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March 21, 2022

VIA ELECTRONIC FILING

Will Seuffert
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

Re: Initial Comments of SunShare, LLC
In the Matter of the Formal Complaint and Request for Expedited Relief by SunShare, LLC Against Northern States Power Company d/b/a Xcel Energy regarding OsterSun Project
Docket No. E002/C-21-125

Dear Mr. Seuffert,

Curtis Zaun, Esq., on behalf of SunShare, LLC, submits these Initial Comments in the above-referenced docket.

Pursuant to Minn. R. 7829.0400, this document has been filed electronically for service on the parties.

Respectfully Submitted,

/s/ Curtis Zaun

CURTIS P. ZAUN

STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

Docket Number E002/C-21-125

In the Matter of the Formal Complaint and Request for Expedited Relief by SunShare, LLC, against Northern States Power Company d/b/a Xcel Energy

INITIAL COMMENTS OF SUNSHARE, LLC

SunShare, LLC ("SunShare"), respectfully submits these Initial Comments in response to the Minnesota Public Utilities Commission's ("Commission") Notice of Answer and Comment Period regarding the above-referenced matter. The Petition for a Variance from Xcel Tariff was filed pursuant to Minn. Stat. § 216B.25, Minn. R. 7835.3200 and Commission Orders.

On June 1, 2021, in the above-referenced docket, SunShare filed public and non-public versions of an amended Formal Complaint Against Xcel Energy requesting Expedited Relief regarding the OsterSun Community Solar Garden Project. On December 21, 2021, Xcel filed public and non-public versions of a Partial Settlement Agreement. On January 31, 2022, SunShare filed a Request for Variance from Xcel Tariff Sheet 9-64.1a regarding the applicable VOS rate for the OsterSun, CleodSun, GraniteSun, QuarrySun, and SinclairSun projects. On February 18, 2022, the Commission issued a Notice of Answer and Comment Period. In its Notice of Answer and Comment Period, the Commission asked parties to comment on, "What action should the Commission take regarding SunShare's request for a variance from Xcel Tariff Sheet 9-64.1a regarding the applicable VOS (Value of Solar) rate for all five of the SunShare Projects?"

Introduction[1]

Minnesota law clearly grants the Commission the authority to set tariff rates, change tariff rates, and grant variances to them.[2] Xcel's Answer, appears to not only question the Commission's authority to set tariff rates, change tariff rates and grant variances to them, but also the Commission's numerous orders establishing the VOS tariff. As the Minnesota Department of Commerce noted in its report on the VOS methodology, "If the VOS is set correctly, it will account for the real value of the PV-generated electricity, and the utility and its ratepayers would be indifferent to whether the electricity is supplied from customer-owned PV or from comparable conventional means. Thus, a VOS tariff eliminates the NEM cross-subsidization concerns."[3] So, unless Xcel contends that the Commission did not adopt the appropriate methodology or that it is not properly calculating the VOS, Xcel's ratepayers are not "highly" subsidizing the CSG program. And, comparing VOS rates to solar PPA rates is like comparing apples and oranges because solar PPA rates externalize all sorts of costs. While it is true that Xcel investors make less money under the VOS than they would under a PPA, claiming that Xcel ratepayers are subsidizing the CSG program is contrary to the very purpose of the VOS. All SunShare is asking the Commission to do is set the VOS rate for these projects consistent with the VOS for other CSG projects that were Deemed Complete in the same time frame thanks to Xcel's tariff violations. SunShare is not asking for preferential treatment or compensatory damages, it is asking for a more applicable VOS rate because Xcel's excessive delays have been extremely detrimental to its projects.

[1] Many of the issues and arguments raised by Xcel are addressed in the Petition for Variance. Therefore, in the interest of avoiding the unnecessary repetition of arguments, SunShare incorporates the arguments raised in the complaint and supplement those arguments with these comments in an attempt to provide additional clarity and understanding.

[2] *See*, e.g., Minn. Stat. §§ 216B.03, 216B.05, 216B.08, 216B.09, 216B.16, 216B.164, 216B.23, and 216B.25.

[3] Minnesota Department of Commerce, Minnesota Value of Solar: Methodology, p. 1 (April 1, 2014).

