Free Rider Problem or Customer Control Problem? Utilities' War on Distributed Generation

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I. INTRODUCTION

The rapidly decreasing costs of installing solar power over the last decade has led many customers to install solar panels on their homes.[1] Installing solar power can reduce or eliminate an individual's electric bill and helps the environment by reducing carbon emissions.[2] This is clearly a win-win for customers, but utility companies are not as happy about the customers installing their own solar panels and reducing their consumption.[3] These customers become part of the distributed generation (DG) system because they generate electric power throughout the grid and near the point of end use instead of generating power from a centralized location as utilities have traditionally done.[4] Utilities allege that DG customers "free ride" on the electrical system by not paying their fair share

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1. *See Solar Industry Research Data: Solar Industry Growing at a Record Pace*, SOLAR ENERGY INDUS. ASS'N [hereinafter *Solar Industry Research Data*], https://www.seia.org/solar-industry-research-data [https://perma.cc/5PDG-JBSU] (last visited Sept. 24, 2021).

2. Taryn Holowka, *Top Four Benefits of Installing Solar Panels on Your Home*, U.S. GREEN BLDG. COUNCIL (Apr. 5, 2017), https://www.usgbc.org/articles/top-four-benefits-installing-solar-panels-your-home [https://perma.cc/6MRS-L897].

3. Josh Garskof, *How Utilities Are Fighting Back on Solar Power*, CONSUMER REPS. (June 30, 2016), https://www.consumerreports.org/energy-saving/how-utilities-are-fighting-back-on-solar-power/ [https://perma.cc/J5BS-J7ZW].

4. DISTRIBUTED GENERATION LAW: A GUIDE TO REGULATIONS, POLICIES, AND PROGRAMS 1–2 (Sarah A. W. Fitts & Florence K. S. Davis eds., 2020).

of the bill while still receiving the benefits of service.[5] As such, utilities have tried to implement rate schemes that charge higher rates to DG customers than non-DG customers.[6]

Per Congress's directive, some federal and state entities implemented regulations that promote DG by requiring that utilities' rates cannot discriminate against DG customers.[7] However, in recent years, and under the lobbying pressure of utilities, some states have enacted laws that allow utilities to charge DG customers different rates.[8] Kansas has laws that fall under both categories, and that tension has created a dispute when a utility company tried to charge DG customers higher rates.[9] Ultimately, the Kansas Supreme Court held in *In re Westar Energy, Inc.* that the rate design violated Kansas law by charging DG customers a higher rate.[10] While this decision provided a favorable precedent for DG advocates in evaluating whether rates charged to DG customers are discriminatory, utilities continue to lobby states to change laws, which may cause DG customers' protection from discrimination to erode. To continue encouraging the growth of DG, legislators, courts, and public utility commissions (PUCs) should account for any benefits that DG provides to utilities and should consider alternative rate schemes when evaluating whether utilities need to charge DG customers additional fees. Further, federal law should step in to provide nationwide protection from discriminatory rates because DG's unique nature actually places it under federal authority.

Section II of this Comment provides the background of the utility model in the United States and how DG impacts it. Section II.C discusses regulations prohibiting utilities from charging DG customers discriminatory rates and looks at Kansas's *Westar* decision on the matter. Section III.A argues that the Kansas Supreme Court's *Westar* decision correctly rejected a rate scheme that singled out DG customers to pay an extra fee. Section III also argues that utilities should not be allowed to

5. JIM LAZAR, REGUL. ASSISTANCE PROJECT, ELECTRICITY REGULATION IN THE US: A GUIDE 78 (2d ed. 2016), https://www.raponline.org/wp-content/uploads/2016/07/rap-lazar-electricity-regulation-US-june-2016.pdf [https://perma.cc/CB5A-GDA2].

6. *Id.*

7. *See* DISTRIBUTED GENERATION LAW, *supra* note 4, at 40–41, 67, 75.

8. *See* NeoVolta Inc., Utilities Lobbying to Eliminate Solar Net Metering: Behind-the-Meter Energy Storage Protects Consumers Against Electricity Pricing Changes, GLOBENEWSWIRE (July 10, 2019, 8:00 AM), https://www.globenewswire.com/news-release/2019/07/10/1880764/0/en/Utilities-Lobbying-to-Eliminate-Solar-Net-Metering.html [https://perma.cc/KD46-BFZT] (discussing utility industry's lobbying to roll back net metering and raise monthly rates for solar users).

9. *See In re* Westar Energy, Inc., 460 P.3d 821, 825 (Kan. 2020).

10. *Id.* at 827.

single out DG customers for free riding concerns when other customers also pose this problem and there are more equitable ways to address it. Section III.D argues that fairness requires weighing any benefits of DG against its costs when utilities propose DG customer rates. Finally, Section III.D proposes that federal law should prevent discriminatory rates against DG customers because federal law will better promote Congress's intention of encouraging small power production and diversification of energy resources.

II. BACKGROUND

It is important to understand electric utilities' traditional economic model and operating requirements to understand the legal regulations placed on utilities. It is critical to remember that utilities are different from other businesses because they "perform[] a function of the state" by providing public services to customers and get to exercise unique powers unavailable to most businesses.[11] This Section will also discuss DG, its impact on utilities, and why policymakers might want to encourage DG. Finally, this Section will discuss regulations on rate discrimination against DG customers by looking at Kansas's *Westar* decision and providing an overview of regulations in other jurisdictions.

A. Utilities Overview

The United States has three main types of electric utility companies that serve customers: (1) investor-owned utilities (IOUs), (2) publicly owned utilities (POUs), and (3) cooperatives (co-ops).[12] While POUs and co-ops are owned by government entities or the members they serve, respectively, IOUs are owned by private investors, as the name suggests.[13] This means that POUs and co-ops generally do not operate for profit, whereas IOUs do.[14] While POUs and co-ops greatly outnumber IOUs, IOUs tend to serve much larger customer bases.[15] As of 2017, IOUs

11. *See* Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 TEX. J. OIL GAS & ENERGY L. 211, 221 (2016) [hereinafter Peskoe, *Utility Rates*] (quoting Smyth v. Ames, 169 U.S. 466, 544 (1898)).

12. Anodyne Lindstrom & Sara Hoff, *Investor-Owned Utilities Served 72% of U.S. Electricity Customers in 2017*, U.S. ENERGY INFO. ADMIN. (Aug. 15, 2019), https://www.eia.gov/todayinenergy/detail.php?id=40913 [https://perma.cc/Z24N-8CKM].

13. *Id.*

14. *See id.*

15. *See id.*

served 72% of U.S. electricity customers.[16]

Customers typically do not have a choice in selecting their utility service provider.[17] Usually, only one electric utility can operate in a given territory because of concerns of inefficiencies and dangers in allowing multiple sets of power lines operated by different utilities to exist in the same territory.[18] Therefore, utilities have a natural monopoly for customers in each territory they operate in.[19] This does not present any problems for customers that are served by POUs or co-ops because of the non-profit nature of those utilities and the ownership interests of the customers. However, the lack of competition can potentially pose problems for customers served by IOUs.[20]

Both the federal government and states have instituted regulatory schemes to protect customers in lieu of competition for electricity distribution.[21] In contrast to a typical private business, the government can regulate private IOUs sales because of the generally accepted theory that IOUs perform a service of the state by providing utility services to its citizens.[22] Further, IOUs have unique authorities not available to most private businesses, "such as the power to exercise eminent domain."[23] For these reasons, IOUs are subject to government oversight in the rate-setting process.[24]

Government oversight of a utility's rate design generally requires that "the rate design is reasonably calculated to recover the costs of providing service . . . plus a reasonable return" on investment for the IOU.[25] In addition to ensuring reasonable rates for customers, a goal of the "ratemaking" process is to make the rates favorable enough to the utilities so as to attract private capital and spur investment in energy opportunities.[26] Only capital investments, such as cost for building a new

16. *Id.*

17. *See* Josh Keefe, *Are Private or Public Electric Utilities Cheaper?*, BANGOR DAILY NEWS (Dec. 23, 2019), https://bangordailynews.com/2019/12/23/mainefocus/are-private-or-public-electric-utilities-cheaper/ [https://perma.cc/3FM7-9HUY].

18. *Id.*

19. *Id.*

20. *See* Peskoe, *Utility Rates*, *supra* note 11, at 221.

21. *Id.*

22. *Id.*

23. *Id.* (citing Smyth v. Ames, 169 U.S. 466, 544 (1898) (discussing railroads' authority to exercise eminent domain as a reason for allowing the government to regulate railroad rates)).

