**BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION**
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| In the Matter of Commission Consideration of Demand Response Under the Federal Infrastructure Investment and Jobs Act of 2021 | PUC Docket No. E999/CI-22-268 |
| In the Matter of a Commission Investigation into the Potential Role of Third-Party Aggregation of Retail Customers | PUC Docket No. E999/CI-22-600 |
| | **REPLY COMMENT** |

The Minnesota Large Industrial Group ("MLIG"), a continuing *ad hoc* consortium of large industrial end-users of energy in Minnesota spanning multiple utilities and functioning to represent large industrial interests before regulatory and legislative bodies, submits the following reply comment pursuant to the applicable notices of comment period issued by the Minnesota Public Utilities Commission ("Commission") and in response to initial comments filed by stakeholders in the above-titled dockets.[1]

## I. INTRODUCTION

The Aggregation Notice solicited stakeholders' input regarding third-party aggregators of retail customers ("ARCs") bidding demand response into organized markets. Specifically, the Commission sought comments on whether it should (1) permit ARCs to bid demand response into organized markets; (2) require electric utilities to create tariffs allowing ARCs to participate in demand response programs; and (3) verify or certify ARCs. The following parties submitted an initial comment: SunRun, Inc., Rocky Mountain Institute, Advanced Energy Management Alliance and CPower ("AEMA"), Great River Energy, Northern States Power Co., dba, Xcel Energy ("Xcel"), Armada Power, LLC, MNSEIA, Low-Income Consumer and Worker Advocates, the Minnesota Department of Commerce, Division of Energy Resources ("Department"), Otter Tail Power Company, Minnesota Power, R Street Institute, Sierra Club and the Union of

[1] Notice of Comment Period (Jan. 24, 2023) (eDocket No. 20231-192443-01) (pursuant to an extension request, the deadlines in this proceeding were subsequently modified by the Commission); Notice of Comment Period (Dec. 9, 2022) (eDocket No. 202212-191208-01) (the "Aggregation Notice") (pursuant to an extension request, the deadlines in this proceeding were subsequently modified by the Commission).

Concerned Scientists (collectively, "UCS"),[2] Walmart Inc., and Voltus, Inc. To briefly summarize, the utilities and select others are opposed to ARC operation in Minnesota, while MLIG (a ratepayer group) and other organizations, including Voltus, Inc. and AEMA, believe the Commission should reverse its previous decision and allow ARC operation in Minnesota to allow for increased and cost-effective demand response options.[3] To further support that position, this reply comment addresses arguments pertaining to ARC operation within Minnesota by providing and/or addressing the following:

- An overview of relevant Federal Energy Regulatory Commission ("FERC") precedent;
- FERC's deference to state laws and regulations does not imply a grant or delegation of authority to state commissions in the absence of state laws or regulations;
- The absence of explicit authority granted by the Minnesota state legislature;
- The Commission's inability to construct implicit jurisdiction; and
- Other arguments made in opposition to ARC operation.

Based upon that analysis, which reveals that the Commission does not have jurisdiction over ARCs bidding demand response into organized markets, MLIG respectfully requests that the Commission reverse its previous unlawful prohibition of ARCs in Minnesota.

## II. ANALYSIS

### A. FERC Does Not Grant the Commission Regulatory Authority

#### 1. Overview of Relevant FERC Orders

As relevant here, in Order Nos. 719 and 719-A,[4] FERC required regional transmission organizations ("RTOs") and independent system operators ("ISOs") to establish market rules that must "allow bids from an ARC unless this is not permitted under the laws or regulations of relevant

[2] Initial Comment by UCS and Sierra Club (Mar. 13, 2023) (eDocket No. 20233-193848-01) ("UCS Comment").

[3] Consistent with its initial comment, MLIG remains eager to explore additional avenues to work with utility partners on demand response, regardless of the outcome of the Commission's inquiries in PUC Docket No. E999/CI-22-600. Effective demand response, whether through utility or ARC partnership, provides system benefits as well as the potential for ratepayer savings. MLIG Initial Comment at 2, 6 (Mar. 13, 2023) (eDocket No. 20233-193920-03).

