lease a generating facility from, or purchase power from, a third-party owner of an on-site generating facility."[30] The rule also defined "third-party owner" as

> an entity that owns a generating facility located on the premises of an interconnection customer and has entered into a contract with the interconnection customer for provision of power from the generating facility. When a third-party owns a net-metered generating facility, the interconnection customer maintains the net metering relationship with the electrical company. A third-party owner does not resell the electricity produced from a net metered generating facility.[31]

20 At least 22 other states allow the third-party ownership of net metering systems, and in many states it has become the primary business model that facilitates the installation of distributed generation and solar power.[32] However, the use of this business model in the state of Washington is in its early stages.[33] The Evergreen State Solar Partnership attributes this to the uncertainty around the Commission's regulation of third-party owners and their ineligibility for state tax incentives.[34]

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[29] Rule Adoption Order at ¶ 33-34.

[30] WAC 480-108-010.

[31] *Id.*

[32] See Evergreen State Solar Partnership, *Third Party Ownership of PV Systems in Washington State* 10 (June 20, 2013).

[33] *Id*. at 3.

[34] *Id.*

21 In sum, Washington's net metering program was established in 1998, yet no electrical company under Commission jurisdiction is close to reaching its system-wide cap.[35] RCW 80.60 allows customers whose systems are owned by third parties to participate in net metering, but this model has not proliferated yet in this state.

III. CONSUMER PROTECTION IN DISTRIBUTED GENERATION CONTRACTS

22 Energy policy stakeholders did not raise consumer protection as a significant issue in their March 2013 and May 2013 comments in this docket. However, in the past year we have had multiple occasions to discuss these issues.[36] In the 2014 legislative session, stakeholders raised concerns regarding the business practices of third-party owners, and legislation was introduced that addressed the need to protect consumers from unfair and deceptive practices in this industry.[37] This section begins by reviewing state policies addressing consumer protection and then examines specific risks faced by consumers of solar leases and PPAs. As described below, which statutes apply to third party providers depends in substantial part on whether those providers are regulated as a utility under Commission statutes.

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[35] See *supra* ¶ 13, Table 1.

[36] We participated in meetings of the Critical Consumer Issues Forum, whose findings are summarized in *Distributed Generation: A Balanced Path Forward*, available at http://www.criticalconsumerissuesforum.com/ (July 2014). PacifiCorp provides its customers with checklists to ensure that consumers ask appropriate questions of solar providers. *See* https://www.pacificpower.net/env/nmcg/cg/re.html; https://www.pacificpower.net/content/dam/pacific_power/image/Efficiency_Environment/Net_Metering/PP_Rooftop_Solar_Checklist_long.pdf. Finally, we note the Arizona Corporation Commission's recent investigation into these issues. *Investigation of Value and Costs of Distributed Generation*, Arizona Corp. Comm'n, Docket No. E-00000J-14-0023, letter from Chairman Bob Stump (March 12, 2014).

[37] Washington H.B. 2176, 2014 Reg. Sess., §1 (January 8, 2014); Washington H.B. Report, H.B. 2176, 2014 Reg. Sess., at 7-8; *Hearing on H.B. 2176 Before the H. Comm. on Technology & Economic Development*, 2014 Reg. Sess., at 1:03:32 (statement of John Rothlin for Avista Corp.).

A. State polices protecting consumers

23 Many state policies, including the Commission's enabling statutes and rules and the Consumer Protection Act, address consumer protection in business relationships.

1. Consumer protection provisions in RCW 80.28.

24 State law provides the Commission broad authority to "regulate in the public interest, as provided by the public service laws" the "practices" of utilities.[38] Those public service laws contain a number of provisions that confer on the Commission the authority to protect consumers. All charges made, demanded or received by a regulated electrical company for electricity or "any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient."[39] In addition, such companies must "furnish and supply such service, instrumentalities, and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable."[40]

25 Further, RCW 80.28.050 requires electrical companies to publish and file with the Commission all their rates and charges. Electrical companies are prohibited from granting any undue or unreasonable preference or advantage to any person, and from engaging in rate discrimination.[41] Other laws protect residential customers from disconnection of utility service for heating during the winter months, under certain conditions, and require companies to offer customers the option of budget billing or equal payment plans.[42]

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[38] RCW 80.01.040(3).

[39] RCW 80.28.010(1).

[40] RCW 80.28.010(2).

[41] RCW 80.28.090-100. An exception is made for the Commission to approve discounted rates for low-income electric and natural gas customers. RCW 80.28.068

[42] RCW 80.28.010(4); RCW 80.28.010(7).

2. Consumer protection rules in WAC 480-100, Part II.

26 The public service laws also convey to the Commission the authority to adopt rules to "carry out its other powers and duties."[43] The Commission's consumer protection rules prescribe companies' service responsibilities, requirements for billing, service applications, deposits, disconnection of service, reconnection of service, meter testing, and payment arrangements.[44] The rules also identify specific information that companies must disclose to customers, and provide customers with protection against disclosure of certain private information.[45] Further, these rules describe companies' responsibilities for responding to customer complaints and disputes, and prohibit companies from disconnecting service while a customer is pursuing a remedy or appeal with the utility or the Commission.[46]

27 To enforce its rules, the Commission may impose civil penalties on regulated companies.[47] When issuing penalties, the Commission gives special consideration to violations that are serious or harmful to the public and to violations that affect a large number of customers.[48]

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[43] RCW 80.01.040(4). The Commission also has more specific authority to adopt rules pertaining to the "all services concerning" the furnishing electricity and rules pertaining to the comfort and convenience of the public." RCW 80.01.160.

