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Filed Electronically and Via Email

Consumer Affairs Office
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101
Consumer.puc@state.mn.us

Re: *In the Matter of a Commission Investigation into the Potential Role of Third-Party Aggregation of Retail Customers*
PUC Docket No. E999/CI-22-600

These comments are submitted on behalf of the Sierra Club and the Union of Concerned Scientists (UCS) on behalf of their members in Minnesota. Sierra Club and UCS appreciate the opportunity to provide the Commission with its position on this important issue that will open new opportunities for clean energy in Minnesota. Sierra Club and UCS provide specific comments on each of the four questions in the Public Notice below.

1. Should the Commission permit aggregators of retail customers to bid demand response into organized markets?

Brief Answer: Yes.

Permitting aggregation of retail customers (ARCs) requires two separate actions. First, the commission should rescind its May 18, 2010, order in docket E-999/CI-09-1449 that purports to prohibit third-party aggregators of retail customers ("ARCs") operating within the service territory of utilities selling more than 4 million megawatt hours (MWh) per year from bidding

into organized markets. Second, the Commission should also explicitly "opt in" to allow third-party ARCs operating within the service territory of utilities within the Commission's jurisdiction who sell less than 4 million MWh.

There are a number of benefits of allowing ARCs to increase competition for cost-effective demand response programs to expand participation beyond current levels. Allowing utilities a monopoly over demand response produces less overall demand response than allowing competitive ARCs to supplement utility resources. Moreover, there are structural biases that inevitably hamper demand response programs operated by monopoly utilities because it conflicts with the utilities' inherent interest in meeting load with rate-based resources. State mandates and Commission oversight can partially counteract those structural biases, but never as well or as completely as market competition.

Sierra Club believes that other parties will provide additional comments identify the benefits of third-party ARCs and generally joins those comments. Sierra Club also reserves the right to provide reply comments regarding those benefits. These comments focus on the fact that the Commission must rescind its prior "opt out" order because it lacks the legal authority to regulate non-utility entities, including prohibiting ARCs. Because the Commission lacks authority in Minnesota law to prohibit non-utility competitive ARC businesses, its May 18, 2010, order in docket E-999/CI-09-1449 was in error and must be rescinded.

Background on ARCs and FERC Order 719

On October 17, 2008, the Federal Energy Regulatory Commission (FERC) issued Order 719 adopting 18 C.F.R. § 35.28(g)(1)(iii), which directs Regional Transmission Organizations (RTOs) to allow ARCs to bid demand response resources from retail customers served by electric utilities that distribute more than 4 million megawatt-hours (MWhs) annual directly into the RTO's organized wholesale energy and ancillary services markets, "unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate." This is generally referred to as the "opt-out" provision. Additionally, Order 719 provided that RTOs may allow ARCs to bid demand response resources from customers served by utilities that distribute 4 million MWh or less per year if the state law "opts in." On July 16, 2009, FERC issued Order 719-A to deny requests for rehearing and affirming Order 719. FERC published notice of Orders 719 and 719-A on August 28, 2009.

On October 2, 2009, the Midcontinent Independent System Operator (MISO) filed revisions to its Open Access Transmission, Energy and Operating Resource Market Tariff to accommodate participation by ARCs in the MISO energy and ancillary service markets.

The Commission's 2010 ARC Prohibition Order

On May 18, 2010, the Commission issued an "Order Prohibiting Bidding of Demand Response Into Organized Markets by Aggregators of Retail Customers and Requiring Further Filings By Utilities" purporting to prohibit third-party ARCs from operating in the service territory of load serving entities selling more than 4 million MWhs annually ("Prohibition Order"). As the Prohibition Order notes, 18 C.F.R. § 35.18(g)(1)(iii) allows non-utilities to bid "reductions in electrical usage aggregated from retail customers"–or "demand response"– into wholesale markets. Prohibition Order at 1. "If the Commission took no action, the new rule would require… (MISO)… to begin accepting bids of demand response from ARCs…." Id. at 2.

