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August 26, 2015

VIA ELECTRONIC FILING

Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
350 Metro Square Building
121 Seventh Place East
St. Paul, MN 55101

Re: In the Matter of the Petition of Northern States Power, d/b/a Xcel Energy, for Approval of its Proposed Community Solar Program
Docket No. E-002/M-13-867
Our File No.: 63,409-0001

Dear Mr. Wolf:

Our firm represents Sunrise Energy Ventures, LLC ("Sunrise") in this matter. On behalf of Sunrise, I enclose for filing the Petition for Rehearing and Reconsideration and Motion for Stay, and accompanying exhibits.

A copy of this letter and the accompanying documents has been mailed or emailed to the persons on the current service list.

Please contact me if you have any questions.

Sincerely,

Corey J. Ayling

Enclosures
cc (w/encl.): Service List

STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
John Tuma	Commissioner
Nancy Lange	Commissioner
Daniel Lipschultz	Commissioner
Betsy Wergin	Commissioner

In the Matter of the Petition of Northern States Power, dba Xcel Energy, for Approval of its Proposed Community Solar Program

Issue Date: August 6, 2015
Docket No. E-002/M-13-867

SUNRISE ENERGY VENTURES LLC'S PETITION FOR REHEARING AND RECONSIDERATION

SUNRISE ENERGY VENTURES LLC'S MOTION FOR STAY

In 2013, the Minnesota legislature enacted a Community Solar Garden program that required Xcel to file a proposed plan by September 30, 2013. Operations were to begin within 90 days after the MPUC's approval of the plan. Minn. Stat. § 216B.1641. Xcel filed its plan on the last possible day and since then has done everything in its power to delay implementation and to minimize the amount of solar energy to be produced by the program. Sunrise Energy Ventures, LLC ("Sunrise"), by contrast, has acted with dispatch, spending millions of dollars in reliance on Xcel's tariff to put into place the customer commitments, land acquisition procedures, and financing

necessary to provide the solar power intended by the legislature. Sunrise estimates that its completed applications serve approximately 10,000 – 15,000 subscribers, whose ability to participate in the solar garden program is now uncertain by virtue of the Order at issue.

Instead of taking full advantage of Sunrise's ability to finance and deliver solar power, Xcel has backtracked on its tariff to propose an entirely different plan of operation. This new plan will effectively bypass Sunrise in favor of providers who failed to complete the application and make the financial deposits required under the tariff – and who will likely be unable to deliver even the limited solar power they claim they will provide.[1]

The root of the problem is that the MPUC has relied on Xcel to develop the record in this matter – instead of ordering the formal procedures and ALJ involvement required by law. While the statute contemplates that Xcel will propose a plan, its review, approval, and implementation are matters for formal rulemaking or adjudication. Sunrise is confident that once a full and fair record is made, the benefits of its program (and compliance with governing law and public policy) will be readily apparent.

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[1] Under the Colorado procedures initially proposed by Xcel, these non-compliant applications would automatically be rejected in two weeks for failing to make the necessary financial deposits. The significant "queue" presented by Xcel as a rationale to deviate from past orders appears to be a problem at least in part of Xcel's own creation.

The MPUC should first and foremost grant an immediate stay so it can review the matter before Xcel begins to take potentially irreparable measures by implementing its new plan on September 1, including removing Sunrise from the queue and imperiling the ability of thousands of residential subscribers to participate in Sunrise's projects. The MPUC's order is not final and effective until this rehearing process is completed. Xcel's rush to implement a nonfinal order is an unseemly arrogation of the MPUC's power. It is the MPUC, not Xcel, who promulgates solar regulatory policy. Yet Xcel is proceeding to implement policy before it has been properly reviewed and considered by the MPUC.

After properly staying this matter to protect its power to hear this petition before Xcel obtains a fait accompli by implementing the challenged order, the MPUC should rule as follows on the merits:

- Withdraw the Order of August 6, 2015 as procedurally improper and lacking the force of law;
- Refer the matter for rulemaking or for contested case adjudication;
- Alternatively, refer the matter for expedited mediation;
- Alternatively, either modify the August 6, 2015 order or extend the stay of the order pending an appeal by certiorari to the Minnesota Court of Appeals.

FACTS

The Community Solar Garden statute enacted in 2013 provides in pertinent part:

> The public utility subject to section 116C.779 shall file by September 30, 2013 a plan with the commission to operate a community solar garden program which shall being operations within 90 days after commission approval of the plan. Other public utilities may file an application at their election. The community solar garden program must be designed to offset the energy use of not less than five subscribers in each community solar garden facility of which no single subscriber has more than a 40 percent interest. The owner of the community solar garden may be a public utility or any other entity or organization that contracts to sell the output from the community solar garden to the utility under section 216B.164, subdivision 4c, or other limitations provided in law or regulations.

Minn. Stat. § 216B.1641(a).

The legislature listed the following standards that will govern MPUC review of a solar garden plan:

> (e) The commission may approve, disapprove, or modify a community solar garden program. Any plan approved by the commission must:
>
> (1) Reasonably allow for the creation, financing, and accessibility of community solar gardens;
>
> (2) Establish uniform standards, fees, and processes for the interconnection of community solar garden facilities that allow the utility to recover reasonable interconnection costs for each community solar garden;
>
> (3) No apply different requirements to utility and nonutility community solar garden facilities;
>
> (4) Be consistent with the public interest;

(5) Identify the information that must be provided to potential subscribers to ensure fair disclosure of future costs and benefits of subscriptions;

(6) Include a program implementation schedule;

(7) Identify all proposed rules, fees, and charges; and

(8) Identify the means by which the program will be promoted.

Minn. Stat. § 216B.1641(e).

To date, no record has been developed showing compliance with these 8 statutory factors. Nor has the MPUC made specific findings detailing how Xcel's shifting plans satisfy these 8 factors.

On September 30, 2013, Xcel filed a petition for approval of its proposed community solar gardens. In an April 7, 2014 Order, the MPUC rejected the proposal and directed Xcel to modify certain aspects of the program. On May 7, 2014, Xcel filed a revised proposal incorporating the changes ordered by the MPUC. On September 17, 2014, the MPUC issued an order approving Xcel's solar garden program with further modifications.

Relying on the terms and conditions of that order and on the tariff filed by Xcel, Sunrise submitted implementation-ready applications for community solar gardens that included reservation letters that committed consumer subscribers to the program. In so doing, Sunrise expended in excess of $2 million in non-refundable development costs, secured $10 million in deposits required under the tariff, and

invested many hours of labor and study. Subscribers of Sunrise also relied upon this tariff. By virtue of the MPUC's Order approving Xcel's backtracking on solar, the 10,000 – 15,000 subscribers associated with Sunrise solar garden projects face significant uncertainty as to the future of their subscription rights. With the exception of a few dozen commercial users, all of these vested subscribers are residential users.

Starting in February 2015, Xcel began to backtrack on its tariff, complaining that applicants such as Sunrise had done too good a job of assembling implementation-ready solar gardens. The filings prompted the Department of Commerce to bring a motion on May 1, 2015 to order Xcel to show cause why the MPUC should not find Xcel to be in violation of the MPUC's orders and to require Xcel to process applications consistent with the MPUC's orders.

Xcel persisted in proposing limits to the megawatts that could be co-located on any one site or area, as well as proposing interconnection limitations that violated federal law and that made Sunrise's applications unviable.[2] When Sunrise refused to agree to such new rules, Xcel allied with a group of smaller, unproven developers lacking in reservation letters and in the wherewithal to deliver a completed garden program. These developers supported and promoted all of Xcel's new restrictions,

[2] Xcel's dire warnings against too much solar power that will harm consumers by higher rates are belied by its own preferred integrated resource plan. That plan projects 1,700 MW of Xcel utility-scale projects and 700 MW from community solar. In addition, Xcel has publicly stated that higher-than-projected MW from community solar could be offset by scaling back on its own utility-scale projects.

which served their own parochial interests. Xcel then trumpeted this agreement as a "partial settlement agreement" worthy of consideration and deference by the MPUC.

Although the issues presented required statutory construction, solar policymaking, and findings on complex issues of disputed fact, the MPUC did not commence formal rulemaking or adjudication proceedings. Instead, it proceeded to hold a meeting on June 23, 2015 to consider the matter. After professing consternation as to how to proceed, the Commissioners recessed to "take a break for ten minutes so that we have a chance to talk to the staff and see whether we can come to any clarity about whether we're going to proceed today or not" contrary to Minnesota's Open Meeting law. Upon their return, the Commissioners suddenly adopted all of Xcel's new restrictions. It issued a formal order to this effect on August 6, 2015.

In the interim, even Xcel confessed unease as to the highly irregular nature of the proceedings. In a letter dated July 24, 2015, Xcel admitted that the matter required follow-up in the form of contested case proceedings, which it proposed to conclude by 2017. Xcel did not explain why the entirety of the MPUC's order should not also be subject to formal rulemaking or contested case procedures.

Notwithstanding this unease, Xcel is rushing to implement the August 6th Order immediately and irreparably so that, as a practical matter, it cannot be considered or modified by the MPUC. Indeed, even before the Order was issued, Xcel stated its intent at a July 29, 2015 working group meeting "to start moving these

changes forward outside of an official Commission Order." Xcel plans, as early as September 1, 2015, to change the order of the queue, thereby destroying Sunrise's ability to deliver solar to its subscribers even before its objections can be heard and ruled on by the MPUC. Xcel is unilaterally denying Sunrise its right to adjust its deemed-complete projects to comply with the retroactive changes as to sizing limitations in the new Order. Xcel will not permit Sunrise to relocate or divest ownership of co-located sites while retaining its reservation letters and queue positions, effectively eliminating the ability of Sunrise to deliver to its subscribers. And Xcel intends to punish those who contest its co-location rulings by removing such protestants from the queue. Thus, while the MPUC contemplates a dispute resolution procedure before the Department of Commerce, a protestant who wins such an appeal will lose the war by being placed at the back of queue.

The resulting prejudice to Sunrise also represents a significant negative effect on the Solar Garden program as a whole, given the importance on Sunrise relative to the market. Sunrise is the owner of nearly 25% of all reservation letters and is committed to developing approximately 100 MW of solar power that stands to be used by 10,000 to 15,000 subscribers[3].

[3] According to the publicly available information, as of June 25, 2015, 429 applications were considered "deemed complete." Sunrise was responsible for 100 of those applications.

ANALYSIS

I. THE MPUC SHOULD IMMEDIATELY STAY ITS AUGUST 6TH ORDER SO THAT THIS PETITION CAN BE HEARD AND DECIDED BEFORE XCEL IMPLEMENTS THE ORDER, TO THE PREJUCIDE OF SUNRISE AND ITS 15,000 SUBSCRIBERS.

Minn. Stat. § 216B.27 Subd. 3 specifically provides that "No order of the commission shall become effective while an application for a rehearing or a rehearing is pending and until ten days after the application for a rehearing is either denied, expressly or by implication, or the commission has announced its final determination on rehearing." Xcel, however, continues to take action to implement the August 6, 2015 Order, to the prejudice of Sunrise. Attached as Exhibit A are the notices of non-compliance sent to Sunrise on August 18, 2015, requiring action by September 1, 2015.

Similarly, even though the August 6, 2015 Order is not final and cannot be final until the rehearing process is completed, Xcel has rushed to make policy decisions on its own and in the working group as if the Order were already final – and as if it is licensed as the MPUC's delegated proxy to make clarifying rulings. Furthermore, Xcel has initiated a decision-making methodology in the working group to discuss and vote on policy decisions never discussed by the MPUC and in clear conflict with both federal law and prior Orders approved by the MPUC.[4] This voting methodology is

[4] Examples include: (1) allowing applicants who have not been deemed to complete to comply with the new retroactively-imposed rules, but not allowing these same liberties to applicants that were deemed complete as of the 6/25 MPUC decision; (2) creating two new separate categories

made up out of whole cloth – without the benefit of a governing constitution reflecting the authority to vote and on what issues. Ultimately, the classification of voting approval is determined by whether Xcel favors the decision. Attached as Exhibit B is Xcel's voting matrix; *see also* July 29, 2015 Working Group Minutes ("Xcel Energy will provide 5 calendar days' notice to the workgroup when policy decisions, including changes to the FAQs, will be discussed"). The voting process fails to distinguish between interested parties as to certain issues (such as changes to approved applications with reservation letters) and disinterested parties (those without reservation letters, whose interests are affected only by prospective changes) who are nonetheless allowed to vote on issues that prejudice interested parties.

In taking action to implement a non-final order in a manner that irreparably prejudices Sunrise and its thousands of residential subscribers, Xcel is violating the express letter of the law.

Apart from violating the plain letter of the regulations, Xcel has unconstitutionally arrogated to itself the powers of the executive branch and has deprived Sunrise of a cognizable property interest without due process of law. And in implementing rules in a way that will punish Sunrise for objecting to a co-location ruling by removing Sunrise from the queue, Xcel will be retaliating against Sunrise for

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for "material upgrades" that allows Xcel to pick and choose which projects they prefer to advance in the interconnection queue (as opposed to the previous, functional definition of "material"); and (3) unilaterally removing an applicant from their position in the interconnection queue if they dispute Xcel's decision on co-location status or interconnection costs.

exercising its First Amendment rights to petition the sovereign (via the dispute resolution process before the Commerce Department created by the August 6, 2015 Order) for redress of grievances. These grievous errors require an immediate remedy.

The MPUC should therefore, as its first and most pressing order of business, issue an immediate order staying its August 6th Order pending rehearing and restraining Xcel from implementing the Order in the meantime.

II. THE AUGUST 6, 2015 ORDER IS VOID FOR FAILURE TO COMPLY WITH FORMAL PROCEDURES REQUIRED BY MINN. STAT. CHAP. 14.

"An agency may not make binding law except in accordance with the authorities and procedures established by [the legislature]." Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like – Should Federal Agencies Use them to Bind the Public?,* 41 DUKE L.J. 1311, 1312 (1992). A policy statement that does not conform to these procedural requirements is void and nonbinding, and will be disregarded as an unpromulgated rule. *See id.* at 1316; *United States Steel Corp. v. Minnesota Pollution Control Agency,* 2015 WL 4508104 at *5 (No. A14-1789 Minn. App. July 27, 2015); Keppel, 21 Minnesota Practice, Administrative Practice & Procedure § 5.05.4 (2d ed. Nov. 2014) ("if an agency intends a policy statement, regardless of its form or denomination, to have general application and binding effect, the agency must promulgate the policy in accordance with the rulemaking procedures contained in the Administrative Procedures Act").

Here, the MPUC acted informally without the rigorous procedures required for rulemaking or adjudication. The resulting policy pronouncements are nonbinding and void.

A. The August 6, 2015 Order Is Void As An Unpromulgated Rule.

"Administrative agencies generally formulate policy by promulgating administrative rules." *In re Pera Salary Determinations Affecting Retired and Active Employees of the City of Duluth,* 820 N.W.2d 563, 570 (Minn. App. 2012); *see Bunge Corp. v. Commissioner of Revenue,* 305 N.W.2d 779, 785 (Minn. 1981). A rule "means every agency statement of general applicability and future effect, including amendments, suspension, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Minn. Stat. § 14.02 Subd. 4; Keppel, 21 Minn. Practice, Administrative Practice & Procedure § 5.01 (2d ed. Nov. 2014) (a rule is "1. A statement of *general* applicability; 2. A statement having *future* effect; and 3. A statement designed to implement, interpret, or prescribe *law, policy,* or *procedure*"). The definition is broad enough to cover interpretive rules (those that make specific the law enforced or administered by the agency) as well as legislative rules (those promulgated pursuant to a delegated power to make substantive law). *In re Pera Salary Determination,* 820 N.W.2d at 570; *Cable Communications Bd. v. Nor-West Cable Communications Partnership,* 356 N.W.2d 658, 667 (Minn. 1984).

The MPUC's August 6, 2015 Order states the general policies that will govern solar gardens – including sizing standards, interconnection dollar limits, dispute resolution procedures before the Department of Commerce, and application procedures. The development process is ongoing, and the Order will have future effect. The Order implements and interprets the solar garden law, policy, and procedure of this State. Even if not denominated as a rule, such policymaking must be classified within the broad definition of "Rule" adopted by the Minnesota Administrative Procedures Act. *See McKee v. Likins,* 261 N.W.2d 566, 577-78 (Minn. 1977).

