KEYES&FOX LLP
DISTRIBUTED GENERATION LAW

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Re: Permissibility of Third-Party Ownership of Renewable Generation in Washington
Date: 9/21/2011

**Introduction**

Under a contract from the National Renewable Energy Laboratory, Keyes & Fox has been asked whether community solar project owners may sell electricity to the project's site host, with the host then net metering the output of that system. This raises the larger question of whether third-party-owned systems may engage in direct sales of electricity or participate in net metering in Washington, as addressed below.

**Question Presented**

As an alternate means of financing customer-generation, a host customer may enter an agreement with a third-party owner of a distributed generation system whereby the host pays for and receives the output of that system through a power purchase agreement. The Washington Utilities and Transportation Commission (Commission) regulates public service companies that operate electric plants "for hire" in Washington. Is a third-party owner that engages in a private, direct retail sale of electricity to a host customer a public service company according to Washington law?

**Short Answer**

Probably not. The Commission only has jurisdiction over a third-party owner if it is a public service company. A third-party owner is not likely to be found to be a public service company because a private, direct sale of electricity is not likely to constitute a dedication to public service under Washington law.

## I. Introduction and Overview of Third-Party Ownership

Third-party ownership of distributed generation is increasingly used across the United States as a means for electric utility customers, who might not otherwise invest in renewable generation, to finance the installation and maintenance of on-site generation. There are many

financing structures available to customers, but the most prevalent are power purchase agreements (PPAs), in which the host customer pays for the system's output on a per kilowatt-hour (kWh) basis, and leasing agreements, characterized by fixed payments unrelated to a system's production. Over the last five years, a majority of non-residential solar photovoltaic systems have been installed utilizing one of these methods.[1] These ownership models are increasingly being used in the residential sector as well, as evidenced by a recent report on the California Solar Initiative.[2]

One reason for the success of third-party ownership model is that third-party owners are better able to take advantage of tax benefits, such as asset depreciation and the federal 30% Business Energy Investment Tax Credit (ITC) for solar energy and other technologies. For many customers, third-party ownership is the only way to monetize tax benefits that would otherwise be unavailable due to insufficient tax appetite to fully capture available benefits. This is particularly true where the host customer is a tax-exempt entity. The monetization of tax benefits lowers the cost to those customers of installing a system. Additionally, the third-party model is advantageous for customers that do not wish to invest substantial upfront capital to install a system.

The main distinction between the prominent third-party models (e.g., PPA or lease), from a customer's perspective, is what the customer is purchasing. For a lease, the customer typically makes fixed monthly payments without any certainty regarding system productivity; the customer bears some of the responsibility for routine maintenance and assumes some of the risk of operation. Under a PPA, the third-party owner of the system typically conducts all required maintenance and assumes the risk of operation. The third-party owner has the incentive to run the system optimally because the host customer only pays for the system output. Thus, a PPA has more certainty from a customer's perspective.

From a regulator's perspective, the distinction is primarily rooted in the legal interpretation of state public utility law. The key legal question is whether that activity falls

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1 *See,* Bolinger, Mark, *Financing Non-Residential Photovoltaic Projects: Options and Implications,* Lawrence Berkeley National Laboratory, (Jan. 2009) LBNL-1410E, at p. 18.

2 *See California Solar Initiative Cost-Effectiveness Evaluation*, (April 2011) Energy & Environmental Economics (E3), Prepared for the California Public Utilities Commission, at p. 57.

within the jurisdiction of a state's public utility regulatory agency. A PPA might trigger the state's jurisdiction if the PPA provider, or third-party owner, meets that state's legal definition of a public utility or other regulated entity. Because a public utility is usually defined in terms of providing a sale of electricity "to the public," a lease arrangement might avoid the threshold of this jurisdictional trigger because the "sale" involves the equipment itself and not any amount of electricity. For a PPA, the question is typically whether the sale constitutes public utility service, offered to the public.