I. Appropriate Docket to file Petition for Variance

Although SunShare is not requesting that the Commission reopen or modify the CSG tariff, but is rather requesting a variance from it, Xcel raised the issue of whether SunShare's petition should have been filed in the CSG docket. SunShare believes the current docket is the appropriate docket to file this petition because it is the docket where the Partial Settlement Agreement was filed. Xcel and SunShare also agreed in the Partial Settlement Agreement that SunShare could file this precise petition, asking for this precise relief. Xcel also correctly points out that the VOS issues presented in the Petition are "part of a larger context" of the Partial Settlement Agreement. For all of these reasons, this is the appropriate docket.

To be clear however, SunShare also strongly supports broad public participation in issues that affect DER in general or CSGs in particular, and therefore would be open to having the Commission file this petition in the CSG docket. This would allow the CSG community to become informed about this issue and provide comments to the Commission so that the Commission could have the benefit of having the opinions of the entire CSG community and not just SunShare. In addition to being the docket in which the Partial Settlement Agreement was filed, SunShare believed its cost increases due to Xcel's unreasonable delays was an unpleasant experience unique to SunShare. However, in its Answer, Xcel repeatedly argues that it in fact it treats *all* CSG developers in a similar manner, delaying their projects and increasing their costs.[4] If this is the case, and the rest of the CSG development community is experiencing the same unacceptable behavior from Xcel, perhaps this matter should be moved to the CSG tariff docket. If Xcel would like to have a broader discussion about the impacts of the "deemed complete" date in light of its

[4] Answer, Section I ("Delays are not unique to SunShare or these projects."); Answer, Section II.B. ("**many other DER and CSG projects have been delayed in receiving their IAs**"); Answer, Section II.B.2.b. ("providing the requested relief to SunShare would give it a competitive advantage compared to other developers who have experienced delays in receiving IAs, for example, because of the current serial review process").

apparent continued and widespread delays, SunShare, along with the rest of the CSG developer community, would be willing to have that discussion. SunShare specifically reserves the right to address this matter further in Reply comments if necessary.

II. Petition for Variance Should be Granted

As an initial matter, and as Xcel well knows because it recently used this same provision to amend its tariff, variances from the VOS rate such as this are judged by the same standard as a variance from the Commission's Rules.[5] Thus, contrary to Xcel's assertion, Minn. R. 7829.3200, subp. 1, provides the applicable standard by which SunShare's request for variance should be judged. It's important to note that despite Xcel's lengthy Answer, this Rule provides for three, and only three conditions that must be satisfied in order to qualify for a variance: (1) enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule; (2) granting the variance would not adversely affect the public interest; and (3) granting the variance would not conflict with standards imposed by law.

Regarding the first condition, excessive burden upon the applicant, Xcel readily admits in its Answer that it delayed offering IAs to SunShare not by days, but weeks and months for all the SunShare Projects. To be clear, the delays burdening the SunShare Projects, the delays which are the subject of this Petition, are not the types of run-of-the-mill delays stemming from procurement problems or issues establishing site control. To the contrary, Xcel unreasonably failed to provide IA's for all of the SunShare Projects. However, its attempts to minimize the resulting excessive burden on SunShare fail to recognize the practical result of these delays: the "deemed complete" date for all intents and purposes should have been 2020, not 2019. For example, Xcel did not tender the IA for GraniteSun until December 16, 2019. Xcel's

[5] *See* Xcel Petition, *In the Matter of Xcel Energy's Request for Variance – Billing Error Rules*, Docket E002/M-20-870, p. 6 (Dec. 9, 2020).

pontifications about SunShare's ability to purchase equipment at great expense so as to qualify for the 2019 ITC, in addition to being speculation, is also unavailing. Xcel seems to be arguing that SunShare should have remedied Xcel's tariff violations by paying out of pocket for equipment to qualify for the 2019 IA. Or, Xcel could have simply not violated its tariff and issued SunShare IAs as it is required to, and this would not even be an issue.