As the Minnesota Court of Appeals held last month, when the MPCA announced broad policy statements that would apply to all permit applicants who met certain criteria, those statements met the broad, functional definition of a "rule." The MPCA could not then write those broad policies into new permits – until those policies were properly promulgated pursuant to the rulemaking procedures of Minn. Stat. § 14. *United States Steel,* 2015 WL 4508104 at *4-5.

The policies and procedures adopted in the August 6, 2015 order for applicants like Sunrise to participate in the solar garden program are much like the policies adopted by the MPCA to be incorporated into ongoing permit applications. They are "an agency statement of general applicability and future effect that is intended to implement or make specific the law enforced or administered by that agency." *Id.* at *5 (quotations omitted). They meet the definition of rulemaking.

The important policymaking accomplished in rules cannot be accomplished on an ad hoc basis. The publication, notice, comment, and ALJ participation specified in Minn. Stat. Chap. 14 must be followed. If the agency fails to follow such procedures, then the policymaking is void – it is an unpromulgated rule that may not be incorporated into ongoing applications and proceedings. *Id.* at *4-5; *In re Pera Salary Determination,* 820 N.W.2d at 570 ("if an agency's interpretation of a statute is not properly promulgated ... the rule is invalid and cannot be used as the basis for agency action"); *McKee,* 261 N.W.2d at 577 (policy statements shall not have the effect of law unless they are adopted as a rule in the manner prescribed by the Administrative Procedures Act); *Matter of Implementation of Utility Energy Conservation Improvement Programs,* 368 N.W.2d 308, 314 (Minn. App. 1985) ("The procedures used by the MPUC related to the administration of its official duties and directly affect the rights and procedures available to the public. The MPUC erred by not properly adopting rules relating to its procedures as required by Minn. Stat. § 14.06").

"Administrative officials are not permitted to act on mere whim, nor their own impulse, however well-intentioned they might be, but must follow due process in their official acts and in the promulgation of rules defining their operations." *United States Steel,* 2015 WL 4508104 at * 4 (quoting *In re Appeal of Jongquist,* 460 N.W.2d 915, 917 (Minn. App. 1990)). "Rulemaking guidelines ensure that those affected by a rule have notice and the ability to comment so that an agency can understand all the important implications of a rule." *United States Steel,* 2015 WL 4508104 at *4. The involvement

of an ALJ is critical to the process. "His or her first obligation is to control the hearing and to create an accurate record. The ALJ must also ensure that all persons involved in the rule hearing are treated fairly and impartially. More substantively, however, the ALJ independently examines the entire record and the language of the proposed rules to determine if the agency has shown, among other things, the rule to be needed and reasonable." G. Beck, Minnesota Administrative Procedure § 20.4.1(2) at p. 325 (2nd ed. 1998, Supp. Dec. 2008).

Instead of an ALJ, Xcel has been permitted to proceed as judge, jury, and interested party. It has been Xcel who has developed the record in this matter. The result can charitably be described as a travesty. Xcel has ignored the comments and objections of Sunrise and others. Xcel courted the applicants who have failed to comply with the tariff terms and presented the results of these irregular negotiations as a "partial settlement" – as if policymaking can be settled without the agreement of ***all*** parties or can be determined by anyone but the Commission itself. In the wake of the August 6th Order, Xcel continues to preside at the working group meetings which have veered beyond the technical issues they were meant to address and morphed into a type of kangaroo court that considers "policy" issues and "votes" on matters that, conveniently enough, favor them and Xcel's agenda over Sunrise and others. Any proposed revisions to the tariff based upon these irregular proceedings should be rejected out of hand.

Even Xcel has grown uncomfortable with its sham proceedings. In a letter dated July 24, 2015, it has requested the appointment of an ALJ. Having gotten most of what it wanted without any fair process whatsoever, it now seeks to enlist an ALJ to clothe the entire charade with a veneer of legitimacy via hearings to decide ***some*** of the follow-up details. Yet, there is no logic to appointing an ALJ to build a record and make findings on just ***some*** of the issues. The ALJ should preside over the entire policymaking process so that the MPUC can promulgate policy in the informed and fair way contemplated by statute.

In short, the August 6, 2015 Order is void in its entirety. For the policies announced in the Order to be effective, the rigorous procedures of the Administrative Procedures Act must be followed. As noted below, the MPUC has some discretion to promulgate policy by contested case proceedings instead of by rulemaking. Either option requires the involvement of an ALJ and proper notice and hearing procedures. The Order must be withdrawn, and the process recommenced in the manner required by Minn. Stat. § 14.

B. <u>The Agency May Elect To Promulgate Policy By Adjudication, But Must Do So Pursuant To Formal Contested Case Proceedings</u>.

"Administrative policy may be formulated by promulgating rules or on a case-by-case basis." *Matter of Investigation into Intra-LATA Equal Access and Presubscription,* 532 N.W.2d 583, 589 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). As a general matter, "[i]mportant questions of social or political policy are more

appropriately promulgated as rules, while the application of specific facts to specific parties is more appropriate within an adjudicatory-type setting." *Id.* However, there is a considerable amount of overlap between these two types of policymaking, and where "principles must be adjusted to meet particular situations," the agency may want to proceed by adjudication rather than by rulemaking. *Id.,* 532 N.W.2d at 590.

Accordingly, "[w]hether to proceed by rulemaking or adjudication is a decision left to the informed discretion of the agency." *Id.; accord, Bunge,* 305 N.W.2d at 785; *cf. NLRB v. Bell Aerospace,* 416 U.S. 267, 293 (1974) (choice between rulemaking and adjudication "lies primarily in the informed discretion of the administrative agency"). For example, the decision may be "too closely imbedded in the particular facts to be stated in a general rule." *Intra-LATA,* 532 N.W.2d at 590. Or, as may be the case here, adjudication may better explicate the facts and rulemaking may be premature because "the agency may have insufficient experience with a particular problem." *Id.* (citing *SEC v. Chenery,* 332 U.S. 194, 202-03 (1947)).

"In practice, the overlap between the APA definitions of adjudication and rulemaking rarely causes problems. A court is likely to acquiesce in an agency's characterization of a proceeding as a rulemaking if it fits within the APA's broad definition of 'rulemaking,' since the APA does not require an agency to use procedures in an adjudication that are more demanding than the procedures an agency must use in rulemaking." Pierce, Administrative Law Treatise § 8.1 at p. 701 (5th ed. 2010).

From Sunrise's perspective, the choice between rulemaking and adjudication is not important, and Sunrise will defer to the MPUC's discretion. The important thing is that Xcel be removed as the party making the record in this matter and that a neutral ALJ be appointed to ensure impartial proceedings, a full exploration of the facts, and a complete record.

Can, however, the matter continue to proceed as an adjudication without the benefit of contested case proceedings? The solar garden statute does not authorize or contemplate some kind of sui generis adjudicatory policymaking process; it does not overrule the MPUC statutes and rules that require contested case adjudication under these circumstances.

In particular, Minn. Stat. § 216B.09 requires "reasonable notice and hearing" when setting policy regarding "service."

> The commission, on its own motion or upon complaint and after reasonable notice and hearing, may ascertain and fix just and reasonable standards, classifications, rules, or practices to be observed and followed by an or all public utilities with respect to the service to be furnished.

Minn. Stat. § 216B.09. "Service" means "natural, manufactured, or mixed gas and electricity; the installation, removal, or repair of equipment or facilities for delivering or measuring such gas and electricity." Minn. Stat. § 216B.02 Subd. 6. The generation, connection, delivery, and payment for solar electrical power meets this definition of "service." In setting the rules for solar gardens in its August 6, 2015

Order, the MPUC was making policy regarding service, thereby requiring a hearing pursuant to Minn. Stat. § 216B.09.

Must the "hearing" be a contested case hearing or can the MPUC fashion the kind of ad hoc "hearing" before the Commissioners held in June that resulted in the Order? A close reading of the applicable statutes and rules requires that the "hearing" be a contested case hearing before an ALJ. In particular, the Administrative Procedures Act defines contested case to be that which determines rights after an agency hearing; the hearing required by Minn. Stat. § 216B.09, then, must necessarily be a contested case hearing.

> "Contested case" means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing. . . .

Minn. Stat. § 14.02 Subd. 3.

Moreover, the rules promulgated by the MPUC require that if there is a right to a "hearing" and there are "material issues of fact", then the matter ***must*** be referred to the OAH for a contested case hearing.

> If a proceeding involves contested material facts and there is a right to a hearing under statute or rule or if the commission finds that all significant issues have not been resolved to its satisfaction, the commission shall refer the matter to the Office of Administrative Hearings for contested case proceedings, unless:
>
> A. all parties waive their rights to contested case proceedings and instead request informal or expedited proceedings, and the commission finds that informal or expedited proceedings would be in the public interest; or

B. a different procedural treatment is required by statute.

Minn. Admin. R. 7829.1000.

The present matter involves multiple material issues of fact involving sizing, operation, and interconnection. There has been no waiver of rights; the parties have not requested an alternative procedure; and given the need to make a complete record before an impartial ALJ, an alternative procedure would not be in the public interest. Accordingly, a contested case proceeding is mandated by Rule 7829.1000.

C. None Of The Exceptions For Valid Informal Agency Policymaking Applies Here.

None of the recognized exceptions from the requirement of formal policymaking procedures applies here. Turning first to rulemaking, Minn. Stat. § 14.03 Subd. 3 lists a number of exemptions from rulemaking procedures, including matters of internal management, attorney general opinions, corrections policies, revenue notices, OSHA standards. There is no exception for utility service or for solar gardens. The courts have fashioned a common law exception when an agency informally adopts a rule interpreting a statute in a way "corresponds with its plain meaning." *United States Steel,* 2015 WL 4508104 at * 3 (quoting *Minn. Transitions Charter School v. Commissioner of Minnesota Department of Education,* 844 N.W.2d 223, 233 (Minn. App. 2014), *review denied* (Minn. May 28, 2014)). The August 6, 2015 Order does not simply enforce the plain meaning of the Solar Garden statute. This exception is inapplicable.

Courts will also give force to an improperly promulgated but longstanding agency rule that construes an ambiguous statute. *See id.; In the Matter of PERA Salary Determination,* 820 N.W.2d at 570; *Cable Communications Board v. Nor-West Cable Communications Partnership,* 356 N.W.2d 658, 667 (Minn. 1984)). The policies promulgated here are not longstanding. Nor have the policies been consistent, given the about-face adopted by the MPUC in the August 6, 2015 Order. *PERA Salary Determination,* 820 N.W.2d at 571 ("courts decline to recognize an agency's interpretation of a statute if the agency has been inconsistent in its interpretation").

Turning next to the recognized exceptions from the requirement of contested case procedures, municipal boundary disputes, corrections adjudications, unemployment/disability cases, workers compensation claims, and Board of Pardons proceedings are all expressly exempt. Minn. Stat. § 14.03 Subd. 2. The present utility dispute does not fall within any of these exemptions.

The Courts have further found contested case proceedings to be unnecessary in the absence of disputed issues of material fact. *In the Matter of a Complaint of People's Cooperative Power Association, Inc.,* 447 N.W.2d 11, 13 (Minn. App. 1989), *review denied* (Minn. Jan. 8, 1990). Here, however, the agency requires facts to be developed so as to make a full record.

D. A Contested Case Hearing is Also Required Because the August 6, 2015 Order Deprived Sunrise Of A Constitutionally-Protected Property Interest.

Regardless of whether there is a statutory right to a contested case hearing, the due process clause of the Fourteenth Amendment may require such a hearing if the agency action will deprive Sunrise of a substantial liberty or property interest. *Goldberg v. Kelly,* 397 U.S. 254 (1970); *see generally* Keppel, *supra,* § 7.04.

Here Sunrise invested $10 million in deposits and $2 million in development costs in reliance on the tariff approved by the MPUC. The deprivation of these funds and its reasonable, investment-backed expectations creates a vested, cognizable property interest. Where, as here, the plaintiff has expended funds in reliance on government permits and regulations, the government may not reverse course without providing due process. *See Reserve, Ltd. v. Town of Longboat Key,* 17 F.3d 1374, 1375-76 (11th Cir. 1994); *Resolution Trust Corp. v. Town of Highland Beach,* 18 F.3d 1536, 1546 (11th Cir. 1994). And continued participation in governmental benefit programs, here created by the solar garden statute, constitutes a cognizable property interest under Minnesota law. *See generally* Keppel, *supra,* § 7.07.2.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Where, as here, the nature of the property interest is compelling (concerning as it does the continued viability of the entity's solar program and interest of thousands of solar subscribers), there is a significant risk of an erroneous deprivation,

and the burdens of proper process are relatively minimal, the due process clause requires a pre-deprivation, trial-type evidentiary hearing. *See Fosselman v. Commissioner of Human Services,* 612 N.W.2d 456, 462-64 (Minn. App. 2000).

III. AS AN ALTERNATIVE REMEDY, THE MPUC MAY REFER THE MATTER FOR EXPEDITED MEDIATION.

In the interest of expediting this matter so as to bring solar energy to the consumer as intended by the legislature, Sunrise would support an election by the MPUC to set this matter on for expedited mediation before an ALJ. Rules promulgated by the Office of Administrative Hearing empower the agency to request the Chief ALJ "to assign a judge to be a neutral party assisting in mediating or negotiating a resolution to dispute relating to proposed rules." Minn. Admin. R. 1400.2450 Subp. 1.

This would be a real and productive mediation. Participants like Sunrise would be able to have a hearing before a neutral appointed and employed by the OAH. The idea would be to forge a true consensus that might obviate several months of administrative proceedings, thereby realizing the legislature's intent to develop solar energy and bring it to market. Sunrise would not simply be outvoted, overruled, and ignored as it currently is at the working group meetings conducted by Xcel. Sunrise is willing to pursue a true compromise. And if all parties, including Xcel, knew that they must compromise, it is possible that productive policies could be formulated quickly by stipulation for MPUC consideration.

Given the press of time, the ALJ could also be empowered, pursuant to a mediated settlement conference under Minnesota Rules 1400.6550, to recommend findings for and resolution of any disputed matters that are not resolved.

IV. THE MPUC SHOULD RECONSIDER OR CLARIFY THE SUBSTANTIVE PROVISIONS OF ITS AUGUST 6TH ORDER.

As noted above, the August 6, 2015 Order is so procedurally flawed as to be a nullity, thereby obviating exploration of its substantive terms. To preserve it rights, however, Sunrise incorporates by reference the violations of law itemized in its draft Complaint attached as Exhibit C– which it will be constrained to file if it is not granted immediate and satisfactory relief. In addition, Sunrise emphasizes the following respects in which the terms of the August 6, 2015 Order were arbitrary or contrary to law:

First, the MPUC should strike the Order in its entirely and withdraw any approval of Xcel's solar garden plan because it has failed to make the findings required by the Solar Garden Statute. In particular, Minn. Stat. § 216B.1641(e) directs that any community solar garden plan approved by the MPUC must meet 8 factors:

> (1) Reasonably allow for the creation, financing, and accessibility of community solar gardens;
>
> (2) Establish uniform standards, fees, and processes for the interconnection of community solar garden facilities that allow the utility to recover reasonable interconnection costs for each community solar garden;
>
> (3) Not apply different requirements to utility and nonutility community solar garden facilities;

(4) Be consistent with the public interest;

(5) Identify the information that must be provided to potential subscribers to ensure fair disclosure of future costs and benefits of subscriptions;

(6) Include a program implementation schedule;

(7) Identify all proposed rules, fees, and charges; and

(8) Identify the means by which the program will be promoted.

Minn. Stat. § 216B.1641(e). The MPUC's order makes no findings on these 8 elements and fails to explain how the approved plan meets or would meet these factors. *See, e.g., DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 145 (Minn. App. 2007) ("The findings of the trial court or agency must be sufficiently detailed to demonstrate that all relevant factors were actually considered."). On this record, there is no support for finding compliance with these factors or the governing statute.