As of the date of this memorandum, twenty-one states and Puerto Rico permit third-party ownership of distributed generation, including the use of PPAs in some form.[3] There are two basic approaches these states take to permitting third-party PPAs. First, many states have passed legislation expressly exempting third-party owners from regulation.[4] Second, many state utility commissions have addressed PPAs a matter of state law and have determined that a third-party owner providing service to one on-site customer does not offer service "to the public," as the service of public utilities is characterized in those states.[5]

This memorandum examines the jurisdiction of the Washington Utilities and Transportation Commission over third-party owners of distributed generation. Our conclusion, based on the Commission's and state courts' interpretations of Washington law, is that the Commission probably does not have jurisdiction over third-party owners because those entities are unlikely to be considered public service companies. Based on this conclusion, there are two primary ways to provide regulatory certainty on this issue in Washington:

- The Washington Utilities and Transportation Commission could find that it does not have jurisdiction to regulate third party owners of customer-sited, net metered distributed

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3 *See* Database of State Incentives for Renewables & Efficiency (DSIRE), Summary Map of Third-Party Solar PPA Policies. Available at: http://www.dsireusa.org/summarymaps/index.cfm?ee=1&RE=1.

4 Texas most recently enacted legislation exempting distributed generation owners from the definition of public utility, SB 981 (2011). North Carolina has similar legislation pending at this time, SB 694 (2011).

5 *See, e.g.*, Decision No. 71795, Docket E-20690A-09-0346 Arizona Corporations Commission (7/12/10) (allowing third-party ownership model for government and non-profit customers); *Declaratory Order, 09-00217-UT*, New Mexico Public Regulation Commission (12/17/10); *Order*, Docket 07-06024, Nevada Public Utilities Commission (11/26/08).

generation, given that it "has the authority to enter a declaratory order, on specified facts, regarding whether the owner of an electric plant is a public service company subject to the regulatory jurisdiction of the Commission. *RCW 34.05.240 & RCW 80.04.015;*"[6] or

- The Washington Legislature could enact legislation that expressly clarifies that a third-party owner is not a public service company or an electrical company as defined in RCW 10.04.010.

## II. Discussion

### A. Whether the Commission has jurisdiction over third-party owners hinges on whether third-party owners meet the definition of a public service company.

Washington law grants the Commission jurisdiction over public service companies operating in Washington. The Commission's general powers and duties require it to "regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons within this state in the business of supplying any utility service or commodity *to the public for compensation*."[7]

The Commission has jurisdiction over public service companies, and, for sales of electricity, the term "public service company" is defined to include any "electrical company."[8] The Commission acknowledges that its jurisdiction "is over public service companies," a legal classification which "includ[es] electrical companies."[9] The Revised Washington Code defines an electrical company as any person "owning, operating or managing any electric plant for hire within this state."[10] "Electrical plant," in turn, is defined as "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."[11] Under the plain language of Washington law, all companies generating electricity "for

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6 *In re Bonneville Power Administration*, 2007 Wash. UTC Lexis 299,*13-14, Conclusion of Law No. 1, Docket UE-070494 (May 15, 2007).

7 RCW 80.01.040 [*italics added*].

8 RCW 80.04.010.

9 *Binkley v. Salmon Shores RV Park,* 2010 Wash. UTC LEXIS 537, *16 (June 2, 2010); *see also In re Bonneville Power Administration,* 2007 Wash. UTC LEXIS 299, *13-14.

10 RCW 80.04.010 [*italics added*].

11 *Id.*

hire" are electrical companies, and all electrical companies are public service companies.[12] Yet, the courts have found a requirement of a dedication to public use, as discussed shortly. A logical reconciliation of the courts' public use requirement and the statutory definition of an electrical company is that the term "for hire" implies a dedication to public use. This reconciliation has not been discussed in case law, but the analysis could have been simplified with a finding that an entity that sells electricity is not necessarily an electrical company. The term "for hire" could be found to impose a limitation greater than "for sale," and that limitation would be a dedication to public use.