The Prohibition Order offers two reasons for prohibiting ARCs. First, it noted that it was "unclear at this point how ARCs would fit into th[e] regulatory structure and what mechanisms the Commission would use to ensure that their actions and practices met the 'just and reasonable' legal standard and served the public interest." Prohibition Order at 5. Second, it noted the "long history" of utility-run demand side management and that it "is important not to jeopardize these gains or… utilities' ability to build on these gains" by allowing anyone other than the utilities "to have meaningful control over their customers' demand response." Id. at 6.

The Commission did not address the predicate legal question of what authority it has under Minnesota law to prohibit ARCs in the first place. The Commission did not determine that an ARC meets the definition of a utility in Minn. Stat. § 216B.02, subd. 4, or an "electric utility" that provides providing "electric service at retail" within the meaning of Minn. Stat. § 216B.38, subd. 4a, 5, 216B.40. In fact, the Commission avoided answering that question by asserting that it is "unclear" how ARCs fit into the Commission's regulatory structure and whether the Commission has jurisdiction to regulate them.

The Commission also did not explain how it could both prohibit ARCs while also "remaining open to pilot programs designed to explore the potential for ARCs and other third-party providers to increase total levels of demand response in Minnesota." Prohibition Order at 6. The Commission asserted that it would allow third party ARCs in the future if specific showings could be made, including a showing of no ratepayer harm, no reduction in existing levels of demand response, a likelihood of increasing demand response rather than replacing existing demand response, and a "serious engagement with the concerns raised by stakeholders in this docket, as well as with the stakeholders themselves." Id. Thus, it appears that the Commission was not convinced that ARCs constitute utilities, since the Commission could not authorize them in the future without violating Minn. Stat. § 216B.40. However, if ARCs are not utilities, the Commission did not identify what legal authority it had to prohibit them in the first place.

Federal Law Accedes to State Laws That Prohibit ARCs But Does Not Provide Authority to Prohibit ARCs

The only purported legal authority the Prohibition Order cites is its claim to be adopted "[p]ursuant to the provisions of 18 C.F.R. § 35.28(g)(1)(iii)." Prohibition Order at 6. However, federal law does not provide authority to states to regulate ARCs. Instead, FERC chose not to preempt state laws prohibiting ARCs, to the extent such laws exist. As FERC explained in Order 719, FERC does not make a determination of whether demand response participation in wholesale markets is either allowed or prohibited by existing state laws. Nothing in 18 C.F.R. § 35.28(g)(1)(iii) purports to provide affirmative legal authority to state regulator entities like the Commission. Moreover, under basic principles of federalism, state agencies are creations of state law and derive their authority from state law. Only state legislatures can grant authority to state agencies.

The Commission Has No Authority Under Minnesota Law to Prohibit ARCs

Unlike other states that provide explicit authority to regulate ARCs, there is no Minnesota statute providing the Commission with authority to regulate ARCs. See e.g., 2013 Arkansas Act 1078 (adopting Arkansas Code § 23-18-1003, 1004, providing explicit authority to regulate ARCs to the Public Service Commission). Therefore, the Commission may only prohibit ARCs if ARCs fall within the Commission's existing regulatory authority. Sierra Club has not identified any statute providing the Commission with authority to prohibit or regulate ARCs.

The Commission's authority is generally limited to regulating public utilities. Minn. Stat. §§ 216B.08, .09, subd. 1. However, ARCs are not "public utilities" within the meaning of Minn. Stat. §§ 216B.02, subd. 4. Nor are ARCs "electric utilities" that render "electric service at retail" within the meaning of Minn. Stat. §§ 216B.38, subd. 4a, 5, and 216B.40.

A. ARCs are not Public Utilities Pursuant to Minn. Stat. § 216B.02, subd. 4.

ARCs do not meet the definition of a "public utility" pursuant to Minn. Stat. § 216B.02, subd. 4. A "public utility" is defined as:

> persons, corporations, or other legal entities, their lessees, trustees, and receivers, now or hereafter operating, maintaining, or controlling in this state equipment or facilities for furnishing at retail… electric service to or for the public or engaged in the production and retail sale thereof….