Second, the co-location limitation of 5MW from any applicant at any project site should be stricken as arbitrary and capricious, as not authorized by statute, and as not meeting the 8-factor test quoted above. Minn. Stat. § 216B.1641 simply requires that a "solar garden facility" have a "nameplate capacity of no more than one megawatt." There are no limitations for "projects" or "project sites", and there are no limitations on co-location. Indeed the statute necessarily requires co-location so as to "[r]easonably allow for the creation, financing, and accessibility of community solar gardens", the first factor quoted above. Here, Sunrise's application meets the

nameplate capacity limit: each co-located facility has a nameplate capacity of no more than 1MW.[5]

It should be noted in this regard that the record reflects considerable confusion as to the details for implementing the co-location policy. Contrary to its current position, Xcel at the hearing of June 25th did not contend that it could simply bump non-complying applicants out of the queue. Instead, it contemplated a compliance period for the developer to bring its application into compliance.[6] Regarding re-location, the Chair of the MPUC found this option to be implicit in the settlement

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[5] The agency action cannot be salvaged as a rationally-based form of statutory construction. In the first place, the construction simply ignores the text of the statute, as explained above. Second, the construction constituted a complete about-face from the previous construction on which Sunrise relied. This creates a promissory estoppel, breach of contract, and tortious interference claim, as detailed in the Draft Complaint attached as Exhibit C. In addition, having created a rule of statutory construction, an agency is unable to do an unsupported about-face. "When an agency changes course by reversing the policy, it must supply a reasoned analysis for the change." *Defenders of Wildlife v. Administrator Envtl. Protection Agency*, 688 F. Supp. 1334, 1347 (D. Minn. 1988) (Murphy, J.) (citing *Motor Vehicle Mfr. Ass'n. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)), *aff'd in part and rev'd in part on other grounds*, 882 F.2d 1294 (8th Cir. 1989). A reviewing court must decide whether an agency made an explanation. *Id.* at 1347. It must then assess whether the given explanation is sufficient under the arbitrary and capricious standard. *Id.* at 1347 (citing *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985)); *Standard Oil Company v. The Department of Energy*, 596 F.2d 1029, 1038 (TECA 1978) (criticizing the Federal Energy Administration for rescinding its earlier interpretation of petroleum price control regulations allowing a class exception for oil refiners, primarily due to political pressure).

Nor may the agency claim that the public interest justifies such an about-face. "'An agency's view of what is in the public's interest may change, either with or without a change in circumstances[,] but an agency changing its course must supply a reasoned analysis.'" *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1455-56 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Assn. v. State Farm*, 463 U.S. 29, 57 (1983)). There is no reasoned analysis behind the MPUC's flip-flop. Such a fundamental change in position can only be characterized as arbitrary and capricious.

[6] At 6 hours, 21 minutes of the June 25th hearing, counsel for Xcel agreed with the idea of a compliance period: "... in terms of the compliance period, I'm not sure that it mattered a whole lot given our disagreement on other issues, but the company is certainly open to some 90 day period where companies can adjust and scale down and deal with those kind of issues."

agreement.[7] And contrary to Xcel's current position, divestment was considered a viable alternative for compliance.[8] Considerable more deliberation and clarification is necessary to explicate the specific rules that should govern co-location, re-location, and divestiture.

Third, in revising the co-location rules of the Xcel's tariff on which Sunrise relied, and pursuant to which Sunrise has expended in excess of $12 million, the MPUC has deprived Sunrise of property without compensation and without due process of law.

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[7] The Chair, at 6 hours 21 minutes of the June 25th hearing noted, in response to Xcel's counsel's objections to relocation: "that's interesting because I assumed from the settlement that was allowed; you could take a 20 MW project, divide it into four parts, and move them to four different places." Interestingly enough, Xcel's Regional Vice President later supports relocation at 6 hours, 35 minutes into the hearing – pointing out that a customer with a 10 MW site can move 5MW of that site to another property.

[8] At 6 hours, 23 minutes, counsel for Sunrise and others stated: "there really shouldn't be any objection to having four developers on one site in fact that would seem to be an efficient use of the land." The Chair responded: "Ok and I guess that's kinda what I had assumed – that they could be sold to other developers, but I don't think that's what Mr. Brown thought, so obviously we've got some additional bones of contention here."

Bill Grant of the Commerce Department noted at 6 hours, 27 minutes: "You've got a couple of options on the table, I think we could live with either one – either 10 MW with no divestment or 5 MW with divestment. But I don't think it's acceptable to have no solution between those two points."

Commissioner Lipshultz assumed divestiture was an option (at 6 hours, 32 minutes): "I wanna come back to divestiture, if a developer with a co-located project in excess of 5 MW sells some of their community solar gardens to an unaffiliated developer, you [Xcel] shouldn't have a problem with that? {pause} ... we came here today, I think, because as I read Xcel's comments and concerns it was related to developers that were just gaming things. You've got an individual developer that strings together a collection of 1 MW community solar gardens into a project, co-located, well in excess of the 1 MW cap for community solar gardens ... and then market the full capacity to a single customer." Continued Lipshultz: "but if they're selling to an unaffiliated developer, that unaffiliated developer could have come in and shared infrastructure for efficiency sake to begin with, and so I'm wondering where your legal hook is to say no to the divestiture that Mr. Moratzka is talking about ... that's where you kinda lost me."

Fourth, the August 6, 2015 Order is void as the product of the violation of the Minnesota Open Meeting Law, Minn. Stat. §§ 13D.01, 13D.06.

Fifth, the Order's limitations on interconnection rights are void and preempted by the Public Utilities Regulatory Policies Act of 1978 (PURPA).

In the alternative, the MPUC should consider the following clarifications that would permit the objectives articulated in the Order to be fully and fairly achieved:

- There must be a clear set of guidelines to implement the Oder, and a reasonable period of time in which to comply with the guidelines once established. For instance, if there is to be a 5MW co-location limit on each "project site," that term must be carefully defined (preferably with the assistance of mediation and Department of Commerce input). Completed applications must preserve their place in the queue pending this clarification. Subscribers of applicants who relied upon the tariff in completing their applications and in making financial commitments should not be penalized.
- The ***applicant*** must be permitted a reasonable opportunity to scale down its ***own*** application to meet the 5 MW limit adopted in the Order by relocating to new sites. Such a right is already granted the applicant in Xcel's existing tariff as part of its right to cure. Relocated facilities on the same substation as the initial application must maintain the current place in the interconnect queue for that substation. Relocated facilities

that require a change to a different substation should be considered in the queue for applications deemed complete as of June 25th for that substation. There must be a reasonable period of time of 120 days from the clarification guideline to secure land options and facilitate relocation.

- Scaling down the application shall also include the option of divesting ownership of the various facilities within any project site. The new applicant obtaining ownership shall retain Sunrise's place in the interconnect queue. Again, subscribers should not be penalized for acting in accordance with the approved tariff. The divestiture must be completed before the systems are ready for operation.[9]
- The Commission should modify the language in its Order adopting Section 2.2(b) of the partial settlement agreement to conform to federal law. Under PURPA, utilities must interconnect with qualifying facilities. *See, e.g.* 18 CFR § 292.303(c)("any electric utility shall make such interconnection with any qualifying facilities as may be necessary to accomplish purchases or sales"); FERC Order No. 688, at 112, No. RM-06-10-000 (Oct. 20, 2006) (obligation to serve qualifying facilities); 18

[9] The arbitrariness of the rules contemplated by Xcel cries out for further clarification. Although Xcel claims to be acting to prevent "utility scale" developments, it is really only adverse to ***old*** large developments. ***New*** large developments are perfectly fine. Thus, under the current updated 5MW program rules, any number of unrelated parties could site their 5 MW projects on the same parcel of land or on contiguous sites and construct and finance them separate from one another. Yet, long-standing applicants like Sunrise cannot achieve the same result via divestiture – even though the end result would be identical.

CFR § 292.306 (addressing interconnection costs). Accordingly, the limiting language of "material upgrades" of a distribution system should be removed. In addition, in the working group, Xcel has proposed a more narrow definition that effectively prohibits any upgrades within or affecting an existing substation – "alterations within the substation" or "re-conductor and line work." These further restrictions were never contemplated in the governing statute or PURPA, and must be removed.

- In its consideration of disputes over size determinations, the Department of Commerce should be empowered to make recommendations for variances to prevent hardship and to serve the statutory guideline to "reasonably allow for the creation, financing, and accessibility of community solar gardens."

V. ALTERNATIVELY, THE MPUC SHOULD STAY THE AUGUST 6, 2015 ORDER PENDING APPEAL PURSUANT TO MINN. STAT. § 14.65.

In the event the MPUC denies Sunrise all relief, it will be constrained to pursue its legal remedies, including an appeal to the Minnesota Court of Appeals. Such an appeal does not stay the enforcement of the August 6, 2015 Order. Minn. Stat. § 14.65. To prevent irreparable harm to Sunrise, and to prevent further harm in the form of wasted public and private resources expended in the course of solar policymaking efforts that may be voided by the Court – and to permit time to obtain the guidance from the Court necessary to proceed further – the MPUC should stay its

Order pending the appeal. Minn. Stat. § 14.65 (agency or court may stay agency decision pending appeal).

CONCLUSION

Accordingly, Sunrise seeks the following ruling:

- Immediately staying the Order of August 6, 2015 pending this petition (and 10 days after any denial of same) and restraining Xcel from implementing its provisions in the interim;
- Withdrawing the Order of August 6, 2015 as procedurally improper and lacking the force of law;
- Referring the matter for rulemaking or for contested case adjudication;
- Alternatively, referring the matter for expedited mediation;
- Alternatively, either modifying the August 6, 2015 order or staying it pending an appeal by certiorari to the Minnesota Court of Appeals.

Dated: August 26, 2015.

McGRANN SHEA CARNIVAL STRAUGHN & LAMB, CHARTERED

Corey J. Ayling (Reg. No. 157466)
Kathleen M. Brennan (Reg. No. 256870)
2600 U.S. Bancorp Center
800 Nicollet Mall
Minneapolis, MN 55402
Telephone: (612) 338-2525

Attorneys for Sunrise Energy Ventures, LLC

EXHIBIT A

From: SRCMN <SRCMN@xcelenergy.com>
Date: Tuesday, August 18, 2015 at 8:53 PM
To: "mnsolar@sunriseenergyventures.com" <mnsolar@sunriseenergyventures.com>
Cc: Joe Tierney <jtierney@sunriseenergyventures.com>, SRCMN <SRCMN@xcelenergy.com>
Subject: Important SR*C Notices for Developers

Hi Dean,

Attached, please find three important documents for your attention and action. Your prompt attention to these documents will help us move your garden applications quickly and with transparency into our expectations and process.
01 defines the process and requirements for scaling co-located Solar*Rewards Community gardens to meet program requirements
02 defines the process and requirements for documenting garden progress to meet program requirements
03 lists your Solar*Rewards Community applications that we consider to be co-located and in need of action before proceeding further in the program.

We look forward to working with you to bring more solar choices to our customers. Please email SRCMN@xcelenergy.com if you have questions as you proceed through the process.

Thank you for your ongoing engagement,
The Solar*Rewards Community Team

Thank you,

Kevin Cray
Xcel Energy | Responsible By Nature
Associate Product Portfolio Manager
1800 Larimer Street, Suite 1500 Denver, CO 80202

Xcel Energy®

Solar*Rewards Community
Demonstration of Progress Requirements Notice

August 18, 2015

As we work together to provide clarity and expedite implementation of the Solar*Rewards Community program, Xcel Energy is providing you with notice of the process for demonstrating progress for projects in the Solar*Rewards Community program following workgroup agreement on these items.

Solar*Rewards Community applications that in aggregate on a co-located basis are more than 1 MW_{AC} are required to provide at least three of the elements listed below to demonstrate progress in accordance with these deadlines:

Deadline	**Applies to**
September 1, 2015	Solar*Reward Community applications, co-located in aggregate of more than 1 MW_{AC} and as of June 1, 2015 deemed complete (per Par. 6.D of tariff Section 9, Sheet 76)
Within 90 days of being deemed complete (per Par. 6.D of tariff Section 9, Sheet 76)	Solar*Rewards Community applications, co-located in aggregate of 1 $MW_{AC,}$ assigned an SRC# on or before September 25, 2015, but deemed complete after June 1, 2015

Element (submit at least 3)	**Documentation required**
☐ Site control	Official documentation of deed, purchase agreement, lease, or option to lease or buy. Official documents or detailed proof of recordation will be accepted.
☐ Sufficient project financing	Official documentation of letter of intent to finance costs to bring garden to operation from financier.
☐ Possession of required local permits	Official land use or building permits from the applicable permitting authority.
☐ Certification from an officer of the applicant verifying that the project complies with the requirements set forth in Federal Energy Regulatory Commission Form 556	Signed copy of Form 556. Form 556 is available at http://www.ferc.gov/industries/electric/gen-info/qual-fac/obtain.asp
☐ Subscriptions for at least fifty (50) percent of project output	Valid subscriptions, including a signed agency agreement, loaded in Solar*Rewards Community application system for at least 50 percent of the garden's output.
☐ Equipment and panel procurement contracts	Purchase order, procurement contract or receipt for equipment needed to operate solar system of the application's size.
☐ Proof of insurance	Proof of adequate liability insurance.

(Over)

Required Action of Applicant:

1) Submit documentation by 5:00 p.m. Central Time on the dates described above. Documentation may be submitted by:
    - Email to SRCMN@xcelenergy.com or
    - Certified mail to Solar*Rewards Community Program, Attention Kerry Klemm, 414 Nicollet Mall – 6, Minneapolis, MN 55401
2) If Xcel Energy does not receive required documentation by the deadline, Xcel Energy will cancel all co-located facilities in excess of 1 MW_{AC}, as indicated on the enclosed form. If you are contesting your co-location determination, submit documentation for all disputed garden applications by the deadline. Failure to do so will result in the cancellation of your disputed application(s).
3) If Xcel Energy deems documentation to be inadequate, we will inform you via email. The applicant will then have up to 10 business days to provide adequate documentation. If the documentation remains insufficient, we will cancel all co-located applications in excess of 1 MW_{AC} that lack appropriate documentation.

Thank you for your ongoing efforts to bring new Solar*Rewards Community choices and opportunities to our customers.

Sincerely,

Xcel Energy Solar*Rewards Community Team

Xcel Energy®

August 18, 2015

Solar*Rewards Community
Project Scale-Down Selection Process

Dear Solar Developer,

We are excited to continue to work with you to help bring Solar*Rewards Community choices to our Minnesota customers. This letter contains important information to help you scale down co-located gardens so we can accelerate the garden approval process. We encourage you to respond early in order to begin our expedited study review.

As you're likely aware, the Minnesota Public Utilities Commission (MPUC) Order dated August 6, 2015, stated that for applications submitted prior to September 25, 2015, no more than 5 MW_{AC} of Co-located Community Solar Gardens in the aggregate will be allowed at any given project site. After September 25, 2015, no more than 1 MW_{AC} of co-location community solar gardens are allowed.

As a reminder, community solar gardens are co-located if they exhibit characteristics of a single development including, but not limited to, common ownership structure, an umbrella sale arrangement, shared interconnection, revenue-sharing arrangements, and common debt and equity financing. These criteria are the same criteria used in Minn. Stat. §216E.021 and Minn. Stat. §272.0295 for determining the total size of separate yet related distributed solar generating systems. Some examples of gardens Xcel Energy considers co-located include those initially submitted on a common site plan, or having similar or adjacent addresses with the same garden name, company or developer. Enclosed in this mailing is a list of your Solar*Rewards Community garden applications that have been determined to be co-located above the applicable limit.

Action Required of Applicant

1) **Please review the enclosed list** of your Solar*Rewards Community applications that are co-located in excess of 5 MW_{AC}. If we did not designate your gardens as co-located but they fall under the Order's definition, you are still obligated to comply with the requirement by proceeding with step 2. Co-located gardens in excess of 5MW_{AC} that are not yet deemed complete may not be included on this list but also must comply with the Order's co-location limits prior to proceeding in the program.

2) **Withdraw excess co-location applications.** Co-located applications submitted by September 25, 2015, must not in aggregate exceed 5 MW_{AC}. Applications submitted on or after September 26, 2015 have a 1 MW_{AC} co-located limit. We have enhanced the

Solar*Rewards Community application system so you can self-select which co-located applications to withdraw. Please log into the online Solar*Rewards Community application system and use the withdraw button located at the top right of your log-in page. Please note that to avoid confusion, we will not provide engineering review results for co-located gardens in excess of the Order's co-location limits.

3) **Contest co-location**: You have the ability to contest our determination of co-location. Please submit the enclosed form via email to the Company and the Minnesota Department of Commerce – Division of Energy Resources at the email addresses shown on the form if you wish to contest the Company's determination of co-located gardens.

4) **Notify Company that self-selection is complete.** Notify the Company at SRCMN@xcelenergy.com that your self-selections are complete.

5) **Receive refund**. For all co-located applications withdrawn or cancelled under this process the Company will refund each Solar*Rewards Community program application fee, each Generation Interconnection Application Fee, and each Solar*Rewards Community deposit with interest

Alternative Action: Proceed outside of Solar*Rewards Community program. Applicants may, alternatively, continue with co-located projects in excess of the Solar*Rewards Community limits under the tariff terms available in Section 10. Applicants selecting this option will be required to withdraw excess solar capacity or entire solar systems from the Solar*Rewards Community program and notify the Company at SRCMN@xcelenergy.com of their intent.