24. *Id.*

25. *See In re* Westar Energy, Inc. & Kan. Gas & Elec. Co., No. 120,436, 2019 WL 1575480, at *6 (Kan. Ct. App. Apr. 12, 2019).

26. *How Utilities Determine Generation and Distribution Rates (Ratemaking)*, ELEC. CHOICE

power plant or new transmission lines, are subject to a reasonable rate of return for the investor.[27] A rate can only directly cover fixed operating expenses, such as labor, maintenance, fuel, insurance, and tax costs,[28] with no reasonable rate of return on these expenses.[29]

The PUC of a state balances the interests of customers paying low rates with utilities desiring high returns on investment when making a determination as to the reasonableness of a proposed rate.[30] If properly applied in a ratemaking procedure, these principles should produce a price that reflects the theoretical price a utility would charge in a competitive market, as opposed to the monopolized market the utility actually operates within.[31] IOUs, ratepayers, and third parties can present competing studies as to the existing costs of providing utilities and ideas on how those should be apportioned amongst customers.[32] Because each of these groups presents information that reflects its interests, the lack of objective studies presents issues in these ratemaking cases.[33] Therefore, PUCs can struggle to objectively allocate costs in ratemaking cases with competing interests, and the growth of renewable energy has presented a competing interest for many utilities in ratemaking cases.

B. Distributed Generation

Distributed generation (DG) refers to electricity generated by sources near the point of end use.[34] While DG is typically thought of as relating to renewable energy sources, it technically only references the means of acquiring and distributing the electricity on the grid.[35] DG encompasses both renewable and fossil fuel sources so long as the source is located near the point of end use.[36] This misconception is for good reason though; DG in the United States typically uses renewable energy sources such as solar

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[hereinafter ELEC. CHOICE], https://www.electricchoice.com/blog/how-utilities-determine-generation-and-distribution-rates-ratemaking/ [https://perma.cc/4W8E-266F] (last visited Sept. 24, 2021).

27. *See id.*

28. LAZAR, *supra* note 5, at 57.

29. *See* ELEC. CHOICE, *supra* note 26.

30. *See id.*

31. Peskoe, *Utility Rates*, *supra* note 11, at 228–29.

32. *See id.* at 221–22.

33. *Id.* at 222; *see also* JAMES C. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 338–39 (1961).

34. DISTRIBUTED GENERATION LAW, *supra* note 4, at 1.

35. *Id.*

36. *Id.*

or wind, with solar accounting for over 90% of DG in the United States.[37]

Electric utilities have traditionally used large, centralized power generating facilities to provide power to a large number of customers.[38] DG was actually common in the early 1900s because the technology for reliably transmitting power long distances did not yet exist.[39] As technology advanced, the economies of scale achieved by using larger power plants and the increased efficiencies associated with larger plants when burning fossil fuels meant that the U.S. electric system turned away from DG and towards centralized power.[40] Power produced at these centralized plants travels long distances to customers at the point of use.[41] For this system to be effective, transformers throughout the transmission system must step-up and later step-down the voltage to a usable voltage for the consumer.[42] Centralized plants must also monitor and respond to the energy demand of customers, which varies throughout the day and year.[43] Because of this issue, utilities found it more efficient to connect their electrical grids and coordinate power plant operations to serve their different customers.[44] Therefore, the electricity delivered to an end-user may or may not have been generated by the utility for which the user is a paying customer.[45]

As renewable energy technologies have recently advanced, the efficiency and economic preferences for centralized power generating facilities have flipped back in favor of DG.[46] The rapid increase in efficiency and decrease in cost of solar and other renewable energy sources has made centralized power plants that use fossil fuels less appealing.[47] Electricity from solar power has already surpassed coal power as a cheaper

37. See Richard L. Revesz & Burcin Unel, *Managing the Future of the Electricity Grid: Distributed Generation and Net Metering*, 41 HARV. ENV'T L. REV. 43, 44 (2017).

38. DISTRIBUTED GENERATION LAW, *supra* note 4, at 3.

39. *Id.* at 6.

40. *See id.*

41. *Id.* at 3.

42. *Id.* at 3–4.

43. *See Centralized Generation of Electricity and Its Impacts on the Environment*, EPA [hereinafter EPA, *Centralized Generation*], https://www.epa.gov/energy/centralized-generation-electricity-and-its-impacts-environment [https://perma.cc/DNF5-HGDC] (last visited Sept. 24, 2021).

44. *Id.*

45. *Id.*

46. DISTRIBUTED GENERATION LAW, *supra* note 4, at 7.

47. Elizabeth Weise, *On World Environment Day, Everything You Know About Energy in the US Might Be Wrong*, USA TODAY (June 5, 2019, 10:20 AM), https://www.usatoday.com/story/news/2019/06/04/climate-change-coal-now-more-expensive-than-wind-solar-energy/1277637001/ [https://perma.cc/N6U9-UVDY].

energy source, and experts predict unsubsidized solar costs will drop below the costs of even natural gas produced electricity in the near future.[48] In addition to utilities taking advantage of these reduced costs by implementing more solar and other renewables as part of its electricity production portfolio, starting in 2015, customers increasingly began to install their own solar panels and become part of the growing DG market.[49]

1. Impacts of DG

In addition to benefits attained by the DG user, the increase in DG capacity due to customers installing their own solar panels has many benefits to utilities, the electrical system, and the public as a whole.[50] First, increase in DG capacity reduces the peak electricity demand that utilities must have capacity to supply.[51] This is especially true for solar DG because peak demands typically occur when the sun shines during the summer due to the increased power demands of air conditioning systems at those times.[52] Not only will DG customers reduce their own demand for electricity from the utility, but they can supply any surplus to nearby customers, further reducing demand on the utility.[53] Therefore, utilities can avoid the expenses associated with expanding capacity just to meet peak demands, and can even reduce costs by shutting down old systems that only exist to meet infrequent peak demands.[54]

Second, increased DG capacity helps utilities reduce transmission expenses and inefficiencies.[55] Due to the fundamental characteristics of electricity, some electricity is lost anytime electricity is transmitted.[56]

48. *Id.*

49. *See* Solar Industry Research Data, *supra* note 1.

50. *See, e.g.*, *The Potential Benefits of Distributed Generation and Rate-Related Issues That May Impede Its Expansion*, U.S. DEP'T OF ENERGY (July 11, 2011), https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/1817_Report_-final.pdf.

51. Revesz & Unel, *supra* note 37, at 80.

52. *See Electricity Demand Changes in Predictable Patterns*, U.S. ENERGY INFO. ADMIN. (Dec. 6, 2011), https://www.eia.gov/todayinenergy/detail.php?id=4190 [https://perma.cc/AB8X-5RKZ]; *see also Do We Use More Electricity in Summer or Winter?*, TEX. ELEC. EXAM'R (Feb. 16, 2018), https://www.texaselectricityexaminer.com/do-we-use-more-electricity-in-summer-or-winter.html [https://perma.cc/RBX9-BWZ6] (noting that whether peak demand occurs due to heating in the winter or air conditioning in the summer will depend on the climate of the customer).

53. Anderson Hoke & Paul Komor, *Maximizing the Benefits of Distributed Photovoltaics*, 25 ELEC. J. 55, 57–59 (2012).

54. Revesz & Unel, *supra* note 37, at 80.

55. Alexandra B. Klass, *Regulating the Energy "Free Riders"*, 100 B.U. L. REV. 581, 609 (2020).

56. DISTRIBUTED GENERATION LAW, *supra* note 4, at 4.

These line losses are negligible when the distances are kept short, but the transmission distances of hundreds of miles that centralized generating facilities must deal with can lead to substantial line losses.[57] DG, by its nature, is located near the end user, so these transmission losses are significantly reduced.[58] Further, there are infrastructure savings when building or upgrading transmission lines because the main power lines will not have to transmit as much power.[59]

Third, increased DG capacity makes the electric grid more resilient and reliable.[60] Increased resiliency of utility infrastructure means it can "avoid or minimize interruption of service during an extraordinary and hazardous event."[61] By having energy sources distributed rather than located at a centralized location, the grid becomes less susceptible to weather-related power outages or terrorist attacks on the power supply.[62] While DG capacity will not be enough to totally reduce the impacts of any such outages, the availability of any localized power can substantially benefit customers during prolonged outages.[63] Because climate change has increased the frequency and intensity of extreme weather events, weather-related power outages continue to rise in frequency.[64] Thus, the importance of infrastructure resiliency will continue to grow in the future.[65]

Finally, the public at large will see environmental and health benefits from the increased capacity of DG.[66] Because of the high prevalence of renewables in DG, increasing DG capacity will naturally have the positive effect of reducing carbon emissions from centralized generating facilities that burn fossil fuels.[67] Aside from this obvious climate change benefit,

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57. *Id.*; *see also How Much Electricity is Lost in Electricity Transmission and Distribution in the United States?*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/tools/faqs/faq.php?id=105&t=3 [https://perma.cc/R3TU-MGK7] (last updated May 14, 2021) (estimating that transmission losses averaged about 5% in the United States between 2015 and 2019).