[44] WAC 480-100-148 (service); WAC 480-100-178 (billing); WAC 480-100-108 (applications); WAC 480-100-113 (deposits); WAC 480-100-128 (disconnection); WAC 480-100-133 (reconnection); WAC 480-100-183 (meter testing); WAC 480-100-138 (payment).

[45] WAC 480-100-103 (required disclosures); WAC 480-100-153 (disclosure protection).

[46] WAC 480-100-173; WAC 480-100-128(9).

[47] The Commission is authorized to impose penalties of up to $1,000 for each violation of a statute, or Commission rule upon formal complaint and hearing, RCW 80.04.380, and to assess civil penalties of $100 per violation per day without a hearing. RCW 80.04.405.

[48] Enforcement Policy of the Washington Utilities and Transportation Commission, Docket A-120061, ¶ 15 (January 4, 2013).

3. RCW 19.86, Consumer Protection Act

28 Companies operating in Washington *not* under Commission jurisdiction are subject to the Consumer Protection Act, RCW 19.86. The act declares that unfair methods of competition and unfair or deceptive business practices are unlawful, and subject to enforcement action by the Attorney General.[49] The Attorney General's Consumer Protection Division has the authority to conduct non-binding arbitration of consumer complaints and bring civil actions for a violation of the act.[50]

29 Actions and transactions regulated by the Commission are specifically excluded from the Attorney General's purview, with the exception of actions by competitive telecommunications companies, over which the Commission and Attorney General retain concurrent jurisdiction.[51]

4. RCW 63.10, Consumer Leases

30 State law requires that leases for the use of personal property include specific consumer protections.[52] A violation of RCW 63.10 is considered an unfair or deceptive act in violation of the Consumer Protection Act, RCW 19.86, facilitating enforcement by the Attorney General.[53]

31 This law includes detailed disclosure requirements. Consumer leases must clearly state the total amount to be paid at the consummation of the lease; details on the payment schedules as well as the total amount of periodic payments; and the total amount paid or payable by the lessee during the lease term for fees, registration,

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[49] RCW 19.86.020; RCW 19.86.080.

[50] RCW 19.86.080.

[51] RCW 19.86.170; RCW 80.36.360.

[52] RCW 63.10 applies to consumer leases for personal property, where the contractual obligation does not exceed $25,000. RCW 63.10.020(4). The term "consumer lease" does not include any lease which meets the definition of a retail installment contract under RCW 63.14.010 or the definition of a lease-purchase agreement under RCW 63.19. *Id.*

[53] RCW 63.10.050.

certificate of title, license fees or taxes, and all other charges.[54] The contracts must identify any insurance associated with the lease, express warranties or guarantees, and the party responsible for maintaining or servicing the leased property.[55] In addition, the lease must include a description of any security interest held or to be retained by the lessor in connection with the lease and a clear identification of the property to which the security interest relates, a statement of whether or not the lessee has the option to purchase the leased property, and the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term.[56]

32 The law also addresses the lessee's liability at the expiration of a lease. Specifically, where the lessee's liability is based on the estimated residual value of the property, such estimated value shall be a reasonable approximation of the anticipated actual fair market value of the property upon expiration of the lease.[57] RCW 63.10.030(1) includes a rebuttable presumption that the estimated residual value is unreasonable to the extent that it exceeds the actual residual value by more than three times the average payment allocable to a monthly period under the lease.

33 Therefore, the state of Washington has many policies, administered by the Commission and the Attorney General, focused on the protection of consumer interests in business relationships. The specifics of their application depends on how the third party providers are characterized.

B. Consumers' risk in the third-party ownership business model.

34 This section discusses the risks that consumers may face when entering into a contract for services with a third-party owner of a net metering system ("company" or "third-party owner"). In the development of this interpretative statement, we reviewed

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[54] RCW 63.10.040(1)(b)-(e).

[55] RCW 63.10.040(1)(f)-(h).

[56] RCW 63.10.040(1)(i); RCW 63.10.040(1)(k)-(l).

[57] RCW 63.10.030(1).

contracts published by SolarCity and the National Renewable Energy Laboratory,[58] and complaints filed by consumers against members of a trade group representing third-party owners, including those published by the Better Business Bureau.[59] As a result of this review, we identified several major risks to consumers; each is discussed below.

1. Fraud and deceptive business practices

35 A common consumer complaint against these companies is an accusation of fraud or deceptive business practices. Several such complaints involved door-to-door sales agents who induced homeowners to sign an iPad for the purported purpose of authorizing the company to evaluate if a solar system is appropriate for the homeowner's property. Shortly after signing the iPad, the customer reports receiving an email stating that she signed a 20-year contract for the installation and lease of a solar system. Another recurring accusation of deceit involves marketing claims regarding solar production and increases in utility rates. In these instances, consumers allege that companies represent that the output from their panels is greater

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[58] SolarCity published its standard contracts on February 5, 2013. NREL published model residential lease contracts, which appear to be based on SolarCity's contracts. These contracts are also available on the Commission's website at http://www.utc.wa.gov/112133.

[59] The Alliance for Solar Choice is a trade group that represents third-party owners of net metering systems. Its membership, including the Demeter Power Group, SolarCity, Solar Universe, Sungevity, Sunrun and Verengo Solar, represents the majority of the nation's rooftop solar market. http://allianceforsolarchoice.com/about-us/. We reviewed all complaints published by the Better Business Bureau regarding these companies dated January 1, 2013 to June 1, 2014. Lauren McCloy, *Consumer Complaints Against Third-Party Owners of Net Metering Systems* (July 21, 2014), available at http://www.utc.wa.gov/112133. We also examined several court actions pending against third-party owners.