Regarding the second condition, SunShare's requested variance does not adversely affect the public interest. First, as set forth herein, the CSG program is not "subsidized." As noted above, Commerce noted in its report on the VOS methodology, "While NEM effectively values PV-generated at the customer retail rate, a VOS tariff seeks to quantify the value of distributed PV electricity. If the VOS is set correctly, it will account for the real value of the PV-generated electricity, and the utility and its ratepayers would be indifferent to whether the electricity is supplied from customer-owned PV or from comparable conventional means. Thus, a VOS tariff eliminates the NEM cross-subsidization concerns."[6] To say that granting SunShare's request is a subsidy is to say that the VOS tariff was not set properly by the Commission to account for the real value of the PV-generated electricity. Moreover, SunShare is not requesting a rate adder, it is requesting a variance to a different VOS rate to more accurately reflect the "deemed complete" date due to Xcel's admitted delays. Thus, there is not any "increase" being passed on to Xcel rate payers. The cost of the electricity being generated will more accurately reflect the time period during which it is being generated. And, if there was any increased cost, it would directly be the result of Xcel's actions, not SunShare's.

As to the third and final condition, granting SunShare's variance request does not conflict with standards imposed by law. In its Answer, Xcel builds an elaborate strawman,

[6] Minnesota Department of Commerce, Minnesota Value of Solar: Methodology, p. 1 (April 1, 2014).

stating that SunShare "essentially" is asking the Commission for "compensatory damages" and then proceeds to explain over three pages why the Commission cannot do so. Quite to the contrary, the Commission has clear authority pursuant to Minn. Stat. § 216B.25 to "upon notice to the public utility and after opportunity to be heard, rescind, alter, or amend any order fixing rates, tolls, charges, or schedules, or any other order made by the commission, and may reopen any case following the issuance of an order therein, for the taking of further evidence or for any other reason." This authority includes granting a waiver of any provision of Xcel's tariff previously approved by order of the Commission.

SunShare meets the requirements for a variance because of Xcel's excessive delays in processing SunShare's projects consistent with its Tariff. While the facts regarding the delays are somewhat unique to each of the projects, all of them were violations of Xcel's tariff, increased the cost of developing the projects and will subject them to unfair competition with other projects that will be receiving a higher VOS. Accordingly, SunShare believes that the Commission grant a variance for the SunShare Projects to allow them to receive the 2020 VOS rate instead of the 2019 VOS rate.

III. CSGs are Qualifying Facilities under Minnesota Law.

It is unclear whether Xcel is intentionally trying to mislead the Commission or simply doesn't understand the definition of a qualifying facility under Minnesota law.[7] SunShare has never argued that OsterSun or any of its other projects are PURPA projects because they DO NOT need to be PURPA projects to be qualifying facilities under Minnesota law. Minn. R. 7835.0100, subp. 19, defines a "qualifying facility" as a small power production facility that satisfies the

[7] Minn. R. 7829.0250 states, "A person who signs a pleading, motion, or similar filing, or enters an appearance at a commission meeting, by doing so represents that the person is authorized to do so, has a good faith belief that statements of fact made are true and correct, and that legal assertions are warranted by existing law or by a nonfrivolous argument for the extension or reversal of existing law or the modification or establishment of rules."

conditions of title 18, part 292 of the Code of Federal Regulations. 18 C.F.R. § 292.203 defines a qualifying facility that is exempt from filing requirements of the rule as a facility that has capacity of 1 MW or less whose primary fuel source is, among other things, renewable resources. The SunShare projects satisfy the definition under part 292 because each of them have a capacity of just 1 MW and generate power by a renewable resource.[8] Accordingly, by the definition of a qualifying facility established in Minnesota law, both Minn. Stat. § 216B.164, subd. 5(a), and Minn. R. 7835.4500, apply to the SunShare projects.