58. DISTRIBUTED GENERATION LAW, *supra* note 4, at 4.

59. Revesz & Unel, *supra* note 37, at 79–80.

60. *Id.* at 80.

61. *Id.* (quoting MILES KEOGH & CHRISTINA CODY, RESILIENCE IN REGULATED UTILITIES 1 (2013)).

62. *Id.*; DISTRIBUTED GENERATION LAW, *supra* note 4, at 6.

63. *See* Revesz & Unel, *supra* note 37, at 80.

64. *See generally* Alyson Kenward & Urooj Raja, *Blackout: Extreme Weather, Climate Change and Power Outages*, CLIMATE CENT. (2014), http://assets.climatecentral.org/pdfs/PowerOutages.pdf [https://perma.cc/TP7G-WUTG].

65. *See id.*

66. Klass, *supra* note 55, at 609.

67. Revesz & Unel, *supra* note 37, at 84.

DG can also benefit the environment and public health by reducing water consumption, improving nearby water and air quality, and reducing land use associated with infrastructure necessary to support fossil fuel electricity generation.[68]

Even when accounting for its downsides,[69] the benefits of DG clearly weigh in favor of promoting DG capacity. Even if policy fails to promote DG, the reduced costs of renewables will continue to incentivize customers to install their own solar and other renewable energy sources.[70] Furthermore, the expected advancements in cost-effectiveness of energy storage technologies will address one of the primary downsides of solar energy—its reliance on the sun and inability to provide consumers with power at all times—and will lead to an even greater rate of increased DG capacity throughout the United States.[71] Instead of working with DG customers to harness the benefits and eliminate any costs associated with increased DG capacity, some utilities seem to seek to villainize DG customers by characterizing them as "free riders."

2. "Free Rider" Problems in Utility Rates

Utilities' rate schemes typically consist of a flat fee that is the same for all customers and a volumetric consumption charge that varies according to a customer's amount of usage.[72] The flat fee is intended to cover some or all of the fixed costs associated with providing service to a customer regardless of what their energy consumption is.[73] The fixed costs include grid infrastructure costs, payment processing, metering, and meter and line maintenance.[74] Setting the flat fee lower than the actual fixed costs incurred by the utility necessarily results in a higher consumption charge to account for the remainder of the fixed costs.[75] Such a rate scheme encourages lower energy consumption by customers.[76]

However, utilities often argue that because DG customers'

68. *Id.*; *see also* Klass, *supra* note 55, at 609.

69. *See* Revesz & Unel, *supra* note 37, at 81–84 (explaining that the costs of DG include upgrading meters and the grid to accommodate bi-directional flow of electricity, dependence of most DG energy sources on weather conditions, and inability to control changes in output of DG energy).

70. *See supra* notes 46–49 and accompanying text.

71. *See* DISTRIBUTED GENERATION LAW, *supra* note 4, at 229.

72. LAZAR, *supra* note 5, at 68.

73. *Id.* at 70.

74. *Id.* at 70, 77.

75. *See id.* at 70.

76. *See In re* Westar Energy, Inc., 460 P.3d 821, 822 (Kan. 2020).

consumption levels are so low, they ultimately do not pay their fair share of the fixed costs.[77] Utilities say DG customers are "free riding" on non-DG customers.[78] A study performed by the utilities in the *Westar* case describes the free rider problem as follows:

> When some customers are able to reduce their energy consumption by installing DG they avoid paying fixed costs that the utility continues to incur to provide the customer with needed services. Ultimately, those costs will be shifted to customers that do not have DG, resulting in a hidden subsidy from non-DG to DG customers.[79]

Some might argue this subsidizing behavior is the entire purpose of setting lower fixed fees and higher consumption charges.[80] However, utilities do not seem content to allow any free riding amongst DG customers.

C. Non-Discrimination Against DG Customers

In addition to the standard requirement that utilities must charge reasonable rates,[81] some state and federal regulations specifically require that rate schemes cannot discriminate against DG customers.[82] With the recent increase of DG customers, the debate surrounding such regulations has become increasingly important. Many utilities have sought to implement new rate schemes to address their concerns of free riding DG customers.[83] This can test the boundaries of regulations that protect DG customers, which has caused DG customers and other interested parties to intervene and dispute the legality of such rate schemes.[84]

1. *In re Westar Energy, Inc.*

On February 1, 2018, Westar Energy[85] filed a petition with Kansas's

77. *See id.*; LAZAR, *supra* note 5, at 78.

78. *Westar*, 460 P.3d at 822.

79. *Id.* at 822–23.

80. *See* LAZAR, *supra* note 5, at 68–70; *see also Westar*, 460 P.3d at 823.

81. *See supra* Section II.A.

82. *See, e.g.*, KAN. STAT. ANN. § 66-117d (2018); 18 C.F.R. § 292.305 (2020); *see also* DISTRIBUTED GENERATION LAW, *supra* note 4, at 40–41, 67, 75.

83. LAZAR, *supra* note 5, at 78.

84. *See, e.g.*, *Westar*, 460 P.3d 821.

85. Westar merged with Kansas City Power and Light Company (KCP&L) (a Great Plains Energy owned company) in May 2018 to form Evergy. This Comment will refer to Westar throughout because the action was filed before the merger and Westar is the name the courts refer to. *See KCP&L*

PUC, the Kansas Corporation Commission (Commission), for approval of a utility rate change.[86] In addition to seeking an increased rate change for all customers, Westar sought approval of special rate design for residential distributed generation (RS-DG) customers.[87] Specifically, Westar sought to implement a three-part rate design for RS-DG customers, as compared to the normal two-part rate design for other customers.[88] Both rate schemes included a fixed service fee and a variable consumption charge that is based on a customer's energy usage.[89] The proposed RS-DG rate scheme included an additional recurring flat fee to charge RS-DG customers.[90]

Westar argued this additional flat fee for RS-DG customers was necessary to offset these customers' reduced demand and consequently lower bills.[91] Because Westar's normal rate scheme, like many utilities, relies on the variable consumption charge to cover some of the fixed costs associated with delivering energy to customers, the RS-DG customers' reduced demand meant that those costs were often not fully covered by an individual RS-DG customer's bill.[92] Thus, without raising the fixed fee portion of the bill, Westar claimed its proposed rate scheme is necessary to address the free rider problem of RS-DG customers not paying their fair share of the fixed costs associated with Westar's service.[93]

Several parties with renewable energy interests sought to intervene in the action before the Commission.[94] The Commission granted the interventions and united the parties to be led by Sierra Club.[95] Despite Sierra Club's objections, the Commission approved a settlement agreement by Westar that allowed it to keep the three-part rate scheme for

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and Westar Energy are Now Evergy, BUS. WIRE (Oct. 7, 2019, 1:36 PM), https://www.businesswire.com/news/home/20191007005732/en/KCPL-and-Westar-Energy-are-now-Evergy [https://perma.cc/6JQZ-D92T].

86. *In re* Westar Energy, Inc. & Kan. Gas & Elec. Co., No. 120,436, 2019 WL 1575480, at *2 (Kan. Ct. App. Apr. 12, 2019).

87. *Id.*

88. *Id.*

89. *Westar*, 460 P.3d at 827.

90. *Id.*

91. *Id.* at 822.

92. *Id.*

93. *Id.* at 822–23.

94. *In re* Westar Energy, Inc. & Kan. Gas & Elec. Co., No. 120,436, 2019 WL 1575480, at *1 (Kan. Ct. App. Apr. 12, 2019) ("Many parties sought to intervene in the case, but, for purposes of this appeal, the important intervenors were Sierra Club, Vote Solar, and Climate and Energy Project.").

