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**PUBLIC SERVICE COMMISSION OF WISCONSIN**

Investigation of Milwaukee Water Works Economic Development Rate  
on the Commission's Own Motion

3720-WI-102

**FINAL DECISION**

This is the Order and Final Decision in the investigation conducted by the Public Service Commission (Commission) on its own motion related to the implementation of the Economic Development Rate (EDR) for the Milwaukee Water Works (MWW).

**Introduction**

The Commission approved an EDR for MWW in February 2011, as part of its Order and Final Decision in docket 3720-WR-107, which established rates for water service. The Commission approved the EDR as a two-year pilot program, ending on February 8, 2013. The Commission required that MWW submit an annual report on or before April 1 of each year identifying the customers that were offered the EDR. MWW submitted its first report on March 21, 2012, which indicated that no customers had taken advantage of the EDR in the first year of implementation.

On May 4, 2012, the Commission opened an investigation on its own motion to determine whether modifications to the EDR were necessary to encourage greater participation by MWW customers. MWW submitted additional information on June 8, 2012, in response to questions from Commission staff. MWW declined to offer suggested changes to the EDR, stating that an additional round of marketing was planned and that the utility would seek

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feedback on the EDR from the Milwaukee Common Council later in 2012. No persons requested party status in this docket. The Wisconsin Industrial Energy Group (WIEG) filed comments on the EDR with the Commission on June 29, 2012.

At its open meeting of July 19, 2012, the Commission determined that modifications to the EDR were necessary to encourage greater participation by MWW customers. Commissioner Callisto dissented.

### **Findings of Fact**

1. MWW has excess water supply capacity in its existing treatment and distribution facilities and has experienced reductions in demand due to the loss of industrial customers and changing consumption patterns.
2. All customer classes benefit from MWW attracting new industrial and commercial customers into its service area because increased demand allows MWW to spread its fixed costs over a wider base of customers.
3. In the first 18 months after its availability, no customers took service under the EDR, in part, because the eligibility criteria may be overly restrictive.
4. It is reasonable to revise the eligibility criteria for the EDR to encourage greater participation by existing and prospective customers.
5. It is reasonable to extend eligibility for the revised EDR for an additional 730 days to provide an opportunity for customers to take advantage of the revised rates.

### **Conclusions of Law**

1. The Commission has the authority to revise MWW's EDR, subject to the conditions expressed in this Final Decision, pursuant to Wis. Stat. §§ 196.02(1), 196.03(1), 196.19, 196.20(1), 196.37, 196.395, and 196.40.

2. Pursuant to Wis. Stat. §§ 196.02(2), 196.37, and 196.60, the Commission concludes that the MWW EDR, as revised and modified by this Final Decision, is not unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise unlawful.

### **Discussion**

#### **Economic Development Rate (EDR)**

MWW relies on Lake Michigan for its water, which provides access to an abundant source of supply. Furthermore, MWW also has substantial excess capacity in its water distribution and treatment infrastructure and could increase production and serve more customers without investing in additional pipes, pumps, or water purification facilities. By adding demand on the system, MWW is able to use its existing facilities more efficiently, without increasing its fixed costs or charges to other ratepayers. This benefits MWW's existing ratepayers by spreading the utility's existing fixed costs over a wider customer base.

On February 4, 2010, the City of Milwaukee, by Milwaukee Common Council Resolution 0911318, requested that the Commission establish an EDR for water-intensive businesses that relocate to or expand within the city. Using the parameters provided by the City of Milwaukee, Commission staff developed a proposed EDR. The Commission approved the EDR in February 2011, as a pilot that expires on February 8, 2013.