Rather than finding a requirement of a dedication to public use within the definition of an electrical company, Washington courts have instead focused on finding a dedication to public use within the definition of a public service company. RCW 80.01.040 includes as one of the Commission's general powers the authority to regulate "all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation," indicating that supplying utility service privately is beyond its jurisdiction. While not discussed, the fact that "public service" is built into the term also indicates a need for dedication to public use. In *Inland Empire Rural Electrification, Inc. v. Department of Public Service*, the court found that a rural electrical cooperative, which served only its members, would fit the literal definition of an electrical company in the 1911 public service commission law.[13] But the court held that "regulation by the department is predicated upon the proposition that the service rendered is public service" and that the person or corporation be a public service corporation.[14]

Commission jurisdiction over a third-party owner of distributed generation, thus, depends on whether it is a public service company, not whether a third-party owner fits the literal definition of an electrical company in RCW 80.04.010.[15] Commission regulations recognize that an electric utility is not only a person that "owns, controls, operates, or manages any electric plant for hire;" it also must "be subject to the commission's jurisdiction."[16] A third-party owner

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12 *Id.*

13 *Inland Empire Rural Electrification, Inc. v. Dept. of Pub. Serv.*, 199 Wash. 527, 536 (1939) (interpreting Rem. Rev. Stat., ß 10344, with language very similar to the current language in RCW 80.04.010).

14 *Id.*

15 *Id.*

16 WAC 480-100-023.

must be a public service company to "come within the purview of the public service commission law."[17]

## B. A third-party owner of distributed generation is not a public service company unless it has dedicated its service to a public use.

An entity is not a public service company in Washington unless its business activity is dedicated to a public use. The Washington Supreme Court stated the standard test for dedication to a public use (i.e., public dedication) in *Clark v. Olson:*

> The test to be applied is whether or not the petitioner held himself out, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them.[18]

Broken into elements, the *Clark* public dedication test requires: (1) holding oneself out with intent (express or implied); (2) to serve the public or a limited portion of the public. An entity that does not satisfy these two elements is not a public service company subject to the Commission's jurisdiction.

### *1. A person's intent to dedicate property to public use must be unequivocal or implied by public interest.*

#### *a. Express intent to dedicate service to the public.*

An entity does not dedicate its property to public use by direct intent, unless that intent is unequivocal. Because a dedication to public use may invoke substantial regulatory interference and expense, Washington law states "such declaration is never presumed without evidence of unequivocal intention."[19] In *State ex rel. Stimson v. Kuykendall*, the Washington Supreme Court opined that a towboat company that filed a tariff for its towing rates had engaged in the most apparent form of dedication to public use: "one who holds himself out to the world, through a

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17 *Inland Empire,*199 Wash. at 535.

18 *Clark v. Olson*, 177 Wash. 237, 243 (1934) (quoting *Van Hoosear v. Railroad Commission,* 184 Cal. 553 (1920)).

19 *Clark*, 177 Wash. at 243.

regularly filed tariff, as willing to perform all the manifold forms of towing which the public may reasonably be expected to require, is devoting his property to a public use."[20]

A third-party owner of renewable generation would have no reason to engage in such formal representations of public dedication. A PPA is a private contract between the system provider and the host customer and does not need to be submitted to the Commission for approval by either party.