Minn. Stat. § 216B.02, subd. 4. That definition requires (1) an entity; (2) that operates, maintains or controls in the state; (3) equipment or facilities for furnishing, production, or sale; (4) electric service at retail; (5) to or for the public. "Service" is defined as "electricity; the installation, removal, or repair of equipment or facilities for delivering or measuring such… electricity." Minn. Stat. § 216B.02, subd. 5. The "equipment or facilities" involved in providing a "service," must be for delivering or measuring "such electricity" provided by the same entity.

Demand response is not a "service" because it is not electricity and does not involve equipment that provides electricity. As the Commission already recognized in its Prohibition Order, ARCs "pay utility customers to reduce their usage–e.g., by turning off machinery, appliance, manufacturing processes–during periods of highest demand." Prohibition Order at 3. ARCs then sell the reductions in electricity consumption in the regional market as a substitute for generation. Id. In other words, demand response reflect the lack of electricity and reductions in electricity use, it does not constitute electricity. Minn. Stat. § 216B.02, subd. 4. Nor is the equipment involved in demand response equipment for providing electricity. The equipment is for the purpose of non-use of electricity and the measurement of reductions in electricity.

Moreover, even if demand response involved provision of a "service" by providing electricity, third-party ARCs do not provide that service "to or for the public." Instead, the enter bilateral, arms-length, contracts with select customers who meet their underwiring criteria. That is not the type of activity "clothed with the public interest" required to constitute "service to or for the public."

The Minnesota Supreme Court interprets the definition of a "utility" based on whether it is "clothed with a public interest," similar to the Iowa Supreme Court. *No. Nat'l Gas Co. v. Minn. Pub. Serv. Comm'n*, 292 N.W.2d 759, 763 (1980) (*citing Iowa State Commerce Comm'n v. No. Nat'l Gas Co.*, 161 N.W.2d 111 (Iowa 1968)).[1] Companies providing third-party behind-the-meter distributed generation (DG) are not clothed with a public interest because they provide a customized service through private arms-length contracts, do not involve equipment "dedicated to public use," do not provide an "indispensable service" or an "essentially commodity" that "ordinarily cries out for public regulation," is not a monopoly, and to individual customers and not a ubiquitous service to anyone who seeks it. *SZ Enterprises, LLC v. Iowa Utilities Bd*, 850 N.W.2d 441, 467 (Iowa 2014); *see also In re Vivint Solar Inc.*, Order No. 25,859, 2016 WL 224170

[1] Prior Minnesota cases also applied criteria such as whether the entity "indiscriminately served and solicited the people of the community in which it operate; that it had monopoly in the territory in which it furnished services; that it had… ability to compete in the area…; and among other things that it had the power of eminent domain…" Dairyland Power Co-op. v. Brennan, 248 Minn. 556, 563, 82 N.W.2d 56 (1957).

*12 (N.H.PUC Jan. 15, 2016) (interpreting New Hampshire statute definition of "public utility" reference to the "public" to require "that it furnishes service to the 'undifferentiated public' without discrimination.").

It is likely that Minnesota courts would reach a similar conclusion for ARCs. *See e.g., Dairyland Power Co-op. v. Brennan*, 248 Minn. 556, 563, 82 N.W.2d 56 (1957) (whether an entity is a public utilities depends on whether it "indiscriminately served and solicited the people of the community in which it operate; that it had monopoly in the territory in which it furnished services; that it had… ability to compete in the area…; and among other things that it had the power of eminent domain…"). ARCs enter customized, arms-length transactions with willing counter-parties, do not dedicate equipment to public use, do not provide an indispensable service, are not a monopoly, and do not have the power of eminent domain. That does not constitute providing service "to or for the public."

Third party ARCs are not "utilities" because their neither provide a "service" nor provide anything to the "public" within the meaning of Minn. Stat. § 216B.02, subd. 4. The Commission's authority to regulate utilities therefore provide no authority to regulate (or prohibit) ARCs.