Thank you for your attention to this important process that will help us work together to move Solar*Rewards Community choices and opportunities forward for our customers, and help provide clarity for everyone. If you have questions regarding this process, please contact us at SRCMN@xcelenergy.com .

Sincerely,

Xcel Energy Solar*Rewards Community Team

414 Nicollet Mall
Minneapolis, MN 55401

Xcel Energy®
RESPONSIBLE BY NATURE®

Notice of Co-location

August 17, 2015

Solar*Rewards Community Garden Applications

To enable faster implementation of the Solar*Rewards Community program, we are providing the information and process you need to comply with the program's co-location limits. The following Solar*Rewards Community applications, in aggregate, are not compliant with the co-location limits described in the August 6, 2015, Minnesota Public Utilities Commission (MPUC) Order Adopting Partial Settlement as Modified. If we did not designate your gardens as co-located in the list below but they fall under the Order's definition, you are obligated to comply with the requirement. Failure to do so will not exempt you from this obligation. Co-located gardens in excess of program limits that are not yet deemed complete may not be included on this list but also must comply with the Order prior to proceeding in the program.

Developer	Email	Garden Names	Co-Located Projects	Size	Applications
SunRise Energy Ventures	jtierney@sunriseenergyventures.com	Big Lake	SEV MN 1, LLC	30.00 MW	30
		Clear Lake	SEV MN 1, LLC	20.00 MW	20
		Silver Spring	SEV MN 1, LLC	50.00 MW	50
		SRC 2	Sev MN 2, LLC	10.00 MW	10
		SRC 2 (85th St.)	Sev MN 2, LLC	10.00 MW	10
		SRC 2 (58th St.)	Sev MN 2, LLC	10.00 MW	10
		SRC 2 (Douglas)	Sev MN 2, LLC	10.00 MW	10
		SRC 2 (Scandia)/SRC 2 (Scandia) II	Sev MN 2, LLC	22.00 MW	22
SunRise Energy Ventures Total				162.00 MW	162

Please contact SRCMN@xcelenergy.com if you need help identifying impacted garden ID numbers or need more information regarding why we've determined your applications to be co-located.

Please withdraw applications in excess of 5 MW from the Solar*Rewards Community application system or submit this form to officially contest any co-location status. While you are not required to fill out this form or withdraw excess applications, any applications in the aggregate that are above the co-location limits and that are not scaled-down to comply with the co-location limits will not progress through the interconnection process for Solar*Rewards Community gardens.

If you wish to contest co-location status, please send the completed form to both SRCMN@xcelenergy.com and susan.peirce@state.mn.us

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☐ I wish to contest the determination that these gardens are co-located based on the following information: _____

_____

_____

(Please include additional detail or supporting evidence as needed.)

Printed Name_____

Title and Company name _____

Signature _____ Date _____

E-mail _____ Phone _____

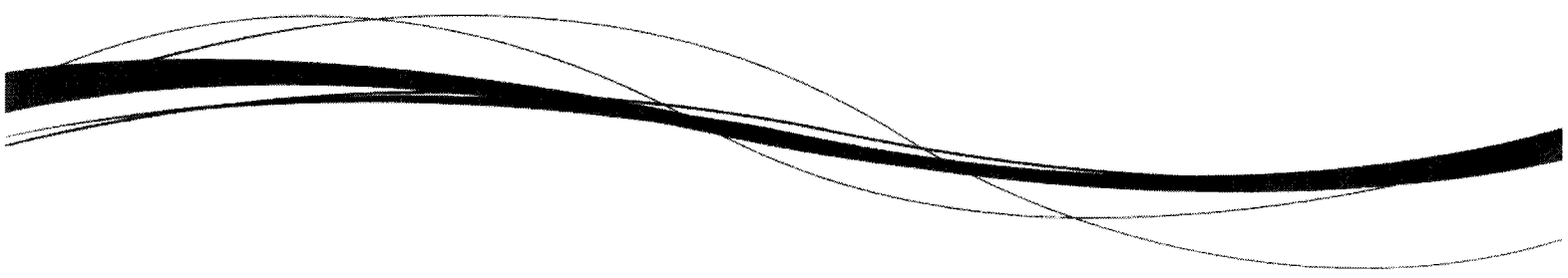

EXHIBIT B

Alternative Decision-Making Methodology adjustment for S*RC Implementation Workgroup:

The moderator of the Working Group will be responsible for deciding which of the following designations apply.

- **Full Consensus** – when no one in the group speaks or votes against the recommendation.

- **Substantial Agreement** – a position in which Xcel Energy is in agreement and over 50% of the other votes agree with the position. (Additionally, the positions of parties who vote against the position will be noted within meeting minutes.)

- **Divergence** – a position in which Xcel Energy is in agreement, but for which 50% or less of the other votes agree with the position, and where Xcel Energy has determined that an adjustment will need to be made within the S*RC program.[1]

- **Minority View** – refers to a proposal in which one or more Garden Operators support or vote in favor of the recommendation which does not fall under one of the above categories.

Voting workgroup members will be required to be designated as such. Voting parties consist of Xcel Energy and Garden Operators who have applied for at least one solar garden. Garden Operators are considered to the same entity if they are affiliated with one another. No more than one vote per Garden Operator allowed. Only those parties present will be allowed to vote. A quorum is required for any such vote. A quorum consists of Xcel Energy plus at least 5 Garden Operators being in attendance. Not all parties consisting of the quorum need to vote for the vote to be effective.

Process for Disputes

For disputes regarding FAQ's and program administration, the Workgroup will petition the Commission for clarification. All positions will be represented and signatories will be the voting parties.

[1] For FAQ documents it may be necessary to implement an administrative adjustment during a dispute. If such cases arise they will be acknowledged as such.

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Sunrise Energy Ventures, LLC,

Plaintiff,

vs.

Minnesota Public Utilities Commission, and Beverly Jones Heydinger, Betsy Wergin, Nancy Lange, Dan Lipschultz, and John Tuma, individually and in their respective capacities as commissioners on the Minnesota Public Utilities Commission; Northern States Power Company (d/b/a/ "Xcel Energy"); and Innovative Power Systems Inc., MN Community Solar LLC, Novel Energy Solutions LLC, Renewable Energy Partners Inc., SolarStone Partners LLC, Sundial Solar Consultants LLC, and TruNorth Solar LLC,

Defendants.

Civil Action No. _____

COMPLAINT

INTRODUCTION

When the Minnesota Legislature passed a law in 2013 calling for the creation of a program that would allow private citizens and businesses to access substantial amounts of solar power, Sunrise Energy Ventures, LLC ("Sunrise Energy") paid close attention. Located in Minnesota, and having developed many successful solar energy projects nationwide, Sunrise Energy was eager to begin investing in its home state.

On September 17, 2014, after receiving proposals from Xcel Energy, the Minnesota Public Utilities Commission ("PUC") published an order establishing a set of rules that would govern Minnesota's community solar garden program. The order was important because it specified what types of solar projects private developers could, and could not, construct. It also established the criteria project applications had to meet to get approved by Xcel Energy. The order specifically allowed for developers to maximize the efficiency of their solar projects by

"co-locating" them in clusters. The order also placed no limits on the aggregate megawatt capacity these co-located clusters of projects could have.

With the program rules established, Sunrise Energy began investing millions of dollars and many other resources into planning, financing, and engineering its projects. This allowed Sunrise Energy to submit 100 individual applications for solar projects within the first hour of Xcel Energy's application period. Sunrise Energy was rewarded for its efforts, receiving 100 firm commitments from Xcel Energy that its projects would be allowed to move forward, in the form of "reservation letters."

Months later, however, Xcel Energy began meeting with other solar energy developers (who had failed to secure reservation letters) in an effort to preclude developers like Sunrise Energy from being able to develop their approved projects. Together, Xcel Energy and these "Developer Defendants" formed a "Partial Settlement Agreement" which contained retroactive changes and restraints designed to disqualify co-located projects that contained capacities exceeding five megawatts. The agreement also contained provisions that empowered Xcel Energy to refuse to allow developers like Sunrise Energy to connect their gardens to its distribution system. Xcel Energy and the Developer Defendants then submitted their agreement to the PUC.

Sunrise Energy and other developers objected strongly to the agreement, as it would disqualify the vast majority of their projects, harm competition in the energy industry, injure their competitive positions, and cause them to lose millions of dollars invested in reliance on the PUC's original rules. The PUC discussed the matter at its scheduled June 25, 2015 hearing. At the meeting, a majority of PUC commissioners seemed confused and expressed doubt about their ability to decide whether to adopt any or all of the proposed changes to Minnesota's community solar garden program. In fact, many commissioners questioned whether they even had enough information to make an informed decision. Suddenly, however, the commissioners decided to take a ten-minute "break" and left the hearing room. They then proceeded to deliberate about the

rule change issue in private, out of public view. These deliberations violated Minnesota's Open Meeting Law, which requires that all meetings of public bodies be open and that all deliberations be conducted in public view.

When the commissioners returned from their private meeting, they had changed their minds. To the surprise of Sunrise Energy and others, they promptly called for a vote and unanimously decided to impose drastic retroactive changes on the Minnesota community solar garden program. The commissioners never disclosed what they deliberated or what information they obtained that caused them to change their minds.

On August 6, 2015, the PUC published an Order, formalizing the decision it made at its June 25, 2015 meeting. The Order was the product of an unlawful deliberative process wherein critical information gathering, discussion, and decision-making were inexplicably hidden from public view. The Order also happens to violate several other principles of federal and state law. If allowed to stand, the Order will cause irreparable harm to Sunrise Energy and will put the bulk of its solar investment at risk.

Sunrise Energy therefore seeks to invalidate this defective order and enjoin the PUC from enforcing it, in addition to other remedies.

THE PARTIES

1. Plaintiff Sunrise Energy Ventures, LLC ("Sunrise Energy") is a Delaware corporation with its principal place of business located at 601 Carlson Parkway, Suite 1050, Minnetonka, Minnesota.

2. Defendant Minnesota Public Utilities Commission ("PUC") is a State of Minnesota commission with its administrative offices located at 121 7th Place East, Suite 350, St. Paul, Minnesota.

3. Defendant Beverly Jones Heydinger is a Commissioner on, and the Chair of, the PUC.

4. Defendant Betsy Wergin is a Commissioner on, and the Vice Chair of, the PUC.

5. Defendant Nancy Lange is a Commissioner on the PUC.

6. Defendant Dan Lipschultz is a Commissioner on the PUC.

7. Defendant John Tuma is a Commissioner on the PUC.

8. Defendant Northern States Power Company (d/b/a/ "Xcel Energy") is a Minnesota corporation with its principal place of business located at 414 Nicollet Mall, Minneapolis, Minnesota.

9. Defendant Innovative Power Systems Inc. is a Minnesota corporation with its principal place of business located at 1413 Hunting Valley Road, St. Paul, Minnesota.

10. Defendant MN Community Solar LLC is a Minnesota limited liability company with its principal place of business located at 4002 Minnehaha Avenue, Minneapolis, Minnesota.

11. Defendant Novel Energy Solutions LLC is a Minnesota limited liability company with its principal place of business located at 23913 County Road 39, St. Charles, Minnesota.

12. Defendant Renewable Energy Partners Inc. is a Minnesota company with its principal place of business located at 3033 Excelsior Boulevard, Minneapolis, Minnesota.

13. Defendant SolarStone Partners LLC is a Minnesota limited liability company with its principal place of business located at 3944 Xerxes Avenue South, Minneapolis, Minnesota.

14. Defendant Sundial Solar Consultants LLC is a Minnesota company with its principal place of business located at 4708 York Avenue South, Minneapolis, Minnesota.

15. Defendant TruNorth Solar LLC is a Minnesota limited liability company with its principal place of business located at 5239 Edina Industrial Blvd., Minneapolis, Minnesota.

JURISDICTION AND VENUE

16. This Court has personal jurisdiction over Defendant PUC and its Commissioners because the PUC's administrative offices are located in the District of Minnesota and certain activities giving rise to this action have taken place in the District of Minnesota. This Court has personal jurisdiction over Defendant Xcel Energy because it or its agents transact business in the District of Minnesota and certain activities giving rise to this action have taken place in the District of Minnesota. This Court has personal jurisdiction over Defendants Innovative Power Systems Inc., MN Community Solar LLC, Novel Energy Solutions LLC, Renewable Energy Partners Inc., SolarStone Partners LLC, Sundial Solar LLC, and TruNorth Solar LLC because each of these defendants (collectively, the "Developer Defendants") transacts business in the District of Minnesota and certain activities giving rise to this action have taken place in the District of Minnesota.

17. This Court has subject matter jurisdiction for this action under 28 U.S.C. § 1331, pursuant to which the United States District Courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. This lawsuit is brought in part pursuant to the Public Utilities Regulatory Policies Act of 1978 (16 U.S.C. § 824a-3), the Sherman Antitrust Act (15 U.S.C. § 1), applicable regulations of the Federal Energy Regulatory Commission (18 C.F.R. §§ 292.303 and 306), and the Due Process, Takings, and Supremacy clauses of the United States Constitution (Articles V, VI, and XIV).

18. This Court has supplemental jurisdiction over all state law claims under 28 U.S.C. § 1367(a) because those claims are so related to claims in the action over which this Court has original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

19. Venue is proper in this district under 28 U.S.C. § 1391(b)(1) because the Defendants are located in the District of Minnesota and a substantial part of the events or omissions giving rise to the claim occurred in this district.

STATEMENT OF FACTS

I. In 2013, the Minnesota Legislature passed legislation designed to promote the growth of solar energy.

20. In 2013, the Minnesota Legislature enacted a bill containing several provisions designed to promote the growth and availability of solar energy in the state of Minnesota.

21. One of these provisions – Minn. Stat. § 216B.1641 – required Xcel Energy to create a "community solar garden" program.

22. Minn. Stat. § 216B.1641 specifically required Xcel Energy to submit a plan to operate a community solar garden program to the PUC by September 30, 2013.

23. A single "community solar garden" is an individual energy facility that harvests solar energy and sells electricity generated from that energy to subscribers who agree to purchase a given portion of its output.

24. Community solar gardens are valuable to the public for several reasons, one of them being that they allow renters and property owners who lack sufficient capital to install their own solar energy systems (or whose property may be unsuitable for solar installation) to still access and purchase solar energy.

25. Once constructed, community solar gardens are connected to a region's electrical grid and the energy they generate is sold to a utility (in this case, Xcel Energy) at a standardized, regulated rate.

26. The amount of electrical power individual community solar gardens can harvest and deliver into a grid (the "capacity" of individual solar gardens) is described in terms of megawatts ("MW").

27. Minn. Stat. § 216B.1641 states that the capacity of individual solar gardens must not exceed 1 megawatt.

28. The statute does not prohibit "co-locating" multiple community solar gardens on the same parcel of land to achieve infrastructure efficiencies.

29. The statute also places no limits on the aggregate capacity of community solar gardens located on the same site.

30. In fact, the statute states that:

> "There shall be no limitation on the number or cumulative generating capacity of community solar garden facilities other than the limitations imposed under section 216B.164, subdivision 4c, or other limitation provided in law or regulations." Minn. Stat. § 216B.1641(a).

II. The Minnesota Public Utilities Commission established rules that allowed individual community solar gardens to be co-located and did not cap the aggregate megawatt capacity of co-located sites.

31. On September 30, 2013, Xcel Energy submitted an initial proposal (in the form of a "tariff filing") for how to create and operate a community solar garden program and submitted it to the PUC.

32. The initial proposal attempted to place limits on the installed capacity of solar gardens. It also did not explicitly acknowledge that solar garden developers could co-locate multiple community solar gardens on the same parcel of land to achieve efficiencies.

33. The PUC did not agree with these, and other, aspects of Xcel Energy's initial proposal.

34. On April 7, 2014, the PUC issued an Order rejecting Xcel Energy's proposal and requiring it to submit a revised proposal containing a number of revisions.

35. The PUC disapproved of any capacity limits being placed on the community solar garden program.

36. The PUC stated that:

> "A capacity limit holds the potential to delay the growth of solar gardens and limit opportunities for subscribers to participate in the program. Allowing maximum garden development in the early years of the program is particularly critical to allow developers to take advantage of the federal Investment Tax Credit before it expires."