No customers have taken advantage of the EDR since its approval. In its response to Commission staff's data request dated May 23, 2012, MWW described its efforts to publicize and implement the EDR. In August 2011, MWW provided informational materials to 66 of the 160 existing customers who met the baseline water usage requirement. In addition, MWW mailed informational materials to 380 food and beverage companies in the seven-county greater Milwaukee region. MWW received five responses to its mailings, but none of the prospective customers qualified or applied for the EDR. MWW also noted that in 2012, it launched a second round of targeted, business-to-business marketing to promote MWW's already low general service rates as well as the EDR. On April 6, MWW sent out 6,133 pieces of direct mail targeted to national site selectors and businesses in the Milwaukee, Wisconsin, and Atlanta, Georgia, areas. The campaign targeted chemical manufacturers, metal fabricators, and the food and beverage industry. MWW has partnered with Milwaukee 7, a private economic development consortium, to assist with promoting the Milwaukee region as a favorable location for water-intensive industries. MWW indicated it intends to conduct a third round of outreach to businesses in other geographic regions with limited water supply, including Arizona, California, Oklahoma, and Texas.

The Commission supports MWW's marketing efforts. However, the Commission believes that the lack of interest in the EDR is the result of the overly restrictive and burdensome requirements of the EDR, not insufficient marketing. As a result, the Commission finds that it is necessary to modify the EDR to achieve the goals of attracting water-intensive business and creating jobs in the Milwaukee region. The changes to the EDR approved by the Commission in this Final Decision are included as Appendix A.

### **Volumetric Criteria**

The existing EDR requires that a new customer use at least 500,000 gallons per month, and that existing customers have a baseline water usage of 1,000,000 gallons per month and increase their usage by 50 percent or 1,500,000 gallons, whichever is less. As noted in MWW's report, there are 160 existing customers who meet the baseline volumetric limits. These volumes were established to ensure that the EDR would be available only to large, water-intensive industries and to discourage the eligibility of smaller volume customers, such as multi-family residential developments and non-industrial customers.

The Commission finds it reasonable to reduce the volumetric criteria so that a new customer needs to use at least 250,000 gallons per month to qualify, and an existing customer needs to use at least 250,000 gallons per month and increase its usage by 50 percent or 250,000 gallons, whichever is less. In addition, the Commission specifies that the EDR is available only to industrial and commercial class customers, as defined in Wis. Admin. Code ch. PSC 185. Public authority, residential, and multi-family residential customers, are excluded from the EDR. MWW estimates that less than 500 existing customers would be eligible for the EDR under the reduced volumetric threshold.

### **Job Creation**

The existing EDR requires that a customer create 25 new, living wage jobs, as defined by § 310-13.1, Milwaukee Code of Ordinances, within 90 days of approval. The Ordinance defines living wage jobs as that wage "required to produce, for 2,080 hours worked, an annual income equal to the U.S. Department of Health and Human Services' most recent poverty guideline for a

family of three.” For calendar year 2012, the poverty guideline for a family of three was \$19,090/year or \$9.18/hour.

The Commission believes the requirement that a business taking advantage of the EDR must create 25 new, living wage jobs fails to account for the size or earnings of potential EDR customers. A large water user with fewer than 25 jobs could still benefit from the system and reduce costs for other ratepayers. Further, there is an implicit job creation benefit if the city retains an existing customer and allows that customer to expand its business, or if a new customer relocates to the region to take advantage of the EDR. These customers may also create new secondary jobs if their expansion triggers increased demand for local goods and services. Therefore, the Commission finds it reasonable to eliminate the requirement that a new or existing customer taking service under the EDR create and retain 25 living wage jobs within 90 days.

### **Affidavit Requirement**

The existing EDR requires that a customer sign an affidavit swearing that the anticipated increases in water consumption would not have occurred “but for” the EDR. The requirement was intended to avoid the possibility of free-riders participating in the EDR. In general, the EDR is intended to attract new customers and demand to the system rather than provide a price break for customers who would have increased their consumption even without the EDR. However, WIEG notes that it is unlikely that a customer considering relocation or expansion could meet this requirement because water rates are only one of several factors that lead a customer to make

a business decision to expand. WIEG suggests that the affidavit requirements be consistent with those that the Commission adopted in Wisconsin Power and Light's (WP&L) EDR.<sup>1</sup>