[4] *Wholesale Competition in Regions with Organized Elec. Mkts.*, Order No. 719, 125 FERC ¶ 61,071 (2008), *order on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

electric retail regulatory authority."[5] On rehearing, in Order No. 716-A, FERC revised the market rule requirements to establish different parameters for smaller utilities, thus providing the state the option to "opt-in" and "opt-out." Specifically, RTOs/ISOs must accept bids from ARCs that aggregate the demand response of the customers of utilities that distributed (1) more than 4 million MWh in the previous fiscal year, unless "the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets by an ARC[,]" i.e., where the relevant electric retail regulatory authority chooses to "opt-out" and (2) 4 million MWh or less in the previous fiscal year, "where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC[,]" i.e., where the relevant electric retail regulatory authority chooses to "opt-in."[6]

FERC subsequently issued Order No. 2222, which revisited the participation of distributed energy resource ("DER") aggregations in RTO/ISO markets.[7] In Order No. 2222, FERC defined DERs to include demand response.[8] FERC also found that the participation of demand response in DER aggregations is subject to the opt-out and opt-in requirements established in Order Nos. 719 and 719-A.[9] FERC explained that while the definition of a DER includes demand response resources and an aggregator of demand response could participate as a DER aggregator, Order No. 2222 does not affect existing demand response rules,[10] nor does it affect the ability of relevant electric retail regulatory authorities to prohibit retail customers' demand response from being bid into RTO/ISO markets by aggregators pursuant to Order No. 719.[11]

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5 Order No. 719, 125 FERC ¶ 61,071 at P 158(k); *see also* Order No. 719-A, 128 FERC ¶ 61,059 at P 57 ("[RTOs/ISOs] must accept bids from an ARC unless the laws or regulations of the relevant electric retail regulatory authority do not permit the ARC to bid."). FERC defines relevant electric retail regulatory authority as "the entity that establishes the retail electric prices and any retail competition policies for customers, such as the city council for a municipal utility, the governing board of a cooperative utility, or the state public utility commission." Order No. 719, 125 FERC ¶ 61,071 at P 158(c).

6 Order No. 719-A, 128 FERC ¶ 61,059 at P 51; *see also Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020), *order on reh'g*, Order No. 2222-A, 174 FERC ¶ 61,197, at P 34, *order on reh'g*, Order No. 2222-B, 175 FERC ¶ 61,227 (2021).

7 *Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020), *order on reh'g*, Order No. 2222-A, 174 FERC ¶ 61,197, *order on reh'g*, Order No. 2222-B, 175 FERC ¶ 61,227 (2021).

8 Order No. 2222, 172 FERC ¶ 61,247 at PP 1 n.1, 114.

9 *Id.* P 145.

10 *Id.* P 118; Order No. 2222-B, 175 FERC ¶ 61,227 at P 7.

11 Order No. 2222, 172 FERC ¶ 61,247 at P 59; Order No. 2222-B, 175 FERC ¶ 61,227 at P 7.

On rehearing, in Order No. 2222-A, FERC reversed its application of Order No 719. FERC found that if a DER aggregation only includes resources that participate as demand response resources, then the Order No. 719 opt-out would apply to that aggregation. On the other hand, FERC did not extend the Order No. 719 opt-out to demand response resources that participate in DERs aggregations that are composed of different types of resources including demand response, because they are not solely aggregations of retail customers.[12] FERC clarified that it did not propose to overturn the Order No. 719 opt-out in Docket No. RM18-9.[13]

Ultimately, FERC set aside its determination in Order No. 2222-A to not extend the "opt-out" and "opt-in" requirements of Order Nos. 719 and 719-A to demand response resources participating in heterogeneous DER aggregations.[14] FERC found that these issues are better addressed in Docket No. RM21-14-000, which will evaluate whether to eliminate the Order No. 719 opt-out.[15] Therefore, currently, "if the relevant electric retail regulatory authority where a demand response resource is located has either chosen to opt out or has not opted in pursuant to Order Nos. 719 and 719-A, then the demand response resource may not participate in a [DER] aggregation."[16]

### 2. FERC Did Not and Cannot Provide the Commission Authority to Opt-Out

FERC cannot and did not give the Commission authority to prohibit retail customers' demand response from being bid into RTO/ISO markets by ARCs. While FERC has identified state legislatures, and potentially the relevant electric retail regulatory authority, as having a pathway to prohibit, or "opt-out," certain demand response aggregations from being bid into organized markets, "Order Nos. 719 and 719-A do not grant or delegate any authority to [relevant electric retail regulatory authorities]."[17] As FERC explained its "exclusive jurisdiction over the participation of demand response resources . . . in the wholesale market does not preclude [FERC] from taking into consideration states' preferences and implementing or deferring to those

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[12] Order No. 2222-A, 174 FERC ¶ 61,197 at PP 22-23, 28; Order No. 2222-B, 175 FERC ¶ 61,227 at P 8. FERC also clarified that the small utility opt-in applies to all DER aggregations, including those that contain demand response resources. Order No. 2222-A, 174 FERC ¶ 61,197 at P 10.