37. The PUC required Xcel Energy to revise its proposal to impose no limits on the installed capacity of solar gardens and to allow multiple solar gardens to be co-located in proximity to each other.

38. Co-locating community solar gardens results in a number of significant efficiencies. Community solar gardens must be attached to energy distribution lines, which are expensive to maintain because they must be regularly updated. Co-locating solar gardens near each other creates economies of scale and allows the entities that own those co-located gardens to share, or split, infrastructure upgrade costs.

39. One of the reasons the PUC directed Xcel Energy to revise its rules to allow for co-location was because it wanted these efficiency benefits to accrue to private developers.

40. The PUC's April 7, 2014 Order stated that:

> "Where a prospective garden operator controls multiple adjacent parcels of land, or even multiple closely situated parcels, the operator should be able to install solar panels on multiple parcels, connect them to grid through a single interconnection point, and take advantage of the resulting economies of scale."

41. Xcel Energy responded to the PUC by revising its rules accordingly to explicitly allow developers to co-locate community solar gardens on the same site.

42. In addition to allowing developers to co-locate individual community solar gardens on the same site, Xcel Energy's revised rules did not impose any limits on the aggregate megawatt capacity that co-located community solar gardens could have.

43. Thus, under the rules drafted by Xcel Energy (and revised as directed by the PUC), private developers could co-locate multiple one megawatt community solar gardens in proximity to each other to generate aggregate capacities of ten megawatts or more.

44. At a public hearing before the PUC on August 7, 2014, Xcel Energy's representative acknowledged that "the structure of the program does allow someone to find a large parcel of land and put several 1 MW projects next to each other . . . ."

45. Xcel submitted its revised rules to the PUC and, on September 17, 2014, the PUC approved them. Among other things, the PUC's September 17, 2014 approval order stated that "Multiple Community Solar Garden Sites may be situated in close proximity to one another in order to share in distribution infrastructure." With the rules in place, the PUC instructed Xcel Energy to open its program to the private sector and begin accepting applications from solar developers interested in constructing community solar gardens.

46. If Xcel Energy disagreed with the validity of the PUC's rules, it could have petitioned the PUC to reconsider its September 17, 2014 Order. Thereafter, Xcel Energy could have challenged the Order in state court. Xcel Energy did not challenge the PUC's Order or the rules set forth therein in any respect.

III. Relying on the approved rules, Sunrise Energy designed plans to develop 100 community solar gardens, financed the projects, assembled compliant applications, and obtained coveted reservation letters.

47. In the energy industry, bids to develop facilities such as community solar gardens are submitted by private developers to the operative utility (in this case, Xcel Energy) in the form of "applications."

48. Applications are assessed and evaluated by utilities as they are received, on a "first ready, first served" basis. The PUC has explained that this ensures that priority is given to the projects with the best chance of succeeding. When an application is determined to be compliant, the utility sends a "reservation letter" to the applicant.

49. A reservation letter is a significant and coveted document. It represents a commitment from a utility to a private party that the private party will be able to develop the project described in the party's application.

50. Because the commitment set forth in a reservation letter is considered firm, a reservation letter also enables developers to start contracting with buyers for the purchase and sale of the project. Buyers consider projects like community solar gardens to be assets and are willing to enter into agreements to purchase those assets from developers once the relevant utility sends the developer a reservation letter.

51. Finally, a reservation letter secures a "queue position" for the applicant. Queue position refers to the location on a particular substation or along a distribution line where an approved applicant is allowed to connect its project. Queue positions closer to the origin of a distribution line are better because distribution infrastructure requires fewer upgrades (and is thus less costly to developers) at closer positions. It is also quicker and cheaper for developers to install their projects at closer queue positions. The incentive to obtain closer queue positions is yet another reason for developers to invest the time and resources to submit timely and compliant project applications.

52. Sunrise Energy tracked the aforementioned rules developments closely. And once the PUC established the applicable rules via its September 17, 2014 Order, Sunrise Energy began finalizing plans to develop 100 community solar gardens co-located on multiple sites along the power grid.

53. Because in this case the applicable rules required developers to submit individual applications for each one megawatt community solar garden they wanted to develop, Sunrise Energy needed to prepare 100 applications that complied in full with all of the rules that Xcel Energy had proposed and the PUC had approved.

54. Sunrise Energy expended a significant amount of time, money, and resources doing so. Specifically, Sunrise Energy spent $1200 per application in program management fees and $1500 per application in engineering fees. Sunrise Energy also made $10 million in required cash deposits to Xcel Energy. Finally, Sunrise Energy incurred approximately $2 million in non-refundable development costs for these 100 gardens.

55. On December 5, 2014, Xcel Energy announced to the private sector that its community solar program was open and that private entities could begin submitting applications to develop community solar gardens along its distribution line.

56. Because Sunrise Energy had spent significant amounts of time, money, and other resources preparing compliant applications, it was able to submit its 100 applications within the first hour of the community solar program being open. More than 300 other applications from other prepared developers were also submitted during this time frame.

57. Sunrise Energy's applications contemplated three sites of co-located solar gardens with aggregate capacities of 20, 30, and 50 megawatts.

58. On March 6, 2015, Sunrise Energy received 100 reservation letters from Xcel Energy – one for each of the community solar gardens Sunrise Energy had planned to develop.

59. These letters represented confirmation that Sunrise Energy would be able to develop its 100 community solar gardens in co-located sites along Xcel Energy's distribution system.

60. Because it had prepared and submitted compliant applications in a timely manner, Sunrise Energy also secured very favorable queue positions along the relevant distribution line for its 100 community solar gardens.

IV. Unsatisfied with the applicable rules, Xcel Energy attempted to scale back the community solar garden program by announcing that it would retroactively cancel or render non-compliant any co-located projects with aggregate capacities exceeding one megawatt.

61. On information and belief, Xcel Energy became concerned at some point about the amount of solar energy that the community solar program would be generating.

62. Many of the other applications it had approved had also been submitted by prepared private developers who planned to co-locate multiple community solar gardens on single sites to achieve aggregate capacities of ten or more megawatts.

63. On March 10, 2015, the PUC's Executive Secretary, Daniel P. Wolf, published a letter to Xcel reiterating that "[t]he Commission's Orders in the docket remain unchanged" and stating that "the Commission expects Xcel to administer its program as set out in statute and related Commission Orders."

64. Notwithstanding the PUC's orders and the reservation letters Xcel Energy provided to developers, on April 28, 2015, Xcel Energy filed comments with the PUC stating that, within 31 days, it intended to unilaterally require all developers who had submitted applications proposing co-located gardens to scale back their projects substantially by reducing the aggregate capacity of any co-located gardens to just one megawatt.

65. Xcel Energy's April 28, 2015 comments threatened that "[n]ew or existing applications which propose projects that individually or in aggregate exceed 1 MW will not advance." In essence, Xcel Energy stated its intention to cancel the bulk of the projects that it had already approved and provided with reservation letters.

66. With its April 28, 2015 comments, Xcel Energy placed at risk the significant investments of several private solar businesses (including Sunrise Energy) who, relying on the original program rules proposed by Xcel Energy and approved by the PUC, had submitted

applications and received reservation letters for projects of co-located solar gardens with aggregate capacities exceeding one megawatt.

67. An ad hoc community of these solar businesses thus filed a petition for expedited relief with the PUC on April 29, 2015, arguing that Xcel Energy's proposed actions would violate the established rules of the community solar garden program and cause significant and potentially irreparable harm to the businesses that had relied on those rules.

68. In the days and weeks that followed, many other interested parties filed rounds of comments with the PUC expressing their views on propriety of Xcel Energy's stated intent to retroactively cancel or deem non-compliant hundreds of solar garden project applications that it had already approved.

69. On May 11, 2015, the PUC acknowledged there was a hearing scheduled for June 25, 2015 and they would address numerous "disputed issues" with the community solar garden program, including but not limited to Xcel Energy's intention to require developers to retroactively scale back their approved co-located projects to aggregate capacities of no more than one megawatt.

V. Meanwhile, Xcel Energy organized a confidential "mediation" between itself, private developers, and other stakeholders.

70. In the months preceding the June 25, 2015 meeting, Xcel Energy organized a confidential "mediation" between itself and solar developers regarding their disagreement with Xcel Energy's concerns and stated course of action.

71. There was a "mediator" present at the mediation that Xcel Energy selected, provided, and paid for.

72. At the mediation, two separate groups of developers emerged.

73. One group consisted of developers who had prepared, financed, engineered, and submitted timely and compliant applications for community solar garden projects. As a result of

their efforts, these developers had seen their applications approved by Xcel Energy and had received reservation letters and favorable positions in the interconnection queue. Sunrise Energy was part of this group, as were the majority of other developers present at the workgroup sessions. In fact, the developers in this group held approximately 93 percent of the reservation letters that had been issued by Xcel Energy.

74. The second group consisted of other developers (the "Developer Defendants") who had also submitted applications for community solar garden projects but had not yet seen their applications approved. Developers in this group either had not been able to meet Xcel Energy's minimum engineering thresholds or had not been able to pay the required fees. Accordingly, they had neither received reservation letters nor secured spots in the interconnection queue. These developers were eager to improve their queue positions, impede the first-developer group's ability to compete in the market, and convince Xcel to join their faction. This second-developer group with unapproved applications comprised a minority of the developers present at the workgroup sessions.

75. The Minnesota Department of Commerce (a ratepayer advocate) and Fresh Energy (a renewables advocacy group) were also present at the mediation as they were intervenors in the PUC proceedings.

76. The mediation was largely unproductive, with the vast majority of developers refusing to agree to retroactively place substantial limits on the amount of allowable aggregate capacity for co-located projects.

77. The Minnesota Department of Commerce and Fresh Energy also did not agree to these retroactive changes.

78. However, Xcel Energy and the Developer Defendants ultimately agreed to sign what Xcel Energy called a "Partial Settlement Agreement."

79. On information and belief, Xcel Energy and the Developer Defendants met privately to draft the language of the "Partial Settlement Agreement."

80. The agreement, among other things, stated that for all "Community Solar Garden applications already in the interconnection queue as of the Effective Date of this Agreement, no more than 5 MWs (AC) of Co-Located Community Solar Gardens in the aggregate from any applicant shall be allowed at any given project site." And any megawatts exceeding 1 MW(AC) would be considered "non-statutory."

81. In other words, the agreement called for retroactively prohibiting any co-located solar gardens with more than five megawatts of aggregate capacity.

82. The agreement also empowered Xcel Energy to unilaterally "scale down" co-located community solar garden applications already in the interconnection queue to five megawatt aggregate capacities.

83. In other words, the agreement empowered Xcel Energy to decide which of a developer's individual solar gardens it wanted to keep and which it wanted to disallow.

84. The agreement provided no recourse or compliance options for those developers who had already invested in developing co-located solar gardens with higher aggregate capacities in reliance on their reservation letters and the PUC's orders. Without any mechanism for preserving their investment, the only option for these developers would be to forfeit their reservation letters.

85. The agreement also contained a provision stating that Xcel Energy would not be required to "interconnect" any community solar gardens to its distribution system that would require the system to receive material upgrades (meaning upgrades costing $1 million or more) for safety, or other, reasons.

86. The provision specifically stated that Xcel Energy would not be required "to undertake any material upgrades in its distribution system to accommodate interconnection of

Community Solar Garden applications" and that "If [Xcel] does not undertake material upgrades . . . then the Community Solar Garden will not be interconnected to [Xcel's] distribution system."

87. This provision directly contradicted federal law, which gives certain developers, including Sunrise Energy, the right to interconnect their facilities to a utility's distribution system.

88. Xcel Energy submitted the "Partial Settlement Agreement" to the PUC on June 22, 2015, just three days before the June 25, 2015 hearing. Xcel Energy asked the PUC to approve the agreement to give it force.

VI. A retroactive five megawatt cap on co-located aggregate capacity would cause significant harm to solar developers like Sunrise Energy who relied on and complied with the community solar garden's applicable rules.

89. Fresh Energy determined that retroactively changing the rules to cap aggregate capacity of co-located community solar gardens at five megawatts would disqualify at least 28 previously approved co-located projects.

90. Fresh Energy also determined that by disqualifying the applications associated with these projects, the retroactive change would result in a total disqualification of 366.5 megawatts of approved projects, leaving just 53.5 megawatts of approved projects compliant.

91. The retroactive change would also cause specific, substantial, and potentially irreparable harm to Sunrise Energy.

92. If the change were implemented by the PUC, it would cause approximately 85 percent of Sunrise Energy's portfolio to become non-compliant.

93. This may effectively deprive thousands of subscribers of the opportunity to obtain solar energy through the community solar gardens program.

94. The change would also empower Xcel Energy to tell Sunrise Energy which five megawatts of co-located capacity it will be allowed to keep.

95. Sunrise Energy would be effectively prohibited from developing those assets, would lose its favorable queue position for affected projects, and would be unable to develop the bulk of the land it purchased in reliance on the rules set forth by Xcel Energy and the PUC.

96. The retroactive change would also impair the value of any contracts Sunrise Energy entered into with buyers for the purchase and sale of its solar garden assets, after receiving application approval, reservation letters, and favorable queue position.

97. As a result of these changes, Sunrise Energy would lose substantial sums of money it has invested to date in solar gardens in reliance on the controlling rules proposed by Xcel Energy and approved by the PUC.

98. Sunrise Energy would need to withdraw most of the applications it has submitted, as would many other developers.

99. The withdrawal of large numbers of applications would inure to the benefit of the second group of developers, who signed the "Partial Settlement Agreement" with Xcel Energy.

100. Having lost the race to secure application approval and favorable queue position to developers like Sunrise Energy and others, these developers would be in a position to claim the suddenly available megawatt capacity and favorable queue positions freed up by the disqualification of previously compliant applications and projects.

VII. On June 25, 2015, after conducting a hearing during which they violated Minnesota's Open Meeting Law, the PUC commissioners voted to adopt the portion of the Partial Settlement Agreement retroactively capping co-located capacity at five megawatts.

101. On June 25, 2015, the PUC convened a meeting and its commissioners conducted a hearing wherein they deliberated about whether to adopt the five megawatt retroactive cap set

forth in the Partial Settlement Agreement submitted two days prior by Xcel Energy, whether to adopt a ten megawatt retroactive cap, or whether to not adopt any retroactive measures.

102. Commissioners Heydinger, Wergin, Lange, Lipschultz, and Tuma, were present at all times during the PUC's June 25, 2015 meeting.

103. These commissioners collectively constituted a quorum of the PUC in that their presence was sufficient to allow the PUC to transact business.

104. As the PUC's deliberations wore on, Commissioner Heydinger stated that it was possible that the PUC might not be able to "mov[e] forward today because there are just too many open questions."

105. Commissioner Lange stated that the PUC might need to "table this for two weeks and let the parties continue to put their heads together on this."

106. At this point, Commissioner Lipschultz made a motion to adopt portions of the Partial Settlement Agreement and proposed amending it by increasing its cap on capacity to ten megawatts, stating "I'm open to a 10 megawatt cap as a friendly amendment."

107. Commissioner Tuma also expressed approval of a ten megawatt cap, stating "I'm comfortable with that" and "I would support going to 10 under the circumstances you just indicated."

108. But as conversation continued, Commissioner Lange again suggested that the quorum was not prepared to decide the issues, stating: "If at the end of this churning here we are going to take some time and reassess and - I don't want to publicly put my vote out there and then, you know, go back in and two weeks later, you know . . . either we're prepared and we have enough information to vote today, or we don't . . . . I am sensing that people are not feeling like they are in a sufficiently comfortable place."

109. And Commissioner Lipschultz echoed these sentiments. Noting that the issue of aggregate co-located capacity was "the critical threshold issue animating all of this" he observed, "I don't sense a lot of sentiment on the commission to take a vote on it."

110. Commissioner Wergin suggested that she was wavering between imposing a retroactive capacity cap of five and ten megawatts, and stated, "My problem is that I don't know if we can sort it out."

111. Commissioner Lipschultz then reiterated that a majority of the PUC appeared to not have sufficient information to be able to make a decision.

112. Commissioner Lipschultz stated, "What I was hearing from Commissioner Wergin and Commissioner Lange, at a minimum, was that . . . they are not sure they're prepared to sort out five versus ten. They need time and more contemplation and perhaps even more information. Hearing that, I do not think there is any point in taking a vote because the vote would force decisions that at least two commissioners and myself, I might add, as a third, are not - and I am not sure, Madam Chair, about you - may not be prepared – these are decisions we might not be prepared to make."

113. At this juncture, Commissioner Heydinger decided that the commissioners needed to leave the room to discuss the issues privately.