*b. Public dedication by implication*

A service with private characteristics may, nonetheless, constitute a dedication to public use where the public has an interest in the activity. There is a long-held principle of constitutional law that states may regulate private activities so long as they are "affected with the public interest."[21] In *Puget Sound Electric Railway v. Railroad Commission of Washington*, the Washington Supreme Court discussed the distinction between purely public use and a private use in which the public has an interest:

> In the one the owner has intentionally devoted his property to the discharge of public service. In the other he has placed property in such a position that, willingly or unwillingly, the public has acquired an interest in its use . . . [and] submits only to those necessary interferences and regulations which the public interests require.[22]

Washington courts limit the public's interest in a private activity to situations where the public consequences of an activity affect the community at large. The *Stimson* court considered a four part test—based on grain elevator cases like *Munn*—to determine if the public attained a sufficient interest in a towboat business to conclude that it was dedicated to a public use: "(1) The important character of the article of commerce in which the public has an interest; (2) the number of such articles of commerce affected thereby; (3) the question of whether or not, in performing the service, private property alone is used; and (4) the question of transportation."[23] The court held that the rates charged to tow timber affected the public interest because timber was an important and ubiquitous article of commerce in Washington and that towing clearly

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20 *State ex rel. Stimson v. Kuykendall*, 137 Wash. 602, 606-07 (1926).

21 *Id.* at 607-08 (citing *Munn v. Illinois*, 94 U.S. 113 (1876)).

22 *Puget Sound Electric Ry. v. R.R. Comm'n*, 65 Wash. 75, 88 (1911).

23 *Id.* at 613.

involved transportation and the use of public property (i.e., waterways).[24] Under facts more analogous to third-party owners of distributed generation, the court in *United and Informed Citizen Advocates Network v. Washington Utilities and Transportation Commission (UICAN)* found that it was significant that the long-distance carrier in question leased and used the facilities of a regulated telecommunications company to provide its service.[25]

A third-party owner of distributed generation does not appear to sufficiently affect the interest of the general public under the *Stimson* test. While it is clear that electricity is important and ubiquitous to commerce in Washington, a typical third-party-owned system is located behind a host-customer's meter and does not involve transportation or a public right-of-way; it would involve only the host's private property.

One counterargument is that most PPA customers will net meter and indirectly use the grid of a regulated utility. This critique is distinguishable from *UICAN* because the third-party provider, unlike the long-distance telephone carrier, is not in privity with the utility and does not depend on a lease or contract with the utility to provide its service. Rather, only the host customer stands in direct relation to the utility through a net metering arrangement.

Another possible argument against third-party ownership of distributed generation is that it affects the public interest by possibly shifting costs from host customers—who now offset some usage with electricity produced from their PPA systems—to non-participating ratepayers. This attack is also distinguishable for two reasons. First, any net metering system, which a customer could have purchased individually, would result in the same theoretical cost shifting. The critique that more people would participate in net metering if third-party financing is allowed—and thereby shift more costs—would be misplaced. This argument is undermined by the fact that Washington has expressly found net metering to be in the public's interest.[26] Second, Washington courts recognize that the matter of cost shifting among ratepayers is a matter for the Commission to resolve within its properly delegated discretion.[27] In *State ex rel.*

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24 *Id.*

25 *United and Informed Citizen Advocates Network v. Util. and Trans. Comm'n*, 106 Wn. App. 605, 613 (Wa. Ct. App. Div. 1, 2001).

26 RCW 80.60.005.

27 *State ex rel. York v. Bd. of Commissioners of Walla Walla Cty.*, 28 Wn. 2d 891, 901 (1947).

*York v. Board of Commissioners of Walla Walla County*, the court rejected the argument that the court should usurp the Commission's authority to grant or withhold franchise rights.[28] The Commission has authority to determine that it is in the public's interest to permit an electric cooperative to operate within a private electric utility's service area, even if it causes economic losses. Therefore, the Commission has the primary authority to determine that any cost shifting that would result from third-party-owned distributed generation is in the public's interest.