95. *Id.*

RS-DG customers.[96] After the Commission denied Sierra Club's petition for reconsideration, Sierra Club filed a petition for judicial review, which the Kansas Court of Appeals accepted.[97]

On appeal, Sierra Club claimed that Westar's new RS-DG rate scheme charged higher overall rates to solar customers, which is discriminatory to solar customers as a class.[98] It argued the discriminatory rate violated Kansas Statutes Annotated (K.S.A.) section 66-117d on rate pricing.[99] Section 66-117d provides the following:

> No electric or gas utility providing electrical or gas service in this state shall consider the use of any renewable energy source . . . as a basis for establishing higher rates or charges for any service or commodity sold to such customer nor shall any such utility subject any customer utilizing any renewable energy source . . . to any other prejudice or disadvantage on account of the use of any such renewable energy source.[100]

Westar in turn argued that the rate design was non-discriminatory and that it was not in violation of these laws.[101] The Kansas Court of Appeals held that another Kansas statute, K.S.A. section 66-1265(e), was more on point and governed the court's decision.[102] Section 66-1265(e) provides the following:

> Each utility shall: . . . (e) for any customer-generator which began operating its renewable energy resource under an interconnect agreement with the utility on or after July 1, 2014, have the option to propose, within an appropriate rate proceeding, the application of time-of-use rates, minimum bills or other rate structures that would apply to all such customer-generators prospectively.[103]

Section 66-1265(e) expressly authorized utilities to charge RS-DG customers different rates, which the court held directly conflicts with the plain language of section 66-117d.[104] When facing conflicting statutes, statutory interpretation rules say the more recent and the more specific law

96. *Id.* at *3.
97. *Id.*
98. *Id.* at *4.
99. *Id.* Sierra Club also argued in the alternative that the discriminatory rate scheme violates 18 C.F.R. § 292.305. *Id.*
100. KAN. STAT. ANN. § 66-117d (2018).
101. *Westar*, 2019 WL 1575480, at *4.
102. *Id.* at *5–7.
103. KAN. STAT. ANN. § 66-1265(e) (2018).
104. *Westar*, 2019 WL 1575480, at *5–7.

should control.[105] The court held that section 66-1265(e) is both the more recent and more specific statute.[106] To understand this decision by the Kansas Court of Appeals and the subsequent reversal by the Kansas Supreme Court, it is important to understand these statutes and their history.

a. History of Kansas DG Rate Statutes

The adoption of section 66-117d by the Kansas Legislature can be traced back to the energy crisis and oil shortages of the 1970s.[107] In addition to the economic risks of a potential oil shortage, there was growing concern that fossil fuels negatively impacted the environment through climate change.[108] Both these risks spurred a movement toward energy conservation and the promotion of renewable energy sources, especially solar.[109] At the same time, unregulated utilities were going bankrupt, so customers began demanding the utilities be regulated to ensure they would have stable energy supply.[110] All these factors combined to create demand for new energy policy.[111]

Congress and President Jimmy Carter addressed these issues by enacting the Public Utility Regulatory Policies Act (PURPA) of 1978.[112] PURPA's goal was "to encourage the development of alternative fuels and increase diversification of energy resources."[113] Most pertinent to RS-DG customers, PURPA directed the Federal Energy Regulatory Commission (FERC) to prescribe rules "to encourage cogeneration and small power production" and to ensure that utilities "shall not discriminate against the qualifying cogenerators or qualifying small power producers."[114]

In the 1980s, several states established their own conservation programs in response to PURPA.[115] Kansas was one of those states, and

105. *Id.* at *6.

106. *Id.*

107. In re Westar Energy, Inc., 460 P.3d 821, 823–25 (Kan. 2020); Inara Scott, *Teaching an Old Dog New Tricks: Adapting Public Utility Commissions to Meet Twenty-First Century Climate Challenges*, 38 HARV. ENV'T L. REV. 371, 386–87 (2014).

108. *Westar*, 460 P.3d at 823–24.

109. *Id.*

110. Scott, *supra* note 107, at 387.

111. *Id.*; *Westar*, 460 P.3d at 823–24.

112. Scott, *supra* note 107, at 387 (citing Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified at 16 U.S.C. §§ 2601–45)).

113. *Id.* at 387–88.

114. 16 U.S.C. § 824a-3(a), (c).

115. Scott, *supra* note 107, at 388.

section 66-117d was one of the statutes it enacted in an attempt to encourage greater diversification of consumer demand and stabilize the electric generation system.[116] As discussed *supra*, section 66-117d states that utilities cannot consider a customer's use of a renewable energy source as reasoning for setting higher rates for service for that customer.[117] As the Kansas Court of Appeals admitted in *Westar*, if section 66-117d "was the only law on the books on this subject," it might have to agree with Sierra Club's argument that the proposed RS-DG rate design is discriminatory and thus, unlawful.[118]

However, the introduction of section 66-1265(e) in 2014 put a new law on the books that had a facially contradictory position to section 66-117d.[119] As discussed *supra*, section 66-1265(e) provides that utilities have the option to use different rate structures "for any customer-generator [operating a] renewable energy resource" (RS-DG customers).[120] At the time section 66-117d was passed, utilities believed that the integration of customer-owned solar units to the grid would promote the economic interests of the utilities as well as the consumers.[121] However, three decades later, utilities began to see distributed solar customers as a nuisance rather than a benefit and began lobbying against legislation that benefits solar customers, especially policies that allow solar users to pay reduced rates or utilize net metering.[122] Kansas's enactment of section 66-1265(e) seems to follow the nationwide trend of utilities fighting back against distributed solar customers. While the Kansas Court of Appeals held that this newly enacted law overrides the non-discrimination requirements enacted decades ago, the Kansas Supreme Court found that the answer was not so simple.

b. *Westar* Holding

The Kansas Supreme Court reversed the Kansas Court of Appeals' decision that Westar's proposed rate scheme was valid under section 66-

116. *Westar*, 460 P.3d at 825.

117. KAN. STAT. ANN. § 66-117d (2018).

118. *In re* Westar Energy, Inc. & Kan. Gas & Elec. Co., No. 120,436, 2019 WL 1575480, at *15 (Kan. Ct. App. Apr. 12, 2019).

119. *Id.*

120. KAN. STAT. ANN. § 66-1265(e) (2018).

121. *See Westar*, 460 P.3d at 825.

122. *See* NeoVolta Inc., *supra* note 8 (discussing utility industry's lobbying to roll back net metering and raise monthly rates for solar users).

1265(e).[123] Unlike the Kansas Court of Appeals, it emphasized "a bedrock principle of statutory interpretation that repeal by implication is not favored."[124] Courts must resist repealing statutes without express language showing a desire to repeal, and statutes should be read as consistent with one another whenever possible.[125] The statutes' purposes could be reconciled by distinguishing between rates as mentioned in section 66-117d and rate *structures* as mentioned in section 66-1265(e).[126] The court went on to give examples of rate schemes that could comply with both statutes while addressing Westar's concerns with DG customers.[127] With those possibilities in mind, the court held that Westar's proposed rate scheme plainly violated the nondiscrimination requirement of section 66-117d "because it uses a customer's DG status as a basis for charging more for the same goods and services than the Utilities charge to non-DG customers."[128]

2. Other Regulations that Address Discriminatory Rates

Like Kansas, FERC and many other states enacted conservation programs that sought to promote renewable energy after PURPA.[129] While FERC's rules clearly promote conservation according to PURPA's original intent, state laws vary in how much protection they afford renewable and DG customers today.

a. Federal Regulation Prohibiting Discriminatory Rates

Pursuant to PURPA's command that FERC should prescribe rules to encourage small power production and ensure utilities do not discriminate against small power producers,[130] FERC promulgated 18 C.F.R. § 292.101 et seq.[131] Most pertinent to DG customers, § 292.305(a) provides the following:

123. *Westar*, 460 P.3d at 827.
124. *Id.* at 826 (cleaned up) (quoting *In re* City of Wichita, 59 P.3d 336, 347 (Kan. 2002)).
125. *Id.* at 827.
126. *Id.* at 826–27.
127. *Id.*
128. *Id.* at 827.
129. Scott, *supra* note 107, at 388.
130. 16 U.S.C. § 824a-3(a), (c).
131. *See* DISTRIBUTED GENERATION LAW, *supra* note 4, at 41–43.

> (1) Rates for sales:
>
> (i) Shall be just and reasonable and in the public interest; and
>
> (ii) Shall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility.
>
> (2) Rates for sales which are based on accurate data and consistent systemwide costing principles *shall not be considered to discriminate* against any qualifying facility *to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics*.[132]

FERC defines a qualifying facility (QF) to include cogeneration facilities that are limited to a certain size and that meet certain efficiency requirements.[133] Notably, any cogeneration facility that has less than one megawatt (MW) of production capability is presumed to meet these requirements and receives a waiver from the requirement to file with FERC.[134] A typical residential solar system is only five kilowatts (kW), or 0.005 MW,[135] which falls well below the one MW limitation for QFs set by FERC. Therefore, RS-DG customers utilizing solar panels are considered QFs under FERC.[136]

In appearing before the Kansas Court of Appeals in *Westar*, Sierra Club contended that the proposed rate design violated 18 C.F.R. § 292.305.[137] However, after the court held the rate did not discriminate because it was "just and reasonable" and "based on systemwide costing principles,"[138] Sierra Club chose not to appeal that portion of the decision to the Kansas Supreme Court.[139] While it is not entirely clear why Sierra Club chose not to appeal this matter, it might have chosen to drop the argument because of federal-state jurisdictional preemption concerns.