114. Minnesota's Open Meeting Law prohibits a quorum of commissioners from meeting privately in any setting to discuss or decide official business or receive information relating to official business.

115. Nevertheless, Commissioner Heydinger specifically stated that "what we're going to do" is "take a break for ten minutes so that we have a chance to talk to the staff and see whether we can come to any clarity about whether we're going to proceed today or not."

116. Commissioner Heydinger clarified that "The question is, are we insufficiently well-informed today to make a decision, or is it just that we have a hard decision to make" and stated "that is what I think we have to try to figure out in the next ten minutes."

117. Commissioner Wergin concurred, stating "I agree. That is what I have to know. If I have all the information I can get, I am ready to make a decision. But I want to know I have the information I need."

118. As Commissioner Heydinger stated, the commissioners were about to convene privately to "decide whether we are going today or not."

119. Each commissioner then stood up and walked out of the hearing room.

120. Each commissioner left the hearing room for the express purpose of privately discussing issues relating to the Partial Settlement Agreement amongst themselves and with staff.

121. The PUC's video system continued to record their empty chairs for approximately ten minutes.

122. Upon information and belief, during these ten minutes, the five commissioners discussed and decided official business and received information relating to official business.

123. After each commissioner had returned to the hearing room, Chair Heydinger confirmed that "the commissioners had time to confer with staff" and promptly asked "whether there is any commissioner prepared to bring a motion."

124. Commissioner Heydinger did not disclose the nature of the commissioners' private discussions and did not disclose whether they received any additional information regarding the business before them.

125. Commissioner Lange immediately made a motion "to move the settlement in its entirety."

126. Commissioner Lange then complained that the PUC "got the settlement very late in the process."

127. Commissioner Heydinger then attempted to clarify Commissioner Lange's motion, stating "the way Commissioner Lipschultz put it," the PUC "would adopt [sections] 2.2 and 2.3 as applicable."

128. Sections 2.2 and 2.3 of the Partial Settlement Agreement contained the provisions imposing retroactive co-located capacity caps of five megawatts.

129. Before voting, the commissioners injected additional uncertainty into the situation by suggesting that they might continue to change their minds about aggregate capacity caps on co-located facilities.

130. Commissioner Lipschultz stated "we will certainly have the opportunity prospectively to revisit, if we want to and if we need to, the megawatt cap on co-located capacity."

131. Commissioner Tuma then stated "I sense we're going to be back here with a battle over some of these co-location issues" and expressed that he was "very frustrated" by the "late settlement," the "late flurry of information," and the PUC's continuing struggle to "figure out what the terms of that [settlement] mean."

132. Commissioner Lange, frustrated, interrupted Commissioner Tuma to state "we have tried to solve that."

133. Commissioner Wergin then speculated that any decision by the PUC might be "something that I think is going to come back to haunt us before the ink is dry." She stated that she would support the Partial Settlement Agreement with "this caveat, that I think it is going to be back and it's going to be back hard and fast because I don't think we are solving it with this partial settlement. I think we're just opening another can of worms." She then said that she

would nonetheless vote to adopt the settlement, despite stating that "I don't think it settles anything."

134. Each commissioner ultimately voted in favor of Commissioner Lange's motion to adopt the sections of the Partial Settlement Agreement that retroactively imposed five megawatt capacity caps on co-located solar garden facilities.

135. Understanding that the retroactive prohibition on co-located capacities greater than five megawatts contained in the Partial Settlement Agreement was likely to be adopted by the PUC, Xcel Energy and the Developer Defendants conducted additional workgroup meetings wherein they adopted additional agreements designed to further constrain the ability of developers like Sunrise Energy to comply with the restraints contained in the Partial Settlement Agreement.

136. Xcel Energy and the Developer Defendants met and conducted a workgroup session on July 21, 2015.

137. At that session, Xcel Energy and the Developer Defendants agreed to adopt additional restraints that would prohibit developers with completed applications from making any changes to their garden operators, developers, or owners, while allowing developers without completed applications (i.e., the Developer Defendants) to make those types of changes.

138. Xcel Energy acknowledged that this restraint would prohibit developers with completed applications from being able to comply with the terms of the Partial Settlement by selling some of their co-located capacity to other entities or by moving some of their co-located capacity to other geographic locations.

139. This restraint was created and agreed to by Xcel Energy and the Developer Defendants for the purpose of refusing to deal with developers such as Sunrise Energy, and in order to allocate the solar energy market to the Developer Defendants, while excluding developers with completed applications from that market.

VIII. The PUC published its Order on August 6, 2015, retroactively changing the program rules to prohibit co-located community garden capacities greater than five megawatts and authorizing Xcel Energy to refuse to interconnect community solar gardens that would require material upgrades to Xcel's distribution system.

140. The PUC published its "Order Adopting Partial Settlement as Modified" on August 6, 2015.

141. In the Order, the PUC reiterated that "[t]he statute requires that a solar-garden program 'reasonably allow for the creation, financing, and accessibility of community solar gardens,' and that, generally, there are to be no limitations on the number or cumulative generating capacity of solar gardens."

142. Nevertheless, the PUC adopted the bulk of the Partial Settlement Agreement's language retroactively prohibiting aggregate capacities of co-located community solar gardens greater than five megawatts.

143. The relevant portion of the Order reads:

> **Co-location.** For Community Solar Garden applications in the interconnection queue as of the Effective Date of this Agreement, no more than 5 MWs (AC) of Co-Located Community Solar Gardens in the aggregate from any applicant shall be allowed at any given project site. For CoLocated [sic] Community Solar Garden applications in the interconnection queue as of the Effective Date which exceed 5 MW (AC), Xcel shall scale down such application [sic] to 5 MWs (AC), and the application deposits and fees associated with such scaled-down portion immediately refunded to the applicant. ~~The Community Solar Gardens developed as a result of such applications which exceed 1 MW (AC) shall be referred to for purposes of this Agreement as "Non-Statutory Community Solar Gardens."~~ For any applications submitted after the Effective Date of this Agreement, but prior to September 25, 2015, no more than 5 MW (AC) of Co-Located Community Solar Gardens in the aggregate from any applicant shall be allowed at any given project site.

144. The PUC attempted to justify its decision to retroactively prohibit aggregate capacities greater than five megawatts by claiming that "the legislature intended the 1 MW limit

to prevent a back door for independent power producers to construct utility-scale projects under the auspices of a solar-garden program." The PUC did not cite any legislative history, or other records, to support this interpretation or its characterization of community solar gardens with greater than five megawatts of capacity as "utility scale."

145. The PUC also did not disclose in its Order what information it obtained, and what deliberations it conducted, during the break the Commissioners took from the June 25, 2015 hearing, that caused it to adopt a five megawatt cap instead of a ten megawatt cap.

146. The PUC also did not disclose in its Order what information it obtained, and what deliberations it conducted, during the break the Commissioners took from the June 25, 2015 hearing, that allowed it to conclude that it was sufficiently informed to decide any disputed issues regarding co-location or retroactive capacity limits.

147. The PUC also adopted the provision of the Partial Settlement Agreement that authorized Xcel Energy to refuse to interconnect community solar gardens that would require material upgrades to Xcel's distribution system.

148. The relevant portion of the Order reads:

> **Distribution System Upgrades.** The Parties agree that for purposes of interconnecting Co-Located Community Solar Gardens to Xcel Energy's distribution system, Section 10 of the Company's Minnesota Electric Rate Tariffs do not require the Company to undertake any material upgrades in its distribution system to accommodate interconnection of Community Solar garden applications. For purposes of this Agreement, material upgrades include, but are not limited to, the addition of substation transformers, the upgrading of existing substation transformers, the installation of new feeder bays, new overhead feeders, or new underground feeders, and re-conductor and pole line work, where the cost of such upgrades exceeds one million dollars. If the Company does not undertake material upgrades, where such upgrades would otherwise be needed for safety, reliability, or prudent engineering practice, then the Community Solar Garden will not be interconnected to the Company's distribution system.

149. The PUC reiterated that this portion of the "settlement agreement . . . provides that Xcel is not required to undertake any material upgrades in its distribution system to accommodate solar-garden interconnections" and stated that it found the provision "to be consistent with the intent of the solar-garden statute."

150. The PUC did not acknowledge that many developers, including Sunrise Energy, never agreed to the provision.

151. The PUC also did not acknowledge that developers have a right to interconnect to a utility's distribution system under applicable federal law.

FIRST CLAIM FOR RELIEF
Violation of the Minnesota Open Meeting Law
Minn. Stat. §§ 13D.01, 13D.06
(As to the PUC and its Commissioners)

152. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

153. Minnesota's Open Meeting Law applies to state commissions and requires that "All meetings . . . must be open to the public . . . when required or permitted by law to transact public business in a meeting." Minn. Stat. § 13D.01, subd. 1(a)(3).

154. Minnesota's Supreme Court has held that "meetings" subject to the Open Meeting Law are "those gatherings of a quorum or more members of the governing body, . . . or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body." *Moberg v. Independent Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983).

155. On June 25, 2015, Commissioners Heydinger, Wergin, Lange, Lipschultz, and Tuma violated Minnesota's Open Meeting Law by conducting a closed meeting within the scope of Minn. Stat. § 13D.01 in a space outside of the PUC's public hearing room.

156. At that closed meeting, Commissioners Heydinger, Wergin, Lange, Lipschultz, and Tuma discussed, decided, and received information as a group on issues relating to official business that was before the PUC.

157. Commissioners Heydinger, Wergin, Lange, Lipschultz, and Tuma conducted this closed meeting in violation of Minnesota's Open Meeting Law intentionally.

158. The violation of Minnesota's Open Meeting Law committed by Commissioners Heydinger, Wergin, Lange, Lipschultz, and Tuma deprived members of the public and private parties such as Sunrise Energy of the ability to know the reasoning and information that ultimately led to the PUC's decision to retroactively cap the aggregate capacity of co-located solar community gardens at five megawatts.

159. This violation of Minnesota's Open Meeting Law rendered the PUC's August 6, 2015 Order unlawful and invalid.

SECOND CLAIM FOR RELIEF
Preemption by Federal Law – the Public Utility Regulatory Policies Act of 1978
16 U.S.C. § 824a-3, 18 C.F.R. § 292.306
(As to the PUC and its Commissioners)

160. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

161. The Public Utility Regulatory Policies Act of 1978 (PURPA) was implemented to encourage the conservation of electric energy and increased efficiency in the use of facilities and resources by electric utilities, among other things.

162. One of the ways PURPA set out to accomplish its goals was through the establishment of a new class of generating facilities which would receive special rate and regulatory treatment.

163. Generating facilities in this group are known as qualifying facilities (QFs), and fall into two categories: qualifying small power production facilities and qualifying cogeneration facilities.

164. A small power production facility is a generating facility of 80 megawatts or less whose primary energy source is renewable (hydro, wind or solar), biomass, waste, or geothermal resources.

165. Each community solar garden facility for which Sunrise Energy has submitted applications and received reservation letters is a generating facility of 80 megawatts or less and thus qualifies as a QF for purposes of PURPA.

166. Pursuant to 16 U.S.C. § 824a-3 of PURPA, the Federal Energy Regulatory Commission (FERC) is required to prescribe "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring traditional utilities to purchase electricity from QFs.

167. Accordingly, FERC, in 18 C.F.R. § 292.303, entitled "Obligation to interconnect," established that "any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart."

168. An interconnection is a physical connection that allows electricity to flow from one entity to another.

169. 18 C.F.R. § 292.303 further states that "The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306."

170. In 18 C.F.R. § 292.306, FERC established that QFs can exercise their right to interconnect with an electric utility by paying a nondiscriminatory interconnection fee approved by the State regulatory authority or a nonregulated electric utility.

171. 18 C.F.R. § 292.306(a) specifically states that, "Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to

any electric utility over which it has ratemaking authority) or nonregulated electric utility may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics."

172. Together, these federal rules establish that QFs have the right to interconnect to a utility's distribution system so long as they are willing to pay the costs associated with upgrading that distribution system to accommodate the interconnection.

173. The PUC's August 6, 2015 Order undermines these rules and defeats the right of QFs to interconnect.

174. The PUC's August 6, 2015 Order states that "Xcel is not required to undertake any material upgrades in its distribution system to accommodate solar-garden interconnections."

175. Many of Sunrise Energy's community solar gardens will likely require material upgrades to be made for any interconnection to occur.

176. The PUC's August 6, 2015 Order further states that "If [Xcel] does not undertake material upgrades, where such upgrades would otherwise be needed for safety, reliability, or prudent engineering practice, then the Community Solar Garden will not be interconnected to the Company's distribution system."

177. The PUC's August 6, 2015 Order thus effectively authorizes Xcel to refuse to allow community solar gardens that constitute QFs to interconnect to its distribution system, despite the fact that QFs willing to pay interconnection fees have the right to interconnect under federal law.

178. The PUC's August 6, 2015 Order conflicts with, frustrates, undermines, and is contrary to the aforementioned PURPA rules.

179. By displacing, frustrating, and contradicting the federal rights afforded to QFs like Sunrise Energy, the PUC's Order violates the doctrine of federal preemption, under the Supremacy Clause of the United States Constitution, Article VI, clause 2.

THIRD CLAIM FOR RELIEF
Violation of Minnesota's Community Solar Garden Statute, Minn. Stat. § 216B.1641(a)
(As to the PUC and its Commissioners)

180. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

181. Minnesota's community solar garden statute expressly states that: "There shall be no limitation on the number or cumulative generating capacity of community solar garden facilities other than the limitations imposed under section 216B.164, subdivision 4c, or other limitations provided in law or regulations." Minn. Stat. § 216B.1641(a).

182. Section 216B.164, subdivision 4c refers only to limitations that a public utility can place on individual facilities.

183. The PUC's Order places limitations on the number and cumulative generating capacity of community solar garden facilities by retroactively capping aggregate capacities of co-located community solar gardens already in the interconnection queue at 5 megawatts, and by retroactively capping aggregate capacities of co-located community solar garden applications submitted after September 15, 2015 at 1 megawatt.

184. The PUC's Order also places limitations on the number and cumulative generating capacity of community solar garden facilities by authorizing Xcel Energy to refuse to interconnect community solar garden facilities that require material upgrades to Xcel Energy's distribution system.

185. The aforementioned limitations effectively violate the express language of Minn. Stat. § 216B.1641(a) and are therefore illegal, invalid, and unenforceable.

FOURTH CLAIM FOR RELIEF
Substantive Due Process
(As to the PUC and its Commissioners)

186. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

187. To satisfy constitutional requirements of substantive due process, agency actions must, at a minimum, have a rational basis. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

188. An agency must also, at a minimum, identify what evidence it is relying on and how that evidence connects rationally with the agency's choice of action to be taken. *Id.*

189. When an agency adopts an arbitrary rule, it violates the mandates of substantive due process. *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

190. In its August 6, 2015 Order, the PUC arbitrarily and capriciously imposed a five megawatt cap on the aggregate capacity of co-located community solar gardens.

191. The PUC did not explain why it imposed a five megawatt cap instead of a ten megawatt cap or a twenty megawatt cap – both of which were proposed by various interested parties as more workable alternatives.

192. Several PUC commissioners had, in fact, supported adopting a ten megawatt cap (prior to arbitrarily changing their minds and supporting a five megawatt cap) at the PUC's June 25, 2015 hearing.

193. The PUC also did not identify what evidence it was relying on in adopting a five megawatt cap (instead of a ten or twenty megawatt cap), and failed to explain how that evidence connected rationally to its choice of action.

194. There was no rational basis for the PUC to adopt a five megawatt cap as opposed to a ten megawatt cap or a twenty megawatt cap (or no cap).

195. The PUC's decision to adopt a five megawatt cap (as opposed to a ten megawatt cap, twenty megawatt cap, or no cap) was therefore arbitrary and capricious.

196. The PUC also arbitrarily and capriciously interpreted the Minnesota community solar garden statute.

197. The PUC specifically stated that "large groups of co-located 1 MW solar gardens are inconsistent with the statute's clear community-focused purpose."

198. The PUC did not explain how it reached this new interpretation, especially since the statute itself states that "[t]here shall be no limitation on the number or cumulative generating capacity of community solar garden facilities . . . ." and the PUC had previously disapproved of any capacity limits being placed on the community solar garden program. Minn. Stat. § 216B.1641(a).

199. There was no rational basis for the PUC to construe the statute otherwise.

200. In its August 6, 2015 Order, the PUC also arbitrarily and capriciously authorized Xcel Energy to refuse to interconnect community solar gardens that would require material upgrades – i.e. upgrades costing more than $1 million – to Xcel's distribution system.