Apart from the *Stimson* test, it is also important that a third-party owner of distributed generation does not provide an essential service, to which there is no available alternative. The nature of the commodity or service may imply a public use where the commodity is essential to society or where a customer has no alternative access to the commodity.[29] In *State ex rel. Public Service Commission v. Spokane & I.E.R. Company*, the court noted that there was nothing in the governing statute to indicate that the public had any interest in the sale of surplus power, where the power was not needed by a streetcar company to fulfill its primary public obligation to provide reliable transportation.[30] Similarly, the court in *Clark* observed a California case holding that a landowner charging an hourly rate for surplus water, as he could spare it, "had not dedicated his work to a public use so as to entitle the public generally to demand water service as a legal right."[31] The *Clark* court distinguished the necessity of water service from a landowner to his neighbors, noting that "there was another pumping plant within a short distance" and that the customers could simply "sink wells on their own lands as successfully as he had done."[32] A third-party owner of distributed generation does not provide an essential form of electricity; it does not provide power whenever and as much as the customer needs. The nature of the service a third-party owner provides does not invoke the public's interest under Washington law.

*2. Public dedication requires holding service open to the public.*

In addition to express intent to dedicate or the implied dedication of property based on the public interest, dedication to public use requires that a person offer service to the public

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28 *Id.*

29 *See generally Clark*, 177 Wash. at 249.

30 *State ex rel. Public Service Commission v. Spokane & I.E.R. Company*, 89 Wash. 599, 606 (1916).

31 *Clark*, 177 Wash. at 245 (citing *Richardson v. R.R. Comm'n*, 191 Cal. 716 (1923)).

32 *Id.* at 249.

without discrimination.[33] The inquiry as to whether a person expressly intends to hold open service to the public is a factual determination for the Commission.[34] Accordingly, the facts must show that a person offers service to the public, or some portion of the public.

A company that holds itself out as willing to provide a service to the general public may be a public service corporation, even if it cannot serve the entire public. Washington law holds that a person offers service to the general public where the service is offered to all who apply, without discrimination, up to the person's capacity for service.[35] A company, therefore, does not have to offer service to the entire public to be a public service corporation.[36] In the context of a third-party owner of distributed generation, the central question is whether the service takes on this public character.

The public character of a service relates to the ability of potentially any member of the public to request service. Washington courts routinely have held that companies with a defined group of customers, such as a membership cooperative, do not hold service open to the public. In *West Valley Land Co. v. Nob Hill Water Association*, the Washington Supreme Court held that a membership-based water association was not a public service company because it had "chosen to serve particular individuals of its own selection, and [did] not serve the public as a class or that portion of it that could be served by Nob Hill."[37] The court held this discretion to refuse service based on technical criteria was significant, even though Nob Hill, otherwise, would normally agree to provide water service to those located within its service area.[38] Accordingly, a third-party owner would argue that it only serves a limited group of customers that meet eligibility criteria, similar to the Water Association in *Nob Hill* that refused service to prospective

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33 *See Inland Empire*, 199 Wash. at 538.

34 *See, e.g., Mills v. Enumclaw Co-op. Creamery Corp.*, 12 Wn. 2d 377 (1942) ("While what constitutes a common carrier is a question of law, the status of a carrier, as such, must be determined from his method of operation."); *Inland Empire*, 199 Wash. at 539 ("The question of the character of a corporation is one of fact . . . what it does is the important thing, not what it, or the state, says that it is.").

35 *See Inland Empire*, 199 Wash. at 537.

36 *See Stimson*, 137 Wash. at 612 ("The public does not mean everybody all the time.") (citing *Peck v. Tribune Co.*, 214 U.S. 185 (1909)).

37 *West Valley Land Company, Inc. v. Nob Hill Water Association*, 107 Wn. 2d 359, 367 (1986).

38 *Id.*

customers who did not meet technical criteria. So long as a third-party owner retains discretion to refuse service, it does not hold service open to the indefinite public.