Congress delineated the authority of the state and federal government

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132. 18 C.F.R. § 292.305(a) (2020) (emphasis added).

133. *Id.* §§ 292.101(b)(1), .203(b), .203(d)(1), .205(a), .205(b), .205(d); *see also In re* Westar Energy, Inc. & Kan. Gas & Elec. Co., No. 120,436, 2019 WL 1575480, at *8 (Kan. Ct. App. Apr. 12, 2019).

134. 18 C.F.R. § 292.203(d)(1); *Id.* § 292.205(d)(4).

135. April Lee & Carolyn Moses, *EIA Electricity Data Now Include Estimated Small-Scale Solar PV Capacity and Generation*, U.S. ENERGY INFO. ADMIN. (Dec. 2, 2015), https://www.eia.gov/todayinenergy/detail.php?id=23972# [https://perma.cc/HAA6-5XLY].

136. *See Westar*, 2019 WL 1575480, at *8.

137. *Id.* at *7.

138. *Id.* at *8.

139. *See generally In re* Westar Energy, Inc., 460 P.3d 821 (Kan. 2020).

to regulate electricity sales when it passed the Federal Power Act (FPA) in 1935.[140] The FPA gives FERC power to regulate electrical energy sales and transmission in interstate commerce and reserves the rights of the states to exclusively regulate electrical energy sales and transmission not covered in the FPA.[141] The FPA excludes FERC from regulating "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce," amongst other limitations.[142] This has led to a "bright line" test that weighs factors such as geography of transmission and facility type to determine whether state or federal regulation applies.[143] DG systems push the rigors of this so-called "bright line" test because DG has attributes that could be argued favor state or federal regulation under the test.[144] As such, one could argue this has created an apparent jurisdictional gray area for DG in determining whether to apply state or federal regulations. However, as evidenced by *Westar*, states still seem to exclusively regulate DG. Left to their own devices, state regulations on discriminatory rates differ in how much protection is granted to DG and renewable customers.

b. State Laws Addressing Discriminatory Rates

Some states have statutes similar to Kansas that prohibit utilities from charging discriminatory rates to customers that use renewable energy sources. For example, an Iowa statute states that utilities "shall not consider the use of renewable energy sources by a customer as a basis for establishing discriminatory rates . . . or subject the customer to any other prejudice or disadvantage based on the customer's use or intended use of renewable energy sources."[145] While such states would almost certainly prohibit rates such as Westar's proposed rate, other states allow the utilities more flexibility in their treatment of DG customers.

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140. DISTRIBUTED GENERATION LAW, *supra* note 4, at 69–70.

141. 16 U.S.C. § 824(a), (b)(1); DISTRIBUTED GENERATION LAW, *supra* note 4, at 69.

142. 16 U.S.C. § 824(b)(1).

143. DISTRIBUTED GENERATION LAW, *supra* note 4, at 70.

144. *Id.*

145. IOWA CODE ANN. § 476.21 (West, Westlaw through Legis. from 2021 Reg. Sess.). Similarly, a Tennessee statute requires any utility that "supplies its services to consumers who use solar or wind-powered equipment . . . shall not discriminate against such consumers by its rates, fees or charges . . . ." TENN. CODE ANN. § 65-4-105(d) (West, Westlaw through 2021 1st Reg. Sess. of 112th Tenn. Gen. Assemb.). Even more clearly not allowing higher rates, a Maine statute provides that no utility "may consider the use of solar energy by a customer as a basis for establishing higher rates or charges . . . ." ME. REV. STAT. ANN. tit. 35-A, § 702(2) (West, Westlaw through 2021 1st Reg. Sess. & 2021 1st Spec. Sess. of 130th Leg.).

Some states have recently enacted laws to push back on DG and address the free rider problem with utility-friendly laws. An Oklahoma statute enacted in 2014 states that no utility "shall allow customers with distributed generation installed . . . to be subsidized by customers in the same class of service who do not have distributed generation."[146] Note that Oklahoma's statute *requires* utilities address the "free rider" problem rather than just permissively allowing utilities to charge DG customers different rates. More recently, Kentucky amended a statute on net metering in 2020 to specifically allow utilities to charge DG customers different rates.[147]

III. ANALYSIS

While Kansas's *Westar* decision does not entirely settle the debate on how utilities can treat DG customers, it provides a win for DG and renewable advocates. However, DG still faces challenges because of utilities' desire to characterize DG customers as free riders. This characterization is inaccurate because it fails to account for benefits that DG provides and ignores the free riding of other customers. As utilities continue their crusade against DG by lobbying states for less DG protections, FERC should step in to provide uniform protection of DG customers as encouraged by PURPA.

A. Analysis of Westar

In *Westar*, both the Kansas Supreme Court and the Kansas Court of Appeals found that statutory interpretation was key in determining whether or not Westar's proposed rate structure was valid under Kansas law.[148] Because the Kansas Court of Appeals held that K.S.A. section 66-117d and section 66-1265(e) directly conflict, it said only section 66-1265(e) should be given effect because it is the more recently enacted

146. OKLA. STAT. ANN. tit. 17, § 156(C) (West, Westlaw through Legis. of 1st Reg. Sess. of 58th Leg.).

147. *See* KY. REV. STAT. ANN. § 278.466(5) (West, Westlaw through 2021 Reg. & Spec. Sess.). The statute states that utilities "shall be entitled to implement rates to recover from [DG customers] all costs necessary to serve its [DG customers] . . . without regard for the rate structure for customers who are not [DG customers]." *Id.* Kentucky's statute seems on par with Kansas's K.S.A. § 66-1265(e) in allowing different rates for DG customers. However, Kentucky does not have any other provision or statute that prohibits utilities from charging *higher* rates to DG customers like K.S.A. § 66-117d does.

148. *In re* Westar Energy, Inc., 460 P.3d 821, 826 (Kan. 2020); *In re* Westar Energy, Inc. & Kan. Gas & Elec. Co., No. 120,436, 2019 WL 1575480, at *6 (Kan. Ct. App. Apr. 12, 2019).

statute and is more specific to the issue.[149] While it is clear that section 66-1265(e) is the more recent statute, having been enacted in 2014 compared to 1980 for section 66-117d, the court's argument that section 66-1265(e) is the more specific statute is much weaker. The court seems to rely on the fact that section 66-1265(e) only applies to RS-DG customers that begin operating as such after July 1, 2014.[150] It says this limitation, that the rates only apply after a certain date, makes its rates more specific than the non-discrimination rate provision, section 66-117d, which applies without a date limitation.[151] This argument is flawed because simply giving a grandfather period to allow consumers or industry to react to a new law does not suddenly make that law more specific than the same law that does not carry such a grandfather period.

In any case, the Kansas Supreme Court did not directly address the same statutory interpretation issue of which statute is more specific because it held the statutes do not actually conflict.[152] Instead, it emphasized that section 66-117d is a nondiscrimination provision that prohibits utilities from charging DG customers a higher *price*, while section 66-1265(e) allows utilities to propose different rate *structures* for DG customers than a standard customer.[153] This price versus structure distinction is critical in showing that the statutes do not conflict. While the Kansas Supreme Court ended its analysis here and did not address the Kansas Court of Appeals' assertion that section 66-1265(e) is the more specific statute, this price versus structure distinction shows that section 66-117d is the more specific statute. That is to say, because section 66-117d addresses overall rates and prices, which are the more specific outcome of the broader rate structure addressed in section 66-1265(e), it is the more specific statute on the issue. While the Kansas Supreme Court ultimately eschewed the need for any such analysis, this distinction on specificity, along with the principle that repeal by implication is not favored, could prove useful for DG advocates in future rate cases depending on the argument that a specific PUC or court prefers.

B. Free Rider Solutions that Comply with Kansas Law

Westar argues that without the ability to charge RS-DG customers an

149. *Westar*, 2019 WL 1575480, at *5–6.
150. *Id.* at *6.
151. *Id.*
152. *Westar*, 460 P.3d at 826.
153. *Id.*

additional fee as per its proposed RS-DG rate structure, it cannot adequately address the free rider problem that RS-DG customers create.[154] This argument bears no weight in the court's statutory analysis of section 66-117d. This is an argument for Westar to take up with the Kansas Legislature. Additionally, the court "can think of several ways" for Westar to address the free rider issue without resorting to price discrimination against RS-DG customers and presents three such options in its opinion.[155]

First, the court says utilities could use nondiscriminatory time-of-use rates.[156] Time-of-use rates vary the volumetric consumption rate charged to the customer depending on the time of day or season.[157] Typically, utilities implement time-of-use rates that charge higher volumetric rates during peak daytime hours when there is higher demand due to the operating hours of commercial offices and higher HVAC cooling loads in the summer, among other factors.[158] The idea behind such a time-of-use rate is that it helps offset the higher cost of generating each additional unit of electricity during peak usage hours and encourages customers to reduce consumption during those peak times.