[13] Order No. 2222-A, 174 FERC ¶ 61,197 at P 10.

[14] Order No. 2222-B, 175 FERC ¶ 61,227 at P 6.

[15] *Id.* PP 26, 28; *see Participation of Aggregators of Retail Demand Response Customers in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys.*, 174 FERC ¶ 61,198 (Mar. 18, 2021).

[16] Order No. 2222-B, 175 FERC ¶ 61,227 at 29 (internal citation omitted).

[17] *Advance Energy Economy*, 161 FERC ¶ 61,245 (2017), *order on reh'g*, 163 FERC ¶ 61,030, at P 43 (2018) (AEE Rehearing Order).

preferences when the circumstances merit. Indeed, [FERC] has done so in other instances."[18] FERC has made clear that it was not required to provide relevant electric retail regulatory authorities an "opt-in" or "opt-out" as it did in Order No. 719, "but rather did so as an exercise of its discretion."[19]

In providing a relevant electric retail regulatory authority with a pathway to prohibit retail customers' demand response from being bid into RTO/ISO markets through the opt-out mechanism, FERC has made clear that its "intent was not to interfere with the operation of successful demand response programs, place an undue burden on state and local retail regulatory entities, or to raise new concerns regarding federal and state jurisdiction."[20] To this end, FERC has clarified that Order Nos. 719 and 719-A do not impose any additional obligations or showings on relevant electric retail regulatory authorities regarding this rule. Instead, FERC "requires an [RTO/ISO] to accept a bid from an ARC, *unless the laws or regulations of the relevant electric retail regulatory authority do not permit* the customers aggregated in the bid to participate."[21]

Consistent with FERC's finding, the relevant RTO/ISO (i.e., Midcontinent Independent System Operator, Inc. ("MISO")) must accept a bid from an ARC unless there are laws or regulations that prohibit customers from participating in aggregated demand response programs in Minnesota. MLIG is unaware of any state law or relevant regulation that contemplates Commission jurisdiction over ARCS or prohibits customers from participating in an ARC-aggregated bid. Additionally, no comment appears to cite a statute or regulation expressly prohibiting customers from participating.

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[18] AEE Rehearing Order, 163 FERC ¶ 61,030 at P 43 (citing Order No. 719 as requiring RTOs/ISOs to receive state utility approval of demand response participation).

[19] Order No. 2222-B, 175 FERC ¶ 61,227 at P 27; Order No. 2222, 172 FERC ¶ 61,247 at PP 58-59; *Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Organizations and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,154, at PP 32-40 (2019), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020); AEE Rehearing Order, 163 FERC ¶ 61,030 at P 7.

[20] Order No. 719, 125 FERC ¶ 61,071 at P 155.

[21] *Id.* (emphasis added).

## B. Minnesota Law Neither Expressly nor Implicitly Grants the Commission Jurisdiction Over ARCs

### 1. Introduction and Overview of Powers Delegated to the Commission

The absence of laws or regulations prohibiting customer participation cannot be rescued through claims that the Commission has authority to regulate ARCs. The Minnesota Supreme Court has long recognized that the Commission is a creature of statute, possessing only those powers expressly granted to it by the legislature. In 1985, the Supreme Court noted:

> It is elementary that the Commission, being a creature of statute, has only those powers given to it by the legislature. *The legislature states what the agency is to do and how it is to do it.* While express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature.[22]

"Neither agencies nor courts may under the guise of statutory interpretation enlarge the agency's powers beyond that which was contemplated by the legislative body."[23] When there is no ambiguous language to construe, courts will look to the "necessity and logic" of the situation.[24] At the same time, the general rule of a reviewing court is to "resolve any doubt about the existence of an agency's authority *against* the exercise of such authority."[25] Additionally, questions of law, including the proper interpretation of the scope of authority, if any, provided by statute, are reviewed *de novo*.[26]

In analyzing whether the Commission has express statutory authority, courts "analyze whether the relevant statute unambiguously grants authority for an administrative agency to act in

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22 *Peoples Nat. Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985) (cleaned up) emphasis added) (quoting *Great N. Ry. Co. v. Pub. Serv. Comm'n*, 169 N.W.2d 732, 735 (Minn. 1969)).