Xcel argues that Minn. Stat. § 216B.164 does not apply to CSGs because CSGs are not qualifying facilities based on an unpublished Court of Appeals case, *In the Matter of the Petition of Northern States Power Company, d/b/a Xcel Energy, for Approval of Its Proposed Community Solar Garden Program*, Case No. A15-1831 (Minn. Ct. App. May 31, 2016) ("CSG Cap Case"). Xcel's arguments ignore the explicit language of that case, Minnesota statutes and Minnesota rules. First and foremost, as noted above, Minn. R. 7835.0100, subp. 19, defines a qualifying facility and the SunShare projects clearly fall within that definition. Neither Minn. Stat. § 216B.164, Minn. Stat. § 216B.1641, nor any other provision of Minnesota law exclude CSGs from the definition of a qualifying facility. Further, neither the definition nor any other provision of Minnesota law conditions being a qualifying facility on the rate that a solar project receives. Minnesota rules recognize that qualifying facilities receive numerous different rates.[9] A solar project does not need to receive the avoided cost rate to be a qualifying facility. And, in fact, Xcel reports CSGs in its Annual Qualifying Facilities Report under the "Other Qualifying Facilities" provision of Minn. R. 7835.1500.[10]

[8] *See* 18 C.F.R. § 292.203(a).
[9] *See* Minn. R. 7835.4011.
[10] *See, e.g*, Xcel Annual Qualifying Facilities Report, Docket E999/PR-20-09, p. 10 (13 of pdf) (Feb. 28, 2020); and, Xcel Annual Qualifying Facility Report, Docket E999/PR- 21-19, p. 10 (13 of pdf) (March 1, 2021).

Second, Minn. Stat. § 216B.1641, the CSG statute, states that a CSG is a "facility that generates electricity by means of a ground-mounted or roof-mounted solar photovoltaic device" whereby, the owner of the CSG, who may be a public utility or any other entity or organization, **"contracts to sell the output from the community solar garden to the utility under section 216B.164"** and "subscribers receive a bill credit for the electricity generated in proportion to the size of their subscription."[11] To put it another way, the CSG statute explicitly states that the electricity generated by CSGs is sold to Xcel under Minn. Stat. § 216B.164. As such, Minn. Stat. § 216B.164 is explicitly incorporated and applicable to CSGs.

And finally, whether CSGs were qualifying facilities under Minn. Stat. § 216B.164, subd. 5(a), and Minn. R. 7835.4500 was not even an issue in the CSG Cap Case relied on by Xcel. The issues in that case, according to the Court, were whether the Commission, in establishing co-location and material upgrade caps as part of Xcel's CSG program, "(1) engaged in unlawful rulemaking, (2) violated relator's due-process rights, and (3) acted in excess of its statutory authority by limiting relator's interconnection rights."[12] That case simply affirmed the Commission's authority to place limitations on the interconnection rights of qualifying facilities, like CSGs, that receive a rate other than the avoided costs rate, as long as the state also offers the avoided cost rate to the qualifying facility. As both Xcel and the Commission should be well aware of because they were parties to that case, that case does not and could not stand for the proposition that CSGs are not qualifying facilities under Minn. Stat. § 216B.164, subd. 5(a), or Minn. R. 7835.4500 because that was not an issue that was before the Commission or the Court. In fact, the definition what a qualifying facility is under Minnesota law is not even cited in the CSG Cap Case. It is unclear how any reasonable person could argue that a case that does not even

[11] *See* Minn. Stat. § 216B.1641(a)&(b) (emphasis added).
[12] *See* CSG Cap Case, p. 1.

cite the definition of what a qualifying facility is under Minnesota law could somehow have such a significant impact on such an important aspect of that law.

In reaching its decision in the CSG Cap Case, the Court of Appeals, relied on FERC's decision in *Winding Creek Solar LLC*, 151 FERC ¶ 61,103 at *3 (2015), wherein FERC stated:

> [A]s long as a state provides QFs the opportunity to enter into long-term legally enforceable obligations at avoided cost rates, *a state may also have alternative programs that QFs and electric utilities may agree to participate in*; such alternative programs may limit how many QFs, or the total capacity of QFs, that may participate in the program.[13]

(Emphasis added).