However, a time-of-use rate designed to recover proportionally more money from RS-DG customers than non-DG customers would likely flip the traditional model and charge reduced prices during daylight hours as compared to nighttime hours. This would be necessary because solar RS-DG customers, who make up the bulk of RS-DG customers, are already reducing their daytime usage because of the energy they get from their solar panels during the day. Thus, rates would need to increase during nighttime hours when RS-DG customers consume proportionally more electricity compared to non-DG customers than they do during daylight hours. This would directly contradict most utilities' goal to reduce consumption during the day in an effort to lower peak demand and reduce required energy capacity. It is unclear how effective a time-of-use rate

154. *Id.* at 823.

155. *Id.* at 827.

156. *Id.*

157. *See* Spencer Fields, *Understanding Time-of-Use (TOU) Rates*, ENERGYSAGE (June 3, 2021), https://news.energysage.com/understanding-time-of-use-rates/ [https://perma.cc/G38D-JQKB]; *see also* Herman K. Trabish, *An Emerging Push for Time-of-Use Rates Sparks New Debates About Customer and Grid Impacts*, UTIL. DIVE (Jan. 28, 2019), https://www.utilitydive.com/news/an-emerging-push-for-time-of-use-rates-sparks-new-debates-about-customer-an/545009/ [https://perma.cc/3XEY-29PL].

158. *See* Tyler Hodge, *Hourly Electricity Consumption Varies Throughout the Day and Across Seasons*, U.S. ENERGY INFO. ADMIN. (Feb. 21, 2020), https://www.eia.gov/todayinenergy/detail.php?id=42915# [https://perma.cc/GE93-8PFP] (noting that the peak demand can become less pronounced during winter months and can shift to early morning and evenings during those months).

structure could be in addressing free riding by RS-DG customers, but the court is correct that it is at least an option.

Second, the court proposes a sliding scale rate to address the free rider problem.[159] Such a system would reward high volume purchasers by decreasing the per-unit price as a customer purchases higher volumes of energy over a given period, likely per billing cycle.[160] This rate structure would substantially address the free riding issue by ensuring that even low energy users pay higher variable consumption rates that would more likely cover fixed costs. However, it would remove customers' incentive to conserve energy usage, which could lead to significantly increased demand that could result in new costs for the utilities, such as new plants to meet peak demand. Such a rate structure would also contradict general principles of energy conservation efforts. The increased demand problems associated with a sliding scale rate that could disincentivize users from reducing energy consumption reminds us why PURPA and section 66-117d were enacted in the first place.[161] As the Kansas Supreme Court said, "one would be justified in wondering whether the free rider problem identified by the Utilities is a feature of the system rather than a bug . . . ."[162]

Finally, and most obviously, the court says that Westar could charge a higher fixed fee to all customers to directly cover the fixed costs associated with providing service to a customer instead of relying on the variable consumption charge to cover a portion of the fixed costs.[163] Minimum bills are another alternative that function somewhat similarly.[164] Minimum bills calculate the customer charge in the standard manner, with the only exception that those with bills that fall below the minimum bill threshold must pay that minimum amount.[165] Customers with higher bills than the minimum are completely unaffected by this rate structure. Minimum bills, like some of the other rate methods mentioned, may discourage some customers from reducing usage as they are essentially allotted a certain amount of usage as "free" within in the minimum bill

159. *Westar*, 460 P.3d at 827.

160. *Id.*

161. *See supra* Section II.C.1.a.

162. *Westar*, 460 P.3d at 823.

163. *Id.* at 827.

164. JIM LAZAR, REGUL. ASSISTANCE PROJECT, ELECTRIC UTILITY RESIDENTIAL CUSTOMER CHARGES AND MINIMUM BILLS: ALTERNATIVE APPROACHES FOR RECOVERING BASIC DISTRIBUTION COSTS 2 (Nov. 13, 2014), https://www.raponline.org/wp-content/uploads/2016/05/rap-lazar-electricutilityresidentialcustomerchargesminimumbills-2014-nov.pdf [https://perma.cc/WW6U-QHPG].

165. *Id.*

structure. Still, minimum billing or higher fixed fees seem to most fairly address the free rider problem caused by low-usage customers, at least from a purely economic perspective. However, minimum bills tend to disproportionately affect low-income customers, which raises concerns of inequity.

Westar (now Evergy) actually proposed, as one option, a minimum bill of $35 to the Commission on remand from the Kansas Supreme Court decision.[166] By Westar's own estimation, this minimum bill would result in increased bills for 18% of customers.[167] With RS-DG customers making up less than 1% of the customer base,[168] one might expect that a rate scheme designed to address the free riding problems created by RS-DG customers would primarily affect RS-DG customers. However, of the customers that would see increased bills due to a $35 minimum bill, RS-DG customers project to make up less than 2% of the impacted customers.[169] While there are concerns that this newly proposed rate design will predominantly hurt low-income customers,[170] this rate design certainly does not facially discriminate against RS-DG customers in violation of K.S.A. section 66-117d. Despite the minimum bill's legal nature, the Commission is still authorized to reject proposals in an effort to better serve Kansans' interests and the true economic interests of the utility. Indeed, the Commission rejected the minimum bill in large part because it found the proposal "overly regressive and an unnecessarily

166. Sarah Spicer, *Evergy's Proposed Electric Rates for Solar Find Few Supporters, Many Critics*, WICHITA EAGLE (Jan. 8, 2021, 5:01 AM), https://www.kansas.com/news/politics-government/article247936975.html; *In re* Westar Energy, Inc. & Kan. Gas & Elec. Co. for Approval to Make Certain Changes in their Charges for Elec. Servs., No. 18-WSEE-328-RTS, 2021 WL 784978, ¶ 19 (Kan. S.C.C. Feb. 25, 2021). Evergy preferred a proposal that charged a $3 per kW grid access fee for DG connected customers. *Id.* at ¶¶ 17, 19. However, the Commission said this proposal was too similar to the rate the Kansas Supreme Court said was discriminatory. *Id*. at ¶ 46. *See also* Direct Testimony on Remand of Bradley D. Lutz at 7–10, *In re* Westar Energy, Inc. & Kan. Gas & Elec. Co. for Approval to Make Certain Changes in their Charges for Elec. Servs., No. 18-WSEE-328-RTS, 2020 WL 6130281 (Kan. S.C.C. Oct. 15, 2020) [hereinafter Testimony of Lutz].

167. Testimony of Lutz, *supra* note 166, at 13. Note that because Westar has merged with KCP&L to form Evergy, the total number of customers has increased. For this reason, it is important to focus on percentages of customers to avoid any confusion when looking at pre-merger and post-merger data.

168. *See infra* notes 172–73 and accompanying text.

169. DG customers made up 0.24% of total customers. *See infra* note 173 and accompanying text. Westar estimates 18% of total customers would be affected by a minimum bill. *See supra* note 167 and accompanying text. Therefore, DG customers make up at most 1.33% of the customers expected to be affected by the minimum bill.

170. *See* Spicer, *supra* note 166 (noting that the economic impacts of COVID-19 and increased unemployment make this an especially poor time to increase rates on low-income customers).

disruptive solution based on the scale of the issue it purports to address."[171]

C. Non-DG Customers as Free Riders

It is dubious whether the goal of Westar's originally proposed RS-DG rate structure was actually to resolve a free rider problem. Only 790 of Westar's customers were RS-DG customers at the time of the evidentiary hearing for this case.[172] In 2017, Westar had nearly 330,000 customers, meaning that RS-DG customers made up only 0.24% of its total customer base at the time.[173] Even if such a low percentage of RS-DG customers warrants a solution against free riding, a rate structure that only addresses the potential free riding of RS-DG customers does nothing to address the free riding of non-DG customers.