23 *Id*. (quoting *Waller v. Powers Dep't Store*, 343 N.W.2d 655, 657 (Minn. 1984)).

24 *Id*.

25 *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005) (emphasis added) (citing *In re N. States Power Co.*, 414 N.W.2d 383, 387 (Minn. 1987)).

26 *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002); *see also In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. Ct. App. 2006) ("Appellate courts retain the authority to review de novo 'errors of law which arise when an agency decision is based upon the meaning of words in a statute.'" (quoting *In re Denial of Eller Media Co.'s Applications for Outdoor Advert. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003))); *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010) ("Whether an administrative agency has acted within its statutory authority is a question of law that [is] review[ed] de novo.") (citing *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d at 259)).

the manner at issue."[27] To assess whether there is an unambiguous grant of authority, traditional rules of statutory construction apply. "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."[28] Long-standing case law has expounded upon this general principle. "The touchstone for statutory interpretation is the plain meaning of a statute's language."[29] When interpreting a statute, a reviewer must "first look to see whether the statute's language, on its face, is clear or ambiguous."[30] Words and phrases in a statute must be assigned their "plain and ordinary meaning" unless otherwise defined in the statute.[31] In addition, when interpreting the plain meaning of a statute, the reviewer must "read the statute as a whole and give effect to all of its provisions,"[32] such that "no word, phrase, or sentence should be deemed superfluous, void, or insignificant."[33] As part of their analysis, courts utilize the canons of statutory construction contained within Minn. Stat. § 645.08.[34]

In the absence of express authority, courts are "reluctant to find implied statutory authority," and will "look closely at the statutory scheme created by the legislature" and "the necessity and logic of the situation."[35] When considering whether implied authority exists, Minnesota courts look to the standards for ascertaining legislative intent set forth in Minn. Stat. §§ 645.16 and 645.17.[36] As demonstrated below, nothing demonstrates that the legislature provided the Commission with express or implied authority to regulate ARCs. Therefore, the Commission lacks jurisdiction to restrict ARC operation.

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27 *In re Hubbard*, 778 N.W.2d at 320 (holding the agency lacked express and implied authority under various acts to certify a city's local variance decisions).

28 Minn. Stat. § 645.16.

29 *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005).

30 *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (citing *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)).

31 *Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267, 273 (Minn. 2017) (internal quotation marks and citation omitted); *see* Minn. Stat. § 645.08(1).

32 *Conga Corp. v. Comm'r of Revenue*, 868 N.W.2d 41, 46 (Minn. 2015).

33 *Allan v. R.D. Offutt Co.*, 869 N.W.2d 31, 33 (Minn. 2015) (internal quotation marks and citation omitted).

34 *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 435 (Minn. 2009).

35 *In re Hubbard*, 778 N.W.2d at 321, 322 (internal quotation marks and citations omitted); *Peoples Nat. Gas*, 369 N.W.2d at 534 ("We have no ambiguous language to construe, unless perhaps the ambiguity of silence. Consequently, we must look at the necessity and logic of the situation.").

36 *In re Minnegasco*, 565 N.W.2d 706, 712 (Minn. 1997) (finding that "[i]n interpreting a statute that is neither entirely clear nor free from all ambiguity, our mission is to construe the statutory language consistent with the legislature's intent and in a sensible manner that avoids unreasonable, unjust, or absurd results").