In the WP&L EDR, the Commission adopted WP&L's suggestion in which the customer must declare that it would not be expanding load or locating new operations in WP&L's service territory "but for" the existence of the EDR, either alone or in combination with other available economic assistance. Because the Commission had also approved use of the EDR for customers in economic distress in the WP&L EDR, the Commission directed WP&L to create an affidavit that covered load retention for customers in economic distress. The Commission also directed that WP&L add the following paragraph to its EDR:

In order to be eligible for this Rider, a customer in economic distress that is seeking to retain its existing load shall sign an affidavit, attesting to the fact that "but for" the rate discounts available under this Rider, either on its own or in combination with a package of economic development or job creation incentives from local, county, State of Wisconsin, or federal programs, the customer would be reducing its energy consumption, shutting facilities in Wisconsin, or leaving Wisconsin.

The Commission agrees with WIEG that the existing affidavit should be modified. Few, if any, large water users would be able to attest that the EDR was the sole factor in their decision making. Nonetheless, the Commission does not believe that it is necessary to include language regarding economic distress in MWW's EDR. This EDR is intended to provide an incentive for expansion on the system, rather than to provide price breaks or incentives for existing demand in situations of economic distress. The Commission believes that other state and local economic development programs are adequate to assist businesses in economic distress. As a result, the Commission finds it reasonable to modify the affidavit provision to require that a customer

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<sup>1</sup> *Wisconsin Power and Light Company's Request for Approval of an Experimental Economic Development Program Rider and the Associated Approval of Deferral Treatment of Revenue Discounts*, docket 6680-GF-126 (June 4, 2010).

taking service under the EDR affirm that the EDR was one factor in its decision to expand or relocate, rather than the only factor.

### **Efficient Water Use**

The existing EDR prohibits the use of water purchased under the EDR for cooling or irrigation purposes. The EDR also requires that a customer taking service under the EDR submit a plan that demonstrates that the customer has implemented cost-effective, best management practices for efficient water use. MWW may conduct a water use audit, at the customer's expense, to verify the implementation of such measures. Failure to do so within 90 days of the audit could result in disqualification for the preferential rate. This provision was intended to reconcile the Commission's interest in promoting efficient water use with the goals of the EDR.

WIEG commented that some best management practices could require significant capital investment and that it may be difficult for a customer to contribute further capital expenditures during an expansion or relocation. WIEG suggested that the Commission modify this requirement to instead allow a prospective customer to demonstrate that it has made commercially reasonable efforts to evaluate and implement water conservation and efficiency measures.

While the Commission remains committed to promoting efficient water use as a statewide policy goal, the Commission agrees with WIEG that the water efficiency requirement should be modified. For any business seeking to expand or locate within MWW's service area, it is in their economic interest to minimize their water (and sewer) use as a way to control operating costs. However, the requirement that a business implement industry best management practices goes beyond what is required for other MWW customers and would be difficult for

MWW to enforce. Thus, the Commission finds it reasonable to modify the EDR to allow eligible customers to demonstrate that they have made reasonable efforts to implement commercially available water efficiency measures rather than requiring industry best management practices. The Commission retains the prohibition on the use of water purchased under the EDR for cooling or irrigation purposes, as well as the provision allowing MWW to conduct a water use audit at the customer's expense.

### **Terms of the EDR**

The modified terms of the EDR are shown in Appendix A. In its initial request, MWW preferred that only customers located in the City of Milwaukee be allowed to participate in the EDR. The Commission found that such a restriction would limit the benefit that an EDR could provide to all of MWW's ratepayers. Any increase in demand that efficiently reduces MWW's excess capacity will benefit MWW's ratepayers, whether that increase occurs in the City of Milwaukee, in a suburban retail community, or in municipalities that purchase water from MWW at wholesale. The Commission finds that it is reasonable to continue to allow a customer to qualify for an EDR if it is located anywhere within MWW's retail service area or in a neighboring community that buys water at wholesale from MWW.