Non-DG customers are not without their free riding concerns. These customers can also have low or non-existent usage rates so that their bills fail to offset the fixed costs of servicing them. Many customers let units sit vacant or only seasonally occupy a unit while still maintaining customer status with the utility.[174] These customers are undoubtedly contributing to the free riding problem in the exact same way Westar complains that RS-DG customers do and are doing so in likely far greater amount than RS-DG customers overall. Additionally, some customers have higher fixed costs to serve than others, but the utilities do nothing to address the free

171. *In re* Westar Energy, Inc. & Kan. Gas & Elec. Co. for Approval to Make Certain Changes in their Charges for Elec. Servs., No. 18-WSEE-328-RTS, 2021 WL 784978, ¶ 59 (Kan. S.C.C. Feb. 25, 2021).

172. *In re* Westar Energy, Inc. & Kan. Gas & Elec. Co., No. 120,436, 2019 WL 1575480, at *1 (Kan. Ct. App. Apr. 12, 2019).

173. *Annual Electric Power Industry Report, Form EIA-861 Detailed Data Files*, U.S. ENERGY INFO. ADMIN. (Aug. 3, 2021), https://www.eia.gov/electricity/data/eia861/ [https://perma.cc/A3R7-KG3R] (choose "2017" ZIP file for download; open "Sales_Ult_Cust_2017" excel file from folder; look at row 2154 in "States" sheet and see value in column "L"). As of February 2021, Evergy—the post-merger entity encompassing Westar and KCP&L—was approaching 1,110 RS-DG customers. At the time of its most recent rate proceeding in 2018 (post-merger), Evergy had 611,452 residential customers. This means RS-DG customers make up about 0.18% of the residential customer base now (it is unclear why the RS-DG percentage has decreased despite most evidence pointing to increasing DG customers over time, but one possibility is that legacy KCP&L customers are even less likely than legacy Westar customers to have solar or other DG). *In re* Westar Energy, Inc. & Kan. Gas & Elec. Co. for Approval to Make Certain Changes in their Charges for Elec. Servs., No. 18-WSEE-328-RTS, 2021 WL 784978, ¶ 58 (Kan. S.C.C. Feb. 25, 2021).

174. HOUS. ASSISTANCE COUNCIL, HOUSING OCCUPANCY & VACANCY IN RURAL AMERICA 5 (May 2012), https://ruralhome.org/wp-content/uploads/storage/research_notes/rrn-housing-vacancy-web.pdf [https://perma.cc/PJ29-RLGK]. According to the 2010 census, approximately 11% of housing units are vacant. *Id.* Undoubtedly not all these units are maintaining utility connections and contributing to the free rider problem, but this number also does not account for seasonal vacancy of units.

riding of the higher fixed cost customers off of the lower fixed cost customers.[175] For example, a customer located near a power plant or in a larger community has a lower infrastructure cost to serve than a customer who lives far away from the power plant or in a more rural area where they may be one of the few customers served by transmission lines.[176] These types of free riding customers—or, in a more positive tone, cross-subsidized customers—have existed for decades without complaint from utilities.[177] Further, these cross-subsidies have traditionally been encouraged in instances such as the varying fixed cost utility customer and other areas of public policy.[178] Despite this, Westar continues to single out and characterize DG customers as free riders.

Westar's proposed rate structure does nothing to address the free riding problems of non-DG customers. Utilities can make a strong argument that refusing to address the higher fixed cost customer problem is beneficial for public policy so that customers far from a power plant are not penalized for the utilities' choice in locating the plant. However, any rate structure that addresses the free riding problem associated with RS-DG customers' low usage but does nothing to address the free riding problem of "vacancy" or "seasonally occupying" customers would seem to be discriminatory against RS-DG customers and consequently in violation of section 66-117d.

If Westar's goal is truly to eliminate the free rider problem, it should address all low usage customers instead of just RS-DG customers. Westar's choice to only target RS-DG customers gives some evidence to the possibility that Westar's intention instead was to reduce the appeal of becoming a RS-DG customer in effort to reclaim control of the grid and maintain customer dependence.

D. DG Rates Elsewhere

The Kansas Supreme Court's *Westar* decision provided a win for proponents of DG and rooftop solar across the United States. The *Westar* decision puts utilities on notice that charging DG customers higher rates can violate state laws that prohibit discriminating against DG customers or charging them higher rates. In states, such as Maine, that explicitly

175. Troy A. Rule, *Solar Energy, Utilities, and Fairness*, 6 SAN DIEGO J. CLIMATE & ENERGY L. 115, 133–34 (2015).

176. *Id.*

177. *Id.* at 131–32.

178. *See id.* at 132–34.

provide that utilities cannot charge DG customers higher rates, the outcome is fairly straightforward, and DG customers will likely prevail in any dispute where utilities attempt to charge higher rates.[179]

However, in states, such as Iowa and Tennessee, that only prohibit discriminatory rates but do not explicitly address higher rates, the outcome is less clear.[180] Utilities, like Westar, will argue that rates that charge DG customers higher fees are not discriminatory because the rate difference is necessary to account for the smaller variable consumption charge recovered from DG customers. If such a dispute arises in one of these states, a higher rate should be considered synonymous with discriminatory rate. This is especially the case because of the availability of alternative rate schemes that do not charge DG customers higher rates while still addressing the alleged free rider problem.[181] While following the principles outlined in the *Westar* decision provides protection to DG customers in states that still have laws protecting DG customers, not all states have these protections.

1. Accounting for Benefits of DG

Utility lobbying has recently prompted some states to change laws to allow unfavorable treatment of DG customers.[182] States, such as Oklahoma and Kentucky, permit or require utilities to charge DG customers higher rates to account for DG customers' lower energy usage and avoidance of paying the full fixed costs that utilities incur by serving customers.[183] In these instances, it is imperative that the rate is only allowed to cover the net losses the utility incurs by serving DG customers with reduced consumption. The utility should have to account for the financial benefits that DG customers provide to the utility and the grid.

Increased DG capacity helps utilities avoid expenses associated with transmission costs and peak capacity demands.[184] When further accounting for public and environmental interests, such as increased

179. *See* ME. REV. STAT. ANN. tit. 35-A, § 702(2) (West, Westlaw through 2021 1st Reg. Sess. & 2021 1st Spec. Sess. of 130th Leg.).

180. *See* IOWA CODE ANN. § 476.21 (West, Westlaw through Legis. from 2021 Reg. Sess.); TENN. CODE ANN. § 65-4-105(d) (West, Westlaw through 2021 1st Reg. Sess. of 112th Tenn. Gen. Assemb.).

181. *See supra* Section III.B.

182. *See* NeoVolta Inc., *supra* note 8.

183. *See* OKLA. STAT. ANN. tit. 17, § 156(C) (West, Westlaw through Legis. of 1st Reg. Sess. of 58th Leg.); KY. REV. STAT. ANN. § 278.466(5) (West, Westlaw through 2021 Reg. & Spec. Sess.).

184. Revesz & Unel, *supra* note 37, at 80; Klass, *supra* note 55, at 609.

resiliency of the grid and reduced emissions, studies show that DG capacity can have a net benefit over the costs it incurs on utilities.[185] Any avoided costs the utilities experience because of DG customers should directly be accounted for and credited against any additional costs that utilities might incur by serving DG customers. However, the additional public and environmental benefits should not be placed solely on the utility to bear financially, so those benefits cannot be accounted for absent a government policy change to repay utilities for bearing the associated financial cost.

Therefore, to encourage the benefits of DG without placing all the financial burden on utilities, the government should create subsidies that reward renewable DG customers for their positive impact on the public health and environment. Government subsidies or tax-credits that can be administered either through the utilities with the intent of offsetting any associated costs of serving DG customers or administered directly to DG customers will help address "a positive externality problem" associated with renewable DG.[186] The positive externality problem exists because DG customers are creating a net benefit to society and the environment but have no way to recoup the financial aspect of these benefits.[187] Without government intervention, the only financial benefits DG customers can recoup are those that the utilities allow them to.

Regardless of whether the government decides to implement tax-credit or other policies to incentivize DG, the non-economic benefits for the public good illustrate the need to protect DG customers to help promote the growth of DG and renewable energy. While state commissions applying net cost-benefit principles when evaluating rate designs will provide some protection for DG customers, to fully effectuate the promotion of DG growth, it is more important that the rules governing rate design directly protect DG customers against discrimination.

