STATE OF MINNESOTA

PUBLIC UTILITIES COMMISSION

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Betsy Wergin	Commissioner

In the Matter of Xcel Energy's Plan for a Community Solar Garden Program	Docket No. E-002/M-13-867

REPLY COMMENTS

I. Introduction.

Innovative Power Systems, Inc., Minnesota Community Solar, LLC, Novel Energy Solutions, LLC, SolarStone Partners, LLC, and TruNorth Solar, LLC respectfully submit the following comments in reply to Sunrise Energy Ventures, LLC's August 26, 2015 petition for rehearing and reconsideration and to the Department's request for clarification. The commenting parties are Minnesota-based solar developers actively participating in Minnesota's community solar garden program and other solar energy markets.

Pursuant to Minn. Stat. § 216B.27, subd. 3, the Commission may reverse, modify or suspend its decision only if, after rehearing, it finds its decision unlawful or unreasonable. Where the petitioner points to no new issues or new evidence which the Commission has already considered, the Commission's long practice is to deny the

petition for reconsideration without a hearing and without argument.[1] Because the Commission's decision was both lawful and reasonable, and because the petitions raise no new issues or arguments the Commission has not already considered, extensively, the Commission should deny Sunrise's request for reconsideration, and do so without a hearing or argument.

II. The Commission Should Deny Sunrise's Request for Rehearing and Reconsideration.

1. Further Delay Will Destroy the CSG Market.

Following more than *two years* in which interested parties have painstakingly negotiated over and the Commission has finally settled on rules under which Minnesota's community solar garden program may now be implemented, Sunrise asks the Commission to suspend the program and undertake a formal rulemaking because "once a full and fair record is made," the program's benefits "will be readily apparent."[2] With due respect to Sunrise, there is no ambiguity in the program's proposed benefits. It is equally clear, however, if the Commission accepts Sunrise's invitation to delay this program for another year or more to undertake rulemaking, the ensuing delay will undoubtedly destroy all of the program's expected benefits. There are many reasons why this program has been so long delayed, and likely enough blame for everyone to share. But there is literally no more time left if any community solar gardens are actually going

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1 *See, e.g., Order Denying Reconsideration*, Dockets E-0002/M-13-603, E-002/M-13-716, February 18, 2014 ("Based on this review the Commission finds that the petition does not raise new issues, does not point to new and relevant evidence, does not expose errors or ambiguities . . . . The Commission will therefore deny the request for reconsideration."); Minn. Rule 7829.3000, subp. 6.

2 Sunrise Petition for Reconsideration, at 2.

to get built, as the legislature expected when it passed the statute, and on which so many Minnesotans are now counting.

The Commission has broad discretion to issue a stay, and must only do so when the public interest so requires. Here, the public interest requires that no stay be issued. Given the December 31, 2016 expiration of the 30% federal investment tax credit on which much of the market relies, the Commission is fully cognizant that time is of the essence. Any stay – even for a short period – would effectively wipe out the CSG market and essentially render meaningless all of the parties' considerable time and effort to make a workable, meaningful CSG market for the state.

Moreover, Sunrise offers no cogent legal argument compelling stay. Its primary argument appears to be based on the constitution – that Xcel Energy has somehow "abrogated to itself the powers of the executive branch" and also violated Sunrise's 1st Amendment rights to "petition the sovereign."[3] As the Commission is fully aware, under the separation of powers doctrine, questions requiring interpretation of constitutional rights is the exclusive province of the courts, not administrative agencies.[4] In any event, vague constitutional allegations, particularly at this stage, are insufficient to derail a program which is expected to inject millions of dollars into Minnesota's economy and employ thousands of people, most of which must happen with the next year.

It is Sunrise's prerogative not to participate in a 5 MW community solar garden program. And to the extent it believes it has been prejudiced by the Commission's

[3] Sunrise Petition at 10-11.

[4] *See, e.g., In re Rochester Ambulance Service*, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993).

August 6 order, it is free to seek relief in the ordinary course by certiorari petition to the court of appeals. It is not entitled, however, to destroy through further delay a market opportunity in which others wish to and are legally entitled to participate.

2. The Commission's August 6 Order Resulted from Wholly Legal Procedures.

Sunrise argues the Commission's August 6 order is "void" because it fails to follow procedures required under the Administrative Procedures Act. It then asks that "the process" – without any identification of what specific "process" it refers to – be "recommenced."[5] Sunrise's request misstates and misunderstands principles of administrative law. Its regurgitation of legal principles in a vacuum and without context are unhelpful and in any event inapplicable.

As Sunrise itself notes, administrative policy may be formulated by promulgating rules or on a case-by-case basis.[6] As stated in the well-known *Intra-LATA* matter, because some principles must be adjusted to meet particular situations, not every principle can or should be cast immediately into the mold of a rule. As a result, whether to proceed by rulemaking or other adjudicative process (including notice and comment, and written order, as is the case here) is a decision left to the informed discretion of the Commission. The Commission may choose to forego rulemaking for a number of reasons, including: (1) the agency has insufficient experience with a particular problem, or (2) the problem is "so specialized and varying in nature as to be impossible to capture

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5 Sunrise Petition at 16.