Limits on the ability to serve the public, however, are not sufficient to avoid dedication to public service. In *Terminal Taxicab Co. v. District of Columbia*, the United States Supreme Court held that a taxicab that served only the guests of a particular hotel was, nonetheless, offering a service to the public. The court said:

> We do not perceive that this limitation removes the public character of the service . . . No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand.[39]

A third-party owner of distributed generation, however, is factually distinguishable from such a common carrier. The fact that a PPA is a discrete, private contract is significant part of that distinction. A third-party PPA provider, in this sense, has the discretion to refuse to enter a private contract; an ability that the court acknowledged that the taxicab driver lacked in *Terminal Taxicab*. *Terminal Taxicab's* holding is based on the principle that any member of the public—that could afford to—could obtain the status of hotel guest and demand the taxicab's service according to the hotel's preexisting arrangement with the taxicab. In contrast, a PPA is a private contract to which the public cannot step into or demand by satisfying a simple condition.

The discretion of a third-party owner to refuse to enter into a PPA is factually more akin to the water association in *Nob Hill* than the taxicab driver in *Terminal Taxicab*. Like the water association in *Nob Hill*, a PPA provider may refuse service based on technical characteristics; for a solar installation this could be factors such as the appropriateness of the site (e.g., shading and structural support), creditworthiness of the applicant, or home ownership. A PPA provider must consider these discrete inputs on a case by case basis, and no member of the public can ever obtain a classification—such as a hotel guest—that entitles them to demand service and be granted a PPA. Unlike *Terminal Taxicab,* a PPA provider has no obligation to serve a customer that meets any or all of the necessary criteria of installation of a system. Regardless, *Nob Hill*

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[39] *Terminal Taxicab Co. v. District of Columbia,* 241 U.S. 252, 255 (1916).

supports the minimal proposition that a PPA provider's discretion to refuse service based on technical criteria means that it is not holding service open to the public.[40]

In addition to discretion to refuse service, private contracts between customers and providers indicate that the service may not be public in character. Under Washington law, there is no public dedication where a party "merely offers to serve only particular individuals of its own selection."[41] In *Spokane & I.E.R. Co.*, the Washington Supreme Court held that a streetcar company was not offering a public service where it provided surplus electricity that it generated to neighboring businesses under private contracts. The court held that the public had no interest in this private transaction because it did not affect the public, regulated portion of the streetcar business and because the nature of the sale was "purely voluntary."[42] This is strikingly similar to the factual scenario of a third-party owner providing discrete sales of electricity, not otherwise encumbered by public demand, under private contract. Similarly, in *Miles*, the court held that a truck operator, who hauled ice cream under a private contract, did not hold himself out as serving the public and was not compelled to serve a customer on terms that differed from the contract.[43]

A third-party PPA is a private contract between the owner and a host customer that, similar to *Miles* and *Spokane & I.E.R. Co.*, does not constitute an offering for public service. The fact that a PPA provider signs a contract to provide service to one host customer does not constitute an offering of service to all who apply. Most importantly, the PPA provider retains discretion to refuse service, as the truck operator in *Miles* and the water association in *Nob Hill*; the public cannot demand service on particular terms. Most importantly, a customer cannot even demand that a PPA provider enter into a private contract.

The distinguishing characteristic between such a private arrangement and a public use is that the public can demand the service as a legal right. The court stated this principle in *Clark*: "Public use, then, means the use by the public and by every individual member of it, as a legal right."[44] Washington courts have routinely held that a corporation engaged in business as a utility cannot insulate itself from regulation and the public's right to demand service by entering into

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40 107 Wn. 2d at 367.
41 *Inland Empire*, 199 Wash. at 263.
42 *Spokane & I.E.R. Co.*, 89 Wash. at 607.
43 12 Wn. 2d at 381.
44 *Clark*, 177 Wash. at 246 (quoting *Van Hoosear*, 184 Cal. 553).

private contracts with its customers.[45] In *UICAN*, the court observed that a company providing long-distance telecommunications service without tolls to its members was engaged in a regulated public enterprise despite its claim that its customers were private members under private contracts.[46] In fact, the court held that telecommunication company's members were from the general public and did not share the commonalities of location to constitute a "private shared telecommunications service."[47] The court held that it was holding its service open to the public because it was identical to the operations of regulated toll providers.