The Attorney General has received one complaint regarding the installation of a solar system. This complaint was not against a member of the Alliance for Solar Choice. E-mail from Shannon Smith, Chief, Consumer Protection Div., Atty. Gen. of Wash., to Yochanan Zakai, Policy Advisor, Util. and Transp. Comm'n., *Third-party owner of solar systems* (July 21, 2104, 3:36 p.m. P.S.T.). Perhaps consumers have not filed other complaints because the use of the third-party ownership business model is in its early stages.

than their performance, or overstate future increases in utility rates, thereby misrepresenting the value of the solar system.[60]

2. Quality of installed systems.

36 Typical complaints surrounding the installation of solar systems include allegations of poor workmanship and systems that do not meet electrical code or utility interconnection requirements. Poor workmanship can result in safety hazards from improper installation of an electrical system, and unnecessary holes in a customer's roof. These complaints are particularly troublesome due to the typical placement of the system on the roof of a home. A roof is a major investment in a home, and the installation of a solar system may void a homeowner's roof warranty.

3. Unfulfilled contract obligations

37 Consumers bear the risk of unfulfilled warranty obligations when entering into a twenty-year contractual relationship with a company. The contracts we examined require the third-party owner to maintain and repair the system, monitor and guarantee the electric output of the system, and return the customer's roof to its original condition at the end of the contract term ("warranty obligations"). Consumers face the risk of immature companies being unable to fulfill long-term obligations due to undercapitalization, bankruptcy, or cessation of operations.

38 Those contracts expose consumers to risk because of the company's right to assign the customer's payments to another entity, or sell the solar system. And they require the company to retain its warranty obligations when the payment stream from the contract is assigned or sold, and to "provide enough cash flow in our financing transactions to pay for" warranty obligations, even if the company "ceases to

[60] *Id.*; *Class* Action Complaint, *Twyla Torregano v. Sader Power, LLC*, Docket No. 2:14-cv-00293 (E.D. La.) (filed Feb. 7, 2014); Class Action Complaint, *Shawn Reed v. Sunrun, Inc.*, Docket No. BC498002 (L.A. Co. Cal. Super.) (filed Jan. 4, 2014).

operate."[61] While these contractual provisions may protect consumers when the company is solvent, they do not shield consumers from the risk that a company may not fulfill its contractual warranty obligations due to undercapitalization, bankruptcy, or cessation of operations.

4. Securitization of consumers' lease payments

39 Third-party owners of net metering systems are using new financing models that may increase risks to consumers. In November 2013, a third-party owner announced the industry's first securitized bond offering.[62] Then on January 15, 2014, a third-party owner announced it will launch a "[w]eb-based investment platform through which it intends to allow a broad range of investors," including individuals, to purchase asset-backed debt.[63] These securitized debt offerings promise investors a certain revenue stream from bundled contracts, while the third-party owner retains a different portion of the revenue stream from those contracts to fulfill its warranty obligations.

40 This novel form of financing is untested, and its impact on consumers is unclear. It is uncertain how consumers will fare in the event cash flows do not occur as predicted or there is a contractual dispute. As we learned during the 2008-09 financial crisis, investment firms can offer highly sophisticated asset-based debt securities based on an expected income stream. Similar to bonds backed by securitized residential mortgages, if the underlying asset loses value or there is a contract dispute, homeowners' interests may conflict with investors' interests.[64] These investors likely

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[61] SolarLease, provision 5(b)(vii); SolarPPA, provision 5(b)(xxi). If the third-party owner ceases operations, some contracts provide customers an option to purchase the system, but others do not. SolarLease, provision 10; SolarPPA, provision 10.

[62] SolarCity Corp., Annual Report (SEC Form 10-K), at 113 (March 18, 2014); SolarCity Corp., Current Report (SEC Form 8-K), at 3 (Nov. 11, 2013).

[63] http://www.solarcity.com/pressreleases/222/-SolarCity-to-Introduce-Solar-Financial-Products-for-Individuals--Institutions-of-All-Sizes.aspx.

[64] One commentator suggests that third-party owners may create a special purpose entity to own the system, similar to how commercial scale wind projects monetize federal tax incentives. Samantha Jacoby, *Solar-Backed Securities: Opportunities, Risks, and the Specter of the Subprime Mortgage Crisis*, 162 U. Pa. L. Rev. 203 (2013). Creating a special purpose entity to own the system would add another layer of complexity to the contractual arrangement with the consumer.

are not motivated to reduce their profits to reach an amicable agreement, fulfill the third-party owner's warranty obligations, or provide customer service.

5. Possible limitation of consumers' legal remedies

41 The contracts we examined limit each party's damages to actual damages, prohibit class action lawsuits, and require the arbitration of any disputes.[65] These restrictions arguably could limit a consumer's ability to ask for judicial review of disputes, and may eliminate the opportunity for consumers to join a class action against a third-party owner.

6. Inadequate communication and disclosure of contract terms.

42 Another risk consumers face is inadequate communication and untimely responses from third-party owners. The contracts we reviewed contain a number of customer obligations for system, home, and property maintenance. Customers agree to keep trees, bushes and hedges trimmed to prevent shading of the panels, and to keep the panels clean.[66] Customers may not realize they have the obligation to periodically trim trees that grew unencumbered before the installation of solar panels. Further, we reviewed complaints alleging that companies did not inform customers of the requirement to completely remove mature trees on their property before signing a contract.