A customer located in MWW's wholesale service territories will qualify for an EDR in a two-step process. The local municipal utility must first request that the Commission approve an EDR for its own retail customers. The local municipal utility can then offer its discounted EDR to the customer and can pass through the amount of the discount to MWW, which will convert the discount into a credit on MWW's wholesale bill to the local municipal utility.

To ensure that existing facilities are adequate to handle any expansions of demand resulting from the EDR, the Commission retains the provision that the operator of the Milwaukee Metropolitan Sewerage District (MMSD) must certify that MMSD can accept the additional discharge without harming the operation of the wastewater treatment facilities and without increasing wastewater charges to any other customers. Similarly, MWW must still certify to the Commission that it has adequate facilities to meet the increase in demand without affecting its source of supply or plant and without increasing water rates to any other customers. If MWW or MMSD must increase treatment, storage or distribution capacity, the EDR customer is responsible for its incremental share of these capital costs.

The Commission approved the EDR as a pilot program to determine whether it could successfully utilize MWW's excess capacity, spread fixed costs over a larger customer base, and achieve other goals. The period when new or existing customers could enroll in the EDR was limited to two years, expiring on February 8, 2013. The Commission recognizes that the changes contained in this Final Decision are substantial and that parties who might typically provide testimony on these changes as part of a rate case have not done so. Moreover, MWW did not request these changes and is advocating against the Commission taking any action at this time, prior to input from the Milwaukee Common Council. Nonetheless, the Commission believes that it received adequate input on this matter during MWW's last rate case and notes that MWW has had more than 18 months to obtain input from the Milwaukee Common Council. The Commission therefore finds it reasonable to modify the EDR and extend the enrollment period for an additional 730 days from the date of this Final Decision.

The Commission retains all other provisions of the EDR.

**Order**

1. This Final Decision takes effect on the day after mailing.
2. MWW's modified EDR is approved, subject to the conditions in this Final Decision.
3. MWW shall promptly notify the Commission when it enrolls a customer to the EDR or removes a customer from the EDR.
4. MWW shall file an annual report no later than April 1 of each year containing the information described in the EDR.
5. Jurisdiction is retained.

Commissioner Callisto dissents and files a separate opinion (attached).

Dated at Madison, Wisconsin, this 21<sup>st</sup> day of August, 2012.

By the Commission:



Sandra J. Paske  
Secretary to the Commission

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See attached Notice of Rights

PUBLIC SERVICE COMMISSION OF WISCONSIN  
610 North Whitney Way  
P.O. Box 7854  
Madison, Wisconsin 53707-7854

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE  
TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE  
PARTY TO BE NAMED AS RESPONDENT**

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

*PETITION FOR REHEARING*

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

*PETITION FOR JUDICIAL REVIEW*

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.<sup>2</sup> The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: December 17, 2008

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<sup>2</sup> See *State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

## APPENDIX A

### Economic Development Rate - - - EDR-1

#### 1. DEFINITIONS

In this tariff:

- A. “Baseline Water Consumption” means the customer’s highest monthly consumption of water in the 24 months preceding the customer’s application to receive service under the Economic Development Rate. A customer’s Baseline Water Consumption shall be calculated in the following manner:
  - 1. For existing customers who are billed monthly, the customer’s highest actual monthly consumption of water in the previous 24 months.
  - 2. For existing customers who are billed quarterly, the customer’s average monthly consumption calculated using the highest quarterly consumption of water in the previous 24 months.
  - 3. For a new customer, the Baseline Water Consumption is zero.
- B. “CCF” means 100 cubic feet.
- C. “Commercial customer” means a business, not-for-profit organization, or other institution that provides goods or services and that takes service exclusively for non-residential purposes. For the purposes of this tariff, mixed-use commercial properties that include residential dwelling units are not considered commercial customers.
- D. “Cooling Water” means water used for cooling, as defined in Section 2.5.0 of the Utility’s operating rules.
- E. “Industrial customer” means a customer who is engaged in the manufacture or production of goods.
- F. “Irrigation Water” means water used outdoors for landscaping, decorative, and cleaning purposes, including lawn watering, fountains, pavement washing, and building washing.
- G. “MMSD” means the Milwaukee Metropolitan Sewerage District.
- H. “PSC” means the Public Service Commission of Wisconsin.
- I. “Utility” means the Milwaukee Water Works.