Because CSGs in Minnesota have the opportunity to enter into long-term legally enforceable obligations at avoided cost rates, the Court determined that "the PUC may lawfully place limitations on participation, including on interconnection costs, without violating state and federal law."[14]

This holding in no way stands for the proposition that CSGs are not qualifying facilities. In fact, the FERC authority cited by the Court of Appeals explicitly recognizes that solar projects under "alternative programs" are qualifying facilities.[15] To state this simply to avoid any confusion or misunderstanding, a CSG is a qualifying facility because it clearly falls under the definition under state and federal law. Because CSGs have the opportunity to enter into long-term legally enforceable obligations at avoided costs rates, which would be what Xcel calls the "PURPA program," the Commission can limit their size and place other restrictions and limitations on them if they choose the rate provided for by the CSG program, which would be considered an

[13] Winding Creek's planned facility was an as-yet unbuilt 1 MW solar facility in Lodi, California.
[14] CSG Cap case, p. 20.
[15] *Id*. (stating that "a state may also have alternative programs that QFs and electric utilities may agree to participate in").

"alternative program."[16] If a CSG does not choose the avoided cost rate it does not fall under the so-called "PURPA program," but that does not mean it is not a qualifying facility under Minn. Stat. § 216B.164, subd. 5(a), or Minn. R. 7835.4500. It simply means the state "may limit how many QFs, or the total capacity of QFs, that may participate in the [CSG] program."

The overly broad general statements, upon which Xcel relies, that the Court of Appeals uses in some of its analysis cannot expand the issues in the case beyond those that were presented to the Court. Nor can they be used to contradict the explicit definition of a qualifying facility found in Minn. R. 7835.0100, subp. 19, the express language found in Minn. Stat. § 216B.1641(a) and (b), or any other provisions of law that recognizes CSGs as qualifying facilities. To argue otherwise demonstrates a fundamental misunderstanding of how the law works.

Some additional guidance to further illustrate that solar projects under an avoided cost program and any alternative program are both qualifying facilities is provided in FERC's order in *Otter Creek Solar, LLC,* 143 FERC ¶ 61,282 (2013), *reconsid. denied,*146 FERC ¶ 61,192 (2014), which was cited in its *Winding Creek* order. In *Otter Creek*, FERC stated:

> Vermont's SPEED program, in contrast, is a voluntary program that Otter Creek and other QFs may choose to avail themselves of if they wish to do so, but it in no way replaces or supersedes the Rule 4.100 program.[17] Instead, the SPEED program is simply an option offered by Vermont to QFs like Otter Creek in addition to, but not as a replacement for, the Rule 4.100 program. And while Otter Creek suggests that there cannot be two rates for QFs, Otter Creek is incorrect; as we recognized in the June 27 Order, the Commission's regulations, in fact, have long allowed QFs to agree to rates that they find acceptable – even rates that "differ from the rate. . . which would otherwise be required.[18]

[16] The VOS tariff is established under subdivision 10 of Minn. Stat. § 216B.164, which is titled, "Alternative tariff; compensation for resource value."
[17] The Vermont Commission's Rule 4.100 program is the Vermont Commission's implementation of PURPA and has been found by the Commission to be consistent with PURPA. *Otter Creek*, p. 3.
[18] *Otter Creek*, p. 3-4.

In summary, the unpublished Court of Appeals case that Xcel has argued establishes that CSGs are not qualifying facilities under Minn. Stat. § 216B.164, subd. 5(a), does not support such a position. It, and the FERC order it is based on, support the complete opposite position. CSGs are qualifying facilities. The rate a solar project receives is irrelevant to whether it is a qualifying facility. Whether a solar project is a qualifying facility is determined by the definition of a qualifying facility provided in state and federal law, which is focused on its size and source of electricity generation, not the rate it receives. The rate a solar project receives is only relevant to whether the state can place limitations on it that would be impermissible if it was receiving an avoided cost rate. Thus, Minn. Stat. § 216B.164, subd. 5(a), and Minn. R. 7835.4500, are applicable to this dispute between Xcel and SunShare.

Conclusion

Minnesota law is clear: the Commission has the authority to set tariff rates, change tariff rates, and grant variances from tariffs. SunShare is not requesting the Commission reopen or modify the CSG tariff, but instead is requesting a variance from that tariff, based on the Partial Settlement Agreement filed in this docket. SunShare has demonstrated the three conditions necessary to receive a variance and respectfully requests the Commission grant the same.

Respectfully Submitted,

Dated: March 21, 2022

/s/ Curtis Zaun
CURTIS P. ZAUN