B. Demand Response Aggregation Is Not Electric Service at Retail.

Demand response aggregation is also not an "electric utility" or "electric service at retail" within the meaning of Minn. Stat. §§ 216B.38 and 216B.40. An "electric utility" under those statutes is defined as an entity "operating, maintaining, or controlling in Minnesota equipment or facilities for providing electric service at retail and which fall within the definition of 'public utility' in section 216B.02, subdivision 4…" Minn. Stat. § 216B.38. subd. 5. Thus, to constitute an "electric utility" an entity both must provide electric service at retail and fall within the meaning of a "utility" in Minn. Stat. § 216B.02, subd. 4. As noted above, ARCs are not utilities and, therefore, also not "electric utilities."

Moreover, ARCs are also not "electric utilities" pursuant to Minn. Stat. §§ 216B.38 and 216B.40 because they do not provide "electric service." Electric service is defined as "electric service furnished to a customer at retail for ultimate consumption…" Minn. Stat. § 216B.38, subd. 4a. While that definition unhelpfully uses "electric service" as part of the definition of "electric service," it uses the defined term "service" as well as requiring service to be furnished "for ultimate consumption." As noted above, demand response is not a "service" because it is not electricity or equipment for delivery of electricity. It is the absence of electricity. And demand response is not consumed—it reflects the absence of consumption or non-consumption.

Because ARCs do not constitute "electricity utilities," the Commission has no authority to prohibit them pursuant to Minn. Stat. §§ 216B.38 and 216B.40. Sierra Club has not identified any other potential source of statutory authority allowing the Commission to regulate the private enterprise of demand response aggregation in Minnesota. Lacking explicit authority, the Commission may not prohibit ARCs and must rescind its Prohibit Order.

The Prohibition Order Likely Required Rulemaking

In addition to lacking a specific statutory authority to regulate ARCs, the Commission's Prohibition Order appears to constitute a legislative rule within the meaning of Minn. Stat. § 14.02, subd. 4, but was not enacted through the procedures for rulemaking. *See e.g.*, Minn. Stat. §§ 14.02, subd. 4, 14.05, subd. 1, 14.22. And even if the prohibition could be characterized as Commission policy, rather than creating new substantive law, it would still require rulemaking because of its broad social and political importance. *In re Appeal of Jongquist*, 460 N.W.2d 915, 917 (Minn.App. 1990) (agencies may not use case by case adjudications to announce broad policies of social and political importance)

2. **Should the Commission require rate-regulated electric utilities to create tariffs allowing third-party aggregators to participate in utility demand response programs?**

Brief Answer: No Position.

It is Sierra Club's understanding that tariffs allowing third-party aggregators to participate in wholesale markets is unnecessary. It is not clear whether additional opportunities to participate in demand response programs run by utilities would be more efficient. Sierra Club reserves further comment until it reviews other comments on this question.

3. **Should the Commission verify or certify aggregators of retail customers for demand response or distributed energy resources before they are permitted to operate, and if so, how?**

Brief Answer: No.

The question presumes that the Commission can "permit" ARCs to do business in the first place. However, noted above, the Commission's authority is generally limited to regulating utilities and does not extend to regulating all energy related businesses that are not utilities. The Commission does not appear to have statutory authority to "permit" or deny ARCs permission to do business, nor to impose a requirement to certify ARCs as a condition of doing business.

4. **Are any additional consumer protections necessary if aggregators of retail customers are permitted to operate?**

Brief Answer: No position.

Sierra Club appreciates that it would be good public policy to have reasonable regulation of ARCs, including extension of basic consumer protections for ARC contracts with customers. Consistent with the Sierra Club's response to question 3, above, the PUC does not appear to have authority to regulate third-party ARCs. While consumer protections may be appropriate, adopting consumer protections for non-utility ARCs likely requires action by a different agency with that explicit authority or the Legislature. Sierra Club would generally support such activities by the appropriate agency or Legislature.

Laurie Williams
Senior Attorney
Sierra Club
1536 Wynkoop St. Suite #200
Denver, CO 80202

Maria Fernanda Chavez
Energy Analyst
Union of Concerned Scientists
mchavez@ucsusa.org