2. Federal Law Prohibiting Discriminatory Rates

FERC already requires that rates for sale shall not discriminate against any QF according to 18 C.F.R. § 292.305. For purposes of this rule, a solar RS-DG customer is considered a QF because the customer's generation capacity invariably falls under the one MW limitation set by

185. *See* LAZAR, *supra* note 5, at 77.
186. Rule, *supra* note 175, at 133–34.
187. *See id.*

FERC.[188] Therefore, FERC should protect small-scale DG customers from discriminatory rates. However, in *Westar*, the Kansas Court of Appeals found that Westar's proposed rate was not discriminatory and did not violate § 292.305.[189] Further, jurisdictional questions exist as to whether federal or state law should apply in regulating utility rates.[190]

a. FERC's Requirements on Rates

The Kansas Court of Appeals found that Westar's proposed rate did not violate § 292.305 because the regulation excludes rates "based on systemwide costing principles" from its definition of discriminatory rates.[191] However, the court failed to recognize that exclusion only applies "to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics."[192] Like DG customers, non-DG customers can have low or non-existent usage because of vacancy, seasonal occupancy, or extreme energy conservation.[193] Therefore, these non-DG customers have similar load characteristics as DG customers, and utilities cannot apply a different rate solely to the DG customers.

The Kansas Court of Appeals did not apply this line of reasoning in part because it found that DG customers are part of a single "class" of customers.[194] Meanwhile, non-DG customers with low usage are still considered part of the larger non-DG customer class. It does not break apart that class depending on the usage of the individual customers. This decision to consider all non-DG customers as part of one class and all DG customers as part of another without any regard to an individual customer's amount of consumption makes little sense in the context that the whole purpose for charging different rates is a customer's lack of consumption. This produces the incongruous result that a DG customer that still consumes high amounts of electricity from the utility will pay a higher fee than a non-DG customer that consumes low amounts of electricity.

188. *See supra* notes 133–36 and accompanying text.

189. *In re* Westar Energy, Inc. & Kan. Gas & Elec. Co., No. 120,436, 2019 WL 1575480, at *8 (Kan. Ct. App. Apr. 12, 2019).

190. Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L.J. 203, 206–07 (2015).

191. *Westar*, 2019 WL 1575480, at *8.

192. 18 C.F.R. § 292.305(a)(2) (2020).

193. *See supra* Section III.C.

194. *Westar*, 2019 WL 1575480, at *8.

Charging the customers based on the pre-classification of DG or non-DG use instead of actual demand shows that utilities actually desire to discourage DG customers. Computerized billing would allow utilities to easily move customers in and out of a "low-usage" class depending on their consumption in a billing period or recent previous billing period(s). Further, the availability of the utility to implement alternative rate schemes, as discussed *supra*,[195] could similarly negate the need to charge DG customers differently. Taking these options into account, a court could find that a rate scheme such as Westar's violates § 292.305 by discriminating against DG customers.

b. "Bright Line" Test on DG

For decades a "bright line" test has determined whether electric utilities are regulated by the state or federal government.[196] According to the FPA, federal regulation extends to transmission and wholesale sales of electric energy in interstate commerce.[197] While this test was workable for a system that almost exclusively supplied power to consumers from centralized generating facilities, the changes to the modern grid system have challenged this test.[198] Separate utilities now connect to a common grid, which has led to a change in the way utilities operate wholesale markets and manage electricity demands.[199] DG has further changed the grid system by introducing customers that generate and transmit electricity in addition to consuming it.[200] The bright line test is no longer workable for the modern electric grid because these changes make it difficult, and in some cases impossible, to distinguish between intrastate electricity and interstate electricity.[201]

The FPA's division of authority weighs in favor of federal law regulating DG. While caselaw has attempted to divide state-federal authority involving DG according to whether a DG is a net consumer or provider of electricity,[202] such a rule can hardly be useful in the context of classifying DG customers in ratemaking cases. The regulatory scheme

195. *See supra* Section III.B.
196. Nordhaus, *supra* note 190, at 206.
197. 16 U.S.C. § 824(a), (b)(1).
198. *See* Nordhaus, *supra* note 190, at 206–07.
199. *Id.* at 207; see also EPA, *Centralized Generation*, *supra* note 43.
200. Nordhaus, *supra* note 190, at 207.
201. *See id.*
202. *See id.* at 208.

would be hopelessly complex if DG customers would be governed by federal law in one month and state law in another depending on changes in their consumption and production of electricity.[203]

In reality, the language of the FPA and developments to the grid system suggest a new test should determine jurisdictional issues involving DG. Because of the interstate connection of the modern electricity grid and the fact that DG transmits electricity, DG customers are transmitting electricity in interstate commerce. Therefore, the FPA clearly has power to regulate DG. It could be further argued that because of the interstate nature of the modern electric grid that utilities are always transmitting electricity in interstate commerce and could entirely be regulated by federal law on such matters. However, that argument is certainly weaker than the argument that DG can be regulated under federal law, and discussion of the issue is beyond the scope of this Comment.

c. Federal Law as a Complement to State Law

FERC does not always claim federal jurisdiction over everything it has the authority to regulate. For example, FERC has taken the stance that it does not have jurisdiction over net metering transactions involving DG such as rooftop solar.[204] FERC has chosen not to take jurisdiction despite its authority to do so and despite the encouragement to do so by some.[205] However, others argue that FERC should not regulate DG.[206] There are valid concerns that weigh against FERC exclusively regulating DG. These include the desire to let states act as a marketplace for experimental policies[207] and that the introduction of federal law can make it difficult to ascertain the exact bounds of state and federal regulation, which can needlessly complicate states' regulatory processes.[208] Nevertheless, FERC can prohibit rates that discriminate against DG customers while avoiding these concerns of increased federal regulation.

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203. *See id.*

204. *See* David Raskin, *Getting Distributed Generation Right: A Response to "Does Disruptive Competition Mean a Death Spiral for Electric Utilities?"*, 35 ENERGY L.J. 263, 274–75 (2014).

205. *See id.*

206. *See generally* Ari Peskoe, *The Case Against Direct FERC Regulation of Distributed Energy Resources*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Sept. 20, 2018) [hereinafter Peskoe, *FERC Regulation*], http://eelp.law.harvard.edu/wp-content/uploads/The-Case-Against-Direct-FERC-Regulation-of-Distributed-Energy-Resources-Falsepdf [https://perma.cc/4YV2-UHFV]; Jim Rossi, *Federalism and the Net Metering Alternative*, 29 ELEC. J. 13, 13 (2016).

207. Rossi, *supra* note 206, at 13.

208. *See* Peskoe, *FERC Regulation*, *supra* note 206, at 6–7.

FERC can complement state regulations on DG rates by exercising its authority to prohibit discriminatory rates against DG customers.[209] FERC can do so while still allowing states to determine the overall rates and rate structures that utilities use to charge customers. This would still allow states to operate as a marketplace to experiment with differing policies. Further, the states would retain the bulk of the regulating power, so states can address concerns unique to their region. Also, by only exercising the narrow power of authority to prevent discriminatory rates, FERC will not overly complicate the federal-state regulatory balance. The state ratemaking process would operate as normal, except the rate makers would have the knowledge that if a rate design gets challenged in court, the court can enforce the federal law to prevent the discriminatory rates. To compare to a federal discriminatory law in another field, FERC's rule would be analogous to the U.S. Equal Employment Opportunity Commission's Title VII prohibiting employment discrimination.[210] Like state employment and contract law, the state energy regulations would primarily govern the field despite the existence of a federal law against discrimination. Only when a discrimination claim is brought will the federal law step in.

FERC has recently shown it is willing to expand its regulatory power. It issued an order in September 2020 that enabled distributed energy resources—a class that generally includes DGs but is slightly broader—to more easily participate in the regional wholesale market for selling electricity.[211] In addition to showing FERC's willingness to expand its power, this also shows that FERC believes distributed power is here to stay and is beginning to support it. FERC should continue this trend by providing DG customers nationwide protection from discriminatory rates.

IV. CONCLUSION

States should follow the lead of the Kansas Supreme Court's *Westar* opinion in evaluating whether rates charged specifically to DG customers are discriminatory. While utilities may argue these rates are necessary to resolve a free riding problem, the availability of alternative rate schemes that address any free riding concerns without singling out DG customers

209. *See* 18 C.F.R. § 292.305 (2020).

210. *See generally* Michael H. Reap, *Concurrent Jurisdiction of Title VII Actions*, 42 WASH. & LEE L. REV. 1403 (1985).

211. Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators, 85 Fed. Reg. 67094 (proposed Sept. 17, 2020) (to be codified at 18 C.F.R. pt. 35).

suggests otherwise. In reality, utilities are seeking to make DG less attractive to customers and will continue to lobby states to make laws less favorable to DG.

As such, FERC and federal law should step in to prevent discriminatory rates across the United States. FERC has authority to regulate utilities involving DG because of developments to the modern grid system and the unique nature of DG. While FERC has traditionally disclaimed jurisdiction over sales to DG customers, FERC should provide DG customers blanket protection against discriminatory rates by utilities, while still allowing states to regulate the utilities more generally. Federal prevention of discrimination against DG is consistent with the FPA and will promote PURPA's purpose of encouraging diversification of energy resources.