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Filed Electronically and Via Email

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

Sierra Club respectfully submits these reply comments on behalf of their members in Minnesota. Sierra Club appreciates the comments filed by the utilities, other interested parties, and by the Department of Commerce Division of Energy Resources ("DOC") in this docket. As many entities pointed out, opening Minnesota to competitive demand response participating directly in the wholesale market will increase opportunities for customers and will engage the forces of competition to expand clean energy and reduce costs in Minnesota. Sierra Club generally agrees with and joins those comments.

Sierra Club also agrees with part, and disagrees with part, of the DOC's legal analysis about the scope of the Commission's authority to regulate demand response aggregators. Sierra Club and UCS agree with DOC's conclusion that customers and third party demand response aggregators (collectively, "ARCs") are not electric utilities and do not provide electric service within the meaning of Minn. Stat. §§ 216B.02, subd. 6 and 216B.38. DOC Comments at 3-5. DOC correctly concludes

(contrary to arguments made by Minnesota Power[1]) that "ARCs are not subject to regulation as public utilities because they do not furnish electricity to retail customers." *Id.* at 6.[2] The DOC's analysis should have stopped there. The Commission need not weigh policy arguments for why third party ARCs should or should not be permitted in Minnesota. If ARCs are not subject to regulation as public utilities, the Commission does not have authority to "opt out" under 18 C.F.R. § 35.28(g)(1)(iii).

To the extent that the DOC contends that the Commission may prohibit third party ARCs because their existence may indirectly affect utility rates, it does not identify a statutory basis for such authority.

As an initial matter, there is no proof that ARCs directly participating in the wholesale market will increase costs for customers, which the DOC's argument presupposes in order to conclude that rates would become unjust or unreasonable. To the contrary, the evidence provided in this docket confirms the basic economic principle: increased ARC participation in the MISO wholesale market will reduce wholesale power costs for ratepayers. Votus Inc. Comments at 5; Initial Comments of Large Industrial Group at 8; *see also LS Power Midcontinent, LLC v. State*, __N.W.2d__, 2023 WL 2618192 *17 ("It is axiomatic that competition breeds innovation, variety, higher quality goods and services, and lower prices for consumers.") (quoting and agreeing with the petitioner's assertion); *In re Xcel Energy's Pet. for Load Flexibility Pilot Programs and Financial Incentive*, Order, Docket No. E-002/M-21-101, 2002 WL 808901 *8 (Minn.Pub.Util.Comm'n, March 15, 2022) (acknowledging that third-party aggregators in utility-directed demand response "could facilitate broader participation and scale of demand-response programs").

Moreover, the Commission's authority to set just and reasonable utility rates does not extend to regulating anything that indirectly "affect utilities' ability to provide service at just and reasonable rates." DOC Comments at 5. "The MPUC, as a creature of statute, only has the authority given it by the legislature." *Minnegasco v. Minn. Pub. Util. Comm'n*, 549 N.W.2d 904, 907 (Minn. 1996) (quotation omitted). The Commission's authority is limited to regulating public utilities. Minn. Stat. §§ 216B.08, 216B.09, subd. 1. That includes setting rates and regulating those

[1] Minnesota Power Comments at 3 (March 13, 2023).
[2] Sierra Club and UCS do not necessarily agree with all of the assertions DOC makes leading to this conclusion.

activities by utilities that directly affect rates; but does not extend to regulating anything having indirect impacts on rates. *Application of Nw. Bell Tel. Co.*, 367 N.W.2d 655, 660-62 (Minn. 1985) (Commission limited to adjusting utility rates and cannot regulate non-utility activity of publishing a phone book); *California ISO v. FERC*, 372 F.3d 395, 403 (DC. Cir. 2004) (FERC's jurisdiction does not include "all those remote things beyond the rate structure that might in some sense indirectly or ultimately" affect it). Any ambiguity about the Commission's authority must be resolved against the existence of such authority. *See e.g., In re Hubbard*, 778 N.W.2d 313, 324-25 (2010); *In re No. States Power Co.*, 414 N.W.2d 383, 387 (1987) (court is reluctant to find implied statutory authority and any double is resolved against the agency).

To be clear, the Commission can regulate aspects of the direct relationship between the utility and demand-response service provided directly to the utility. But, what it may not do is reach beyond the utility's service to regulate (i.e., prohibit) customers' relationships with non-utility third party ARCs. Sierra Club appreciates that there may be sound policy to regulate third-party ARCs, such as consumer protection. But this is not the forum for such policy discussions. Here, because current Minnesota law does not appear to give the Commission authority to prohibit third-party ARCs, it may not "opt-out" under 18 C.F.R. § 35.28(g)(1)(iii).

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