43 Other complaints that we reviewed included allegations that customers were not able reach a person with adequate knowledge or authority to resolve a complaint, and that eight months after a consumer signed a lease and paid an initial fee, the company had not commissioned the solar system. Complaints also allege inadequate disclosure of

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The risks to consumers in this type of transaction could be similar to the risk for a securitized bond transaction.

[65] SolarLease, provisions 14 and 18; SolarPPA, provisions 14 and 18.

[66] SolarLease, provision 5; SolarPPA, provision 5.

customer's tax obligations,[67] or options to purchase the system prior to the end of the lease term.[68]

7. Impacts on the sale of a customer's home

44 The contracts we reviewed also appear to limit a customer's right to transfer the contract upon sale of the home.[69] We observed three options for consumers in the lease and PPA contacts we reviewed.

45 First, if the homebuyer meets certain credit requirements, the customer can transfer the contract to the homebuyer. Second, if the homebuyer does not meet certain credit requirements, the customer may prepay the remaining payments, then add the cost of the prepayment to the sale price of the house.[70] The homebuyer then retains the right to use the system, and the third-party owner maintains the system for the remainder of the term.

46 Third, under certain conditions the customer can remove the system from her current home and install it on her new home, paying all associated costs. Typical removal, installation, and interconnection costs make it impractical to move a solar system, thus effectively rendering this option uneconomical. For example, we reviewed complaints discussing a $500 non-refundable "site audit and design fee" to provide an

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[67] SolarLease, provision 5(f); SolarPPA, provision 5(e). The contracts require customers to pay any applicable sales or use taxes, and personal property taxes. These taxes pose an additional cost that companies may not clearly disclose when discussing the payments required under the contract.

[68] Some contracts offer an option for a customer to purchase the system at the end of years 5, 10 and 15 of the lease term, while other PPAs offer the option to purchase the system after year 5, and annually thereafter. SolarPPA, provision 10; NREL Model Contracts, provision 10. In some leases we reviewed, the customer was not offered an option to purchase. SolarLease, provision 10; NREL Model Contracts, provision 10.

[69] SolarLease, provision 12; SolarPPA, provision 12; NREL Model Contracts, provision 12.

[70] The prepayment includes a discount.

estimate of the cost to remove the system and install it on a new home.[71] Some consumers complain that companies do not adequately disclose a customer's obligations upon the sale of her home.[72]

47 In sum, consumers face a variety of risks when entering into long-term contractual relationships with third-party owners of net metering systems, and the state of Washington has numerous laws and policies designed to protect consumers' interests.

IV. POLICY STATEMENT

A. Commission oversight of regulated companies

48 The Commission oversees a wide range of utility operations in a variety of industries. This includes economic regulation, the provision of safe and reliable service, the protection of consumer interests, and the administration of certain state policies, such as the Energy Independence Act, RCW 19.285. The Commission's oversight of an industry is more prescriptive in certain areas: for example, the Commission has stringent consumer protection rules regarding the disconnection and reconnection of utility service.[73] In other instances, the Commission's regulation is more flexible. For example, a competitive telecommunication company, telecommunications company subject to an alternative form of regulation, or household goods carrier's rates receive less scrutiny than the rates of other utilities the Commission regulates because of the competitive nature of those industries.[74]

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[71] This fee was not disclosed in the customer's contract, or in the model contracts we reviewed. If the customer decides to move the system, the fee is credited towards the cost of moving the system.

[72] Class Action Complaint, *Shawn Reed v. Sunrun, Inc.*, Docket No. BC498002 (L.A. Co. Cal. Super.) (filed Jan. 4, 2014).

[73] *See* WAC 480-100-128; WAC 480-100-133.

[74] RCW 80.36.320; WAC 480-15-490(4).

49 Companies providing electric service, referred to in statute as "electrical companies," are subject to the Commission's economic and consumer protection regulations.[75] In its economic oversight of electrical companies, the Commission uses traditional rate base, rate of return regulation. This traditional form of economic regulation provides more scrutiny to a utility's rates than other forms of regulation. While this regulation is premised on the fact that, in general, electric utility service is a monopoly, unlike a number of states, Washington's statutes do not guarantee franchised service territories for electric companies.[76]

50 The Commission's consumer protection oversight of electrical companies is broad and exclusive. While the Attorney General is the primary enforcer of the Consumer Protection Act, that act specifically exempts "actions or transactions . . . regulated under laws administered by" the Commission.[77] Thus, the Attorney General may not prosecute consumer protection complaints against actions by regulated utilities under the Consumer Protection Act, and a consumer's only recourse is through the company or Commission. We now turn to the principal question of this interpretative statement: whether third-party owners of net metering systems are electrical companies under current law.

B. Commission jurisdiction over electrical companies

51 In RCW 80.01.040(3) the Commission is authorized to

> [r]egulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging

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[75] *See* RCW 80.04.010. The Commission does not have jurisdiction over consumer-owned electric utilities, such as public utilities districts, municipal utilities, rural electric cooperatives. RCW 80.04.500.

[76] *See Tanner Electric Cooperative v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 911 P.2d 1301 (1996) (discussing service area agreements between utilities).

[77] RCW 19.86.170. In most other cases where competition exists, companies are subject to state and federal anti-competition and consumer protection laws, administered by the state Office of the Attorney General and Federal Trade Commission, respectively.

> within this state in the business of supplying any utility service or commodity to the public for compensation.