### 2. State Law Does Not Grant the Commission Authority to Regulate ARCs

The Minnesota Supreme Court has long recognized that the Commission is a creature of statute, possessing only those powers expressly granted to it by the legislature.[37] At its core the Commission is charged with the regulation of public utilities.[38] Despite no statutory language expressly addressing ARC operation, certain stakeholders continue allegations that statutory provisions may preclude ARCs from aggregating utility customers in Minnesota.[39] UCS rebutted these claims in initial comments noting that ARCs are not public utilities and that the aggregation of demand response is not retail electric service under Minnesota law.[40] The Department also analyzed this issue and concluded that "the better reading…of the relevant statutes and rules is that ARCs are not subject to regulation as public utilities because they do not furnish electricity to retail customers. The service they provide is related to electric service but is not, itself, electric service."[41] To be sure, MLIG agrees with these analyses and raised similar arguments during the Commission's initial review of this issue.[42]

An ARC is not a public utility subject to Commission jurisdiction. When interpreting a statute, a reviewer must "first look to see whether the statute's language, on its face, is clear or ambiguous."[43] Words and phrases in a statute must be assigned their "plain and ordinary meaning" unless otherwise defined in the statute.[44] Pursuant to Minn. Stat. § 216B.02, subd. 4, a public utility is defined as someone who operates, maintains, or controls equipment or facilities for "furnishing at retail" electric service.[45] Turning to the plain meaning of the key word in the definition, the term "furnish" in this context means "to provide or supply."[46] In other words, an

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37 *See Peoples Nat. Gas Co.*, 369 N.W.2d at 534.

38 Minn. Stat. § 216B.01 (stating that "[i]t is hereby declared to be in the public interest that public utilities be regulated").

39 *See, e.g.*, Initial Comment by Minnesota Power at 2-3 (Mar. 13, 2023) (eDocket No. 20233-193851-01) ("MP Comment").

40 UCS Comment at 4-7.

41 Initial Comment by the Department at 6 (Mar. 13, 2023) (eDocket No. 20233-193876-02) ("Department Comment"). Notwithstanding the position taken by the Department in comments, this concession, on its face, demonstrates that the Commission does not possess the authority to regulate ARCs.

42 *In the Matter of an Investigation of Whether the Commission Should Take Action on Demand Response Bid Directly into the MISO Markets by Aggregators of Retail Customers (ARCs) under FERC Orders 719 and 719-A*, Initial Comment by Large Industrial Group (Mar. 8, 2010). The Large Industrial Group ("LIG") is the previous iteration of MLIG.

43 *Am. Family Ins. Grp.*, 616 N.W.2d at 277 (citing *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d at 384 (Minn. 1999)).

44 *Sanchez*, 897 N.W.2d at 273 (internal quotation marks and citation omitted); *see* Minn. Stat. § 645.08(1).

45 Minn. Stat. § 216B.02, subd. 4 (emphasis added).

46 *Furnish*, Dictionary.com, https://www.dictionary.com/browse/furnish (last visited Apr. 8, 2023).

ARC must provide or supply electric service at retail to satisfy the definition of "public utility." But this is inconsistent with how ARCs operate. As described by an aggregator, an ARC "enables consumers to profitably participate in various wholesale programs across…the MISO footprint….[the ARC] secures for its customers wholesale market revenues for payment for the use of their assets which participate in wholesale electric markets."[47] ARCs are not furnishing (i.e., providing) electricity at retail, rather ARC's are ensuring customers are fairly compensated for the value the customers provide to the wholesale market. To be sure, this reading is also consistent with Minn. Stat. § 216B.38, subd. 4a, which confirms that "electric service means electric service furnished to a customer at retail[.]" Because the relevant statutory language confers Commission jurisdiction over public utilities and the plain meaning of key terms in these statutes confirms that ARCs do not satisfy that definition, the Commission does not possess express authority to regulate ARC operation.

The Commission similarly lacks implied jurisdiction to regulate ARCs. As previously noted, in the absence of express authority, courts are "reluctant to find implied statutory authority."[48] But when examining whether implied authority exists, Minnesota courts look to the standards for ascertaining legislative intent set forth in Minn. Stat. §§ 645.16 and 645.17.[49] Characterizing these statutes to the inquiry at hand, courts will construe laws to: (1) give effect to all the statute's provisions; (2) avoid results that are absurd, impossible, or unreasonable; and (3) ensure statutory certainty.[50] Consistent with the analysis above, the Commission's lack of jurisdiction over ARCs does not violate these core tenets. The Commission retains the authority to regulate public utilities, which are, again, furnishing electricity to customers at retail. ARCs, which do not satisfy these requirements within that statute and instead operate in wholesale markets, are free to operate outside of the Commission's regulatory purview. To find that implicit jurisdiction exists in this instance is inconsistent with the Commission's charge to regulate the

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47 Initial Comment by Voltus at 1 (Mar. 13, 2023) (eDocket No. 20233-193934-02).