6 *In re Investigation into Intra-Lata Equal Access and Presubscription*, 532 N.W.2d 583 (Minn. Ct. App. 1985); *Bunge Corp. v. Commissioner of Revenue*, 305 N.W.2d 779, 785 (Minn. 1981).

within the boundaries of a general rule."[7] And as the courts have recognized, an agency with expertise in a particular area, particularly where it is interpreting and implementing a statute to which the legislature has specifically entrusted to its judgment, as it has here, has enormous advantages over reviewing courts in making this complicated judgment.[8]

Here, for more than two years, the Commission has been wrestling with the new community solar garden animal – all the while providing Sunrise and all other parties the opportunity to weigh in on every aspect of the program, including which procedures are best employed to address it. Based on the unique questions presented, and always with the backdrop of the expiration of the federal 30% ITC, the Commission chose, as is its discretion, to proceed by notice and comment, conduct hearings in which heard from affected parties, and to issue a written decision. It was a reasonable and wholly legal manner in which to proceed.

To the extent that Sunrise believed that a rulemaking (or even contested case) was necessary – it should have made that request two years ago. At this point there is no way to undertake a rulemaking or contested case and still allow for projects to be commercially operable in 2106. Asking that the Commission deliberately wipeout the market to undertake a process which it was not required to do in the first place is obviously not reasonable.

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[7] *Intra-LATA*, at 590, citing to *Securities & Exc. Comm'n v. Chenery*,, 332 U.S. at 202, 203, 67 S.Ct. at 1580; *see also,* Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, § 6.8 at 267 (3rd ed. 1994).

[8] *Intra-LATA*, at 590.

3. Expedited Mediation Is Unnecessary and Equally Impractical.

For the same reasons, assigning this matter to an ALJ for "expedited mediation" is likewise unnecessary and impractical. Because the Commission's August 6 order is both reasonable and lawful, no dispute is ripe before the Commission.

4. There Is No Need to "Clarify" Parts of the August 6 Order.

Last, Sunrise's request that the Commission clarify certain aspects of the August 6 order is nothing other than a request for reconsideration, which for the reasons explained above, should be denied. Each of the points of clarification it seeks were thoroughly discussed by the parties and the Commission in June, and Sunrise raises nothing new. Clarification on these points is unnecessary.

III. There Is No Need for the Commission to "Clarify" Its Order As Requested by the Department.

The Department labels its request as one of clarification but in reality asks the Commission to modify its order based on points the Department and others previously argued in June. Like Sunrise's request, the Department's request raises no new issues which merit reconsideration. It is time to put the policy pencils down and to move post haste to program implementation and project build-out. The Commission should deny the Department's request.

1. Distribution Upgrades and the $1M Cap; the Department Misunderstands PURPA.

The Department asks the Commission to clarify the $1 million cap on distribution upgrades because the Public Utilities Regulatory Policies Act of 1978 imposes no such obligation on "qualified facilities." The Department misunderstands PURPA and

misinterprets the CSG program. The Department is correct that PURPA imposes no cap on the cost of what is otherwise required to interconnect a QF, costs for which the QF would be responsible, not the utility. But the Department's four pages of argument on this subject matter wholly miss the point. The CSG program isn't PURPA. If it was, then the *rate* which Xcel would be required to pay under the program would be its avoided cost rate – likely closer to $.03/kWh, not the CSG rate. If developers such as Sunrise and others wish to remove the $1 million cap in order to pay for unlimited distribution upgrades, they should expect to do so under Xcel's avoided cost PURPA rules, not the CSG program.

2. Ownership Transfers.

There is no need to clarify whether developers should be allowed to transfer ownership interests in projects exceeding 5 MW. The issue was also discussed in detail in June. Applicants that abused the CSG program by developing utility scale projects could then simply trade with other, similarly-situated applicants, create partially-owned affiliates or other entities in which to hide ownership structures, or otherwise game the system to avoid the co-location limits. The Commission rejected ownership transfers because transfers would simply allow developers to do indirectly what the Commission determined they could not do directly. Another reason the Commission decided against transfers was because transfers would only exacerbate one of NSP's principal concerns about limiting CSGs to 5 MW in the first place: that the utility-scale solar projects presented significant distribution upgrade and reliability concerns, and were far removed from the concept of a 1 MW garden provided in the CSG statute. If developers who

over-planned are allowed to simply transfer their projects, then nothing has been solved because the projects for all intents and purposes remain the same utility scale projects, with simply different owners. There is nothing new here and the Commission should promptly deny this request.

Last, it is important that the Commission deny these requests for another reason: finality. Any change or "clarification" from the Commission's June 6 order will certainly only beget more requests for reconsideration and clarification, kicking off a cycle that could easily last well into next year, etc. Xcel's CSG program, like the CSG statute itself, is far from perfect. Nonetheless, it represents the state's best effort thus far to build meaningful amounts of solar energy in a climate best known for its long winters. It is time for the Commission to end deliberation on these points and allow the marketplace the opportunity to make solar investment and create green jobs. While it remains uncertain how successful the program may ultimately turn out, it is certain that very little time remains in which to find out.

Dated: September 8, 2015

Respectfully submitted,

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