52 We are authorized to determine if a person is subject to our jurisdiction in RCW 80.04.015.

53 Several relevant definitions in RCW 80.04.010 address the scope of our power to regulate utility service. RCW 80.04.010(23) defines a "public service company," subject to Commission jurisdiction, as including "every gas company, electrical company, telecommunications company, wastewater company, and water company." RCW 80.04.010(12) defines an "electrical company" to include

> any corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad company generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others), and every city or town *owning, operating or managing any electric plant for hire* within this state

(Emphasis added).

54 Finally, RCW 80.04.010(11) defines "electric plant" to include:

> all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat, or power for hire; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.

55 However, Washington courts interpreting and applying these statutes in a variety of contexts read into this definitional maze the principle that "[r]egulation by the [Commission] is predicated upon the proposition that the service rendered is public

service."[78] As stated in the *Inland Empire* case, "[a] corporation becomes a public service corporation, subject to regulation by the [Commission], only when, and to the extent that, its business is dedicated or devoted to a public use."[79]

56 Accordingly, to determine that a company is subject to the Commission's jurisdiction, we must answer two questions affirmatively: (1) does the company meet RCW 80.04.010(12)'s definition of an "electrical company," and (2) are there factors indicating that the service provided is a public service? We now turn to the first part of the analysis, and examine if third-party owners of net metering systems meet RCW 80.04.010(12)'s definition of electrical company.

1. Does the company meet RCW 80.04.010(12)'s definition of "electrical company"?

57 Parsing through the literal words of these definitions, a company is a "public service company" subject to our jurisdiction if it is an "electrical company." A company is an "electrical company" if it "owns, operates, or manages" "for hire" any "electrical plant." And "electric plant" includes "personal property operated, [or] owned . . . in connection with . . . the generation . . . or furnishing of electricity . . . for power for hire."

58 It seems clear that solar panels meet the definition of "electric plant" as "fixtures" and "personal property" that is "used" "in connection with" the "generation" of electricity "for power." As we discuss further below, it also seems likely that under a third-party ownership arrangement such facilities would be "for hire." Therefore, a third-party owner of a solar system meets the definition of an electrical company as a corporation

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[78] *Inland Empire Rural Elec., Inc. v. Department of Pub. Serv.*, 199 Wash. 527, 536, 92 P.2d 258, 262 (1939) (hereinafter Inland Empire). The Supreme Court of Washington's most thorough discussion of the Commission's jurisdiction over electric utilities is found in *Inland Empire*. In *Inland Empire*, the utility was organized as a non-profit corporation and its bylaws required the return of any profit to its customers. The Supreme Court of Washington found that the utility was not subject to the Commission's jurisdiction.

[79] *Id.* at 537, 92 P.2d at 262-63; *see also Clark v. Olson*, 177 Wash. 237, 253, 31 P.2d 534 (1934) (determining that the owner of a water system had not intended to engage in a public service).

that owns electrical plant for hire. However, in order to determine that a company is subject to our jurisdiction we must also find that the service it provides is a public service.

2. Are there factors indicating that the service provided is a public service?

59 Washington courts analyzing the public service requirement look at a variety of factors to determine whether the facilities in question are dedicated to public use.[80] The questions courts ask include: is the service offered to the public, is a monopoly present, and are consumers in need of protection?

60 RCW 80.04.010(12) defines an "electrical company" to include only entities "owning, operating or managing any electric plant *for hire* within this state" (emphasis added). The statutory requirement that the company must offer its service *for hire* means that the service must be offered to the public at large. In *Inland Empire*, the Supreme Court of Washington identified this factor saying, "The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility; or whether, on the contrary, it merely offers to serve only particular individuals of its own selection."[81] Accordingly, a company that serves the public as a class is more likely to dedicate its facilities to public use. No doubt, there appears to be something tautological in this reasoning: if you hold yourself out as a utility, you are a utility.

61 The second factor we must consider is the market power of the company. The theoretical underpinning of utility regulation is that the regulated company is a natural

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[80] *Inland Empire*, 199 Wash. at 537, 92 P.2d at 262 ("A corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use."); *United and Informed Citizen Advocates Network v. Util. and Trans. Comm'n*, 106 Wash. App. 605, 24 P.3d 471, (2001); *Clark v. Olson*, 177 Wash. 237, 31 P.2d 534; *State ex rel. Stimson v. Kuykendall*, 137 Wash. 602, 243 P. 834 (1926).

[81] *Inland Empire*, 199 Wash. at 537, 92 P.2d at 262-63.

monopoly, and it is more efficient for a monopoly to provide the service than the competitive market.[82] In the absence of robust competition to ensure fair rates, we are more likely to find that the service is a public one.[83]

62 Another factor we examine is consumers' need for protection. If the consumers of a company are at the mercy of the company's shareholders to provide an essential public service, it is more appropriate for the Commission to regulate the company. For example, in *Inland Empire*, the Supreme Court of Washington found that a nonprofit corporation was not subject to regulation by the Commission, in part because the nonprofit corporation

> does not have the character of an independent corporation engaged in business for profit to itself at the expense of a consuming public which has no voice in the management of its affairs and no interest in the financial returns. Its member [sic] do not stand in the relation of members of the public needing the protection of the [C]ommission in the matter of rates and service supplied by an independent corporation.[84]

63 We also note that it is difficult, if not impossible, to create a bright-line rule that separates companies that have dedicated their facilities to public use, and those that are not providing a public service. This public service test is generally a factual determination, and in some circumstances one factor should be given more weight

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[82] *See Munn v. Illinois*, 94 U.S. 113, 151-52 (1876).