48 *In re Hubbard*, 778 N.W.2d at 321 (citations omitted); *Peoples Nat. Gas*, 369 N.W.2d at 534 ("We have no ambiguous language to construe, unless perhaps the ambiguity of silence. Consequently, we must look at the necessity and logic of the situation.").

49 *In re Minnegasco*, 565 N.W.2d at 712 (finding that "[i]n interpreting a statute that is neither entirely clear nor free from all ambiguity, our mission is to construe the statutory language consistent with the legislature's intent and in a sensible manner that avoids unreasonable, unjust, or absurd results").

50 Minn. Stat. §§ 645.16 and 645.17.

retail market.[51] To step into the wholesale market, seemingly in direct conflict with legislative intent,[52] would lead to an absurd and unreasonable result.

Minnesota law neither expressly nor implicitly grants the Commission authority to regulate ARCs. These entities operate beyond Commission jurisdiction in the wholesale market (i.e., not retail market), and their operation within Minnesota does not interfere with the powers specifically delegated to the Commission. In recognition of its inability to regulate ARCs, the Commission should reverse its previous prohibition of ARC operation.

## C. Opponents to ARC Operation Raise Various Red Herring Arguments That Should Be Disregarded

### 1. ARC Operation Does Not Violate Utilities' Exclusive Service Territories

In initial comments Minnesota Power notes that Minn. Stat. § 216B gives electric utilities the sole responsibility to deliver electric service to consumers in their service area.[53] But Minnesota Power neither explains how an ARC is a public utility under state law nor how ARC operation violates utilities' statutory charge.[54] Notwithstanding its lack of explanation, Minnesota Power incorrectly claims that "allowing third-party aggregators unfettered access to current utility customers would conflict with this statute."[55]

State law permits each utility to have "the exclusive right to provide electric service at retail to each and every present and future customer in its assigned service area and no electric utility shall render or extend electric service at retail within the assigned service area of another electric utility unless the electric utility consents thereto in writing[.]"[56] The key underlying terms in this analysis are "electric utility" and "electric service." The term "electric utility" in the exclusive service territory context requires a two-part showing. Namely, "electric utility" is an entity that

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51 *See, e.g.*, *In the Matter of the Application of Minnesota Gas Company for Authority to Change its Schedule of Rates for Gas Utility Service in Minnesota*, PUC Docket No. G008/GR-80-630, Order After Reconsideration at 1, 5 (Nov. 25, 1981) (holding that the company's customer appliance service program was a "nonutility" operation); *see also, Matter of Implementation of Utility Energy Conservation Improvement Programs*, 368 N.W.2d 308, 313 (Minn. Ct. App. 1985) (holding that "energy conservation improvements are not "service" as defined by Minn. Stat. § 216B.02, subd. 6, but rather are purchases or installation [of equipment]"). To be sure, the Minnesota Court of Appeals' differentiation of conservation from service is analogous to the issue of demand response discussed herein.

52 *See, e.g.*, Minn. Stat. § 216B.38, subd. 4a.

53 MP Comment at 3.

54 *See id.* at 3.

55 *Id*.

56 Minn. Stat. § 216B.40.

both meets the definition of "public utility" under section 216B.02, subd. 4 of the Minnesota Statutes and is "operating, maintaining, or controlling in Minnesota equipment or facilities for providing electric service at retail[.]"[57] Furthermore, "electric service" is defined as "electric service furnished to a customer at retail for ultimate consumption, but does not include wholesale electric energy furnished by an electric utility to another electric utility for resale."[58] As previously discussed, ARCs are neither public utilities nor providing electricity at retail. Furthermore, demand response, which is the modification of customer energy usage (including through curtailments) to reduce peak demand for grid stability and reliability purposes, is not and cannot be furnished to customers for "ultimate consumption."[59] In short, arguments that ARC operation in Minnesota would somehow violate the exclusive service territory provisions in section 216B.37 to 216B.44 of the Minnesota Statutes are entirely without merit.

### 2. Concerns Regarding Increased Rates Are Misplaced and Lack Support

In initial comments, certain stakeholders claim that allowing ARC operation will either increase the costs of existing utility demand response or utilities will lose existing demand response capacity, both resulting in higher retail electricity rates.[60] The Department claims that "the most likely scenario is that allowing ARCs will either increase the cost of [demand response], raising retail rates, or existing [demand response] will be lost resulting in new capacity being constructed," which could negatively impact utility customers.[61] The fears outlined by the Department are both irrelevant to the Commission's analysis and rest upon faulty reasoning.