201. The PUC did not explain why it authorized Xcel Energy to refuse to interconnect certain community solar gardens, or why it included a cap on upgrades to Xcel's distribution system to exclude those costing more than $1 million, as opposed to any other amount.

202. Instead, the PUC merely stated, in conclusory fashion and without citing support, that the authorization was "consistent with the intent of the solar-garden statute" and "should result in a faster-moving interconnection queue."

203. The PUC also did not set forth any evidence to justify its decision to authorize Xcel Energy to refuse to interconnect community solar gardens.

204. There was no rational basis for the PUC to authorize Xcel Energy to refuse to interconnect community solar gardens needing upgrades of more than $1 million.

205. In fact, the PUC's decision would undermine the purpose of the solar-garden statute by effectively allowing Xcel Energy to prevent a significant amount of solar energy capacity from being made available to interested subscribers.

206. The PUC's decision to authorize Xcel Energy to refuse to interconnect community solar gardens needing material upgrades was therefore arbitrary and capricious.

207. The PUC's decisions to adopt a five megawatt retroactive cap and authorize Xcel Energy to refuse to interconnect community solar gardens therefore violate the Due Process Clause of the United States Constitution, Article XIV, clause 1.

FIFTH CLAIM FOR RELIEF
Procedural Due Process
(As to the PUC and its Commissioners)

208. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

209. Procedural due process imposes constraints on governmental decisions which deprive individuals of "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

210. Specifically, government entities may not reverse course and retroactively change rules, depriving or impairing individuals' property interests, without providing procedural due process to that individual.

211. Where, as here, the nature of a property interest is compelling, there is a significant risk of an erroneous deprivation, and the burdens of proper process are relatively minimal, the due process clause requires a pre-deprivation, trial-type evidentiary hearing. *See Fosselman v. Commissioner of Human Services*, 612 N.W.2d 456, 462-64 (Minn. App. 2000).

212. Sunrise Energy has invested $10 million in deposits and approximately $2 million in development costs in reliance on the tariff approved by the PUC.

213. Sunrise Energy has also received 100 reservation letters from Xcel Energy after complying with applicable program rules and requirements.

214. These investments and reservation letters constitute vested and cognizable property interests.

215. The PUC's August 6, 2015 Order retroactively imposed rules and conditions that deprived Sunrise Energy of its property interests and compromised their value.

216. The PUC and its Commissioners failed to provide interested parties, including Sunrise Energy, with the opportunity to be heard through a contested case hearing or procedurally analogous hearing prior to issuing its August 6, 2015 Order.

217. By depriving Sunrise Energy of its property interests without providing Sunrise Energy with the opportunity to be heard through a pre-deprivation, trial-type hearing, the PUC and its Commissioners violated the Due Process Clause of the United States Constitution, Article XIV, clause 1.

SIXTH CLAIM FOR RELIEF
Taking Without Just Compensation – U.S. Constitution, Article V
(As to the PUC and its Commissioners)

218. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

219. The Takings Clause of the Fifth Amendment guarantees just compensation whenever private property is "taken" for public use. U.S. Const., Article V.

220. Government action that is "overly burdensome" may be a regulatory taking. *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1150-1151 (Fed. Cir. 2014).

221. In fact, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

222. In general, "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *see also U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.").

223. Sunrise Energy has invested $10 million in deposits and approximately $2 million in development costs in reliance on the tariff approved by the PUC.

224. Sunrise Energy has also received 100 reservation letters (i.e., contracts) from Xcel Energy after complying with applicable program rules and requirements.

225. Finally, Sunrise Energy has entered into contracts for the purchase of land on which its community solar gardens will be developed.

226. These investments and contracts constitute vested, valid, and cognizable property interests.

227. The PUC, by issuing an order retroactively capping co-located community solar garden capacity to five megawatts and by retroactively authorizing Xcel Energy to refuse to interconnect developer's projects, has regulated and directly appropriated and abrogated the property and property interests of Sunrise Energy.

228. Sunrise Energy made its investments, obtained reservation letters, and entered into contracts for real property in reliance on a state of affairs that did not include the aforementioned order or challenged regulatory regime.

229. Sunrise Energy's investment-backed expectations were reasonable, as Sunrise Energy reasonably expected that it would be able to develop and sell co-located community solar

gardens with aggregate capacities exceeding five megawatts if it made investments and submitted applications in compliance with the established and prevailing program rules.

230. As a direct result of the PUC's actions and regulations, Sunrise Energy's property and property interests have suffered a diminution in value and have been deprived of all economically beneficial uses.

231. But for the PUC's retroactive Order, Sunrise Energy's property and property interests would have a fair market value at or above $50 million.

232. Accordingly, the PUC's Order violates the Takings Clause of the Fifth Amendment to the U.S. Constitution, Article V.

SEVENTH CLAIM FOR RELIEF
Taking Without Just Compensation – MN Constitution
(As to the PUC and its Commissioners)

233. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

234. The Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation." Minn. Const. Art. I, § 13.

235. The language of the Takings Clause in the Minnesota Constitution is similar to the Takings Clause in the U.S. Constitution. *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 551-52 (Minn. 1996).

236. Courts therefore rely on cases interpreting the U.S. Constitution's Takings Clause in interpreting this clause in the Minnesota Constitution. *See, e.g., Zeman*, 552 N.W.2d at 552 (citing federal cases).

237. Government action that is "overly burdensome" may be a regulatory taking. *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1150-1151 (Fed. Cir. 2014).

238. In fact, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

239. In general, "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *see also U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.").

240. Sunrise Energy has invested $10 million in deposits and approximately $2 million in development costs in reliance on the tariff approved by the PUC.

241. Sunrise Energy has also received 100 reservation letters (i.e., contracts) from Xcel Energy after complying with applicable program rules and requirements.

242. Finally, Sunrise Energy has entered into contracts for the purchase of land on which its community solar gardens will be developed.

243. These investments and contracts constitute vested, valid, and cognizable property interests.

244. The PUC, by issuing an order retroactively capping co-located community solar garden capacity to five megawatts and by retroactively authorizing Xcel Energy to refuse to interconnect developer's projects, has regulated and directly appropriated and abrogated the property and property interests of Sunrise Energy.

245. Sunrise Energy made its investments, obtained reservation letters, and entered into contracts for real property in reliance on a state of affairs that did not include the aforementioned order or challenged regulatory regime.

246. Sunrise Energy's investment-backed expectations were reasonable, as Sunrise Energy reasonably expected that it would be able to develop and sell co-located community solar

gardens with aggregate capacities exceeding five megawatts if it made investments and submitted applications in compliance with the established and prevailing program rules.

247. As a direct result of the PUC's actions and regulations, Sunrise Energy's property and property interests have suffered a diminution in value and have been deprived of all economically beneficial uses.

248. But for the PUC's retroactive Order, Sunrise Energy's property and property interests would have a fair market value at or above $50 million.

249. Accordingly, the PUC's Order violates the Takings Clause of the Minnesota Constitution, Article I, sec. 13.

EIGHTH CLAIM FOR RELIEF
Violation of Minnesota's Administrative Procedure Act, Minn. Stat. Ch. 14
(As to the PUC and its Commissioners)

250. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

251. An agency rule is an "agency statement of general applicability and future effect, including amendments, suspension, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4.

252. Minnesota's Administrative Procedure Act requires that all agency rules be adopted pursuant to certain specific procedures. Minn. Stat. § 14.001-14.69.

253. These procedures include, but are not limited to, publication, notice, comment, and participation by an administrative law judge. *Id.*

254. If an agency fails to follow the enumerated procedures, its policymaking – and any issued rule – is void. *See, e.g., In re Pera Salary Determination,* 820 N.W.2d at 570 ("if an agency's interpretation of a statute is not properly promulgated . . . the rule is invalid and cannot be used as the basis for agency action."); *McKee v. Likens,* 261 N.W.2d 566, 577 (policy

statements shall not have the effect of law unless they are adopted as a rule in the manner prescribed by the Administrative Procedures Act).

255. The PUC's August 6, 2014 Order sets forth a number of agency rules – i.e., statements of general applicability and future effect that are intended to implement or make specific the law enforced or administered by the PUC.

256. However, the PUC failed to follow the rulemaking procedures set forth in Minn. Stat. § 14.001-14.69 in adopting these rules.

257. In particular, the PUC failed to hold a hearing on the proposed rules wherein an administrative law judge presided, as required by Minn. Stat. § 14.14, subd. 2a.

258. Moreover, the PUC failed to submit into the record the jurisdictional documents, including the statement of need and reasonableness, and any written exhibits in support of the proposed rule. *See id.*

259. Interested parties were also not allowed to question PUC representatives or witnesses, or interested persons making oral statements, in order to explain the purpose or intended operation of a proposed rule, or a suggested modification, or for other purposes if material to the evaluation or formulation of the proposed rule, as required by Minn. Stat. § 14.14, subd. 2a.

260. The PUC therefore violated Minnesota's Administrative Procedure Act in promulgating the aforementioned rules. The rules contained in the PUC's August 6, 2015 Order are therefore null and void.

NINTH CLAIM FOR RELIEF
Promissory Estoppel
(As to the PUC and its Commissioners)

261. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

262. Xcel Energy submitted an initial tariff filing to the PUC on September 30, 2013 that attempted to place limits on the installed capacity of community solar gardens and did not acknowledge that developers could co-locate multiple community solar gardens on the same parcel of land to achieve efficiencies.

263. The PUC issued an Order rejecting Xcel's initial tariff filing and requiring Xcel to submit a revised tariff containing a number of specific revisions.

264. The PUC specifically disapproved of any capacity limits being placed on the community solar garden program and required Xcel to eliminate them, stating that "A capacity limit holds the potential to delay the growth of solar gardens and limit opportunities for subscribers to participate in the program."

265. The PUC's disapproval and statement constituted a promise that capacity limits would not be placed on community solar gardens.

266. The PUC also explicitly required Xcel to allow developers to co-locate community solar gardens near each other to achieve efficiencies, stating: "Where a prospective garden operator controls multiple adjacent parcels of land, or even multiple closely situated parcels, the operator should be able to install solar panels on multiple parcels, connect them to grid through a single interconnection point, and take advantage of the resulting economies of scale."

267. The PUC's statement constituted an additional promise that developers would be allowed to co-locate their solar gardens to achieve efficiencies.

268. Following the PUC's statements, Xcel submitted a revised tariff that explicitly allowed developers to co-locate community solar gardens on the same site and did not impose any limits on the aggregate megawatt capacity that co-located community solar gardens could have.

269. On September 17, 2014, the PUC approved Xcel's revised tariff, and again stated that "Multiple Community Solar Garden Sites may be situated in close proximity to one another in order to share in distribution infrastructure."

270. The PUC then instructed Xcel to open its program to the private sector and begin accepting applications from solar developers interested in constructing community solar gardens consistent with the established rules.

271. The PUC expected or should have reasonably expected its promises to induce substantial and definite action by Sunrise Energy and other private developers in reliance thereon.

272. The PUC's promises did induce Sunrise Energy to take substantial action.

273. Specifically, Sunrise Energy began finalizing plans to develop 100 community solar gardens co-located on multiple sites along the power grid.

274. Sunrise Energy spent $1200 per application in program management fees, $1500 per application in engineering fees, made $10 million in required cash deposits to Xcel, and incurred approximately $2 million in non-refundable development costs for these 100 gardens.

275. Sunrise Energy also entered into a contract with a large solar company for the purchase of its community solar gardens, once they were constructed.

276. Now, the PUC has reneged on the promises it made above, by issuing an Order that retroactively (a) limits the aggregate megawatt capacity of co-located community solar gardens to 5 megawatts (b) authorizes Xcel to refuse to interconnect community solar gardens to its grid, and (c) fails to provide any meaningful means for developers such as Sunrise Energy to comply with the new rules without losing their coveted queue positions or seeing their project applications get declared non-compliant.

277. By reneging on its previous promises, the PUC has put the substantial investment made by Sunrise Energy and its competitive position relative to other developers at risk.

278. The PUC's promise must be enforced to avoid injustice.

TENTH CLAIM FOR RELIEF
Promissory Estoppel
(As to Xcel Energy)

279. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

280. Xcel Energy submitted an initial tariff filing to the PUC on September 30, 2013 that attempted to place limits on the installed capacity of community solar gardens and did not acknowledge that developers could co-locate multiple community solar gardens on the same parcel of land to achieve efficiencies.

281. The PUC issued an Order rejecting Xcel Energy's initial tariff filing and requiring Xcel to submit a revised tariff containing a number of specific revisions.

282. The PUC specifically disapproved of any capacity limits being placed on the community solar garden program and required Xcel Energy to eliminate them, stating that "A capacity limit holds the potential to delay the growth of solar gardens and limit opportunities for subscribers to participate in the program."

283. The PUC also explicitly required Xcel Energy to allow developers to co-locate community solar gardens near each other to achieve efficiencies, stating: "Where a prospective garden operator controls multiple adjacent parcels of land, or even multiple closely situated parcels, the operator should be able to install solar panels on multiple parcels, connect them to grid through a single interconnection point, and take advantage of the resulting economies of scale."

284. Following the PUC's statements, Xcel Energy submitted a revised tariff that explicitly allowed developers to co-locate community solar gardens on the same site and did not impose any limits on the aggregate megawatt capacity that co-located community solar gardens could have.

285. On September 17, 2014, the PUC approved Xcel Energy's revised tariff, and again stated that "Multiple Community Solar Garden Sites may be situated in close proximity to one another in order to share in distribution infrastructure."

286. The PUC then instructed Xcel Energy to open its program to the private sector and begin accepting applications from solar developers interested in constructing community solar gardens consistent with the established rules.

287. Xcel Energy's revised and approved tariff constituted a promise that developers would be allowed to co-locate their solar gardens to achieve efficiencies and would not be subjected to any capacity limits.

288. Xcel Energy expected or should have reasonably expected its promises to induce substantial and definite action by Sunrise Energy and other private developers in reliance thereon.

289. Xcel Energy's promises did induce Sunrise Energy to take substantial action.

290. Specifically, Sunrise Energy began finalizing plans to develop 100 community solar gardens co-located on multiple sites along the power grid.

291. Sunrise Energy spent $1200 per application in program management fees, $1500 per application in engineering fees, made $10 million in required cash deposits to Xcel Energy, and incurred approximately $2 million in non-refundable development costs for these 100 gardens.

292. Xcel Energy approved each of Sunrise Energy's applications, and sent Sunrise Energy 100 reservation letters that functioned as commitments that Sunrise Energy would be able to construct its projects.

293. Relying on Xcel Energy's aforementioned promises and its reservation letters, Sunrise Energy entered into a contract with a large solar company for the purchase of its community solar gardens, once they were constructed.

294. Now, Xcel Energy has reneged on the promises it made above, by petitioning the PUC to retroactively change the applicable program rules to (a) limit the aggregate megawatt capacity of co-located community solar gardens to 5 megawatts and (b) authorize Xcel to refuse to interconnect community solar gardens to its grid.

295. The PUC adopted these revised rules on August 6, 2015.

296. Xcel Energy has also failed to adopt, provide, or develop any meaningful means for developers such as Sunrise Energy to comply with the new rules without losing their coveted queue positions or seeing their project applications get declared non-compliant.

297. By reneging on its previous promises, Xcel Energy has put the substantial investment made by Sunrise Energy and its competitive position relative to other developers at risk.

298. Xcel Energy's promises must be enforced to avoid injustice.

ELEVENTH CLAIM FOR RELIEF
Breach of Contract
(As to Xcel Energy)

299. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

300. The 100 reservation letters sent by Xcel Energy to Sunrise Energy and signed by Sunrise Energy are valid and binding contracts.

301. Sunrise Energy has performed, and continues to perform, all of its obligations pursuant to those reservation letters.

302. Xcel Energy has taken actions, as described above, that constitute actual and anticipated breaches of its express and implied obligations under the reservation letters, including but not limited to: (a) entering into a "Partial Settlement Agreement" with other developers that contains terms designed to render Sunrise Energy's existing project applications

non-compliant; (b) submitting that "Partial Settlement Agreement" to the PUC and causing the PUC to adopt its terms; (c) ignoring the validity of the reservations letters it has sent to Sunrise Energy and its continuing obligations thereunder, and (d) adopting additional rules designed to prevent Sunrise Energy from being able to modify its approved projects to comply with the terms the PUC adopted from the "Partial Settlement Agreement."