2. REQUIREMENTS FOR A RETAIL CUSTOMER TO QUALIFY FOR THE ECONOMIC DEVELOPMENT RATE

- A. Any Commercial or Industrial customer that meets all of the following criteria may petition the Utility for service under the Economic Development Rate:
  - i. The customer either is new to the retail service area of the Utility or is expanding its take of metered service under Utility Schedule Mg-1 or Mg-2.
    - a. For a new customer, the customer's water usage is at least 250,000 gallons (334 CCF) per month, excluding Irrigation Water or Cooling Water.
    - b. For an existing customer, the customer's Baseline Water Consumption is at least 250,000 gallons (334 CCF) per month and its consumption increases by 250,000 gallons (334 CCF) or 50 percent over its Baseline Water Consumption per month, whichever is less, excluding Irrigation Water or Cooling Water.
  - ii. The customer demonstrates reasonable efforts to implement commercially available water efficiency measures. The Utility may request an independent analysis of the economic feasibility of any proposed measures, at the customer's expense.
  - iii. The customer files an affidavit with the Utility attesting to the fact that "but for" the rate discounts available under the Economic Development Rate, either on its own or in combination with a package of economic development or job creation incentives from local, county, state of Wisconsin, or federal programs, the customer would not have expanded or located its operations within the Utility's service territory or increased its water consumption by the amount described in subd. i., above.
- B. Any petition under par. A. above shall be made on a form the Utility provides and shall include all the information necessary to judge whether the customer meets the eligibility criteria specified in par. A. If the petitioning customer meets these criteria, and MMSD and the Utility file the certificates specified in Section 3., the customer's incremental increase in water consumption is eligible for service under the Economic Development Rate for 60 months. When this cycle of billing periods expires, the customer is not eligible again for service under the Economic Development Rate.

3. ADEQUACY OF WATER AND WASTEWATER CAPACITY

- A. Before the Utility can serve a customer under the Economic Development Rate, the operator of MMSD must certify to the PSC in writing that MMSD can accept

the proposed increased wastewater discharge without adversely affecting the operation of the wastewater treatment plant or increasing wastewater charges to other customers.

- B. Before the Utility can serve a customer under the Economic Development Rate, the operator of the Utility must certify to the PSC in writing that the Utility can provide the proposed consumption without adversely affecting the Utility's source of supply or plant or increasing water rates to other customers.

4. BILLING FOR THE INCREMENTAL EXPANSION OF WATER SERVICE

- A. The Utility shall bill each customer under the Economic Development Rate on a monthly basis.
- B. Service charges are as specified in Utility Schedule Mg-1 or Mg-2.
- C. The volume rate for all water used, up to the customer's Baseline Water Consumption, is as specified in Utility Schedule Mg-1 or Mg-2.
- D. The volume rate for all water used in excess of the customer's Baseline Water Consumption is as follows:

Months 1 to 12:	\$0.54 per CCF (\$0.722 per thousand gallons)
Months 13 to 24:	\$0.62 per CCF (\$0.829 per thousand gallons)
Months 25 to 36:	\$0.70 per CCF (\$0.936 per thousand gallons)
Months 37 to 48:	\$0.78 per CCF (\$1.043 per thousand gallons)
Months 49 to 60:	\$0.86 per CCF (\$1.150 per thousand gallons)

In the sixty-first month, the customer is no longer eligible for the Economic Development Rate and shall be charged the applicable rates in Utility Schedule Mg-1 or Mg-2.