The public cannot demand service from a third-party owner, on this rationale, because it does not offer the same service as a regulated electric utility. A third-party PPA provides on-site generation that usually is supplemental to utility electric service. Indeed, the variable nature of most generators operating under third-party PPAs—and the renewable attributes—provide "as available" service, not the "full requirements" service that electric utilities are obligated to provide. The public in Washington does not have the right to demand "as available," renewable generation service from any currently regulated entity.

### C. A community solar project is a form of third-party ownership presently allowed under Washington law.

Washington law related to community solar projects encourages and anticipates third-party ownership. Under the community solar provisions, utilities may claim a tax benefit for several varieties of community solar projects 75 kW or less, including one that is "owned by local individuals, households, nonprofit organizations, or nonutility businesses" and placed on local government property.[48] RCW 82.16.110(2)(a)(iii) provides that a "community solar project" includes one that is "owned by a company whose members are each eligible for an investment cost recovery incentive for the same customer-generated electricity as provided in RCW 82.16.120." Both of these models are forms of third-party ownership.

More broadly, Washington's community solar provisions are incorporated within the State's solar incentive program in the State's tax code, including the provisions in RCW

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45 *See, e.g., State ex rel. Addy v. Dept. of Pub. Works*, 158 Wash. 462, 466 (1930); *UICAN*, 106 Wn. App. 605.

46 *UICAN,* 106 Wn. App. at 613.

47 *Id.*

48 RCW 82.16.110(2)(a)(i).

82.16.120 that do not require the owner of a system, or any of the eligible members of the company, to be the customer of record at the situs of the solar facility.[49] Customer-generated electricity is defined as "electricity that is generated from a renewable energy system located within Washington and installed on an individual's, businesses', or local government's real property that is also provided electricity generated by a light and power business."[50] Indeed, that section provides that the individual, business, or participant in a community solar project may apply to the utility serving the situs of the system, without regard to the customer status of the individual, business or participant. To the extent "customer-generated electricity" is broadly stated by Washington law, the tax code appears to support third-party ownership of community solar projects.

### D. A distributed generation system owned by a third-party owner may participate in net metering in Washington.

Washington net metering law is sufficiently flexible to allow a host customer of a third-party owned system to participate in net metering. Washington law defines a "customer-generator" as a "user of a net metering system."[51] In many states, net metering statutes define a customer-generator as the "owner and operator" of a net metering system, evincing a legislative intent to require both ownership and operation of a system as a condition for net metering eligibility. Where the definition of customer-generator uses the disjunctive "or" between the conditions, as in "owner or operator," canons of statutory interpretation suggest a legislative intent that either condition will satisfy net metering eligibility. Even in that case, there is some ambiguity as to whether a customer is the "operator" of a third-party system, since the PPA provider typically performs all operational functions. The Washington legislature's choice to define customer-generator as a "user" of a net metering system demonstrates an unambiguous intent not to limit net metering eligibility based on system ownership. The term "User" is sufficiently broad to encompass a host customer who receives on-site generation through a third-party PPA. Therefore, Washington law does not prohibit third-party owned systems from net metering.

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49 RCW 82.16.120(1)(a).

50 RCW 82.16.110(3).

51 RCW 80.60.010(2).

## III. Conclusion

It appears that the Commission does not have jurisdiction over a third-party-owned distributed generation system so long as the owner does not dedicate its property to public service by holding open service to the public. The character of service of a distributed generation system—assuming it does not meet all "as needed" customer electricity requirements—is distinct from electric utility service and does not otherwise implicate the public interest.

If the Commission or the State Legislature clarifies that third-party owned distributed generation is not within the jurisdiction of the Commission, the third-party financing model will likely be utilized as it has been in other states. In turn, regulatory certainty for third-party owners could spur investment in distributed generation resources and increase use of net metering in Washington, which the legislature has clearly stated is in the public interest.