As a threshold matter, any consideration of rate implications should be excluded from the Commission's analysis prior to resolution of the jurisdictional issue, which by the Department's own concession, should be resolved against a finding of Commission jurisdiction.[62] Notwithstanding this determination, the Department's concerns are misplaced for at least three reasons.

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57 *Id.* § 216B.38, subd. 5.
58 *Id.* § 216B.38, subd. 4a.
59 *Id.* § 216B.36, subd. 4a (defining "electric service" for purposes of outlining electric utilities' exclusive service territories).
60 Department Comment at 19-20. Initial Comment by Xcel at 5-6 (Mar. 13, 2023) (eDocket No. 20233-193910-01).
61 Department Comment at 21.
62 *Id.* at 6.

First, fears of losing utility demand response capacity are largely unfounded, because existing long-term capacity products are typically subject to agreements. For example, MLIG members on Minnesota Power's system currently participate in demand response Product C, which is a longer-term product that provides the utility with 100 to 202 MW of demand response capacity until 2028.[63] These agreements are mutually beneficial because they provide customers with rate mitigation over a sustained period of time, while the utility is, in turn, able to count that capacity over a longer time period. Even if ARCs were to operate in the state and offer better options for customers, customers currently subject to demand response capacity agreements could not offer the same capacity twice and would be subject to non-compliance penalties for failure to honor existing agreements. The better pricing could, however, incent additional demand response beyond that already committing. In short, fears about losing existing demand response are seemingly, at least in part, assuming customers' willingness to breach existing agreements. This is an unreasonable assumption that should not persuade the Commission.

Second, as it relates to existing demand response, the Department's three scenarios make unreasonable assumptions and do not account for logical and reasonable benefits. In scenario (a) the Department correctly notes that if ARC-demand response does not offer the same or better benefits than utility programs, customers will likely not participate. In scenarios (b) and (c), however, the Department claims that if utility demand response is below the market price either ARCs will capture existing utility demand response customers, resulting in lost utility capacity or utilities will be forced to increase the price paid for demand response programs. As to the former, these concerns are largely mitigated by the existence of current long-term utility demand response programs, which often require contractual agreements between the customers and utility. In any case, the Department offers no commentary on why a utility should be compensating demand response resources at less than market value.

In the latter hypothetical, where ARCs offering lower-priced demand response that drives the price of utility demand response upward, the Department's assumption that this will negatively impact rates is overly simplistic. The Department's hypothetical fails to consider that better value for demand response may, in turn, spur larger participation in demand response based on pricing.

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63 MLIG Comment at 3-4.

For example, a customer may currently be willing to subject 10 MW of its load to interruption in a utility demand response program. That customer has likely determined that 10 MW is a reasonable portion of its load to commit to demand response, based on the costs in incurs and the benefits it receives. There are also customers that may not believe the benefits are worth the costs, and therefore have declined to participate in existing demand response programs. If the price for utility demand response programs increases to reflect market value, customers already participating in demand response programs may increase the level of load already committed to interruption and new customers may elect to participate. The Department's analysis fails to consider that these higher prices could spur greater participation.

Finally, and even more concerning, the Department's examples overlook the benefits provided by demand response resources. MLIG strongly opposes the Department's implication that properly valuing demand response resources, which could increase the price paid for these resources, will negatively impact the system. If ARCs do, in fact, increase demand response participation through pricing, options, and/or greater access to demand response resources, the system as a whole will benefit from reducing the need for load-following and peak generating resources. This could have a corresponding beneficial effect on electric energy prices and emissions reduction through reduced reliance on fossil-fueled peaking resources. It is unclear why the Department failed to acknowledge these system benefits here, when such benefits are regularly considered as part of the utility's resource acquisitions.

## III. CONCLUSION

While maintaining the positions set forth in its initial comment, MLIG respectfully requests that the Commission reverse course and permit ARC operation in Minnesota. Doing so is not only consistent with the Commission's jurisdiction (or lack thereof), but permitting ARC operation will also maximize customer participation in demand response programs that further important policy considerations. This will result in decreased overall rates for utility customers.

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Respectfully submitted,

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