- E. For expansions of service that require the Utility or MMSD to increase treatment, storage, or distribution capacity, the customer shall contribute the capital cost of the incremental capacity to the Utility or MMSD. Customers shall be responsible for water main extensions and service lateral installations as provided in Schedules Lc-1 and X-1.
- F. Economic development customers taking service under Schedule Mg-2 and located outside the City of Milwaukee shall be billed rates 25 percent higher than those laid out in Section 4.D. as required by Wis. Stat. § 62.69(2)(h).
- G. For the purposes of Wis. Stat. § 196.193, the rates established in this Schedule shall be considered general service rates.

5. WATER CONSUMPTION MINIMUM

If a customer fails to meet the minimum consumption requirements in Section 2.A.i. for four consecutive months, the customer ceases to qualify for the Economic Development Rate. All subsequent billing shall be under the applicable general service rates.

7. DEMONSTRATION OF EFFICIENT WATER USE

- A. The Utility may conduct or contract for an annual water use audit to determine whether the customer has in fact made reasonable efforts to implement commercially available water use efficiency measures. The customer shall pay the cost of the audit, whether performed by the Utility or a contractor.
- B. If the Utility determines that the customer has not made reasonable efforts to implement commercially available water efficiency measures, the customer shall have 90 days to implement the practices. If the customer fails to do so, the customer ceases to qualify for the Economic Development Rate and all subsequent billing shall be under the applicable general service rates.

8. WATER USE EXCEPTIONS

- A. Irrigation Water or Cooling Water is not eligible for the Economic Development Rate and shall be billed at the applicable general service rate.
- B. The customer shall, at its own expense, install plumbing necessary for a secondary meter or meters to measure the use of Irrigation Water or Cooling Water separately.

9. AVAILABILITY OF THE ECONOMIC DEVELOPMENT RATE

The Economic Development Rate is open for 730 days for customers to begin taking service, commencing on the date when this rate first takes effect. Further extensions of the Economic Development Rate are subject to PSC approval.

10. CLAWBACK PROVISION

- A. If the customer ceases to qualify for the Economic Development Rate, as specified in Sections 5. or 6., before 60 months have been completed, the customer is liable to the Utility for the amount specified in par. B.
- B. A customer's liability under par. A. constitutes the difference between the rate paid under the Economic Development Rate and the applicable general service rates that the customer would otherwise have paid, for the most recent two years that the customer was served under the Economic Development Rate.

11. NOTIFICATION AND REPORTING TO PSC

- A. The Utility shall inform the PSC in writing each time it approves a customer's request for service under the Economic Development Rate. This notice shall include the proposed volume of consumption by type and the certifications of adequate capacity required under Section 3.
- B. The Utility shall annually file with the PSC a report listing the customers on the Economic Development Rate, the total water consumption by each customer, and the consumption by each customer that the Utility billed under the Economic Development Rate. The Utility shall submit this report on or before April 1 each year.

## PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation of Milwaukee Water Works Economic Development Rate  
on the Commission's Own Motion

3720-WI-102

### DISSENT OF COMMISSIONER ERIC CALLISTO

I dissent from the Commission's *Final Decision* in this docket modifying the terms of Milwaukee Water Works' (MWW) Economic Development Rate (EDR). The Commission's adopted changes are premature, insufficiently developed, and are being ordered largely in the absence of input from interested parties and affected stakeholders, including the water utility itself, the city of Milwaukee (City), and the utility's wholesale customers. While I agree that ongoing Commission scrutiny and re-evaluation is appropriate for the EDR, I would have preferred that we allow the two-year pilot period to run, as initially intended, and that we at least wait for the MWW's expected feedback on tariff modifications before ordering such substantial changes.<sup>3</sup>

The EDR for MWW was initially approved in February 2011. Its concept and terms were developed in MWW's rate case, a vigorously contested proceeding.<sup>4</sup> The issue of the EDR was itself specifically litigated, generating testimony from MWW, Commission staff, wholesale

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<sup>3</sup> To say that "MWW has had more than 18 months to obtain input from [the City]" is inaccurate. *See Final Decision*, in this docket, at p. 10. While the EDR was first approved more than 18 months ago, it makes no sense for the utility to seek City input on a tariff *before* it has even been implemented and which was slated for a two-year pilot period.