[83] *State ex rel. Stimson v. Kuykendall*, 137 Wash. at 609, 243 P. at 836.

[84] *Inland Empire*, 199 Wash. at 539, 92 P.2d at 263. *See West Valley Land Co., Inc. v. Nob Hill Water Association*, 107 Wash.2d 359, 368, 729 P.2d 42, 47 (1986) ("It is material, however, that Nob Hill does not have the character of an independent corporation engaged in business for profit to itself at the expense of a consuming public which has no voice in the management of its affairs and no interest in its financial returns. The members of Nob Hill do not stand in the same position as members of the general public needing the protection of the UTC in the matter of rates and service supplied by an independent corporation.")

than in others.[85] Therefore, each determination requires an investigation by the Commission and a detailed examination of the particular facts of the case.[86]

64 The Iowa Supreme Court recently considered a similar issue and made a fact-specific determination based on different factors.[87] The specific facts of the third-party ownership business model we examined can be distinguished from the specific facts in the *Iowa Util. Bd.* case. In *Iowa Util. Bd.*, the court found that "[f]rom a consumer protection standpoint, there is no reason to impose regulation on this type of individualized and negotiated transaction."[88] That decision relied on the fact that an arms-length negotiation between two sophisticated parties, the city of Dubuque and Eagle Point Solar, resulted in a customized and individualized contract.[89] The third-party ownership business model we examined may not include sophisticated consumers, and does not produce customized or individualized contracts for each transaction. To the contrary, NREL published a model residential lease contract for the whole industry to use, and the securitization of income streams from these contracts is dependent on uniform contracts. Additionally, as discussed below, we observed several instances where consumer protection regulation would benefit the public interest.

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[85] *SZ Enterprises, LLC v. Iowa Util. Bd.*, 2014 WL 3377074, *24-27 (Iowa July 11, 2014).

[86] *Inland Empire*, 199 Wash. at 538, 92 P.2d at 263 ("The question of the character of a corporation is one of fact to be determined by the evidence disclosed by the record.") We examine the facts of each case before us and apply the factors described above to determine if a company is subject to our jurisdiction.

[87] *SZ Enterprises, LLC v. Iowa Util. Bd.*, 2014 WL 3377074 at *24 ("the proper test is to examine the facts of a particular transaction on a case-by-case basis to determine whether the transaction in question cries out for public regulation."). The Iowa cases describes eight factors that courts use to determine if a company has dedicated its service to public use. Washington law requires us to examine similar concepts.

[88] *Id.* at *25. Additionally, Iowa law provides electric utilities exclusive service territories, and Washington law does not. *Id*. at *18; *Tanner Electric Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 911 P.2d 1301.

[89] *Id*. at *25.

65 We now examine the factors identified in Washington case law to determine if they persuade us that the third-party ownership business model, as described above, meets the public service test.

66 First, we examine if the electric plant is offered "for hire." RNP and NW SEED argue that under the circumstances described in Section II.B above, a net metering system is not dedicated to public use because it is not offered "for hire;" there is no offer to supply service for use by the public as a class.[90] The third-party's offer to enter into a negotiation regarding the installation of a net metering system is limited by the third party's business practices. The typical screening criteria that a third party owner uses include ownership of the host property, credit score, engineering or structural criteria and a property's location and solar potential (including shading).[91] Proponents stress that, even with these requirements, a third-party owner's offer to contract is limited to entering into contractual negotiations and not an offer to provide service.[92] We are not certain that providers are as discriminating as proponents claim. In jurisdictions where the third-party ownership model has proliferated, companies have employed numerous sales agents to go door-to-door, offering their services to a large number, if the not the majority, of homeowners. The proliferation of offers to install and service solar systems on an individual's home may alone prove sufficient to sway this factor towards a finding of public use. Additionally, there may be little practical difference between the service obligations of an incumbent utility and the service offers of a third-party owner. An incumbent utility has a so-called "obligation to serve." But that obligation is not without qualification. It is premised on an application for service from the consumer and the determination that the consumer is "reasonably entitled" to such service.[93] Similarly, a third-party owner may accept all applications

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[90] May 17, 2013, letter from Megan W. Decker, Michael O'Brien, Jennifer Grove, and Linda Irvine, at 3.

[91] *Id.*

[92] *Id.*

[93] RCW 80.28.110 states: "Every . . . electrical company . . . engaged in the sale and distribution of . . . electricity . . . shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonable entitled thereto . . . all available . . . electricity . . . as demanded . . ."

for service from any consumer whose home is appropriate for a solar system, and who has a sufficient credit score.

67 We recognize, however, that our findings regarding this factor may vary depending on the practices of each company. However, given our understanding of the practices of third party providers, we find that this factor favors a dedication to public service, though reasonable argument can be made to the contrary.[94]

68 Turning to an assessment of monopoly and market power, we observe that any company or individual can install and own a net metering system. No one argues that it is more efficient for a monopoly to provide solar systems to homeowners. In this regard, the third-party ownership model may not be particularly well suited for

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[94] We do not differentiate between the lease and PPA arrangements because in practice their impact is almost identical. *United and Informed Citizen Advocates Network v. Util. and Trans. Comm'n*, 106 Wash. App. 605, 611, 24 P.3d 471, 474 ("It is the conduct that makes the corporation subject to regulation."); *Inland Empire*, 199 Wash. at 538, 92 P.2d at 263 ("A corporation which is actually engaged as a public utility cannot escape regulation by the state merely because its charter or its contract characterizes it as a private corporation."). The only significant difference we can identify between the arrangements is that the SolarPPA, in provisions 10 and 11, provides the customer an option to purchase the system while the SolarLease does not.