303. Xcel Energy's breaches of the reservations letters were intentional, knowing, and opportunistic.

304. As a direct and proximate result of Xcel Energy's breaches of the reservation letters, Sunrise Energy has been severely and irreparably harmed.

305. As a result of Xcel Energy's actual or anticipated breach of contract, Sunrise Energy is entitled to injunctive relief, specific performance, damages, costs, and attorney's fees.

TWELFTH CLAIM FOR RELIEF
Sherman Act § 1, 15 U.S.C. § 1
(As to Xcel Energy and the Developer Defendants)

306. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

307. Section 1 of the Sherman Act (15 U.S.C. § 1) provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

308. Section 1 may be violated "when a group of independent competing firms engage in a concerted refusal to deal with a particular supplier, customer, or competitor." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

309. Section 1 may also be violated when a group of competing firms engage in concerted action or form agreements designed to allocate a market amongst themselves and exclude competitors from reaching territories or customers.

310. Xcel Energy and the Developer Defendants are competitors in that they each sell or seek to sell energy subscriptions to commercial and residential customers in the State of Minnesota.

311. Xcel Energy, together with the Developer Defendants, have formed agreements, contracts, conspiracies, and concerted actions in an effort to refuse to deal with Sunrise Energy in the business of developing, distributing, and selling solar energy in the State of Minnesota, and to allocate markets, customers, and territories amongst themselves.

312. Xcel Energy and the Developer Defendants have acted together through a series of ongoing meetings of their Solar*Rewards Community Implementation Workgroup.

313. Xcel Energy and the Developer Defendants drafted, entered into, and signed a June 25, 2015 "Partial Settlement Agreement" wherein they agreed to restrictions and restraints that would render Sunrise Energy's approved project applications non-compliant, eliminate the queue positions Sunrise Energy had secured, preclude Sunrise Energy and other developers from interconnecting to Xcel Energy's distribution system, improve the Developer Defendants' competitive positions relative to Sunrise Energy, and substantially reduce the amount of solar electric energy Xcel Energy would be required to purchase and distribute through its system.

314. As the PUC acknowledged in its August 6, 2015 Order, the Developer Defendants entered into the "Partial Settlement Agreement" because they believed developers who had secured reservation letters had obtained an "unfair advantage in competing for subscribers."

315. Xcel Energy and the Developer Defendants, through additional workgroup meetings, subsequently developed and agreed to additional rules that prohibited developers with completed applications (and reservation letters) like Sunrise Energy from taking steps to comply with the terms of the "Partial Settlement Agreement," while allowing developers with incomplete applications like the Developer Defendants to take those same compliance steps.

316. Specifically, Xcel Energy and the Developer Defendants approved rules that would prohibit developers with completed applications from selling portions of their community solar gardens to other developers or modifying the geographic location of their gardens, while allowing the Developer Defendants to take these same steps.

317. The purpose and effect of this collective concerted refusal to deal is to ensure that Sunrise Energy is not able to sell significant amounts of energy subscriptions to commercial and residential customers in Minnesota, that the net amount of solar energy available to subscribers in Minnesota remains low, that Xcel Energy's existing market share and market power is not disrupted, and that the Developer Defendants' competitive position is improved.

318. The purpose and effect of these collective restraints is also to allocate energy markets, customers, and territories among Xcel Energy and the Developer Defendants, and to exclude Sunrise Energy and other developers with completed applications and reservation letters from reaching these markets, customers, and territories.

319. These restraints, individually and collectively, have been designed to ensure that the solar energy market in Minnesota is allocated to the Developer Defendants with incomplete applications, and not to the group of developers, including Sunrise Energy, with approved applications and reservation letters.

320. These agreements between Xcel Energy and the Developer Defendants constitute per se violations of Section 1 of the Sherman Act because they are anticompetitive horizontal agreements between competitors that constitute (a) concerted refusals to deal with particular solar energy suppliers, including Sunrise Energy, and (b) deliberate attempts to allocate markets, customers, and territories among themselves and prevent Sunrise Energy and other developers from accessing these markets, customers, and territories.

321. These agreements between Xcel Energy and the Developer Defendants also constitute per se violations of Section 1 of the Sherman Act because they directly impact

residential and commercial consumers' ability to purchase solar energy subscriptions from a broad range of suppliers at a lower cost, and are not ancillary to any legitimate business arrangement.

322. Alternatively, the agreements entered into by Defendants violate the "Rule of Reason."

323. A relevant market exists, the product dimension of which is electrical energy. The geographic dimension of this market is the State of Minnesota.

294. An alternative market exists, the product dimension of which is electrical energy derived from solar sources. The geographic dimension of this market is the State of Minnesota.

324. Defendants have market power in the relevant markets.

325. The aforementioned agreements between Xcel Energy and the Developer Defendants constitute horizontal restraints that have had and will continue to have the anticompetitive effects of: (a) unreasonably restricting and reducing competition among suppliers in the markets for electrical energy and electrical energy derived from solar sources, (b) artificially and unreasonably excluding renewable energy suppliers from the relevant energy markets, (c) reducing the supply of solar-generated electricity subscriptions that are available for purchase by residential and commercial consumers, (d) restraining innovation in the markets for electrical energy and solar electrical energy, (e) artificially reducing consumer access to solar energy in the State of Minnesota, and (f) forcing consumers to purchase a greater portion of their electricity from Xcel Energy and its non-renewable sources.

326. There is no procompetitive justification for the aforementioned restraints in any of the relevant markets set forth above, or, in the alternative, any pro-competitive benefits of the restraints are substantially outweighed by their anticompetitive effects, and any legitimate interests of Defendants could be achieved by less restrictive alternatives.

327. As a direct and foreseeable result of Defendants' agreements, conspiracies, and restraints, Sunrise Energy has been and will continue to be injured in its business or property and has suffered damages in an amount to be established at trial.

THIRTEENTH CLAIM FOR RELIEF
Minnesota Antitrust Act, Minn. Stat. § 325D.51 (2014)
(As to Xcel Energy and the Developer Defendants)

328. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

329. Minn. Stat. § 325D.51 (2014) declares unlawful every "contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce."

330. Minnesota antitrust law is interpreted and applied consistently with federal antitrust law. *Lorix v. Crompton Corp.,* 736 N.W.2d 619, 627-29 (Minn. 2007); *State v. Alpine Air Prod., Inc.,* 490 N.W.2d 888, 894 (Minn. Ct. App. 1992); *State by Humphrey v. Road Constructors,* 1996 Minn. App. LEXIS 597 at *5 (Minn. Ct. App. 1996).

331. Xcel Energy and the Developer Defendants are competitors in that they each sell or seek to sell energy subscriptions to commercial and residential customers in the State of Minnesota.

332. Xcel Energy, together with the Developer Defendants, have formed agreements, contracts, conspiracies, and concerted actions in an effort to refuse to deal with Sunrise Energy in the business of developing, distributing, and selling solar energy in the State of Minnesota, and to allocate markets, customers, and territories amongst themselves.

333. Xcel Energy and the Developer Defendants have acted together through a series of ongoing meetings of their Solar*Rewards Community Implementation Workgroup.

334. Xcel Energy and the Developer Defendants drafted, entered into, and signed a June 25, 2015 "Partial Settlement Agreement" wherein they agreed to restrictions and restraints that would render Sunrise Energy's approved project applications non-compliant, eliminate the

queue positions Sunrise Energy had secured, preclude Sunrise Energy and other developers from interconnecting to Xcel Energy's distribution system, improve the Developer Defendants' competitive positions relative to Sunrise Energy, and substantially reduce the amount of solar electric energy Xcel Energy would be required to purchase and distribute through its system.

335. As the PUC acknowledged in its August 6, 2015 Order, the Developer Defendants entered into the "Partial Settlement Agreement" because they believed developers who had secured reservation letters had obtained an "unfair advantage in competing for subscribers."

336. Xcel Energy and the Developer Defendants, through additional workgroup meetings, subsequently developed and agreed to additional rules that prohibited developers with completed applications (and reservation letters) like Sunrise Energy from taking steps to comply with the terms of the "Partial Settlement Agreement," while allowing developers with incomplete applications like the Developer Defendants to take those same compliance steps.

337. Specifically, Xcel Energy and the Developer Defendants approved rules that would prohibit developers with completed applications from selling portions of their community solar gardens to other developers or modifying the geographic location of their gardens, while allowing the Developer Defendants to take these same steps.

338. The purpose and effect of this collective concerted refusal to deal is to ensure that Sunrise Energy is not able to sell significant amounts of energy subscriptions to commercial and residential customers in Minnesota, that the net amount of solar energy available to subscribers in Minnesota remains low, that Xcel Energy's existing market share and market power is not disrupted, and that the Developer Defendants' competitive position is improved.

339. The purpose and effect of these collective restraints is also to allocate energy markets, customers, and territories among Xcel Energy and the Developer Defendants, and to exclude Sunrise Energy and other developers with completed applications and reservation letters from reaching these markets, customers, and territories.

340. These restraints, individually and collectively, have been designed to ensure that the solar energy market in Minnesota is allocated to the Developer Defendants with incomplete applications, and not to the group of developers, including Sunrise Energy, with approved applications and reservation letters.

341. These agreements between Xcel Energy and the Developer Defendants constitute per se violations of Section 1 of the Sherman Act because they are anticompetitive horizontal agreements between competitors that constitute (a) concerted refusals to deal with particular solar energy suppliers, including Sunrise Energy, and (b) deliberate attempts to allocate markets, customers, and territories among themselves and prevent Sunrise Energy and other developers from accessing these markets, customers, and territories.

342. These agreements between Xcel Energy and the Developer Defendants also constitute per se violations of Section 1 of the Sherman Act because they directly impact residential and commercial consumers' ability to purchase energy subscriptions from a broad range of suppliers at a lower cost, and are not ancillary to any legitimate business arrangement.

343. Alternatively, the agreements entered into by Defendants violate the "Rule of Reason."

344. A relevant market exists, the product dimension of which is electrical energy. The geographic dimension of this market is the State of Minnesota.

345. An alternative market exists, the product dimension of which is electrical energy derived from solar sources. The geographic dimension of this market is the State of Minnesota.

346. Defendants have market power in the relevant markets.

347. The aforementioned agreements between Xcel Energy and the Developer Defendants constitute horizontal restraints that have had and will continue to have the anticompetitive effects of: (a) unreasonably restricting and reducing competition among suppliers in the markets for electrical energy and electrical energy derived from solar sources, (b)

artificially and unreasonably excluding renewable energy suppliers from the relevant energy markets, (c) reducing the supply of solar-generated electricity subscriptions that are available for purchase by residential and commercial consumers, (d) restraining innovation in the markets for electrical energy and solar electrical energy, (e) artificially reducing consumer access to solar energy in the State of Minnesota, and (f) forcing consumers to purchase a greater portion of their electricity from Xcel Energy and its non-renewable sources.

348. There is no procompetitive justification for the aforementioned restraints in any of the relevant markets set forth above, or, in the alternative, any pro-competitive benefits of the restraints are substantially outweighed by their anticompetitive effects, and any legitimate interests of Defendants could be achieved by less restrictive alternatives.

349. As a direct and foreseeable result of Defendants' agreements, conspiracies, and restraints, Sunrise Energy has been and will continue to be injured in its business or property and has suffered damages in an amount to be established at trial.

FOURTEENTH CLAIM FOR RELIEF
Tortious Interference with Prospective Economic Advantage
(As to the PUC and its Commissioners)

350. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

351. Sunrise Energy had a reasonable expectation of obtaining economic advantage by developing community solar gardens, interconnecting them to Xcel Energy's distribution system, selling solar energy subscriptions to residential and commercial consumers, and selling some or all of its solar community garden assets to another purchaser.

352. The PUC and its Commissioners knew that Sunrise Energy had these expectations.

353. Sunrise Energy's expectations were based in part on the rules that the PUC and its Commissioners had pushed for and adopted which allowed Sunrise Energy to co-locate community solar gardens with unlimited cumulative megawatt capacities.

354. By retroactively adopting new rules that prohibited co-located solar gardens with aggregate capacities exceeding 5 megawatts and allowed Xcel Energy to refuse to interconnect developers needing material upgrades to its distribution system, the PUC and its Commissioners interfered with Sunrise Energy's expectations.

355. This interference was tortious.

356. This interference violated Minn. Stat. §§ 13D.01 – 06 and 18 C.F.R. §§ 292.303 and 306.

357. In the absence of the tortious and illegal conduct by the PUC, Sunrise Energy would have realized its economic advantage.

358. As a direct and proximate result of the PUC's tortious and illegal conduct, Sunrise Energy has been injured in its business or property and has suffered damages in an amount to be established at trial.

FIFTEENTH CLAIM FOR RELIEF
Tortious Interference with Prospective Economic Advantage
(As to Xcel Energy and the Developer Defendants)

359. Sunrise Energy repeats and realleges each and every of the foregoing allegations as though fully set forth herein.

360. Sunrise Energy had a reasonable expectation of obtaining economic advantage by developing community solar gardens, interconnecting them to Xcel Energy's distribution system, selling solar energy subscriptions to residential and commercial consumers, and selling some or all of its solar community garden assets to another purchaser.

361. Xcel Energy and the Developer Defendants knew that Sunrise Energy had these expectations.

362. Sunrise Energy's expectations were based in part on the rules that Xcel Energy had drafted, and the PUC had adopted, which allowed Sunrise Energy to co-locate community solar gardens with unlimited cumulative megawatt capacities.

363. By retroactively entering into a "Partial Settlement Agreement" that prohibited co-located solar gardens with aggregate capacities exceeding 5 megawatts and allowed Xcel Energy to refuse to interconnect developers needing material upgrades to its distribution system, Xcel Energy and the Developer Defendants interfered with Sunrise Energy's expectations.

364. Xcel Energy and the Developer Defendants further interfered with Sunrise Energy's expectations by agreeing to adopt rules during several workgroup sessions designed to ensure that Sunrise Energy could not comply with the operative terms of the "Partial Settlement Agreement" that the PUC had adopted.

365. This interference was tortious.

366. This interference violated 15 U.S.C. § 1 and Minn. Stat. § 325D.51.

367. In the absence of the tortious and illegal conduct by Xcel Energy and the Developer Defendants, Sunrise Energy would have realized its economic advantage.

368. As a direct and proximate result of Xcel Energy's and the Developer Defendants' tortious and illegal conduct, Sunrise Energy has been injured in its business or property and has suffered damages in an amount to be established at trial.

Prayer for Relief

WHEREFORE, Sunrise Energy respectfully seeks an Order:

A. Declaring that the PUC's August 6, 2015 Order is illegal and unenforceable under federal and Minnesota law;

B. Declaring that the PUC's August 6, 2015 Order conflicts with and is preempted by PURPA and applicable FERC regulations;

C. Enjoining the PUC and its Commissioners from enforcing its August 6, 2015 Order;

D. Ordering the PUC and its Commissioners to keep their promise to allow Sunrise Energy to develop co-located community solar gardens with aggregate megawatt capacities exceeding five megawatts;

E. Ordering the PUC and its Commissioners to conduct a new hearing that complies with the Minnesota Open Meeting Law by having its Commissioners deliberate co-location, megawatt caps, and/or other disputed issues without taking any breaks to (i) privately discuss or decide the matter as a quorum, (ii) privately discuss the matter with staff as a quorum, or (iii) privately obtain information from staff related to the matter;

F. Ordering the PUC to conduct a new hearing that complies with the requirements of Due Process and the Minnesota Administrative Procedure Act.

G. Imposing a civil penalty in the amount of $300 on each individual PUC Commissioner, pursuant to Minn. Stat. § 13D.06, subd. 1, for his or her violation of the Minnesota Open Meeting Law;

H. Declaring that the restraints contained in the "Partial Settlement Agreement" and the additional aforementioned restraints adopted by Xcel Energy and the Developer Defendants through their workgroups are illegal under federal and Minnesota antitrust law;

I. Enjoining Xcel Energy and the Developer Defendants from enforcing any of the restraints contained in the "Partial Settlement Agreement" or the aforementioned

restraints adopted by Xcel Energy and the Developer Defendants through their workgroups;

J. Enjoining Xcel Energy from breaching any of its obligations pursuant to the 100 reservation letters it issued to Sunrise Energy;

K. Awarding Sunrise Energy damages in an amount to be established at trial, but no less than $50 million, and then trebled;

L. Awarding to Sunrise Energy reasonable costs, attorney's fees, and prejudgment interest; and

M. Awarding any further relief that the Court deems equitable and just.

Dated: _____

By: _____

Christopher W. Madel (230297)
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