<sup>4</sup> *See generally* docket 3720-WR-107.

customers,<sup>5</sup> the Wisconsin Industrial Energy Group (WIEG), the Alliance for the Great Lakes, the City, and Milwaukee County. The Commission considered and deliberated the EDR in three separate open meetings, before ultimately approving its implementation on a pilot basis. Now, well before the pilot period is over, without the input of MWW, the City, wholesale customers, and in the absence of any stated position from Commission staff, the Commission has chosen to make significant modifications to the EDR for MWW, essentially rewriting the tariff's eligibility requirements.

As a result of the *Final Decision*, the EDR will be available to many more potentially eligible customers. Just how many, we cannot say with certainty. Indeed, it is a testament to the lack of process and factual investigation that underlie the *Final Decision's* modifications that during the Commission's open meeting discussion held on July 19, 2012, no one present – neither staff nor any commissioner – could estimate how many potentially eligible EDR customers there would be as a result of lowering the tariff's volumetric usage criteria. Here the Commission is modifying the water usage requirements ostensibly to make the EDR more widely available, yet at the time of the decision, it was wholly unable to articulate the extent to which the proposed modifications would expand the eligible customer class. Subsequent to the Commission's open meeting and decision, Commission staff did prepare a listing of the top 750 MWW users, ranked by volumetric usage, but because of the imprecision of the customer

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<sup>5</sup> The wholesale customers that participated in the MWW rate proceeding in docket 3720-WR-107 include the cities of Mequon, New Berlin, Wauwatosa, West Allis and Menomonee Falls, and the villages of Shorewood, Brown Deer, Butler, and Greendale.

categories included on the staff listing, the Commission is still without a complete and accurate accounting of potentially eligible EDR customers.<sup>6</sup>

The job creation requirement that accompanied the initial MWW EDR is removed in the Commission's *Final Decision*. While I did not enthusiastically support the job creation requirement when the EDR was initially approved, I went along with it in acknowledgement that it was supported by the utility and the City, and that the EDR concept for water service had specifically grown out of a policy development conversation between the City and area business leaders.<sup>7</sup> At the time, I – as a utility regulator – was willing to show some deference and restraint on the economic development initiatives of the local community, at least on a pilot basis. And though I do not remain wedded to forever including the job creation requirement in MWW's EDR, I think we owe it to the utility, the City, and all of the affected stakeholders to have a more fully informed debate on that point before ultimately determining whether to include the requirement, change it, or eliminate it entirely.<sup>8</sup>

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<sup>6</sup> See Staff Memorandum, in this docket, from John Schulze, Jr., Administrator of the Division of Water, Compliance and Consumer Affairs, to the Commission, dated August 2, 2012 (acknowledging that an accurate accounting of eligible customers would require further analysis from MWW).

<sup>7</sup> Job creation criteria function differently for a municipal utility, as opposed to an investor-owned, given the clear impact to municipal tax base that accompanies an employment increase.