We can *imagine* a situation where the lease of a generator would not be subject to our jurisdiction. Assume a simple leasing arrangement in which a consumer leases a diesel generator system from the hardware store. The consumer is responsible for the installation and operation of the generating system. The store simply provides a generator for pick-up, and the consumer is responsible for everything else. It would make no sense to conclude that the hardware store is engaging in utility service. The store is not holding itself out to public as a provider of electricity and is not engaged in the details of the operation of the generator. Under these simple circumstances, we would conclude that a leasing arrangement would not be offering a "utility service or commodity," as contemplated in RCW 80.01.040(3), for hire. Thus, the lease would not trigger the Commission's jurisdiction over the hardware store. One can envision a similar arrangement for the leasing of solar panels: the hardware store may, as an alternative to selling panels outright, offer to lease them to homeowners for a defined term without providing installation, operation, or warranty services. In such a simple case, it would be difficult to conclude that the hardware store is a jurisdictional utility.

Additionally, from an engineering and financial standpoint, a stand-alone diesel generator and a solar system that is interconnected with a utility's electric grid subject are quite dissimilar due to our detailed interconnection rules. *See* WAC 480-108.

traditional economic regulation because there is no natural monopoly, and in areas where the model has proliferated several companies compete to provide service.[95] Yet some companies providing this service may have greater market power than others, and the lack of a monopoly does not preclude a finding of public use.[96] This factor does not overwhelmingly disfavor a finding of public use, but the absence of a monopoly tilts slightly against such a finding.

69 Finally, we examine if consumers are in need of "the protection of the [C]ommission in the matter of rates and services supplied by an independent [for-profit] corporation."[97] As we noted above, there may be several companies competing to provide solar systems to homeowners, and robust competition tends to ensure that rates are fair to consumers. In contrast, the terms of the services provided by third-party owners do not always appear to be fair or reasonable to consumers. As described in Section III.B, some consumers in other jurisdictions complain of fraud in the execution of contracts, deceptive marketing claims, unfulfilled warranty obligations, and inadequate disclosures and communication. Where there is a significant risk to consumers and the interests of investors and consumers are not aligned, courts are more likely to find a dedication to public use. Accordingly, we believe that these risks to consumers strongly favor a finding of public use.

70 Without a bright line rule to determine if a facility is dedicated to the public use, we must make a fact-specific determination. We examined the facts surrounding the third-party ownership business model, including certain contracts, and customer complaints and lawsuits in other jurisdictions. The need for consumer protection weighs towards a finding of public use, while the lack of a monopoly weighs slightly against a finding of public use. Based on the facts presented to us, we find that third-party owners offer their service "for hire," but reasonable arguments can be made on each side of the question. After examining considerable evidence and much deliberation, we find on balance that companies using the third-party business model

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[95] Moreover, in jurisdictions where third-party owners thrive, they may erode the energy sales of incumbent utilities.

[96] *State ex rel. Stimson v. Kuykendall*, 137 Wash. at 609, 243 P. at 836 ("the question of whether or not a monopoly actually existed is not a controlling feature" of this analysis).

[97] *Inland Empire*, 199 Wash. at 539, 92 P.2d at 263.

have dedicated their facilities to public use. In making this determination, we place more weight on the need for consumer protection than other factors.

71 However, we emphasize that this result is not clear-cut and very dependent on the specific facts. While we have reviewed some contracts, those can be changed and, no doubt, there could be others with many different details. Further, as discussed in the next section, we do not believe that it serves the public interest to undergo this fact-specific analysis for each individual third-party owner in order to determine jurisdiction. Nor do we believe it is necessarily appropriate to subject these companies to a regulatory scheme designed for natural monopolies.[98]

V. CONCLUSION

72 Based on our analysis of variants in the third-party ownership business model, we conclude that solar providers, depending on specific facts, likely would be subject to Commission jurisdiction. However, we also conclude that the appropriate public policy regarding these companies would be one that avoids regulatory uncertainty, protects consumers, promotes competition, and spurs innovation and economic development. The current statutory framework falls short in that regard.

73 We could conduct a case-by-case examination of the facts and circumstances of each company's business model and determine these questions of dedication to public use and our jurisdiction. Although this would provide a decision tailored to the specific facts for each company, we believe that this would be too time-consuming and create too much regulatory uncertainty before and during the pendency of such proceedings. We wish to avoid this uncertainty and administrative burden, which would be counter to the state's policy to promote renewable energy, lower carbon emissions, and encourage innovation and economic development.

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[98] Our conclusion should not be read to imply that the Commission would embark on a regimen of rate regulation of third-party owners of distributed generation similar to that typical for the more traditional regulated utilities. We do not read our statutes to be that prescriptive. For example, while RCW 80.28.050 requires utilities to file tariffs with the Commission "in such form as the commission may prescribe . . . ." It would appear that the Commission has some administrative leeway in implementing these statutory requirements.

74 Therefore, we believe that the best course of action would be for the Legislature to clarify the Commission's authority over and regulation of third-party owners of net metering systems in statute. This would produce a level of certainty that the Commission alone is unable to provide and could serve to avoid potential litigation over jurisdictional issues.

75 If the Legislature chooses to expressly provide the Commission jurisdiction over third-party owners, it should consider the level of regulation the Commission should exert on the companies and the impact of the regulation on consumers and businesses. Specifically, we do not think it wise to employ full economic regulation or to exclude explicitly certain companies from this emerging market. Instead, we believe our primary focus should be on consumer protection and ensuring that the proper conditions are established for fair competition. Limiting the Commission's jurisdiction and oversight to consumer protection issues should reduce the likelihood that such oversight will dampen the interest of third-party owners and other solar entrepreneurs in pursuing business opportunities in Washington state, and ultimately provide more choices for those customers who desire to use solar energy.

76 In considering the impact on businesses, we do not believe that traditional rate base, rate of return regulation is appropriate for third-party owners. Instead, a model similar to the Commission's economic oversight of competitive telecommunication companies offers a better approach.[99] Under this model, the Legislature would deem the leasing of solar systems (and perhaps other forms of distributed energy) not subject to detailed economic regulation. Companies would simply register with the Commission and publicly post their prices and contracts.

77 We also believe that state policy should promote competition and further the development of small-scale renewable energy. All market players, from incumbent utilities to newer investor-owned companies, should be able to offer solar leases to customers throughout the state.[100] The Commission's focus would be on ensuring fair

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[99] RCW 80.36.320-360.

[100] In general, we believe that the burden is on incumbent utilities to develop a strategy and business plan to compete more fully in the distributed energy resources market on either a

play in a competitive market and on protecting the interests of consumers. As new entrants compete with incumbent utilities, we ask that the Legislature provide the Commission with general policy guidance on the structure of this evolving market, after which the Commission can design detailed rules.

78 In considering the impact on consumers, we believe both the Commission and the Attorney General's Consumer Protection Division have a role to play. The Commission would like to perform the same services for consumers of third-party owners as it does for consumers of electrical companies. This includes promulgating rules, receiving consumer complaints, investigating the issues raised, helping resolve disputes once escalated, and initiating administrative action against companies when appropriate. The Commission has a strong consumer protection division with staff trained to provide direct assistance to consumers. In response to inadequate communication and untimely responses by third-party owners, the Commission's consumer protection staff could work with consumers and companies to achieve the timely resolution of disputes.[101] Incumbent utilities have expressed concern about their role in responding to consumer inquiries regarding services provided by third-party owners. Incumbent utilities and other groups could refer inquiries to the Commission if it had oversight of third-party owners. In response to the limitation of consumers' legal remedies, the Commission could require the use of its dispute resolution processes.[102]

79 Additionally, the Attorney General should be provided the opportunity to investigate fraudulent and deceptive business practices and bring suits in court on behalf of the public. The Attorney General is well situated to respond to many of the risks described in Section III.B, and we welcome the opportunity to work collaboratively with the Attorney General to protect consumers. Currently, if the Commission gains jurisdiction over the actions of an electrical company, the Attorney General's office may not prosecute those actions. We recommend that any statutory language

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regulated or non-regulated basis. To date, we have not received such plans from utilities under our jurisdiction, but look forward to reviewing them when ready, hopefully in the near future.

[101] WAC 480-100-173.

[102] WAC 480-07 Subpart D: Alternative Dispute Resolution.

expressly providing the Commission jurisdiction over third-party owners should also make inapplicable the exemption from the Consumer Protection Act in RCW 19.86.170,[103] and make any violation of the Commission's consumer protection rules a violation *per se* of the Consumer Protection Act.[104]

80 In addition, specifying disclosure requirements would further decrease the risk to consumers described in Section III.B. For example, the Legislature or the Commission could require any third-party ownership contracts to include a summary sheet conspicuously disclosing:

(1) A list of customer obligations beyond the monthly lease payments (*i.e.*, removal of the system for roof repair).
(2) The roof warranty provided, and a list of common roof damage situations and which party is responsible for the cost of system removal and repairs in each situation.
(3) An estimate of annual energy production for the term of the contract.
(4) A description of the customer's options when selling her home.
(5) A description of the warranty provided.
(6) An estimate of the total contract payments in the first year, the percentage contract payments increase each year, and an estimate of the total amount the customer will pay over time.
(7) A clear statement that the customer is responsible for a regular monthly utility payment, as well as the additional lease payment.[105]

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[103] The Commission and Attorney General retain concurrent jurisdiction regarding consumer protection issues for competitive telecommunication companies. RCW 80.36.360. We envision a similar arrangement for third-party owners of net metering systems. We would share information about complaints and company responses with the Attorney General so that third-party owners are not burdened to provide the same response to two different agencies.

[104] A violation of RCW 63.10, the state's consumer protection laws for leases, is a violation *per se* of the Consumer Protection Act. RCW 63.10.050. The same could be true for the Commission's consumer protection rules for third-party owners.

[105] Other disclosures could include: (1) If projected utility rate increases are used to justify system costs or payments, the justification must also provide information regarding historic increases for that utility over the same period of time as the offered contract. (2) The manufacturer and model number of all substantial components of the system. (3) Notice when a contract or system changes ownership, for any reason, and to whom.

81 Finally, we acknowledge that this issue has been the subject of proposed legislation for the last several years. Distributed generation is a rapidly evolving market benefitting from technological innovation and new business models that lower costs to consumers. We recognize that it may be difficult to reach a consensus on these issues. Accordingly, if the Legislature does not act in its 2015 session, we will consider acting, consistent with state law and policy, to propose and adopt rules that would further clarify our jurisdiction over third-party owners of net metering systems and describe how we would regulate such companies.

DATED at Olympia, Washington, July 30, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, Commissioner