<sup>8</sup> The *Final Decision* itself reflects confusion on the job creation purposes of the tariff. At points, it emphasizes the efficient use of excess capacity and the potential cost reduction for customers. See *Final Decision*, in this docket, at Finding of Fact 2, p. 2 (“increased demand allows MWW to spread its fixed costs over a wider base of customers”); p. 3 (“[t]his benefits MWW’s existing ratepayers by spreading the utility’s existing fixed costs over a wider customer base”); and p. 7 (“This EDR is intended to provide an incentive for expansion on the system, rather than to provide price breaks or incentives for existing demand in situations of economic distress. The Commission believes that other state and local economic development programs are adequate to assist businesses in economic distress.”). But at other points, it emphasizes the job creation aspects of the tariff. See *Final Decision*, in this docket, at p. 4 (“the Commission finds that it is necessary to modify the EDR to achieve the goals of attracting water-intensive business and creating jobs in the Milwaukee region”) and p. 6 (full paragraph emphasizing that jobs will still result from the tariff even if the living wage requirement is removed). The Commission’s confusion is understandable, as the tension between job creation and the regulatory obligation to keep rates fair is a primary challenge when designing an EDR. I, too, am confused about how we best craft these rates. That is why a full debate from all of the stakeholders would better inform us.

The Commission's *Final Decision* also removes the original EDR's water efficiency requirement. No longer must eligible EDR customers utilize best management practices for efficient water usage. Again, this eligibility requirement is something I would be willing to reconsider with the benefit of some analysis showing that its inclusion actually functioned as a barrier to entry.<sup>9</sup> As importantly, I would have preferred that the Commission better understand the legal implications of removing the water efficiency requirement. It is well-settled that discriminatory rate treatment, such as is present in MWW's EDR, can only be justified for a "distinct rate class of customers" with sufficiently different usage characteristics.<sup>10</sup> In originally approving the tariff in February 2011, the Commission explicitly relied on the water efficiency requirement as an aspect of the EDR that made its eligible customers sufficiently distinct and which would help the tariff withstand legal challenge.<sup>11</sup> If the EDR for MWW is as important as the Commission says it is, its legal sufficiency is deserving of a more thoughtful and transparent vetting.<sup>12</sup>

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<sup>9</sup> There is no factual basis to support the conclusion that the original EDR's water efficiency requirement has acted as a prohibitive barrier to uptake of the MWW tariff. Notably, the Commission's *Final Decision* makes no such conclusion, instead relying on the vague and unsupported comments of WIEG, a state trade association that advocates for affordable and reliable energy service. *See Final Decision*, in this docket, at pp. 8-9; *see also* Comments of WIEG, in this docket, at p. 5, dated June 29, 2012 (PSC REF#: 167667).

<sup>10</sup> *See Final Decision, Application of Milwaukee Water Works, Milwaukee County, Wisconsin, for Authority to Increase Water Rates*, docket 3720-WR-107, at pp. 24-25 (February 3, 2011).

<sup>11</sup> *See id.* The Commission has some experience defending the legality of utility EDRs. *See* Decision and Order, *Citizens Utility Board v. PSC of Wisconsin*, Case No. 10-CV-3536, at pp. 10-12 (Wis. Cir. Ct. Dane Co. Feb. 11, 2011). In the *CUB* case, the circuit court specifically interpreted the energy efficiency requirement that the Commission required for the Wisconsin Power & Light EDR as critically important to its being upheld, specifically noting the efficiency requirement's mandatory nature.

<sup>12</sup> I take no issue with the Commission's modification to the EDR's "but for" affidavit because, as modified, it is functionally no different than originally crafted. Whether a customer would not have expanded water usage *but for the EDR* or would not have expanded usage *but for the EDR in combination with a package of economic development incentives*, the EDR in both cases is a factual precondition or cause of the customer's actions. The "but for" causal standard is generally understood as not to exclude the presence of other possible causes that act in concert with the identified "but for" cause. *See* Restatement (Third) of Torts § 26 cmt. b (2010). The Commission's *Final Decision* misunderstands the originally approved EDR as requiring that the EDR alone constitute the "sole factor" for the customer's expansion. *See Final Decision*, in this docket, at pp. 6-8.

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I am willing to acknowledge that the originally crafted EDR is worthy of improvement. I agree that some easing of the eligibility requirements may be in order. I disagree that rushing out poorly developed modifications without stakeholder input is a prudent course of action. We should have honored MWW's request to take up any modifications at least until later this year, with the benefit of a more complete, thorough, and transparent analysis.

I respectfully dissent.

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